Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.12019 OF 2017

Sarvamangal Mercantile Co. Ltd.	]	Petitioner
Vs.		
Mohatta Brother Property Co. & Ors.	]	Respondents

WITH

WRIT PETITION (ST) NO.27375 OF 2017

B. Sharad Kumar & Co.	]	Petitioner
Vs.		
Mohatta Brother Property Co & Ors.	]	Respondents

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Mr. R.A. Thorat, Sr. Advocate a/w Mr. P.J. Thorat, for Petitioner in W.P. No.12019 of 2017 and W.P. (ST) No.27375 of 2017.

Mr. P.S. Dani Sr. Advocate a/w Mr. C.N. Chavan a/w Ms. Bijal Chowlera a/w Mr. Sanket Tawade, for respondent No.1 in W.P. No.12019 of 2017 and W.P. (ST) No.27375 of 2017.

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CORAM : R.G. KETKAR, J.

DATE : 23RD MARCH, 2018.

P.C.

Heard Mr. Thorat, learned Senior Counsel for the petitioner and Mr. Dani, learned senior Counsel for respondent No.1 at length.

2. Writ Petition No.12109 of 2017 takes exception to the judgment and order dated 6th July, 2017 passed by the Appellate Bench of the Small Causes Court, Mumbai below Exhibit 8 in R.A.E Suit No.801/1620 of 1996. The controversy in this Petition is respect of Godown No.2, Mohatta Bhavan

situate at Dr. E. Moses Road, Worli, Mumbai 400 018. By that order, the Appellate Court allowed the application Exhibit 8 made by the petitioner and stayed operation and execution of the judgment and decree dated 5th May, 2016 passed by the learned Judge in R.A.E. Suit No.801/1620 of 1996 subject to condition of petitioner depositing a sum of Rs. 4,50,000/- per month on or before 10th day of each month as compensation for use and occupation of Godown No.2 from the date of the decree till decision of the appeal and shall continue to deposit the same at the same rate on or before 10th day of each succeeding month. The petitioner is given liberty to deposit arrears of compensation for the use and occupation of the suit premises either in lumpsum or in three equal monthly installments from 6th July, 2017. Office is directed to invest that amount in Fixed Deposit for a period of one year and thereafter for a similar period of one year each. The petitioner is further restrained from creating third party interest or parting with possession in any manner of the suit premises till decision of the appeal.

3. Writ Petition (ST) No.27357 of 2017 takes exception to the judgment and order dated 6th July, 2017 passed below Exhibit 8 in Appeal No. 322 of 2016 arising from R.A.E Suit No.776/1588 of 1996. The controversy in this Petition is in respect of Godown No.3, Mohatta Bhavan, Dr. E. Moses Road, Worli, Mumbai – 400 018.

4. Since common question of law and fact arise in these Petitions, the same can conveniently be disposed of by this common order. In order to appreciate controversy raised in this Petition, facts from Writ Petition No.12019 of 2017 are taken into consideration.

5. Respondent No.1/plaintiff instituted suit for recovery of possession of Godown No.2, Mohatta Bhavan situate at Dr. E. Moses Road, Worli, Mumbai

400 018 (for short 'suit premises'). The suit premises was let out on the monthly rent of Rs. 3198/-. The plaintiff claimed possession of the suit premises, inter alia, invoking grounds u/s 13 (1) (b) and 13 (1) (e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). By judgment and decree dated 5th May, 2016, the learned trial Judge decreed the suit. The learned trial Judge held that the plaintiffs established that defendant No.1 carried out additions and alterations of permanent nature inside the suit premises without their consent. The plaintiffs proved that defendant No.1 illegally sublet the suit premises to defendant No.2 and then to defendant No.3 and lastly to defendant No.4. The learned trial Judge, further, held that the plaintiffs proved that defendant No.1 illegally and unlawfully parted with suit premises and/or given on leave and licence, created third party interest in respect of the suit premises in favour of defendant No.3 in breach of injunction order and/or undertaking given by the defendant No.1 to the Court.

6. Aggrieved by that decision, defendant No.1 preferred Appeal No.321 of 2016. During pendency of the appeal, defendant No.1 filed application Exhibit 8 on 3rd September, 2016 for staying eviction decree. On behalf of respondent No.1, Affidavit in reply of Rekha Virendrakumar Mohatta, partner of defendant No.1 was filed on 14th October, 2016. Rejoinder was filed on behalf of the petitioner. By the impugned order, the Appellate Court has allowed application and stayed eviction decree subject to imposing conditions referred in the earlier part of the order. It is against this order, defendant No.1 has instituted the present Writ Petition.

7. In support of this Petition, Mr. Thorat submitted that while passing the impugned order, the Appellate Court did not give reasons for fixation of compensation @ Rs.4,50,000/- per month. He submitted that defendant No.1

and the plaintiffs relied on valuation reports. In so far as valuation report relied on by the petitioner is concerned, the Appellate Court referred to that report in paragraph 20, however, thereafter the Appellate Court did not deal with valuation report relied on by defendant No.1. He has taken me through valuation report submitted by Architect Pradeep N. Kushawar and the indicators in paragraph 9 of that report. He submitted that in paragraph 9, the valuer referred three indicators on leave and licence agreement on market rental;

[1] Golden Liquor Agency Godown situate at Sitaram Mill Patra road, Sitaram Mill Compound, J.R. Boricha Marg, Lower Parel, Fort, Mumbai -400 013 having carpet area of 2500 square feet was given on rent in the year 2015 @ Rs. 30,000/- per month and @ Rs. 33,000/- per month in the year 2016.

[2] Gala No.4 and 6 situate on the ground floor of Shah & Nahar Industrial Estate, Dr. E. Moses Road, Worli, Mumbai 400 018 having carpet area of 4146.29 square feet was given on rent in the year 2015 for Rs. 1,70,000/- per month and for Rs. 1,87,000/- per month in the year 2016 with deposit of Rs. 10,20,000/- .

[3] Gala No.3 on the ground floor, Bharat Bazaar. D.S. Cross Lane, Gandhi Nagar, Worli Point, Mumbai 400 018 having carpet area 1920.62 square feet was given on rent in the year 2015 for Rs. 60,000/- per month and for Rs. 66,000/- per month in the year 2016 with deposit of Rs. 4,00,000/-.

He submitted that these properties are situate in the same vicinity where the suit premises is situate. He also invited my attention to leave and licence agreement entered into between Messrs. Super Auto Engineering Works on one hand and M/s. Business Broadcast News Private Limited on the other. He has taken me through the report prepared by Mr. Kushawar which records that the suit premises was constructed in the year 1952 and at present is more than 60 years old.

8. Mr. Thorat submitted that the Appellate Court discarded the valuation report relied on by respondent No.1. He has taken me through paragraphs 26,27 and 30 of the impugned order. In paragraph 26, the Appellate Court discarded the capital value method as also capitalization of rent method adopted by valuer of the first respondent. In paragraph 27, the Appellate Court discarded indicators relied on by the respondent No.1 as also leave and licence agreements. In paragraph 30, the Appellate Court referred to Indicator No.2. In paragraph 29, the Appellate Court considered leave and licence agreement in favour of M/s. Infinity Cars Pvt. Ltd. He submitted that basically the said indicator is not comparable instance. He has invited my attention to leave and licence agreement dated 6th April, 2015 executed between respondent No.1 and M/s. Infinity Cars Pvt. Ltd which is situate opposite Nehru Center, Dr. Annie Besant Road, Worli, Mumbai 400 018. Industrial premises on plot No.3 on the ground floor about 4800 square feet along with constructed portion 4800 carpet area along with open space was also given on leave and licence basis to M/s. Infinity Cards Private Limited. As against this the suit premises admeasuring 4000 square feet is situate at Dr. E. Moses Road. User of M/s. Infirmity Cars Private Limited is Motor Vehicle Service Station from workshop. As against this, suit premises is a godown. Whereas the Appellate Court did not discuss the valuation report relied on by the petitioner/defendant No.1 and discarded valuation report relied on by respondent No.1, none the less, on the basis of discussion in paragraph 29, the Appellate Court fixed compensation @ Rs.4,50,000/- on the basis of 50% of comparable indicator No.2 in respect of M/s. Infirmity Cars Private Limited. He, therefore, submitted that the impugned order is liable to be set aside, thereby, restoring application Exhibit 8 for deciding it afresh.

9. Mr. Thorat relied on following decisions in support of his submissions;

[1] **Atma Ram, Properties (P) Ltd. V. Federal Motors (P) Ltd., (2005) 1 SCC 705.**

[2] **State of Maharashtra and another Vs. Super Max International Private Limited and others, (2009) 9 Supreme Court Cases 772.**

He submitted that while fixing the amount of compensation, the Court has to exercise restraint and should not fix any excessive, fanciful or punitive amount. The amount of compensation should be reasonable so as to enable the tenant to pay that compensation. If the tenant is unable to pay compensation so fixed by the Court, it will render the appeal infructuous.

10. On the other hand, Mr. Dani supported the impugned order. Mr. Dani, however, was not in a position to point out that the Appellate Court has considered and discussed valuation report relied by the petitioner. He, however, invited my attention to the trial Court's judgment and in particular paragraphs 25 to 28. In paragraph 25, the learned trial Judge referred to cross-examination of D.W.1 Mr. Sanjay Jain, Director of the petitioner. D.W.1 Sanjay Jain was shown copy of leave and licence agreement executed by defendant No.1 in favour of defendant No.2. Leave and licence agreement was entered in the year 1996 for the period commencing from 1st August, 1996 and ending on 31st July, 1999. Defendant No.2 agreed to pay compensation @ Rs. 1,50,000/- per month. D.W. 1 admitted that as per leave and licence agreement Rs. 18,000,00/- was interest free deposit and monthly compensation was Rs. 1,50,000/-. He submitted that having regard to the fact that Rs.1,50,000/- was charged as monthly compensation in the year 1996 as also Rs.18,00,000/- interest free security deposit was collected by defendant No.1, as also having

further due regard to the fact that after passage of about 21 years, the Appellate Court has fixed interim compensation @ Rs.4,50,000/-, no case is made out for interfering with the impugned order.

11. In paragraph 29, the Appellate Court referred to the instance of leave and licence agreement of M/s. Infirmity Cars Private Limited. It was given on licence for Rs. 9,00,000/- per month. The Appellate Court clamped down rate of compensation at 50% of instance of M/s Infirmity Cars Private Limited and accordingly fixed compensation @ Rs. 4,50,000/- per month. He, therefore, submitted that no case is made out for interfering with the impugned order.

12. I have considered the rival submissions of learned Counsel for the parties. I have also perused the material on record. It is no doubt true that the Appellate Court though referred valuation report relied by defendant No.1 in paragraph 20 of the impugned order, did not thereafter discuss the said valuation report and the instances relied on by the petitioner. It is also true that the Appellate Court also substantially discarded the instances relied on by respondent No.1 in the valuation report. In the case of **Atma Ram** Properties **(P) Ltd**. (supra) in paragraph 9, the Apex Court has observed thus;

> **"Robust common sense, common knowledge of human affairs and events gained by judicial experience and judicially noticeable facts, over and above the material available on record – all these provide useful inputs as relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on. After all, in the words of Chief Justice Chandrachud, speaking for the Constitution Bench in Olga Tellis v. Bombay Municipal Corpn. (1985) 3 SCC 545, it was observed;**
> **"Common sense which is a cluster of life's experience, is often more dependable than the rival facts presented by warring litigants".**

13. In the present case, on behalf of the petitioner D.W.1 Sanjay Jain was examined. Para 25 of the trial Court's judgments reads thus;

> 25.During cross-examination, D.W.1 was shown the copy of the leave and licence agreement executed by defendant No.1 in favour of the defendant No.2. He admitted that he has signed the said agreement. He further admitted that leave and licence agreement between defendant No.1 and 2 and leave and licence agreement executed between B. Sharad Kumar & Company, and B.M.G Crescendo India Pvt. Ltd are executed at the same time and except the amount of deposit and licence fees other contents are similar in both the agreements. He admitted that said agreement is executed between defendant No.1 and 2 in respect of godown No.2 and period leave and licence agreement was of three years. He has avoided to answer the question whether B.M.G Crescendo India Pvt. Ltd had vacated the godown No.2 after the period of leave and licence agreement. He further admitted that as per said agreement Rs. 18,00,000/- was the deposit amount and monthly compensation was Rs.1,50,000/-."

In paragraph 28, it was observed thus;

> "28.The address of the establishment is of suit premises i.e Unit No.2 and 3 of Mohatta Properties, Dr. E. Moses Road, copy of leave and licence agreement Exhibit-105 is reflecting that said leave and licence agreement was executed by defendant No.1 in favour of the defendant No.2 BMG Crescendo Pvt. Limited. The premises were given on leave and licence basis i.e for three years from 01/08/1996 to 31/07/199, as per the said agreement defendant No.1 has accepted Rs.10,00,000/- and the amount of Rs.8,00,000/- was to be to defendant No.1 after the agreement towards interest free deposit amount and the compensation was agreed @ Rs.1,50,000/- per month.

14. Thus, in the year 1996, the suit premises was given on leave and licence basis by defendant No.1 to defendant No.2 by charging Rs. 1,50,000/- per month as compensation and Rs.18,00,000/ interest free security deposit was also collected. The Appellate Court has passed the impugned order on 6th July, 2017. Mr. Thorat submitted that the Appellate Court did not consider the

valuation report relied by defendant No.1. It is, however, material to note that the valuation report relied by defendant No.1 does not consider the fact that the suit premises was given on leave and licence in the year 1996 by charging monthly compensation @ Rs.1,50,000/- together with Rs. 18,00,000/- interest free security deposit. In my opinion, 10% increase in the monthly compensation of Rs. 1,50,000/- every year would be modest and reasonable compensation. If calculation is carried out on that basis, defendant No.1 would be liable to pay amount as under:

Year	Monthly compensation	10% Increase	Total
1996	150000	15000	165000
1997	165000	16500	181500
1998	181500	18150	199650
1999	199650	19965	219615
2000	219615	21962	241577
2001	241577	24158	265734
2002	265734	26573	292308
2003	292308	29231	321538
2004	321538	32154	353692
2005	353692	35369	389061
2006	389061	38906	427968
2007	427968	42797	470764
2008	470764	47076	517841
2009	517841	51784	569625
2010	569625	56962	626587
2011	626587	62659	689246
2012	689246	68925	758171
2013	758171	75817	833988
2014	833988	83399	917386
2015	917386	91739	1009125
2016	1009125	100912	1110037
2017	1110037	111004	1221041
		1071041	11781454

Even if, 15,000/- (being 10% of 1,50,000/-) is uniformly increased for the period from 1996 to 2017, the monthly compensation of Rs.1,50,000/- in the year 1996 will come to Rs. 1,50,000/ + Rs.15,000/- (increase per year) x 20 = Rs.4,50,000/-(1996 to 2017) as against monthly compensation of Rs.10,71,041/- + 1,50,000/- = 12,21,041/-. (Rs. 10,710,41/- being increase as indicated above +1,50,000/- comes to Rs. 12,21,041/-.) Thus, fixation of monthly compensation @ Rs. 4,50,000/- cannot be said to be excessive, fanciful or punitive.

15. In view thereof, I do not find any merit in the submission of Mr. Thorat that the Appellate Court committed error in discarding the valuation report relied by defendant No.1. Mr. Thorat further submitted that the Appellate Court discarded the valuation report relied by respondent No.1/plaintiff as would be evident from paragraphs 26,27 and 30 of the impugned order. I do not find any merit in the submission. As in paragraph 29, the Appellate Court considered leave and licence agreement in favour of M/s. Infirmity Cars Private Limited. In view thereof, it cannot be said that the Appellate Court discarded valuation report relied by respondent No.1/plaintiff. Mr. Thorat also submitted that as held by the Apex Court in the case of **State of Maharashtra** (supra), the Court has to exercise restraint and should not fix any excessive, fanciful or punitive amount of compensation. It is not open for defendant No.1 to complain about fixation of monthly compensation @ Rs. 4,50,000/- when defendant No.1 had given the suit premises on leave and licence in the year 1996 by charging monthly compensation of Rs. 1,50,000/- and Rs. 18,00,000/- interest fee security deposit.

16. In view thereof, I do not find that fixation of compensation @ Rs. 4,50,000/- per month by the Appellate Court, albeit on different ground is

unreasonable and arbitrary. Hence, no case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

17. At this stage, Mr. Thorat orally prays for stay of this order for a period of 8 weeks from today. Mr. Dani opposes this prayer and submits that the petitioner be directed to deposit Rs.2,25,000/- per month as per the impugned order till further orders.

18. Having regard to the fact that the petitioner intends to challenge this order before higher Court, I find that request made by Mr. Thorat is reasonable. Hence, notwithstanding dismissal of this Petition, order passed by the Appellate Court below Exhibit 8 dated 6^{th} July, 2017 and this order shall remain stayed for a period of 8 weeks from today. Order accordingly.

[R.G. KETKAR, J.]