

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10789 OF 2014**

M/s. P K. Hospitality Services Pvt Ltd. ..Petitioner
Vs.
Mumbai International Airport Pvt Ltd. & Anr. ..Respondents

Mr. Vinay Hegde for the Petitioner
Mr.P. K.Samdhani Senior Advocate, Ms Shoma Maitra and Ms Arpita Joshi
i/b M/s. Wadia Ghandy & Co. for the Respondent No.1
Mr. Nishant Atre i/b M/s. M.V. Kini & Co. for the Respondent No.2

CORAM : R. M. SAVANT, J.
DATE : 13th MARCH, 2015

PC.

1 The Writ Jurisdiction of this Court is invoked against the order dated 9-10-2014 passed by the Learned Judge of the City Civil Court, Borivali Division, Dindoshi, by which order, Notice of Motion No.912 of 2014 came to be dismissed.

2 The Petitioner company is the original Plaintiff who had filed the Suit in question being S.C. Suit No.1472 of 2008. Against an order passed in the Notice of Motion filed in the Suit for interim reliefs, the Petitioner had approached this Court by way of Appeal From Order No.1033 of 2008. The said Appeal from Order came to be disposed of on 10-10-2008, though a Learned Single Judge confirmed the order passed by the Trial Court. The directions which were based on the willingness of the Appellant i.e. the

Petitioner herein to vacate the premises in question came to be issued which are contained in clauses (ii) and (iii) of the said order dated 10-10-2008. In the context of the challenge raised in the above Petition clause (iii) of the said order is material and is therefore reproduced hereinunder for ready reference.

(iii) Upon the modernisation work in respect of the said location being completed, the Respondents shall not place any party other than the Plaintiff in possession of the suit premises or any premises adjoining it or near it. Further the Respondent shall place the Appellant in possession of the said premises or similar premises if constructed in the said location or any adjoining or nearby location. The same would also be without prejudice to the rights and contentions of both the parties.

3 The said order was corrected by order dated 5-3-2014 only in the matter of description of the parties. In view of the fact that the Defendant No.1 i.e. the Respondents herein had not complied with the directions as contained in clause (iii) of the said order that the instant Notice of Motion No.912 of 2014 was filed by the Petitioner invoking order XXXIX Rule 11 of the Civil Procedure Code for striking of the defence of the Respondents i.e. the Defendant No.1 in the Suit. The said Notice of Motion was therefore founded on the alleged non compliance of the said directions. As indicated above the said Notice of Motion came to be dismissed by the Trial Court by the impugned order dated 9-8-2014. The Trial Court accepted the case of the Defendant No.1 that there is no breach of the interim order in view of the statement which has

come in the cross-examination of the Defendant's witness who had deposed that no commercial outlets have been allotted till date in the new integrated terminal. The Trial Court on the said basis observed that there is no material to say that the Defendant No.1 have allotted shop premises and is intentionally avoiding to allot the same to the Plaintiff. The Trial Court lastly observed that at this stage no inference can be drawn that the Defendant No.1 have intentionally not complied with the interim order. Hence the defence of the Defendant No.1 need not be struck off.

4 The above Petition as indicated above has been filed challenging the said order dated 9-10-2014. The above Petition has been heard from time to time by this Court at some length and the issue as regards the allotment of the premises to the Petitioner was tried to be resolved. On behalf of the Defendant No.1 an affidavit has been filed by Mr. Sumeet Anand, Assistant Vice President and Authorised Representative of Mumbai International Airport Pvt Ltd., in which affidavit, the premises which the Defendant No.1 is ready to allot to the Petitioner are indicated in the plan annexed as Exhibit A to the said affidavit. The said affidavit also mentions the documents which the Petitioner would have to execute with the Defendant No.1. To the said affidavit, is also annexed a copy of the commercial terms offered to the Petitioner which is contained in Exhibit F annexed to the said affidavit. Hence by the said affidavit, the Defendant No.1 has made an offer to the Petitioner of the

premises which are marked in the copy of the plan annexed as Exhibit A to the said affidavit and two alternative sites have thereby been offered.

5 In so far as the said premises are concerned, they are in the arrival area of the new Airport Complex. In view of the said offer as contained in affidavit dated 11-3-2015, filed by Mr. Sumeet Anand, in the above Petition, in my view, the cause for filing the Notice of Motion for striking of the defence would not survive as in view of the offer now made, it cannot be said that the Defendant No.1 has not complied with the directions as contained in clause (iii) of the order dated 10-10-2008. Hence though the Trial Court has rejected the application on the ground that as yet no commercial outlets have been allotted to any other party, the impugned order now can also be sustained on the ground that the Defendant No.1 has now made an offer of allotment of premises which is contained in the said affidavit. The impugned order therefore does not deserve to be interdicted in the Writ Jurisdiction of this Court.

6 The Learned Counsel appearing on behalf of the Petitioner sought to raise contentions as regards the offer made by the Defendant No.1. It is his submission that the said offer is not in terms of clause (iii) of the order dated 10-10-2008 passed by the Learned Single Judge of this court. The Learned Counsel sought to urge contentions as regards the location and the commercial

terms offered. In my view, it is not necessary for this Court whilst considering the above Writ Petition challenging an order passed on an application filed for striking of the defence to consider the said contentions. This Court is only required to consider whether there is a deliberate and willful non compliance of the directions as contained in clause (iii) of the said order dated 10-10-2008. It is trite in so far as the striking of the defence is concerned, the same has to be dealt with, a certain amount of circumspection and only if the conduct of the party is bordering on being deliberate, contumacious that the drastic step of striking of defence is to be taken. In my view, having regard to the offer now made by the Defendant No.1, there is no warrant to strike of its defence. In so far as whether the offer is in terms of clause (iii) or not, it would open for the Petitioner to agitate the said grievance at the appropriate stage in the Suit.

7 Since the Learned Counsel appearing for the Petitioner states that the Petitioner did not have enough time to consider the said offer having regard to the financial implications which arise, with a view to give an opportunity to the Petitioner, the Defendant No.1 is directed to keep the said offer open till 15-4-2015. The Petitioner to communicate his willingness to accept the said offer on or before 15-4-2015, if it fails to communicate by the said date, it would be presumed that the Petitioner is not interested in the said offer and the Defendant No.1 then would be entitled to deal with the premises

in question which have been offered to the Petitioner and which are shown in Exhibit A to the affidavit. The Learned Senior Counsel appearing for the Defendant No.1 states that in so far as the Petitioner is concerned, the commercial terms annexed to the affidavit as Exhibit F, clause (1)(2) in the column of Fee, in so far as the Petitioner is concerned, should be read as Rs.15,000/- per square meter per month and the alternative of the revenue share 29% would not be applicable to the Petitioner. In the light of the aforesaid, the above Writ Petition to stand disposed of.

[R.M.SAVANT, J]