Amk

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 1055 OF 2016
IN
FIRST APPEAL NO. 1061 OF 1994

	Eruch Boman Khavar Indian Inhabitant residing at 801, Nishant, Altamount Road, Mumbai - 400 026.	]]]].. Applicant
	In the matter between	
1.	Kantilal Chunilal Motla (since deceased) Through his LRs	]]
(a)	Smt. Kokilaben Kantilal Motla	]
(b)	Mukesh Kantilal Motla	]
(c)	Mitesh Kantilal Motla All residing at 154/5, Shankar Niwas, 20, Tardeo Road, Hajiali, Bombay-400 054.	]]]]
(d)	Smt. Bharti Rajendra Sayani residing at Queens View, 6th floor, Walkeshwar Road, Bombay-400 006.	]]]
(e)	Smt. Chhaya Pradip Gandhi residing at Vallabh Apartments, 2nd floor, Breach Candy, Above Grindlays Bank, Bombay - 400 026.	]]]]
2.	Natwarlal Sakalchand Shah (deceased)	]]
2(a)	Smt. Nita Bharat Shah Wd/o. Late Bharat Natwarlal Shah daughter-in-law, Age-50 years, Adult, Indian Inhabitant,	]]]]

2(b) Jigar Bharat Shah]
Son of Late Bharat Natwarlal Shah,]
Grand-son, Adult, Age-23 years, Indian]
Inhabitant, Both residing at 102, Harshi]
Apartment, Madona Colony, Opp. Dena Bank,]
Borivali (West), Mumbai- 400092.]

2(c) Mrs. Arpita Bhavin Shah]
Daughter of Late Bharat Natwarlal Shah,]
Married grand-daughter, Age-28 years,]
Adult, Indian Inhabitant, Residing at A/1403,]
Shree Rameshwar Tower, Borivali (West),]
Mumbai - 400 092.]

2(d) Dilip Natwarlal Shah, Son]
Age-54 years, Adult, Indian Inhabitant,]
Residing at 202, Bhavik Darshan,]
Rokadia Lane, Borivali (West),]
Mumbai - 400 092.]

2(e) Vrijbala Kirtikumar Shah]
Married daughter, Adult, Age-60 yrs,]
Indian Inhabitant, Residing at A/101,]
Jade Apartment, Shankar Lane,]
Kandivali (West), Mumbai - 400 067].. Appellants

Vs.

1. Boman P. Irani (deceased)]

1(a) Homayun Boman Irani (Khavar)]

1(b) Perviz Boman Khavir (deceased)]
1(b)-1 Eric Perviz Khavar]
LR of respondent No.1(b)]

1(c) Shahnaz Boman Khavar]

1(d) Nargis Boman Khavar]
All of Mumbai Indian Inhabitants]
residing at 212, Rajneelam,]
Breach Candy, Mumbai-400 026.]

1(e) Eruch Boman Khavar]
also of Mumbai Indian Inhabitant]

	residing at 801, Nishant Altamount Road,	]
	Mumbai - 400 026.	]
1(f)	Farhang Boman Khavar	]
	also of Mumbai Indian Inhabitant	]
	Residing at Ninepar Cascle Band	]
	Stand, 4th floor, Bandra, Mumbai.	]
2.	Heeraben Vallabhdas Shah	]
	(the only heir and legal representative	]
	of deceased original defendant No.3,)	]
	residing at 301, Bhavik Darshan,	]
	3rd floor, Rokadia Lane,	]
	Borivali (West), Bombay.	].. Respondents

Mr. Ashwin Thakkar a/w. Mr. Nainesh Amin for the Applicant.
Mr. Pankaj Thatte for the Respondents/Appellants

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 18th OCTOBER, 2016.

P.C.:

1. This is an application preferred by the original plaintiff seeking the direction to the appellants to deposit in this Court a sum of Rs.90,000/- per month as an interim compensation from the date of decree i.e. 04.10.1994 till 30.06.2011 and at the rate of Rs.1,25,000/- per month from 01.07.2011 till the final disposal of this appeal.

2. It is submitted by the applicant herein that he is the owner of a business, named as 'Kala Kendra' at shop No.3, Zaver Gallaries, Gala No. 63, Warden Road, Mumbai. By a written agreement dated 17.02.1966, he has given the business for conducting to original defendant No.1, the

predecessor of the present appellants, who are his legal heirs. The royalty for the conduct of the business was decided to be 550/- p.m. On account of the default committed by defendant No.1 in payment of royalty, applicant/plaintiff terminated the agreement and filed the suit for the recovery of possession of the said premises, bearing S. C. Suit No. 6403 of 1970. The suit came to be decreed on 04.10.1994 and the defendants/appellants were directed to deliver possession of the suit business and the suit shop to the plaintiff. While decreeing the suit, however, no order was passed regarding prayer clause (b) pertaining to the royalty since it was observed that the defendants were depositing the same regularly in the Court and inquiry was directed for mesne profits in the future under Order 20 Rule 12 of the CPC. Defendants have challenged the said decree by preferring the instant appeal. At the time of filing the appeal, the application under Order 41 Rule 5 was filed for stay to the execution of the decree. At that time, the undertaking was given that defendants would deposit Rs.550/- p.m. towards current compensation. Hence, subject to that undertaking, stay was granted to the execution of the decree. Since, then the appeal is pending for hearing before this Court.

3. As per the submission of learned counsel for the applicant, various applications were moved by the applicant before this Court for fixing the appeal for final hearing. Accordingly, as per the order passed by

this Court on 28.03.2012 in Civil Application No. 778 of 2012, the appeal was fixed for final hearing from 02.04.2012 onwards. However, as the hearing of the appeal could not take place, again a Civil Application No. 120 of 2013 was moved and as per the order passed by this Court on 15.01.2013, the appeal came to be fixed for final hearing with effect from 25.02.2013 under the category of appeals pertaining to senior citizens. By the order dated 07.10.2013, the matter was part heard and was again listed for final hearing on 21.10.2013. However, thereafter somehow or other, the matter could not be proceeded further for no fault of applicant. As a result thereof, the applicant filed Civil Application No. 2415 of 2014 seeking direction against the appellant for depositing the interim amount of compensation. The said application came to be withdrawn with liberty to file a fresh application and, accordingly, this present application is filed seeking once again the prayer to the effect that as the appellants-original defendants are enjoying the possession of the suit premises along with business therein, whereas the applicant, the decree-holder is deprived of the fruits of the decree, the defendants may be directed to deposit certain amount in consonance with the current market rate of the suit premises in this Court.

4. It is further submitted in the application that the suit premises is admeasuring about 300 sq. ft. and situated at very prominent location like Breach Candy, Bhulabhai Desai Road, Mumbai. The applicant has

also got the valuation of the said suit premises done through the Chartered Engineer, Shri V. K. Lad. His report dated 30.06.2016 is also produced along with this application at Exhibit 'B'. It is submitted that the current market rate of compensation for commercial premises in the said locality is about Rs.650/- per sq. ft. per month. Three instances of such premises in the same locality are cited in the application to that effect. On the basis of this material, it is urged that considering the present rate of compensation/rent of the suit premises, the interim compensation for continuous use and occupation of the suit premises by the defendants be fixed at the rate of Rs.90,000/- p.m. from 04.10.1995 till 30.06.2011 and at the rate of Rs.12,500/- p.m. from 01.07.2011 till the hearing of the appeal.

5. This application came to be resisted by the appellant vide his affidavit-in-reply contending, *inter alia*, that this application is not maintainable as there is no such provision for granting of interim compensation at this stage, when the appeal is ripe and fixed for final hearing. It is urged that when the appeal was filed and application was moved for seeking stay to the execution of the decree of possession, this Court has already imposed certain conditions like, directing the appellants to deposit Rs.550/- p.m. in the Trial Court. Accordingly, the appellants are religiously following the said order and depositing the amount. It is submitted that all of sudden, there is no reason for the applicant to move such application, especially, when there is no delay or negligence on the

part of the appellants to proceed with the hearing of the appeal. It is urged that as and when the appeal is fixed for hearing, the appellants have appeared in this Court and were prepared to proceed with hearing of the appeal. Merely because the hearing of the appeal cannot take place, the appellants cannot be penalized for the same. It is further submitted that already the relief of separate inquiry for mesne profit as required under Order 20 Rule 12 of the CPC is given to the applicant by the Trial Court. In such situation, as and when the appeal will be decided, the applicant would get the due amount of compensation which may be fixed after due inquiry in the proceedings for mesne profit. Thus, according to learned counsel for the appellants, there is absolutely no case made out to allow this application.

6. In support of this application, learned counsel for the applicant has relied upon two authorities; one that of **State of Maharashtra & Anr. Vs. M/s. Super Max International Pvt. Ltd. & Ors., 2009 (5) ALL MR 1001** and second that of **Maria Margarida Sequeira Fernandes and others Vs. Erasmo Jack De Sequeira (Dead) Through LRs., (2012) 5 SCC 370**. In both these authorities, the issue before the Apex Court was whether the party in possession should be allowed to continue with possession without there being any necessary direction as to the payment of compensation to the owner. In the first authority, that of **State of Maharashtra & Anr. Vs. M/s. Super Max International Pvt. Ltd. & Ors.**

(supra) which pertains to the revision preferred by the tenant against the Judgment and decree in eviction suit passed under the Rent Act, the Apex Court held that in a appeal or revision preferred by the tenant against an order or decree of eviction, it is open to the appellate or revisional Court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at a rate higher than the contractual rent. It was further held that, that in fixing the amount subject to payment of which the execution of the order/decree is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount. However, the Court may fix the amount as per Stamp Duty Ready Reckoner as was done in this authority by the High Court. It was held that the amount of Rs.5,40,000/- p.m. as fixed by the High Court with reference to Stamp Duty Ready Reckoner was considered reasonable and its reasonableness was held to be can not be doubted. In this decision, the Apex Court has relied upon its earlier decision in **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705** for considering the aspect as to why such order becomes necessary to be passed in situation where the possession of the immovable property is continued with the tenant on account of pendency of the appeal despite the decree of eviction.

7. In the second authority of **Maria Margarida Sequeira Fernandes** (supra), the Apex Court has in para 81 considered exactly the

similar situation as in the present case and held that in the case of enormous delay in adjudication of cases, the pragmatic approach needs to be adopted, so that the serious problem of the property being retained and litigation pertaining to valuable real estate properties being dragged can be solved. In paragraphs 87 and 88 of the order, the Hon'ble Apex Court was while dealing with the issue of grant of interim injunction further pleased to observe as follows:

> *"87. Experience has shown that all kinds of pleadings are introduced and even false and fabricated documents are filed in civil cases because there is an inherent profit in continuation of possession. In a large number of cases, honest litigants suffer and dishonest litigants get undue benefit by grant or refusal of an injunction because the courts do not critically examine pleadings and documents on record. In case while granting or refusing injunction, the court properly considers pleadings and documents and takes the pragmatic view and grants appropriate mesne profit, then the inherent interest to continue frivolous litigation by unscrupulous litigants would be reduced to a large extent.*
>
> *88. The court while granting injunction should broadly take into consideration the prevailing market rentals in the locality for similar premises. Based on that, the court should fix ad hoc amount which the person continuing in possession must pay and on such payment, the plaintiff may withdraw after furnishing an undertaking and also making it clear that should the court pass any order for reimbursement, it will be a charge upon the property.*

8. In the instant case, it is a matter of record that the suit was filed in the year 1970 before the Trial Court. It came to be decreed in the year 1994 and since 1994, the appeal is pending in this Court, despite the various applications made by the applicant for expeditious hearing of the appeal on one count or other, as may be seen from the record. For no fault on the part of applicant he is being deprived from possession of suit

property as the hearing of the appeal has not taken place, despite about 22 years from the filing of the appeal. The reason may be enormous judicial delay, as observed by the Hon'ble Apex Court. As to the submission of learned counsel for the appellant that the appellant is not responsible for this delay, this submission is already dealt with by the Apex Court in the above said two authorities and held that, whatever the reason may be for the delay in disposal of pending proceedings, the Court can compensate the decree holder for the same, by directing the other party to make the payment of a compensation amount, which can be in consonance with the current market rate, so that the said party should not suffer any peculiar or financial loss, even if such party may be deprived of the right to possession of his immovable property.

9. In the instant case, it may be true that when the appeal was filed and the application was moved for stay to the execution of the decree, this Court has directed the appellant to deposit the contractual rent of Rs.550/- p.m. Though according to learned counsel for the appellant, the said order was passed in consonance with Order 41 Rule 5 of the CPC and there is no fresh ground or reason to review or recall that order, this submission cannot be accepted for the simple reason that there is a definite drastic change in the circumstances which were prevailing when the appeal was filed and the order was passed in the year 1994 and the present circumstances. At that time no one would have visualized that

the appeal would remain pending for such a long period of 22 years and meanwhile the market values of the property will be sky reaching. However now as per the admitted fact, the appeal has remained pending since not less than 22 years and this despite the fact that on several occasions, it was fixed for final hearing. Hence there is change in the circumstances which requires this Court to take a re-look into the matter and that can be done only by directing the appellants to deposit certain amount towards interim compensation to the applicant/decree holder.

10. It may be true that the Trial Court has directed the inquiry under Order 20 Rule 12 of the CPC for the mesne profit but then those provisions are always there. The Apex Court has also considered this aspect in the case of **Maria Margarida Sequeira Fernandes** (supra) and despite such provisions being there, the Apex Court has categorically held that, the Court can direct payment of the compensation amount which can be at the market rate, so as to compensate the loss which the decree holder is suffering. It is categorically held that the Court can fix, till such inquiry in mesne profits, the ad hoc amount which the person continuing in possession must pay and on such payment, if made, the Court may allow the plaintiff to withdraw the said amount on furnishing undertaking and also making it clear that the Court should pass any order of reimbursement, it will be a charge upon the property.

11. Therefore, it is clear that the Apex Court has taken note of all these eventualities and thereafter made it clear that despite all the provisions relating to mesne profit or otherwise, whenever there is delay in conduct of the matter, may be on account of judicial delay or whatever other reason is there, but the Court can definitely take into consideration the aspect of compensating the party which is deprived of possession by directing the party in possession of the property to pay reasonable amount of compensation.

12. As to the quantum of compensation, the applicant has produced on record the report of the Chartered Engineer, Shri V. K. Lad, who has after taking into consideration the various methods like, the Stamp Ready Reckoner, and the rental value of the surrounding properties, has arrived at this amount which the applicant is claiming. He has also considered the order passed by this Court dated 16.07.1997 in Suit No. 638 of 1995 in respect of rent of similarly situated property. There is nothing in the reply filed by the appellant to challenge the said valuation or to contend that it is on exorbitant or higher side. According to appellant, no such contentions are raised as there is no reason to grant such compensation but considering the above said decision of the Apex Court and considering the fact that despite the judgment and decree of the Trial Court passed in the year 1994, the applicant/decree holder is being deprived from possession of the property and the appellants are enjoying

the said possession, it has become necessary to compensate the applicant by directing the appellants to pay the compensation amount, as arrived at by the valuer in his report. Moreover, the amount which the applicant is claiming in this application cannot be called as exorbitant, especially, having regard to the fact that suit premises are used for commercial purpose and also considering the location of the suit premises, which are situated at prime area near Breach Candy, Bhulabhai Desai Road and since the year 1970 when the suit was filed and since the year 1994, when the decree was passed, the appellants have continued to be in possession of the said property and enjoying the fruits and facilities thereof. In my considered opinion, therefore, if one has regard to all these aspects and factors, then application filed by the plaintiff-applicant deserves to be allowed. Accordingly, the application is allowed.

13. The appellants are directed to deposit in this Court a sum of Rs.90,000/- p.m. as an interim compensation from the date of decree i.e. 04.10.1994 till 30.06.2011 and at the rate of Rs.1,25,000/- p.m. from 01.07.2011 till the final disposal of the appeal. The appellants to deposit these amounts within 12 weeks from today.

14. On failure of the appellants to deposit the amount within the stipulated period, it follows that the stay granted to the execution of the decree will stand automatically vacated.

15. At this stage, learned counsel for the appellants seeks stay to the execution to this order. However, no case is made out to stay this order as already period of 12 weeks is granted to deposit the amount in this Court. Hence prayer to stay this order is rejected.

16. At this stage, learned counsel for the applicant seeks that the order relating to prayer clause (c) for withdrawal of the amount as and when deposited by the appellant in the Court be granted. Learned counsel for the applicant submits that he is ready to give undertaking to reimburse the amount, in case the decision of the appeal goes against him and there will be charge on the suit premises of that amount. Subject to this condition of the applicant furnishing undertaking to the Court that he will reimburse the amount in case the decision of the appeal goes against him and there will be charge on the suit property of this amount, the applicant is permitted to withdraw the amount, as and when deposited by the appellant in the Court.

17. The application is disposed of accordingly.

[DR. SHALINI PHANSALKAR-JOSHI, J.]