

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11620 OF 2017

Dr. Nirmala Sohanlal Pandit ... Petitioner
Vs.
Madhu Sudan Kumar Mangalore Jarappa
and others ... Respondents

Ms Ranjana Parikh for Petitioner.
Ms Seems K. Chopda for Respondents No.1 to 4.

CORAM : R. G. KETKAR, J.
DATE : JUNE 26, 2019

P.C. :

Heard Ms Parikh, learned Counsel for petitioner and Ms Chopda, learned Counsel for respondents No.1 to 4 at length.

2. This Petition takes exception to the order dated 27.04.2017 passed by the learned trial Judge below exhibit-9 in L.E.Suit No.91 of 2014. By that order, the learned trial Judge rejected the application made by the petitioner / plaintiff seeking direction to the defendant to pay compensation pending hearing and final disposal of the Suit from 01.09.1986 or from the date Court deems fit; restraining the defendants from alienating, encumbering and / or parting with possession of the suit premise and not to obstruct the entry of the plaintiff in the suit premises. Rule. Ms Chopda waives service for respondents No.1 to 4. 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.

3. The plaintiff had earlier instituted S.C.Suit No.5774 of 1986 in the City Civil Court at Mumbai for removal of the defendants from flat

No.19, 2nd floor, Sheila Mahal, 1st Pasta Lane, Colaba, Bombay 400 005 (for short 'suit premises'). By order dated 30.03.1998, Suit was dismissed. Aggrieved by that decision, plaintiff preferred First Appeal No.279 of 1999. On 27.01.2014, this Court permitted withdrawal of the appeal in view of the decision of the Apex Court in ***Prabhudas Damodar Kotecha VS. Manharbala Jeram Damodar*, (2013) 15 SCC 358** with liberty to adopt appropriate proceedings in the Court of Small Causes at Mumbai.

4. It appears that defendants had instituted R.A.D.Suit No.1781 of 1997 for declaration of their tenancy rights in the suit premises. By order dated 11.03.2003, the learned trial Judge dismissed the Suit. Aggrieved by that decision, defendants preferred Appeal No.507 of 2003 before the Appellate Bench of the Small Causes Court. By order dated 03.07.2014, the Appellate Court dismissed the appeal. Aggrieved by these orders, defendants preferred Writ Petition No.7538 of 2004 in this Court. That Petition was disposed of on 04.03.2008. This Court recorded that learned Counsel for the petitioner did not press the Petition on merits and submitted that in view of the findings recorded by the Courts below on the point of possession, the petitioners' (respondents herein) possession should not be disturbed by the respondent (plaintiff herein) without following due process of law. On behalf of the respondent (plaintiff herein), the learned Counsel made statement that respondent (plaintiff herein) will not disturb the petitioners' (respondents herein) possession without following due process of law. This Court also recorded that respondents No.1 and 2 therein have already initiated the proceedings before the appropriate Court and are following due process of law for getting back possession of the suit premises. In the circumstances, Petition was disposed of as not pressed. It was made clear that the possession of the petitioners (respondents herein) shall not be disturbed by the respondents (petitioners herein) without following

due process of law.

5. As mentioned earlier, in pursuance of liberty granted by this Court by order dated 27.01.2014 in First Appeal No.279 of 1999, plaintiff has instituted the present Suit inter alia contending that defendants are gratuitous licensees and are not tenants in the suit premises. The defendants' claim of tenancy based on exclusive possession and payment of rent was negatived upto this Court. Defendants have no right, title and interest of any nature whatsoever in the suit premises and defendants are allowed to occupy the premises on humanitarian grounds without charging any compensation as the gratuitous licensee. The plaintiff has terminated the licence and / or permission granted to the defendants by filing Short Cause Suit No.5774 of 1986.

6. Defendants filed their written statement resisting the Suit. During the pendency of the Suit, plaintiff took out interim notice at exhibit-9 for directing the defendants to pay interim compensation @ Rs.50,000/- per month or at such rate, this Court may deem fit and proper, from 01.09.1986 or from such other date as this Court may deem fit and proper. Defendant filed affidavit-in-reply opposing the application. Plaintiff filed affidavit in rejoinder. By order dated 27.04.2017, the learned trial Judge partly allowed the application. It is against this order, the plaintiff has instituted the present Petition.

7. In support of this Petition, Ms Parikh submitted that before the learned trial Judge, plaintiff had produced registered leave and licence agreement dated 30.06.2015 in respect of flat No.6 admeasuring 600 sq.ft. situate on the 4th floor, Sheila Mahal CHS Ltd. Mumbai 400 005. The suit premises is also situate in the same building. The learned trial Judge however, rejected the application mainly on the ground that by

prayer clause (c), plaintiff has claimed compensation from 01.09.1986 till the disposal of the Suit. By prayer clause (b), plaintiff has claimed the relief of payment of mesne profit at market rate from the date of termination of licence from September 1986. Under Order XX, Rule 12 of C.P.C. it is to be adjudicated after inquiry as per order on final adjudication.

8. Ms Parikh submitted that the learned trial Judge failed to appreciate that plaintiff was not claiming mesne profits and is claiming interim compensation as per Order XV-A of C.P.C. She also relied upon the following decisions of the Apex Court in:

- (i) ***Maria Margarida Fernandes Vs. Erasmo Jack de Sequeria, 2012 (4) Bom.C.R.75***, and in particular paragraph 101 thereof; and
- (ii) ***Marshall Sons & Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd., AIR 1999 SC 882***.

9. On the other hand, Ms Chopda has invited my attention to the affidavit in reply filed by the first respondent, and in particular paragraphs 4 and 5. She submitted that accordingly, the defendants have deposited in all Rs.2,85,500/- in the Small Causes Court, Mumbai. She submitted that perusal of paragraphs 4 and 5 would indicate that defendants were regularly paying monthly compensation to the plaintiff @ Rs.500/- per month till the year 1986. The plaintiff on her own stopped accepting monthly compensation from the defendants. As per the directions issued by the City Civil Court in Suit No.2442 of 1986, defendants have deposited the monthly compensation @ Rs.500/- in the City Civil Court till February 1998 and the same has been withdrawn by the plaintiff. As per the directions given by the Small Causes Court in order dated 27.04.2011, defendants' Advocate made enquiries about payment of maintenance charges from April, 2014 and electricity charges for usage of the premises. Till date, they have not received any

reply or clarification from the plaintiff or her Advocate.

10. It is further contended that under their Advocate's covering letter dated 25.04.2019, defendants have deposited Rs.2,79,500/- in the Small Causes Court, Mumbai and the breakup is given in paragraph 5. She further submitted that the learned trial Judge rightly rejected the claim of compensation of Rs.50,000/- per month as it is highly illegal, unreasonable and unjustifiable.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the Suit instituted by the defendants for declaration of their tenancy rights was dismissed by the trial Court. The decree was confirmed by the Appellate Court and the Writ Petition instituted by the defendants challenging these orders was withdrawn. This Court protected the possession of the defendants and permitted plaintiff to follow due process of law. In pursuance thereof, plaintiff has instituted the present Suit and pending that Suit application is taken out for fixation of interim compensation. On the basis of prayer clause (b) in the Suit, the learned trial Judge however proceeded on the premise that the application is for mesne profits and under Order XX Rule 2 of C.P.C., it can be agitated after inquiry as per order on final adjudication. In my opinion, the learned trial Judge committed error apparent on the face of record. The learned trial Judge misdirected himself in treating the application as application for claiming mesne profits. Section 2(12) of C.P.C. defines the expression "mesne profits" as under:

"2. Definitions.- In this Act, unless there is anything repugnant in the subject or context,-

(12) 'mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in

wrongful possession;”

12. The learned trial Judge was of the view that by prayer clause (c) in the Suit, plaintiff has claimed compensation from 01.09.1986 till disposal of the Suit. As this is the final relief, the same cannot be granted at interlocutory stage. In my opinion, the learned trial Judge has not properly appreciated that prayer clause. The said relief is interim relief pending the Suit. That apart, the learned trial Judge should have proceeded to decide the application under Order XV-A of C.P.C. Order XV-A reads thus,

“ ORDER XV-A

(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.

In the event of any default in making the deposits, as aforesaid, the Court may subject to the provisions of sub-rule (2) strike off the defence.

(2) Before passing an order for striking off the defence, the Court shall serve notice on the defendant or his Advocate to show cause as to why the defence should not be struck off, and the Court shall consider any such cause, if shown in order to decide as to whether the defendant should be relieved from an order striking off the defence.

(3) The amount deposited under this rule shall be paid to the plaintiff lessor or licensor or his Advocate and the receipt of such amount shall not have the effect of prejudicing the claim of the plaintiff and it shall not also be treated as a waiver of notice of termination.

Explanation.- The suit for eviction shall include suit for mandatory injunction seeking removal of licensee from the premises for the purpose of this rule.”

13. As the learned trial Judge has committed serious error, the impugned order deserves to be set aside and the application exhibit-9 deserves to be restored to the file of the trial Court.

14. The learned Counsel for the parties state that the next date of hearing before the trial Court is 09.07.2019. In view thereof, the learned trial Judge is directed to treat the application as application under Order XV-A and shall decide the same in accordance with law. The learned trial Judge is requested to decide the application within two weeks from 09.07.2019. Parties are at liberty to file documents in advance. The documents shall be filed on or before 04.07.2019 and served on the other side during this period. Rule is made absolute in the aforesaid terms with no order as to costs.

15. All parties, including the trial Court, to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)

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