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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO.436 OF 2018
IN
NOTICE OF MOTION NO.1814 OF 2016
IN
SUIT NO.598 OF 2016

Afzal Haji Mohammed ... Appellant
Vs.
Khairunnisa Haji Mohammed Haji Essa and Ors. ... Respondents

Mr. Vaibhav Krishna a/w Mr. Tahir Prande i/b. Maharashtra Law Associates for the Appellant.

Mr. Chetan Kapadia and Mr. Vatsal Parikh i/b. Manilal Kher Ambalal & Co. for the Respondent No.1.

Mr. Ajay Verma on behalf of the Respondent No.2 present in person.

Mr. D.R. Shetty, the Court Receiver is present.

CORAM : A.S.OKA AND M.S. SONAK, JJ.

DATE : 31st OCTOBER 2018.

ORAL JUDGMENT (Per A.S.Oka, J)

1 We have heard the learned counsel appearing for the appellant (the original first defendant) and the learned counsel appearing for the first respondent (the original plaintiff). Shri Ajay Verma, authorised signatory of the second respondent is present. Considering the narrow controversy involved, the appeal is forthwith taken up for final disposal. For the purpose of this appeal, the third respondent may not be a necessary and proper party. Hence, we are not issuing any notice to the said respondent.

2 The challenge in this Appeal is to the judgment and order dated 28th August 2018 passed by the learned Single Judge on a praecipe filed by the Advocate for the plaintiff in Notice of Motion No.1814 of 2016 in Suit No. 598 of 2016. The first defendant is the son of the plaintiff. The dispute is in respect of the flat subject matter of the suit. The second defendant is the licensee in respect of the suit flat. The third respondent is a Co-operative Society in which the suit flat is situated. The Notice of Motion was taken out being Notice of Motion No.1814 of 2016 by the plaintiff for grant of various interim reliefs.

3 In the suit, the first substantive prayer is for a declaration that the Gift Deed dated 19th October 2015 executed by the plaintiff in respect of the suit flat in favour of first defendant is null and void. Various consequential reliefs are prayed in the plaint on the basis of the substantive prayer. A prayer is also made for a decree of damages against the first defendant.

4 Interim relief was prayed for in the aforesaid Notice of Motion of appointment of Court Receiver with a direction to the Court Receiver to take possession of the suit flat, to collect rent and license fees from the second defendant during the subsistence of leave and license agreement dated 16th November 2015 and upon expiry or termination of the leave and license agreement, to take physical possession of the suit flat. On the said Notice of Motion taken out by the plaintiff, on 19th April 2017, the learned Single Judge passed an order appointing the Court Receiver, High Court, Bombay as the Receiver of the suit flat with a

direction not to disturb possession of the second defendant who was a licensee in respect of a part of the flat. The Court Receiver was directed to place the plaintiff in possession of the remaining portion of the said flat. A direction was issued to the second defendant to pay monthly license fee directly to the plaintiff's mother. The amounts till then received by the second defendant being an amount of Rs.17 Lakh was ordered to be deposited by the first defendant with the Court Receiver. The learned Single Judge directed that the leave and license agreement by and between the first defendant and the second defendant shall not be renewed without leave of the Court. It was further observed that a leave and license agreement shall not be executed either by the plaintiff or the first defendant without leave of the Court. The said order is ad-interim order as the Notice of Motion was kept pending.

5 The Advocate for the plaintiff filed a praecipe dated 30th July 2018 seeking leave for extension of leave and license agreement. It is on the basis of the said prayer made on the praecipe for grant of leave, by the impugned order the learned Single Judge directed that the license shall be renewed in favour of the second defendant for a further period of 11 months at the monthly compensation of Rs.2,16,000/-. It is not in dispute that the license fee was payable at the same rate at the time of expiry of the term of the existing leave and license agreement.

6 We have heard the learned counsel appearing for the first defendant and the learned counsel appearing for the plaintiff. We must note here that Shri Ajay Verma, authorised signatory of the second

defendant was present yesterday when this appeal was heard. He has tendered an affidavit on behalf of the second respondent. A copy of the resolution passed by the designated partners of the second defendant LLP in the meeting held yesterday has been annexed to the said affidavit which records that Shri Ajay Verma has been duly authorised to represent the second defendant. The learned counsel appearing for the appellant has taken us through the impugned order. In support of the appeal, his submission is that even the first defendant had offered to take the flat on leave and license basis as agent of the Court Receiver. He pointed out that the existing leave and license agreement which expired provided for escalation clause and at the time of renewal of the leave and license agreement, the license fee payable was Rs.2,16,000/- p.m. He pointed out that under the impugned order, no escalation has been provided. He urged that not even a proper application was made by the plaintiff for grant of leave. His submission is that the first defendant is the owner of the suit flat on the basis of the registered Gift Deed subject matter of challenge in the suit and therefore, he was entitled to make his own offer.

7 The learned counsel appearing for the plaintiff invited our attention to the findings recorded in paragraphs 1 and 2 of the impugned order. He submitted that according to the case made out by the first defendant, M/s. Rose Construction was willing to take the suit flat on leave and license basis. He pointed out that the learned Single Judge found that Mr. Nadim Khan representing M/s. Rose Construction was not found to be honest with the Court and he had made false statements. He pointed out that the said Nadim Khan withdrew his offer as noted in the

impugned order. He submitted that considering these facts, the learned Single Judge passed an order allowing the second defendant to continue as a licensee at monthly compensation of Rs.2,16,000/- and therefore, no interference is called for in the impugned order. He pointed out that the conduct of the first defendant as reflected from the impugned order will have to be considered.

8 Shri Ajay Verma, authorised signatory of the second respondent has filed an affidavit affirmed today. The same is taken on record and marked 'A-1' for identification. In the third paragraph of the affidavit, he has stated thus :-

“ I say that I am desirous to continue to occupy the suit premises, save and except an area of 150 sq. ft. occupied by the Respondent No.1 and the terrace area, on Leave and License basis for a period of 11 months on monthly license fees of Rs.2,37,600 (Rupees Two Lacs Thirty Seven Thousand Six Hundred only) which is an escalation of 10% from the current license fees paid by me, exclusive of the applicable taxes.”

9 Shri Ajay Verma, appeared in person and reiterated what is stated in the affidavit. We have perused the plaint. In the plaint, there is a challenge to the Gift Deed executed by the plaintiff in favour of the first defendant on 19th October 2015. By an ad-interim order, the second defendant - licensee was directed to pay license fees directly to the plaintiff. If ultimately the suit filed by the plaintiff fails, possibly the first defendant will be entitled to claim license fee/ monthly compensation which was ordered to be paid to the plaintiff.

10 It is not in dispute that in the existing leave and license agreement, there was an escalation clause by which the license fee was enhanced at periodical intervals. License fee payable at the time of expiry of the agreement was Rs.2,16,000/-. When the second defendant had agreed to enhance license fee after periodical intervals as can be seen from the agreement, the learned Judge, if he intended to grant leave to renew the agreement, ought to have ensured that the offer of payment of monthly compensation exceeds Rs.2,16,000/-. If the plaintiff fails in the suit, possibly the said amount could be claimed by the first defendant. Therefore, in our view, if the learned Judge intended to allow the second defendant to continue as a licensee, higher amount than what was payable under the expired agreement ought to have been ordered to be paid.

11 Secondly, leave was sought by filing a praecipe. A proper Notice of Motion ought to have been filed supported by an affidavit.

12 In the affidavit of Shri Ajay Verma, it is stated that the second defendant is willing to pay monthly license fee of Rs.2,37,600/- which is 10% higher than the current license fee which is payable under the expired agreement.

13 If the learned Single Judge was inclined to grant leave, before grant of leave, he ought to have examined the aspect of market value of the suit premises so that the amount could have been more than the sum of Rs.2,16,000/- which was payable under the expired agreement.

14 As there was no proper application made by the plaintiff and considering the aforesaid reasons, we are inclined to set aside the impugned order. However, the second defendant has offered to pay at the rate of Rs.2,37,600/- without prejudice to its rights and contentions. Therefore, while remanding the matter, we propose to accept the statement made on behalf of the second defendant by Shri Ajay Verma. The second defendant will have to pay said amount directly to the plaintiff. However, this order which we propose to pass shall not be construed as grant of a leave either for renewal of the existing agreement or for execution of a new leave and license agreement. The payment of the amount at the rate of Rs.2,37,600/- will be subject to the order which may be passed on the application for leave which may be made by the plaintiff.

15 Accordingly, we pass the following order :-

ORDER

- (i) The impugned order dated 28th August 2017 is hereby quashed and set aside. We make it clear that Notice of Motion No.1814 of 2016 shall be treated as pending;
- (ii) It will be open for the plaintiff to make a proper application for grant of leave for continuing the leave and license agreement in favour of the second defendant or to execute a fresh leave and license agreement in favour of the second defendant. Till further orders and in any event, till the date of passing an order on application which may be moved by the plaintiff for grant of leave,

the second defendant shall continue to pay compensation at the rate of Rs.2,37,600/- from 1st November 2018;

- (iii) The second defendant shall pay the amount directly to the plaintiff subject to further orders which may be passed in the suit ;
- (iv) We make it clear that payment of the aforesaid amount of Rs.2,37,600/- pm will not create any equity in favour of the second defendant. The payment of the said amount shall be subject to further orders passed in the pending notice of motion and suit;
- (v) If any such application for grant of leave is made by the plaintiff, the same shall be decided in accordance with law;
- (vi) Appeal is partly allowed on above terms;
- (vii) The learned counsel appearing for the plaintiff states that application for leave will be made by the plaintiff within a period of one month from today. We accept the said statement.

(M.S. SONAK, J.)

(A.S.OKA, J.)