

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8305 OF 2019

Smt. Lilavati G. Parekh (deleted) and
Smt. Tarulata M. Shah .. Petitioner

vs.

Sita wd/o. Sooru S. Shetty
(deleted) and Jayprakash S. Shetty
and ors. .. Respondents

Mr. Durgaprasad Sabnis a/w. Mr. Durgesh M. Kulkarni i/b
Lex Firmus for the Petitioners.
Mr. Ranjit A. Thorat, Sr. Counsel and Mr. R.B. Singhvi I/b
Lex Services for Respondent Nos.2 and 3.

CORAM : R. G. KETKAR, J.
DATE : 5th AUGUST 2019.

P.C. :-

1] Heard Mr. Durgaprasad Sabnis, learned Counsel for the
petitioner and Mr. R.A. Thorat, learned Senior Counsel for
respondent Nos.2 and 3 at length.

2] By this petition under Article 227 of the Constitution of
India, the petitioner, hereinafter referred to as the plaintiff,
has challenged the order dated 26th June 2019 passed by the
Appellate Bench of the Small Causes Court (for short
“*Appellate Court*”) below Exhibit-8 in Appeal No. 88 of 2018.
By that order, the Appellate Court allowed the application
made by respondent Nos.2 and 3 (appellant Nos. 2 and 3)

and stayed the eviction decree dated 2nd May 2017 passed by the learned Trial Judge in R.A.E.Suit No.1831/5564 of 1985, subject to the following conditions:

“(a) Appellant No.2 and 3 (respondent Nos.2 and 3 herein) are directed to deposit monthly compensation in respect of the suit premises at the rate of Rs.50,000/- (Rs. Fifty Thousand Only) per month from the date of the decree till June, 2019 within the period of four weeks from the date of this order.

(b) Appellants No.2 and 3 (respondent Nos.2 and 3 herein) are further directed to go on depositing further monthly compensation at the rate of Rs.50,000/- (Rs.Fifty Thousand only) per month from July, 2019 onwards on or before 15th day of each month till the final disposal of this appeal.

(c) Appeal is expedited and made time bound to be disposed of within the period of 8 weeks from the date of this order.

(d) The Additional Registrar of this Court is hereby directed to invest the amount as and when deposited by the appellants (respondent Nos.2 and 3 herein) in Fixed Deposit Account for initial period of one year in the Nationalized Bank on next working date and thereafter renew it time to time”.

3] Mr. Sabnis seeks leave to delete rest of the respondents on the ground that respondent Nos.2 and 3 herein, who are appellant Nos.2 and 3 before the Appellate Court, are the only contesting respondents. In view thereof and on the motion made by Mr. Sabnis, leave to delete rest of the respondents is granted. Amendment to be carried out forthwith.

4] Rule. Mr. R.B. Singhvi waives service on behalf of respondent Nos.2 and 3. 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 disposal.

5] The plaintiff had instituted the suit against the defendants for recovery of possession of Shop No.4 situate on the ground floor of Building known as Ishkrupa at M.G. Road, Vile Parle (E), Bombay-400 057 (for short "*suit premises*"). The suit was instituted by invoking the grounds under Sections Section 108(o) of the Transfer of Property Act, 1882 (for short '*T.P.Act*') read with Sections 13(1)(a), 13(1) (b) and 13(1)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, (for short "*Act*"). The suit was decreed *ex-parte* on 2nd May 2017. Respondent Nos.2 and 3 filed an application under Order IX Rule 13 of Code of Civil Procedure, 1908 (for short "*CPC*") on 3rd July 2017 for setting aside the *ex-parte* decree. On 5th July 2017, they also filed a substantive appeal under Section 96 of the CPC. By order

dated 1st August 2018, learned Trial Judge allowed the application made by them under Order IX Rule 13 of CPC.

6] Aggrieved by the decision dated 1st August 2018, the plaintiff preferred Civil Revision Application No. 511 of 2018. By order dated 9th April 2019, Civil Revision Application was allowed and the order dated 1st August 2018 passed by the learned Trial Judge was set aside. Application made by respondent Nos.2 and 3 was dismissed with exemplary costs of Rs.25,000/- to be paid by them to the plaintiff. At that stage, oral application for stay to the order for a period of 8 weeks was made and assurance was given that within two weeks respondent Nos.2 and 3 and all adult family members using/residing in the suit premises will file usual undertaking with advance copy to the other side incorporating therein that:

- “(a) they are in possession and nobody else is in possession of the suit premises;*
- (b) they have neither created third party interest nor parted with possession of the suit premises;*
- (c) they will hereafter neither create third party interest nor part with possession of the suit premises;*
- (d) defendants No.3(a) and 3(b) will deposit arrears of rent, if any, in this Court under intimation in writing to the learned Advocate for the plaintiff.*

(e) in case they are unable to obtain suitable orders from the higher Court within 8 weeks from today, they will handover vacant and peaceful possession of the suit premises to the plaintiff.”

7] In view thereof, subject to respondent Nos.2 and 3 filing undertaking within two weeks in the aforesaid terms, eviction decree was stayed for a period of 8 weeks. It was made clear that in case undertaking is not filed within two weeks and/or respondent Nos.2 and 3 commit breach of any of the clauses of the undertaking, stay shall stand vacated without further reference to the Court. The matter was ordered to be listed for reporting compliance on 25th April 2019.

8] The matter was taken up in the production board on 24th April 2019. It was brought to the notice of the Court that though the order was passed in Civil Revision Application on 9th April 2019, the order was uploaded only on 22nd April 2019. In view thereof, respondent Nos.2 and 3 sought extension of one week time for filing undertaking. Accordingly, by order dated 24th April 2019, the time stipulated in the order dated 9th April 2019 was extended by one week.

9] Aggrieved by the decision of this Court in Civil Revision Application No. 511 of 2018, respondent Nos.2 and 3 preferred Special Leave Petition (for short “SLP”) before the Apex Court. By order dated 10th May 2019, the SLP was dismissed. In pursuance to the order dated 9th April 2019, the matter was listed for reporting compliance on 10th July 2019. This Court noted the orders passed by this Court and the Apex Court as also filing of a substantive appeal by respondent Nos.2 and 3 challenging the decree dated 2nd May 2017.

10] In paragraph 3 of the order dated 10th July 2019, the submission of respondent Nos.2 and 3 that they could not provide the undertaking on time as there was delay in the order getting uploaded was noted. It was also observed that respondent Nos.2 and 3 efforts to have an *ex-parte decree* set aside under Order IX Rule 13 of CPC culminated in the Supreme Court's order of rejection. Further, this Court in paragraph 5 has observed thus:

“5. Now, as the regular appeal is said to be pending, the Appellate Bench of the Small Causes Court may proceed with the matter expeditiously but uninfluenced

by the developments in the tenant's application under Order 9 Rule 13 of CPC.”

11] In pursuance thereof, the Appellate Court heard the application at Exhibit-8 taken out by respondent Nos.2 and 3 in substantive appeal for stay of the eviction decree. By impugned order, as noted earlier, the Appellate Court has stayed the eviction decree, subject to depositing monthly compensation at the rate of Rs.50,000/- per month.

12] In support of this petition, Mr. Sabnis submitted that respondent Nos.2 and 3 made a solemn statement before this Court that within two weeks they will file undertaking in terms of paragraph 16 of the order dated 9th April 2019. It is on this statement, the eviction decree was stayed for a period of 8 weeks. As the order was not uploaded, the matter was taken up in the production board on 24th April 2019 for extension of time for filing undertaking. Accordingly, one week extension as sought for, was granted for complying the order dated 9th April 2019. Even after extension, respondent Nos.2 and 3 did not file an undertaking.

13] Mr. Sabnis submitted that respondent Nos.2 and 3 induced this Court to grant stay on the basis of representation that they will file an undertaking in terms of paragraph 16 of the order dated 9th April 2019. The Court acted upon this representation, which respondent Nos.2 and 3 never intended to act upon it. In other words, on the representation of respondent Nos.2 and 3, this Court was persuaded to grant stay to the eviction decree. Respondent Nos.2 and 3 are therefore, guilty of contempt of Court, notwithstanding, non-furnishing of undertaking. In support of this submission, he relied upon paragraph 12 of the decision in ***Rita Markandey vs. Surjit nsingh Arora – (1996) 6 SCC 14.***

14] On merits, Mr. Sabnis submitted that before the Appellate Court the plaintiff has produced valuation report dated 7th September 2017. He has taken me through the basis of valuation. He submitted that the valuation was made on the basis that the building is more than 50 years old and therefore, depreciation of 60% of the cost of construction was allowed. The valuation was made on the basis of rates

mentioned in Ready Reckoner in respect of locality where the suit premises is situate. The annual return on this value was allowed at the rate of 7.00% and accordingly, the Valuer recommended Rs.1,11,374/- as monthly compensation. As against this, the Appellate Court, however, without giving any reasons scaled down compensation to Rs.50,000/-. No reasons are given for fixing Rs.50,000/- per month as reasonable compensation. He, therefore, submitted that the impugned order may be modified by directing respondent Nos.2 and 3 to pay compensation at the rate of Rs.1,11,374/- per month and appropriate action under the Contempt of Courts Act, 1971 may be issued against them, in view of the decision in *Rita Markandey (supra)*.

15] On the other hand, Mr. Thorat submitted that respondent Nos.2 and 3 had simultaneously filed proceedings under Order IX Rule 13 of CPC as also substantive appeal under Section 96 of the CPC challenging the judgment and decree dated 2nd May 2017 passed by the learned Trial Judge. He submitted that the said course is permissible. In support of this proposition, he relied upon the

decision of ***Bhivchandra S. More vs. Balu G. More - (2019)***

6 SCC 387. The Apex Court has extensively dealt with the scope of proceedings under Order IX Rule 13 of CPC and proceedings under Section 96 of the CPC.

16] Mr. Thorat submitted that in the proceedings under Order IX Rule 13 of CPC, the statement was made on behalf of the plaintiff that he will not take any effective steps for executing decree. The said statement was recorded on 6th October 2017, which was continued during pendency of the proceedings under Order IX Rule 13 of CPC. The learned Trial Judge has allowed the application under Order IX Rule 13 of CPC on 1st August 2018 and set aside the *ex-parte* decree. Respondent Nos.2 and 3 therefore, did not have any threat of dispossession and consequently, there was no necessity for applying stay to the eviction decree.

17] By order dated 9th April 2019, this Court set aside the Trial Court's order and dismissed the application filed by respondent Nos.2 and 3 under Order IX Rule 13 of CPC. He submitted that at that time, it was wholly unnecessary to

orally apply for stay of the eviction decree for the following reasons:

- (a) by that time, the plaintiff did not file execution proceedings for execution of the decree;
- (b) there was no threat of dispossession;
- (c) the appeal filed by respondent Nos.2 and 3 under Section 96 of the CPC was already admitted on 13th July 2018 and the application for execution of decree is filed on 19th June 2019. Application at Exhibit-8 for stay of the eviction decree was filed prior thereto on 6th June 2019.

He submitted that the decision of *Rita Markandey (supra)* is not applicable in the facts and circumstances of the present case as there was no necessity for orally applying stay to the eviction decree. He therefore, submitted that no case is made out for initiating any proceedings under the Contempt of Courts Act, 1971.

18] Insofar as merits of the case is concerned, Mr. Thorat submitted that the valuation relied upon by the plaintiff is based upon Ready Reckoner and no instances of leave and

licences are considered in the valuation report. The Appellate Court, after considering the relevant criteria namely locality or area and age of building etc., has fixed reasonable compensation at the rate of Rs.50,000/- per month. The order being discretionary in nature, no case is made out for interfering with the quantum fixed by the Appellate Court. Respondent Nos.2 and 3 have deposited compensation at the rate of Rs.50,000/- per month upto September 2019. For all these reasons, he submitted that no case is made out for interfering with the impugned order.

19] I have considered the rival contentions advanced by both the parties. I have also perused the material on record. The following facts are not in dispute:

- a] The plaintiff had instituted the suit against respondent Nos.2 and 3 for eviction invoking the grounds under Section 108(o) of the T.P.Act read with Sections 13(1)(a), 13(1)(b) and 13(1)(c) of the Act;
- b] The suit was decreed on 2nd May 2017;

- c] On 3rd July 2017, application under Order IX Rule 13 of CPC was made by respondent Nos.2 and 3 for setting aside the *ex parte* decree;
- d] On 5th July 2017, they also filed substantive appeal under Section 96 of the CPC challenging the decree passed by the Trial Court;
- e] No fault can be found with respondent Nos.2 and 3 in prosecuting simultaneous remedies challenging *ex parte* decree dated 2nd May 2017 viz., (i) by filing application under Order IX Rule 13 of CPC and (ii) by filing substantive appeal under Section 96 of the CPC; and
- f] Appeal is admitted on 13th July 2018. The application at Exhibit-8 is filed on 6th June 2019.

20] As noted earlier, during pendency of proceedings under Order IX Rule 13 of CPC, the plaintiff made the statement on 6th October 2017 that till next date he will not take any effective steps for executing the decree. It appears that the said statement was operating during pendency of the proceedings under Order IX Rule 13 of CPC. The learned

Trial Judge allowed the application under Order IX Rule 13 of CPC on 1st August 2018 and set aside the *ex-parte* decree. The plaintiff challenged that order by instituting Civil Revision Application No. 511 of 2018 in this Court.

21] Reference was made to the decision of ***Maria Margarida Sequeria Fernandes vs. Erasmo Jack De Sequeria - AIR 2012 SC 1727*** and more particularly, paragraphs 84 and 85 thereof were extracted. In paragraph 15, this Court observed that respondent Nos.2 and 3 had filed application for setting aside *ex-parte* decree which is nothing but abuse of process of Court and process of law. The order passed by the learned Trial Judge dated 1st August 2018 was set aside the MARJI Application filed by respondent Nos.2 and 3 under Order IX Rule 13 of CPC was dismissed by imposing exemplary costs of Rs.25,000/-.

22] Paragraph 16 and 17 of that order read thus:

16. At this stage, Mr. Shah orally applies for stay of this order for a period of 8 weeks from today. He assures that within two weeks from today, defendants No.3(a) and 3 (b) (respondent Nos.2 and 3) and all adult family members using/residing in the suit premises will

file usual undertaking with advance copy to the other side incorporating therein:

“(a) they are in possession and nobody else is in possession of the suit premises;

(b) they have neither created third party interest nor parted with possession of the suit premises;

(c) they will hereafter neither create third party interest nor part with possession of the suit premises;

(d) defendants No.3(a) and 3(b) will deposit arrears of rent, if any, in this Court under intimation in writing to the learned Advocate for the plaintiff.

(e) in case they are unable to obtain suitable orders from the higher Court within 8 weeks from today, they will handover vacant and peaceful possession of the suit premises to the plaintiff.

17] In view thereof, on the oral application made by Mr. Shah, this order is stayed for a period of 8 weeks subject to defendants No.3(a) and 3 (b) (respondent Nos.2 and 3) filing undertaking in the aforesaid terms within two weeks from today. It is made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendants No.3(a) and 3 (b) (respondent Nos.2 and 3) commit breach of any of the clauses of the undertaking, stay shall stand vacated without further reference of the Court.”

23] A perusal of paragraph 16 shows that oral application was made on behalf of respondent Nos.2 and 3 for staying of eviction decree for a period of 8 weeks. Mr. Thorat submitted that really speaking there was no necessity for orally applying for stay of the eviction decree as there was no threat for dispossession. Though the appeal was admitted on 13th

July 2018, the application for stay of the eviction decree was made on 6th June 2019. In other words, while allowing Civil Revision Application on 9th April 2019, stay to the eviction decree was not obtained in the pending appeal. I therefore, do not find any merit in the submission. If at all according to respondent Nos.2 and 3, there was no threat of dispossession and even the execution proceedings were not filed by the plaintiff, they should have not orally applied for stay of eviction decree for 8 weeks.

24] As mentioned earlier, the appeal filed under Section 96 of the CPC was already admitted on 13th July 2018, they could have very well moved application for interim relief in the pending appeal. Respondent Nos.2 and 3 challenged the order passed by this Court by filing SLP in the Apex Court. That SLP was dismissed on 10th May 2019. It is only when the SLP was dismissed, respondent Nos.2 and 3 filed application at Exhibit-8 on 6th June 2019. As noted earlier, on oral application made on behalf of respondent Nos.2 and 3, stay of 8 weeks was granted. As the order was not uploaded immediately and was uploaded on 22nd April 2019,

further extension of 1 week was sought for filing undertaking.

25] It is not disputed that respondent nos.2 and 3 did not file undertaking in pursuance of the orders dated 9th April 2019 and 24th April 2019. Thus, respondent Nos.2 and 3 induced this Court to grant stay for a period of 8 weeks though they never intended to file undertaking. On the basis of such representation, which was false to their knowledge, they persuaded this Court to stay the eviction decree for a period of 8 weeks. Respondent Nos.2 and 3 took full advantage of the stay granted by this Court. It is only when SLP was dismissed on 10th May 2019, they took out application at Exhibit-8 on 6th June 2019. In other words, if the Apex Court were to stay this Court's order or to set aside this Court's order, there was no necessity for filing application at Exhibit-8 for stay and even prosecuting the appeal. Be that as it may. Respondent Nos.2 and 3 took advantage of stay order granted by this Court for a period of 8 weeks and did not file undertaking.

26] In paragraph 12 of *Rita Markandey (supra)* , the Apex Court observed thus:

“12. Law is well settled that if any party gives an undertaking to the Court to vacate the premises from which he is liable to be evicted under the orders of the Court and there is a clear and deliberate breach thereof it amounts to civil contempt but since, in the present case, the respondent did not file any undertaking as envisaged in the order of this Court the question of his being punished for breach thereof does not arise. However, in our considered view even in a case where no such undertaking is given, a party to litigation may be held liable for such contempt if the Court is induced to sanction a particular course of action or inaction on the basis of the representation of such a party and the Court ultimately finds that the party never intended to act on such representation or such representation was false. In other words, if on the representation of the respondent herein the Court was persuaded to pass the order dated 5-10-1995 extending the time for vacation of the suit premises, he may be held guilty of contempt of Court, notwithstanding non furnishing of the undertaking, if it is found that the representation was false and the respondent never intended to act upon it. However, the respondent herein cannot be held liable for contempt on this score also for the order in question clearly indicates that it was passed on the basis of the agreement between the parties and not on the representation of the respondent made before the Court. It was the petitioner who agreed to the unconditional extension of time by four weeks for the respondent to vacate and subsequent extension of time on his giving an undertaking and this Court only embodied the terms of the agreement so arrived at, in the order. We are, therefore, of the opinion that the respondent cannot in any way be held liable for contempt for alleged breach of the above order. As regards the contention of the petitioner that by trespassing into some other portion of the house in question during the pendency of the appeal the

respondent has committed contempt of Court, we are unable to accept the same: firstly because, the respondent's claim is that he has been in occupation thereof since long and this contentious issue cannot be decided solely on the basis of affidavits and secondly because the above issue does not fall within the limited scope of our enquiry in this proceeding which centres round the order dated 5-10-1994."

27] In view thereof, *prima facie*, I am satisfied that respondent Nos.2 and 3 are liable for proceedings under civil contempt as defined under Section 2(c) of the Contempt of Courts Act, 1971. In view thereof, issue notice under Rule 9 Chapter XXXIV of the Bombay High Court Appellate Side Rules, 1960 as to why action under the Contempt of Courts Act, 1971 be not initiated against respondent Nos.2 and 3, returnable on 4th September 2019.

28] Insofar as the merits of case is concerned, as noted earlier, the plaintiff had relied upon valuation report dated 7th September 2017. The valuation is based upon Ready Reckoner. As the building is more than 50 years old, the Valuer has allowed 50% depreciation of the cost constructions. The suit premises is used for commercial

activities and on that basis the rate of building and land in rupees per sq.meter of built up area comes to Rs.3,15,900/-.

29] In case of ***State of Maharashtra and anr. vs. Super Max International Private Limited and ors.***-(2009) 9 SCC **772**, the Apex Court observed in paragraph 78, compensation fixed on the basis of Ready Reckoner is reasonable and its reasonableness cannot be doubted.

30] The Appellate Court however, without recording any reasons has scaled down the compensation at the rate of Rs.50,000/- per month on the ground that valuation has not given comparable instance. The Appellate Court did not consider the ratio laid down in *Super Max International Private Limited (supra)*, respondent Nos.2 and 3 did not produce any material for fixing reasonable compensation.

31] In view thereof, the impugned order dated 26th June 2019 is modified to the extent of fixing compensation at the rate of Rs.50,000/- per month by substituting the same by Rs.1,11,000/- per month. Respondent Nos.2 and 3 shall

deposit Rs.1,11,000/- per month from the date of decree till 30th September 2019, subject to deposits already made within three months from today. Respondent Nos.2 and 3 will go on deposit amount of compensation at the rate of Rs.1,11,000/- per month from October 2019 on or before 15th day of each month till the final disposal of the appeal.

32] It is made clear that in case the arrears are not deposited within three months from today and respondent Nos. 2 and 3 did not go on deposit Rs.1,11,000/- per month on or before 15th day of each month from October 2019, the stay shall stand vacated without further reference to the Court.

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

(R. G. KETKAR, J.)