

:-Order Below Exh.05:-

01. The present appeal has been preferred against the respondent herein challenging the judgment and decree being passed by the Learned Principal Senior Civil Judge, Himmatnagar whereby the suit of the appellants herein has been dismissed.
02. During the pendency and final disposal of the appeal, the appellants herein have been made present application vide Exh.05 seeking to have the stay on the execution of present judgment and decree. This application has been resisted tooth and nail by the respondents herein by putting up oral submissions that grant of stay means undue advantage in the form of creating right where it is none. The learned Trial Court has clearly held that the respondent No. 2 is in the possession of suit agriculture land and he has been bonafide purchaser of the suit agriculture land, consequently, the stay as asked for may not be granted.
03. Operation of decree and execution thereof is sought to be stayed. The provisions in that regard lie in Rule-05 of Order XLI. The main elements or conditions which are expected to be present for the purpose of staying operation and execution of the decree are enumerated in following terms;
 - (a) That substantial loss may result to the party applying for stay of execution unless the order is made;
 - (b) That the application has made without unreasonable

delay; and

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

- 04.** 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 order of stay merely by preferring an appeal is not 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. While granting interim orders in favour of any party to litigation for the purpose of extending protection to it, effective during the pendency of the proceedings at the interim stage and if they 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 of it of benefit earned by the opposite party under the interim order of the court, or (b) compensation for what it has lost, and to grant such relief is the inherent jurisdiction of the court. While granting an order of stay under order 41 rule 05 of the code, 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. In this regard, the reference may be made to Hon'ble Apex Court judgment in ***M/S. Atma Ram Properties(P) Ltd. Vs. M/S. Federal Motors Pvt. Ltd.*** in Appeal (Civil) 7988 of 2004.

05. Applying the law governing the field as culled-out in the preceding para requires venturing into the observations of Learned Trial Court. The finding of the Learned Trial Court goes that the applicants/appellants herein are neither the owner nor possessor. These two vital findings and conclusion of the learned Trial court must be looked into from the prism of the nature of suit and prayer of the appellants herein in the suit in question. The appellants herein who are original plaintiffs sought declaration in respect of ownership and having possession which sought to be protected by issuing

perpetual injunction preventing the respondents herein from in any manner disturbing their possession. Both of these prayers have been denied by concluding that neither title nor possession lies in the appellants herein. This aspect emerges from the para 13.5, 13.6, 13.7 and conclusion in the form of operative order. The Judgment and decree which are sought to be stayed have become absolutely otiose as it is not executable for the reason that the possession which would be main threat to the appellants herein does not believe to be lay in them. Since, this Judgment and decree is not executable, there does not arise question of staying the Judgment and Decree and operation thereof. As the three essential elements which are sine-qua-non and slightest possibility of their absence does not allow the appellate court to operate under Rule 5 of Order XLI. The first essential condition is that there must be likelihood of substantial loss that may result to the party applying for stay of execution unless the order is made. It is settled law that the threat of losing possession of some immovable property is nothing but substantial loss to the person who applies for seeking the stay on operation and execution of Judgment and decree. Here, the learned Trial Court has categorically held that the possession lies in the respondents herein, there is no question of arising such substantial loss. At the same time, the appellants herein do not seem to have applied for the stay on execution and operation of impugned Judgment and decree. The appellants herein have been without such stay for more than one and

half years. This itself suggests that there is no eminent danger to his any of the right and particularly to the alleged possession.

06. Since the Appellate Court at this stage operating under the equity jurisdiction and 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. This requires the applicant for order of stay must do equity for seeking equity. The equitable jurisdiction requires to put the parties on such terms the enforcement whereof would satisfy the demand for the justice of the party found successful at the end of the appeal.

07. In this view of the matter, the following final order is passed;

∴ ORDER ∴

The present application seeking to have stay on the operation and execution of decree under challenge stands **dismissed**.

The order is pronounced in the open Court on **30th day of January, 2025** under my hand and seal.

(Kanubhai R. Rabari)
Principal District Judge
Sabarkantha at Himmatnagar
UIC No. GJ00477

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