

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**COURT RECEIVER'S REPORT NO.142 OF 2019/I-Group
IN
COMMERCIAL SUIT NO.755 OF 2017**

Bai Mamubai Trust

And Others

... Plaintiffs

Versus

Suchitra wd/o. Sadhu Koraga

Shetty

... Defendant

.....

Mr. Mayur Khandeparkar i/b Mr. Maulik K. Tanna for the Plaintiffs.

Mr. Mathews Nedumpara a/w Ms. Rohini Amin i/b Ms. Kanchan Agarwal for the Defendant.

Mr. N.A. Bandodkar, 2nd Assistant to Court Receiver present.

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CORAM : S.C. GUPTE, J.

DATE : 13 SEPTEMBER 2019

ORAL JUDGMENT :

. Heard learned Counsel for the parties and the receiver's representative, who is present in court.

2 This Court Receiver's Report seeks directions concerning payment of royalty by the defendant, who is in possession of the suit premises as an agent of the receiver. The court receiver has fixed a royalty of Rs.1,20,000/- per month as royalty payable from 12/20 July 2017. The defendant has paid a sum of Rs.45,000/- as monthly royalty on an ad-hoc basis as required by this court between 12/20

July 2017 and 7 June 2018. By a separate order passed on 7 June 2018, the court receiver has required the Defendant to deposit the difference of Rs.75,000/-, i.e. the difference between Rs.1,20,000/- fixed as final royalty and the ad-hoc royalty of Rs.45,000/- paid by the Defendant, for the period between 12/20 July 2017 and till 7 June 2018 within six weeks. The Defendant has neither paid the arrears nor the royalty fixed by the court receiver for the further period, i.e. from 7 June 2018 till date. The receiver, in the premises, seeks directions from this court on the future course of action.

3 The suit premises consist of three shops, which together constitute a restaurant, where the Plaintiff-trust has been said to be carrying on business in the name and style of “Manoranjana Hotel” by appointing conductors. The predecessor of the Defendant as well as the Defendant herself, who the plaintiff claims to be such conductors or their assignees, have filed proceedings before the Court of Small Causes for declaration of tenancy in respect of the suit premises. One Maganlal S. Hemani, the original conductor, had filed the first declaratory suit seeking a declaration of his tenancy in respect of the suit premises. Pending that suit, a deed of assignment was executed by Hemani purporting to assign the entire business of one Sadhu Koraga Shetty. In 1990, Shetty filed his own declaratory suit before the Court of Small Causes seeking declaration of his tenancy. That suit was dismissed for default. Without reviving the suit, Shetty filed another declaratory suit, being R.A.D. Suit No.1245 of 2000, seeking a similar relief. Even that suit was dismissed for default on 6 June

2000. Despite dismissal of these two suits, Shetty filed yet another declaratory suit, being R.A.D. Suit No.1843 of 2003, claiming to be a monthly tenant in respect of the suit premises. During the pendency of that suit, Shetty expired. He was survived by the present Defendant, who impleaded herself as the plaintiff in that suit. The suit was eventually dismissed on 1 December 2009. The trial court recorded in its order that her predecessor was not a tenant in respect of the suit premises. The Defendant's appeal from that decree was dismissed by the Appellate Bench of the Court of Small Causes by a reasoned order. This order, as of now, has attained finality, although a writ petition filed by the Defendant challenging the Appellate order of the Court has been admitted and pending hearing before this court, but without any order being passed therein. It is in these facts that the Plaintiffs have approached this court by way of the present title suit, claiming recovery of possession of the suit premises from the Defendant.

4 By an order dated 12/20 July 2017, this court framed a preliminary issue of limitation and pending determination of that issue, appointed Court Receiver, High Court, Bombay as a receiver of the suit property. The receiver was, however, directed to merely take formal possession of the suit property and not disturb the physical possession of the Defendant. The Defendant was to be appointed agent of the receiver under an agency agreement on payment of a monthly royalty, but without any security. The royalty was initially fixed at the rate of Rs.45,000/- per month. By a further order dated 3

November 2017, it was clarified that the royalty of Rs.45,000/- ordered to be paid by the Defendant was to be merely an ad-hoc monthly royalty, the final royalty to be fixed by the Court Receiver. By a further order dated 24 November 2017, on the Defendant's Notice of Motion seeking a recall of the order of 12/20 July 2017, this court dismissed the notice of motion and directed the court receiver to continue the exercise of fixation of final royalty after hearing both parties, since the original royalty fixed by the court in its order dated 12/20 July 2017 was merely an ad-hoc royalty.

5 The court receiver, thereafter, appointed valuers on his panel for suggesting a fair and reasonable royalty to be charged for the agency in respect of the suit premises. M/s Nadkarni & Co. was appointed as valuers. The valuers made a report, on which the parties were heard extensively by the court receiver. After hearing the parties, the court receiver, in the face of the royalty of Rs.1,91,600/- per month suggested by the valuers, fixed a monthly royalty in the sum of Rs.1,20,000/- per month in respect of the three shops forming part of the suit premises, and open otala and covered open space in occupation of the Defendant. The Defendant was directed to pay this royalty from 12/20 July 2017.

6 The order of the court receiver fixing this royalty was the subject matter of challenge in a chamber summons taken out by the Defendant before this Court. By an order dated 25 January 2019 passed on that chamber summons, this Court was of the view that the

determination of royalty by the court receiver was reasonable and proper, and did not merit any interference. This Court, accordingly, dismissed the Defendant's chamber summons. This order was carried by the Defendant in appeal before the Division Bench of this Court. The Appellate Court, by its order dated 26 April 2019, dismissed that appeal. The order has not been carried any further by the Defendant, and has now attained finality.

7 Despite the orders passed by this Court, the Defendant did not pay the royalty amount of Rs.1,20,000/- fixed by the court receiver. Between 12/20 July 2017 and 7 June 2018, the Defendant paid the originally fixed ad-hoc royalty of Rs.45,000/-. By an order dated 7 June 2018, as noted above, the receiver had requested the Defendant to pay arrears of the difference between the final royalty and the ad-hoc royalty (i.e. Rs.1,20,000/- less Rs.45,000/- = Rs.75,000/-) from 12/20 July 2017 till 7 June 2018 within six weeks from the meeting date, i.e. from 7 June 2018. After the rejection of the Defendant's Appeal from the order passed on the chamber summons, by a letter dated 23 May 2019, the court receiver requested the Defendant to deposit the arrears of difference of royalty amounting to Rs.17,75,000/- (for the period between 01 August 2017 for 20 days from 12/20 July 2017 and from 01 August 2017 to 30 June 2019) within two weeks.

8 By her communication dated 11 June 2019 through her Advocate, the Defendant requested the receiver to give her one

month's time for payment and not take any step till then. Her request for granting her further time to pay the arrears was rejected by the court receiver and the present report was submitted to the Court.

9 It is apparent from the above narration that the order fixing royalty in the sum of Rs.1,20,000/- per month has attained finality; the Defendant cannot resist to pay that royalty. Mr. Nedumpara, learned Counsel appearing for the Defendant, submits that her challenge to the Appellate decree of the Court of Small Causes has been pending before this Court. That was so, even when the first order of appointment of court receiver was passed as also her challenge to the fixation of the royalty by her chamber summons was rejected by this Court and that order was confirmed by the Appeal Court. Mere pendency of the Defendant's writ petition challenging the appellate order, thus, does not avail the Defendant.

10 Mr. Nedumpara submits that though the Court of Small Causes had rejected the Defendant's suit for declaration of her tenancy, the Court has not made any further observation, particularly, concerning the nature of her possession of the suit premises. It is quite apparent that this very argument was advanced before the Court when it decided the Plaintiffs' notice of motion on 12/20 July 2017. This Court held that, as of now, in the face of the orders of the Court of Small Causes, the Defendant could not seek to protect her possession on the basis of any right, title or interest in the suit premises. In a

suit based on title, the plaintiff does not have to show the nature of the defendant's possession; the plaintiff has to show his title to the suit property. If it is the defendant's case that he has any right, title or interest to occupy the suit property, he must do so by setting up an appropriate defence based on such right, title or interest. As this Court made it very clear in its order of 12/20 July 2017, the fact that the Appellate order of the Court of Small Causes was challenged before this Court was neither here or there. If there was no protective order in favour of the Defendant in that challenge, she could not successfully resist the Plaintiffs' application for appointment of court receiver in the suit based on their title.

11 Mr. Nedumpara relies on Section 10 of the Code of Civil Procedure, 1908 ("Code") and cites many a latin maxims in support of his plea that the present suit cannot, in fact, continue when the issue has been directly and substantially in issue in a previously instituted suit between the same parties. There is no question of application of Section 10 of the Code to the present suit and that is for more than one reason. The very first reason is that there is no such application before the Court. A stay of suit application has to be moved by the Defendant by presenting a notice of motion under the Rules applicable to the Original Side of this Court. That is, obviously, not done. The second reason is that when the motion was moved, in the first place, before this Court by the Plaintiffs for appointment of court receiver, this was not urged by the Defendant. The third and the most pertinent reason is that the facts of the case

do not bring it within the mandate of Section 10. The suit in the present case is on the Plaintiff's title and the Defendant's right to resist such suit; whereas the question directly and substantially in issue in the Defendant's own suit in the Court of Small Causes was of her purported tenancy of the suit premises. Secondly and more importantly, the Court of Small Causes has no jurisdiction to grant the relief claimed in the present suit by the Plaintiffs. Such relief is incomprehensible in the Defendant's suit before that court. The Defendant's suit is for declaration of her tenancy. In that suit, there is no question of the Court granting the relief claimed by the Plaintiffs in the present suit, namely, recovery of possession of the suit premises based on their title. For all these reasons, and all the latin jargon apart, the principle of stay of suit contained in Section 10 of the Code has no application at all to the facts of the present case.

12 Mr. Nedumpara submits that the orders passed by this Court on the chamber summons of the Defendant and her Appeal therefrom are simply interlocutory orders; there is no finality in the matter. One more latin phrase is dished out in support of the proposition. The proposition has no substance. Interlocutory orders do have finality; that finality is for interlocutory purposes. We are essentially concerned here with rights of the parties for interlocutory purposes.

13 The Court Receiver's Report, in the premises, is disposed of by directing the Defendant to pay arrears of royalty in the sum of Rs.17,75,000/- within a period of eight weeks from today.

14 In the event the Defendant fails to pay the arrears and continue to pay further royalty in the sum of Rs.1,20,000/- per month from the date of the Report, i.e. 1 June 2019, the receiver shall take physical possession of the suit premises by dispossessing the Defendant. The receiver may enlist such assistance from the local Police Station as he may need in that case. The local police station, namely, Pant Nagar Police Station, is directed to render all assistance to the receiver for the purpose.

15 The costs of this report, fixed at Rs.3,000/-, shall be borne by the Plaintiffs. These costs shall be paid to the Court Receiver within a period of two weeks from today.

16 The Court Receiver's Report is disposed of accordingly.

(S.C. GUPTE, J.)