

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1488 OF 2019

Radhabai Baburao Desai ... Petitioner
Vs.
Hafiz Munnawar Sheikh Noor ... Respondent

WITH
WRIT PETITION NO.2499 OF 2019

Hafiz Munnawar Sheikh Noor Mohammad Shaikh... Petitioner
Vs.
Radhabai Baburao Desai ... Respondent

Mr. Sameer Shankar Kolge for Petitioner in W.P.No.1488 of 2019 and
for Respondent in W.P.No.2499 of 2019.
Mr. Abdul Rab Shaikh for Respondent in W.P.No.1488 of 2019 and for
Petitioner in W.P.No.2499 of 2019.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 27, 2019

P.C. :

Heard Mr. Kolge, learned Counsel for the petitioner in Writ
Petition No.1488 of 2019 as also for the respondent in Writ Petition
No.2499 of 2019 and Mr. Rab, learned Counsel for the respondent in
Writ Petition No.1488 of 2019 as also for the petitioner in Writ Petition
No.2499 of 2019 at length.

2. These cross Petitions take exception to the order dated
05.12.2017 passed by the Appellate Bench of the Small Causes Court
below exhibit-7 in Appeal No.301 of 2017 arising from R.A.E.Suit
No.222 of 2005. By that order, the Appellate Court allowed application
exhibit-7 file by Radhabai Baburao Desai (for short 'Radhabai') -
defendant and stayed eviction decree dated 05.05.2017 passed by the
learned trial Judge in R.A.E.Suit No.222 of 2005 subject to imposing
following conditions:

“a. The stay shall be subject to the condition that Radhabai

(defendant) shall pay and continue to deposit the sum of Rs.7,500/- (Rupees Seven Thousand Five Hundred only) per month from the date of decree i.e. from 05.05.2017 as compensation for the use and occupation of the suit premises during the pendency of the present Appeal.

b. Radhabai to deposit the arrears of compensation either in lumpsum or in 03 (three) equal monthly installments from today i.e. 05.12.2017 payable on or before 05th day of each calendar month.

c. On such deposit being made, the office of Court of Small Causes, Mumbai shall invest the amount in Fixed Deposit of 01 (one) year extendable thereafter on yearly basis till further order.

d. Radhabai shall not part with possession of the suit premises or to create any third party interest in respect of the suit premises during the pendency of this appeal.”

3. Rule. Learned Counsel for the respective respondents waive service. Having regard to the short controversy raised in these Petitions as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petitions are taken up for final hearing.

4. Mr. Kolge, in support of Writ Petition No.1488 of 2019, submitted that for the reasons recorded in paragraph 13, the Appellate Court has directed Radhabai to pay Rs.7,500/- per month from the date of the decree. The Appellate Court relied upon unregistered Leave and Licence Agreements, both, dated 29.09.2017. One was in respect of shop No.198, Panchi Niwas, Pipe Road, Kurla (West), Mumbai 400 070 and other was in respect of room No.9A, Panchi Niwas. He submitted that the suit premises is a residential premises, and therefore, Hafiz Munnawar Shaikh Noor Mohammed Shaikh (for short 'Hafiz') - plaintiff was not justified in relying upon the Leave and Licence Agreement in respect of shop premises. He submitted that the Appellate Court also did not consider area of the suit premises, locality among others, which are the relevant considerations while fixing reasonable compensation. He,

therefore, submitted that the impugned order deserves to be set aside.

5. On the other hand, Mr. Rab has invited my attention to reply filed by Hafiz in Writ Petition No.1488 of 2019. He submitted that by the impugned order, Radhabai was directed to keep on depositing Rs.7,500/- per month from the date of the decree passed by the trial Court. Radhabai, however, has committed 14 defaults and after committing 14 defaults, has chosen to approach this Court. As Radhabai has failed to comply the impugned order for more than one year, she is not entitled to any equitable relief in exercise of powers under Article 227 of the Constitution of India. He submitted that in so far as Leave and Licence Agreement in respect of shop is concerned, though it is for residential-cum-shop use, it is described as shop premises.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, for the reasons recorded in paragraph 13, the Appellate Court has fixed the compensation @ Rs.7,500/- per month. Paragraph 13 reads thus,

“13. The perusal of the record points out to the fact that respondent has produced on record the agreement of leave and licence in respect of shop for the period 15.01.2017 to 14.12.2017 i.e. for the previous year. The licence fee agreed therein is Rs.15,000/- per month for the premises situated in the same vicinity of Kurla (West), Mumbai. The said leave and licence agreement is not registered document and merely a notarized document. Moreover it is alleged to have been executed by plaintiff No.1 Hafiz. Before placing reliance upon the same we have to be cautious. The same is the case with another agreement of leave and licence executed by plaintiff No.1 Hafiz for the period 20.06.2017 to 19.05.2018 on the rental basis of Rs.10,000/- per month. It is in respect of room.”

7. A perusal of paragraph 13, extracted hereinabove, shows that the Appellate Court has not considered the relevant factors such as the market value of the building on the date of letting, prevailing rentals in

the locality as on the date of letting, the size or situation or amenities, age of construction, latest assessment of the building or other circumstances for fixing reasonable compensation. The landlord and tenant, both, are aggrieved by the impugned order. In the fitness of things, therefore, the impugned order is liable to be set aside thereby giving opportunities to the parties to produce material before the Appellate Court for fixing reasonable compensation. The Appellate Court will fix reasonable compensation in the light of the decisions of the Apex Court in *Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.*, (2005) 1 SCC 705, *State of Maharashtra Vs. Super Max International Private Limited*, (2009) 9 SCC 772, and *Niyaz Ahmed Khan Vs. Mahmood Rahmat Ullah Khan*, 2008 (7) SCC 539. Hence, the following order:

- a. Impugned order dated 05.12.2017 below exhibit-7 passed by the Appellate Court is set aside;
- b. Application exhibit-7 is restored to its original position;
- c. The parties are at liberty to produce material for fixing reasonable compensation;
- d. The Appellate Court is requested to dispose of application exhibit-7 within 8 weeks from today;
- e. The Appellate Court will fix the compensation in the light of the decisions of the Apex Court in **Atma Ram Properties (P) Ltd.** (*supra*), **State of Maharashtra** (*supra*) and **Niyaz Ahmed Khan** (*supra*);
- f. All contentions of the parties on merits are expressly kept open;
- g. It is made clear that deposit made by Radhabai in pursuance of the order dated 13.02.2019 will not come in the way of the plaintiff Hafiz while deciding application exhibit-7;

- h. The amount deposited by Radhabai shall be transmitted to the Small Causes Court at Mumbai forthwith;
 - i. Rule is made absolute in the aforesaid terms with no order as to costs.
8. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab