

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10718 OF 2018

Ida Celene Mathias and others	...	Petitioners
Vs.		
Mobin Ahmed Khan	...	Respondent

WITH

WRIT PETITION NO.9952 OF 2018

Mobin Ahmed Khan	...	Petitioner
Vs.		
Ida Celene Mathias and others	...	Respondents

Mr. G. S. Godbole, Senior Advocate a/w. Mr. Sumit S. Kothari for Petitioners in W.P.No.10718 of 2018 and for Respondent No.3 in W.P.No.9952 of 2018.

Mr. Joseph David i/b. David Associates for Respondent in W.P.No.10718 of 2018 and for Petitioner in W.P.No.9952 of 2018.

CORAM : R. G. KETKAR, J.
DATE : OCTOBER 22, 2018

P.C. :

Heard Mr. Godbole, learned Senior Counsel for petitioners in Writ Petition No.10718 of 2018 as also for respondent No.3 in Writ Petition No.9952 of 2018 and Mr. David, learned Counsel for respondent in Writ Petition No.10718 of 2018 and for petitioner in Writ Petition No.9952 of 2018 at length.

2. Both these Petitions take exception to the judgment and order dated 07.08.2018 passed by the Appellate Bench of the Small Causes Court in Revision Application No.56 of 2018. By that order, the Appellate Court partly allowed the Revision Application in the following terms:

“ The order by the learned trial Judge C.R.No.34 below Exh-13 in L.E.&C. Suit No.16 of 2017 dated 17.04.2018 is hereby set aside and substituted as under:

The order directing the defendant to deposit the

damages @ Rs.20,000/- per day from 1-5-2016 with liberty to the plaintiffs to withdraw the said amount is hereby set aside.

The operative order clause No.3 is hereby modified and defendant is directed to deposit monthly licence fee of Rs.2,00,000/- from 1-5-2016 till 1-8-2018 total amounting to Rs.52,00,000/- in 8 installments on or before 15th day of each month starting from August 2018.

The defendant is hereby directed to deposit monthly licence fee of Rs.2,00,000/- from the date of order till disposal of suit on or before 15th day of each succeeding month in the Court.

Addl. Registrar, Small Causes Court, Bandra Branch is directed to invest the amount of licence fee as and when deposited by the appellant in the fixed deposit for the term of atleast one year in the Nationalized Bank.

No order as to costs.”

3. Mrs. Ida Celene Mathias and four others, hereinafter collectively referred as 'Mathias', have instituted Writ Petition No.10718 of 2018 challenging that part of the impugned order whereby the Appellate Court has set aside the order dated 17.04.2018 passed by the learned trial Judge directing petitioner in Writ Petition No.9952 of 2018 (hereinafter referred to as 'Mobin Khan') to deposit damages @ Rs.20,000/- per day from 01.05.2016 with liberty to Mathias to withdraw that amount. They have also challenged the order on the ground that though Mobin Khan is directed to deposit monthly licence fee of Rs.2,00,000/- from the date of the order till 01.08.2018 amounting to Rs.52,00,000/- in 8 installments on or before 15th day of each month starting from August 2018 and is further directed to deposit monthly licence fee of Rs.2,00,000/- from the date of the order till disposal of the Suit on or before 15th day of each succeeding month, Mathias are not permitted to withdraw that amount.

4. Mobin Khan has instituted Writ Petition No.9952 of 2018

challenging that part of the impugned order whereby the Appellate Court modified clause 3 of the operative part of the trial Court's order and directed him to deposit monthly licence fee of Rs.2,00,000/- from 01.05.2016 till 01.08.2018, total amounting to Rs.52,00,000/- in 8 installments on or before 15th day of each month starting from August 2018 and further directed him to deposit monthly licence fee of Rs.2,00,000/- from the date of the order till disposal of the Suit on or before 15th day of each succeeding month in the Court.

5. Rule. Learned Counsel for the respective respondents waive service. Having regard to the narrow controversy raised in these Petitions and at the request and by consent of the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing. The relevant and material facts that are necessary for the disposal of the Writ Petitions are as follows:

6. On 23.11.2015, a registered leave and licence agreement was entered into by and between Mathias on one hand and Mobin Khan on the other. Clause 2 thereof provided that the duration of the licence is for a period 6 months commencing from 01.11.2015 and ending by efflux of time on 30.04.2016. Clause 3 thereof provided that in consideration of the Mathias permitting Mobin Khan to use and occupy the licensed premises, namely, commercial premises on the ground floor of the building known as Mathias Bakery admeasuring about 2160.50 sq.ft. (carpet area) alongwith an adjoining A.C. shed (for short 'suit premises') on leave and licence basis, Mobin Khan shall pay to Mathias a sum of Rs.2,00,000/- per month as and by way of licence fee and / or compensation for the use and enjoyment of the suit premises for a period of 6 months. The said licence fee shall be deemed to be a standard licence fee or compensation payable in respect of the suit premises. Clause 4 thereof provided that in addition to the payment of

Rs.2,00,000/- per month, Mobin Khan shall also be liable to pay directly, electricity and water charges for the electricity and water consumed in the suit premises as per the meter installed for the purpose.

Clause 12 thereof provided thus,

“12. In the event of the Licensee (Mobin Khan) failing to handover to the Licensors (Mathias) possession of the licensed premises on the expiry or sooner determination or termination of the licence hereby granted as hereinabove provided and continues to remain in occupation and possession of the licensed premises, then in that event, notwithstanding the right conferred upon the Licensors (Mathias), the Licensors (Mathias) shall take such steps as may be advised to take physical possession of the licensed premises. The Licensors (Mathias) shall also be entitled to charge the Licensee compensation and / or damages for the use and occupation of the licensed premises at the rate of Rs.20,000/- (Rupees Twenty Thousand Only) PER DAY, which the Licensee (Mobin Khan) agrees, undertakes and confirms to pay.”

7. After the efflux of time as Mobin Khan did not handover possession of the suit premises, Mathias instituted L.E.&C. Suit No.16 of 2017 on or about 03.01.2017 in the Small Causes Court at Bombay (Bandra Bench) inter alia praying for possession of the suit premises; for directing Mobin Khan, his servants, agents, family members or any person/s claiming through him to remove themselves with all their belongings from the suit premises or any part thereof and to quit, vacate and handover quiet, vacant and peaceful possession of the suit premises; for direction to Mobin Khan to deposit quantified compensation / penalty / damages at the rate of Rs.20,000/- per day during the pendency of the Suit with liberty to withdraw the same; for direction to Mobin Khan to deposit accrued licence fee at the rate of Rs.2,00,000/- per month with liberty to withdraw the same.

8. Mathias took out application exhibit-13 under Order XV-A of the Code of Civil Procedure, 1908 (for short 'C.P.C.') inter alia praying for

direction to Mobin Khan to deposit pre-estimated genuine quantified compensation and / or liquidated damages @ Rs.20,000/- per month from 01.05.2016 till the disposal of the Suit; for further direction to Mobin Khan to deposit accrued monthly licence fee @ Rs.2,00,000/- per month from 01.05.2016 with liberty to withdraw the same.

9. Mobin Khan filed reply exhibit-20 dated 18.04.2017 opposing that application. By order dated 17.04.2018, the learned trial Judge allowed the application in the following terms:

“2. Pending the hearing and disposal of the present suit, the defendant is directed to deposit the pre-estimated genuine quantified compensation and / or liquidated damages @ Rs.20,000/- per day from 01/05/2016 with liberty to plaintiffs to withdraw the same.

3. Pending the final hearing and disposal of present suit, the defendant is directed to deposit accrued monthly licence fees @ Rs.2,00,000/- per month from 01/05/2016 and plaintiffs are at liberty to withdraw the same.”

10. Aggrieved by this decision, Mobin Khan instituted Revision Application No.56 of 2018. Mobin Khan has also instituted R.A.D.Suit No.221 of 2017 on 17.04.2017 inter alia praying for declaration that he is a lawful tenant of the suit premises; for perpetual injunction restraining Mathias from dispossessing him from the suit premises without following due process of law; for permitting him to deposit an amount of Rs.3,00,000/- towards 4 months rent @ Rs.75,000/- per month on or before 10th day of every succeeding month. Mobin Khan also instituted R.A.D.Suit No.346 of 2018 in or about August 2018 inter alia praying for declaration that the leave and licence agreement dated 23.11.2015 is sham and colourable document; for declaration that the said document is never to be acted upon; for declaration that Mathias are not entitled to any reliefs under the said agreement. By that impugned order, the Appellate Court partly allowed the Revision Application as indicated earlier. It is against this order, Mobin Khan has instituted Writ

Petition No.9952 of 2018 and Mathias have instituted Writ Petition No.10718 of 2018.

11. In support of Petition instituted by Mathias, Mr. Godbole has invited my attention to clauses 1, 2, 3 and 12 of the leave and licence agreement. He submitted that the learned trial Judge allowed the application on 17.04.2018 and directed Mobin Khan to deposit pre-estimated genuine quantified compensation and / or liquidated damages @ Rs.20,000/- per day from 01.05.2016 with liberty to Mathias to withdraw the same. The learned trial Judge further directed Mobin Khan to deposit accrued monthly licence fees @ Rs.2,00,000/- per month from 01.05.2016 and permitted Mathias to withdraw the same. He submitted that the period of leave and licence agreement was from 01.11.2015 to 30.04.2016. The said period is admittedly over and despite that, Mobin Khan has not handed over possession of the suit premises. Though Mobin Khan is occupying the suit premises, he is neither praying accrued licence fee of Rs.2,00,000/- per month nor paying damages @ Rs.20,000/- per day, after the expiry of the licensed period, namely with effect from 01.05.2016. He relied upon Section 74 of the Indian Contract Act, 1872 (for short 'Act') to contend that when a contract is broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. In the present case, in terms of clause 12, Mobin Khan agreed to pay compensation and / or damages @ Rs.20,000/- per day. He is also liable to pay monthly licence fee @ Rs.2,00,000/- per month in terms of clause 3 of the leave and licence

agreement.

12. Mr. Godbole further submitted that though the learned trial Judge has permitted Mathias to withdraw the compensation and / or liquidated damages @ Rs.20,000/- per day from 01.05.2016, the same may be ordered to be deposited in the Small Causes Court with further direction to invest the same pending the Suit filed by Mathias. In so far as the direction to Mobin Khan to deposit monthly licence fee @ Rs.2,00,000/- per month from 01.05.2016 is concerned, Mathias may be permitted to withdraw the same, unconditionally.

13. On the other hand, Mr. David submitted that the Appellate Court was not justified in modifying clause 3 of the operative part of the trial Court's order and directing Mobin Khan to deposit monthly licence fees @ Rs.2,00,000/- from 01.05.2016 till 01.08.2018 and further directing him to deposit monthly licence fee of Rs.2,00,000/- from the date of the order till disposal of the Suit. He submitted that Mobin Khan's father was inducted in the suit premises by Robert Mathias as far as back as in the year 1977. Thus, father of Mobin Khan entered in the suit premises way back in the year 1977. From 1980 till 1992, various agreements were executed between the parties. The agreements between 1980 and 1992 are in possession of Mathias and not in possession of Mobin Khan. The agreements executed between 1992 and 2015 are in possession of Mobin Khan. He submitted that Mobin Khan has instituted Suit challenging the agreement dated 23.11.2015. He has sought declaration that the leave and licence agreement dated 23.11.2015, which was executed by his Power of Attorney, is sham and colourable document and that the said agreement was never to be acted upon. He has also prayed for further declaration that Mathias are not entitled to any benefit under the said agreement. Mathias, till date, have not filed written

statement in the said Suit and the Suit is proceeding ex-parte. He submitted that Mobin Khan is in exclusive possession of the suit premises. He submitted that Mathias have never raised demand for payment of licence fee @ Rs.2,00,000/- per month. Even in the demand, which was raised firstly on 10.01.2017, they did not claim licence fee @ Rs.2,00,000/- per month. In fact, Mobin Khan is paying Rs.75,000/- per month to the plaintiff No.3. He submitted that the Appellate Court was not justified in directing Mobin Khan to deposit monthly licence fees @ Rs.2,00,000/- from 01.05.2016 till 01.08.2018 and further directing him to deposit monthly licence fee of Rs.2,00,000/- from the date of the order till disposal of the Suit. The said amount can be quantified only after evidence is adduced by the parties. At the interlocutory stage, the Appellate Court was not justified in passing the directions impugned in the operative part of the order.

14. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. I have already extracted clause 12 of the leave and licence agreement. Clauses 2 and 3 of the said agreement read thus,

“2. The duration of the license hereby granted shall be for a period of 6 (Six) months only commencing from the date 01st November 2015 (and ending by efflux of time on 30th April 2016 or on sooner determination thereof, as recorded in the terms and conditions herein) the Licensors puts the Licensee in permissive user and occupation of the licensed premises.

3. In consideration of the Licensors permitting the Licensee to use and occupy the licensed premises on leave and license basis, the Licensee shall pay to the Licensors a sum of Rs.2,00,000/- (Rupees Two Lakhs only) per month as and by way of license fee and / or compensation for the use and enjoyment of the licensed premises for the said period of 6 (six) months. The said license fee shall be deemed to be standard license fee or compensation payable in respect of the said premises. If the Licensee challenges the said license fee payable in respect to the said premises as not being standard license fee or compensation before any Court or Forum, then

and in that event, this Agreement shall come to an end and the Licensee shall forthwith quit, vacate and hand over quiet, vacant and peaceful possession of the said premises.”

15. A perusal of clause 2, extracted hereinabove, show that the duration of licence is for a period of 6 months commencing from 01.11.2015 and ending on efflux of time on 30.06.2016. A perusal of clause 3 shows that Mobin Khan agreed to pay licence fee of Rs.2,00,000/- per month for use and enjoyment of the suit premises for a period of 6 months. Clause 12 extracted earlier shows that Mobin Khan agreed, undertook and confirmed to pay Rs.20,000/- per day in the event of his failure to handover possession of the suit premises on the expiry or sooner determination or termination of the licence.

16. As noted earlier, Mathias have instituted Suit on or about 17.04.2017. A perusal of prayers made in that Suit clearly shows that as and way of interim order, they have claimed compensation / penalty / damages @ Rs.20,000/- per day as also direction to deposit accrued licence fee @ Rs.2,00,000/- per month. Mr. David submitted that they have, however, not claimed these amounts from a particular date. I do not find any merit in this submission. Admittedly, the licensed period is over on 30.04.2016. Equally, admitted position is that Mobin Khan continues to be in occupation of the suit premises. In view of clause 3 of the leave and licence agreement, he has agreed to pay licence fee @ Rs.2,00,000/- per month. Section 55 of the Maharashtra Rent Control Act, 1999 (for short 'Maharashtra Rent Act') reads thus,

55. Tenancy agreement to be compulsorily registered.- (1) Notwithstanding anything contained in this Act or any other law for the time being in force, any agreement for leave and licence or letting of any premises, entered into between the landlord and the tenant or the licensee, as the case may be, after the commencement of this Act, shall be in writing and shall be registered under the Registration Act, 1908 (XVI of 1908).

(2) The responsibility of getting such agreement registered shall be on the landlord and in the absence of the written registered agreement, the contention of the tenant about the terms and conditions subject to which a premises have been given to him by the landlord on leave and licence or have been let to him, shall prevail, unless proved otherwise.

(3) Any landlord who contravenes the provisions of this section shall, on conviction, be punished with imprisonment which may extend to three months or with fine not exceeding rupees five thousand or with both.”

17. A perusal of the above extracted provision shows that after commencement of the Maharashtra Rent Act, the agreement of tenancy or for leave and licence is required to be in writing and further it is required to be registered under the Registration Act, 1908. The responsibility of getting such agreement registered is on the landlord and in the absence of the written registered agreement, the contention of the tenant about the terms and conditions subject to which a premises have been given to him by the landlord on leave and licence or have been let to him, shall prevail, unless proved otherwise.

18. In the instant case, the leave and licence agreement is admittedly a registered instrument. In view thereof, prima facie, the contention of Mobin Khan about the terms and conditions subject to which premises have been given to him on leave and licence basis cannot be accepted at this stage. As he is occupying the suit premises even after expiry of the licensed period, he is bound to pay monthly compensation @ Rs.2,00,000/-.

19. In so far as the payment of compensation and / or damages @ Rs.20,000/- per day is concerned, a perusal of the order of the Appellate Court shows that Appellate Court undoubtedly reproduced Section 74 of the Act. After reproducing Section 74, it was observed in paragraph 25 thus,

“25. The above facts indicates that the question of awarding damages on the basis of breach of contract is a matter of evidence and is to be appreciated in the proceeding and the burden is on the party who claimed damages. So at this stage, the question of awarding damages does not arise. The order passed by the learned trial Court regarding awarding damages of Rs.20,000/- per day from 1-5-2016 and liberty to the plaintiffs to withdraw the same is not legal and proper and deserves to be set aside.”

20. In my opinion, the approach of the Appellate Court to say the least is perverse. After extracting Section 74, still, the Appellate Court observed that the question of awarding damages on the basis of breach of contract is a matter of evidence and is to be appreciated in the proceeding and the burden is on the party, who claimed damages. So at this stage, the question of awarding damages does not arise. In my opinion, the said finding is in the teeth of Section 74 of the Act. This is more so when in paragraph 21, the Appellate Court observed that “At this stage, we are bound by the facts that the leave and licence agreement has been registered by the parties to the proceedings. So parties to the proceedings are bound by the leave and licence agreement”. In view thereof, the impugned order passed by the Appellate Court deserves to be set aside thereby allowing application exhibit-13 in the following terms:

- (a) Pending the hearing and final disposal of L.E.& C. Suit No.16 of 2017, Mobin Khan shall deposit the pre-estimated genuine quantified compensation and / or liquidated damages @ Rs.20,000/- per day from 01.05.2016 till disposal of the Suit in the trial Court;
- (b) The arrears of liquidated damages shall be deposited for the period from 01.05.2016 till 31.10.2018, within 8 weeks from today, under intimation in writing to the Advocate for Mathias;
- (c) Upon deposit, the said amount shall be invested in any Fixed Deposit, initially for a period of 3 years and shall be renewed during pendency of the Suit;

- (d) Pending the hearing and final disposal of L.E.&C. Suit No.16 of 2017, Mobin Khan is directed to deposit monthly licence fee of Rs.2,00,000/- from 01.05.2016 till 31.08.2018 total amounting to Rs.56,00,000/- within 8 weeks subject to adjustment of deposits / payments made to Mathias;
- (e) Pending the hearing and final disposal of L.E.&C. Suit No.16 of 2017, Mobin Khan shall deposit monthly licence fee @ Rs.2,00,000/- for the period from 01.09.2018, on or before 10th day of the succeeding month/s under intimation in writing to the Advocate for Mathias;
- (f) Mathias are permitted to withdraw the amount referred in clauses (d) and (e) hereinabove, unconditionally.

21. Rule is made absolute in Writ Petition No.10718 of 2018 and Rule is discharged in Writ Petition No.9952 of 2018 with no order as to costs.

(R. G. KETKAR, J.)

Minal Parab