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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL WRIT PETITION NO. 12836 OF 2017**

JAYANTHI BHALCHANDRA PATKAR AND ANRPETITIONERS

V/s.

AAKARSHRAI BHAIJURAI RAIRESPONDENT

Mr. Bharat Joshi Advocate for the Petitioner

CORAM : NITIN W. SAMBRE, J.

DATE: JUNE 13, 2022.

P.C.:

- 1) Heard. On 17/10/2019, this Court has called upon the Respondent through a show cause notice as to why, in addition to regular licence fees, additional amount of Rs. 10,000/- per day be not saddled towards accommodation/compensation as the Suit No. 1/2017 for eviction and mesne profit is pending adjudication.
- 2) Respondent has chosen not to appear in the matter inspite of there being additional opportunity offered to the Respondent on 21/12/2021.
- 3) After the licence period was over, as reflected in the deed of

licence dated 14/12/2015 , the aforesaid suit came to be initiated.

4) Application Exh. 14 is taken out by the Petitioner pursuant to provisions of Order XVA Rule 1 of Code of Civil Procedure, 1908 ('CPC' for the sake of brevity) (Bombay Amendment). Prayer in the said Application is based on prayer in the Complaint which reads thus:

"19. The Plaintiffs therefore pray that:

A. The Hon'ble Court may be pleased to declare that the possession of the Defendant over suit shop after 01/07/2016 is per se illegal and un-authorized

B. The Hon'ble Court may be pleased to direct the Defendant to forthwith handover vacant and peaceful possession of the suit shop to the Plaintiffs

C. The Hon'ble Court may be pleased to direct the Defendant to pay to the Plaintiffs sum of Rs. 17,30,000/-

D. The Hon'ble Court may be pleased to direct the Defendant to pay to the Plaintiffs sum of Rs. 10,000/- per day towards damages for use and occupation of the suit shop from the date of the suit till recovery of vacant and peaceful possession of the suit shop.

E. The Hon'ble Court may be pleased to award cost of this suit.

F. The Hon'ble Court may be pleased to pass any other order in favour of the Plaintiffs as it may deem fit and proper in the circumstances of the case and oblige."

5) The claim for direction to the Respondents to deposit amount is based on aforesaid registered deed of licence particularly clause 7 which reads thus:

“7) It is also agreed between the parties, that, in the event of the licensee and/or his employees neglecting to remove themselves and or/their articles and effects from the said premises, on expiry or sooner determination of this agreement, then, without any prejudice to any other remedy available to the licensors, the licensors shall not only be entitled to hold the said security deposit free of interest until such compliance but the licensors shall also be entitled to recover damages at the rate of Rs. 10,000/- (Rupees Ten Thousand only) per day in addition of the license fees in force on the material date.”

6) In the aforesaid background, contentions of counsel for the Petition are, Petitioner has every right in law as referred above to claim a direction against the Respondent to deposit amount of mesne profit in the Court. According to him, inspite of there being a registered leave and licence agreement, Respondent has denied execution of such document to which the Court below has formed to be a basis for rejecting the prayer for issuance of directions to

Respondent to deposit an amount of compensation/part of mesne profit as is claimed in the Plaint. He would further urge that Respondent has failed to respond to the notice so also repeated orders passed by this Court and as such, this Court must take judicial note of the same by directing the Respondent to deposit the amount of Rs. 10,000/- per day as has been agreed in the aforesaid registered leave and licence agreement.

7) The aforesaid contentions are not controverted before this Court.

8) This Court is required to be sensitive to the Bombay amendment to Order XV of the CPC. Order XVA Rule 1 of CPC reads thus:

“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.

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.”

9) Aforesaid provisions provide for a remedy to the parties like the Petitioner who are suffering at the hands of Respondent/Defendant whose licence period is already over and who have failed to vacate two premises inspite of notice to that effect is served.

10) The evidential value of registered leave and licence agreement is not considered by the Court below while dealing with aforesaid prayer of the Petitioner. Merely because Respondent has come out with a case of denial of existence of a registered leave and licence agreement, that by itself will not give any lever to the Respondent not to honour the provisions of law. Rather the provisions of evidence Act particularly section 78 provides for its evidential value. In the backdrop of existence of registered leave and licence agreement burden shifts on the Respondent to prove the fact of non-existence of such agreement which the Respondent has prima-facie failed to discharged.

11) In view of above, it is established that there exist a registered leave and licence agreement and the licence period there is expired, the burden in view of aforesaid provisions shifts on Respondent to demonstrate that there exist such registered leave and licence agreement.

12) In the aforesaid background, the Court below, in my opinion has committed an error in rejecting the prayer of the Petitioner for issuance of directions under Order XVA Rule 1 of CPC.

13) Having regard to the recitals as referred above in the registered leave and licence agreement, it will be appropriate in my opinion to direct the Respondent to deposit part of the amount which is claimed by the Petitioner towards mesne profit.

14) Fact remains that Suit property is situated at Dombivli (East), Thane and is being commercially used by the Respondent for running ready-made garment business. Order XVA of C.P.C empowers the Court with whom such Suit for eviction is pending to consider and award such amount as it deems fit towards arrears of mesne profit. In the case in hand Respondent has agreed in registered leave and licence agreement, in cause 7 to pay said charges.

15) In this background and having regard to the dimensions and location of the Suit property, it will be appropriate in my opinion to direct the Respondent to deposit an amount of Rs. 2,000/- per day towards part of the discharge of the liability of the mesne profit as has been agreed to in the registered leave and licence agreement dated 14/12/2015 . Let the aforesaid amount be deposited by the Respondent from the date of Application Exh. 14. It is further directed that till the decision of the Suit, Respondent shall continue to deposit the said amount alongwith licence fees.

16) Needless to clarify that in case if the Respondent fails to honour the aforesaid directions which are passed in exercise of powers under Order XVA Rule 1 of CPC, necessary consequences provided therein shall follow. As such, order impugned passed below Exh. 14 is hereby quashed and set aside.

17) Petition stands allowed in the above terms.

[NITIN W. SAMBRE, J.]

IRESH SIDDHARAM
MASHAL

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SIDDHARAM MASHAL
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