

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.13304 OF 2018

Omprakash Gupta & ors .. Petitioners
` vs
Khorshed Naozer Irani & ors .. Respondents

with WRIT PETITION NO.14308 OF 2018

Naozar Firoze Irani .. Petitioners
since decd per legal heirs
vs
Omprakash Gupta & ors .. Respondents

Mr.Y.S.Bhate with Mr.Upendra Lokegaonkar for Petitioners
Mr.Jaydeep Deo for Respondents.

Coram : M.S.SONAK, J
Date : 20TH DECEMBER, 2018

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1. Heard learned counsel for the parties.
2. At the request of learned counsel for the parties, both writ petitions are taken up together for disposal since both the writ petitions challenge the order dated 6.10.2018 made by the appellate Bench of the Small Causes Court, at Mumbai (Appeal Court).
3. The petitioners in Writ Petition No.13304 of 2018 challenge

the impugned order dated 6.10.2018 to the extent, the same imposes conditions upon them to deposit the compensation at the rate of Rs.2,00,000/-per month in order to benefit from the interim order restraining the execution of the judgement and decree dated 28.8.2017 in R.A.E. No.902/1637/1996.The petitioners in Writ Petition No.14308 of 2018 challenge the impugned order dated 6.10.2018 on the ground that the compensation amount of Rs.2,00,000/- per month as determined by the appeal Court is too meagre, and the same must be enhanced to at least Rs.7,62,705/- per month as per the valuation report submitted by the said petitioners.

4. Mr.Bhate learned counsel for the petitioners in Writ Petition No.13304 of 2018 submits that the principles in case of **Atma Ram Properties Pvt.Ltd vs Federal Motors Pvt.Ltd 2005 1 Supreme Court Cases 705**, are not applicable to the present case because, the decree dated 28.8.2017 which has been appealed before the appellate Court is a clear nullity. He submits that the suit premises in the present case, is an open plot of land admeasuring 8 gunthas and therefore, the Small Causes Court lacks jurisdiction to even, entertain the suit seeking eviction of the petitioners from such open plot. He relies on **Hotel Kings & ors vs. Sara**

Farhan Lukmani (2007) 1 Supreme Court Cases 202 and Shaha Ratanshi Khimji & sons vs Kumbhar Sons Hotel Private Limited (2014) (14) Supreme Court Cases 1 in support of his contention that a suit for eviction for a open plot is not at all maintainable before the civil Courts under the rent legislation. He points out that these decisions as well as the decision of this Court in Om Joshi Apartments Flat Owners Co-op Housing Society Ltd vs.Dr.Natwarlal D.Joshi 1999 (4) ALL MR 356 also lay down the proposition that a decree for eviction of the lessees of a open plot cannot operate, as a decree for eviction against the occupants of any building therein. He submits that these decisions lay down that the occupants of such buildings or structures will then have to be regarded as direct tenants/leseees of the head lessor. He submits that since this is a factual position in the present case, the decision in Atmaram Properties Pvt.Ltd (supra) are clearly in-applicable and the petitioners could not have been directed to deposit Rs.2,00,000/- per month by way of compensation as a pre-condition for stay of the execution of the eviction decree.

5. On the other hand, Mr.Deo learned counsel for the petitioner in Writ Petition No.14308 of 2018 whilst disputing the aforesaid

contentions, points out that the suit premises, in the present case are an entire building, comprising 19 apartments and two shops. He submits that the plot is located on a property which comprises 8 gunthas. He submits that this property and the building is situate at Kurla (West) which is a commercial hub in Mumbai. He submits that as per the valuation report submitted by the petitioners, the compensation should have been determined at Rs.7,62,705/- per month. He submits that since the appeal Court claims have to taken a middle-way even then, the compensation should have been Rs.4,00,000/- per month. For all these reasons, Mr.Deo learned counsel for the petitioners submitted that Writ Petition No.14308 of 2018 is liable to be allowed.

6. Mr.Deo also submits that the appeal Court was not right in granting a blanket stay so as to benefit, even the parties, who had not appealed against the eviction decree dated 28.8.2017. He therefore, submits that the impugned order dated 6.10.2018 is required to be clarified and the stay order granted thereby, restricted only to the appellants before the appeal Court and not others, who have chosen not to appeal the eviction decree dated 28.8.2017.

7. **The rival contentions now fall for determination :**

8. In case of *Atma Ram Properties Pvt.Ltd* (supra) the Hon'ble Apex Court has held that while passing an order of stay under Rule 5 of Order 41 of Code of Civil Procedure, 1908 the appellate Court does have jurisdiction to put the appellant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned, such terms needless to say, shall be reasonable.

9. The Apex Court has further held that in case of premises governed by the provisions of Rent Control legislations, the tenancy does not stand terminated merely by its termination under the general law. It terminates with the passing of the decree for eviction. Therefore, with effect from that date, the tenant is liable to pay the mesne profits or compensation for use or occupation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent

effective for the period preceding the date of the decree. The Doctrine of Merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.

10. In *State of Maharashtra & anr vs Super Max International Private Limited & ors (2009) (9) Supreme Court cases 772* the apex Court after advertng to the rulings in *Atma Ram Properties* (supra) has held that in an appeal or revision preferred by a tenant against the decree of eviction passed under the Rent Act, it is open to the Appellate or Revisional Court to stay execution of decree on terms including direction to pay monthly rent. at rate higher than contractual rent. Needless to add that in the event, in fixing the amount, the Court to exercise restraint and not fix any excessive, fanciful or punitive amount.

11. From the aforesaid, it is clear that the appeal Court while granting a stay on the execution of the decree has to balance the rights of both the tenant, as well as the landlord. If the tenant is directed to deposit some illusory amount which has no nexus whatsoever with market conditions on the date when execution of a eviction decree is being

stayed, then the landlord will suffer considerable prejudice if ultimately it is found that there was no merit in the tenant's appeal and the same is consequently, required to be dismissed. At the same time, the amount which the tenant is required to deposit should not be so excessive or punitive, that the tenant is totally unable to pay the same and for that reason, forced to suffer execution even before his appeal is decided. Therefore, the contentions as regards the quantum of compensation which is directed to be deposited as a pre-condition for stay, will have to be examined in this context.

12. Mr.Bhate learned counsel for the petitioners however submits that in the peculiar facts of the present case, the rulings in case of *Atma Ram Properties Pvt.Ltd* (supra) is not applicable and therefore, there should have been no direction for deposit of compensation at all and in any case, direction could have been restricted to deposit the compensation at the rate of Rs.400/- per month which was the contractual rent between the lessor and lessee.

13. The contentions raised by Mr.Bhate learned counsel for the petitioners relate, mainly to the merits of the appeal. At this stage, it is

certainly not possible to say that the contentions raised by him are full-proof nor can it be said, that the contentions lack merits. These are matters which will have to be decided at the stage of final disposal of the appeal. There is no doubt that these contentions as well as the decisions which Mr.Bhate learned counsel for the petitioners, has cited in support of his contentions, will be taken into consideration by the appeal Court whilst deciding the appeal on merits.

14. However, it is necessary to note that these contentions are not, in the facts of the present case, of such a degree, as to hold that the decree of eviction made is *ex-facie* a nullity and should not be permitted to operate even for a minute. Therefore, on the basis of such contentions, it is not possible to accept Mr.Bhate's contentions that the principles laid down in *Atma Ram Properties* (supra) or *Super Max International Private Limited* (supra) are in-applicable and ought not to be considered even at all.

15. Ultimately, this is a case where the Small Causes Court has passed a decree of eviction, and the petitioners in Writ Petition No.13304 of 2018 have applied for and secured a stay on execution of such a decree.

If ultimately, the petitioners fail in their appeal, then the decree holders cannot be left in lurch or be required to commence proceedings for recovery of mesne profits afresh. Therefore there is nothing wrong in imposing condition that the petitioners deposit some amount of compensation as a pre-condition for stay of the execution of the eviction decree. In this case, there is no direction that such amount be paid to the landlords. The direction is only for deposit of such amount.

16. By virtue of the stay order, the eviction of petitioners from their respective apartments has been stayed. The decree had directed eviction from the land admeasuring approximately 8 gunthas and a building which comprises 21 units and two garages. There is a dispute as to whether the garages are lawful or unlawful. There is also a dispute as to whether two of the units are being used for commercial purposes. All these disputes are not relevant at this stage. Suffice to note that the suit premises in the present case, are located at Kurla (West) and comprise 21 units and two garages and whether they are authorized or unauthorized. Taking into consideration all these factors, it can certainly not be said that the compensation amount of Rs.2,00,000/- per month is either excessive or punitive. In fact, this amount is quite reasonable in the facts and

circumstances of the present case.

17. Mr.Deo learned counsel for the petitioner in Writ Petition No.14308 of 2018 however, submits that as per the valuation report submitted by the decree holders, the compensation should have been Rs.7,62,705/-. The appeal Court has taken into consideration, the valuation report. The appeal Court has also taken into consideration the circumstances that there are several tenants who have been in occupation of the units for several years. The exercise of discretion by the appeal Court is quite reasonable, in as much as the appeal Court has undertaken a balancing exercise so as to protect the rights of the decree holders, as well as judgement debtors.

18. In the facts' of the present case, therefore the impugned order in so far as it determines the amount of compensation, does not warrant interference. However Mr. Deo is right in his submission that the stay order dated 6.10.2018 made by the appeal Court should operate only in favour of the appellants who have chosen to appeal against the eviction decree dated 28.8.2017 in R.A.E.Suit No.902/1837/1996. If some of the judgement debtors have chosen not to appeal against the eviction decree,

then they cannot be granted benefit of the stay order dated 6.10.2018. To this extent, some modifications or clarifications is in order.

19. Accordingly, it is clarified that the impugned order dated 6.10.2018 will stay the eviction decree dated 28.8.2017 only in so far as the appellants in Appeal No.377 of 2017 are concerned, and not such of the judgement debtors, who have not even chosen to appeal against the eviction decree dated 28.8.2017. This clarification may be treated as a part of the impugned order dated 6.10.2018.

20. Therefore, with clarifications/modifications, as aforesaid, both these Petitions are liable to be disposed and are hereby disposed. However, there shall be no order as to costs.

21. At the request of Mr.Bhate learned counsel for the petitioners, the time limit for deposit of arrears of compensation, in terms of the impugned order is however, extended up to 28.2.2019 as this period is otherwise to expire on 5.1.2019.

(M.S.SONAK, J)

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