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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION***

WRIT PETITION NO. 13013 OF 2016

Krishna Developers Pvt. Ltd.

... Petitioner.

V/s.

Mumbai International
Airport Authority Pvt. Ltd.

... Respondent.

Mr. Girish Godbole a/w. S.L. Shah i/b. Shah Legal for the Petitioner.
Mr. Pravin Samdani, Senior Advocate a/w. Farid Karachiwala, Ms.
Shoma Maitra and Ms. Haisheen Madan i/b. Wadia Ghandy & Co.
for the Respondent.

CORAM : N.M. Jamdar, J.

28 November, 2016.

Oral Order :-

The Petitioner has challenged the order passed by the Appellate Bench of Small Cause Court dated 28 September 2016 on the Application below Exhibit 7 taken out by the Petitioner for stay of the judgment and decree, passed by the Small Cause Court. The Petitioner is aggrieved by the direction of the Appellate Bench to deposit the decretal amount of Rs.6,82,55,905/- or furnish security

in the form of bank guarantee to the extent of the amount, within period of two months from the date of the order.

2. On 10 May 2007, an agreement for leave and licence was executed between the Petitioner and the Respondent in respect of a commercial property situated at Andheri, Mumbai. The property admeasures 32,060 sq.ft. super built up area and 44 parking spaces. The agreement came into effect on 16 June 2007 and it was stipulated to expire on 15 June 2010. Dispute arose between the parties and the agreement was sought to be terminated by the Respondent on 3 June 2009, which led to filing of the Suit bearing No.L.E. & C. No. 141/175 of 2009 by the Petitioner on 28 November 2009. The suit for recovery of possession of the premises and for amount of Rs.5,23,84,423/- towards licence fees, car parking and maintenance charges. Counterclaim bearing No. 2 of 2010 was filed by the Respondent. In the counterclaim the Respondent sought relief of refund of balance security deposit of Rs.7,13,65,560/- alongwith interest at the rate of 12% per annum since 19 January 2010 till actual realization. There were various proceedings between the parties which reached the Apex Court. Ultimately, the learned Small Causes Court Judge, by the Judgment and Order dated 16 April 2016 dismissed the suit and partly allowed the counterclaim. The Small Causes Court Judge disposed of the suit and the counterclaim by the following order :-

“1. The suit is hereby dismissed with no order as to costs.

2. The Counterclaim of the Defendant is hereby partly allowed with no order as to costs.

3. The Defendant is entitled to recover the security deposit amount of Rs. 10,68,90,345/- (Rupees Ten Crore Sixty Eight Lakh Ninety Thousand and Three Hundred Forty Five only) from the Plaintiff.

4. The Defendant is liable to pay amount of Rs.31,09,655/- (Rupees Thirty One Lakh Nine Thousand Six Hundred fifty Five only) to the Plaintiff.

5. The Defendant is entitled to recover amount of Rs.6,82,55,905/- (Rupees Six Crore Eighty Two Lakh Fifty Five Thousand Nine Hundred Five only) along with interest @ 6% per annum from 19.01.2010 till the actual realization of the said amount of security deposit.

6. The Defendant is entitled to withdraw the amount of Rs.3,86,34,440/- (Rupees Three Crore Eighty Six Lakh Thirty Four Thousand Four Hundred Forty only) deposited in the Court accordingly after the appeal period is over.”

3. The Petitioner filed an Appeal bearing No.10 of 2006 in the Appellate Bench of Small Causes Court and sought stay to the execution and operation of the judgment and order passed by the learned Small Cause Court Judge on 28 September 2016 and also to restrain the Respondent from withdrawing the amount of

Rs.3,86,34,440/-. This application was opposed by the Respondent. The Appellate Bench after hearing both the sides disposed of the application by the following order :-

“(i) The impugned judgment and decree dated 6.04.2016 passed in L.E. & C. Suit No. 141/175 of 2009 is stayed till final hearing and disposal of the appeal subject to following terms and conditions.

(ii) The appellant shall deposit a decretal amount of Rs. 6,82,55,905/- or furnish security in form of bank guarantee to the extent of said amount in the Court within two months from the date of this order.

(iii) If the appellant deposits the said amount of Rs.6,82,55,905/- in the Court then the Registrar of the Small Cause Court to invest the same in the Fixed Deposit for the term of at least one year in any nationalized bank immediately as per the rule.

(iv) The respondent shall not withdraw the amount of Rs. 3,86,34,440/-, which is already deposited in the Court, till final hearing and disposal of the appeal.

(v) If the appellant failed to comply with the order, the stay granted by the Court shall automatically stand vacated.

(vi) Intimate to the Trial Court.”

Resultantly, the Respondent was restrained from withdrawing the amount of Rs.3,86,34,440/- and the stay was granted to the execution of the judgment of the learned Small Causes Court Judge

on depositing the amount or by way of security in the form of bank guarantee. This order has been impugned in the present Petition.

4. I have heard Mr. Girish Godbole, learned Counsel for the Petitioner and Mr. Pravin Samdani, learned Senior Advocate for the Respondent.

5. The learned Counsel for the Petitioner submitted that the learned Small Causes Court had no jurisdiction in respect of the claim of the Respondent to recover/refund the security deposit as the said relief is not recovered by Section 41 of the Presidency Small Cause Court Act, 1882. He submitted that it has been held by the learned Single Judge of this Court that a clause in the leave and licence agreement which provides for lock in period is valid and the observation of the learned Small Cause Court regarding the validity of the clause is against the law laid down by this Court. The learned Counsel submitted that it is not a mandate of law that whenever a stay for execution of money decree is sought that the entire amount must be deposited. He relied on proviso to Order 41 Rule 1 sub-rule (3) (Maharashtra amendment) which reads thus :-

“ Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.”

He submitted that the decision of the Apex Court in the case of *Kanpur Jal Sansthan and Anr. v/s. Bapu Constructions* reported in (2015) 5 SCC 267, relied upon the respondent does not deal with the Maharashtra amendment. Learned counsel submitted that therefore, the Court will take into consideration the merits of the challenge, especially since it is on the ground of lack of jurisdiction and mould the relief properly by reducing the bank guarantee required and permitting the Petitioner to furnish security in the form of an immovable property. The learned Counsel for the Petitioner submitted that the Petitioner is ready to furnish the title deeds of a property which belongs to sister concern of the Petitioner alongwith necessary undertakings of the Directors. Mr. Samdani, the learned Senior Advocate for the Respondents on the other hand submitted that the arguments raised by the Petitioner are regarding merits of the challenge and no exceptional circumstances have been made out to deviate from normal rule that for stay of money decree, the appellant will have to deposit the decretal amount. He submitted that the property which is the subject matter of the dispute is already let out to some third party and a Company Petition No. 343 of 2016 has been filed for winding up of the Petitioner in which claim is made to the tune of around Rs.60,00,000/- wherein the Petitioner has filed its appearance. He submitted that the security in form of property of sister concern will lead to further complications. The learned Counsel submitted that in the circumstances no interference

in the impugned order is warranted as none of the arguments that are advanced especially regarding the jurisdiction of the Court were advanced before the learned Small Cause Court Judge nor before the Appellate Bench.

6. In the power of superintendence, limited scope that is available to interfere with such discretionary orders is on an enquiry whether the use of discretion by the Appellate Bench is perverse or otherwise. Proceeding on the arguments advanced by the learned Counsel for the Petitioner that the Appellate Bench has a discretion to either permit deposit of the entire amount or some other form of security, the question still remains this discretion used in the present case can be stated to be perverse. The decree is purely a money decree. It is not that the Appellate Bench has only directed the deposit of the amount, but has also given liberty to the Petitioner to furnish a bank guarantee. In this court also, when the matter was argued on the last occasion, it was adjourned for the Petitioner to take instructions whether the Petitioner would keep aside this amount in a fixed deposit in its own bank. The learned Counsel for the Petitioner on instructions submitted that the Petitioner is not agreeable to this course of action. Therefore, the Appellate Court has given two options to the Petitioner and the third option was also given by this Court. Limitless indulgence cannot be granted to the Petitioner.

7. As far as the argument that the claim of the Respondent could not have been entertained by the learned Small Cause Court Judge, there was no issue framed to that effect before the learned Small Cause Court Judge. The judgment of the learned Small Cause Court also indicates that no specific argument to that effect was made. It is the contention of the learned Counsel for the Petitioner that this ground was taken in the written statement to the counterclaim. However, the fact remains that no issue was framed neither there is any argument made. Furthermore, when the application was urged in the Appellate Court, that the decree is passed without jurisdiction, was not one of the grounds raised by the Petitioner. Therefore, whether the Petitioner should be permitted to urge this point for the first time in the Appeal would be something that will be considered when the Appeal is taken up for hearing on merits. As regards the contention based on the decision of this Court holding that a clause in leave and licence agreement providing for lock in period is valid, is again an argument that is on the merits of the Appeal. Therefore, at the most it can be said that the Petitioner has a prima-facie case, but for granting injunction, prima facie case is only one of the criteria.

8. The offer made by the Petitioner of keeping aside the office property, was neither made before the Appellate Court nor a

statement is made in the Writ Petition. The learned Counsel for the Petitioner during the course of the argument has made this submission and sought leave to produce the title deeds in respect of the property sought to be offered. The learned Counsel for the Respondent has rightly expressed an apprehension in view of the pending Company Petition for winding up. Furthermore, the security in the form of the property of the sister concern, will only lead to further complications. A defence could be taken in future that the property is of a different entity, even though the directors may be common.

9. Considering the background of the litigation and the fact that there is a winding up petition filed and that the decree assailed is a money decree, I am of the opinion that this is not a case where the stay to the execution of a money decree can be secured by partly providing a security in terms of an immovable property. In the facts and circumstances of the case, the exercise of discretion by the Appellate Bench to grant stay to the execution of the order impugned before it by furnishing security in the form of bank guarantee is proper. The Petitioner is not agreeable to keeping aside the money in a fixed deposit.

10. In the circumstances, no interference is warranted in the impugned order. The Writ Petition is rejected. At this stage the

learned Counsel for the Petitioner states that some time may be granted as the petitioner desirous of taking the challenge further. Considering the facts and circumstances, I am inclined to extend the time stipulated in the impugned order by period of four weeks from today, however it will take some time to get the copy of the order therefore it is extended for a period of six weeks from today.

(N.M. Jamdar, J.)