

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11318 OF 2017

Gajanan Shanker Naik & Ors. ... Petitioners

Versus

Syedna Mufaddal Saifuddin & Anr. ... Respondents

Mr. V. Y. Sanglikar for Petitioners.

Mr. M. Saeed Kadu a/w Santosh Maske for Respondent No.1.

CORAM : NITIN W. SAMBRE, J.
DATE : 15th OCTOBER 2018.

P.C.

. The Petitioners – original Defendants suffered a Judgment and Decree dated 29th June 2011 passed by the Court of Small Causes at Bombay in RAE & R Suit No. 862/2165 of 1993.

2. Originally the suit was for possession of the open plot and land situated at Mangalwadi, Girgaon, Mumbai. Along with the decree for possession a prayer was also made for recovery of arrears of statutory rent for particular period mentioned in the prayer clause – (b), i.e. for directing the enquiry into the mesne profit pursuant to the Order 20 Rule 12 of the Code of Civil Procedure.

3. By the Judgment and Decree passed by the Small Causes Court suit for possession was decreed, however, the Court has refused to pass a decree for mesne profit.

4. Feeling aggrieved by the said Judgment and Decree, an Appeal being Appeal No. 87 of 2011 with an application for stay came to be moved was allowed vide impugned order dated 4th July 2016 passed by the Small Causes Appellate Court, Mumbai with direction to deposit compensation of Rs.30,000/- in each month. As such, this Writ Petition.

5. The learned Counsel for Petitioners – Original Defendants would urge that once the trial court refused to order an enquiry into the mesne profit, it was not open for the appellate court to invoke the provisions of Order 41 Rule 5 of the Code of Civil Procedure to incorporate an unreasonable condition of payment of compensation of Rs.30,000/- per month. According to him, from the pleadings of the plaintiff it could be inferred that agreed rent was Rs.150/- per month. In this background, the condition of payment of compensation of Rs.30,000/- while exercising powers to stay the Judgment and Decree of the lower court cannot be termed to be reasonable and justified in the facts and circumstances of the case. As such, he sought indulgence.

6. *Per contra*, the learned Counsel for Respondent No.1 – Plaintiff would urge that Order 41 Rule 5 of the Code of Civil Procedure empowers the appellate court to incorporate a condition of payment of compensation which powers are reasonably exercised by the court by way of impugned order. According to him, there is sufficient basis for reaching to an amount of compensation of Rs.30,000/- and in absence of any error of jurisdiction the Writ Petition is liable to be dismissed.

7. Considered rival submissions.

8. The invoking of powers under Order 41 Rule 5 of the Code of Civil Procedure while dealing with an application for grant of stay at the behest of an unsuccessful party before the trial court would be spelt out from the said procedural provisions i.e. Order 41 rule 5 of the Code of Civil Procedure.

9. The only issue which required to be looked into is whether the condition of payment of compensation of Rs.30,000/- per month is reasonable or not.

10. If the said issue is appreciated in the backdrop of the pleadings as are placed before the learned trial court i.e. the fixed rent of Rs.150/-per month of the property in question of which the original Defendant claimed

to be in possession of and the refusal of the learned trial court to exercise the powers under Order 20 Rule 12 of the CPC particularly in the matter of directing enquiry into the mesne profit, the condition of payment of compensation of Rs.30,000/- appears to be too stringent and unreasonable. The learned trial court upon adjudication of the issue raised before it in the backdrop of the factual matrix and the evidence has refused to exercise powers under Order 20 Rule 12 of the Code of Civil Procedure so as to direct an enquiry into the mesne profit.

11. For ordering payment of compensation of Rs.30,000/-, the appellate court has relied upon the ready reckoner rates of the suit property and considering the same to be the basis, has ordered payment of compensation of Rs.30,000/- per month.

12. What is required to be appreciated is, at an interim stage it is not that the powers of the appellate court are restricted in the matter of awarding payment of compensation or of awarding no compensation. In my opinion, in the case in hand award of compensation in the backdrop of the fact that the rent was agreed at Rs.150/- per month appears to be unreasonable. Apart from above, the reliance placed by the learned lower appellate court on the ready reckoner rates for the purpose of calculating compensation is also unjustified, as there is no basis in law to

the effect, though some guess work for the purpose of calculating compensation is permissible.

13. In the aforesaid backdrop, in my opinion, the order impugned needs to be modified.

14. In the aforesaid background, amount of compensation of Rs.30,000/- is reduced to Rs.10,000/- to be paid as ordered by the learned lower appellate court.

15. Let the arrears of amount of compensation be cleared by depositing the same before the appellate court within a period of one month from today.

16. In the aforesaid backdrop, hearing of the Appeal as prayed for is expedited.

17. As such, the Writ Petition stands partly allowed.

(NITIN W. SAMBRE, J.)