IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7268 OF 2014

The Mobile Store Limited **..Petitioners**

Vs.

Satish Chimanlal Shah & Anr **..Respondents**

Mr. Dinesh Tiwari a/w Mr. Swapnil Ambre i/b Dinesh Tiwari & Associates for the Petitioners
Mr. M. S. Mhambre for the Respondents

CORAM : R. M. SAVANT, J.
DATE : 17th FEBRUARY, 2016

P.C.

1 The above Petition exemplifies the manner in which the order passed by the Trial Court as confirmed by the Lower Appellate Court is sought to be stalled.

2 The Petitioners are the original Defendants in the Suit in question being L.E. & C Suit No.118 /172 of 2008. The said Suit has been filed for eviction of the Defendants and for mesne profits. In the said Suit, the Plaintiffs / landlord filed an application Exhibit 8 invoking order 15A of the Civil Procedure Code for directing the Defendants who are licensees to deposit the arrears of licence fees, the mesne profits and the municipal taxes from December 2008 onwards till the disposal of the Suit along with interest @ 18%. The said application under Order 15A of the Civil Procedure Code was

replied to on behalf of the Defendants. The said reply was rejoined by the Plaintiffs. It seems that during the course of the arguments the Plaintiffs were directed by the Learned Judge of the Small Causes Court to file further affidavit about actual payment of municipal taxes by them which the Plaintiffs accordingly did. The Trial Court adjudicated upon the said application and allowed the same in terms of the operative part of the impugned order dated 10-9-2009 which for the sake of ready reference is reproduced hereinunder :

> "1 Without prejudice to the rights and contentions of both the parties, the defendant to deposit licence fee at the rate of Rs.80,000/- per month from December 2008 to July 2009 Rs.6,40,000/- and also deposit amount of property tax of Rs.13,45,301 - Rs.4,80,000 = 8,65,301/-. The defendant can deposit aforesaid amount within fifteen days from the date of this order.
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> 2 The defendant shall also keep on depositing monthly licence fees of Rs.80,000/- from August 2009 plus for every six months of occupation of the suit premises from 1st October 2009 onwards deposit Rs.2,43,000/- per six months towards the municipal taxes.
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> 3 The defendant shall pay the future amount of licence fee and municipal taxes till disposal of the suit or till actual handing over the possession of the suit premises to the plaintiff which ever is earlier.
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> 4 The plaintiff shall be entitled to withdraw the amount on account so deposited subject to undertaking that the plaintiff shall refund the amount if, found paid excess to him by the defendant."

Hence the Defendants were in terms of the said order liable to pay the licence fees @ 80,000/- per month for occupation as mentioned in the operative part as also the municipal taxes to the extent mentioned in the operative part of the said order dated 10-9-2009.

3 Aggrieved by the said order dated 10-9-2009, the Defendants filed Revision Application No.11 of 2010. The Appellate Bench of the Small Causes Court partly allowed the said Revision Application and modified the order passed by the Trial Court dated 10-9-2009 to the extent mentioned in the operative part of its order dated 15-2-2013. The same is reproduced herein under for the sake of ready reference:

> "1) Revision is partly allowed.
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> 2) The order of the Ld. Trial Judge on Exh.8 in LE & C Suit No.118/172 of 2008 dated 10.09.2009 is modified as under:
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> (i) Without prejudice to the rights and contentions of both the parties, the applicant/defendant to deposit licence fee at the rate of Rs.80,000/- per month from December 2008 to July 2009 i.e. Rs.6,40,000/-. Defendant/applicant shall deposit 50% of the taxes calculated by the respondents/plaintiffs i.e. 50% of Rs.13,45,391/- after deducting Rs.4,80,000/- the security amount forfeited by the respondents/plaintiffs within a period of one months from the date of this order.
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> (ii) Applicant/defendant shall keep on depositing monthly licence fee of Rs.80,000/- per

month from August 2009 and shall deposit Rs.1,25,000/- per six months of occupation towards Municipal Taxes from 01.10.2009.

(iii) Applicant/defendant shall pay future amount of licence fee and Municipal taxes at the aforesaid rate till disposal of the suit or till handing over the possession of the suit premises to the respondents/plaintiffs whichever is earlier.

(iv) The respondents/plaintiffs shall give the exact figure of tax which is enhanced due to acceptance of licence fee of Rs.80,000/- per month in respect of the suit premises, as per clause 1.5 of leave and licence agreement dated 11.09.2006 and shall furnish the exact data of the enhanced increase of the property tax in respect of the suit premises to the applicant/defendant within one months, and after respondents/plaintiffs furnishes such date the amount deposited by the applicant/defendant shall be adjusted, accordingly.

(v) If the applicant/defendant is liable to pay further amount as per the calculations submitted by the respondents/plaintiffs, the applicant/ defendant shall pay it within a period of one months thereafter.

(vi) The respondents/plaintiffs shall be entitled to withdraw the amount so deposited by the applicant/defendant on furnishing an undertaking that respondents/plaintiffs shall refund the excess amount, if any, deposited by the applicant/defendant.

4 In terms of the said order, the Plaintiffs had informed the Defendants that the property taxes have been enhanced and the demand for property taxes was on the said basis. This was done by the Plaintiffs by letter

dated 9-3-2013. In view of the fact that the order dated 10-9-2009 as confirmed by the order dated 15-2-2013 passed by the Appellate Bench of the Small Causes Court was not complied with. The Plaintiffs filed an application Exhibit 19 invoking order 15A of the Civil Procedure Code for striking off the defence of the Defendants on account of the non compliance of the said orders. It is pertinent to note that the application Exhibit 19 has not been annexed to the above Writ Petition. The said application was replied to on behalf of the Petitioners / original Defendants and the defence taken was that they are ot using the suit premises and are ready to hand over possession of the suit premises and therefore they are not liable to pay the licence fees. The said application Exhibit 19 was rejected by the Trial Court on the ground that whilst passing the order dated 10-9-2009 there is no specific order passed against the Defendants that if they failed to deposit the mesne profits / rent, their right of defence will be struck off. The Trial Court held that in the absence of a specific order, the defence of the Defendants cannot be struck of. This was the principal ground on which the application Exhibit 19 was rejected.

5 The Plaintiffs carried the matter by way of a Revision Application being No.117 of 2013 to the Appellate Bench of the Small Causes Court. The Appellate Bench of the Small Causes Court after adverting to the judgments cited by either side observed that normally defence should not be struck off but when it is found that there is deliberate disobedience of the order passed by the Court, the defence can be struck off which is within the discretion of the

Court. The Appellate Bench of the Small Causes Court observed that it was an admitted position that the order passed by the Trial Court dated 10-9-2009 has not been complied with, the Defendants have not paid a single penny pursuant to the said order. The Appellate Bench of the Small Causes Court further observed that the Defendants have not shown any sufficient cause as to the reason why they have not complied with the said order dated 10-9-2009. The Appellate Bench of the Small Causes Court observed that the Trial Court has failed to appreciate that the Defendants have not complied with the order without any sufficient cause. The Appellate Bench of the Small Causes Court observed that it does not agree with the Trial Court that unless there is a conditional order the defence cannot be struck of as the cause of action for striking of defence has arisen when the Defendants failed to comply with the order. The Appellate Court having regard to the defence taken by the Defendants i.e. the Petitioners herein held that the Defendants are liable to pay the licence fees till they actually handed over possession of the suit premises to the Plaintiffs. However, with a view to give an opportunity to the Defendants, the Appellate Bench of the Small Causes Court granted two months time to the Defendants to comply with the said order dated 10-9-2009.

6 The Learned Counsel Mr. Tiwari appearing on behalf of the Petitioners would seek to make submissions as regards the correctness of the amounts which have been claimed by the Plaintiffs vide the said Exhibit 8. It was the submission of the Learned Counsel Mr. Tiwari that the amount which

has already been paid have not been accounted for and an exorbitant amount is sought to be claimed. The Learned Counsel also sought to reiterate the submissions which were urged before the Trial Court that unless a conditional order is passed, the defence cannot be struck of. In support of the said contention, the Learned Counsel sought to place reliance on the Division Bench Judgment of the Gujarat High Court in the matter of **Harisondas Chunilal Chokshi Vs. Prabhavtiben**[1] and the Judgment of a Learned Single Judge of this Court in the matter of **Anita M. Harretto Vs. Abdul Wahid Sanaullah**[2]. The aforesaid judgment concern Section 11(4) of the Bombay Rent Act, which Act was a para-materia provision.

7 Per contra, the Learned Counsel appearing on behalf of the Respondents / Plaintiffs Mr. Mhambre would seek to support the impugned order. It was the submission of the Learned Counsel that inspite of indulgence being shown by the Appellate Bench of the Small Causes Court , the Defendants have refused to comply with the said order dated 10-9-2009, passed by the Trial Court. The Learned Counsel would contend that the defence set up by the Petitioners to the said application Exhibit 19, being not found acceptable by the Appellate Bench of the Small Causes Court it could not be said that the procedure has not been followed prior to the defence being struck off.

1 **AIR 1973 GUJ 240**
2 **AIR 1985 Bom 98**

8 Having heard the Learned Counsel for the parties, in my view there is no merit in the above Petition. In so far as Order 15A of the Civil Procedure Code is concerned, the same is in the nature of a self-contained code and the said provision itself posits as to what would be the consequences if an order passed thereunder is not complied with. In the instant case, the application Exhibit 19 filed by the Plaintiffs under Order 15A was contested by the parties. The Defendants were represented by an Advocate and it is after a contest that the order dated 10-9-2009, came to be passed directing the Defendants to pay licence fees @Rs.80,000/- and the property taxes to the extent mentioned in the said order. Significantly, no contention as regards the correctness of the amounts due to the Plaintiffs or the property taxes, was raised before the Trial Court. The matter was thereafter on the order being passed by the Trial Court on 10-9-2009 carried to the Appellate Bench of the Small Causes Court by way of a Revision. In the said Revision, the amount that was quantified by the Respondents herein i.e. the original Plaintiffs was to the extent of Rs.51 lacs which is appearing in the prayer clause of the said application. At the said stage also no grievance was made as regards the computation of the said amount and in fact in respect of the property taxes, the Plaintiffs were asked to inform the Defendants if there was any change in the property taxes on the higher side whereupon the Plaintiffs by their letter dated 9-3-2013 had communicated that the demand for the property taxes was on

the basis of the demand made. It is in the instant Petition that the contentions as regards the correctness of the calculation etc., have been raised for the first time. It is required to be noted that the order dated 10-9-2009 passed by the Trial Court or the order dated 15-2-2013 passed in Revision has not been set aside or modified.

9 In my view therefore, the contentions urged on behalf of the Petitioners cannot be accepted for more than one reason. Firstly that the Defendants were already heard whilst passing the order dated 10-9-2009 and thereafter by the Appellate Bench of the Small Causes Court in Revision. It is also required to be noted that the Trial Court in its order dated 10-9-2009 has observed that the said order has been passed without prejudice to the rights and contentions of the parties and also with a direction to the Plaintiffs to give an undertaking that they shall refund the excess amount. The Trial Court has further observed that the amount can be determined on merits when the matter is finally decided. Hence the contention raised on the basis of the handing over possession of the premises in question on 7-4-2014 as also on the ground that the computation is not proper, can be urged before the Trial Court at the appropriate stage. However, from the conduct of the Petitioners, the intention of the Petitioners is clearly manifested in as much as the attempt seems to be that not to pay a single pai and thereby not to comply with the order passed by the Trial Court which has been passed as long back as on 10-9-

2009 as confirmed on 15-2-2013. This Court had also asked the Learned Counsel for the Petitioners whether the Petitioners are ready to deposit the said amount within a particular time frame by initially depositing a substantial amount and thereafter the balance. However, the Learned Counsel for the Petitioners on instructions communicated the reluctance of the Petitioners to do so. In my view the judgments supra cited on behalf of the Petitioners cannot be interpreted to mean that the orders passed by the courts below directing the Petitioners to make the deposit are not to be complied with. The judgments supra though lay down the proposition that a notice is required to be issued to the Defendants before the defence can be struck off, in the facts of the present case where the cause of action for fling the application Exhibit 19 arose only when there was a non compliance of the order dated 10-9-2009 and which application was contested on behalf of the Petitioners by raising various defences, and since the said defences were not found to be acceptable by the Appellate Bench of the Small Causes Court, it cannot be said that there is any infraction of the proceedings in the matter of striking off the defence of the Petitioners i.e. the original Defendant. Though the object behind enacting Rule (2) of Order 15 can be said to protect the tenants, at the same time it is necessary to ensure that the landlords are not put to undue hardships at the hands of the recalcitrant tenants.

10 In that view of the matter, there is no merit in the above Writ

Petition which is accordingly dismissed. The Petitioners to pay costs of Rs.10,000/- to the Respondents within four weeks from date.

[R.M.SAVANT, J]