

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9945 OF 2016

M/s. Matsun Financials LLP ... Petitioner
Vs.
M/s. OG Corporation ... Respondent

Mr. Vishal Kanade a/w. Mr. Deepak J. Lulia for Petitioner.
Mr. Pradip D. Gharat for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 8, 2019

P.C. :

Heard Mr. Kanade, learned Counsel for the petitioner and Mr. Gharat, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff', has challenged the judgment and order dated 04.04.2015 passed by the learned trial Judge below exhibit-9 in L.E.&C.Suit No.56/69 of 2013 as also the judgment and order dated 04.07.2016 passed by the Appellate Bench of the Small Causes Court in Revision Application No.119 of 2016. By these orders, the Courts below rejected the application made by the plaintiff *inter alia* praying for,

- a. directing the respondent, hereinafter referred to as 'defendant', to deposit all the arrears of increased municipal taxes, compensation, interest and other charges in respect of office premises No.34 admeasuring 1165 sq.ft., 3rd floor, Maker Chambers-III, Nariman Point, Mumbai 400 021 (for short 'suit premises') for sum of Rs.4,79,99,874/- plus applicable taxes and interest upto February 2013, more particularly mentioned at Exhibit-M to the plaint;
- b. directing the defendant to deposit market value compensation @ Rs.27,60,150/- per month plus Rs.1,38,685/-

towards municipal taxes plus applicable taxes from March 2013 onwards; and

c. directing the defendant to vacate the suit premises and handover vacant and peaceful possession of the suit premises to the plaintiff.

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

4. The plaintiff has instituted Suit *inter alia* praying for possession of the suit premises; payment of arrears of increased municipal taxes, compensation, interest and other charges as also payment of market value compensation. Pending the Suit, plaintiff took out application at exhibit-9 for various reliefs, indicated earlier. The defendant filed reply dated 06.05.2013 opposing the application. During the pendency of the application, defendant filed application on 02.02.2015 praying for taking into consideration the actual amount payable by the defendant to the plaintiff while fixing the interim amount. By order dated 04.04.2015, the learned trial Judge rejected the application principally on two grounds, firstly, the relief claimed in the Suit and in the application exhibit-9 are identical. Thus, the reliefs claimed in the application being of final nature cannot be granted at interlocutory stage. Secondly, in terms of clause 12(e) as the plaintiff failed to refund security deposit, the defendant is entitled to retain the possession of the licensed premises. Aggrieved by that decision, initially, Writ Petition No.8278 of 2015 was instituted in this Court. By order dated 29.01.2016, Petition was disposed of as not maintainable as the petitioner has an equally efficacious alternate statutory remedy of filing Revision under Section

42(4) of the Presidency Small Cause Courts Act, 1882. In pursuance thereof, plaintiff filed Revision Application before the Small Causes Court. During the pendency of that Revision Application, defendant filed application exhibit-10 dated 09.06.2016 for depositing the keys of the suit premises in the Court and handing over the same to any independent and impartial person. Mr. Kanade submitted that by order dated 04.07.2016 passed by the Appellate Court below exhibit-10 filed by the defendant, the Appellate Court directed return of keys of the suit premises to the defendant. By order dated 04.07.2016, the Appellate Bench rejected the Revision Application again principally on the ground that the relief claimed in the application exhibit-9 and in the Suit are identical. Reliefs claimed in the application exhibit-9 are of final nature and the same cannot be granted at interlocutory stage. The Appellate Court also considered clauses 12(b) and 12(e) of the leave and licence agreement. It is against these orders, plaintiff has instituted the present Petition.

5. In support of this Petition, Mr. Kanade has invited my attention to the registered leave and licence agreement dated 10.01.2011 entered into between the parties. In particular, he invited my attention to clauses 3, 8, 12 and 20 of that agreement. He submitted that by that agreement, respondent was permitted to occupy the suit premises for the period commencing from 01.01.2011 and ending on 31.12.2011. The defendant did not handover possession of the suit premises after the expiry of the licensed period. He submitted that the Courts below have not considered various clauses of the leave and licence agreement as also Section 74 of the Indian Contract Act, 1872. The Courts below also did not consider the fact that the application made by the plaintiff is under Order XV-A of C.P.C. The Courts below were not justified in rejecting the application on the ground that relief claimed in the application is of final

nature. He submitted that so long as the defendant retains the possession of the suit premises, it is liable to pay licence fees and also property taxes in terms of clauses of the leave and licence agreement. The Courts below have also not considered the correspondence exchanged between the parties.

6. On the other hand, Mr. Gharat supported the impugned orders. He submitted that even before filing of the application dated 09.06.2016 for depositing the keys, defendant tried to deposit the keys in the trial Court. However, no orders came to be passed. The defendant, therefore, filed application exhibit-10 on 09.06.2016 for depositing the keys. He submitted that as the plaintiff did not refund Rs.60,00,000/- towards security deposit, the Courts below rightly held that plaintiff is not entitled to the relief claimed in the application.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The Petition was heard from time to time by this Court. In the order dated 14.12.2016, statement of the defendant that it is not interested in holding onto the possession of the suit property was recorded. The plaintiff was permitted to collect the keys of the suit premises deposited by the defendant in the Small Causes Court, Mumbai. It is common ground between the parties that in pursuance thereof, plaintiff has collected the keys and he is in possession of the suit premises from 01.01.2017.

8. As mentioned earlier, the Courts below have rejected the application mainly on the ground that the reliefs claimed in the application are in the nature of the final relief. In my opinion, the approach of the Courts below is perverse. It is not in dispute that the Suit instituted by the plaintiff is pending in the trial Court. Order XV-A

of C.P.C. reads thus,

“
Order XV-A
Striking off Defence in a Suit by a Lessor

(1) In any suit by a lessor or a licensor against a lessee or a licensee, as the case may be, for his eviction with or without the arrears of rent or licence fee and future mesne profits from him, the defendant shall deposit such amount as the Court may direct on account of arrears up to the date of the order (within such time as the Court may fix) and thereafter continue to deposit in each succeeding month the rent or licence fee claimed in the suit as the Court may direct. The defendant shall, unless otherwise directed, continue to deposit such amount till the decision of the suit.

(2) ...

(3) ... ”

9. A perusal of the above extracted provision clearly shows that in any suit by a lessor or a licensor against a lessee or a licensee, for his eviction with or without the arrears of rent or licence fee and future *mesne* profits from him, the defendant is required to deposit such amount as the Court may direct on account of arrears upto the date of the order and thereafter continue to deposit in each succeeding month, the rent or licence fee as the Court may direct. The defendant has to, unless otherwise directed, continue to deposit such amount till the decision of the Suit. Thus, Order XV-A specifically enables a lessor or a licensor to invite Court's order directing the defendant to deposit arrears of rent or licence fee, etc. during the pendency of the suit. The Courts below were, therefore, not justified in rejecting the application on the ground that the relief claimed in the application is in the nature of final relief.

10. Section 74 of the Indian Contract Act, 1872 (for short 'Contract Act') reads thus,

“74. Compensation for breach of contract where penalty stipulated for.— When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such

breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.— A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.— When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”

11. A perusal of the above extracted provision shows that when a contract is broken if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, **whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.** The Courts below have also not adverted to the provisions of Section 74 of the Contract Act. Even the Courts below did not advert to the correspondence exchanged between the parties. On one hand, plaintiff is claiming possession as also payment of property taxes from 01.01.2012 onwards and on the other, defendant is contending that as the plaintiff did not refund security deposit of Rs.60,00,000/-, it is entitled to occupy the suit premises. The Courts below ought to have considered the

correspondence exchanged between the parties while deciding the application. As the Courts below have failed to apply the correct tests while deciding the application, the impugned orders are liable to be set aside. Hence, the following order:

- a. Impugned judgment and order dated 04.04.2015 passed by the trial Court as also the judgment and order dated 04.07.2016 passed by the Appellate Court are set aside and the application exhibit-9 made by the plaintiff is restored to the file of the learned trial Court for deciding it afresh;
- b. While deciding the application, the learned trial Judge will not reject it on the ground that the relief claimed in the application is of final nature. The learned trial Judge will consider the correspondence exchanged between the parties, clauses of the leave and licence agreement, Section 74 of the Contract Act and will decide the said application on the basis of the material on record and in accordance with law. The trial Court will also consider the attempts made by the defendant for handing over possession as also depositing the keys in the trial Court;
- c. It is stated that the trial Court has fixed the matter on 11.01.2019. On that date, the parties will appear before the trial Court and the trial Court will fix the suitable date for hearing of application exhibit-9 and will decide the application within 4 weeks from fixing a suitable date;
- d. All contentions of the parties are expressly kept open.

12. Rule is made absolute in the aforesaid terms with no order as to costs.

(R. G. KETKAR, J.)