

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9280 OF 2014**

PNC Wellness Ltd.

...Petitioner

VS.

Mr.Rajiv Rabendra Datta

...Respondent

....

Mr.Rohan Sawant a/w. Ms.Miloni Gala i/b. Mr.Mahesh A. Mahadgut for the Petitioner.

Mr.Mayur Khandeparkar a/w. Mr.Omar Khaiyam Shaikh i/b. Mr.Manoj Jaiswal for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 8th JULY,2016

P.C.:

1. Heard Mr.Sawant, learned Counsel for the petitioner and Mr. Khandeparkar, learned Counsel for the respondent at length.

2. By this petition under Article 227 of the Constitution of India petitioner has challenged Judgment and Order dated 10th July, 2014 passed by the learned Judge, presiding over Court Room.17, Small Causes Court at Mumbai, below Exh 33 in L.E. & C. Suit No. 164/200 of 2012. By that order, the learned trial Judge allowed the application made by respondent (hereinafter referred to as plaintiff) under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for

amending the plaint and permitted the plaintiff to add paragraph (22A) and the following prayer clause in the suit.

“(bb) that the Defendants be ordered / decreed to pay to Plaintiff a sum of Rs.90,25,000/- (Ninety Lakh Twenty Five thousand only) towards arrears of licence fees and amenity charges @ Rs.4,75,000/- per month for the period 1/4/2012 till 10/11/2013.”

3. It is not in dispute that the plaintiff has instituted suit against the petitioner, hereinafter referred to as defendant for recovery of possession of Shops no. 5, 6, 12A and 12B in all ad-measuring 2400 sq.ft situate on ground floor and upper floor at Akash Ganga Co-operative Housing Society Limited having C.S. No.686 of Malabar Hill, and Cumballa Hill Division, Mumbai-400 026 (hereinafter referred as the “said premises”).

4. During pendency of the suit the plaintiff took out application vide Exhibit-8 seeking directions against the defendant to deposit Rs.28,50,000/- towards the arrears of license fees and amenity charges and compensation from 1st April, 2012 to 1st September, 2012 and further direction to deposit Rs.4,75,000/- towards license fee and amenity charges till the disposal of the suit.

5. By order dated 21st June, 2013 the learned trial Judge allowed the application. Clauses (2) and (3) of the order read thus:

“2. The defendants are hereby directed to deposit Rs.28,50,000/- (Rs. Twenty Eight lakh Fifty thousand only) towards the license fees and amenity charges from 1st April 2012 to 30th September, 2012, as well as Rs.42,75,000/- (Rs. Forty two lakhs seventy five thousand only) towards the license fees and amenity charges from 1st October, 2012 to 30th June, 2013 within a period of two months from the date of this order.

3. The defendant also directed to deposit the month license fees and compensation at the rate of Rs.2,00,000/- (+) Rs.2,75,000/- = Rs.4,75,000/- per month (Rs.Four Lakhs seventy five thousand only) in the Court on or before 15th day of each month.”

6. Aggrieved by this decision defendant preferred Writ Petition No.7451 of 2013 in this Court. By order dated 20th August, 2013, petition was dismissed. Aggrieved by these decisions, defendant preferred Special Leave to Appeal (Civil) No.32063 of 2013 before the Apex Court. On 17th October, 2013 statement made by defendant that defendant will hand over quiet and peaceful possession of the suit premises to the plaintiff on or before 15th November, 2013 was recorded. Defendant submitted that on handing over possession of the

suit premises to the plaintiff prayer clause (a) would not survive and suit may continue with regard to the other prayers. Defendant further submitted that on handing over suit premises from defendant to plaintiff, order dated 21st June, 2013 passed by the Small Causes Court and order dated 20th August, 2013 passed by this Court be set aside.

7. Learned Senior Counsel for the plaintiff submitted that respondent has no objection if the order is passed in terms of submission made on behalf of the defendant. Hearing of the Special Leave Petition was adjourned to 18th November 2013 so as to enable the defendant to handover possession to the plaintiff on or before 15th November, 2013. It was made clear that in case possession is not handed over Special Leave Petition shall stand dismissed without further consideration. It is not in dispute that as per order of the Apex Court defendant has handed over possession to the plaintiff on 10th November, 2013 i.e. to say within the time stipulated by the Apex Court in the order dated 17th October, 2013.

8. Special Leave Petition was thereafter listed for hearing on 18th November, 2013. Leave was granted and the impugned order was set aside. Appeal was disposed of after recording the prayers made in the suit namely prayer clause (a) and (b). It was also recorded that

since possession of the suit premises was already been handed over by defendant to plaintiff prayer clause (a) of the suit did not survive and the suit was dismissed as infructuous with regard to prayer clause (a).

9. With regard to prayer clause (b) Apex Court made it clear that the suit will continue before the Small Causes Court. It is thereafter plaintiff has filed application dated 30th January, 2014 for adding paragraph (22A) after paragraph 22 and prayer clause (bb) after prayer clause (b).

10. By the proposed amendment in prayer clause (bb) plaintiff sought decree against the defendant to pay a sum of Rs.90,25,000/- towards arrears of license fees and amenity charges @ Rs.4,75,000/- per month for a period 1st April, 2012 till 10th November, 2013. The defendant resisted application by filing reply in March 2014. By the impugned order the learned trial judge allowed the application. It is against this order, defendant has instituted present petition.

11. By order dated 26th June, 2015 this Court admitted the Writ Petition by issuing Rule and granted interim relief in terms of prayer clause (b). Aggrieved by this order plaintiff preferred Special Leave to appeal in this Court. By order dated 1st October, 2015 the Apex Court

disposed of this petition with a request to the High Court to dispose of the Writ Petition expeditiously and not later than three months from the date of receipt of copy of the order. Accordingly, I have heard the parties at length.

12. In support of the petition Mr. Sawant submitted that defendant agreed to handover possession of the suit premises to the plaintiff on or before 15th November, 2013. It was submitted that in the event of defendant handing over possession to the plaintiff on or before 15th November, 2013, the order dated 21st June, 2013 passed by the Small Causes Court and order dated 20th August, 2013 passed by this Court be set aside.

13. On behalf of the plaintiff no objection was given for passing order in terms of submission made on behalf of the defendant. This no objection is recorded by the Apex Court in order dated 17th October, 2013. At the same time Apex Court made it clear that in case the possession is not handed over on or before 15th November 2013 Special Leave Petition shall stand dismissed without further consideration and accordingly posted the matter for hearing on 18th November, 2013.

14. Mr. Sawant submitted that defendant has handed over possession on 10th November, 2013. The Apex Court therefore set aside the orders passed by Small Causes Court and this Court and dismissed the suit in so far as prayer clause (a) is concerned. The suit remained only in respect of prayer clause (b).

15. He submitted that once the plaintiff had given up their claim for license fees and amenity charges from 1st April 2012 onwards before the Apex Court, by the proposed amendment they cannot introduce the same claim. Mr. Sawant submitted that plaintiff should have moved the Apex Court and sought clarification before filing application for amendment. Without adopting that course, plaintiff filed application under Order 6 Rule 17 of the C.P.C. for amending the plaint thereby adding paragraph (22A) and prayer clause (bb). He therefore submitted that the impugned order deserves to be set aside.

16. On the other hand, Mr. Khandeparkar supported the impugned order. He submitted that the fair reading of the order passed by the Apex Court does not show that there is any bar against the plaintiff for applying for amendment of the plaint. He submitted that while considering the application for amendment Court cannot go into merits of the proposed amendment. He also relied upon Order 2 Rule 4 of the

C.P.C. and contended that plaintiff had given up his claim in respect of interlocutory reliefs. This will not preclude the plaintiff from claiming final relief. He therefore submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

17. I have considered the rival submission advanced by the learned Counsel appearing for the parties, I have also perused material on record. It is not in dispute and is rather matter of record that plaintiff had filed application seeking direction to the defendant to deposit sum of Rs.28,50,000/- towards arrears of licence fees and amenity charges and compensation from 1st April, 2012 till 1st September, 2012 and further direction to deposit the amount of Rs.4,75,000/- towards license fees and amenity charges till the disposal of the suit.

18. By order dated 21st June, 2013 the learned trial Judge allowed the application. I have already reproduced clause (2) and (3) of the operative part of the said order. Perusal of clause (2) shows that defendant was directed to deposit Rs.28,50,000/- towards license fees and amenity charges from 1st April, 2012 to 30th September, 2012 as well as Rs.42,75,000/- towards the licence fees and amenity charges from 1st October, 2012 to 30th June, 2013 within a period of two months from the date of the order. By clause (3) of the operative part of the

order the learned trial Judge directed the defendant to deposit the monthly license fees and compensation at the rate of Rs.2,00,000/- (+) Rs.2,75,000/- aggregating Rs.4,75,000/- per month in the Court on or before 15th day of each month.

19. Aggrieved by this decision, defendant had preferred Writ Petition no. 7451 of 2013 in this Court. By order dated 20th August, 2013 the Writ Petition was dismissed. Aggrieved by these orders, defendant carried the matter before the Apex Court. On behalf of the defendant following statement was made and the same was recorded by the Apex Court in its order dated 17th October, 2013

“Ms. Bina Madhavan, learned counsel for the petitioner, after seeking instructions from Mr.Pallab Bhattacharya, Director, stated that petitioner shall hand over quiet, vacant and peaceful possession of the suit premises, details of which have been set out in the plaint, to the respondent on or before November 15, 2013. She further submits that on handing over possession of the suit premises to the respondent, prayer (a) in the suit will not survive and suit may continue with regard to the other prayers. She further submits that upon handing over possession of the suit premises by the petitioner to the respondent, the order passed by the Small Causes Court on 21.06.2013 and the impugned order dated 20.08.2013 be set aside.”

On behalf of the plaintiff following statement was made and the same was recorded by the Apex court in its order dated 17th October, 2013.

“Mr. Shyam Divan, learned senior counsel for the respondent, submits that the respondent has no objection if the order is passed in terms of the submissions.”

20. After recording the statements, the Apex Court postponed the hearing of Special Leave Petition to 18th November, 2013 and made it clear that in case the defendant fails to handover possession of the suit premises to the plaintiff on or before 15th November, 2013, the Special Leave Petition shall stand dismissed without further consideration.

21. It is not in dispute that defendant handed over possession of the suit premises to the plaintiff on 10th November, 2013. On 18th November, 2013 the Apex Court granted leave. In paragraph 2 of the order it was recorded that it was common ground of the parties that possession of the suit premises was handed over by the defendant and taken over by the plaintiff pursuant to the submission made by the learned Counsel for the defendant on 17th October, 2013. In paragraph 3 the Apex Court reproduced the prayers in the suit which are as under:

“(a) That the defendant be ordered and decreed to hand over quiet, vacant and peaceful possession

of the suit premises bearing Nos. 5, 6, 12A and 12B, is situated on ground floor and upper floor at Akash-Ganga Co-operative Housing Society Limited. The shop area admeasuring 2400 sq.ft having C.S. No.686 of Malabar Hill and Cumballa Hill Division, Mumbai-400 026 alongwith amenities to the plaintiff.

(b) That an enquiry for mesne profit be ordered and directed to be made for determining mesne profit payable by the defendants to the plaintiff from 1st August, 2012 till decree for possession is passed and thereafter till the defendant deliver vacant and peaceful possession as per the provisions of Order 20 Rule 12 of the Code of Civil Procedure, 1908.”

22. In paragraph 4 the Apex Court observed that since the possession of the suit premises has already been handed over by the defendant to the plaintiff prayer clause (a) of the suit did not survive. In view thereof suit was dismissed as infructuous with regard to prayer clause (a). In paragraph 5, the Apex Court observed that with regard to prayer (b) the suit will continue before the Small Causes Court. The Apex Court set aside the impugned order and disposed of the the Civil Appeal with no orders to costs.

23. After disposal of the appeal, plaintiff has filed an application for amendment on 30th January 2014. By the proposed amendment

plaintiff wants to incorporate paragraph (22A). In paragraph (22A) plaintiff has made reference to the earlier proceedings referred herein above and thereafter contented thus :-

“Plaintiff states that in view of the said Order other prayers are to be heard and decided at the hearing of suit. Plaintiff states that the Defendants have not paid agreed licence fees @ Rs.2,00,000/- per month and amenity charges @ Rs.2,75,000/- per month (aggregating to Rs.4,75,000/-) from 1/4/2012 onwards till they hand over possession of suit premises to the Plaintiff on 10/11/2013 as assured to the Hon'ble Supreme Court of India. Plaintiff states that the Defendants are therefore liable to pay to Plaintiff a sum of Rs.90,25,000/- (Ninety Lakh Twenty Five Thousand) towards the “said arrears of licence fees and amenity charges”

24. I have already reproduced prayer clause (bb) in the earlier part of the order. Perusal of the above extracted portion shows that after referring to the Apex Court orders dated 17th October, 2013 and 18th November, 2013 plaintiff asserted that other prayers are to be heard and decided at the hearing of the suit. Plaintiff asserted that defendants have not paid agreed license fees and amenity charges @ Rs.4,75,000/- per month i.e. Rs.2,00,000/- per month license fees and amenity charges @ Rs.2,75,000/- from 1st April, 2012 onwards till handing over possession of the suit premises to the plaintiff on

10th November, 2013 as assured to the Apex Court. Plaintiff therefore asserted that defendant are required to pay to the plaintiff a sum of Rs.90,25,000/- towards arrears of said license fees and amenity charges.

25. As noted earlier, the plaintiff had claimed these reliefs in the application filed at Exhibit 8 and the said application was allowed by the trial Court on 21 June, 2013 and the Writ Petition filed by the defendant was dismissed by this Court on 20th August, 2013. Before the Apex Court plaintiff gave no objection for setting aside these orders subject to the defendant handing over possession of the suit premises to the plaintiff on or before 15th November, 2013. Defendant admittedly handed over possession before 15th November, 2013. By way of the proposed amendment, it is not open to the plaintiff to claim the same relief which was specifically given up before the Apex Court. In any case before filing application for amendment plaintiff should have approached the Apex Court and sought clarification / permission to file application.

26. Mr. Khandeparkar submitted that the orders passed by the Apex Court do not preclude the plaintiff from filing application for amendment. He further submitted that while considering the application

for amendment Court cannot go into merits of the case. He also relied upon Order 2 Rule 4 and lastly he contended that merely because the plaintiff had given up reliefs claimed at interlocutory stage, that will not preclude the plaintiff from claiming final relief.

27. I do not find any merit in any of the submissions. It is no doubt true that while considering application for amendment the Court cannot consider merits of the case. But the moot question in the present case is whether in the facts and circumstances of the present case, the plaintiff could have claimed relief which was specifically given up before the Apex court. It is not the case of the plaintiff that defendant did not hand over possession of the suit premises as agreed and as recorded in the Apex Court order. In fact while recording statement on behalf of the defendant Apex Court clarified that in case possession is not handed over to the plaintiff on or before 15th November, 2013, Special Leave Petition shall stand dismissed.

28. Thus the plaintiff made representation before the Apex Court that in case the defendant hands over possession on or before 15th November, 2013, he has no objection for setting aside the orders dated 21st June, 2013 passed by the trial Court and 20th August, 2013 passed by this Court. Having given up the claim for license fees and

amenity charges before the Apex Court now plaintiff cannot turn around and file application for amendment of plaint and claim the same relief.

29. In view thereof, I find that the learned trial Judge was not justified in allowing the application. Hence impugned order is set aside. Application at Exhibit 33 is dismissed. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)