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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4881 OF 2013

Cawasji Behramji Catering Services Pvt Ltd

...Petitioner

Versus

Foundations

...Respondent

Ms Anita Castelino, for the Petitioner.

**Mr Ravi Kadam, Senior Advocate, a/w Mr Birendra Saraf, Sunil
Tilokchandani, Subhasree Chatterjee, Akshi Gandhi, i/b M/s.
Manilal Kher Ambalal & Co, for the Respondent.**

CORAM: G.S. PATEL, J

DATED: 7th November 2017

PC:-

1. Rule. Respondent waives service. By consent, rule is made returnable forthwith and taken up for hearing and final disposal.
2. The case arises squarely under Chapter VIII of the Maharashtra Rent Control Act 1999. It pertains to the refusal to grant leave to defend in an application made by the owner-licensor under Section 42 of that Act.
3. Having heard Ms Castelino for the Petitioner and Dr Saraf for the Respondents at some length, and having considered the rival

submissions and the material on record, I am not persuaded that the orders impugned call for any interference.

4. The Writ Petition is directed against an order dated 15th May 2013 of the Additional Commissioner, Konkan Division confirming an order dated 7th August 2012 of the Competent Authority. The Additional Commissioner passed his order in a Revision Application filed by the present Writ Petitioners. He rejected the Revision Application and confirmed the order of the Competent Authority refusing to grant the Petitioner leave to defend.

5. The previous history is somewhat convoluted, but in summary runs like this. On 19th November 2010, the Petitioner and the Respondent entered into Leave and License Agreement¹ for premises that are described as Flat No. 701 and 702 of the 7th floor of a building known as “The Moorings” at 56, St. Paul Road, Bandra (West), Mumbai 400 050. Evidently the premises are luxury apartments being in a prime locality. The two flats admeasure 2800 sq. feet and 2200 sq. feet respectively. The Petitioner is a private limited company wholly controlled by members of the Arambhan family. The term of this agreement was for 24 months.

6. There were the usual complaints during the period of the Leave and License Agreement, and it was ultimately terminated when the Respondent sent an advocate’s notice dated 10th March 2012,² and a subsequent email of 2nd April 2012.³ I will not spend

1 Exhibit “B”, *p.* 67.

2 Exhibit “D”, *pp.* 103-107.

3 Exhibit “F”, *pp.* 110-113.

more time on a consideration of Ms Castelino's submission that the grounds for termination do not inspire confidence (they speak of several types of nuisance etc), since that is quite irrelevant to the consideration at hand. There was also a case of structural alterations and a failure to insure the premises. It is enough to note that the Petitioner replied to these termination notices, denying the various allegations. On 21st April 2012, the Respondent filed an eviction application number 32 of 2012 before the Competent Authority, Mumbai Konkan Division. In this it sought compensation of Rs.50,000/- per day. There is a provision in the Leave and License Agreement itself for compensation beyond termination.

7. Section 41 of the Maharashtra Rent Control Act 1999 reads thus:

"41. Definition of landlord for the purpose of Chapter VIII.

For the purposes of this Chapter, landlord means a landlord who is,—

(a) a person who has created a service tenancy in respect of his premises or a part thereof in favour of his employee under section 22;

(b) a member of the armed forces of the Union or a scientist or a Government servant or a successor-in-interest, referred to in section 23; or

(c) a person who has given premises on license for residence or a successor-in-interest referred to in section 24."

8. It is obvious from clause (c) that this chapter applies to premises given on leave and license for residential purposes.

9. Section 42 of the Maharashtra Rent Control Act 1999 reads thus:

"42. Special provisions for making application to Competent Authority by landlord to evict tenant or licensee

Notwithstanding anything contained in this Act or any other law for the time being in force or any contract to the contrary or any judgment or decree or order of any court, but subject to the provisions of section 22 or 23 or 24 as the case may be; a landlord may submit an application to the Competent Authority, signed and verified in a manner provided in rules 14 and 15 of Order VI of the First Schedule to the Code of Civil Procedure, 1908, as if it were a plaint, to the Competent Authority having jurisdiction in the area in which the premises are situated, for the purpose of recovery of possession of the premises from the tenant or licensee, as the case may be."

10. A special procedure is then provided in Section 43, which reads thus:

"43. Special procedure for disposal of applications.

(1) Every application by a landlord under this Chapter for the recovery of possession shall be accompanied by such fees as may be prescribed. The Competent Authority shall deal with the application in accordance with the procedure laid down in this section.

(2) The Competent Authority shall issue summons in relation to every application referred to in sub-section (2) in the form specified in Schedule III.

(3)(a) The Competent Authority shall, in addition to, and simultaneously with; the issue of summons for service on the tenant or licensee, as the case may be, also direct the summons to be served by registered post, acknowledgement due, addressed to the tenant or the licensee or agent empowered by such tenant or licensee to accept the service at the place where the tenant or licensee or such agent actually and voluntarily resides or carries on business or personally works for gain;

(b) When an acknowledgment purporting to be signed by the tenant or licensee or their agent received by the Competent Authority or the registered article containing the summons is received back with an endorsement purporting to have been made by a postal employee to the effect that the tenant or licensee or their agent had refused to take delivery of the registered article, the Competent Authority may proceed to hear and decide the application as if there has been a valid service of summons.

(4)(a) The tenant or licensee on whom the summons is duly served in the ordinary way or by registered post in the manner laid down in sub-section (3) shall not contest the prayer for eviction from the premises, unless within thirty days of the service of summons on him as aforesaid, he files an affidavit stating grounds on which he seeks to contest the application for eviction and obtains leave from the Competent Authority as hereinafter provided, and in default of his appearance in pursuance of the summons or his obtaining such leave, the Statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant or the licensee, as the case may

be, and the Applicant shall be entitled to an order for eviction on the ground aforesaid,

(b) The Competent Authority shall give to the tenant or licensee leave to contest the application **if the affidavit filed by the tenant or licensee discloses such facts as would disentitle the landlord from obtaining an order for the recovery of possession of the premises on the ground specified in section 22 or 23 or 24;**

(c) Where leave is granted to the tenant or licensee to contest the application, the Competent Authority shall commence the hearing of the application as early as practicable and shall, as far as possible, proceed with the hearing from day to day, and decide the same, as far as may be, within six months of the order granting of such leave to contest the application.

(5) The Competent Authority shall, while holding an inquiry in a proceeding to which this Chapter applies, follow the practice and procedure of a court of small causes, including the recording of evidence."

(Emphasis added)

11. Now it is clear that this is a summary proceeding; permission for leave to defend must be obtained before an application can be contested. The discretion is wider, and is to be more liberally construed: the facts disclosed in the tenant's affidavit seeking leave should be such as would disentitle a licensor to an order of eviction. That in turn postulates that it is not any and every defence or statement of facts that automatically yields leave to defend; were that so, there was no need for the section at all. The section requiring leave operates as a filter, though this is not overly fine-

meshed but a broader sieve through which much may yet pass. Even so, the facts are to be directed to this: that on those facts, the licensor is not entitled to an order of eviction.

12. The defence here was, and this was pleaded in the application filed by the Respondent on 25th May 2012 for leave to defend, that the Leave and License Agreement was executed at the Respondents' request merely for convenience; the true intent was a transaction of sale; that there was an Agreement of Sale, and this was executed on the same day. However, it was never registered. A copy of the document that is so invoked is from page 56 onwards and it was annexed to the application for leave to defend. Though this document may have been signed, it does not seem to be, strictly speaking, an agreement for sale but one that grants the directors of the Petitioner an in-principle first refusal or first option for purchase of these very premises to be exercised in the last month of the leave and licence agreement; an understanding that obviously postulates that the agreement runs its full term without hindrance or hitch. I do not believe this fits the requirement of the section. There is no agreement of sale properly so-called; an in-principle first-refusal option, and that too one available to individuals, and, further, one that operates only if the license runs its full term, is not one that can be said to create any rights in favour of the company-licensee on a premature termination for cause.

13. The application for leave to defend was contested with pleadings going up to the stage of sur-rejoinder. On 7th August 2012, by a fairly elaborate order, the Competent Authority rejected

the application for leave to defend.⁴ There followed a second order directing the eviction of the Petitioner.

14. The Petitioner filed Revision Application No. 527 of 2012 and sought stay. That application for stay was rejected on 1st October 2012. In the meantime, the Petitioner filed Writ Petitions Nos. 3396 of 2013 and 3763 of 2013. These were disposed of by this Court by its order dated 16th April 2013 but these related to the orders passed in attachment proceedings regarding the money claim.

15. Ultimately, the impugned order of the Appellate Authority was passed on 15th May 2013 rejecting the Petitioner's Revision Application and, therefore, confirming the refusal of leave to defend.⁵

16. I have considered this order carefully. It seems to me difficult to find fault with it. Certainly, it is not an order that can be said to be perverse or one that takes an implausible view. The Appellate Authority noted that while there may be a separate agreement in the nature of agreement for sale, first, that would be the subject matter of a specific performance suit; and, in any case, the agreement was not with the company but was an agreement granting a first option to the Petitioner's directors. To say, therefore, that the company had a right to purchase was incorrect. I agree.

17. The Competent Authority was also correct in saying that it is difficult to see how the 'purpose' of a leave and license agreement

4 Exhibit "O", pp. 219-223.

5 Exhibit "CC", pp. 337-347.

could be dislodged by leading oral evidence contrary to its stated terms. The second explanation to Section 24 was referred to and the Appellate Authority was correct in holding that this document once produced is conclusive evidence of the facts contained in it. The Competent Authority had held that on the basis of the documents filed before it there was no question of allowing the Petitioner to impeach the breaches alleged. The Appellate Authority considered this approach of the Competent Authority and found no fault with it. Equally I can find no fault with the view taken by the Appellate Authority either. In any case, the issue seems to be covered by the decision of this Court in *Surendra B Agarwal v AML Merchandising Pvt Ltd*⁶ and *AMI Merchandising Pvt Ltd v State of Maharashtra & Ors.*⁷ The decision in *Surendra Agarwal* is very close in its factual conspectus to the facts of this case. There, too, there was an option to one Nirav Mody to purchase the suit premises. It may be that on the facts of that case the Court was moved to set aside the order in revision (the Appellate Authority having granted leave) but that was on entirely different considerations and particularly because the Additional Commissioner did not examine the legality and propriety of the order passed by the Competent Authority. In that matter, the Appellate Authority in revision went too far afield and ignore the limited scope or proceedings under Section 115 of the Code of Civil Procedure, 1908. In the present case, the order in revision suffers from no such infirmity.

62010 (5) Bom CR 331 : 2010 (1) Mh LJ 223.

72014 (3) Bom CR 248 : 2014 (3) Mh LJ 257.

18. Ms Castelino relies on the decision of the Supreme Court in *Inderjeet Kaur v Nirpal Singh*.⁸ That sets out a general proposition that no person should suffer a civil consequence like eviction without being given an adequate opportunity. This is obviously not to be read in the context of a specific statutory embargo which says that a party will not have leave to defend unless sufficient cause is made out. One cannot possibly read such a provision off the statute book entirely and certainly not in pursuit of a general principle, however desirable or laudable.

19. She then relies on the decision of the Supreme Court in *Precision Steel & Engineering Works & Anr v Prem Deva Niranjan Deva Tayal*⁹ for the observations in paragraphs 10 to 12. Indeed it seems to me peculiar that this passage should at all be relied on by the Petitioner in this case. Those observations, in my view, would not assist the Petitioner quite as much they imagine. This was said in the context of the Delhi Rent Control act.

10. **Undoubtedly the procedure prescribed in Chapter III-A of the Act is materially different in that it is more harsh and weighted against the tenant. But should this procedural conundrum change the entire landscape of law?** When a landlord approaches Controller under Section 14(1) proviso (e), is the court to presume every averment in the petition as unchallengeable and truthful? **The consequence of refusal to grant leave must stare in the face of the Controller that the landlord gets an order of eviction without batting the eyelid. This consequence itself is sufficient to liberally approach the**

⁸(2001) 1 SCC 706.

⁹(1982) 3 SCC 270.

prayer for leave to contest the petition. While examining the question whether leave to defend ought or ought not to be granted the limited jurisdiction which the Controller enjoys is prescribed within the well-defined limits and he cannot get into a sort of a trial by affidavits preferring one set to the other and thus concluding the trial without holding the trial itself. Short-circuiting the proceedings need not masquerade as a strict compliance with sub-section (5) of Section 25-B. The provision is cast in a mandatory form. **Statutory duty is cast on the Controller to give leave as the legislature uses the expression “the Controller shall give” to the tenant leave to contest if the affidavit filed by the tenant discloses such fact as would disentitle the landlord for an order for recovery of possession.** The Controller has to look at the affidavit of the tenant seeking leave to contest. **Browsing through the affidavit if there emerges averment of facts which on a trial, if believed, would non-suit the landlord, leave ought to be granted.** Let it be made clear that the statute is not cast in a negative form by enacting that the Controller shall refuse to give to the tenant leave to contest the application unless the affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order, etc. That is not the mould in which the section is cast. **The provision indicates a positive approach and not a negative inhibition.** When the language of a statute is plain, the principle that legislature speaks its mind in the plainest language has to be given full effect. No canon of construction permits in the name of illusory intendment defeating the plain, unambiguous language expressed to convey the legislative mind. And the legislature had before it Order 37, an analogous provision where leave to defend is to be granted and yet avoiding the phraseology of the Code of Civil Procedure, namely, “substantial defence” and “vexatious and frivolous

defence”, the legislature used the plainest language, “facts disclosed in the affidavit of the tenant”.

11. **The language of sub-section (5) of Section 25-B casts a statutory duty on the Controller to give to the tenant leave to contest the application, the only pre-condition for exercise of jurisdiction being that the affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order for the recovery of possession of the premises on the ground mentioned in Section 14(1)(e).** Section 14(1) starts with a non obstante clause which would necessarily imply that the Controller is precluded from passing an order or decree for recovery of possession of any premises in favour of the landlord against the tenant unless the case is covered by any of the clauses of the proviso. The proviso sets out various enabling provisions on proof of one or the other, the landlord would be entitled to recover possession from the tenant. One such enabling provision is the one enacted in Section 14(1) proviso (e). Upon a true construction of proviso (e) to Section 14(1) it would unmistakably appear that the burden is on the landlord to satisfy the Controller that the premises of which possession is sought is (i) let for residential purposes; and (ii) possession of the premises is required bona fide by the landlord for occupation as residence for himself or for any member of his family etc.; and (iii) that the landlord or the person for whose benefit possession is sought has no other reasonably suitable residential accommodation. This burden, landlord is required to discharge before the Controller gets jurisdiction to make an order for eviction. This necessarily transpires from the language of Section 14(1) which precludes the Controller from making any order or decree for recovery of possession unless the landlord proves to his satisfaction the conditions in the enabling

provision enacted as proviso under which possession is sought. Initial burden is thus on the landlord.

12. The question is whether this burden is in any way diluted or stands discharged or wholly shifted to the tenant because of a different procedure prescribed in Chapter III-A of the Act. Section 25(4) provides that in default of the appearance of the tenant in pursuance of the summons or his obtaining such leave, the statement made by the landlord in the application for eviction shall be deemed to be admitted by the tenant and the landlord shall be entitled to an order for eviction on the ground set out in Section 14(1)(e). On a combined reading of Section 14(1) proviso (e) with Section 25-B(1) and (4) the legal position that emerges is that on a proper application being made in the prescribed manner which is required to be supported by an affidavit, unless the tenant obtains leave to defend as contemplated by sub-sections (4) and (5) of Section 25-B, the tenant is deemed to have admitted all the averments made in the petition filed by the landlord. The effect of these provisions is that the Controller would act on the admission of the tenant and there is no better proof of fact as admission, ordinarily because facts which are admitted need not be proved. But what happens if the tenant appears pursuant to the summons issued, under sub-section (2) of Section 25-B, files an affidavit stating the grounds on which he seeks to contest the application. As a corollary it would transpire that the facts pleaded by the landlord are disputed and controverted. How is the Controller thereafter to proceed in the matter? It would be open to the landlord to contest the application of the tenant seeking leave to contest and for that purpose he can file an affidavit in reply but production and admission and evaluation of documents at that stage has no place. **The Controller has to confine himself to the affidavit filed by the tenant under sub-section (4) and the reply,**

if any. On perusing the affidavit filed by the tenant and the reply if any filed by landlord the Controller has to pose to himself the only question: Does the affidavit disclose, not prove, facts as would disentitle the landlord from obtaining an order for the recovery of possession on the ground specified in clause (e) of the proviso to Section 14(1)? The Controller is not to record a finding on disputed questions of facts or his preference of one set of affidavits against other set of affidavits. That is not the jurisdiction conferred on the Controller by sub-section (5) because the Controller while examining the question whether there is a proper case for granting leave to contest the application has to confine himself to the affidavit filed by the tenant disclosing such facts as would prima facie and not on contest disentitle the landlord from obtaining an order for recovery of possession. At the stage when affidavit is filed under sub-section (4) by the tenant and the same is being examined for the purposes of sub-section (5) the Controller has to confine himself only to the averments in the affidavit and the reply if any and that becomes manifestly clear from the language of sub-section (5) that the Controller shall give to the tenant leave to contest the application if the affidavit filed by the tenant discloses such facts as would disentitle the landlord from recovering possession etc. The jurisdiction to grant leave to contest or refuse the same is to be exercised on the basis of the affidavit filed by the tenant. That alone at that stage is the relevant document and one must confine to the averments in the affidavit. If the averments in the affidavit disclose such facts which, if ultimately proved to the satisfaction of the court, would disentitle the landlord from recovering possession, that by itself makes it obligatory upon the Controller to grant leave. It is immaterial that facts alleged and disclosed are controverted by the landlord because

the stage of proof is yet to come. It is distinctly possible that a tenant may fail to make good the defence raised by him. Plausibility of the defence raised and proof of the same are materially different from each other and one cannot bring in the concept of proof at the stage when plausibility has to be shown. This view taken in *B. Kanjibhai v. Mohanraj Rajendrakumar* [AIR 1970 Guj 32 : 11 Guj LR 140] and *Kishan Singh v. Mohd. Shafi* [AIR 1964 J&K 39 : 1964 Kash LJ 92] appears to have been approved in *Santosh Kumar v. Bhai Mool Singh* [AIR 1958 SC 321 : 1958 SCR 1211, 1217 : 1958 SCJ 434] where at SCR p. 1217 this Court while commenting upon an order granting conditional leave under Order 37 Rule 3, passed by the trial Judge which was to this effect: "In the absence of these documents, the defence of the defendants seems to be vague consisting of indefinite assertions...", observed as under:

"This is a surprising conclusion. The facts given in the affidavit are clear and precise, the defence could hardly have been clearer. We find it difficult to see how a defence that, on the face of it, is clear becomes vague simply because the evidence by which it is to be proved is not brought on file at the time the defence is put in.

The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the court has to determine is whether 'if the facts alleged by the defendant are duly proved' they will afford a good, or

even a plausible, answer to the plaintiff's claim. Once the court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains."

The manifest error committed in the procedure followed at present by the Controller under Section 25-B may be pointed out. The tenant has to file an affidavit stating the grounds on which he seeks to contest the application. The Controller may accept an affidavit in reply if landlord chooses to file one. So far there is no difficulty. There then follows affidavit in rejoinder and sur-rejoinder and the documents are produced and when this procession ends the Controller proceeds to examine the rival contentions as if evidence produced in the form of the affidavits untested by cross-examination and unproved documents are before him on the appreciation and evaluation of which he records an affirmative finding that the facts disclosed in the affidavit of tenant are not proved and therefore leave to contest should be refused. In our opinion, this is wholly impermissible. The regular trial required to be held by a Court of Small Causes as contemplated by sub-section (6) read with sub-section (7) of Section 25-B is not to be substituted by affidavits and counter-affidavits at the stage of considering tenant's affidavit filed for obtaining leave to contest the petition under sub-section (4). Sub-section (6) enjoins a duty on the Controller where leave is granted to the tenant to contest the application to commence the hearing of the petition as early as practicable and sub-section (6) prescribes procedure to be followed as if the Controller is a Court of Small Causes. The Court of Small Causes follows the summary procedure in the adversary system where witnesses are examined and cross-

examined and truth of averment is decided on the touchstone of cross-examination. A speedy trial not conforming to the well-recognised principle of arriving at truth by testing evidence on the touchstone of cross-examination, should not be easily read into the provision at a stage not contemplated by the provision unless the statute positively by a specific provision introduces the same. The scheme of Section 25-B does not introduce a trial for arriving at the truth at the stage of proceeding contemplated by sub-section (4) of Section 25-B.

(Emphasis added)

20. The one essential requirement that emerges from any reasonable reading of these two authorities is that leave to defend is not to be granted for the asking. The consequence of a refusal of the leave is indeed severe and a liberal approach is certainly to be commended. But liberal-mindedness cannot be stretched to the extent that it can render a statutory provision illusory or otiose. Some meaning and heft must be accorded to the words of the statute. Otherwise, the filing an application for leave to defend would be an empty formality and leave to defend would follow as a matter of course.

21. In any case, *Precision Steel* has been considered at length by RG Ketkar J in the decision in *AMI Merchandising Pvt Ltd* in a factual scenario that is as close as it is possible to get to the present case.¹⁰ In paragraph 37 Ketkar J said:

10 This was second round after the decision in *Surendra Agarwal* remanding the matter. The same parties are involved, and in *Surendra Agarwal*, the name of the respondent seems to have been wrongly shown as AML Merchandising instead of AMI Merchandising. The same

"37. Section 47 lays down that save as otherwise expressly provided in the Act, no civil court shall have jurisdiction in respect of any matter which the Competent Authority or the State Government or an officer authorised by it is empowered by or under the Act to decide, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power so conferred on the Competent Authority or the State Government or such officer. The provisions of Chapter VIII cannot be invoked for deciding eviction proceeding either under section 15 or 16 of the Maharashtra Rent Act. Understood thus, decision of the Apex Court in the case of *Precision Steel & Engineering Works & Indrajeet Kaur (supra)* is not applicable while considering the provisions of Maharashtra Rent Act for deciding applications filed under Chapter VIII of the Maharashtra Rent Act."

22. I am bound by this decision, and I am bound to follow it; and, in any case, it is not demonstrated that the decision in *AMI Merchandising* is capable of being distinguished or is *per incuriam*.

23. These decisions, therefore, will not assist Ms Castelino in her endeavour.

24. Two final points remained for consideration. The first is that the Respondent has already recovered possession in 2012 and there is the order of recovery of Rs. 50,000/- per day apparently against the Petitioner. There is no question of restoring possession today.

person, Nirav Modi, claimed that he had an option to purchase the flat in question. In the case before Ketkar J, he sought to intervene, invoking these rights.

Second, the Petitioner has filed a substantive suit for specific performance of the so-called agreement for sale and this is pending. Consequently, no purpose at all would be served by interfering with this order even if sufficient cause for interference was made out and which, in my view, it most emphatically is not.

25. The Writ Petition is dismissed. There will be no order as to costs.

26. At this stage, Dr Saraf refers to previous orders dated 16th April 2013 and 5th June 2013 in regard to the amount of Rs. 87 lakhs lying with the Bank of India, Khar Branch. This is the amount that was directed to be deposited. On 5th June 2013, on behalf of the Respondent a statement was made that it would not recover this sum from the Bank of India, Khar Branch till 18th June 2013. This statement has continued since. Dr Saraf requests that the Respondent be now relieved of this statement, so that the amount of Rs. 87 lakhs can be recovered. Ms Castelino of course asks for continuation of the statement.

27. The stay has been operative for far too long. I do not see any merit in this case. Dr Saraf submits that the Respondent may be permitted to withdraw this amount with all accrued interest against an undertaking to bring back the amount with appropriate interest is sufficient. That submission is accepted, and permission as sought is granted subject to the furnishing of an undertaking. That undertaking will be furnished within two weeks from today and it will be to this extent, that the Respondent will bring back the entire

amount withdrawn with interest as it is currently earning. That undertaking will survive for a period of 12 weeks from today.

(G. S. PATEL, J)