IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5146 OF 2016

M/s. Ganesh Garments through its Proprietor
Manilal L. Karia … Petitioner
Vs.
Dena Bank … Respondent

Mr. A. M. Khandekar i/b. Tamhane & Co. for Petitioner.
Mr. Rajesh L. Shethia and Mr. Chetan R. Shah for Respondent.

CORAM : R. G. KETKAR, J.
DATE : APRIL 29, 2016

P.C. :

Heard Mr. Khandekar, learned Counsel for petitioner and Mr. Shethia, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and order dated 01.03.2016 passed by the learned Principal Judge of the City Civil Court for Greater Mumbai in Stay Application No.12 of 2016 in Miscellaneous Appeal No.9 of 2016. By that order, the learned Appellate Authority stayed the execution of the order dated 29.12.2015 passed by the Estate Officer until final decision of the appeal subject to the petitioner herein depositing with the respondent No.1 Bank arrears of damages at the rate of Rs.77,073/- per month from 26.11.2008 to 29.02.2016 with interest at the rate of 9% p.a., within a period of two months from the date of the order. The Appellate Authority also directed the petitioner to go on depositing with respondent No.1 the damages at the rate of Rs.77,073/- per month from March, 2016 onwards within 10 days after completion of each calendar month.

3. In support of this petition, Mr. Khandekar strenuously contended that by a registered Deed of Assignment dated 16.02.1957, the tenant

Saremal Maganaji sold and assigned his running business at Shop No.5, Dena Bank Building, 3rd Pasta Lane, Colaba Causeway, Mumbai - 400 005 (for short 'shop premises') together with its goodwill, stock in trade, furniture, fixtures, etc. and the benefits incidental thereto of the tenancy rights to one Bhuralal Bhartingji Purohit. Said Bhuralal ran the business and then in turn sold his running and going business at the shop premises to one Khimji Manek together with its goodwill, stock-in-trade and other rights and benefits pertaining to the said business and stock in trade furniture, fixture and incidental to the said sale the benefits of tenancy rights of shop premises by registered Deed of Assignment dated 22.03.1958. Said Khimji Manek ran the business for some time and by a registered Deed of Assignment dated 11.07.1960 sold his running and going business run at the shop premises to one Shah Devshi Malshi together with its good will, trade name and other rights and benefits pertaining to the said business and stock-in-trade, furniture, fixture and incidental to the said sale the benefits of tenancy rights of shop premises. Said Shah Devshi Malshi in turn by a registered Deed of Assignment dated 10.09.1968 sold his running and going business run at the shop premises together with its goodwill, trade name and other rights and benefits pertaining to the said business and stock-in-trade, furniture, fixture and incidental to the said sale the benefits of tenancy rights of shop premises to the father of the petitioner – Lakhamshi Bachubhai Shah.

4. Mr. Khandekar relied upon the decision of the Apex Court in the case of ***Suhas H. Pophale Vs. Oriental Insurance Company Limited*****, (2014) 4 SCC 657** and in particular paragraphs 64 to 66 thereof. He submitted that in paragraph 64, the Apex Court noted two categories of occupants. Firstly, those who are in occupation since prior to 16.09.1958 i.e. prior to the Public Premises (Eviction of Unauthorised

Occupants) Act, 1958 (for short 'Public Premises Act') became applicable and secondly, those who came in occupation thereafter but prior to the date of the concerned premises belonging to the respondent. Petitioner's father came in occupation on 10.09.1968 and respondent-Bank was nationalized on 19.07.1969. In other words, petitioner is in occupation of the shop premises as a tenant prior to nationalization of the respondent-bank. In view of the decision of **Suhas H. Pophale** (*supra*), petitioner is governed by the provisions of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947 and subsequently Maharashtra Rent Control Act, 1999. Mr. Khandekar submitted that Review Petition and Curative Petition seeking review of the decision in the case of **Suhas H. Pophale** (*supra*) were rejected by the Apex Court. He, therefore, submitted that basically the notice issued by the respondent under the provisions of the Public Premises Act and the proceedings conducted thereunder are vitiated and the order passed by the Estate Officer is null and void. He, therefore, submitted that the learned Appellate Authority was not justified in imposing any condition on the petitioner while granting stay to the order passed by the Estate Officer.

5. Mr. Khandekar further submitted that having regard to the financial condition of the petitioner, it is not possible for him to make the payment as per the impugned order. Even on this count, the impugned order is liable to be set aside.

6. On the other hand, Mr. Shethia relied upon the decision of the Apex Court in the case of ***Ashoka Marketing Ltd. Vs. Punjab National Bank***, **AIR 1991 SC 855**. He submitted that the Constitution Bench in **Ashoka Marketing Limited** (*supra*) has held that the provisions of the Public Premises Act override the provisions of the Rent Control Act. He

also relied upon the decision of ***New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd.***, **AIR 2016 SC 86** to contend that the law laid earlier by the Larger Bench shall prevail over the law laid down by the Smaller Bench and is binding on any subsequent Bench of lesser or equal strength. He further submitted that by valuation report dated 22.08.2013, the valuer appointed by the petitioner also certified that the fair market rent of the shop premises is Rs.166/- per sq.ft. of built up area, which is fair and reasonable. By the impugned order, the learned Appellate Authority has directed the petitioner to pay the damages @ Rs.166/- per month. Even the Estate Officer has quantified the damages of the shop premises @ Rs.166/- per month that is to say Rs.77,073/- per month. He also relied upon the order dated 15.04.2016 passed by this Court in Writ Petition No.4017 of 2016 and submitted that the shop premises is also situate in the same building and this Court had dismissed the Petition. For the reasons stated therein, this Petition also deserves to be dismissed.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that while deciding the proceedings under the Public Premises Act, the Estate Officer held that petitioner herein is liable to pay mesne profit / damages quantified @ Rs. 382.25 sq.ft. x Rs.375 = Rs.1,43,343.75 per month with effect from 26.11.2008. It is not in dispute that the petitioner had appointed a valuer. On 22.08.2013, he has certified that the fair market rent of the shop premises is Rs.166/- per sq.ft. per month on built up area, which is fair and reasonable. The learned Appellate Authority has accordingly granted stay subject to imposing condition on the petitioner to deposit arrears of rent @ Rs.77,073/- per month, which is as per the certificate issued by the petitioner's valuer. In view thereof, I do not find that the learned

Appellate Authority has committed any error while fixing the quantum of damages.

8. Mr. Khandekar relied upon the decision of the Apex Court in **Suhas Hari Pophale** (*supra*) to contend that respondent-bank was not justified in invoking the provisions of the Public Premises Act by issuing notice and by holding proceedings thereunder. As against this, Mr. Shethia relied upon the decision of the Apex Court in the case of **Ashoka Marketing** (*supra*) rendered by the Constitution Bench as also decision in the case of **New India Assurance Company Limited** (*supra*). Apart from that, he also submitted that by order dated 17.03.2015, the Apex Court referred the matter before the Larger Bench by observing that the decision in the case of **Suhas Pophale** *(supra)* is contrary to the decision of the Constitution Bench rendered in the case of **Ashoka Marketing** *(supra)*. In view of the decision of the Apex Court in the case of **New India Assurance Company Limited** *(supra)*, this Court is bound by the law laid down by the larger Bench. In view thereof and for the reasons recorded in the order dated 15.04.2016 passed in Writ Petition No.4017 of 2016, I do not find that any case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

9. At this stage, Mr. Khandekar prays for stay of this order for a period of 8 weeks from today. In view thereof, notwithstanding dismissal of the Petition, this order shall remain stayed for the period of 8 weeks from today. Learned Principal District Judge is requested to dispose of the Appeal as expeditiously as possible and in any case within 4 months from today on production of the authenticated copy of this order.

(R. G. KETKAR, J.)