

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10679 OF 2015

Vidyaben Mafatlal Parikh and another .. Petitioners

vs.

Smt.Nirat Krishnadeo Gupta & Ors. .. Respondents

Mr.Jaydeep J. Thakkar for the petitioners

Mr.G.S.Godbole i/b Mr.Sumit S. Kothari for the respondent nos.1 to 3

CORAM : K. K. TATED, J.

DATE : MARCH 14, 2016

P.C.:

- 1 Heard the learned counsel for the parties.
- 2 By this petition under Article 227 of the Constitution of India, petitioner landlord challenges the order dated 17.3.2009 passed by Appellate Bench of Small Causes Court below Exhibit-12 in Appeal No.248 of 2015 dismissing the petitioner plaintiff's application for compensation.
3. For the sake of convenience, the nomenclature of the parties as is stated in the R.A.E.Suit No. 1419/4662 of 1983 will be referred to hereinafter as the petitioner / plaintiff and respondent / defendant.

4 The plaintiff filed R.A.E.Suit No.1419/4662 of 1983 in the court of Small Causes at Bombay against defendant for possession of the suit premises i.e. tenanted premises on the ground floor of the building “Prashant” situated at 387 Linking Road, Khar, Mumbai 400 052 admeasuring 1500 sq.ft. and a garage admeasuring 160 sq.ft. On the date of filing of suit, the rent of the suit premises was Rs.167/- per month. The suit filed by the plaintiff was decreed by the Trial Court on 8th and 9th September, 2005 directing the defendant to deliver the possession of the suit premises to the plaintiff within three months from the date of the order. The Trial Court also directed separate enquiry to be held in respect of future mesne profit under Order XX Rule 12 of the Civil Procedure Code, 1908.

5 Being aggrieved by the Judgment and Decree passed by the Trial Court, the defendant preferred Appeal No.248 of 2005 before the Appeal Court of Small Causes at Mumbai (Bandra Branch). That appeal was admitted by the Appellate court. In that appeal, the defendant preferred application below Exhibit 5 for stay of the Judgment and Decree passed by the Trial Court. That application was allowed by the Appellate Bench of the Small Causes Court by order dated 18.1.2006 after hearing both the sides. The operative part of the said order reads thus:

“ORDER

Notice is made absolute.

The stay to the execution of the decree is granted till the disposal of the appeal. The hearing of the appeal is

expedited as prayed for. The appeal is kept for hearing on 27th February, 2006.”

6 Thereafter, the plaintiff preferred Application below Exhibit 12 for compensation from the date of decree. That application was preferred by the plaintiff on 20.2.2008 for direction to the defendant to deposit in court or to pay to the plaintiff a sum of Rs.68,42,550/- being arrears of compensation from September 2005 to January 2008 at the rate of Rs.2,35,950/- with further direction to continue to pay the said amount of Rs.2,35,950/- per month from February 2008 onwards till the disposal of the Appeal. In that application, the defendant filed their reply dated 2.7.2008 and opposed the same. The Appellate court of Small Causes by oral judgment dated 17.3.2009 rejected the plaintiff's application below Exhibit 12 for mesne profit. Hence, the present Writ Petition.

7 The learned counsel for the petitioner submits that the court below erred in coming to the conclusion that the application filed by the plaintiff was not maintainable in law. He submits that the Appellate Court at the time of rejecting the plaintiff's application for mesne profit held that, order dated 18.1.2006 below Exhibit 5 was passed after hearing both the sides and at that time, the court has not granted any liberty to the plaintiff to prefer appropriate application for compensation. Hence, the appellate court rejected the plaintiff's application.

8 The learned counsel for the plaintiff submits that though the

plaintiff placed on record valuation report prepared by Government Registered Valuer dated 12.2.2008 showing per month rent approx. Rs.2,35,950/-, the appellate court failed to consider the same. He submits that the suit property is situated at Khar which is a posh locality of Mumbai. He submits that the suit property is situated in Bungalow. He submits that entire ground floor of Bungalow is in possession of the defendant. He submits that even the defendant is in possession of the garage admeasuring 160 sq.ft. He submits that as on today the defendant is paying only Rs.167 per month by way of rent though the defendant is in occupation of the area admeasuring 1500 sq.ft on ground floor. He submits that property is situated in a posh locality known as Khar on Linking Road. To this property all civic amenities are available within an approachable distance. It is served by buses and taxis so far as surface communication is concerned. Further Khar Railway Station is situated within a walkable distance of ten minutes from the suit property. He submits that the valuer in Valuation Report dated 12.2.2008 stated that 2145 sq.ft built up area plus one closed garage about 160 sq.ft. is in possession of the defendant. He submits that at the time of calculating per month income from the suit premises, the valuer has given deduction of 20% as the structure is old. He submits that considering other sale instances and locality in which the suit premises is situated, the valuer submitted valuation report stating that the suit premises can be fixed at Rs.2,35,980/- per month. The said valuation report is of 2008.

9 The learned counsel for the petitioner submits that when the Appellate Bench of Small Causes Court passed order on 18.1.2006

below Exhibit 5 in favour of defendant, that time the Appellate Court directed that hearing of the Appeal be held on 27.2.2006 on expedite basis. He submits that the petitioner was under bonafide impression that matter itself will be disposed of within a short period. Therefore, he has not preferred any application for compensation. He further submits that in the meanwhile, there were settlement talks between the parties. Therefore, there is a delay on the part of the plaintiff to prefer the application for compensation.

10 The learned counsel for the petitioner submits that the Appeal was listed for final hearing before the Appellate Bench on 15.7.2014. On that date, advocate for the defendant asked time and same was adjourned to 30.9.2015. Again on 30.9.2015 the matter was adjourned at the request of advocate for defendant. Hence, the Appellate Court by way of last chance, adjourned the matter. He submits that the defendant filed application on 14.12.2015 for carrying out amendment in the written statement. That application is pending for hearing on its own merits. He submits that on one or the other ground the defendant was prolonging the hearing and final disposal of the appeal. Hence, plaintiff filed application for compensation. He submits that considering these facts, delay if any in preferring the application may be condoned. He submits that in the interest of Justice, this Hon'ble Court be pleased to set aside the impugned order dated 17.3.2009 passed by the Appellate Bench of Small Causes Court and direct the defendant to deposit sum of Rs.2,35,980 per month from the date of the Judgment and Decree passed by Trial Court till the disposal of the Appeal. He submits that if the plaintiff's application below Exhibit-12

is not allowed, irreparable loss will be caused to the plaintiff. In support of this contention, the learned counsel for the plaintiff relies on the judgment of this court in the matter of *Super Max International Pvt.Ltd. & Ors. vs. M/s.R.M.Choksey & Co.dated 3.3.2009 in Civil Application No.37 of 2009 in Writ Petition No.8702 of 2005*. He relies on paragraph 6, 7 and 8 of that order which reads thus:

“6. Having considered the rival arguments and perusing the relevant documents on record, I would in the first place answer the preliminary point raised on behalf of the tenants that it is not open to the landlord to ask for modification of the interim order for continuation of protection to the tenants during the pendency of the Writ Petition which has already been admitted after hearing both sides and unconditional interim relief granted.”

“7. Learned Counsel for the tenants submits that it would amount to review of the Order dated 22nd February, 2006. It is then contended that keeping in mind the parameters for exercising review jurisdiction, it is not open to this Court to impose any further condition other than the one provided in the interim order dated 22nd February, 2006. To buttress this contention, reliance is placed on the decision of the Apex Court in the case of Haridas Das v/s. Usha Rani Banik(Smt) and ors. reported in (2006) 4 SCC page 78. The argument clearly overlooks that it is not a case of review of the order. It would have been a case of review, if the Court was called upon to recall the entire interim order. The landlord by this application is merely asking for imposing additional condition to allow the tenants to enjoy the suit property in lieu of interim protection during the pendency of the Writ Petition. Granting of this relief at best would result in modification of the interim order and not review thereof. Thus understood, the principle stated by the Apex Court in Haridas

Das(Supra) is of no avail to the tenants. Moreover, the fact that the earlier unconditional interim order was granted after hearing both sides cannot preclude the landlord from applying for modification of the order so as to impose some legitimate condition to meet the ends of justice. Keeping in mind that the Writ Petition is not likely to reach for hearing for quite some time, the landlord who has succeeded in getting decree of eviction is entitled to claim suitable interim arrangement to meet the ends of justice.”

“8. It was then argued that the legal position stated by the Apex Court in the Atma Ram Properties(supra) case could have been invoked by the landlord, when the matter was argued on 22nd February, 2006. The fact that such argument was not canvassed on behalf of the landlord on 22nd February, 2006 in my opinion, in no way preclude the landlord to later on apply for imposing additional condition to enable the tenants to avail of the interim protection in terms of the Order dated 22nd February, 2006.

There is nothing in law, which would preclude the landlord in doing so. In other words, the fact that no argument for imposing condition, now prayed by the landlord, was canvassed on 22nd February, 2006, will come in the way of the landlord to call upon the Court to impose appropriate condition in terms of the legal position stated by the Apex Court in Atma Ram Properties case(supra). Indeed, the question whether the landlord would be entitled for arrears of interim monthly compensation with retrospective effect is a matter within the discretion of the Court. The Court may confine the relief to the landlord from the date of the filing of the present Application. That would meet the ends of justice and address the concern of the tenants as well to that extent.”

11 On the basis of these submissions and the order of this court dated 3.3.2009 in Civil Application No.37 of 2009, the learned counsel

for the plaintiff submits that application for compensation can be filed at any stage.

12 On the other hand the learned counsel for the defendant vehemently opposed the present Writ Petition. He submits that appellate bench of Small Causes Court rightly rejected the plaintiff's application by impugned order dated 17.3.2009. He submits that when the defendant preferred application below Exhibit 5 for stay of the operation and implementation of order dated 8th and 9th September, 2005 passed by Trial Court, at that time, plaintiff has not raised any objection nor pleaded for compensation. Hence, the appellate court by impugned order dated 17.3.2009 rightly rejected the plaintiff's application. He submits that there are delay and laches on the part of the plaintiff to prefer the present Writ Petition. He submits that though the impugned order was passed by the Appellate court on 17.3.2009 petitioner plaintiff preferred the present Writ Petition in this court on 2.9.2015 i.e. after six years from the date of impugned order. He submits that the plaintiff has not explained laches on his part to prefer the present Writ Petition. Hence, there is no substances in the present Writ Petition and same be dismissed only on the ground of laches.

13 The learned counsel for the defendant further submits that the suit structure is old. He submits that defendant also placed on record valuers report dated 17.5.2008 of H.M.Panchal and Associates who are Government Approved Valuer. He submits that the defendant's valuer shown mesne profit per month in respect of suit premises to the tune of Rs.3644. Therefore, there is no question of granting any relief in

favour of the plaintiff holding that the mesne profit may be more than Rs.2 lacs.

14 The learned counsel for the defendant submits that at the time of fixing compensation mesne profit, court has to consider the income of the party who is in possession/tenant. He submits that in the present proceeding, defendant is not in possession to pay the compensation if it is fixed @ Rs.2,35,950/- as per the plaintiff's valuer. He submits that in any case the appeal is already admitted by the Appellate Bench of Small Causes Court and same is kept for hearing and final disposal. Hence, there is no substance in the present Writ Petition. The learned counsel for the defendant relies on the judgment of this court in the matter of *Chandrakant Dhanu & Another vs. Sharmila Kapur & Others dated 7.1.2009 in Writ Petition No.6858 of 2008*. He relies on the paragraph 21 (d) and (h) which reads thus:

“(d) The Court, needs to consider and take note of (i) the Rent Control Legislation, governing the particular premises/ residential or non-residential. (ii) the Location/ area of the premises (iii) the age/ nature of construction of the building/premises (iv) the facilities in the premises and outside the premises, advantages and disadvantages (v) the market value and the rental value of the premises based on architecture / expert / valuation reports / opinion (vi) other instances of the rent / license fees of similarly situated premises (vii) the date of termination of the tenancy / license.

(h) One important aspect is that the Court, after giving opportunities to both the parties, needs to decide the interim and urgent issue of grant of provisional fair and reasonable compensation/occupation charges, based

upon authenticated material produced on the record, pending the Appeal, summarily. There is no question of detail trial, but it is an essential condition precedent to grant stay of the eviction decree/order on the footing of Order 41, Rule 5 of Civil Procedure Code. The final decision of the appeal should be uninfluenced by such tentative figure / order. Such provisional payment should be condition precedent but it is always adjustable. The amount so fixed in such proceedings is tentative figure. Such interim order/ payment is always subject to the final result of the appeal.”

15 On the basis of these submissions and the authority cited above, the learned counsel for the defendant submits that there is no substance in the present Writ Petition and same be dismissed with costs.

16 I have heard both the sides. There is no dispute that as on today there is a decree against the defendant for handing over possession of the suit premises to the plaintiff. The suit premises is situated in a posh locality of Khar, Mumbai. Apart from that, the defendant is occupying ground floor bungalow. As on today the defendant is paying Rs.167 per month. Valuation Report dated 12.2.2008 placed on record by the plaintiff shows that per month net income in respect of suit premises comes to Rs.2,35,950/-. Same was calculated by them on the basis that defendant is occupying 2145 sq.ft. Whereas as per the contention of the plaintiff himself that the defendant is occupying 1500 sq.ft. Not only that the suit structure is more than 60 years old. Valuer has deducted only 20% towards the old structure. Considering these facts, this court have to consider the monthly compensation to be paid by the defendant during the pendency of the appeal.

17 It is to be noted that though the Appellate court at the time of deciding the application below Exhibit 5 filed by the defendant held that the Appeal be decided expeditiously, the same is pending till today. In that the defendant recently on 14.12.2015 filed application for carrying out appropriate amendment in written statement. This itself shows that the defendant on one or the other ground want to prolong the litigation as he is enjoying the suit premises by paying Rs.167 per month. The authority cited by the defendant in the matter of *Chandrakant Dhanu & Another vs. Sharmila Kapur & Others* (Supra) also supports the plaintiff's case.

18 Considering the submissions made by the learned counsel for the petitioner, valuation report dated 12.2.2008 of Santosh Kumar, Government Registered Valuer and the authority placed on record, I am of the opinion that the defendant to deposit Rs.1,50,000/- per month by way of compensation from the date of decree passed by Trial Court i.e. 9.9.2005 till the hearing and final disposal of the Appeal No.248 of 2005 pending in the court of Small Causes Court at Mumbai. Hence, following order is passed:

- a) Oral judgment dated 17.3.2005 passed by the Appellate Bench of Small Causes Court, Mumbai, Bandra Branch below Exhibit 12 in Appeal No.248 of 2005 in R.A.E.Suit No.1419/4662 of 1983 is set aside.
- b) Application dated 20.2.2008 'Exhibit-12' preferred by plaintiff for directing defendant to deposit compensation in

court is partly allowed.

c) Respondent / Defendant is directed to deposit sum of Rs.1,50,000/- per month towards compensation in respect of suit premises in Trial Court on or before 10th of each month till the hearing and final disposal of Appeal No.248 of 2005.

c) Defendant to pay compensation from the month of September 2005 i.e. decree passed by Trial Court till the hearing and final disposal of the Appeal No.248 of 2005 i.e. from September 2005 till March 2016 to be deposited in Trial Court as follows:

- (i) 25% on or before 30th April, 2016
- (ii) 25% on or before 31st May, 2016
- (iii) 25% on or before 30th June, 2016
- (iv) and remaining 25% on or before 31st July, 2016

d) If there is a default of any instalment, interim protection granted in favour of defendant below Exhibit 5 in Appeal No.248 of 2005 on 18.1.2006 shall stand vacated without referring back to the court.

e) Respondent / Defendant to continue to pay compensation of Rs.1,50,000/- per month from the month of April, 2016 on or before 10th of each month till the hearing and final disposal of the Appeal, failing which interim protection granted in favour of defendant by the appellate

bench of Small Causes Court shall stand vacated without referring back to the court.

f) If amount is deposited within stipulated time as stated hereinabove Trial Court is directed to invest entire amount in fixed deposit account of any Nationalized Bank, initially for a period of one year and same shall be renewed from time to time till hearing and final disposal of the Appeal No.248 of 2005.

g) No order as to costs.

h) Writ Petition stands disposed of accordingly.

i) At this stage, the learned counsel for the defendant seeks stay of this order for some time to approach the Apex Court.

j) Considering the fact that respondent/defendant is enjoying the suit premises in a Bombay's posh locality @ Rs.167 per month, I am of the opinion that defendant is not entitled to any relief. Oral request made by the Advocate for defendant stands rejected.

JUDGE