

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE SIDE JURISDICTION**

**WRIT PETITION [STAMP] NO.8845 OF 2019**

Zerin Kersi Hathiram and another. ] Petitioners

Vs.

Khushroo Keki Jasavala and others. ] Respondents

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Dr. Abhinav Chandrachud a/w Mr. D.A. Joseph i/b David Associates, learned Counsel for the Petitioners.

Mr. Jaydeep Deo, learned Counsel for Respondents No.1,3 and 4.

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**CORAM : R.G. KETKAR, J.**

**DATE : 1<sup>st</sup> APRIL, 2019.**

**P.C.**

Heard Dr. Chandrachud, learned Counsel for the petitioners and Mr. Deo, learned Counsel for respondents No.1,3 and 4 at length. Despite service, none appears for respondent No.5.

2. On instructions, Dr. Chandrachud seeks leave to delete respondent No.2,6,7 and 8. Leave as prayed for is granted. Amendment shall be carried out forthwith.

3. This Petition takes exception to the order dated 30<sup>th</sup> January, 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai below Exhibit 6 in (R) Appeal No.317 of 2016. By that order, the Appellate Court allowed the application filed by the petitioners/defendants No.5 and 6 under Order-XLI, Rule-5 of the Code of Civil Procedure, 1908 (for short 'C.P.C') and stayed eviction decree dated 4<sup>th</sup> May, 2016 passed by the learned trial Judge in R.A.D Suit No.1556 of 1999 subject to the following conditions;

- [1] The operation and execution of the impugned judgment and decree dated 04.05.2016 passed by the learned trial court in R.A.D. Suit No.1556 of 1999, is hereby stayed till the disposal of this appeal subject to condition that defendant No.5 and 6 to pay compensation at the rate of Rs.50,000/- per month from the date of decree i.e dated 04.05.2016 till January, 2019 within two months from the date of the order.
- [2] The appellants(defendants No.5 and 6) shall deposit further monthly interim compensation at the rate of Rs.50,000/- per month in the Court before 10<sup>th</sup> day of each succeeding month till final disposal of the suit/appeal.

4. Rule. Mr. Deo waives service on behalf of respondents No.1, 3 and 4. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of learned Counsel for the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

5. In support of this Petition, Dr. Chandrachud raised following contentions;

- [1] property in dispute is Flat No.8, 4<sup>th</sup> floor, Saidunnisa House, 48 Sleater Road, Mumbai 400 007 (for short 'suit premises'). It is used for residential purpose. The Appellate Court, however, proceeded on the premise that the suit premises is having commercial user and on that basis, fixed the compensation;
- [2] the Appellate Court has not dealt with the valuation report of Kishor Karamsey & Co dated 24<sup>th</sup> March, 2017 submitted by defendants No.5 and 6 though in paragraph 13, reference is made to the valuation report.

[3] the Appellate Court did not consider the fact that the building where the suit premises is situate is in a dilapidated condition. Maharashtra Area Housing Development Authority (for short 'MHADA') has issued eviction notice. He submitted that defendants No.5 is 68 years old. Defendant No.6 is 76 years old. Defendant No.6 retired in the year 1998. His last wage drawn was Rs.7400/- per month. Defendant No.6 is suffering from heart ailments, diabetes and age related diseases. Respondent No.1/original plaintiff was not in physical possession of the suit premises.

6. On the other hand, Mr. Deo submitted that the Appellate Court has considered valuation report relied on by defendants No.5 and 6 as also three leave and licence agreements relied by the plaintiff. Mr. Deo further submitted that son of the petitioners/defendants No.5 and 6 is also residing in the suit premises. Dr. Chandrachud submitted that he draws salary of Rs.32,466/- per month. Mr. Deo submitted that the plaintiff was dispossessed from the suit premises on 11<sup>th</sup> June, 2004. He also invited my attention to the reply filed by the plaintiff/respondent No.1. On instructions, he states that the plaintiff wants to rely on leave and licence agreements dated;

[a] 23<sup>rd</sup> February, 2015

[b] 19<sup>th</sup> July, 2016

[c] 6<sup>th</sup> August, 2016.

7. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute and is rather a matter of record that defendants No.5 and 6 have produced valuation report dated 24<sup>th</sup> March, 2017 prepared by Kishor Karamsey & Company, Government Registered Valuers. A perusal of that

report shows that they have suggested fair market rent of Rs.2300/- per month. In paragraph 13 of the impugned order, the Appellate Court has referred to the valuation report relied on by defendants No.5 and 6 which shows that Rs.2300/- per month would be just and proper compensation. The Appellate Court, however, thereafter did not deal with this report. In paragraph 15, the Appellate Court observed that neither the appellants (defendants No.5 and 6) nor the respondent (plaintiff) have filed valuation report. In short, the finding recorded by the Appellate Court in paragraph 15 is factually incorrect and contrary to record. That apart, the Appellate Court proceeded on the premise that the suit premises is having commercial user. Prima facie, the said fact is also not borne out from record.

8. In view thereof, the impugned order cannot be sustained and is deserves to be set aside. Accordingly, the impugned order is set aside. Application Exhibit 6 is restored to its original position. The Appellate Court will deal with valuation report relied on by defendants No.5 and 6 as also will consider the leave and licence agreements produced by the plaintiff along with reply at Exhibit 16. All contentions of the parties including the contentions recorded in this order are expressly kept open. The parties assure that they will appear before the Appellate Court on 15<sup>th</sup> April, 2019 and for that purpose no fresh notice be issued to defendants No.5 and 6 and the plaintiff. In the meantime, the Appellate Court will issue notice to the remaining respondents in the Petition. The Appellate Court is requested to dispose of the application on or before 3<sup>rd</sup> May, 2019. Having regard to the fact that defendant No.5 is 68 years old and defendant No.6 is 76 years old as also having further due regard to the fact that the plaintiff claims to have been dispossessed from the suit premises in the year 2004, the Appellate Court is requested to dispose of the appeal as expeditiously as possible and in any case, before end of 2019.

9. Rule is made absolute accordingly with no order as to costs. All the parties including the Appellate Court to act upon the authenticated copy of this order. Writ to go down forthwith. Order accordingly.

**[R.G. KETKAR, J.]**