M/S. Atma Ram Properties (P) Ltd vs M/S. Federal Motors Pvt. Ltd on 10 December, 2004

Equivalent citations: AIRONLINE 2004 SC 597

Author: R.C. Lahoti

Bench: R.C. Lahoti, G.P. Mathur

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           CASE NO.:
Appeal (civil)  7988 of 2004

PETITIONER:
M/s. Atma Ram Properties (P) Ltd.

RESPONDENT:
M/s. Federal Motors Pvt. Ltd.

DATE OF JUDGMENT: 10/12/2004

BENCH:
CJI R.C. LAHOTI & G.P. MATHUR

JUDGMENT:
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J U D G M E N T [Arising out of S.L.P.(C) No.6415 of 2002] R.C. Lahoti, CJI Leave granted.

The suit premises are non-residential commercial premises admeasuring approximately 1000 sq. ft. and situated in Connaught Circus, New Delhi. The premises are owned by the appellant and held on tenancy by the respondent on a monthly rent of Rs.371.90p. per month. The tenancy had commenced sometime in the year 1944 and it appears that ever since then the rent has remained static. Admittedly, the provisions of the Delhi Rent Control Act 1958, (hereinafter 'the Act', for short) are applicable to the premises.

Sometime in the year 1992, the appellant initiated proceedings for the eviction of the respondent on the ground available under Clause (b) of sub-Section (1) of Section 14 of the Act alleging that the respondent had illegally sublet the premises to M/s. Jay Vee Trading Co. Pvt. Ltd. and the sub-tenant was running its showroom in the premises. Vide order dated 19.3.2002, the Additional Rent Controller, Delhi held the ground for eviction made out and ordered the respondent to be evicted. The respondent preferred an appeal under Section 38 of the Act. By order dated 12.4.2001, the Rent Control Tribunal directed the eviction of the respondent to remain stayed but subject to the condition that the respondent shall deposit in the Court Rs.15,000/- per month, in addition to the contractual rent which may be paid directly to the appellant. The deposits were permitted to be made either in cash or by way of fixed deposits in the name of the appellant and directed to be retained with the Court and not permitted to be withdrawn by either party until the appeal was

finally decided. Raising a plea that the respondent could not have been directed during the pendency of the proceedings at any stage to pay or tender to the landlord or deposit in the Court any amount in excess of the contractual rate of rent, the respondent filed a petition under Article 227 of the Constitution putting in issue the condition as to deposit Rs.15,000/- per month imposed by the Tribunal. By order dated 12.2.2002, which is impugned herein, the learned single Judge of the High Court has allowed the petition and set aside the said condition imposed by the Tribunal. The effect of the order of the High Court is that during the pendency of appeal before the Tribunal the respondent shall continue to remain in occupation of the premises subject to payment of an amount equivalent to the contractual rate of rent. Feeling aggrieved, the landlord (appellant) has filed this appeal by special leave.

Ordinarily this Court does not interfere with discretionary orders, more so when they are of interim nature, passed by the High Court or subordinate Courts/Tribunals. However, this appeal raises an issue of frequent recurrence and, therefore, we have heard the learned counsel for the parties at length. Landlord-tenant litigation constitutes a large chunk of litigation pending in the Courts and Tribunals. The litigation goes on for unreasonable length of time and the tenants in possession of the premises do not miss any opportunity of filing appeals or revisions so long as they can thereby afford to perpetuate the life of litigation and continue in occupation of the premises. If the plea raised by the learned senior counsel for the respondent was to be accepted, the tenant, in spite of having lost at the end, does not loose anything and rather stands to gain as he has enjoyed the use and occupation of the premises, earned as well a lot from the premises if they are non-residential in nature and all that he is held liable to pay is damages for use and occupation at the same rate at which he would have paid even otherwise by way of rent and a little amount of costs which is generally insignificant.

Shri K. Ramamurthy, the learned senior counsel for the appellant submitted that once a decree or order for eviction has been passed, the tenant is liable to be evicted and if he files an appeal or revision and opts for retaining use and occupation of the premises, he should be prepared to compensate the landlord by paying such amount as the landlord would have been able to earn in the event of the premises being vacated and, therefore, the superior court, passing an order of stay, acts well within its discretionary jurisdiction by putting on terms the appellant who seeks an order of stay. On the other hand, Shri Ranjit Kumar, the learned senior counsel appearing for the respondent, defended the order of the High Court by raising several pleas noticed shortly hereinafter.

The order of eviction passed by Rent Controller is appealable to the Rent Control Tribunal under Section 38 of the Act. There is no specific provision in the Act conferring power on the Tribunal to grant stay on the execution of the order of eviction passed by the Controller, but sub-Section (3) of Section 38 confers the Tribunal with all the powers vested in a Court under the Code of Civil Procedure, 1908 while hearing an appeal. The provision empowers the Tribunal to pass an order of stay by reference to Rule 5 of Order 41 of the Code of Civil Procedure 1908 (hereinafter 'the Code', for short). This position was not disputed by the learned senior counsel appearing for either of the parties.

Sub-Rule (1) and (3) of Rule 5 of Order 41 of the Code read as under:-

> "R.5 Stay by Appellate Court (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Xxx xxx xxx xxx (3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the court making it is satisfied ____

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

xxx xxx xxx xxx"

> It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in the Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate Court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate Court is that in spite of the appeal having been entertained for hearing by the appellate Court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the Court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the Court dealing with a prayer for the grant of stay asks to itself is: Why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted.
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> Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be 'substantial loss' to the party applying for stay of execution within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of the Code. Clause (c) of the same provision mandates security for the due performance of the decree or

order as may ultimately be passed being furnished by the applicant for stay as a condition precedent to the grant of order of stay. However, this is not the only condition which the appellate Court can impose. The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate Court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not the statutory right conferred on the appellant. So also, an appellate Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on the facts and circumstances of a given case an appellate Court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal. In South Eastern Coalfields Ltd. Vs. State of M.P. & Ors., (2003) 8 SCC 648, this Court while dealing with interim orders granted in favour of any party to litigation for the purpose of extending protection to it, effective during the pendency of the proceedings, has held that such interim orders, passed at an interim stage, stand reversed in the event of the final decision going against the party successful in securing interim orders in its favour; and the successful party at the end would be justified in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery to it of benefit earned by the opposite party under the interim order of the High Court, or (b) compensation for what it has lost, and to grant such relief is the inherent jurisdiction of the Court. In our opinion, while granting an order of stay under Order 41 Rule 5 of the CPC, the appellate court does have jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party successful at the end of the appeal in so far as those proceedings are concerned. Thus, for example, though a decree for payment of money is not ordinarily stayed by the appellate Court, yet, if it exercises its jurisdiction to grant stay in an exceptional case it may direct the appellant to make payment of the decretal amount with interest as a condition precedent to the grant of stay, though the decree under appeal does not make provision for payment of interest by the judgment-debtor to the decree-holder. Robust commonsense, common knowledge of human affairs and events gained by judicial experience and judicially noticeable facts, over and above the material available on record - all these provide useful inputs as relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on. After all, in the words of Chief Justice Chandrachud, speaking for the Constitution Bench in Olga Tellis and Ors. Vs. Bombay Municipal Corporation and Ors. (1985) 3 SCC 545, - "commonsense which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants".

Shri Ranjit Kumar, the learned senior counsel for the respondent, submitted that during the pendency of the appeal the tenant-appellant cannot be directed to pay any amount over and above the amount of contractual rent unless and until the decree or order of eviction has achieved a finality because, in view of the protection of rent control legislation enjoyed by the tenant, he shall continue

to remain a tenant and would not become a person in unlawful possession of the property until the decree has achieved a finality from the highest forum upto which the litigation is pursued. Reliance was placed on the decision of this Court in Smt. Chander Kali Bai & Ors. Vs. Shri Jagdish Singh Thakur & Anr., (1977) 4 SCC 402, followed in Vashu Deo Vs. Balkishan, (2002) 2 SCC 50. This submission raises the following two issues:- (i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) upto what point of time the tenant is liable to pay rent at the contractual rate and when does he become liable to pay to the landlord compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent?

Under the general law, and in cases where the tenancy is governed only by the provisions of Transfer of Property Act, 1882, once the tenancy comes to an end by determination of lease under Section 111 of the Transfer of Property Act, the right of the tenant to continue in possession of the premises comes to an end and for any period thereafter, for which he continues to occupy the premises, he becomes liable to pay damages for use and occupation at the rate at which the landlord could have let out the premises on being vacated by the tenant. In the case of Chander Kali Bai & Ors. (supra) the tenancy premises were situated in the State of Madhya Pradesh and the provisions of the M.P. Accommodation Control Act, 1961 applied. The suit for eviction was filed on 8th March 1973 after serving a notice on the tenant terminating the contractual tenancy w.e.f. 31st December 1972. The suit came to be dismissed by the trial Court but decreed in first appeal decided on 11th August, 1975. One of the submissions made in this Court on behalf of the tenant-appellant was that no damages from the date of termination of the contractual tenancy could be awarded; the damages could be awarded only from the date when an eviction decree was passed. This Court took into consideration the definition of tenant as contained in Section 2(i) of the M.P. Act which included "any person continuing in possession after the termination of his tenancy" but did not include "any person against whom any order or decree for eviction has been made". The court, persuaded by the said definition, held that a person continuing in possession of the accommodation even after the termination of his contractual tenancy is a tenant within the meaning of the M.P. Act and on such termination his possession does not become wrongful until and unless a decree for eviction is passed. However, the Court specifically ruled that the tenant continuing in possession even after the passing of the decree became a wrongful occupant of the accommodation. In conclusion the Court held that the tenant was not liable to pay any damages or mesne profits for the period commencing from 1st January 1973 and ending on 10th August 1975 but he remained liable to pay damages or mesne profits from 11th August 1975 until the delivery of the vacant possession of the accommodation. During the course of its decision this Court referred to a decision of Madhya Pradesh High Court in Kikabhai Abdul Hussain Vs. Kamlakar, 1974 MPLJ 485, wherein the High Court had held that if a person continues to be in occupation after the termination of the contractual tenancy then on the passing of the decree for eviction he becomes a wrongful occupant of the accommodation since the date of termination. This Court opined that what was held by the Madhya Pradesh High Court seemed to be a theory akin to the theory of "relation back" on the reasoning that on the passing of a decree for possession, the tenant's possession would become unlawful not from the date of the decree but from the date of the termination of the contractual tenancy itself. It is noteworthy that this Court has not disapproved the decision of the Madhya Pradesh High Court in Kikabhai Abdul Hussain's case but distinguished it by observing that the law laid down in Kikabhai

Abdul Hussain's case was not applicable to the case before it in view of the definition of 'tenant' as contained in the M.P. Act and the provisions which came up for consideration of the High Court in Kikabhai Abdul Hussain's case were different.

Reliance, by the learned counsel for the respondent, on the case of Vashu Deo (supra) is misconceived, inasmuch as, in that case the Court was dealing with the rule of estoppel of tenant for holding that the tenant was estopped from disputing the title of his landlord so long as he continued in possession of the tenancy premises and until he had restored the landlord into possession.

In Shyam Sharan Vs. Sheoji Bhai & Anr., (1977) 4 SCC 393, this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorized and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation, till the date he delivers the vacant possession to the landlord. With advantage and approval, we may refer to a decision of the Nagpur High Court. In Bhagwandas Vs. Mst. Kokabai, AIR 1953 Nagpur 186, the learned Chief Justice of Nagpur High Court held that the rent control order, governing the relationship of landlord and tenant, has no relevance for determining the question of what should be the measure of damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. After determination of the tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the rent control order. If the real value of the property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value. We find ourselves in agreement with the view taken by the Nagpur High Court.

Placing reliance on the decision of this Court in Kunhayammed & Ors Vs. State of Kerala & Anr., (2000) 6 SCC 359, Shri Ranjit Kumar, the learned senior counsel submitted that the decree of trial Court merges in the decree of the appellate Court and, therefore, the tenant shall continue to remain a tenant (and shall not become an unlawful occupant), until the passing of decree by the highest Court because the decree would achieve a finality only when the proceedings have finally terminated and then the decree of trial Court shall stand merged in the decree of the appellate Court, the date whereof only would be relevant for determining the nature of occupation of the tenant. We are not impressed.

In Kunhayammed & Ors. (supra), this Court, on an elaborate discussion of the available authorities, held that once the superior Court has disposed of the lis before it either way, i.e. whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, Tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, this Court has also observed that the doctrine of merger is not of universal or unlimited application. In spite of merger the actual fact would remain that it was the decree or order appealed against which had directed the termination of tenancy with effect from which date the tenant had ceased to be the tenant, and the obligation of the tenant to deliver possession over the tenancy premises came into operation though the same remained suspended because of the order of stay.

We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy.

In the Delhi Rent Control Act 1958, the definition of 'a tenant' is contained in clause (l) of Section 2. Tenant includes 'any person continuing in possession after the termination of his tenancy' and does not include 'any person against whom an order or decree for eviction has been made'. This definition is identical with the definition of tenant dealt with by this Court in Chander Kali Bai & Ors. case (supra). The tenant-respondent herein having suffered an order for eviction on 19.3.2001, his tenancy would be deemed to have come to an end with effect from that date and he shall become an unauthorized occupant. It would not make any difference if the order of eviction has been put in issue in appeal or revision and is confirmed by the superior forum at a latter date. The date of termination of tenancy would not be postponed by reference to the doctrine of merger.

That apart, it is to be noted that the appellate Court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the tenant-appellant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate Court. While ordering stay the appellate Court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate Court to put the tenant-appellant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In Marshall Sons & Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd. & Anr., (1999) 2 SCC 325, this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment- creditor of the fruits of decree, it is necessary for the Court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.

To sum up, our conclusions are:-

> (1) while passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable;
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> (2) in case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (l) of Section 2 of the Act,

> the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises.

The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree;

(3) the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.

In the case at hand, it has to be borne in mind that the tenant has been paying Rs.371.90p. rent of the premises since 1944. The value of real estate and rent rates have skyrocketed since that day. The premises are situated in the prime commercial locality in the heart of Delhi, the capital city. It was pointed out to the High Court that adjoining premises belonging to the same landlord admeasuring 2000 sq. ft. have been recently let out on rent at the rate of Rs.3,50,000/- per month. The Rent Control Tribunal was right in putting the tenant on term of payment of Rs.15,000/- per month as charges for use and occupation during the pendency of appeal. The Tribunal took extra care to see that the amount was retained in deposit with it until the appeal was decided so that the amount in deposit could be disbursed by the appellate Court consistently with the opinion formed by it at the end of the appeal. No fault can be found with the approach adopted by the Tribunal. The High Court has interfered with the impugned order of the Tribunal on an erroneous assumption that any direction for payment by the tenant to the landlord of any amount at any rate above the contractual rate of rent could not have been made. We cannot countenance the view taken by the High Court. We may place on record that it has not been the case of the tenant- respondent before us, nor was it in the High Court, that the amount of Rs.15,000/- assessed by the Rent Control Tribunal was unreasonable or grossly on the higher side.

For the foregoing reasons, the appeal is allowed. The order of the High Court is set aside and that of the Tribunal restored with costs incurred in the High Court and in this Court. However, the tenant-respondent is allowed six weeks' time, calculated from today, for making deposits and clearing the arrears upto the date consistent with the order of the Rent Control Tribunal.