

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

WRIT PETITION NO. 1879 OF 2017

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| 1 | Mr. Aajul Abubakar Abdul Rauf Khan
adult, Indian inhabitant
residing at: Bright Apartments, 1 st floor
Flat No.1, CTS No.6825, Village Kolivary,
Kolekalyan, Off. Kalina Kurla Road,
Santacruz (E), Mumbai 400 055. |]
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| 2 | Mr. Kamar Abubakar Abdul Rauf Khan
residing at: Bright Apartments, 1 st floor
Flat No.1, CTS No.6825, Village Kolivary,
Kolekalyan, Off. Kalina Kurla Road,
Santacruz (E), Mumbai 400 055. |]
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| 3 | Amanullah Abubakar Khan Alias
Manubhai, Indian inhabitant,
residing at: Bright Apartments, 1 st floor
Flat No.1, CTS No.6825, Village Kolivary,
Kolekalyan, Off. Kalina Kurla Road,
Santacruz (E), Mumbai 400 055. |]
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] | Petitioners
Original defendant
Nos. 2(a), 2(b), 3 & 4 |
| 4 | Atarunnisa w/o Amanullah Abubakar
Khan, Indian inhabitant,
residing at: Bright Apartments, 1 st floor
Flat No.1, CTS No.6825, Village Kolivary,
Kolekalyan, Off. Kalina Kurla Road,
Santacruz (E), Mumbai 400 055. |]
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Versus

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| 1 | Mumtaz Khan Khudabaksh of surat,
aged about 66 years, adult, Indian
inhabitant,
residing and carrying on business of
Meena Hotel, Main Road, Main Road, Olpad
Dist. Surat, Gujrat and having address in
Mumbai at c/o Galaxy Apartments, "B" |]
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Wing, Room NO.308, Near Jain Mandir Road, Bandra (W) Mumbai 400 050	] Respondents] Respondent No.1] orig. plaintiff.]
2 Mumtaz Khan Khudabaksh of surat aged about 66 years, adult, Indian inhabitant, residing and carrying on business of Meena Hotel, Main Road, Olpad Dist. Surat, Gujarat and having address in Mumbai at c/o Galaxy Apartments, "B" Wing , Room No.308 Near Jain mandir Road, Bandra (W), Mumbai 400 050.	]]]]]] Respondent No.2] Orig. defendant] No.2]
3 State of Maharashtra, to be served to Government Pleader, High Court, (A.S.), (Writ Cell), Mumbai	]]] Respondent No.3]

- Mr.Mangesh Patel for the Petitioners.
- Mr. S.A. Jabbar for Respondent Nos.1 and 2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

CLOSED FOR JUDGMENT : 11th DECEMBER, 2017.

JUDGMENT PRONOUNCED : 13th DECEMBER, 2017

JUDGMENT :-

1] Rule. Rule made returnable forthwith. Heard finally with consent of learned counsel for both the parties.

2] By this Writ Petition filed under Article 226 and 227 of the Constitution of India, the Petitioners are challenging the order dated 25th October, 2016 passed by City Civil Court Dindoshi, Mumbai in S.C.

Suit No.1141 of 2013, thereby making Notice of Motion No.2964 of 2015 filed therein absolute in terms of prayer Clause (a), (d), (f) and (g).

3] Facts of the Writ Petition are to the effect that the Petitioners herein are the original Defendant Nos.2 (a), 2(b), 3 and 4. Respondent No.1 has filed a suit against them for seeking possession of the suit flat on the ground that their possession is that of rank trespassers and Respondent No.1 being the owner of the said flat is entitled to get the said possession. During pendency of the suit Respondent No.1 filed the Notice of Motion No.1128 of 2013 for appointment of Court Receiver under Order No. XL Rule 1 of Code of Civil Procedure. The said Notice of Motion was allowed by the Trial Court vide order dated 15th December, 2014 and the Court Receiver, High Court, Bombay, was appointed to take possession of the suit flat with a further direction that the Court Receiver shall continue the possession of Defendants over the suit flat on the condition that the Defendants shall pay rent of Rs.10,000/- per month from the date of taking possession by Court Receiver till decision of the suit and the amount of rent was to be deposited in the Court. The Defendants were also restrained from alienating or creating any third party interest in the suit flat till decision of the suit.

4] Respondent No.1/Plaintiff then filed a Motion for “Speaking to the Minutes” of the said order, pursuant to which the order was clarified to the extent that the word “rent” was replaced by the word “royalty”. However, so far as the other reliefs claimed by the Plaintiff in the said motion of Speaking to the Minutes, like directing the Defendants to execute the Agreement of Agency with Court Receiver and also the prayer that the amount of royalty fixed by the Court in the said order was not in consonance with the market rate came to be rejected.

5] Being aggrieved thereby, the Respondent No.1/Plaintiff filed Writ Petition No.5693 of 2015 before this Court. The said Writ Petition came to be disposed of by holding that no interference is warranted in the impugned order. However, liberty was granted to the Respondent No.1 to file an appropriate application before the Trial Court in respect of his grievance about the direction to the Defendants to execute an Agreement of Agency and also about the amount of royalty being not in consonance with the market rate.

6] Accordingly, the Respondent No.1 filed the Notice of Motion No.2964 of 2015 before the Trial Court seeking these various reliefs as laid down in prayer Clause (a), (d), (f) and (g). The Trial Court after hearing learned counsel for both the parties was pleased to

allow the said Notice of Motion in terms of the prayer clause (a), (d), (f) and (g).

7] While challenging this impugned order of the Trial Court, the submission of the learned counsel for the Petitioners is that without there being any material before the Trial Court, the Trial Court has enhanced the amount of royalty and moreover without there being any direction in the earlier order passed on 15th December, 2014, the trial Court has also given the direction for execution of Agreement of Agency. It is submitted that, if such direction was not there in the original order passed on 15th December, 2014 while appointing the Court Receiver, it can be given subsequently. Hence according to learned counsel for the Petitioner, the impugned order needs to be quashed and set-aside.

8] Per contra, learned counsel for the Respondent-Plaintiff has challenged the maintainability of this Writ Petition itself by relying upon the judgment of the Apex Court in the case of ***Radhey Shyam & Anr. vs. Chhabi Nath & Ors, JT 2015 (3) SC 140***, holding that, the judicial orders of Civil Court are not amenable to writ jurisdiction under Article 226 of the Constitution of India.

9] Further relying upon the judgment of the Apex Court in

the case of *Shalini Shyam Shetty & Anr. vs. Rajendra Shankar Patil, (2010) 8 SCC 329*, it is urged that the scope of writ jurisdiction of the High Court under Article 227 of the Constitution of India is limited and in exercise of the said power, the High Court cannot act as a Court of Appeal over the orders of the Civil Court or Tribunal, subordinate to it.

10] Further according to learned counsel for the Respondents, the Petitioners have already accepted the order of the Trial Court and has sought time before the Court Receiver and also before the Trial Court itself for compliance of the said order, like payment of the dues of royalty and for execution of necessary Agreement of Agency. Thus, according to learned counsel for the Respondents, when the Petitioners have already accepted the said order, there is no scope for the Petitioners to challenge the same in this writ jurisdiction.

11] In view of the settled position of law, as this Writ Petition under Article 226 of the Constitution of India is not maintainable and the writ jurisdiction of this Court under Article 227 of the Constitution of India is limited only to ascertaining the legality and validity of the impugned order passed by the Trial Court, within the limited jurisdiction, if this Court considers the controversy involved in this Writ Petition, it can be seen that the Petitioners had not challenged the

earlier order dated 15th December, 2014 passed by the Trial Court, thereby appointing the Court Receiver under Order XL Rule 1 of Code of Civil Procedure and therefore that order has become final.

12] Now once, the Court Receiver is appointed to take possession of the suit flat and the possession of the Org.Petitioner/Defendant is continued for and on behalf of the Court Receiver, then it follows that the Defendants had to execute an Agreement of Agency with the Court Receiver. It is a consequential step for effective implementation of the order of appointment of Court Receiver to take possession of the suit flat and for continuing the possession of the Defendant over the suit flat on his behalf. Therefore, there is no error in the Trial Court's passing an order to that effect.

13] Even as regards the enhancement of the amount of royalty, the impugned order passed by the Trial Court shows that the Trial Court has considered the Leave and License Agreements executed between the adjacent flat owners, which showed that the royalty amount fixed by the earlier order dated 15th December, 2014 was on lower side. After arriving at this conclusion, the Trial Court has enhanced the amount of royalty and that too in a reasonable way by increasing it from Rs.10,000/- to Rs.25,000/- per month from 15th January, 2015 upto 31st March, 2015 and further directing the

Petitioners to pay to the Plaintiff an amount of Rs.9,000/- which was paid to the Court Receiver for taking custody of the premises and further directing the Petitioners to deposit Rs.2400/- per year starting from completion of one year from the date of taking possession of the suit premises with the Court Receiver as per High Court (Original Side Rules).

14] Thus, the perusal of the order passed by the Trial Court reveals that the reliefs granted are consequential reliefs in view of the initial order dated 15th December, 2014 passed by the Trial Court for appointment of the Court Receiver and directing the Petitioners to pay royalty amount of Rs.10,000/- per month. Therefore, within the limited writ jurisdiction of this Court under Article 227 of the Constitution of India, this Court does not find any ground made out to interfere in the impugned order, especially when the Petitioners have already accepted the said order by seeking time from the Trial Court and the Court Receiver for execution of Agreement of Agency and for depositing of the amount.

15] Writ Petition therefore holds no merit, hence stands dismissed. Rule discharged.

[DR.SHALINI PHANSALKAR-JOSHI, J.]