

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10459 OF 2016**

Mrs. Sadiya Shainu Shaikh

Petitioner

Vs

Development Corporation of
Konkan Ltd (DCKL) and Anr

.. Respondents

Mr. Uday P. Warunjikar i/b Nitesh Bhutekar, Advocate for
Petitioner.

Ms.Lata Desai a/w Ms Ashwini Padalkar i/b M/s Divekar & Co
Advocates for Respondent no. 1.

CORAM : R.G.KETKAR,J.
DATE : 30/11/2016

PC:

1. Heard Mr. Uday Warunjikar, learned counsel for the petitioner and Ms.Lata Desai, learned counsel for respondent no.1 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 5.4.2016 passed by the learned Judge, City Civil Court, Mumbai, in Misc. Civil Application No.51 of 2016 in S.C.Suit No.3046 of 2015. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as 'plaintiff', for restoration of Suit No.3046 of 2015, which was dismissed in default on 23.10.2015.

3. Plaintiff has instituted the suit on 30.7.2015 against the respondents, hereinafter referred to as 'defendants', inter alia, praying for declaration that she is entitled to possession, use,

occupation and enjoyment of Flat No.A-8/002, Ground Floor Veena Nagar, L.B.S. Road, Mulund (W), Mumbai (for short, 'suit premises'); for declaration that the plaintiff is entitled to acquire/purchase the suit premises from the defendants and that defendant no.1 be directed to execute the conveyance in favour of the plaintiff; for perpetual injunction restraining the defendants from interfering and/or obstructing with the plaintiff's peaceful possession, use, occupation and enjoyment of the suit premises, among other prayers.

4. Plaintiff was allotted the suit premises vide allotment letter dated 18.12.1992. Condition No.10 laid down that allotment of the quarter will stand automatically cancelled on the date from which plaintiff ceases to be an employee of the corporation on account of retirement/dismissal/resignation or otherwise. On 18.2.1993, the plaintiff made endorsement to the effect that terms and conditions are acceptable to her. It appears that on 8.9.2016 the plaintiff opted for voluntary retirement in pursuance of application dated 7.9.1996.

5. It further appears that defendant no.1 instituted Criminal Case no.448/SS/6 against the plaintiff under Section 630 of the Companies Act,1956. By the Judgment and order dated 10.3.2011, the learned Addl.Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai convicted the plaintiff for an offence punishable under Section 630(1) of the Companies Act vide

Section 255(2) of the Code of Criminal Procedure, 1873 and sentenced her to pay a fine of Rs.1000/- , in default to suffer simple imprisonment for one month. The plaintiff was further directed to deliver vacant possession of the suit premises within three months from the date of the order, i.e. on or before 9.6.2011, in default to suffer further simple imprisonment for six months. Aggrieved by this decision, the plaintiff preferred Criminal Appeal No.330 of 2011. By order dated 3.12.2013, learned Addl. Sessions Judge, Greater Mumbai dismissed the appeal and directed the plaintiff to vacate the quarter within three months, failing which the sentence as ordered would be effected.

6. Aggrieved by these orders, the plaintiff instituted Criminal Revision Application No. 38 of 2014 in this Court. After hearing both sides, by order dated 7.7.2016, this Court dismissed the Criminal Revision Application and only as a matter indulgence, the plaintiff was given time of three months from the date of the order for vacating the suit premises.

7. As noted earlier, during the pendency of the criminal proceedings, the plaintiff has instituted the suit for the aforesaid reliefs. By order dated 23.10.2015, the learned trial Judge dismissed the suit on the ground that the plaintiff did not remove all the office objections. On 4.4.2016, the plaintiff filed Misc. Civil Application No.15 of 2016. In paragraph 10, she prayed for

condoning delay of 101 days in filing the application.

8. It further appears that defendant no.1 issued notice dated 2.4.2016 calling upon the plaintiff to hand over possession within 48 hours, failing which they will execute the order of the learned Magistrate. Reference was made to the orders passed in criminal proceedings. The plaintiff also took out Notice of Motion for condoning the delay as also staying the effect and implementation of the notice dated 2.4.2016. By the impugned order dated 5.4.2016, the learned trial Judge rejected the application. In paragraph 5, the learned trial Judge observed that the application was filed on 4.4.2016, i.e. after lapse of period of 5 months and 11 days. The period of limitation for filing application for restoration is 30 days. There is no prayer for condonation of delay. The learned trial Judge held that no sufficient cause was made out for restoration of the suit.

9. In support of this Petition, Mr. Warunjikar has invited my attention to the Misc.Application filed by the plaintiff and in particular paragraph 10 thereof to contend that the finding recorded by the learned trial Judge in paragraph 5 is factually incorrect and contrary to record. In paragraph 10 of the application, it was specifically prayed for condoning delay of 101 days in filing the application. He, therefore, submitted that the impugned order deserves to be set aside thereby restoring the suit to its original position.

10. Mr. Warunjikar has invited my attention to the order dated 10.10.2016 passed by this Court. By that order, Registry was directed to place the matter for admission as per its C.M.I.S date, i.e. 20.2.2017. It was observed that in case the respondents are proceeding to take possession of the suit from the petitioner-plaintiff, the respondent-Corporation shall give 15 days notice to the petitioner and liberty was reserved to the petitioner to apply. The petitioner was also restrained from creating any third party rights or parting with possession. He submitted that in case the Court is inclined to restore the suit, some breathing time may be given to the plaintiff for obtaining suitable orders from trial Court. He submitted that the plaintiff's husband is a paralytic patient. He has taken me through paragraph 6 of the application to contend that even after retirement the defendants have sold flats occupied by the employees. The plaintiff is also similarly situated, she is ready and willing to purchase the suit flat at its market value. He also relied upon the valuation report made by Techno Consultant showing market value of the suit premises at Rs. 23,68,000/-. He further submitted that the defendants have not released Rs. 10 lakhs being her terminal dues. This Court will consider these mitigating circumstances and protect the possession of the petitioner for few days so as to enable her to obtain suitable orders in the suit.

11. On the other hand, Ms. Desai supported the impugned

order. She submitted that the petitioner is convicted in proceedings under Section 630 of the Companies Act. While passing the order, the learned Magistrate directed the plaintiff to hand over possession on or before 9.6.2011, in default to suffer further imprisonment for six months. The plaintiff had carried the matter before the Sessions Court and even this Court and both the Courts have decided against the plaintiff. While dismissing the Revision Application, this Court granted three months time from 7.7.2016 for vacating the suit premises and till date the plaintiff has not handed over possession of the suit premises. She further disputed the contentions advanced by Mr Warunjikar to the effect that defendant no.1 has sold flats to similarly situated employees and that Rs. 10 lakhs are due from the defendants. She submitted that defendant no.1 has issued notice on 2.4.2016 in pursuance of the orders passed by the criminal court. She submitted that at no point of time any interim order was passed in favour of the plaintiff.

12. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the learned trial Judge has dismissed Misc. Application on the ground that no prayer for condoning delay was made. In paragraph 10 of the application, the plaintiff has specifically prayed for condoning the delay. Paragraph 10 reads thus:

“10. That the plaintiff has good case on merits and therefore it is necessary to restore the present suit by recalling the order dated 23.10.2015 in the interest of justice. Be pleased to condone the delay of 101 days in filing the present application in the interest of justice.”

13. In view thereof, it cannot be said that the plaintiff did not make prayer for condoning the delay. The reason given by the learned trial Judge, therefore, is factually incorrect and contrary to the record. Impugned order, therefore, deserves to be set aside, thereby restoring suit instituted by the plaintiff to its original position.

14. This brings me to the prayer made by Mr. Warunjikar to protect the possession of the plaintiff for some period so as to obtain suitable orders from the trial Court. Ms. Desai has opposed this application.

15. As noted earlier, the plaintiff was allotted the suit premises vide allotment letter dated 18.12.1992. Condition no.10 reads thus:

“10. The allotment of the quarter will stand automatically cancelled on the date from which you cease to be an employee of the corporation on account of retirement/dismissal/resignation or otherwise.”

The plaintiff accepted the terms and conditions by signing allotment letter on 18.2.1993. On 8.9.2016, the plaintiff opted for voluntary retirement. Thus, the plaintiff ceases to be employee of defendant no.1 and the allotment of the suit premises stood

automatically cancelled. That apart, while convicting the plaintiff, the learned Magistrate has imposed fine of Rs. 1000/-, in default to suffer simple imprisonment for one month. Mr. Warunjikar submitted that the plaintiff has paid fine of Rs.1000/-. Clause (2) of operative part of the order of the learned Magistrate reads thus:

(2) The accused is further directed to deliver vacant possession of the Qaurter, as detailed in paragraph no.3 of the complaint to complainant within 3 (three) months from the date of this order, that is, on or before 9/6/2011, in default to suffer further simple imprisonment for six months."

Perusal of the above extracted clause clearly shows that the plaintiff was given three months time to vacate the suit premises, in default to suffer simple imprisonment for six months. Criminal Appeal preferred by the plaintiff was dismissed on 3.12.2013. While dismissing the appeal, the learned Sessions Judge gave three months time to the plaintiff to vacate the suit premises failing which the sentence as ordered would be effected. While dismissing the revision application on 7.7.2016, this Court only as a matter of indulgence gave three months time to vacate the suit premises and confirmed the conviction awarded by the learned Magistrate. Thus, it would be evident that the plaintiff has been convicted under section 630 of the Companies Act and is also sentenced to undergo six months simple imprisonment in default of handing over possession. Time was extended from time to time by various Courts including this Court. Time

stipulated by this Court expired in October, 2016 and till date the plaintiff has not handed over possession. In view thereof, the request made by Mr. Warunjikar cannot be considered. It is, however, made clear that in the event of the defendants taking over possession, the same shall be subject to the outcome of the suit.

16. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)