IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 728 OF 2015
WITH
CIVIL APPLICATION NO. 882 OF 2015
AND
APPEAL FROM ORDER (ST) 34736 OF 2015
WITH
CIVIL APPLICATION (ST) NO. 34737 OF 2015

Dilip Motumal Duhilani,
R/at Asgarali Bldg., 20,
Vakola Village Road,
Santacruz (E), Mumbai -400 055. … Appellant in appeals & Applicant in CAAs.

v/s

Smt.Sumitra Rani,
widow of late Shri A.B.Gandhi,
R/at 203-B, Bhai Randhirsingh Nagar,
Ludhiana, Punjab; and others. … Respondents

Ms.Sunita Poddar along with Ms.Farhana Khan for the appellant in both appeals and applicant in both civil applications.

Mr.Ahmed Abdi along with Satya Prakash Sharma i/by Abdi & Co. for Resp. Nos.2 to 5 in both appeals and applications.

Mr.Ashwinkumar Tammannavar, Section officer of the Court Receiver present in Court.

Coram: N.M. Jamdar, J.

Dated : 12 April 2016

Oral Order :

The Appeal from Order No.728 of 2015 challenges the order passed by the City Civil Court on 16 December 2014 in Notice of Motion

No.3642 of 2008 taken out by the Respondent herein, for fixing a monthly royalty of Rs.70,000/- in respect of the suit hotel, and disposing of the notice of motion by fixing the royalty at Rs.60,500/- from October 2008 till September 2009 and so on, with 20% increase in royalty as stated therein.

2 Appeal from Order (St) No.34736 of 2015 challenges the order passed by the City Civil Court, Mumbai, in Notice of Motion No.997 of 2015 taken out by the Respondents to terminate the agency agreement executed by the Court Receiver in favour of the Appellant and to take physical possession of the suit premises.

3 The suit premises is a hotel known as M/s.Amar Sindh Punjab Hotel, situated at Shop No.279-293, situated at Shop No.1, 279-293, N.C. Kelkar Road, Miranda Chawl, Dadar (West), Mumbai-28.

4 Suit bearing No.9376 of 1995 was filed by the Appellant under Section 6 of the Specific Relief Act in this Court, which was subsequently transferred to the City Civil Court, Mumbai, by the amendment in its pecuniary jurisdiction. The Respondents are heirs of deceased Amar Singh. Amar Singh had set up a eating house in the suit premises. According to the Appellant, the Appellant was in exclusive use and occupation of the premises by virtue of conducting agreement dated 11 December 1961, which was continued from time to time. According to the Appellant, he applied for transfer of various licences in respect of the suit hotel and the licences were granted in his name. It was stated by the Appellant that, on 3 January 1993 the Respondents forcibly evicted the

Appellant from his settled possession. The Appellant thereafter filed a complaint with the police authorities and thereafter filed a suit bearing No.1072 of 1995 with a prayer that the Respondents be directed to restore the possession of the suit hotel. By an order dated 13 April 1995, this Court appointed the Court Receiver as a Receiver and the Appellant was appointed as an agent of the Receiver on royalty, to be decided by the Receiver. By an order dated 19 January 1998, this Court fixed the royalty at Rs.7,000/- per month. Thereafter, a notice of motion was taken out by the Respondents bearing No.3642 of 2008 seeking enhancement of royalty to Rs.70,000/-, in view of passage of time. This Court directed that the Valuer be appointed, and as an interim measure directed payment of Rs.15,000/- as royalty. An appeal was filed by the Appellant before the Appeal Bench which was disposed of by maintaining the order of Rs.15,000/- as an interim relief and clarifying that the order regarding valuation will continue.

5 On 13 January 2012, the valuer submitted his report and opined that, if possession of the suit premises given on leave and licence basis, it would be around Rs.60,500/- as on 28 December 2011. The City Civil Court also took note of the order passed by this Court on 22 August 2011 wherein an increase at the rate of 20% was contemplated. The City Civil Court took note that the valuation report has considered the prime location, present condition, commercial potential and prevailing market rate. The City Civil Court, by the impugned order dated 16 December 2014 accepted the valuation report and fixed the Royalty at Rs.60,500/-). Thereafter, the present Appeal from Order No.728 of 2015 was filed. While it was pending, since there was no interim order, the Notice of

Motion No.997 of 2015 taken out by the Respondents for termination of agency of the Appellant was considered by the City Civil Court and since the Appellant had not deposited the amount of royalty as directed by the order dated 16 December 2014, proceeded to terminate the agency of the Appellant with a direction to the Court Receiver to take back the possession from the Appellant. This order was challenged in Appeal from Order No.728 of 2015. It was filed with a delay which delay was condoned by this Court on 28 April 2015.

6 Thereafter both the appeals came up before this Court 2 March 2016, when the following order was passed :

> *'P.C.*
>
> *. The appellant (original plaintiff) is directed to deposit the entire arrears of Royalty amount at the rate of Rs.15,000/- per month from 1st November 2014 till date. It is made clear that the said amount of deposit would be without prejudice to the rights and contentions of the plaintiff. Further arguments of the appellant can be heard only after this amount is deposited with the office of the Court Receiver within three weeks from today.*
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> *2. In view of there being a serious dispute whether the plaintiff is conducting their restaurant business or not, the Court Receiver is directed to depute the representative of his office to the suit premises within one week from today and submit a report about the status of the activities being carried on in the suit premises. Representative of the Court Receiver shall also make an enquiry whether such business has been conducted from last one year in the suit premises and shall disclose the same in the said report. Report shall be submitted within three weeks from today. Charges of the representative of the Court Receiver, if any, shall be debited in the suit account.*
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> *3. Place both the appeals from order on board for 'Admission'*

> *on 28th March 2016.'*

Thereafter on 28 March 2016, the following order was passed and the appeals were placed on board for dismissal:

> *'P.C. :*
>
> *None for the Appellant. By order dated 15 April 1995 the Court Receiver has been appointed on the motion made by the Appellant / Plaintiff. It is pointed out that the Appellant / Plaintiff is appointed as an Agent and the Court Receiver was directed to fix the royalty. By the order impugned in the Appeal, royalty of Rs.60,500/p.m. has been fixed starting from October 2008 with 20% increase as provided for. By order dated 2 March 2016, this Court in this Appeal had directed the Appellant to deposit arrears of royalty at the rate of Rs.50,000/p.m. from 1 November 2014 till date. The Court Receiver points out that inspite of repeated reminders, this amount is not paid. None appears for the Appellant. It appears that the Appellant is not interested in continuing as an Agent of the Receiver.*
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> *2. Place both the Appeals on Board on 12 April 2016 under the caption "for dismissal".'*

7 Learned counsel for the Appellant submitted that due to various unavoidable reasons the royalty at the rate of Rs.15,000/- could not be paid. She submitted that the amount is ready today and may be permitted to be deposited. Since both the appeals are pending for admission and that the amount of Rs.15,000/- which was to be paid within three weeks, was not paid, and it was only a condition for hearing the arguments; the Appellants were called upon to argue the appeals on merits which the learned counsel for the Appellant had proceeded to do.

8 Learned counsel for the Appellant submitted that the amount of Rs.60,500/- fixed as a royalty is excessive. She submitted that, by an order dated 19 January 1998, this Court has taken note that merely because the premises are hotel premises and situated in prime locality, the category of people to visit the hotel premises need to be taken into consideration. She submitted that the valuation report has been accepted in toto by the City Civil Court. According to the learned counsel for the Appellant, the valuation report has taken into consideration the pagadi and the information of the estate agent, which is not produced on record. She submitted that a room has been added in consideration and income from the hotel is also not considered. She submitted that the Appellant is in possession of the premises from 1961 and has been wrongfully dispossessed. She submitted that, it is not possible for the Appellant to deposit the amount of Rs.60,500/- and the amount of Rs.15,000/- which is indicated in the order dated 2 March 2016, be continued. She submitted that the suit is now ready for trial. As regard the termination of agency it was contended that, while the present appeal was pending, the notice of motion was allowed by the City Civil Court without considering that the challenge of the Appellant is pending in this Court.

9 Learned counsel for the Respondents, on the other hand, submitted that the valuation report and the compensation fixed is fair and proper. He relied upon the affidavit filed by the Respondent Nos.2 to 5 in these appeals on 22 January 2016, placing on record certain photographs, electricity bills to demonstrate that the Appellant is not using the premises. The Court Receiver has also filed his report on 23 March 2016 pursuant to the order passed by this Court.

10 The short question that arises is, whether the discretion used by the City Civil Court in fixing the royalty of the premises at Rs.60,500/- is fair and proper ? It has to be kept in mind that the premises are a hotel premises situated in a prime locality. As regard the valuation report, no objection was filed by the Appellant and the learned counsel for the Appellant has made oral submissions as regard the correctness of the valuation report. When this Court fixed the royalty at Rs.7,000/-, it was in the year 1998, and it is common knowledge that by devaluation of rupee the same amount is now much more. On 22 August 2011, this Court did not reject the prayer of the Respondents of increase in royalty of Rs.70,000/- in toto, but directed that the valuation be done. Pursuant to the orders of the Court, the valuer has placed his report on record. The valuer has taken into consideration various aspects, such as, shop, size of the premises, the rates in ready reckoner, etc.. The valuer has considered and granted 20% depreciation, however, has considered the fact that it is a commercial premises. The area of the hotel is 603 sq.ft. The Appellant has not placed any contra material on record and has only orally proceeded to criticize the report of the valuer. The Appellant has not placed any material to demonstrate that the report of the valuer is incorrect. Once this Court has directed that the valuer's report be submitted and that there was no objection submitted to the valuer's report, there was no error committed by the City Civil Court in accepting the report of the valuer. Even otherwise, as stated earlier, by passage of time, even the amount of Rs.7,000/- has to be substantially increased due to devaluation of rupee.

11 Apart from this position, the affidavit which has been filed by the

Respondent placing on record the present position of the suit premises has also gone uncontroverted. It has been placed on record by the Respondents that the premises have been closed for several months. The Appellant has annexed electricity bills of the hotel. The electricity bill which is placed on record shows that last payment was in 31 October 2013. The photographs of the hotel from the outside, have been placed on record shows that regular upkeep of the hotel premises, is not done as can be seen from the condition of the nearby stores. The Court Receiver has also placed on record that when he visited the premises he had taken out photographs of the premises from inside. The Court Receiver has placed on record the photographs of the inside of the premises The photographs show that the equipments used for cooking are completely corroded, the cement and paint from the wall is peeling. The utensils have been stored in cabinet from, which the cement is falling. If the hotel business was being run, such would not be the situation of a kitchen, which clearly shows that it has not been used.

12 This is the position which emerges today is that the Appellant has not paid the royalty as fixed by the City Civil Court, which royalty I do not find to be excessive and fixed after use of discretion which can be stated as perverse. There is no response to the assertion of the Respondents that the premises are not being used The Appellant's own case is that hotel business given only on conducting basis. Even the royalty granted by this Court of Rs.15,000/- per month was not paid within the stipulated period. It clearly therefore shows that the Appellant is only holding on to the premises for some oblique motive, as alleged and is deprived the Respondents of the use of the premises. If the Appellant is neither paying

royalty as fixed and nor using the premises, no equitable order can be extended in favour of the Appellant.

13 As regard the order passed in Appeal from Order (St) No.34736 of 2015, it is the order consequential upon the first order and since I am not inclined to interfere with the first order, the second order which is a follow up action, also need not be disturbed. However, to give one more opportunity to the Appellant it is clarified that the order passed in the second Notice of Motion i.e. No.997 of 2015 passed on 15 December 2015, will come into effect after a period of three weeks from today.

14 Accordingly, both the appeals are disposed of as under :

(1) Appeal from Order No.728 of 2015, is dismissed.

(2) Appeal from Order (St) No.34736 of 2015, is disposed of as under :

(i) The order passed on 15 December 2015 in Notice of Motion No.997 of 2015, is confirmed. This order will come into effect after a period of three weeks from today i.e. on 3 May 2016.

(ii) This appeal is disposed of accordingly.

(iii) No order as to costs.

15 In view of disposal of the appeals, the civil applications do not survive and are disposed of.

(N. M. Jamdar, J.)