

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 12859 OF 2022

Ms.Shobha H. Kapadia	}	
R/at Ivory Towers, Building No.2,	}	
2nd Floor, Room No.204, Juhu-	}	
Koliwada, Mumbai-400 049.	}	...Petitioner

Versus

1. Mr.Kishor Gopaldas Rajda	}	
R/at 145/C, Dr. Vegas Street,	}	
Mumbai-400 002.	}	
2. Mr.Bharat Hansraj Ruparel	}	
R/at B/5, Kakad Estate, Rajawadi	}	
Road, Ghatkopar (East),	}	
Mumbai-400 077.	}	
3. Mr.Mahendra V. Kapadia	}	
R/at Priya, 282, Juhu Cross Road, 3rd	}	
Floor, Andheri (West),	}	
Mumbai-400 058	}	
4. M/s. Odhavji Madhavji & Co.	}	
Add At 23/25, Phanaswadi, Dadi Seth	}	
Agiary Lane, Mumbai-400 002.	}	Respondents

Mr. Baiju Pupala i/b. Mr.Anil Lulla, Advocate for the Petitioner.
Mr.A.N. Shukla along with Mr. Nitin Shukla, Advocate for the
Respondents.

CORAM : SHIVKUMAR DIGE, J.

DATE : 6th APRIL 2023

Oral Judgment :

1. Rule. Rule made returnable forthwith. By consent of parties, the matter is heard finally.
2. The petitioner has challenged the impugned order passed by the Appellate Bench of Small Causes Court, Mumbai, below Exhibit “7”. By the said order, the Appellate Court has directed the petitioner to deposit interim compensation of Rs.2,70,000/- per month from the date of decree till final disposal of the appeal.
3. It is contention of learned counsel for the petitioner that the interim compensation order passed by the Appellate Court is without making any inquiry under Order XX Rule 12 of the Civil Procedure Code 1908 (for short “the CPC”) and the valuation report submitted before the Appellate Bench was incorrect. He further submits that Appellate Court has not considered the fact that without making any inquiry under Order XX Rule 12 of the CPC, the valuation of the suit property cannot be fixed. Hence, requested to allow the petition.

4. Learned counsel for respondent Nos.1 and 2/original plaintiffs submits that decree of eviction is passed against the petitioner, but it was contention of the petitioner before the Appellate Court that suit premises is the only source of income to the petitioner. The suit premises is admeasuring 2500 square feet and situated on the ground floor in Kalbadevi area which is an commercial area. As per the valuation report, the monthly rent of the suit premises is around Rs.2,79,531/-. The Appellate Court has considered the rent at Rs.2,70,000/- per month. Learned counsel further submits that the impugned order is passed under Order XLI Rule 5 of the CPC and not under Order XX Rule 12 of the CPC. Hence, the order passed by the Appellate Bench is legal and valid and no interference is required in it.

5. I have heard both learned counsel, perused the impugned order passed by the Appellate Court. In the said order, the

Appellate Bench has observed that the advocate for the appellant/petitioner herein did not file on record the valuation report, any documents which will show how much compensation the suit premises will fetch. On the other hand, advocate for respondent Nos.1 and 2 filed valuation report dated 9th January 2019 issued by an architect. From the said report, it appears that the suit premises is commercial premises situated in Kalbadevi area, it is measuring 2500 square feet and situated on the ground floor of the building, as per the valuation report, the monthly mesne profit of the suit property is Rs.2,79,531/- per month. Based on prevailing and fair market rent as on 9th January 2019 as well as the decision of Hon'ble Apex Court in the case of **Viraj Traders versus Kamala Jain AIR 2022 SC 1377.** wherein the Hon'ble Apex Court has observed that the existence of power under Order XLI Rule 5 of the CPC is not to be confused with the exercise of its power by an Appellate Court.

There is power with the Appellate Court which may not enable it to order any unreasonable amount or reach a windfall to the landlord. The appellant is in use and occupation of the suit premises being tenant of respondent Nos. 1 and 2, hence the appellant/petitioner is liable to pay compensation in respect of the suit premises, on the basis of observations of Hon'ble Apex Court, the Appellate Court has decided fair market compensation of the suit premises at Rs.2,70,000/- per month.

6. It is contention of the learned counsel for the petitioner that, at present, the petitioner is not in possession of the suit premises. Hence, she cannot be directed to pay the compensation. In my view, this stand is taken by the petitioner for the first time before this Court, as before the Appellate Court, the petitioner had taken the stand that the suit premises is only source of income of the petitioner, and if stay is not granted, grave prejudice would be caused to the petitioner. Even it was mentioned before the Appellate Court that the petitioner had

good case on merit and chances to succeed in the appeal. Hence, I do not see merit in the contention of the learned counsel for the petitioner that the petitioner is not in possession.

7. The Hon'ble Apex Court in case of ***Atma Ram Properties Pvt. Ltd. V/s. M/s. Federal Motors Pvt. Ltd.***¹ has held that the Appellate Court, while exercising jurisdiction under Order XLI Rule 5 of the CPC, has inherent power to put the tenant-applicant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of Appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the Appellate Court.

8. In the present case, the Appellate Bench has passed the order under Order XLI Rule 5 of the CPC. The Hon'ble Apex Court in the case of ***State of Maharashtra V/s. Super Max International Pvt. Ltd. & Ors.***² had held that the interim order of

1 2005 SCBRC 99

2 AIR 2010 Supreme Court 722

the High Court asking the appellant to deposit of Rs.5,40,000/- from the date of the decree as condition for stay of the execution of decree of ejectment has to be seen as one single package. The appellant may or may not accept the order as a whole. But it is not open to it to accept the order insofar as it stays the execution of the decree and to question the condition too attached to it. In an Appeal or Revision, stay of execution of the decree passed by the Court below cannot be asked for as of right. While admitting the Appeal or Revision, it is perfectly open to the Court to decline to grant any stay or to grant stay subject to some reasonable condition.

9. In my view, in the present matter, the Appellate Bench has called valuation report of the suit premises, and on that basis, Appellate Bench has directed the petitioner to pay interim compensation of Rs.2,70,000/- per month from the date of decree till final disposal of the appeal. It is an interim compensation. I do not see any infirmity in the impugned order and I pass following order.

ORDER

- (i) Writ Petition is dismissed.
- (ii) Rule is discharged. No order as to cost.
- (iii) Ad-interim order, granted by this Court, is vacated.

(SHIVKUMAR DIGE, J.)