IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7323 OF 2019

Ramlal Jhumarmal Bagadia Charitable Trust
and others … Petitioners
Vs.
Allahabad Bank … Respondents

Mr. Surel S. Shah a/w. Mr. Rajan Yadav and Ms Nita Solanki i/b. Kiran Jain & Co. for Petitioners.
Mr. Navid Yunus Memon for Respondents.

CORAM : R. G. KETKAR, J.
DATE : JULY 9, 2019

P.C. :

Not on Board. At the request of Mr. Shah, taken up for admission.

2. Heard Mr. Shah, learned Counsel for the petitioners and Mr.Memon, learned Counsel for the respondents at length.

3. This Petition takes exception to the order dated 25.02.2019 passed by the learned trial Judge below exhibit-16 in Special Civil Suit No.393 of 2016. By that order, the learned trial Judge rejected the application made by the petitioners-plaintiffs inter *alia* praying for passing appropriate directions against the respondents, hereinafter referred to as 'defendants', to pay towards *mesne* profits @ Rs.30,00,000/- per month at the prevailing market rate from the date of termination of licence on 23.05.2016 till possession of shop No.2, ground floor, Arenja Arcade, Sector 17, Vashi, New Mumbai admeasuring 3650 sq.ft. (for short 'suit premises') is handed over to the plaintiffs among other prayers.

4. Rule. Mr. Memon waives service for the respondents. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

5. The plaintiffs have instituted Suit against the defendants inter *alia*

contending that defendants were inducted in the suit premises under the leave and licence agreement dated 06.07.1998. The licence was for a period of 10 years commencing from 06.07.1998 and ending on 05.07.2008 on payment of monthly compensation @ Rs.1,67,000/- per month. The compensation for the leave and licence and service agreement were agreed to be increased @25% for the renewed period i.e. from 06.07.2003 to 05.07.2008. After various meetings and negotiations, it was agreed between the parties that plaintiffs will renew the leave and licence agreement for a further period of 5 years i.e. from 06.07.2008 to 05.07.2013 at the increased agreed rate of monthly compensation of Rs.4,33,438/-. By letter dated 24.04.2012, plaintiffs informed in advance that they are not inclined to further renew the leave and licence and service agreement as the license is ending on 05.07.2013. The plaintiffs called upon the defendants to vacate the premises by 05.07.2013. As they did not handover possession, Suit is instituted against the defendants for recovery of possession of the suit premises among other reliefs. During the pendency of the Suit, plaintiffs took out application for the injunction praying for *mesne* profits. The defendants filed reply dated 25.04.2017 opposing the application. By the impugned order, the learned trial Judge rejected the application. The said order reads thus,

> “ Perused the applications, say and submissions from both the sides. It appears that without any legal evidence, quantum of the *mesne* profit cannot be filed.
>
> In this case, at this stage, no such legal evidence is come on record. Further more, the unlawful use of the suit property by the defendant is yet to prove by evidence. Hence, in the present circumstances, the submissions cannot be considered. Hence, with these reasons, this application is not tenable. Therefore, it is rejected for this reason. The following order is passed:
>
> 1. Application is rejected.
> 2. No order as to cost.
>
> Sd/-”

6. A perusal of the above order shows that the learned trial Judge noted that there is no legal evidence on record. Further, the unlawful use of the suit property by the defendant is yet to prove by evidence. The application is therefore, not tenable and accordingly it was rejected. In my opinion, the approach of the learned trial Judge is perverse. It is not in dispute that the parties entered into leave and licence agreement dated 06.07.1998 and the said licence came to an end on 05.07.2013. In any case, the licence is not renewed by the plaintiffs. It, therefore, cannot be said that the defendants are in lawful possession of the suit property. The learned trial Judge however observed that the unlawful use of the suit property by the defendants is yet to be proved by the evidence. That apart, the learned trial Judge should have treated this application under Order XV-A of C.P.C. Alternatively, even if the application is for *mesne* profits, Order XX, Rule 12(1)(b) of C.P.C. the Bombay High Court Amendment lays down that where a Suit is for the recovery of possession of immovable property and for rent or *mesne* profits, the Court may pass a decree for the rent or *mesne* profits which have accrued on the property during the period prior to the institution of the Suit, or directing an enquiry as to such rent or *mesne* profits. In view thereof, the impugned order cannot be sustained and is liable to be set aside. Hence, the following order:

a. Impugned order dated 25.02.2019 is set aside;

b. Exhibit-16 is restored;

c. It will be open to the parties to adduce evidence in support of their respective case, if they so desire;

d. Rule is made absolute accordingly with no order as to costs.

(R. G. KETKAR, J.)

Minal Parab