

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition (ST) NO. 17677 OF 2018

Power House Fitness Ltd.

...Petitioners

Versus

M/s Raj Dadarkar & Associates

...Respondent

....

Mr. Vishal Kanade I/b. Darryl Paul Barretto, Advocate for the Petitioners.
Mr. Bipin Joshi, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 03rd JULY, 2018

P.C.

1. Heard Mr.Vishal Kanade, learned counsel for the petitioners and Mr.Bipin Joshi, learned counsel for the respondent, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'defendants', have challenged the order dated 25.4.2018 passed by the Appellate Bench of the Small Causes Court at Bombay below Exhibit-7 in (P) Appeal No.10/2018. By that order, the Appellate Court disposed of the application Exhibit-7 filed by the defendants for stay of the execution of the eviction decree dated 21.11.2017 passed by the learned trial Judge in L.E. & C. Suit No.137/174 of 2011. The Appellate Court stayed the eviction decree subject to following conditions:

- “(a) the defendants shall deposit interim compensation @ Rs.1,50,000/- (Rs. One Lakh Fifty Thousand Only) per month for the period from September, 2011 till November, 2017 total amounting to Rs.1,11,00,000/- within six months. The said amount shall be invested in any Nationalized Bank for the period of one year. Period of fixed deposit shall be renewed yearly by the Registrar of the Court. The disbursement of the said amount will be subject to the final outcome of the Cross Appeal filed by the respondents.
- (b) The defendants shall continue to deposit interim monthly compensation @ Rs.1,50,000/- per month from December, 2017 till April, 2018 within six months and continue to deposit the amount of compensation pending the hearing and final disposal of the appeal for ensuing months on or before 7th day of next month i.e. from May, 2018 onwards. The plaintiffs are at liberty to withdraw the said amount as and when deposited by the defendants in the Court.
- (c) The defendants shall furnish an undertaking in the Court that they will not part with possession of the suit premises or create third party interest thereon.”

3. In support of this Petition, Mr. Kanade raised following contentions :

- i) The defendants have filed application under Order XLI Rule 5 of C.P.C. for stay of the eviction decree. The Appellate Court could have directed the defendants to deposit interim compensation @ Rs.1,50,000/- per month for the period from September, 2011 till November, 2017. In view of the decision of Apex Court in **Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd., (2005) SCC 705**, the

Appellate Court could have imposed condition of depositing interim compensation from the date of the decree and not prior to passing of the decree. In the present case, the eviction decree is passed on 21.11.2017. The Appellate Court was, therefore, not justified in directing the defendants to deposit interim compensation for the period from September, 2011 to November, 2017.

ii) The Appellate Court could not have granted relief which was refused by the learned trial Judge while decreeing the suit. By clause-3 of the operative part of the trial Court's order, the learned trial Judge directed the defendants to pay compensation @ Rs.1,50,000/- per month for the period from 1.12.2008 till August, 2011 within a period of two months. In other words, while passing the decree on 21.11.2017, the learned trial Judge did not award compensation from September, 2011 till passing of the decree in November, 2017. Aggrieved by that part of the order, the respondents/plaintiff have preferred cross-objections. The defendants have disputed the licence fee of Rs.1,50,000/- per month. The Appellate Court was, therefore, not justified in directing the defendants to deposit interim compensation from September, 2011 till November, 2017 @ Rs.1,50,000/-.

iii) While considering application under Order XLI Rule 5 of C.P.C., the Court can award reasonable compensation and not

compensation at market rate. Even on this count, the impugned order is liable to be set aside.

4. On the other hand Mr. Joshi supported the impugned order. He invited my attention to clause-2(a) of the leave and licence agreement dated 20.11.2008. Clause-2(a) specifically provides for payment of licence fee @ Rs.1,50,000/- for the period 1.12.2008 to 30.10.2009. He invited my attention to the order dated 26.9.2014 passed by this Court in Writ Petition No.6975/2014. In paragraph-3 of that order, the statement on behalf of the defendants (petitioners herein) that they will deposit arrears of compensation @ Rs.1 Lakh per month from the date of filing of the suit i.e. September, 2011 till November, 2013 within one week, was recorded. He submitted that though solemn statement was made before this Court, the defendants did not comply the order dated 26.9.2014. The defence raised by the defendants was struck out. He further submitted that in fact the defendants have deposited the amount of Rs.36,40,000/- @ Rs.1,50,000/- per month. Prior to filing of the suit, the defendants have disputed the quantum of the licence fees. He further submitted that the plaintiffs have also instituted cross-appeal as the learned trial Judge did not award the compensation from September, 2011 till passing of the decree. He submitted that the defendants have not disputed non-

payment of the licence fee from September, 2011 till date. He, therefore, submitted that no case is made out for interfering with the impugned order.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of clause-2(a) of the leave and licence agreement dated 20.11.2008 clearly shows that the licence fee agreed between the parties was Rs.1,50,000/- for the period commencing from 1.12.2008 to 30.10.2009. Though the defendant has contended that they have disputed the quantum of licence fee @ Rs.1,50,000/- per month, no material is shown to that effect. It is also relevant to note that in the order dated 26.9.2014, the statement made on behalf of the defendant that they will deposit the arrears of compensation @ Rs.1 Lakh per month from filing of the suit i.e. September, 2011 till November, 2013, was recorded. It is not in dispute that the defendant has not complied the said order. A perusal of the record shows that the learned trial Judge struck out the defence for non-compliance of the order in its entirety.

6. A perusal of the trial Court's order and in particular clause-3 thereof shows that the learned trial Judge directed the defendants to

pay compensation @ Rs.1,50,000/- per month for the period 1.12.2008 till August, 2011. In paragraph-10 of the impugned order, the Appellate Court has observed that the learned trial Judge failed to grant compensation pending trial. *Prima facie* I do not find that the Appellate Court committed any error in that regard. In fact as noted earlier, the defendants have instituted Writ Petition No.6975/2014 challenging the orders dated 1.2.2014 passed by the Appellate Bench of the Small Causes Court as also order dated 19.11.2013 passed by the learned trial Judge below Exhibit-20 in L.E. & C. Suit No.137/174 of 2011 directing the defendants to deposit arrears of compensation @ Rs.1,50,000/- from the date of filing of suit i.e. from September, 2011 till November, 2013 and further amount of Rs.1,50,000/- per month till decision of the suit.

7. It is not in dispute that the defendants have not paid the licence fees from September, 2011 onwards though they are in possession of the suit premises. The learned trial Judge, therefore, was not *prima facie* justified in restricting the direction of paying compensation till August, 2011. The orders of the Courts below are clearly referable to Order XV-A of C.P.C. A perusal of the impugned order shows that the Appellate Court has directed the defendants to deposit interim compensation @ Rs.1,50,000/- per month from

September, 2011 till November, 2017 and said amount is ordered to be invested in any Nationalized Bank. Thus the Appellate Court has protected interest of both sides. Whosoever succeeds in the appeal will take away the amount along with the accrued interest. By clause-2(b), the defendants are directed to deposit interim monthly compensation @ Rs.1,50,000/- per month from December, 2017 till April, 2018 within six months and continue to deposit the amount of compensation pending the hearing and final disposal of the appeal for ensuing months on or before 7th day of next month i.e. from May, 2018 onwards. The respondents/plaintiffs are directed to withdraw said amount. Even on this count, I do not find that the Appellate Court committed any error.

8. During the course of hearing, Mr. Kanade, on instructions, submitted that the defendants will hand over vacant and peaceful possession of the suit premises to the plaintiffs by 10.7.2018. He further states that the defendants will prosecute the appeal filed by them before the Appellate Court. Statements, on instructions, made by Mr.Kanade are accepted.

9. In the light of the aforesaid discussion, I do not find that the Appellate Court committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. It is expressly made

clear that the observations made herein are tentative and *prima facie* and are made only for the purpose of considering correctness of the impugned order and the Courts below shall decide the matter on the basis of evidence on record and on its own merits in accordance with law. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)