

order below Ex. 5

(1) I have read the application. Heard the Ld. Advocate for the Appellant as well as respondent. Perused the papers placed on the record of present appeal and also perused the record and proceedings of the original RCS No. 12 of 2017.

(2) The present Regular Civil Appeal has been filed against Judgement and Decree dated : 24.03.2023 passed by the Court of Ld. Principal Civil Judge, Kalyanpur in Regular Civil Suit No. 12 of 2017, by which the Trial Court has passed an decree of eviction in favour of the present respondent.

(3) The appellant has filed present application seeking an order staying the operation of the proceedings under a decree or staying the execution of a decree. It has been submitted that appellant and respondent are real brothers and they were living in joint family with their father Dudabhai and they were doing the agriculture work. It is also submitted that suit property was purchased from the income of undivided family and the suit property is in possession of the appellants since last more than 30 years and till date possession of the suit property belongs to appellant. It is submitted that since last more than 30 years the respondent has left India and living abroad with his family members. It is also submitted that due to oral understanding the properties of undivided family were divided between the members of the family and suit property was given to appellant being a member of joint family as owner and till then the possession of the suit property belongs to the present appellant. It has been submitted that false suit for possession has been filed by the respondent alleging that appellant is only the care taker of the suit

Page No. (5)

and Trial Court has passed Judgement and Decree for eviction and hence, the appellant has filed the present appeal. It is also submitted that there are fair chances that appellant may succeed in the appeal. It is submitted that respondent has already filed an execution petition for execution of impugned decree. It is submitted that if during the pendency of the present appeal possession of suit property is snatched away from the appellant under the guise of execution of decree, the present appeal may become meaning less and there may be multiplicity of proceedings and hence, the execution proceedings are required to be stayed during the pendency of the appeal.

(4) Whereas, the respondent has submitted written arguments at Ex. 26. It has been submitted on behalf of respondent that vacant plot was purchased by the respondent from his self-acquired funds in the year 1978 and the said property was purchased by way of registered sale deed and therefore Ld. Trial Court has rightly held that the respondent is the lawful owner of the said suit property. It is submitted that in the year 1987, the respondent moved to United Kingdom and thereafter respondent was kept visiting India and during one of such visit in December, 1988 the respondent allowed the appellant herein being respondent's brother to reside in the part of the suit property as a care taker and large area of the suit property remained locked and was in the possession of respondent wherein appellant had no access. It is further submitted that appellant having misused his position as caretaker, has taken undue advantage of circumstances, broke open the locks and occupied the entire suit property and started using the same for keeping livestock and the rooms to keep fodder and other animal food without any authority, consent or taking prior permission from the respondent. Hence, the respondent was

Page No. (6)

constrained to file a suit for eviction and Ld. Trial Court has rightly held that the respondent had purchased the suit property by a registered sale deed from his self-earned income and the appellant herein had failed to prove that the suit property came in the share of the appellant in settlement and accordingly, the respondent herein is rightly entitled to recover the possession of the suit property. It is submitted that appellant has stated that he has no other place to reside and if the impugned judgment is not stayed it will cause irreparable harm to the appellant is absolutely false and baseless because appellant has an alternative place to reside and hence, appellant also failed to show his prima facie case and also failed to establish that balance of convenience in his favour.

(5) To decide the present petition relevant provision contained in O. XLI R. 5 of the CPC is required to be looked into, the same is reproduced below :--

"Order 41, Rule 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.

(Explanation : An order by the Appellate court for the stay of execution of the decree shall be effective from the date of the communication of such order to the court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate court shall, pending the receipt from the Appellate court of the order for the stay of execution for any order to the contrary, be acted upon by the court of first instance.)

Page No. (7)

(2) Stay by Court which passed the decree :

Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(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.

(4) Subject to the provisions of Sub-rule (3) the court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in Sub-rule (3) of Rule 1, the court shall not make an order staying the execution of the decree."

(6) In the matter on hand it has not been disputed that appellant is having the possession of the suit property since long time. It is also not in dispute that appellant has preferred an appeal against decree of eviction passed against him and also moved an application for staying the decree immediately along-with appeal. It is also not in dispute that said appeal is still pending before this Court since 2023. It has also been not in dispute

Page No. (8)

that during this period the respondent has not filed any execution petition to execute the decree of eviction. It is also not in dispute that the execution petition to execute the decree has been filed after almost 2 years of filing the present appeal. It is also not in dispute that application Ex. 16 and 20 filed by the appellant to adduce additional evidence at the appellate stage was pending for hearing. Hence, it clearly appears that if during the pendency of the present appeal, the decree is executed the present appeal become meaning less and there may be multiplicity of proceedings and hence if the execution of the decree is not stayed, the appellant is likely to suffer serious damage which cannot be compensated in terms of money and on the contrary, if execution of the decree is stayed, it will not cause any loss or prejudice to respondent. Hence, considering the circumstances prevail in the present matter and considering the discussion above, this application Ex. 5, is hereby allowed and the execution of a Judgement and Decree passed by the Court of Ld. Principal Civil Judge, Kalyanpur in Regular Civil Suit No. 12 of 2017 is hereby stayed till final disposal of this appeal and office is directed to communicate the present order of stay of execution of decree to the Court of Ld. Principal Civil Judge, Kalyanpur immediately. There shall no order as to costs.

Place : Dwarka.
Date : 11.08.2025.

[Kaushikkumar Jashvantlal Modi]
Additional District Judge, Dwarka.
(UID-GJ00597)