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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO. 521 OF 2017
WITH
CIVIL APPLICATION NO. 1331 OF 2017**

Kotecha Investment Corporation Pvt. Ltd.
a Company incorporate under the provisions
of the Companies Act, 1956, and having its
Registered Office at 231, Dadabhoy Naoroji
Road, Fort, Mumbai – 400 001.

... Appellant/
Applicant

Versus

1. State of Maharashtra.
2. The Collector of Bombay City,
having his office at Old Customs House,
Shahid Bhagatsingh Marg, Mumbai 400 001.
3. Krishanal Ramlal Kharbanda of Mumbai,
Indian Inhabitant, carrying on business at
Flat No. 1, Ground Floor on the Western
Side of Ram Mahal, Dinshaw Vachha Road,
Mumbai – 400 020.

... Respondents

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Mr. Nikhil Sakhardande along with Mr. Kaustav Talukdar and Ms. Shubhra Swami i/by M/s. Lex Legal and Partners for the Appellant/Applicant.

Mr. Yogesh Dabke, Asst. Government Pleader, State for the Respondent No.1.

Mr. Gajanan Shankarrao Yedme, Awwal Karkun, Revenue Branch, Collector Office, Mumbai City present in Court.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 16th DECEMBER, 2019

PRONOUNCED ON : 20th DECEMBER, 2019

JUDGMENT :

. By this First Appeal filed by the appellant (original plaintiff), the appellant has impugned the judgment and order dated 28th February, 2017 passed by the Bombay City Civil Court in Suit No. 248 of 1991 thereby dismissing the suit filed by the appellant with cost. By consent of the appellant and the respondent nos. 1 and 2, the First Appeal is heard finally at the admission stage. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. The appellant was the original plaintiff whereas the respondent nos. 1 and 2 were the original defendant nos. 1 and 2. In so far as the respondent no.3 is concerned, he was defendant no.3 before the Trial Court. The First Appeal against the said respondent no.3 is rejected by an order dated 12th March, 2018 passed by the learned Registrar (Judl.-II). Respondent No.3 (original defendant no.3) was the monthly tenant of the plaintiffs in respect of Flat No.1 on the ground floor of the building known as Ram Mahal, situated at Dinshaw Vachha Road, Bombay – 400 020.

3. By an Indenture of Lease dated 27th April, 1944, the Governor of Bombay granted a lease to one Vajkunvar Devchand Doshi in respect of a plot of land being Plot No. 121, in Block II of the Backbay Reclamation Estate of the Government of Bombay for the period of 99 years. The said Lease Deed granted permission for assignment of the lease. The minimum

open space required to be left open was described in paragraph 2 of the said Indenture of Lease.

4. It was the case of the appellant that by a Deed of Assignment dated 29th July, 1955 between the appellant and the said lessee, the appellant became the assignees of the said plot of land. On 21st January, 1970, the appellant entered into agreement by giving monthly tenancy to the respondent no.3 in respect of the Flat No.1 on the ground floor of the building known as Ram Mahal, Dinshaw Vachha Road, Bombay – 400 020 which had been constructed on the leasehold plot. Clause 9 of the said agreement for monthly tenancy provided that the respondent no.3 shall at all times observe and perform the covenants and conditions contained in the Indenture of Lease dated 17th April, 1944 and shall not commit any breach or non compliance thereof and keep the appellant indemnified in respect of any breach or non compliance thereby.

5. It was the case of the appellant that the respondent no.1 was conducting a business of a restaurant known as Rasna Refreshment in the said Flat No.1. The respondent no.3 without the permission of the appellant encroached upon the portion of the plot of land required to be kept open pursuant to the provisions of the lease granted by the Government of Bombay to the appellant. On 22nd June, 1972, the appellant terminated the monthly tenancy of the respondent no.3. The appellant filed a suit being Suit

No. 1306 of 1975 in the Bombay City Civil Court against the respondent no.3 and sought a permanent order and injunction to restrain from remaining upon, occupying, entering upon or using the said compulsory open space in the said property. The appellant also prayed for a mandatory injunction against the respondent no.3 ordering him to remove the structures constructed by him in the said open space.

6. On 13th February, 1986, the appellant and the respondent no.3 obtained a consent decree in the said suit by filing consent terms. By the said consent terms, the respondent no.3 submitted to almost all the prayers in the plaint filed by the appellant. The respondent no.3 also submitted to the decree whereby the mandatory order of injunction against the respondent no.3 requiring him to dismantle the shed over the area shown in yellow wash on the plan annexed to the said consent terms and to dismantle and remove within 12 months from the date of the said order dated 13th February, 1986 and to restore the space open to sky was passed. The respondent no.3 thereafter forwarded his application dated 12th February, 1986 addressed to the Collector of Bombay, requesting the Collector of Bombay to grant him permission to use the said space of 800 sq. ft. in the open space as shown in the plan annexed to the consent terms.

7. The said Collector of Bombay however by letter dated 13th June, 1986 informed the appellant that the said application would have to be made by

the appellant, since the appellant was lessee in respect of the said plot of land. The appellant accordingly made an application on 16th June, 1986 to the Collector of Bombay for grant of permission for the enclosure of the said open space admeasuring 800 sq. ft. shown on the plan. By letter dated 28th March, 1990, the Revenue and Forest Department of the respondent no.1 refused to grant permission for enclosing 800 sq. ft. of open space. The appellant informed the respondent no.3 about the said decision taken by the respondent no.1.

8. On request of the respondent no.2, the appellant requested the learned Minister (Revenue and Forest) to allow the retention of the shed admeasuring 800 sq. ft. constructed on the compulsory open space in front of Rasna Restaurant. By letter dated 4th April, 1991, the respondent no.3 informed the appellant that the Government did not deem it proper to amend the decision already intimated to the appellant earlier. The appellant accordingly informed the respondent nos. 3 and 4, the said decision taken by the respondent no.1 and furnished a copy thereof to the respondent no.3. The appellant also called upon the respondent no.3 to remove or demolish the unauthorized shed.

9. On 25th June, 1991, the respondent no.2 issued a notice to the appellant thereby terminating the said lease dated 27th April, 1944 on the ground that the appellant had alleged to have committed the breach of the

covenant no.2(d) and sub-rule (I) and 8 attached to the said lease and had not removed the said unauthorized shed. The respondent no.2 called upon the appellant to handover the vacant and peaceful possession of the said plot on 1st August, 1991. The appellant by letter dated 1st July, 1991 addressed to the respondent no.2 pointed out that the appellant had not constructed any unauthorized structure. The said unauthorized structure was constructed by the respondent no.3.

10. The appellant also pointed out that the consent decree passed by the City Civil Court on 13th February, 1986 in which the respondent no.3 was ordered to demolish and remove the said unauthorized structure. The respondent no.3 however did not remove the said unauthorized structure. The appellant issued a notice to the respondent no.2 to withdraw the said notice of termination issued by the respondent no.2. The appellant vide its advocate's letter dated 29th June, 1991 informed the respondent no.2 that the respondent no.3 was asked to remove the unauthorized shed by the appellant but the said respondent had not removed the unauthorized shed. The appellant also opposed the notice of termination issued by the respondent no.2.

11. On 26th July, 1991 the appellant filed a suit before this Court which was subsequently transferred to City Civil Court *inter-alia* praying for a declaration that the notice dated 25th June, 1991 issued by the respondent

nos. 1 and 2 was illegal, bad in law, without authority of law and for other reliefs. No written statement was filed by any of the respondents. The appellant examined Mr. Arvind Jeram Kotecha, one of the Director of the appellant before the Trial Court to prove the case of the appellant. There was no cross-examination of the witness examined by the appellant by any of the respondents. The Trial Court passed a judgment and decree dated 28th February, 2017 dismissing the said suit filed by the appellant.

12. Mr. Sakhardande, learned counsel for the appellant invited my attention to the various documents annexed to the plaint and the deposition made in the affidavit in lieu of examination-in-chief. He also invited my attention to the findings rendered by the Trial Court in the said judgment and decree dated 28th February, 2017. He submits that though the Trial Court noticed the fact that the said suit had proceeded against the respondents as undefended and without written statement and there was no cross-examination of the witness examined by the appellant and the witness of the appellant had gone unchallenged and uncontroverted, the Trial Court dismissed the said suit.

13. It is submitted by the learned counsel that during the pendency of the said suit, the respondent nos. 1 and 2 have also accepted the penalty on 23rd February, 2005 for the said alleged breaches committed by the appellant. The Trial Court did not take cognizance of this fact also in the impugned

judgment and decree.

14. It is submitted by the learned counsel that since there was neither written statement filed by any of the respondents nor any cross-examination of the witness examined by the appellant, the facts pleaded by the appellant having been proved and not having been controverted by any of the respondents, the Trial Court could not have dismissed the suit filed by the appellant.

15. Mr. Dabke, learned Asst. Government Pleader, appearing for the respondent no.1 on the other hand submits that the written statement on behalf of the respondent nos. 1 and 2 was already affirmed on 16th September, 2015. The said written statement however was not filed in Court. He submits that though the matter was on board on 15th October, 2015 for recording of evidence/admission denial of documents and the learned Asst. Government Pleader had requested the Trial Court to allow the respondent nos. 1 and 2 to file written statement and for taking written statement on record, the written statement was not taken on record. The learned Asst. Government Pleader had also made a submission that an appropriate application would be filed for extension of time for filing written statement.

16. The Trial Court however did not accept the submission made by the respondent nos. 1 and 2 and directed to proceed for admission and denial on

the next date i.e. 29th October, 2015. He submits that this Court thus shall remand the matter back to the Trial Court with an opportunity to the respondent nos. 1 and 2 to file written statement on record and to proceed with the matter on its own merits. Learned Asst. Government Pleader produced a copy of the said written statement for perusal of this Court along with letter dated 28th October, 2015 addressed by the learned Asst. Government Pleader to the Law and Judiciary Department of the State Government.

17. Mr. Sakhardande, learned counsel for the appellant in rejoinder submits that the respondent nos. 1 and 2 did not challenge the said order passed by the City Civil Court, refusing their request to permit them to file written statement as sought to be suggested by the learned Asst. Government Pleader for respondent nos. 1 and 2. He submits that in any event, the respondent nos. 1 and 2 even did not cross-examine the witness examined by the appellant and thus on that ground itself the Trial Court ought to have decreed the said suit.

REASONS AND CONCLUSION

18. It is not in dispute that none of the respondents filed any written statement on record though were served with writ of summons. The suit was filed in the year 1991. No written statement was filed by the respondents

even till September 2015. The witness examined by the appellant had already filed affidavit in lieu of examination-in-chief on 19th December, 2013 and thereafter an additional affidavit in lieu of examination-in-chief on 20th October, 2016.

19. Though it is urged by the learned Asst. Government Pleader now across the bar that the learned Trial Judge had refused to take the written statement on record, the respondent nos. 1 and 2 did not challenge any such order passed by the Trial Court. A perusal of the letter dated 28th October, 2015 sent by the learned Asst. Government Pleader appearing for the respondent nos. 1 and 2 to the Secretary, Law and Judiciary Department and also to the Under Secretary, Revenue Department, indicates that the learned Asst. Government Pleader had given advice to file a writ petition against the order passed by the Trial Court for not granting extension of time to file written statement. The fact remain that no such proceedings were filed by the respondent nos.1 and 2 though such advice was given on 28th October, 2015.

20. A perusal of the Roznama produced by the learned Asst. Government Pleader for respondent nos. 1 and 2 indicates that by an order dated 9th January, 2015, the Trial Court had already passed an order that the suit against the respondent nos. 1 and 2 shall be proceeded undefended. On 17th February, 2015, the Trial Court had passed an order, directing the appellant

to lead evidence to prove its case and to file affidavit of evidence by 19th March, 2015.

21. Learned Asst. Government Pleader does not dispute that the witness examined by the appellant was not even cross-examined by the respondent nos. 1 and 2. No application was made by the respondent nos. 1 and 2 to recall the witness of the appellant for cross-examination of the said witness even belatedly.

22. A perusal of the judgment and decree passed by the Trial Court indicates that though the Trial Court noticed that the suit had proceeded *ex-parte* against all the respondents, in view of there being no written statement till 9th January, 2015 and the suit had been proceeded against them as undefended and though the Trial Court recorded a finding that the respondent nos. 1 to 3 had not produced any documents nor examined any witness on their behalf and the evidence of the witness examined by the appellant had gone unchallenged and uncontrovered, the Trial Court dismissed the said suit filed by the appellant.

23. In my view, the respondents not having filed the written statement to the plaint filed by the appellant and not having cross-examined the witness examined by the appellant and not having led any evidence to prove their case, the averments made in the plaint were deemed to have been admitted.

The evidence led by the appellant remain uncontroverted and are thus deemed to have been proved. In these circumstances, in my view, the Trial Court ought to have passed a decree in favour of the appellant and could not have dismissed the said suit.

24. A perusal of the affidavit in lieu of examination-in-chief filed by the witness examined by the appellant clearly indicates that it was deposed by the appellant that no breaches of the provisions of the Lease Deed were committed by the appellant. Such deposition not having been controverted were thus deemed to have been proved.

25. The respondent nos. 1 and 2 did not bother to apply for extension of time to file written statement or to recall the order passed by the Trial Court directing the suit to proceed undefended against them. The respondent nos. 1 and 2 also did not challenge the said order passed by the Trial Court though were advised to file a writ petition. The learned Trial Judge did not take cognizance of the fact that the respondent nos. 1 and 2 had already collected the amount of penalty from the appellant for the alleged breaches committed by the appellant. It was not the case of the respondent nos. 1 and 2 that the said penalty accepted by the Collector of Bombay without prejudice to their rights and contention. In my view, the alleged breaches, if any on the part of the appellant was thus waived by the respondent nos. 1 and 2.

26. In my view, since the decree passed by the Trial Court dismissing the suit is *ex-facie* perverse and contrary to the evidence led by the appellant, the impugned judgment and order deserves to be set aside. The appellant has made out a case for grant of reliefs prayed in the suit.

27. I therefore pass the following order:-

- (a) The judgment and order dated 28th February, 2017 passed by the City Civil Court, Greater Mumbai, in Suit No. 248 of 1991 is set aside.
- (b) Suit No. 248 of 1991 is decreed in terms of prayer clauses (a) and (b).
- (c) There shall be no order as to costs.

(R.D. DHANUKA, J.)