

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6648 OF 2019

The Bombay Diocesan Trust
Association Pvt. Ltd.

.. Petitioner

vs.

Daryl J. Pareira and ors.

.. Respondents

Mr. Jaydeep Deo for the Petitioner.

Mr. Sameer Vaidya I/b Mr. A.A. Carvalho for Respondent
Nos.1 to 3.

CORAM : R. G. KETKAR, J.

DATE : 18th JULY 2019.

P.C. :-

1] Heard Mr. Jaydeep Deo, learned counsel for the petitioner and Mr. Sameer Vaidya, learned counsel for respondent Nos.1 to 3.

2] This Petition takes exception to the order dated 8th March 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai below Exhibit - 8 in Appeal No.407 of 2018. By that order, the Appellate Court stayed execution of the decree dated 17th September 2018 passed in Execution Application No.257 of 2018 issuing possession warrant on the condition that the appellants/respondents No.1 to 3 herein shall not part with possession of the suit premises or create third party interest till decision of the appeal.

3] Mr. Deo submitted that the petitioner had instituted R.A.E. Suit No.178/378 of 1998 against respondents No.4 and 5 on the ground of non user. By order dated 22nd July 2011, the learned trial Judge decreed the suit. No appeal was preferred challenging that order. When the petitioner went for execution of the decree, respondents No.1 to 3 herein obstructed the execution. The petitioner, therefore, took out Obstructionist Notice No.9 of 2012. After a full-fledged trial, the learned trial Judge disposed of the Obstructionist Notice by holding that the obstructionists have no independent right to obstruct execution of the decree. Aggrieved by this order, respondents No.1 to 3 preferred appeal before the Appellate Court. They also preferred application Exhibit-8 for staying the trial Court's order dated 17th September 2018. The Appellate Court did not impose conditions about depositing any compensation. The petitioner has, therefore, challenged that order.

4] The petition was heard on 13th June 2019 and notice for final disposal was issued to the respondents, returnable on 3rd July 2019. The parties were put to notice that subject

to the time constraint and convenience of the Court, petition will be disposed of finally on the said date. Notice to further indicate that despite service if respondents No.1 to 3 fail to appear, the Court will proceed to decide the petition on its own merits.

5] Rule. Mr. Sameer Vaidya waives service. Having regard to the narrow controversy raised in the petition and with the consent of the parties, Rule is made returnable forthwith and the petition is taken up for final disposal.

6] A perusal of the impugned order reveals that the Appellate Court has granted stay to the execution of the decree without fixing reasonable compensation. Having regard to the provisions of Order XLI Rule 5 of Code of Civil Procedure, 1908 (for short "CPC") as also the decisions of the Apex Court in ***Atma Ram Properties (Private) Limited Vs. Federal Motors Private Limited - 2005 (1) SCC 705*** and ***State of Maharashtra & anr. Vs. M/s. Super Max International Pvt. Ltd. & Ors.-2009 (5) ALL MR 1001***, the Appellate Court had committed a serious error in not fixing

reasonable compensation. There is a failure to exercise of jurisdiction vested in the Appellate Court while granting stay to the eviction decree without fixing reasonable compensation. In view thereof, the impugned order cannot be sustained and as such the same is liable to be set aside.

7] Hence, the following order:

(a) The impugned order dated 8th March 2019 is set aside and the Application at Exhibit-8 in Appeal No.407 of 2018 is restored to the file of the Appellate Court for deciding it afresh;

(b) The Appellate Court is requested to fix the reasonable compensation in the light of *Atma Ram Properties (Private) Limited (supra)* and *M/s. Super Max International Pvt. Ltd. (supra)*. Let that exercise be done within eight weeks from today. Till such time the application at Exhibit-9 will be decided, the eviction decree dated 17th September 2018 passed in Execution Application No. 257 of 2018 is stayed subject to condition of respondent Nos.1 to 3 herein neither

creating any third party interest nor parting with possession of the suit premises;

(c) Rule is accordingly made absolute with no order as to costs;

(R. G. KETKAR, J.)