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

WRIT PETITION NO. 11819 OF 2016

Meher Master Moos

...Petitioner

VS

Roshan Noshir Punooole & Anr.

...Respondents.

.....

Mr Kunal Bhanage for the Petitioner.

Mr Sunil Jayakar a/w Gunjan Jayakar i/b Mr Miheer Jayakar
for Respondent No.1A to 1C.

.....

**CORAM : B. P. COLABAWALLA, J.
JULY 18, 2017.**

P.C.:

This Writ Petition filed under Article 227 of the Constitution of India challenges the order dated 28th July, 2016 directing the Petitioner to deposit arrears of interim compensation at the rate of Rs.1,50,000/- per month from June 2015 to July 2016 and thereafter to continue making the deposit at the said rate per month from August 2016 onwards till the disposal of Appeal No. 330 of 2015.

2 Very few facts need to be noted to dispose of this Writ

Petition. The Petitioner before me is the original Defendant No.1 in R.A.E. Suit No. 814/1301 of 2007. Respondent Nos.1(a) to 1(c) are the heirs and legal representatives of original Respondent No.1 who was the original Plaintiff. For the sake of convenience, I shall refer to the parties as they were arrayed before the Trial Court.

3 The Plaintiff filed the aforesaid R.A.E. Suit No. 814/1301 of 2007 against Defendant No.1 claiming a decree of eviction on the ground of personal bona-fide requirement. The said suit was contested by Defendant No.1 by filing her Written Statement ("W.S."). Thereafter, on the basis of these pleadings, issues were framed by the Trial Court and on the basis of which the parties led their respective evidence. Thereafter, after hearing the respective parties, the Trial Court decreed the suit in favour of the Plaintiff by its Judgment and Decree dated 11th June, 2015. The eviction decree was passed with reference to Flat No.2 at Sekhsaria Sadan, 20 Napeansea Road, Mumbai 400 026 admeasuring about 1930.27 sq. ft. carpet area consisting of living room, three bed-rooms with three attached bathrooms/toilets, kitchen, storage area, servants room area of

approximately 131 sq. ft. having its separate attached bathrooms, toilet and connected common passage (for short the **“suit premises”**). From the operative part of the order of the eviction decree, it is clear that Defendant No.1 was directed to hand over possession of entire suit premises within three months from the date of the order.

4 Being aggrieved by this Judgment and Order, Defendant No.1 preferred an appeal before the Appellate Bench of the Small Causes Court at Mumbai being Appeal No. 330 of 2015. Along with the Appeal, Defendant No.1 also preferred a Stay Application (Exh.6) seeking stay of the execution of the decree dated 11th June, 2015. To this stay application, the Plaintiff filed its affidavit in reply and Defendant No.1 also filed its affidavit in rejoinder thereto. After hearing the parties, the Appellate Bench of the Small Causes Court at Mumbai stayed the execution of the decree dated 11th June, 2015 passed in R.A.E. Suit No. 814/1301 of 2007 until final disposal of Appeal No.330 of 2015 subject to Defendant No.1 depositing the arrears of interim compensation @ Rs.1,50,000/- per month towards the use and occupation of the suit premises from June 2015 to July

2016 within a period of three months from the date of the order. A further direction that was given by the Appellate Bench was that Defendant No.1 shall continue to deposit Interim Monthly Compensation at the same rate pending the hearing and final disposal of the appeal. This monthly compensation was to be deposited on or before the 10th day of each month. Being aggrieved by this order of the Appellate Bench, Defendant No.1 is before me in my equitable, extraordinary and discretionary jurisdiction under Article 227 of the Constitution of India.

5 In this factual backdrop Mr Kunal Bhanage, learned advocate appearing on behalf of Defendant No.1 submitted that the impugned order suffers from perversity and error apparent on the face of the record requiring my interference under Article 227 of the Constitution of India. He submitted that in the facts of the present case, Defendant No.1 was not occupying entire suit premises but was only occupying a part thereof. According to Mr Bhanage, the 1st Defendant was only occupying an area of approximately 301 sq. ft. which was one bedroom and a kitchen. This being the factual position, he submitted that the interim compensation fixed as a condition for granting stay of the

execution of the decree, could not have been arrived at by taking into consideration the entire area of the suit premises, namely, 1930 sq. ft. carpet area.

6 Over and above this contention, Mr Bhanage submitted that in any event the compensation fixed by the Appellate Bench was punitive, considering the fact that the 1st Defendant had produced its Income Tax returns before the Appellate Bench and which have not even been considered by it. He submitted that looking to the income of the 1st Defendant, the figure of Rs.1,50,000/- per month fixed as interim compensation was highly punitive and, therefore, was required to be interfered with. For all the aforesaid reasons, he submitted that the impugned order dated 28th July, 2016 be quashed and set aside.

7 On the other hand, Mr Jaykar, learned advocate appearing on behalf of the Plaintiff submitted that there was no merit in the contentions raised by Mr Bhanage. He submitted that the impugned order is a detailed order giving proper and cogent reasons, requiring no interference under Article 227 of the Constitution of India. He submitted that it is totally

incorrect for Defendant No.1 to contend that the compensation ought to have been fixed only on the basis that she was allegedly occupying only 301 sq.ft. and not the entire suit premises. Mr Jaykar brought to my attention the specific stand of Defendant No.1 in her W.S. wherein she has categorically stated that she has been inducted by the Plaintiff as her tenant since December 1979 - January 1980 and she has been a tenant of the Plaintiff in respect of the entire suit premises and the Garage. He submitted that this identical statement has again been made by Defendant No.1 in R.A.D. Suit No.185 of 2009 which was filed by Defendant No.1 herein seeking a declaration of tenancy. In paragraph 1 of the plaint in this suit, Defendant No.1 has categorically stated that she seeks a declaration of her tenancy in respect of the suit premises of which she has been in occupation and possession since December 1979 - January 1980. What is important to note, according to Mr Jaykar, is that the suit premises has been described as the entire suit premises and not just one room and the kitchen, as was sought to be contended before me. Looking to these facts he submitted that it is too late in the day for the 1st Defendant to contend that since she is allegedly occupying only 301 sq. ft., compensation ought

to have been fixed only for this area and not for the entire suit premises.

8 As far as the argument of compensation being punitive is concerned, Mr Jaykar submitted that the Appellate Bench has correctly considered this aspect in its correct perspective. He submitted that the Appellate Court has correctly taken note of the fact that the 1st Defendant is a lady who travels abroad frequently, and therefore, cannot be said to be a person not of sufficient means. In this respect Mr Jaykar brought to my attention the factual observations made by the Appellate Court in paragraph 25 of the impugned order. He submitted that even though the report of Mr Maniar and which was accepted by the Appellate Court, fixed the Fair Monthly Compensation @ Rs.1,96,779/-, the Appellate Court had reduced this to Rs.1,50,000/-. This being the case, he submitted that there was nothing punitive about the Interim Compensation fixed at Rs.1,50,000/- per month. This was more so in the facts of the present case, considering that the suit premises admeasure approximately 2000 sq. ft. and are situated on Napeansea Road which is very prime locality in the city of

Mumbai, was the submission of Mr Jaykar.

9 I have heard learned advocates for the parties at length and I have perused the papers and proceedings in the Writ Petition. I have also given my careful consideration to the impugned order.

10 On the first contention raised by Mr Bhanage that the compensation ought to have been fixed only for an area of 301 sq. ft. (as that was the alleged area in occupation of the 1st Defendant), I find considerable force in the argument canvassed by Mr Jaykar. I find that this argument, which is canvassed before me today runs counter to the pleadings that were filed by the 1st Defendant before the Courts below. In the Written Statement filed by the 1st Defendant in R.A.E. Suit No.814/1301 of 2007 in paragraph 7, the 1st Defendant has categorically stated as under:-

“7 *This Defendant says that she has been inducted by the Plaintiff as her tenant since about December 1979 - January 1980 i.e. for the last 27-28 years she has been the tenant of the Plaintiff in respect of the entire suit premises and the said garage. This Defendant states that in fact since January 1980 till date, i.e. for the past about 27-28 years, she has paid*

the entire monthly rent and other expenses in respect of the said suit premises and also for the garage attached to the suit premises, whatsoever was the rent amount demanded from time to time, by the Landlord from the Plaintiff.....”

11 Even in the R.A.D. Suit filed by the 1st Defendant herein being R.A.D. Suit No.185 of 2009 (Plaintiff in the said R.A.D.Suit) she, in paragraph 1, has categorically averred in the following terms:-

“1 *The Plaintiff seeks declaration to be the tenant of the Defendant No.2 in respect of the Suit premises of which the Plaintiff has been in occupation and possession since about December 1979- January 1980 along with her late parents, being Flat No.2 on ground floor of the Suit building known as Sekhsaria Sadan owned by the Defendant No.2 of which Defendant No.1 is the tenant i.e. in whose name tenancy stands. The Suit premises consists of a hall - dining room, three bedrooms with three bathrooms - toilets, a kitchen, a storage room, a servants room with attached bathroom-toilet, internal passages, admeasuring in area about 1930 sq.ft. and more particularly described as CTS NO. 31591 of Malabar Hill Division situate on 20 Nepean Sea Road, Mumbai 400 026 at a monthly rent as in July 2007 of Rs.1673/- which is the residential premises, and for the sake of brevity hereinafter referred to as “the Suit premises” and the building Sekhsaria Sadan in which the Suit premises is situate shall hereinafter be referred to as “the Suit building”. The Suit premises is bounded as described hereunder:*

On the East..by Birla School on Nepean Sea Road
On the West..by flat No.1 in Suit building in

occupation of one Devjee family
On the North..by compound road and wall of
Patel Estate
On the South.. by open space with number of
garages inside compound wall of
Patel Estate.

In addition to the residential premises described as Suit premises, Plaintiff is also in occupation of one garage bearing No.G-19 whose tenancy also stands in the name of Defendant No.1 admeasuring area 184.72 sq.ft. at a monthly rent as in July 2007 of Rs.62/- which amount is also paid by the Plaintiff to the Defendant No.1, along with the monthly rent of the Suit premises. The Plaintiff ever since coming into occupation of the Suit premises since about January 1980 has paid the prevailing monthly rent amount for the Suit premises along with the garage and she is enjoying both the premises peacefully, exclusively, without any disturbance”

12 Even in the evidence led before the Trial Court, during her cross-examination, the 1st Defendant has denied that two rooms were kept locked by the Plaintiff. In fact she categorically states in her cross-examination that the Plaintiff had handed over the keys of said two rooms to her mother. Looking at these categorical statements made by the 1st Defendant before the Trial Court, I am unable to accept the submissions of Mr Bhanage that the 1st Defendant was only in occupation of 301 sq. ft., and therefore, the compensation ought to have been fixed

only with reference to this area and not entire suit premises. It is the specific case of the 1st Defendant, and all throughout, that she is in use and occupation of the entire suit premises. This being the case, the 1st Defendant today, and that too only for the purpose of fixing the interim compensation, cannot be allowed to contend that she is in use and occupation only of 301 sq.ft. I, therefore, have no hesitation in rejecting this argument.

13 This now brings me to the next contention raised by Mr Bhanage that the compensation fixed was punitive in nature and ought to be reduced. In this regard, I find that the Appellate Bench of the Small Causes Court at Mumbai has given due weightage to the reports that were produced by the Plaintiff as well as the 1st Defendant. The Plaintiff had produced a report of one Mr Maniar, which records that the area of the flat is 1930.27 sq. ft. carpet area, corresponding to 2288.13 sq. ft. built up area. He has taken into consideration the age of the construction, as well as the situation, location etc. of the suit premises. He has also taken into account comparable instances of Leave and License agreements on Nepeansea Road, Mumbai, and thereafter, come to the conclusion that the Fair Market

Compensation for the suit premises would be Rs.1,96,779.18 per month.

14 On the other hand, Defendant No.1 placed reliance on the report of S.N.A. & Associates. The Appellate Bench recorded that the said report of S.N.A. & Associates was restricted only to an area of 301 sq. ft. Further I find that the comparable instances taken into consideration by the said S.N.A. & Associates were not in the vicinity of Nepeansen Road but were of August Kranti Marg, Cumballa Hill, A.K.Marg, Manav Mandir Road and Altamount Road, Mumbai. In these circumstances, I find that the Appellate Bench of the Small Causes Court correctly did not place any reliance on this report and accepted the valuation report given by Mr Maniar. What is important to note is that despite the fact that Mr Maniar's report opines that the Fair Market Compensation would be Rs.1,96,779/- per month, the Appellate Bench after taking all facts into consideration came to the conclusion that the Fair Market Compensation, that the 1st Defendant ought to deposit should be Rs.1,50,000/- per month.

15 Whilst fixing the interim compensation under Order 41 Rule 5 of the Code of Civil Procedure, 1908, certain amount of guess work has to be undertaken by the Appellate Court. Unless it is shown that the discretion exercised by the Appellate Bench is wholly perverse, I am of the opinion that this Court ought not to interfere with that discretion under Article 227 of the Constitution of India. In the facts of the present case, I find that this discretion has been exercised judiciously and can certainly not to be said to suffer from any perversity. I, therefore, cannot agree with the submission of Mr Bhanage that the amount fixed of Rs.1,50,000/- per month for the use and occupation of the suit premises can by any stretch of the imagination be termed as punitive. Even on the ground that the Petitioner (1st Defendant) does not have the means to pay, I find this argument to be without substance. As recorded by the Appellate Bench of the Small Causes Court, the 1st Defendant is a person who travels frequently abroad. Merely by producing only two pages of the Income Tax Returns would not indicate that she is not a person of means. This argument also, therefore, stands rejected.

16 For all the aforesaid reasons, I find no merit in this

Writ Petition. It is, accordingly dismissed. However, in the facts and circumstances of the present case, there shall be no order as to costs.

17 The time to comply with the order of the Appellate Bench for depositing arrears as well as depositing the monthly compensation is extended by a period of eight weeks from today.

(B. P. COLABAWALLA, J.)