

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10957/2014

Santosh Khedekar

... Petitioner

V/s.

Purushottam M. Suvarna

... Respondent

Mr. P. J. Thorat for the petitioner

CORAM: K.K. TATED, J.
DATED : MARCH 23, 2016

PC. :

1. Heard the learned counsel for the petitioner plaintiff.
2. By this petition under Article 227 of the Constitution of India the petitioner challenges the order dated 13.10.2014 passed by the Appellate Bench of Small Causes Court, Mumbai (Bandra Branch) below Exhibit- 20 in LD & C Suit No.11/11/2010 dismissing the plaintiff's Application under Order XXXIX Rule 10 of the Code of Civil Procedure, 1908 for directions to the respondent defendant to deposit the admitted amount of Rs.23,75,000/- in the court.
3. It is the case of the plaintiff that the plaintiff and defendant entered into leave and license agreement dated 07.04.2008 for conducting the business known as "Hotel Khandaar (Bar and Restaurant) in an area about 2000 sq.ft. consisting of ground plus one upper floor situated at 21, Nagardas Road, Andheri (East), Mumbai –

400069. It is the case of the plaintiff that thereafter the licensing authority cancelled the license for conducting the bar and restaurant business in the suit premises. Hence, the plaintiff filed a suit in the Court of Small Causes for declaration that the defendant has no right to retain the security amount of Rs.25 lacs paid by the plaintiff by way of deposit and for other reliefs. In that suit, the plaintiff made an application for injunction restraining the respondent defendant from creating any third party right, title and interest in respect of the suit property. The defendant filed reply to that notice in which they disclosed that they already created third party right in respect of the suit property.

4. The learned counsel for the plaintiff submits that thereafter they made an application under Order XXXIX Rule 10 of the Code of Civil Procedure, 1908 on 02.08.2013 below Exhibit- 20 for directions to the respondent defendant to deposit the admitted amount of Rs.23.75 lacs in the court and allow the plaintiff to withdraw the same. That application was rejected by the court on 13.10.2014. Hence, the present petition.

5. The learned counsel for the petitioner submits that the Trial Court erred in coming to the conclusion that the petitioner plaintiff failed to make out a case for an order below Exhibit- 20 i.e. directions to the defendant to deposit the admitted amount in court. He submits that the defendant in his written statement as well as reply to the notice below Exhibit- 20 admitted that he received sum of Rs. 20 lacs. He submits that though the defendant raised objection that the

said amount was paid by one Mr. Jariwalla and not by the plaintiff, same was paid by Mr. Jariwala on behalf of the plaintiff only. He further submits that the defendant, with *mala fide* intention, raised objection about the maintainability of the suit on the ground that there was an arbitration clause in leave and license agreement. He submits that the Trial Court dismissed the plaintiff's application only on the ground that the defendant disputed the amount due and payable to the plaintiff. He submits that though the defendant disputed the said amount in his written statement and reply, same was admitted by the defendant stating that he received a sum of Rs. 20 lacs by way of security deposit. Hence, considering the provisions of Order XXXIX Rule 10 of the Code of Civil Procedure, 1908, the Trial Court ought to have directed the defendant to deposit the said amount during pendency of the suit. Hence, the order passed by the Trial Court dated 13.10.2014 is required to be set aside allowing the plaintiff's Application under Order XXXIX Rule 10 of the Code of Civil Procedure, 1908.

6. Heard the learned counsel for the petitioner plaintiff at length. The learned counsel for the plaintiff produced a copy of the written statement filed by the defendant. Perusal of the same shows that the defendant has specifically raised objection that he has to recover more than Rs.4 lacs from the plaintiff. The objection raised by the defendant that because of mistake on the part of the plaintiff, the licensing authority cancelled the license for conducting the hotel and bar in the suit premises. Hence, there is no question of directing the defendant to deposit the said amount. It is to be noted that the defendant, in

paragraph 5 and 13 of written statement specifically denied his liability to pay said amount to the plaintiff. If there is dispute about the payment/liability, then there is no question of enforcing Order XXXIX Rule 10 of the Code of Civil Procedure, 1908. These facts are considered by the Trial Court in paragraph 7 of the impugned order. I do not find any reason to interfere with the said order under Article 227 of the Constitution of India. Hence, the Writ Petition stands rejected.

(K.K. TATED, J.)