

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.101 OF 2016
IN
CIVIL REVISION APPLICATION NO.531 OF 2012**

F.S. Kerr & Co. Private Limited : Applicant.

In the matter between

**F.S. Kerr & Co. Private Limited : Petitioner/Applt Original
Defendant No.1.**

Versus

N.M. Wadia Charities and ors : Respondents.

**Mr. R V Pai a/w Mr. A P Pai i/by Mr. V V Pai for the Applicant.
Mr. V B Naik, Senior Advocate a/w Mr. Mayur Khandeparkar a/w Mr.
Prateek Pai i/by Keystone Partners for the Respondent No.6.**

CORAM : R. M. SAVANT, J.

DATE : 13th April 2016

P.C.

1 The above Civil Application has been filed by the original Applicant in the above Civil Revision Application No.531 of 2012 i.e. F.S.Kerr & Co. Private Limited. The above Civil Application as originally filed inter-alia sought the relief of re-call of the order dated 27/11/2015 as modified by the order dated 18/12/2015 passed in Civil Application No.589 of 2015 in Civil Revision Application No.531 of 2012, the relief that the order dated 27/11/2015 be modified in relation to the quantum of mesne profits/compensation with reference to the portion of the suit premises

admeasuring about 1200 sq.ft. as directed to be handed over by the impugned judgment and decree dated 04/05/2012 of the Appellate Bench of the Small Causes Court.

2 Pursuant to the order dated 17/02/2016 passed in the above Civil Application by which leave to amend was granted, prayer clause (b-1) was incorporated which is to the following effect :-

“(b-1) In the alternative to the preceding prayers, this Hon'ble Court be pleased to clarify the Order dated 27-11-2015 and modified Order dated 18-12-2015 passed in Civil Application No.589 of 2015 in Civil Revision Application No.531 of 2012 relates to the portion of the suit premises admeasuring about 1200 sq.ft. as directed to be handed over by the impugned judgment and decree dated 04/05/2012.”

The said leave to amend was granted as this Court was prima facie of the view that the relief sought vide prayer clauses (a) and (b) in the Civil Application as originally filed were not inconsonance with the liberty granted by the Apex Court vide its order dated 22/01/2016 passed in Petition for Special Leave to Appeal No.1341 of 2016. Pursuant to the said order dated 17/02/2016 paragraphs 6A to 6D have also been incorporated wherein the averments in respect of the clarification sought as regards the order dated 27/11/2015 as modified by the order dated 18/12/2015 find a place.

3 The above Civil Application, as indicated above, has been filed pursuant to the order dated 22/01/2016 passed by the Apex Court. The said order of the Apex Court reads thus :-

“Learned counsel for the petitioner seeks leave to withdraw the special leave petition in order to make an application for clarification before the High Court if the matter is not heard.

Permission granted. The special leave petition is accordingly dismissed as withdrawn, as prayed for.”

The clarification sought is of the order dated 27/11/2015 which clarification is as regards the extent of the premises to which the directions as contained in the said order dated 27/11/2015 would apply. It would be apposite to refer to the operative part as contained in paragraph 12 of the said order dated 27/11/2015 which for the sake of ready reference is reproduced herein under :-

i) The Respondent no.1 to deposit in this Court interim compensation at the rate of Rs.100/- per sq.ft. per month for the area of 3700 sq.ft., pending the hearing and final disposal of the above Civil Revision Application the same would be from 05th February 2014. The said deposit would be without prejudice to the rights and contentions of the parties.

(ii) Insofar as the amount to be deposited for the period February 2014 upto November 2015 is concerned, the said amount to be deposited in this Court within 12 weeks from date.

(iii) Insofar as the amount to be deposited from December 2015 onwards is concerned, the same is to be deposited on/or before 10th of each succeeding month.

(iv) If Respondent no.1 desires to carry out any tenantable repairs, it can do so after giving prior intimation to the landlord i.e. the Applicant herein who would not obstruct such tenantable repairs. Except tenantable repairs, no other repairs are permitted.

(v) After the amount is deposited, the Applicant would be at liberty to apply for withdrawal of the same and if any such application is made, the same would be considered on its own merits by the concerned Court.

(vi) The hearing of above Civil Revision Application no.531 of 2012 is now followed by Civil Revision Application no.677 of 2015 which is filed by the Applicant landlord. Hearing of both the Civil Revision Applications is expedited and to be placed for final hearing in the week commencing on 07th March 2016 with liberty to the parties to apply for the Civil Revision Applications to be heard on a fixed date.

(vii) The deposit made by Respondent no.1 herein would undoubtedly be subject to the result of the Civil Revision Application.

At this stage the learned counsel appearing for Respondent no.1 applies for stay of the order of monthly deposit. In view of the fact that the deposit is to be made in this Court from month to month, which is also without prejudice to the rights and contentions of the parties and also subject to the result of the Civil Revision Application, there is no warrant to stay that part of the order. The said prayer is accordingly rejected.”

The said order has been passed in Civil Application No.589 of 2015 filed by the Respondent No.6 i.e. Prima Properties Pvt. Ltd. in the above Civil Revision Application. The said Civil Application No.589 of 2015 was filed by the Respondent No.6 relying upon the judgment of the Apex Court in Atma Ram.

Properties (P) Ltd. v/s. M/s. Federal Motors Pvt. Ltd. reported in (2005) 1 SCC 705. The directions as contained in the operative part of the said order dated 27/11/2015 came to be issued after considering the material that was placed on record by the parties. In so far as the area of the premises is concerned, as can be seen from clause (i) of the said paragraph 12 of the order dated 27/11/2015 the Applicant herein who was the Respondent No.1 in the said Civil Application was directed to pay interim compensation at the rate of Rs.100/- per sq.ft. per month for the area of 3700 sq.ft., pending the hearing and final disposal of the Civil Revision Application No.531 of 2012. The directions, in so far as the arrears are concerned, were also calculated on the said basis.

4 The above Civil Application has been filed seeking clarification as regards the extent of the premises to which the directions as contained in the operative part of the said order dated 27/11/2015 would be applicable. It is the contention of the learned counsel for the Applicant that the decree passed against the Applicant who was the original Defendant No.1 was in respect of the premises admeasuring 1200 sq.ft. on the 4th floor of the building in question and therefore the Applicant is not liable to pay for an area beyond 1200 sq.ft. Reliance is sought to be placed on the operative part of the judgment and order dated 04/05/2012 passed by the Appellate Bench of the Small Causes Court which had partly decreed the suit after the Trial Court had

dismissed the suit. Attention is also sought to be drawn to the fact that the Courts below have recorded a finding that the Defendant Nos.3 and 4 were protected licensees within the meaning of Section 15A of the erstwhile Bombay Rent Act. The finding in respect of the Defendant Nos.3 and 4 as recorded by the Appellate Bench of the Small Causes Court was sought to be highlighted by the learned counsel appearing for the Applicant. In the said context it is required to be noted that against the decree passed by the Appellate Bench of the Small Causes Court the Applicant has filed the above Civil Revision Application No.531 of 2012. The above Civil Revision Application has been admitted and is pending hearing and final disposal. However, in the context of the reliefs sought in the above Civil Application what is required to be noted is that the Applicant had filed an affidavit in rejoinder in the above Civil Revision Application to the affidavit in reply filed by the Respondent No.6 herein. In the said affidavit in rejoinder it was disclosed by the Applicant that it is in possession of the premises which were earlier in the occupation of the Defendant Nos. 3 and 4 by virtue of the Deeds of Surrender executed by the said Defendants which are dated 19/03/2004 and 25/04/2004. It has come on record that the Defendant No.3 was in possession of 1800 sq.ft, whereas the Defendant No.4 was in possession of 700 sq.ft. from the Applicant. The disclosure of the said fact of the Deeds of Surrender executed by the Defendant Nos.3 and 4 prompted the Respondent No.6 to file its own Civil Revision Application being No.677 of 2015 challenging the findings recorded by the

Appellate Bench of the Small Causes Court qua the Defendant Nos.3 and 4, in the light of the said Deeds of Surrender. In the said Civil Revision Application the fact of the Deeds of Surrender being executed by the Defendant Nos.3 and 4 in favour of the Applicant pursuant to which the Applicant is in possession of the entire area of the 4th floor admeasuring 3700 sq.ft. has been highlighted. Hence in the Civil Revision Application No.677 of 2015 the Respondent No.6 has prayed that the decree ought to have been passed even in respect of the premises which were in occupation of the Defendant No.3. At the cost of repetition it is required to be stated that the decree against the Defendant No.3 was refused on the ground that it is a protected licensee within the meaning of Section 15A of the erstwhile Bombay Rent Act. As indicated above the Respondent No.6 had filed Civil Application No.589 of 2015 for enhanced compensation from the Applicant pending the above Civil Revision Application. Paragraphs 15 and 21 of the said Civil Application as also prayer clause (a) are material and for the sake of ready reference are reproduced herein under :-

“15 On a bare comparison of the aforesaid documents and the findings of the said Learned Appellate Bench, it is now evident that it is in fact the Petitioner herein who is in actual use, occupation and possession of the entire Suit Premises being 3,700 sq.ft. It is further clear that the Petitioner herein has misled the said Learned Appellate Bench as well as this Hon'ble Court to the extent that it has at no point of time disclosed that Respondent No.8 is in fact not in possession of a portion of the Suit Premises since 2004. In fact the Petitioner herein has on oath made a false statement that Respondent No.8 is in use, occupation and possession of the said 750 sq.ft. built up area of the Suit Premises.

21 The valuation carried out as aforesaid sometime in or around August, 2011 was captured in a Valuation Report dated 17th August, 2011. As per the said Valuation Report dated 17th August, 2011, the market rental for the Suit Premises being an upper floor commercial premises was in or around a sum of Rs.132/- per sq.ft. per month of the built up area of the Suit Premises and therefore, the total aggregate rent for the 3,700/- sq.ft. of the Suit Premises is Rs.4,88,400/- (Rupees 4 Lakh Eight Eight Thousand Four Hundred only) per month. Hereto annexed and marked as Exhibit “E” is a copy of the Valuation Report dated 17th August, 2011.”

“Prayer clause (a) :- Pending the hearing and final disposal of the present Civil Revision Application, this Hon'ble Court be pleased to direct the Petitioner to deposit a monthly compensation calculated at a rate of Rs.4,88,400/- (Rupees Four Lakh Eighty Eight Thousand Four Hundred Only) per month from 4th May, 2012 till 31st December, 2013 or such other date as this Hon'ble Court deem fit and proper and at a rate of Rs.5,18,000/- (Rupees Five Lakh Eighteen Thousand Only) per month from 1st January, 2014 till the Petitioner hands over quiet, vacant and peaceful possession of the entire Suit Premises to the Applicant herein or such other date as this Hon'ble Court deem fit and proper.”

Reading of the said paragraphs and prayer clause (a) would therefore disclose that the reliefs sought in the Civil Application on the basis of the judgment of the Apex Court in *Atma Ram Properties (P) Ltd.'s* case (supra) was on the basis that the Applicant herein is in possession of 3700 sq.ft. and therefore the compensation which was calculated and which was claimed vide prayer clause (a) as above was on the said basis.

5 It would therefore be necessary to see how the aforesaid case of the Respondent No.6 was dealt with by the Applicant herein. The Applicant herein had filed an affidavit in reply to the said Civil Application No.589 of 2015. In so far as paragraph 15 is concerned, the said paragraph has been dealt with vide clause (g) of paragraph 11. The said clause (g) merely contains an denial without specifically dealing with the averments made in paragraph 15. In so far as paragraph 21 is concerned, the averments therein have not been specifically dealt with save and except stating that the Applicants are claiming on the basis of the area of 3700 sq.ft. Hence even in the affidavit in reply the claim of the Respondent No.6 herein for enhanced compensation pending the Civil Revision Application on the basis that the Applicant is in possession of the premises admeasuring 3700 sq.ft. was not disputed and put in issue by the Applicant. This Court therefore proceeded to consider the said Civil Application No.589 of 2015 on the basis that the premises are admeasuring 3700 sq.ft. and has allowed the same to the extent of the directions as contained in the operative part of the order dated 27/11/2015 and thereby directed the Applicant herein to deposit and make the payments in terms of the said directions.

6 In so far as the Applicant herein occupying the entire 3700 sq.ft. is concerned, the following excerpts from paragraph 9 and paragraph 11 of the affidavit in rejoinder filed by the Applicant in Civil Revision Application No.531

of 2012 are relevant :-

“In fact, in the year 2004, the Petitioner had for expanding its business lawfully taken over independent exclusive possession of the portion of the suit premises, which formerly were under the Petitioner's direct control and in joint/concurrent possession alongwith the original Defendant No.3 and the representatives of the Defendant No.4, vide Registered Instruments being Deed of Surrender dated 19th March 2004 bearing Registration No.02046/2004 and Deed of 25th February, 2004 bearing Registration No.01388/2004. The Petitioner has paid substantial sum as and by way of consideration, stamp duty, registration charges and other expenses towards securing the Deeds of Surrender. The Petitioner is in exclusive possession of the Suit premises and as such now no part of the premises is distinguishable qua the portion in joint possession of the Petitioner along with Original Defendant No.3 and 4. In spite of this, the Respondent No.6 landlord has been harassing and bullying the present Petitioner with the sole intention to somehow grabbing the Suit premises or any part thereof without there being any requirement for the same to them.”

“I say that the Petitioner has clearly demonstrate their intention to expand their business by now exclusively carrying on business from the Suit premises, and lawfully excluding the Original Defendant No.3 and representatives of the Original Defendant No.4 from joint possession of the Suit premises under the aforesaid Deeds of Surrender.”

7 Against the said order dated 27/11/2015 the Applicant filed an SLP in the Apex Court. In the Apex Court, the Applicant had sought leave to withdraw the SLP, to file an application seeking clarification before this Court. The Apex Court had accordingly granted permission, and dismissed the SLP as withdrawn.

8 In my view, it is not possible to accept the contentions urged on behalf of the Applicant herein that since the decree passed is only in respect of the suit premises which were in occupation of the Applicant i.e. 1200 sq.ft., the directions as contained in the order dated 27/11/2015 cannot apply to the premises beyond the area of 1200 sq.ft. The factum of the Applicant obtaining possession of the premises from the Defendant Nos.3 and 4 pursuant to the Deeds of Surrender executed by the said Defendant has already been adverted to herein above. It is required to be noted that though the Deeds of Surrender are dated 19/03/2004 and 25/04/2004 i.e. prior to the Appellate Bench of the Small Causes Court deciding the Appeals. Pertinently they were not brought to the notice of the Appellate Bench of the Small Causes Court whilst it was considering the Appeals. The Appellate Bench of the Small Causes Court rendered its judgment dated 04/05/2012 oblivious of the fact that during the pendency of the Appeal the Defendant No.1 has come in possession of the premises which were in the erstwhile occupation of the Defendant Nos.3 and 4.

9 It would also be relevant to refer to the clause of the Deed of Surrender dated 19th March 2004 which for the sake of ready reference is reproduced herein under :-

“AND WHEREAS the party of the 1st part have approached the party of the 2nd part and intimated to the party of the 2nd part that they desire to put an end to the litigation and do not desire that the litigation

between the parties should continue and that they do not desire to continue to contend that they are deemed tenants/licensees of the premises and that they do not intend to seek the protection of the Act and have expressed a desire to the party of the 2nd part to surrender to and in favour of the party of the 2nd part whatever rights they claim, which are not admitted by the party of the 2nd part, and have expressed a desire to the party of the 2nd part that they desire to remove themselves alongwith there articles and things from the said cabin which is jointly used by them alongwith the party of the 2nd part and have expressed a desire to stop the joint user of the said cabin alongwith the party of the 2nd part, and to terminate the contract of consultancy that was entered into by the party of the 1st part with the party of the 2nd part.”

An identical clause is in the other Deed of Surrender dated 25th February 2004.

A reading of the said clause therefore makes it clear that the Defendant Nos.3 and 4 had given up their protection as protected licensees and had surrendered the premises to the Applicant who was undoubtedly the head tenant in so far as the Defendant Nos. 3 and 4 are concerned. As indicated above the said Deeds of Surrender executed by the Defendant Nos.3 and 4 were not disclosed to the Appellate Bench of the Small Causes Court by the Applicant, which therefore adjudicated the Appeals oblivious of the said fact.

10 It is required to be borne in mind that the Plaintiff had filed the suit in question against the Defendants on the ground of sub-letting and in so far as the Defendant Nos.3 and 4 from whom the Applicant has obtained possession, decree was not passed against them on the ground that they are

protected licensees within the meaning of Section 15A of the erstwhile Bombay Rent Act. The consideration of the Appellate Bench of the Small Causes Court may have been different if the factum of the Deeds of Surrender were to be brought to its notice. It is also required to be borne in mind that the Civil Revision Application No.677 of 2015 filed by the Respondent No.6 herein challenging the finding recorded by the Appellate Bench of the Small Causes Court qua the Defendant Nos.3 and 4 is also pending hearing and final disposal and is to be heard along with the Civil Revision Application filed by the Applicant. Hence the pleadings on record in the said Civil Application No.589 of 2015 make it clear that the area of the premises in occupation of the Applicant being 3700 sq.ft. was never contested by the Applicant herein during the adjudication of the said Civil Application No.589 of 2015. In fact at the hearing of the said Civil Application a statement was made by the learned counsel for the Applicant (Respondent No.1 in the said Application) that the Respondent No.1 is a export house and is at present carrying out business in the premises in question.

11 The Applicant in the said Civil Application No.589 of 2015 advisedly proceeded on the basis of the premises being 3700 sq.ft., as it was its case that the Respondent No.6 i.e. the Applicant in the said Civil Application No.589 of 2015 was not entitled to compensation beyond Rs.30/- per sq.ft. which according to the Applicant was the contractual rent. The said fact is also

fortified by the averments contained in paragraph 5(J) of the above Civil Application. Hence the grievance ineffect seems to be as regards the rate per sq.ft. i.e. Rs.100/- per sq.ft. fixed by this Court by the said order dated 27/11/2015. Hence to get over the rate per sq.ft. fixed by this Court, that this method of questioning the extent of the premises to which the said rate would apply is being adopted. Hence the same is obviously an afterthought so as to avoid the liability to pay the amount calculated on the basis that the premises are admeasuring 3700 sq.ft.

12 No clarification is therefore required to be given in respect of the said order dated 27/11/2015. The above Civil Application is accordingly rejected.

[R.M.SAVANT, J]