Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1864 OF 2017

Papri Bose Mehta ...Petitioner
Versus
Vista India Digital Media Pvt Ltd & Anr ...Respondents

Mr Mayur Khandeparkr, *a/w Mr Mehul Shah, Mr Hemang Jariwala, i/b Auroma Law, for the Petitioner.*
Mr Sachin Daga, *for Respondents Nos.1 and 2.*

CORAM: G.S. PATEL, J
DATED: 28th November 2017

PC:-

1. **Rule**. Respondents waive service. By consent, returnable forthwith and taken up for hearing and final disposal.

2. *Prima facie* it is evident that the impugned order of 8th July 2016 of the Commissioner, Konkan Division is directly contrary to a previous order of Sonak J of this Court in Writ Petition No.145 of 2015.

3. The premises in question were given on leave and licence by the present Petitioner ("**Mehta**") to the Respondent company. This is a residential flat no.303, 3rd floor, Amrit Building, 'A' Block, Carter Road, Bandra (W), Mumbai 400 050. The case is that the leave and licence agreement of 23rd May 2006 ran till 30th April 2007 from 1st June 2006. There appears to have been renewals and a separate agreement in regard to the hire of furniture and fixtures. The documents are registered. The leave and licence agreement expired on 20th February 2011. The answer even at the stage of the quit notice was that the company had advanced a substantial loan aggregating to Rs.57.40 lakhs to Mehta and that the company was not required to vacate until the loan was repaid, notwithstanding any expiry of the licence in the meantime.

4. Having regard to the provisions of Section 43 of the Maharashtra Rent Control Act, 1999, on Mehta filing a suit for recovery of possession, the company sought leave to defend. This was granted by the Competent Authority on 7th July 2012. Mehta challenged it before the Commissioner, Konkan Division in a revision proceeding and by an order dated 22nd November 2013, the Commissioner reversed the Competent Authority. In other words, in the revision, leave to defend was refused. The company came up to this Court in Writ Petition No.145 of 2015, and by a detailed order dated 5th August 2015 that Writ Petition was dismissed. Two paragraphs of that order need to be quoted:

> "8. It is further to be noted that from 1 March 2011, though the Petitioners continue in occupation of the suit premises, the Petitioners have not bothered to pay or deposit even the agreed monthly compensation at the rate of Rs.85,000/- per month. The arrears on this count, have *prima facie,* accumulated up to Rs.42,50,000/-. Upon the query from the Court as to whether the Petitioners are prepared to deposit this amount, the learned counsel for the Petitioners submitted

> that the Petitioners would not deposit more than Rs.10 to 15 lakhs.
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> 9. In the aforesaid circumstances, it is apparent that the so called defence raised by the Petitioners was in the nature of a moonshine. Leave to defend was, therefore, rightly declined."

5. Even before Mr Justice Sonak it was this argument of having given a loan as advance that was being agitated, but as we have seen, was one that was finally buried with a description that it was moonshine, and no defence at all.

6. It seems that in the meantime the company had filed some sort of application under Order VII Rule 11 of the Code of Civil Procedure and a second one under Section 151 of the Code of Civil Procedure asking for a dismissal of the ejectment action before the Competent Authority.

7. The Competent Authority then passed an order on 10th November 2015, a copy of which is from page 619 onwards. That order allowed Mehta's application in Case No.31 of 2011 and directed delivery of possession as also ordering payment of monthly compensation. I find that in the order there was a specific reference to the Writ Petition that was ultimately disposed of by Mr Justice Sonak (paragraph 4).

8. Then in paragraph 7, the Competent Authority concluded that the company was in possession on the basis of a leave and licence agreement and was a mere licensee. He held that the respondent had failed to vacate despite the expiry of the licence and found in favour of the Applicant, also concluding that he had the jurisdiction. In effect, that put paid to any pending application whether under Section 151 or Order VII Rule 11 because the jurisdictional question came to be firmly answered on 10th November 2015. Obviously there was no question of the company filing any such application thereafter nor of it entering a defence either directly or indirectly for this leave to defend had been refused right up to the High Court.

9. The company went to the Commissioner in revision, and this yielded the impugned order.

10. What the Additional Commissioner did was to hold in a very perfunctory paragraph that on a careful consideration he had come to the conclusion that there was merit in the revision application filed and that the Competent Authority ought to have had due regard to the pendency of the application under Section 151 and Order VII Rule 11 and therefore directed that the matter be remanded and heard a fresh.

11. I do not know whether this consideration is careful or not, but it is most certainly incorrect and wholly erroneous. There was no question of the Additional Commissioner effectively granting the company leave to defend when Mr Justice Sonak of this Court had confirmed the refusal of that leave. Sonak J's order had attained finality. The company may have filed some civil suits but it has not even attempted to challenge that order or have it set aside. It cannot question the correctness of Sonak J's order nor have me today reopen the issues concluded by that order, including this entire defence of having given a loan, something that has been repeated again and again *ad nauseum*. It is a completely fruitless and futile exercise.

12. The restriction of a statute cannot be bypassed in this fashion. The respondent cannot do directly that which it is prohibited from doing directly, i.e., from entering a defence. Not being allowed to defend the ejectment action, it cannot file now an application for dismissal of the suit on the ground under Section 151 or Order VII Rule 11 because that is nothing but entering a defence although the form may be different. There is no question that the impugned order of 8th July 2016 of the Additional Commissioner is wholly unsustainable and must be set aside.

13. This leaves the question of costs and here I find the conduct of the company is even more reprehensible. Two years ago, before Sonak J this question also arose and once again the company said that the reason it does not pay a single paisa towards licence fees is because of this alleged loan transaction, something that has been negatived as a defence throughout. Sonak J's order in paragraph 8 quoted above reveals a startling figure then due of Rs.42,50,000/-. Today the amount is significantly more. There is not even equity on the side of this Respondent.

14. The Writ Petition succeeds and rule made absolute in these terms. The impugned order is quashed and set aside. The order of the Competent Authority is restored and will operate.

(G. S. PATEL, J.)