

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4230 OF 2017**

1. Hasanali Hasambhoy Jetha	)	
Age 79 years	)	
2A. Suraiya Akbarali Jeth	)	
2B. Yabir Akbarali Jetha	)	
2C. Yakir Akbarali Jetha	)	
2D. Raiyab Akbarali Jetha	)	
3. Jetha Properties Pvt Limited	)	
All having their address at Jetha Compound	)	
Opposite Byculla Goods Depot,	)	
Dr. Ambedkar Road, Byculla,	)	
Mumbai 400 027	)	..Petitioners
		(orig Appellants/ Defendants)

VERSUS

1a. Mrs. Razia Yusuf Noorani	)	
1A1 Yusuf Noorani	)	
1A2 Anees Yusuf Noorani	)	
1A3 Salman Yusuf Noorani	)	
1A4 Mrs. Zain Kably	)	
1B Mohammed Obedulla Chinoy	)	
All having their address at	)	
Chinoy Mansions, 162, Warden Road	)	
Mumbai 400 036	)	
1C Taher Chinoy	)	
residing at Chinoy Mansions,	)	

162, Warden Road	)	
Mumbai 400 036	)	
1D Ameera Rafiq Wahedna	)	
residing at Wahedna Apartments	)	
Hill Road, Bandra	)	
Mumbai 400 050	)	
1E Shahjehan Chinoy	)	
residing at 37 H, Block 6 Pechs	)	
Karachi 29, Pakistan	)	
2 Messers Bulwark Warehousing Co.	)	
3 Messers Gen Stone India	)	
4 Messers Amit Warehousing Co.	)	
All having their office Opposite Byculls Goods	)	
Depot, Mumbai 400 027	)	..Respondents

Mr. V. Y. Sanglikar for the Petitioners
Mrs. Ranjana Parikh i/b Ms Rubia Taneja and Ms Shama Taneja for the Respondents

CORAM : R. M. SAVANT, J.
RESERVED ON 28th April, 2017
PRONOUNCED ON 5th May, 2017

JUDGMENT

1 Rule. With the consent of the Learned Counsel for the parties made returnable forthwith and heard.

2 The Writ Jurisdiction of this Court is invoked against the order dated 18-3-2017 passed by the Appellate Bench of the Small Causes Court on

the application Exhibit 7 filed by the Petitioners / original Appellants in Appeal No.305 of 2016 filed by the Petitioners before the Appellate Bench of the Small Causes Court, Mumbai. By the said order, the said application for stay pending the Appeal was allowed in terms of the operative part of the impugned order. The said operative part stipulates that the Petitioners to pay interim compensation @ Rs.10,00,000/- (Ten Lakhs) per month to the Respondents and also to furnish undertakings as directed by the said operative part of the order.

3 The facts necessary for adjudication of the above Writ Petition can in a nutshell be stated thus:

The Petitioners herein are the heirs of the original lessee one Hashambhai Jetha who was granted a lease of a plot of land admeasuring 3341 sq. yards by an Indenture of Lease dated 7-4-1941, along with the said plot the said Hashambhai Jetha was granted another plot by assignment admeasuring 109 sq.yards which is part of the same property. The schedule to the said Lease Deed i.e. Schedule A and B make a reference to the said two plot of lands. As indicated above the Petitioners are the heirs of the original lessee i.e. the said Hashambhai Jetha, whereas the Respondents are the heirs of the original lessor i.e. Bai Khatubai. The Petitioners are the Defendants in the Suit in question being R. A. E. Suit No.202/972 of 1973, whereas the

Respondents are the original Plaintiffs who have filed the said Suit. The said Lease Deed contained a recital to the effect that in consideration of the expenses incurred by the tenant i.e. the said Hashambhai Jetha in erection and completion of the structures or sheds hereinafter mentioned and all the rent that the lessor i.e. the landlady has demised unto the tenant all that piece or parcel of land and the premises more particularly described in the first schedule. The lease also contains a recital in respect of the assignment that the lessor assigns unto the tenant all her right, title and interest in that piece or parcel of land and premises more particularly described in the second schedule and delineated on the plan. The said Lease Deed also contains a covenant that on the termination of the tenancy, the tenant to yield up the said premises with all the structures or sheds or buildings erected thereon meaning thereby that the tenant was required to hand over possession not only of the land but the structures, sheds and buildings erected thereon.

4 The landlady called upon the lessee to pay the arrears of the lease rent failing which the lease would stand terminated. Accordingly the tenancy of the said premises came to be terminated by the landlady by notice dated 7-7-1992. The landlady thereafter filed the Suit in question i.e. R.A.E. Suit No.202/972 of 1973 which was filed by one Resubai Chinoy against Hashambhai Jetha and Akbarali Jetha on the ground of default. For the purposes of the present Petition, suffice it would be to state that the said Suit

came to be decreed by the Trial Court by judgment and order dated 9-3-2016. The Defendants i.e. the Petitioners herein aggrieved by the said decree filed an Appeal before the Appellate Bench of the Small Causes Court being Appeal No.304 of 2016. In the said Appeal, the Appellants i.e. the Petitioners herein filed Exhibit 7 for stay of the decree passed by the Trial Court. Since the issue was of granting stay having regard to the provisions of Order XLI Rule 5 of the Civil Procedure Code and having regard to the fact that the Appellate Court was likely to put the Appellants to terms in the matter of payment of interim compensation as a condition for stay of the decree, the parties filed valuation reports. The Petitioners filed the valuation report of one M/s. S.M. Kini & Co., whereas the Respondents filed the valuation report of Mr. H.S. Maniar, Chartered Engineer, Surveyor and Registered Estate Valuer. As can be seen from the said reports, the said valuers adopted 3 identical methods of valuation. The valuation based on the Ready Reckoner published by the State of Maharashtra, the capitalisation of the rent method and the instances of sale. The Appellate Bench did not deem it appropriate to accept the valuation as made either by M/s S. M. Kini & Co. or Mr. H. S. Maniar for the reasons mentioned in its order. In so far as the report of Mr. H. S. Maniar is concerned the Appellate Bench observed that the valuers have proceeded on the basis of wrong parameters in so far as zoning, F.S.I. Etc is concerned. The Appellate Bench observed that though it is true that the Respondents were lessors and the owners of the structures, the Appellants cannot deny the claim of the

contesting Respondents in considering the income from the structures as one of the parameters for fixing the interim compensation. The Appellate Bench further observed that the Appellants cannot forget the fact that the structures are standing on the land let out by the contesting Respondents and that the tenancy of the Appellants has been terminated which has been accepted by the Trial Court by passing a decree against them.

The Appellate Bench observed that the figure of Rs.3,62,409/- as concluded by M/s S. M. Kini & Co. is on the lower side and that it is arrived at by over looking certain parameters. The Appellate Bench in so far as report of Mr. H. S. Maniar is concerned, observed that it is on a higher side. According to the Appellate Bench he too has taken into consideration wrong parameters (wrong zone, nature of ownership, access to rate, incorrect FSI, high rate of return). The Appellate Bench observed that it is not accepting the valuation done by the said valuers at Rs.27,38,350/- per month, since it is on the higher side. The Appellate Bench concluded that the contesting Respondents are entitled to receive Rs.10,00,000/- per month as interim compensation. The Appellate Bench accordingly allowed the application Exhibit 7 filed by the Appellants i.e. the Petitioners herein on the condition of the Appellants depositing Rs.10,00,000/- per month as interim compensation and directed the arrears to be paid in terms of the directions contained in the operative part of the impugned order. The Appellate Bench also directed the interim

compensation to be deposited in a nationalised bank for a period of one year. The Appellate Bench has also directed the Petitioners i.e. the Appellants before it to give undertaking in terms of the directions as contained in the operative part of its order. The said directions are reproduced hereinunder for the sake of ready reference:

“(i) Within 15 days from today, appellants to give details of the structures (total numbers, area, floors and the persons in occupation as per leave and licence agreements) standing on both the suit lands by way of undertaking on affidavit.

(ii) Appellants to inform respective licensees (7 in numbers):-

(a) Within 15 days from today about pendency of this appeal.

(b) Appellants to seek their approval prior to effect change if any in their constitution which is having effect on the right over respective licenced premises standing on the suit land.

(iii) Within two months from today Appellants to file undertaking along with annexures about giving information to the licensees as directed above.

(iv) Within 15 days from today Appellants to give fresh undertaking about not creating third party interest in respect of suit land and in respect of structures standing on the suit land (other than in favour of licensees mentioned in the reply dated

26.08.2016 filed by contesting respondents) till disposal of the appeal.

(v) Appellants to seek leave of the Court prior to entering into any sort of fresh transaction with existing licensees of these structures.”

As indicated above, it is the said order dated 18-3-2017 which is taken exception to by way of the above Petition.

5 **The Learned Counsel appearing on behalf of the Petitioners Mr. Sanglikar would make the following submissions :**

(I) The interim compensation fixed is on a higher side considering that what was leased out to the Petitioners was only land and not structures which are of the ownership of the Petitioners.

(II) That the interim compensation to be fixed has to be in terms of the parameters laid down by the Apex Court in the judgment in the matter of **Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt Ltd.**¹ and in the matter of **State of Maharashtra Vs. M/s. Supermax International Pvt Ltd.**² and the principles laid down by a Learned Single Judge of this Court in the judgment in the matter of **Chandrakant Dhanu & anr Vs. Shamla Kapur & Ors**³.

¹ 2005(1)SCC 705

² AIR 2010 SC 722

³ 2009(2)AIR Bom R 458

(III) The Appellate Bench has erred in taking into consideration the income derived from the structures, as the structures are of the ownership of the Appellants i.e. the Petitioners. Reliance is placed on the judgment of the Apex Court in the matter of **M. L. Yacob Sheriff (Deceased) by heirs Vs. Rajrani Devi**⁴

(IV) That the interim compensation ought to be a percentage of the licence fees prevalent in the market and not at the market rate itself. Reliance is placed on the judgment of a Learned Single Judge of this Court in the matter of **Marjorie Passanah & Anr. Vs. Mumtaz Iqbal Shaikh**⁵

(V) That there cannot be any subletting having regard to the covenants of the Lease Deed as the Petitioners were having a right to let out the structures in the instant case the structures have been let out to the family concerns.

6 Submissions made by the Learned Counsel appearing on behalf of the Respondents Ms Parikh:

(I) That the Petitioners who are in Appeal against a decree of eviction cannot be heard to say that they are not liable to pay licence fees at the

⁴ AIR 2004 Supreme Court 1200

⁵ 2009(1)MhLJ 972

prevalent market rate as interim compensation.

(II) That the Petitioners have during the pendency of the Suit have leased out the sheds constructed on the plot of land out of which they are deriving handsome income.

(III) That having regard to the market rate prevalent of the licence fees, the interim compensation fixed by the Appellate Bench cannot be said to be exorbitant, excessive or fanciful.

(IV) That the conduct of the Petitioners can be seen from the fact that the Petitioners have not denied the letting out of the structures / sheds pending the Suit as the allegations made by the Respondents in that regard have not been denied by the Petitioners.

(V) The conduct of the Petitioners is such that they are not entitled to the exercise of any discretion in the matter of payment of interim compensation in their favour.

7 Having heard the Learned Counsel for the parties, I have considered the rival contentions. The issue which arises for consideration is whether the order passed by the Appellate Bench of the Small Causes Court

imposing conditions for stay as imposed by the impugned order requires any interference at the hands of this court in its Writ Jurisdiction under Article 227 of the Constitution of India. The issue of grant of stay pending the Appeal or Revision in the Appellate Forum had come up for consideration before the Apex Court in the Judgment of Atma Ram Properties (P) Ltd. (supra). The Apex Court in the said case having regard to the Order XLI Rule 5 of the Civil Procedure Code held that the grant of stay and the conditions that can be imposed on the Appellants are to be founded inter alia on the following facts :

(I) The security to be furnished for the due performance of the decree or order as may be ultimately passed being furnished by the Applicants for stay as a condition precedent to the grant of order of stay.

(ii) The power to grant stay is discretionary and flows from the jurisdiction conferred on an Appellate Court which jurisdiction is equitable in nature.

(iii) The Appellants seeking an order of stay must do equity for seeking equity.

(iv) The Apex Court may put the party seeking stay on such terms the enforcement whereof would satisfy the demand for justice of the party found

successful at the end of the Appeal.

(v) The Apex Court does have the jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party which is successful at the end of the Appeal.

(vi) The Apex Court thereafter concluded that robust common sense, common knowledge of holding affairs and things gained by judicial experience and judicially noticeable facts over and above the material available on record thus provide inputs of relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on.

8 The Apex Court in Supermax International Pvt. Ltd. (supra) which matter was heard by a three Judge Bench of the Apex Court held that there was no conflict between Atma Ram Properties (P) Ltd. (supra) and Niyaz A Khan's case the Apex Court held that in any Appeal or Revision stay of the execution of the decree passed by the courts below cannot be asked as a matter of right. It is open to the Appellate or Revisional Court to stay the execution of the order or decree on terms including a direction to pay monthly rent at the rate higher than the contractual rent. The Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

9 The judgment in Atma Ram Properties (Supra) as also the other judgments on the said issue were cited before a Learned Single Judge of this Court in Chandrakant Dhanu's case. The Learned Judge in Chandrakant Dhanu's case culled out the principles which flow out of the said judgment. The said principles are revolving around what the Apex Court has held in Atma Ram Properties (P) Ltd and Supermax International Pvt Ltd. (Supra). It is therefore not necessary to dilate on the said principles any further. Thereafter another Learned Single Judge in Marjorie Passanah's case (supra) having regard to the Judgment of the Apex Court held that a balance would have to be struck in weighing the equities so that there is no substantial loss to either party. The Learned Single Judge held that the Court may consider as to what percentage of the market value in terms of licence fees the premises in question can fetch could be termed as reasonable. The Learned Single Judge thereafter has laid down the basis on which the amount as interim compensation can be fixed.

10 Now coming to the facts of the instant case as indicated above, the plot admeasuring 3341 sq.yards equivalent about 28000 sq.ft. was granted on lease basis to the predecessor of the Petitioners and a plot admeasuring 109 sq.yards equivalent to about 800 sq.ft. in the same property was assigned to the predecessor of the Petitioners. There is no dispute about the fact that there are structures and sheds put up by the Petitioners on the said plot of land. The

said structures and sheds during pendency of the Suit have been granted on leave and licence basis to various parties by the Petitioners. The said leave and licence agreements which have been brought on record by the Respondents and the area and the licence fees payable thereunder are tabulated herein under:

	Name of Licensee	Area	Licence fees	Deposit (Interest free)
1	Counsulate General of Canada	800 sq.ft.	Licence fees Rs.88,200/-	Rs.2,00,000/-
2	Blueme Venture Advisors Pvt Ltd.	848 sq.ft.	Licence fees Rs.91,800/-	Rs.5,50,000/-
3	Audio compass (India) Pvt Ltd.	589 sq.ft.	Licence fees Rs.70,680/-	Rs.2,12,040/-
4	Supernovo Retail Pvt Ltd.	200 sq.ft.	Licence fees Rs.21,000/-	Rs.1,26,000/-
5	New Jen Internet Working Pvt Ltd.	2685 sq.ft.	Licence fees Rs.1,87,500/-	Rs.16,00,000/ -
6	Zoomin Online India Pvt Ltd.	6865 sq.ft.	Licence fees Rs.4,32,500/-	Rs.43,20,600/ -
7	S. K. Constalation BLU Advisory Pvt Ltd.	1775 sq.ft.	Licence fees Rs.1,40,000/-	Rs.8,00,000/-

Hence as can be seen from the above table, the Petitioners have let out the said structures and sheds to various parties by taking rent free deposit and also payment of substantial licence fees. The licence fees as can be seen that is realised by the Petitioners is in the region of Rs.10,00,000/- per month. The agreements also provide for enhancement of licence fees to the extent of 5 to 10% every year or every two years. As indicated above, the

decree has been passed against the Petitioners i.e. the original Defendants on the ground of subletting. Whether the letting out of structures and sheds by the Petitioners amounts to subletting is a matter which obviously can be gone into at the hearing of the Appeal. This Court therefore is not required to go into the said aspect in the present proceedings. However, the fact remains that the valuation of the property and the return that the suit premises would fetch, would be contingent upon the licence fees that the structures and the sheds are fetching the Petitioners.

11 In so far as the reports of M/s S. M. Kini & Co. and Mr. H. S. Maniar are concerned, as indicated above both the valuers are registered estate valuers and they have carried out the exercise of valuation by adopting three methods i.e. the ready reckoner method, multiplier method and the licence fees method. After carrying out the said exercise the valuers of the Petitioners have concluded that the fair market rent of the property would be in the region of Rs.3,62,409/- whereas the valuers of the Respondents Mr. H. S. Maniar has concluded that the valuation would be Rs.27,38,353/-. However, as observed by the Appellate Bench of the Small Cause Court the said valuation has been carried out by the valuer Mr. H. S. Maniar by considering wrong parameters i.e. the wrong zone, nature of ownership, access to road, incorrect FSI, high rate of return. The Appellate Bench of the Small Causes Court has therefore observed that the valuation of M/s S.M. Kini

& Co. is too low whilst the valuation of Mr. H.S. Maniar is too high and has therefore not deemed it appropriate to go by the valuation of both the valuers but has chosen to fix the interim compensation by taking various factors into consideration and thereafter has come to a conclusion that Rs.10,00,000/- would be the correct interim compensation that would be payable by the Petitioners to the Respondents pending the Appeal. It would be apposite to refer to the principles laid down by the Apex Court in *Atma Ram Properties (Supra)*. The Apex Court as indicated above has held that the power to grant stay of the decree passed by the Trial Court is a discretion to be exercised by the Appellate Court. The Apex Court can be said to have crystallised the conditions that can be imposed by observing that the party seeking a stay order can be granted such stay on such terms as would reasonably compensate the party which is successful at the end of the Appeal. The Apex Court in *Supermax International Pvt Ltd. (Supra)* has held that whilst carrying out the said exercise the court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

12 It was the submission of Shri Sanglikar that in terms of the Judgment of the Learned Single Judge in Chandrakant Dhanu's case, the Petitioners i.e. the original Appellants cannot be directed to pay more than a percentage of the prevalent market licence fees. In my view, it is not possible to accept the said contention as the factor relied upon by Mr. Sanglikar is only

one of the factors amongst other factors which are to be taken into consideration whilst fixing the interim compensation as a condition for grant of stay, but the same would also depend on the facts and circumstances of each case. The Judgment of the Apex Court in Yacob's case (supra) would also have no application as in the said case the issue was of fixation of fair rent i.e. the standard rent under the Bombay Rent Act and it is in the said context that the Apex Court held that the value of the structures has no relevance. The facts of the instant case can be distinguished from the facts of the case that were there before the Apex Court in Yacob's case (supra) as in the instant case, the Petitioners are faced with a decree of eviction in respect of which decree they have sought a stay and therefore the Appellate Bench of the Small Causes Court was entitled to take into consideration amongst other things the monetary benefit that the Petitioners were deriving out of the structures and sheds. It is required to be noted that the suit premises i.e. the land is situated in Byculla that is in South Mumbai and it is about 4 to 5 kilometers from V. T. Station or Chatrapati Shivaji Terminus. The said land can therefore be said to be a prime property in the context of its location. The Petitioners are exploiting the said plot of land which has been leased and assigned to them by letting out the sheds and the structures which have been constructed on the said land. The tabular statement reproduced hereinabove shows that the licencees are Companies as well as the Canadian Consulate from whom the Petitioners have taken rent free deposit as also are getting handsome licence

fees. The conduct of the Petitioners shows that they have let out the premises when the Suit was pending. As can be seen from the tabular statement for an area of 6865 sq.ft. the Petitioners are getting licence fees of Rs.4,32,500/- per month. Faced with the situation wherein the valuation report produced by the Petitioners shows very low figure of Rs.3,62,409/- and the valuation report of the Respondents shows a very high figure of Rs.27,38,353/-. The Appellate Bench of the Small Causes Court took upon itself to fix the compensation having regard to the following factors namely land being lease hold, zone in which land is situated, available FSI, non touch road, structures being licenced, non onerous to the Appellants and non denying the right of the Appellants and fixed the compensation at Rs.10,00,000/- per month and also directed the deposit of said amount from a particular date and directed the Petitioners to furnish undertaking in terms of the operative part of the impugned order.

13 In so far as the amount fixed by the Appellate Bench of the Small Causes Court is concerned, the said amount would also have to be considered in the context of the licence fees and the interest free deposits which the Petitioners are getting from the licensee who are in occupation of various sheds in the suit premises. This is in view of the fact that by the judgments of the Apex Court it is well settled that the decree holder is required to be compensated for the loss caused to him on account of the decree being stayed.

If the said principle is applied, then the amount fixed at Rs.10,00,000/- per month cannot be said to be excessive, exorbitant or fanciful, as has been observed by the Apex Court in the case of Supermax International Pvt Ltd. (Supra). In my view therefore, no interference is called for with the quantum fixed by the Appellate Bench of the Small Causes Court.

14 In so far as the undertaking to be furnished by the Petitioners as directed by the operative part of the impugned order is concerned, in my view, the Petitioners cannot have any grievance about the said undertaking in so far as clauses (i) to (iii) as the said undertaking has been directed to be furnished so as to protect the interest of the decree holders i.e. the Respondents, as in the event the decree is confirmed by the Appellate Bench of the Small Causes Court, the Respondents would be entitled to the possession of the land alongwith structures / sheds thereon. However, to balance the equities between the parties as the interim compensation to be deposited by the Petitioners is Rs.10,00,000/-, clauses (iv) and (v) are required to be modified.

 In so far as clause (iv) is concerned, the said clause is amended to the following effect. “the Appellants would not create any third party rights in respect of the suit land and structures standing thereon save and except by way of leave and licence agreements in respect of which they would place the same on record of the Appellate Bench of the Small Causes Court as also inform the licensees of the pending Appeal and that their continuance in occupation would be subject to the result of the Appeal.

In so far as clause (v) is concerned, instead of the Appellants seeking leave of the court prior to entering into any sort of fresh transaction with the existing licensee of the structures, the said clause is substituted by the following clause. “ The Appellants to inform the Appellate Bench of the Small Causes Court of any new transaction entered into with the existing licensee of the structures and also put the licensee to notice of the pending Appeal”. However the same would be subject to clause (iv) as above. The Appellants to filed the undertaking latest by 6-6-2017.

It is made clear that clauses (iv) and (v) as above would be without prejudice to the rights and contentions of the parties in the Appeal.

15 Hence save and except to the extent as above, this Court does not deem it appropriate to interfere with the impugned order. The Writ Petition is accordingly dismissed. Rule discharged with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]

Date: 5th May, 2017

At this stage the Learned Counsel for the parties make a joint request for the expeditious hearing of the Appeal. Considering that the Suit is of the year 1973, the hearing of the Appeal is expedited.

[R.M.SAVANT, J]