

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO. 7463 OF 2019

Shantilal Amritlal  
since deceased through  
L.Rs. and ors. .. Petitioners  
vs.  
Brijmohan P. Sekhsaria and anr. .. Respondents

Mr. R.A. Thorat, Sr. Counsel i/b Mr. Jaydeep Deo for the  
Petitioners.

Mr. P.S. Dani, Senior Counsel i/b Ms Snehal Raju Modi for  
Respondents.

**CORAM : R. G. KETKAR, J.**

**DATE : 30<sup>th</sup> JULY 2019.**

**P.C. :-**

1] Heard Mr. R.A. Thorat, learned Senior Counsel for the  
petitioners and Mr. P.S. Dani, learned Senior Counsel for the  
respondents at length.

2] By this petition under Article 227 of the Constitution of  
India, the petitioners, hereinafter referred to as the  
defendants, have challenged the order dated 16<sup>th</sup> August  
2018 passed below Exhibit-55 in Appeal No. 320 of 2001 in  
R.A.E. & R. Suit No. 1028/3635 of 1980 as also the order  
dated 1<sup>st</sup> December 2018 in Review Application No. 26 of  
2018 passed by the Appellate Bench of the Small Causes  
Court at Bombay (for short "*Appellate Court*"). By order dated

16<sup>th</sup> August 2018 passed below Exhibit-55, the Appellate Court has partly allowed the application made by the respondents, hereinafter referred to as the plaintiffs and directed the defendants to deposit compensation amount at the rate of Rs.5,00,000/- per month from the date of application, i.e., 23<sup>rd</sup> November 2016 till further orders. The defendants were also directed to deposit the arrears of compensation from the date of application till the end of August 2018 either in lumpsum or in three equal installments payable by three months from 16<sup>th</sup> August 2018. The defendants were further directed to deposit future compensation at the same rate commencing from September 2018 till further order on or before 10<sup>th</sup> day of each month. On such deposit being made, the office of Small Causes Court, Mumbai was directed to invest the amount in Fixed Deposit for one year extendable thereafter on yearly basis till further order.

3] In support of this petition, Mr. Thorat submitted that the plaintiffs have instituted a suit against the defendants invoking on two grounds, viz., arrears of rent as

contemplated by Section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act (for short “Act”) and reasonable and *bona fide* requirement as contemplated by Section 13 (1)(g) of the Act. The Trial Court decreed the suit on 20<sup>th</sup> March 2001. The defendants preferred an appeal on 25<sup>th</sup> June 2001. During pendency of the appeal, the defendants took out an application for stay of the eviction decree. By order dated 6<sup>th</sup> June 2002, the Appellate Court stayed the eviction decree subject to the defendants depositing all arrears of rent at the rate of Rs.211.87 per sq.ft per month on or before 30<sup>th</sup> June 2002 and to go on depositing monthly rent on or before 10<sup>th</sup> day of each succeeding month. The amount as and when deposited and also lying in the Court be paid over to the plaintiffs on account and without prejudice to the rights and contentions of both the parties.

4] Mr. Thorat submitted that while granting stay to the eviction decree, the Appellate Court did not impose any condition including condition of depositing the reasonable compensation. The plaintiffs did not challenge that order.

The plaintiffs thereafter filed an application at Exhibit-55 on 23<sup>rd</sup> November 2016 for directing the defendants to deposit arrears of compensation at the prevailing market rate from the date of decree, i.e., 20<sup>th</sup> March 2001 and also to further go on depositing compensation at the current rate, i.e., Rs.8,72,438/- per month in respect of the suit premises as calculated on the basis of market rate as per Stamp Duty Ready Reckoner and more particularly set out in the Valuation Report dated 14<sup>th</sup> October 2016 annexed to the application. In the event of non payment of rent/compensation at the market rate as directed by the Court, the stay to the eviction decree dated 20<sup>th</sup> March 2001 may be vacated. The plaintiffs further prayed for vacating the stay in terms of point Nos.3 and 4 of order dated 20<sup>th</sup> March 2001 so as to enable them to take out appropriate application for separate inquiry for the quantum of *mesne* profit.

5] Alongwith the application, the plaintiffs filed Valuation Report dated 14<sup>th</sup> October 2016 made by *Kishore Karamsey & Co*, Government Registered Valuer. He invited my attention

to the paragraphs 11 and 12 of the application. He has also taken me through the Valuation Report showing fair market rent for the period 2011-2016. According to the Valuer, the fair market rent in respect of suit premises ad-measuring 3399.14 sq. ft. at the rate of Rs.257/- per sq. ft., per month comes to Rs.8,72,438/-. He submitted that the Appellate Court without recording any reason had directed the defendants to deposit Rs.5,00,000/-. There is no basis for issuing such direction. He submitted that the Appellate Court committed serious error while directing the defendants to deposit the compensation at the market rate. The compensation fixed by the Appellate Court is exorbitant, excessive, punitive and not reasonable. He also relied upon the following decisions:

- (i) Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd. - (2005) 1 SCC 705;**
- (ii) Pradeep Kumar vs. Hajari Lal – (2008) 3 SCC 299;**
- (iii) State of Maharashtra and anr. vs. Super Max International Private Limited and ors. - (2009) 9 SCC 772;**
- (iv) Order dated 19<sup>th</sup> March 2009 passed by this Court (Coram: Shri. A.M. Khanwilkar, J., as His Lordship then was ) in Writ Petition Nos. 2500 and 2501 of 2009 (Madhavlal N. Pittie vs. Shekhar Narayan Shetty and ors.);**

- (v) Super Max International Pvt. Ltd. and ors vs. M/s. R.M. Choksey and Co. - 2009 (3) ALLMR 528;**
- (vi) Order dated 4<sup>th</sup> March 2010 passed by this Court (Coram: Shri. A.S.Oka, J., as His Lordship then was ) in Civil Application No.688 of 2009 in Writ Petition No. 5658 of 2004 along with connected matters.**

Mr. Thorat submitted that the carpet area of suit premises is 2525.88 sq.ft., as is evident from the Plan prepared by MHADA Panel Architect. Having regard to the fact that the Appellate Court has fixed the excessive compensation, he submits that the petition requires consideration.

6] On the other hand, Mr. Dani supported the impugned order. Mr. Dani submitted that in paragraph 36 of the impugned order, the Appellate Court recorded that it is not in dispute that the area of suit premises are of 3399 sq.ft. on the ground floor. He submitted that the Valuation Report made by *Kishore Karasmsey and Co.* is based on Stamp Duty Ready Reckoner. Insofar as the fair market rent for the period 2011-2016, the Valuer had fixed the average rate per sq.ft was fixed at Rs.257/-; average cost of construction was

fixed at Rs.1660.63; as the building is more than 80 years old, 80% was deducted from Rs.1660.63 which came to Rs.1328.50. Accordingly, the cost of construction, per square feet came to Rs.55,000/-; capitalising the market rate at the rate of 8%, the annual rate per sq. ft. comes to Rs.4399/- and monthly rate per sq.ft came to Rs.366.66. As the suit premises is situated on the ground floor without amenities, 30% was deducted came upto Rs.110/-. Thus, the Valuer recommended fair market rate of Rs.257 per sq. ft and accordingly, determined fair market monthly rent at Rs.8,72,438/-. The Appellate Court however, did not accept the Report in totality and scaled down to Rs.5,00,000/-.

7] Mr. Dani submitted that while passing the impugned order, the Appellate Court did not impose condition that on failure of defendants to deposit the amount will result in vacating the stay order. The plaintiffs therefore, took out an application at Exhibit-62 for imposing condition that in the event of failure in depositing the amount as per impugned order, the stay will be vacated. By order dated 27<sup>th</sup> March 2019, the Appellate Court rejected the application by

observing that the defendants have instituted the writ petition and the matter is *sub-judice* before the High Court and therefore, the Appellate Court cannot modify its own order. The plaintiffs are at liberty to urge all the points before the High Court to get the order modified, if they feel that this order is lacking such directions. He submitted that though the impugned order was passed on 16<sup>th</sup> August 2018, till date the defendants have not complied that order and at the same time the plaintiffs are unable to execute the eviction decree. He therefore, submitted that no case is made out for interference of the impugned order.

8] I have considered the rival contentions advanced by both the parties. I have also perused the material on record. It is not in dispute that the area of suit premises are of 3399 sq.ft. on the ground floor of the building known as '*Sekhsaria House*' situate in the prime locality of Babulnath Road, Mumbai-400 007. It is not in dispute that after eviction decree was passed by the Trial Court on 20<sup>th</sup> March 2001, in the appeal, preferred by the defendants, the eviction decree was stayed on 6<sup>th</sup> June 2002, subject to the defendants

depositing all arrears of rent at the rate of Rs.211.87 per sq.ft per month. In other words, while staying the eviction decree, the Appellate Court did not direct the defendants to deposit reasonable compensation. The decision in *Atma Ram Properties (P) Ltd. (supra)* was rendered in 2005. That is to say after passing of the order dated 6<sup>th</sup> June 2002 by the Appellate Court. Nonetheless, the application for stay made by the defendants is regulated by provisions of Order XLI Rule 5 of Code of Civil Procedure, 1908 ( for short “CPC”).

9] In *Atma Ram Properties (P) Ltd. (supra)*, the Apex Court has interpreted Order XLI Rule 5 of CPC. In paragraph 8, the Apex Court observed that mere preferring of an appeal does not operate as stay on the decree or order appealed against. In paragraph 9, the Apex Court observed that while granting an order of stay under Order XLI Rule 5 of CPC, the Appellate Court does have jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party successful at the end of the appeal insofar as those proceedings are concerned. *Robust* common sense, common knowledge of human affairs and events gained by judicial

experience and judicially noticeable facts, over and above the material available on record – all these provide useful inputs as relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on. While granting stay to the eviction decree in the eviction suit, the tenant is liable to pay *mesne profits* or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of decree.

10] In the present case, as mentioned above, the Appellate Court did not impose any condition while staying the eviction decree dated 6<sup>th</sup> June 2002. It is only on 23<sup>rd</sup> November 2016, i.e., after passage of nearly 14 years, the plaintiffs took out an application Exhibit-55. Along with the application, the plaintiffs also enclosed the Valuation Report dated 14<sup>th</sup> October 2016. As against this, the defendants merely relied upon Leave and Licence instances and did not produce any Valuation Report. The Appellate Court has considered the

instances relied by the defendants. In paragraph 48, the Appellate Court observed that most of the instances relied by the defendants are that in all of the four instances, Licensor is common viz. Trustees of the Parsi Panchayat Funds and Properties and the Licensees are invariably individuals from Parsi community. In paragraph 49, the Appellate Court observed that Parsi Panchayat provides accommodation to the needy community members on rental basis, at much more concessional rates as compared to the prevailing market rental rates, as one of its objects.

11] A perusal of the Valuation Report relied upon by the plaintiffs shows that it is based on Ready Reckoner. In paragraph 78 of the decision in case of *Super Max International (supra)*, the Apex Court observed that fixation of amount with reference to Stamp Duty Ready Reckoner cannot be doubted as unreasonable. That apart, though the Valuer had recommended compensation at the rate of Rs.8,72,438/- per month, the Appellate Court has fixed the compensation at the rate of Rs.5,00,000/-per month. Having regard to the locality of the suit premises, I do not find that

the Appellate Court committed any error while fixing the compensation. It cannot be said that fixation of compensation is exorbitant, fanciful or punitive.

12] It is also material to note that the Appellate Court did not direct the defendants to deposit the compensation at the rate of Rs.5,00,000/- per month from the date of eviction decree passed on 20<sup>th</sup> March 2001 and the same is ordered from the date of application, i.e., 23<sup>rd</sup> November 2016.

13] As mentioned earlier, though no stay is operating in this petition, the defendants have not deposited the amount as ordered by the Appellate Court. While passing the order, the Appellate Court did not put condition that failure to comply the order will result in vacating the stay. Though, the plaintiffs took out an application at Exhibit-62, the Appellate Court rejected the application on the ground that the matter is *sub judice* before this Court and the plaintiffs are at liberty to urge all the points before this Court for modification of the impugned order.

14] In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, the petition is liable to be dismissed and is hereby dismissed. It is however, clarified that if the defendants do not comply with the order dated 16<sup>th</sup> August 2018, the stay granted on 6<sup>th</sup> June 2002 shall stand vacated without further reference to the Court and the plaintiffs are at liberty to execute the eviction decree. The defendants shall deposit the arrears of compensation from 23<sup>rd</sup> November 2016 being the date of application till 31<sup>st</sup> July 2019 either in lumpsum or in three equal installments payable by three months from 31<sup>st</sup> July 2019.

15] At this stage, Mr. Thorat submitted that by prayer clauses (c) and (d) in application Exhibit-55, the plaintiffs prayed the following reliefs:

*“c) In the event of non-payment of the rent/compensation at market rate as directed by this Hon’ble Court , the stay to the execution of decree dated 20.03.2001 be set aside;*

*d) That stay of execution decree in terms of points 3 and 4 of order dated 20.03.2011 be vacated to enable the Respondents to take out appropriate application for separate inquiry for the quantum of mesne profit”*

16] By the impugned order, the Appellate Court rejected the that prayers. Mr. Thorat submitted that when these prayers are specifically rejected and the plaintiffs have not challenged the order, this Court cannot direct that the stay to eviction decree to stand vacated on their failure in depositing the arrears of compensation. He submitted that the defendants cannot be expected to address on this aspect during the course of arguments for the first time in this writ petition. He therefore, submitted that this Court cannot impose condition on the defendants that in case they fail to deposit or comply the order, the stay will be vacated.

17] It is not possible to accept the submission of Mr. Thorat for more than one reason. In the first place, as mentioned earlier, the Appellate Court rejected the application at Exhibit-62 by giving liberty to the plaintiffs to agitate this aspect in the proceedings pending in this Court on the ground that the matter is *sub judice* before the High Court and the plaintiffs are at liberty to urge all the points before this Court for modification of the impugned order. Though the plaintiffs have agitated the contention, the defendants are

not ready and willing to address the Court on this aspect though opportunity is given to them. It cannot be said that the defendants are taken by surprise in view of the Appellate Court specifically granting liberty to the plaintiffs to agitate this point in the High Court. The plaintiffs cannot be in the worst position in this Court as well.

18] Secondly, in the case of **Surya Dev Rai Vs. Ram Chander Rai, (2003) 6 SCC 675**, the Apex Court has considered the powers of superintendence under Article 227 of the Constitution of India. In paragraph 22, the Apex Court observed that *“It is well-settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved **or may even be exercised suo motu.** The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those*

*technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.*

*(emphasis supplied)”*

19] In paragraph 24, the Apex Court observed that “the power under Article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate Courts and Tribunals within the bounds of their authority and not for correcting mere errors. The power may be exercised in cases occasioning grave injustice or failure of justice such as when (i) the Court or Tribunal has assumed a jurisdiction which it does not have, (ii) has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamount to overstepping the limits of jurisdiction.”

20] In paragraph 25, the Apex Court observed that “in exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and

*circumstances of the case may warrant, may be by way of guiding the inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well.”*

21] In paragraph 26, the Apex Court observed that there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error committed by the inferior court or tribunal would be incapable of being remedied once the proceedings have concluded. It was also held that where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.

22] In paragraph 32, the Apex Court referred to the decision in *State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru*, **(2003) 6 SCC 641**. In that case, the Apex Court held that the jurisdiction under Article 227 cannot be limited or fettered by an Act of the State Legislature. The supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with interlocutory order. In paragraph 38, the Apex Court summed up the conclusions in a nutshell as under:

*“(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.*

*(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.*

*(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby*

*occasioning failure of justice.*

*(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.*

*(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.*

*(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.*

*(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for*

*correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.*

*(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.*

*(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.”*

23] It was thereafter observed that though the Court has laid down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a straitjacket formula or rigid rules. It was further observed that there may be cases where '*a stitch in time would save nine*'. At the end, the Apex Court observed that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the Judge.

24] Applying the principles laid down in the case of **Surya Dev Rai** (*supra*) to the facts of the present case, I am satisfied that in the present case by not imposing condition, the Appellate Court has failed to exercise jurisdiction vested in it. Therefore, it is required to be corrected by this Court. As mentioned earlier, though no stay is operating in this petition, the defendants have not complied the impugned order. Because of failure on the part of the Appellate Court of not imposing condition of vacation for stay to eviction decree,

the plaintiffs cannot execute the decree. Though I called upon Mr. Thorat to address on this aspect, the defendants are not ready and willing to advance any arguments.

25] At this stage, Mr. Thorat orally applies for stay of this order. In view of the conduct of the defendants, as well as the defendants are given sufficient time to deposit arrears of compensation, the oral request for stay of this order is rejected.

**(R. G. KETKAR, J.)**