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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6018 OF 2017

Ramesh Hiranand Kundanmal ...Petitioner.
vs
Samir Narain Bhojwani & Ors. ...Respondents.

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Mr P.K.Dhakephalkar, Sr. Counsel a/w Mr Vivek Kantawala a/w Mr Amey Patil, Ms Pari Mohan i/b Jaydeep Jawahar Thakkar for the Petitioner.
Mr Aspi Chinoy, Sr. Counsel a/w Mr D.V.Deokar a/w Mr Subodh Joshi a/w Mr Pinakin Modi i/b M/s Parimal K. Shroff & Co. for Respondent No.1.
Mr Minoo Siodia a/w Ms Ashiya Shaikh i/b M/s Rustamji & Ginwala for Respondent No.2.

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CORAM : **B.P.COLABAWALLA, J.**
***JUNE 16*, 2017.**

P.C. :

This Writ Petition has been filed challenging the Judgment and Order dated 15th April, 2017 passed by the Appellate Bench of the Small Causes Court at Mumbai in the application of the Petitioner for stay in Appeal No.333 of 2016. By the impugned order the Appellate Bench of the Small Causes Court, Mumbai granted stay of the eviction decree passed by the Trial Court on the condition that the Appellant (the Petitioner herein) as well as Respondent No.2 (Respondent No.2 herein) shall deposit within a period of 2 months interim compensation

@ Rs.300/- per square foot per month for the total area of the suit premises admeasuring 6855 sq.ft., from the date of the decree (5th May, 2016) till the date of the impugned order. A further direction was given that the Petitioner herein shall go on depositing further monthly interim compensation at the above rate per month on or before the 15th day of each month till final disposal of the appeal. Being aggrieved by this conditional order, the Petitioner is before me in my writ jurisdiction under Article 227 of the Constitution of India.

2 The Petitioner is the original Defendant No.2 in TE & R Suit No. 351/371 of 2001 filed in the Small Causes Court at Mumbai under Section 41 of the Presidency Small Causes Court Act. Respondent Nos.3 to 7 in this Writ Petition were the original Plaintiffs in the said suit and were the owners of the suit premises. Thereafter, Respondent No.1 herein was substituted as the Plaintiff in place of Respondent Nos.3 to 7 as he claimed to have acquired the suit premises under a Deed of Conveyance dated 3rd September, 2010. Respondent No.2 herein was the original Defendant No.1 in the said suit. For the sake of convenience, I shall refer to the parties as they were arrayed

before the Trial Court.

3 The said TE & R Suit No. 351/371 was filed by the Plaintiff seeking eviction of Defendant No.1 as also Defendant No.2 from the suit premises on the ground that the lease granted to Defendant No.1 had expired and the notice to quit was given by the Plaintiff to Defendant No.1. The suit premises are described as a piece and parcel of land admeasuring 1169 sq. yards (977.455 sq. meters) bearing cadestral Survey No. 710 of Malabar & Cumballa Hill Division. It is the case of the Plaintiff that the suit premises had been let out on yearly rent of Rs.81,720/-.

4 This suit was contested by both the Defendants by filing their Written Statement. On the basis of the pleadings before the Trial Court, issues were framed and thereafter the suit proceeded to trial. Ultimately this suit was decreed by a judgment and decree dated 5th May, 2016 and Defendant Nos.1 and 2 were directed to handover vacant and peaceful possession of the suit premises situated at 41 Peddar Road, more particularly described in the schedule to the plaint.

5 Being aggrieved by this judgment and decree, Defendant No.1 as well as Defendant No.2 both filed appeals before the Appellate Bench of the Small Causes Court at Mumbai. The 1st Defendant's appeal was numbered as Appeal No. 343 of 2016 whereas the appeal of the 2nd Defendant (the Petitioner herein) was numbered as Appeal No.333 of 2016.

6 In the appeal filed by the 2nd Defendant he made an application at Exh.7 for stay of the operation and execution of the impugned judgment and decree dated 5th May, 2016 passed by the Trial Court on the grounds more particularly set out in the said application. In the said application, the 2nd Defendant sought to rely upon a valuation report dated 20th August, 2016 whereby the valuer came to the opinion that fair market compensation for the land provided for the petrol pump under reference would be approximately Rs.58,000/- per month. Over and above this valuation report the 2nd Defendant also relied upon a notification issued by the Government of Maharashtra as well as Regulation 69 of the Development Control Regulations, Mumbai to substantiate the argument that the suit premises

were restricted in its user only as a Petrol Pump, and therefore, while computing the interim compensation this would be a vital factor that needs to be taken into consideration. Over and above this, the 2nd Defendant also filed his Income Tax returns, Balance-sheet and Profit & Loss account to enable the Appellate Bench to come to a fair and reasonable figure for fixing the interim compensation.

7 The Plaintiff on the other hand relied upon five Leave and Licence Agreements to show what would be the commercial market rent for the suit premises. These Leave and License Agreements were with reference to the shops and commercial premises in the vicinity and next to the area of the suit premises.

8 It appears that the 1st Defendant also had made an application for stay of the impugned judgment and order dated 5th May, 2016 passed by the Trial Court. However Mr Minoo Siodia, learned advocate appearing on behalf of the 1st Defendant (Respondent No.2 herein) on instructions stated that the 1st Defendant is not going to press its appeal and would be

withdrawing the same. Be that as it may, the application for stay of the execution of the decree of the both the Defendants was finally heard and by the impugned judgment and order dated 15th April, 2017 the operation and execution of the Trial Court's decree dated 5th May, 2016 was stayed subject to both the Defendants depositing within two months the amount of interim compensation jointly and/or severally at the rate of Rs.300/- per square foot per month for the total area of the suit premises admeasuring 6855 square feet from the date of the decree, till the date of the order dated 15th April, 2017. The additional direction given was that the 2nd Defendant shall continue to go on depositing further monthly interim compensation at the above rate on or before the 15th day of each month till final disposal of the appeal. It is aggrieved by this order that the 2nd Defendant (Petitioner herein) is before me under Article 227 of the Constitution of India.

9 In this factual backdrop, Mr Dhakephalkar learned senior Counsel appearing on behalf of the 2nd Defendant, submitted that the impugned order is wholly perverse in view of the fact that it has not taken into account the relevant factors

and placed reliance on irrelevant factors whilst coming to the figure of interim compensation fixed by it in the application filed for stay of the execution of the decree.

10 Mr Dhakephalkar further submitted that if one looks at the description of the suit premises as mentioned in the plaint, the same is only with reference to the land and not the constructed area of 6855 sq. ft. He submitted that admittedly the construction on the land was put up by the predecessors of the 1st Defendant (HPCL). To further this argument he brought to my attention the schedule to the plaint which can be found at page 936 of the compilation (Volume IV) wherein the schedule describes the suit premises as follows:-

"S C H E D U L E "A""

All that piece or parcel of land or ground formerly of Pension and Tax Tenure the cess whereof has been situate lying and being on the east side of Pedder Road on Cumballa Hill in the Island of and Sub-Registration District Bombay containing by measurement 1169 Square Yards (977.455 Sq.Mtrs) or thereabouts and are registered in the Books of the Collector of Land Revenue, Bombay with other land under Laughtons Survey No. ID/7121 and 2/7123 and Collectors New No. B/785 and A/555 and Cadestral Survey No.710 of Malbar and Cumballa Hill Division and are assessed by the Assessor and Collector of Municipal Rates and Taxes under "D" Ward No.3463(2) Street No.41 and bounded:

On or towards North	**: By the property bearing Cadestral : Survey No.711 belonging to Mrs : Annapurnabai G. Deshmukh**
On or towards South	**: C.S.No.669 belonging to the : Provident Investment Co. Ltd.**

On or towards East	**: Partly by the property of Mrs.** **: A.G. Deshmukh and partly by the** **: property of the said the Provident** **: Investment Co. Ltd.**
On or towards West	**: By Pedder Road"**

11 Mr Dhakephalkar also brought to my attention the decree passed by the Trial Court, which according to Mr Dhakephalkar, was only with reference to the land. He submitted that this being the position, and since the 2nd Defendant was asking for stay of the decree which was only with reference to the land, the interim compensation ought to have been fixed taking into consideration what would have been the market rent for the land and not on the basis of the structure which was standing upon it. He submitted that in this respect the Appellate Bench of the Small Causes Court has completely gone wrong in considering the constructed area for arriving at the interim compensation.

12 Mr Dhakephalkar additionally submitted that the suit premises are only permitted to be used for the purposes of a Petrol Pump and cannot be used for any other purpose. In this respect he brought to my attention to Regulation 69 which reads

as under:-

> "*notwithstanding anything contained in these Regulations, in the redevelopment of sites of existing filling and service station of Petrol, Diesel, Compressed Natural Gas or any other Motor Vehicle Fuel, change of user shall not be permitted*".

He submitted that this being the case, the interim compensation could not have been fixed by the Courts below treating it as if it is a commercial premises and thereby fixing an exorbitantly high rate of compensation. To further this argument, Mr Dhakephalkar relied upon the agreement with reference to a Petrol Pump at Churchgate which was produced by the Plaintiff himself. He submitted that this agreement was for the period 2013 to 2018 and which clearly shows that this Petrol Pump was taken on Leave and Licence initially at the monthly compensation of Rs.2,50,000/- for the first 30 months and thereafter at Rs.2,75,000/- per month. This according to Mr Dhakephalkar works out to approximately Rs.50 per square foot. Looking to all these facts, Mr Dhakephalkar submitted that the impugned order suffers from serious infirmities as it has not taken into consideration all these factors whilst arriving at the figure of interim compensation. He, therefore, submitted that the impugned order requires my interference under Article 227 of the Constitution of India.

13 On the other hand, Mr Chinoy learned Senior Counsel appearing on behalf of the Plaintiff, submitted that there was no merit in the arguments canvassed by Mr Dhakephalkar. He submitted that admittedly the 2nd Defendant was using the suit premises for a commercial purpose. This is a categorical finding not only by the Trial Court but also in the impugned order. Mr Chinoy took me through the entire reasoning and was at pains to point out that this finding has not even been challenged in the Writ Petition. He submitted that this being the case there was absolutely nothing wrong in the approach of the Courts below to calculate the interim compensation based on the constructed area which was admittedly being used for a commercial purpose by the 2nd Defendant. Mr Chinoy submitted that this is more so in the facts of the present case considering that the lessee of the premises was the 1st Defendant, namely, HPCL and the 2nd Defendant was only a dealer of the 1st Defendant. In law it had no independent right. The 1st Defendant has now decided to abide by the eviction decree and not to challenge it. It is the 2nd

Defendant who is objecting, without sufficient cause, the execution of the decree. He submitted that if the 2nd Defendant wants the luxury of litigation and deprive the landlord of the fruits of the decree, then it is only fair that he be directed to pay fair market rent for continuing to hold on to the suit premises. He, therefore, submitted that the order passed by the Courts below fixing the interim compensation at the rate of Rs.300 per sq. ft. per month was fully justified and in any event could not be termed as perverse or indicating any error of law apparent on the face of the record requiring my interference under Article 227 of the Constitution of India.

14 In addition to the aforesaid arguments, Mr Chinoy brought to my attention Regulation 69 and submitted that the said Regulation applies only when a property on which a Petrol Pump is situated goes in for redevelopment. Regulation 69 does not prohibit certain commercial activities being carried on in a property which is predominantly used as a Petrol Pump. He submitted that it is common knowledge that in virtually every Petrol Pump in Mumbai commercial activities are carried out such as ATMs, Restaurants and Convenience Stores. As long as

the dominant use of the land was for a Petrol Pump, Regulation 69 did not prohibit carrying on commercial activities on such land/property. He submitted that, therefore, the reliance placed on Regulation 69 by Mr Dhakephalkar is wholly misconceived and misplaced. He submitted that in the facts of the present case, admittedly the 2nd Defendant was carrying on commercial activities in the suit premises. This being the case, it is only fair that interim compensation be fixed on that basis.

15 In support of the arguments canvassed by him, Mr Chinoy relied upon a decision of the Supreme Court in the case of **State of Maharashtra & Anr. Vs. Super Max International Pvt. Ltd. & Ors.** reported in **(2009) 9 Supreme Court Cases 772.** Mr Chinoy placed reliance on paragraphs 72 to 77 of this decision to submit that the entire conditional order of stay of the execution of decree has to be seen as one single package. The party obtaining stay may or may not accept the order as a whole but it is not open to accept the order in so far as it stays the execution of decree and then question the condition attached to it. The only exception to this is that the condition attached should not be excessive, fanciful or

punitive. Looking to all the facts of the present case, Mr Chinoy submitted that under no circumstances can the interim compensation fixed by the Court below be termed as either fanciful, excessive or punitive. He submitted that the Leave and Licence Agreements which were produced by the Plaintiff indicated that the market rent for commercial premises in the same vicinity was Rs.500/- per square foot per month, whereas the Courts below, after taking all arguments into consideration, had reduced the same to Rs.300/- per sq. ft. per month. Looking to all these facts, Mr Chinoy submitted that there was no merit in this Writ Petition and the same ought to be dismissed.

16 I have heard learned counsel for parties at length and perused the papers and proceedings in the Writ Petition as well as the impugned order. As mentioned earlier, in the Appeal filed by the 2nd Defendant, he made an application for stay below Exh.7 under Order 41 Rule 5 of the CPC to stay the operation and execution of the judgment and decree dated 5th May, 2016 in TE & R Suit No. 351/371 of 2001. By the impugned decree the Plaintiff was held to be entitled to possession of the suit premises and the Defendants were directed to deliver vacant and peaceful

possession of the suit premises to the Plaintiff. What is important to note here is that though the user of the suit premises is restricted pursuant to Regulation 69, the 2nd Defendant in his evidence before the Trial Court has admitted that he has been using the suit premises for commercial activities including that of a petrol pump, automobile service station, repair workshop, sale of spares and accessories, repairs of motor cars, fitting of accessories and running of an Automobile Dealership and Authorized service station for local and foreign brand cars. Over and above this, the cross-examination of the 2nd Defendant clearly reveals that he is running a business from the suit premises such as Karrs India since 1986-87 Ocean Creast Marine since 2005-06, Ocean Creast Marine Pvt. Ltd. since 2009-10 as well as other businesses around the same period and he maintained separate accounts for all these businesses. The Appellate Bench of the Small Causes Court, in paragraph 17 of its decision, has given a finding that admittedly the suit property is occupied by the 2nd Defendant after the passing of the decree and he is running various businesses from the suit property. It is taking into consideration these factors that the Appellate Bench of the

Small Causes Court sought to reject the Valuation Report relied upon by the 2nd Defendant under which the interim compensation was valued at a meager Rs.58,000/- per month. Even if one were to take into consideration that Regulation 69 restricts the user of the suit premises, it would be ridiculous to suggest that the suit premises, the area of which is almost approximately 8000 sq.ft., out of with 6855 sq.ft. being built up, can only fetch Rs.58,000/- per month in a prime locality in Mumbai like Peddar Road. I find that the Appellate Bench of the Small Causes Court was, therefore, fully justified in not placing much reliance on the valuation report produced by the 2nd Defendant.

17 As far as the reliance placed on the agreement of the Petrol Pump at Churchgate is concerned, and on which heavy reliance was placed by Mr Dhakephalkar, I find considerable force in the arguments of Mr Chinoy that if one looks at that agreement, and more particularly clause (h) at page 876 (Volume IV of the compilation), there is a specific covenant which states that the Petrol Pump premises or any part thereof shall not be used for any purpose whatsoever other than for

storage, selling and distributing petroleum products and its allied services to the general public i.e. as a Petrol Pump. He submitted that it is in these circumstances that one has to look at the license fee fixed for the Petrol Pump at Churchgate. It cannot be compared to the suit premises considering that there was no such covenant in the lease that was granted by the Plaintiff to the 1st Defendant.

18 As far as the argument of Mr Dhakephalkar is concerned regarding the fact that the decree is passed only for land, and therefore, the valuation ought to have been done only with reference to the land, I do not find any merit in this contention. Admittedly if the decree is executed (and especially considering the stand taken by the 1st Defendant that it is not opposing the eviction decree) the 2nd Defendant would lose possession not only of the land but also of the structures standing thereon. Admittedly the 2nd Defendant is using and occupying the structures that are standing on the suit premises. It cannot be allowed to do so at a meager compensation of Rs.58,000/- per month, especially after it has suffered a decree of eviction and whose status, at least *prima facie,* appears to be

that of only as a dealer of the 1st Defendant. This being the case I have no hesitation in rejecting this argument of Mr Dhakephalkar.

19 This now only leaves me to consider whether the interim compensation at the rate of Rs.300 per square ft. per month is fair and reasonable compensation. As mentioned earlier, the Plaintiff had produced five Leave and Licence Agreements of commercial shops and establishments around the area next to the suit premises. The compensation in those Leave and Licence Agreements was approximately Rs.500 per square foot per month. Despite this, and taking all factors into consideration, including the fact that the user, if any, of the suit premises would be restricted by virtue of Regulation 69, contrasted with the fact that various businesses are being carried on by the 2nd Defendant in the suit premises including that of running a Petrol Pump, I do not think that the interim compensation fixed by the Courts below can be termed as fanciful, excessive or punitive. In the facts of the present case, the interim compensation fixed @ Rs.300 per sq.ft. per month comes to approximately Rs.20,56,000/- per month,

which to my mind, in the factual matrix before me, would be the fair and reasonable compensation for the suit premises. In any event, considering all these facts and carefully perusing the impugned order, I do not find that it suffers from any perversity or any error of law apparent on the face of record requiring my interference under Article 227 of the Constitution of India. The view taken by the Court below is certainly a possible and a plausible view, which does not require my interference. However, considering the stand of the 1st Defendant that it is not contesting the decree it would be in the fitness of things to direct the Appellate Bench of the Small Causes Court of Mumbai to hear and decide the appeal filed by the 2nd Defendant within a period of three months from the date of the receipt of a copy of this order.

20 With the aforesaid directions, the Writ Petition is dismissed. There shall be no order as to costs. The time to deposit the arrears as directed by the Appellate Bench of the Small Causes Court is extended by a period of two months from today.

(B.P.COLABAWALLA,J.)