

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

**WRIT PETITION NO. 6587 OF 2017**  
**WITH**  
**CIVIL APPLICATION NO. 1347 OF 2017**

|                          |               |
|--------------------------|---------------|
| Mr. Vinod Sadanand Patil | ...Petitioner |
| <b>Vs.</b>               |               |
| Dilip Vimalanand Kopikar | ...Respondent |

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Mrs. Neeta Karnik i/b Mr. Mihir N. Joshi, for the Petitioner.  
Mr. K. Kharawala i/b Lex Juris, for the Respondent .

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**CORAM : B.P. COLABAWALLA, J.**  
**DATED : JULY 21, 2017**

**P.C. :**

Rule. Respondent waive service. By consent of parties rule made returnable forthwith and heard finally.

2 By this Writ Petition filed under Article 227 of the Constitution of India. The Petitioner challenges two orders, both dated 15th April, 2017 passed below Exhibit-32 and Exhibit-34 respectively. Exhibit-32 was an Application filed by the Respondent seeking reimbursement and arrears of compensation. According to the Respondent, this Application was filed pursuant to the consent terms that were entered into between the parties before this Court dated 5<sup>th</sup> August, 2015

(Page No. 79 of the paper book). Exhibit-34 was an Application filed by the Petitioner herein seeking permission of the Appellate Court to lead additional evidence in terms of Order 41 Rule 27 of the Code of Civil Procedure, 1908.

3 I have gone through the papers and proceedings in this Writ Petition and also heard the learned counsel for the parties. The few facts that need to be noted are that the Petitioner is the licensee of a premises admeasuring approximately 6000 sq. ft. situated at Plot No. 10/2, Sector – 18, Opposite Euro School, besides Bharat Gas Godown, Airoli, Navi Mumbai – 400 708 (hereinafter referred to as the “suit premises”). A leave and license agreement dated 4<sup>th</sup> October, 2011 was entered into between the Petitioner and the Respondent in relation to the suit premises. The compensation payable for taking these premises on leave and license was also specifically mentioned in the said agreement. Since, the Petitioner paid the license fees only for the first nine months and thereafter defaulted in payment of the license fees, the same was terminated by the Respondent. Thereafter, the Respondent filed a suit in the Court of Civil Judge (J.D.) Vashi, New Mumbai being Regular Civil Suit No. 171/2013 seeking

possession of the licensed premises as well as for arrears of compensation.

4 To contest the suit, the Petitioner also filed his written statement. Thereafter, the Respondent filed an Application seeking a direction against the Petitioner to deposit the arrears of compensation in Court, this Application was filed as Exhibit-9. By an order dated 13<sup>th</sup> July, 2014, the trial Court directed the Petitioner to deposit the arrears of compensation. Since the Petitioner did not comply with the aforesaid order, the trial Court ultimately struck off the defence of the Petitioner by its order dated 28<sup>th</sup> December, 2014. Thereafter, the suit came to be decreed by the trial Court on 17<sup>th</sup> January, 2015.

5 Being aggrieved by the order passed by the trial Court decreeing the suit, the Petitioner preferred an Appeal before District Judge, Thane (the Appellate Court). Along with the appeal the Petitioner also filed an Application for stay at Exhibit-5. This Application was disposed of by the Appellate Court by its order dated 30<sup>th</sup> April, 2015 wherein the stay of the execution of the trial Court decree was granted subject to the Petitioner depositing 50% of the arrears of

compensation from the date of the suit till the date of the appeal and 50% of the agreed rent as per the leave and license agreement from 18<sup>th</sup> March, 2015 till the disposal of the appeal. This order came to be challenged by the Petitioner by approaching this Court in its writ jurisdiction by filing Writ Petition No. 5734 of 2015. This Writ Petition was disposed of by consent of parties wherein the Petitioner agreed to handover peaceful possession of the suit premises to the Respondent. It was further agreed between the parties that the claim of the Respondent with respect to reimbursement of outgoings paid by them and also the quantum of compensation was to be decided by the Appellate Court on an Application to be preferred by the Respondent. The Respondent also undertook not to pursue the execution application till such time the appeal filed by the Petitioner was decided by the Appellate Court.

6 Pursuant to these consent terms, the Respondent preferred Exhibit-32 for computing the arrears of compensation and a direction asking the Petitioner to pay the same to the Respondent. This Application was heard by the Appellate Court and by its order dated 15<sup>th</sup> April, 2017 (for short “the first impugned order”) directed the

Petitioner to pay the amount of compensation of Rs. 1,38,55,600/- together with interest at 12% per annum from the date of the filing of the appeal till its realization. This amount was to be paid within one month from the date of the order. The Appellate Court gave a further direction that if the Petitioner failed to pay / deposit this amount with interest, the appeal would stand dismissed and the Respondent would have an opportunity to recover the amount as per the Rules.

7 On the same day, the Appellate Court also passed an order in Exhibit-34 which was an Application filed by the Petitioner for leading additional evidence under Order 41 Rule 27 of the Code of Civil Procedure, 1908 (for short “the second impugned order”). The Appellate Court, after hearing the Petitioner, was of the view that no case was made out for leading additional evidence as contemplated under Order 41 Rule 27 and therefore proceeded to dismiss the Application for leading additional evidence (Exhibit-34). It is being aggrieved these two impugned orders that the Petitioner is before me in my writ jurisdiction under Article 227 of the Constitution of India.

8 In this factual backdrop, Mrs. Neeta Karnik, the learned counsel appearing on behalf of the Petitioner, submitted that the first impugned order (namely the order passed below Exhibit-32) was clearly wrong in so far as the Appellate Court gave a direction for dismissal of the appeal if the Petitioner did not deposit the amount of compensation of Rs. 1,38,55,600/-. She submitted that the statutory right of appeal could not be taken away by the Appellate Court in this fashion if the said payment of compensation was not made by the Petitioner. The Respondent had other remedies in law so as to have that order executed, but the Appellate Court could certainly not have dismissed the appeal, who the submission.

9 Mr. K. Kharawala, the learned counsel appearing on behalf of the Respondent fairly submitted and conceded that the Appellate Court could not have dismissed the appeal of the Petitioner in this fashion. He submitted that to this extent, the order of the Appellate Court dated 15<sup>th</sup> April, 2017 passed below Exhibit-32 can be modified.

10 As far as the second impugned order is concerned, Mrs. Neeta Karnik submitted that the Appellate Court ought to have allowed the

Petitioner to lead additional evidence. She submitted that the leave and license agreement entered into between the parties was to enable the Petitioner to run a hospital. It has now come to light that the licensed premises could be used only for Storage/Godown for LPG and Display of LPG Gas. This being the position, the same would have a serious bearing on the out come of the appeal and therefore the Petitioner ought to have been allowed to lead additional evidence. On this issue, I am unable to agree with Mrs. Neeta Karnik. The Appellate Court has passed a detailed order from Page Nos. 57 to 61 of the paper book. The Appellate Court has come to a categorical finding that no case has been made out for leading additional evidence under Order 41 Rule 27 of Civil Procedure Code, 1908. In fact, on going through the Application for leading additional evidence (Exhibit-34), I find that absolutely no grounds are made out as contemplated under the said provision. This being the position, I do not find any fault with the second impugned order passed by the Appellate Court below Exhibit-34.

11 For the forgoing reasons, the following order is passed:

**ORDER**

- (i) The first impugned order dated 15<sup>th</sup> April, 2017

passed below Exhibit-32 is set aside in so far as it directs that on the failure of the Petitioner to deposit the amount of Rs. 1,38,55,600/-, the appeal is to stand dismissed. It is made clear that the said order is upheld in so far as the amount of compensation fixed of Rs. 1,38,55,600/- is concerned. If this amount is not paid, the Respondent is at liberty to take out appropriate proceedings for recovery of this amount that he may be entitled to in law.

(ii) As far as the second impugned order is concerned, I do not find that the same suffers from any perversity or an error apparent on the face of the record requiring my interference. This order therefore is not disturbed.

12 Rule is made absolute in the aforesaid terms. However in the facts and circumstances of the case, there shall be no order as to cost. In view of the disposal of the Writ Petition, nothing survive in Civil Application No. 1347 of 2017 and the same is disposed of accordingly.

**(B. P. COLABAWALLA, J.)**