

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN  
BENCH AT JAIPUR

**ORDER**

IN

**S.B. Civil Misc. Stay Application No.2871/2001**

In

S.B. Civil Second Appeal No.513/2001

Mst. Mooli W/o late Shri Kajormal & Others  
...defendant-appellants

Versus

Kajormal (since deceased) through L.Rs.  
Smt. Parwati W/o late Shri Kajormal  
...plaintiff-respondents

**Date of Order ::: 31.10.2006**

Present

**Hon'ble Mr. Justice Narendra Kumar Jain**

Shri M.M. Ranjan, Counsel for defendant-appellants

Shri G.K. Garg, Counsel for plaintiff-respondents

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**//Reportable//**

**By the Court:**

Heard learned counsel for the parties on the stay application under Order 41 Rule 5 read with Section 151 of the Code of Civil Procedure.

The plaintiff-respondent filed a suit for redemption and possession against the defendants in respect of the disputed property, which was dismissed by the lower court but, on an appeal filed by the plaintiff, the first appellate court decreed the suit and passed a decree of redemption as well as for possession in favour of the plaintiff.

The learned counsel for the defendant-appellants

contended that the second appeal has already been admitted by this court on the substantial questions of law, therefore, it will be just and proper in the interest of justice to stay the operation of the judgment and decree passed by the first appellate court, otherwise the appellants will be dispossessed from the property in dispute and this appeal will become infructuous. Whereas, the learned counsel for the respondents contended that mere admission of the second appeal on the substantial question of law does not entitle the appellants to have stay in their favour automatically and in case any interim stay is granted then execution of decree passed in his favour by the first appellate court will be delayed and respondent will not get possession of the disputed property in spite of decree in their favour, therefore, the stay application filed by the appellants may be dismissed or, in alternative, in case this court passes an interim stay order in favour of the appellants, at-least the appellants be directed to pay mesne profit during the pendency of this second appeal.

I have considered the submissions of the learned counsel for both the parties.

The Hon'ble Supreme Court in the case of Atma

**Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.,**

**(2005) 1 SCC 705**, considered the jurisdiction of the appellate Court while passing order of stay under Order 41 Rule 5 of the C.P.C., and held that the appellate court has jurisdiction to put the applicant under Order 41 Rule 5 of the C.P.C., on such reasonable terms as would, in its opinion, reasonably compensate the decree-holder for loss occasioned by delay in execution of the decree by grant of stay, while passing the stay order in his favour, in the event of the appeal being dismissed.

The Hon'ble Supreme Court in the above referred case has considered the scope of Order 41 Rule 5 of the C.P.C., while granting stay order in favour of a person against whom there is a decree by the court below. The Hon'ble Supreme Court has observed that the decree-holder should reasonably be compensated for loss occasioned by delay in execution of the decree by grant of stay, while passing the stay order against him.

The property in dispute was mortgaged long back and the first appellate court has now passed a decree of redemption as well as possession in favour of the plaintiff but, in view of the fact that the second appeal has already been admitted and in case interim

stay is not passed then the appellants may be dispossessed and the second appeal may become infructuous, therefore, I am of the view that once the appeal is admitted then the decree of possession passed against the appellants should be stayed and simultaneously the respondent-decree-holder can also be compensated by directing the appellants to pay a reasonable compensation by way of mesne profit during the pendency of the second appeal. The amount of mesne profit can be fixed after considering the facts and circumstances of each case including the place, where the property is situated, nature and measurement of the property etc., and the market value of the monthly rent which can be fetched in case possession of the disputed property is delivered to the decree-holder.

So far as present case is concerned, the learned counsel for the appellants submits that the shop in dispute is situated in a village Ramgarh Pachwara, Tehsil Lalsot, therefore, mesne profit of Rs.10/- or Rs.20/- per month may be fixed, whereas the learned counsel for the respondents submits that it is not a small village and even in the village the shop cannot be taken on rent at the rate of Rs.10/- or Rs.20/- per month as suggested by the learned counsel for the appellants, therefore, reasonable amount may be fixed as mesne profit.

Consequently, I allow the stay application and direct that the judgment and decree passed by the first appellate court against the appellants shall remain stayed subject to following terms and conditions:-

That the defendant-appellants shall deposit Rs.200/- (Rupees two hundred) per month with effect from 1<sup>st</sup> of November, 2006, by 15<sup>th</sup> day of each succeeding month in the Bank Account of the respondents, the details of which will be furnished by respondents within a period of two weeks or, in case the details of the bank account are not furnished, the appellants shall pay the aforesaid amount to the respondents in cash by 15<sup>th</sup> day of each succeeding month. It will be open for the appellants to deposit/pay the aforesaid amount in advance also.

It is made clear that in case the appellants fail to deposit the mesne profits as directed above for consecutive two months then it will be open for the plaintiff-respondents to get the decree of the

first appellate court executed even during the pendency of this second appeal without any reference to this court.

**(Narendra Kumar Jain) J.**

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