IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 12142 OF 2023

M/s. Pramukh Properties & Developers Private Limited. ...Petitioner.

Versus

Atul J. Doshi and Others. ...Respondents.

Mr. M. M. Vashi, Senior Advocate along with Ms. Panthi Desai i/b M/s. M. P. Vashi & Co., for the petitioner.
Mr. Rajeev Narula, Ms. Mehek Chaudhary i/b Jhangiani, Narula & Associates for the respondents.

Coram : Sharmila U. Deshmukh, J.
Reserved on : November 8, 2023.
Pronounced on : December 1, 2023.

ORDER :

1. The petition filed under Article 227 of the Constitution of India takes exception to the order passed by the Revisional Court and the Appellate Court dated 2nd September 2023 upholding the order of the Small Causes Court dated 3rd August 2022 passed below Exhibit-16 in L.E.& C. Suit No.113 of 2019. The challenge is limited to the direction of deposit of liquidated damages.

2. Briefly stated the facts are that the respondents are the

owners of suit premises being Unit No.601, situated at Agarwal B2B Centre, Kanchpada, Malad (West), Mumbai which was given on leave and license basis to the petitioner for a period of 26 months vide registered leave and licence agreement dated 8th October 2013. L.E.& C. Suit No.113 of 2019 came to be filed by the respondents under section 42 of the Maharashtra Rent Control Act, 1999 read with the Presidency Small Causes Court Act, 1882, seeking recovery of possession of the licensed premises, arrears of Rs.1,39,56,905/- upto 31st March 2019 and mesne profits of Rs.10,000/- per day as per the agreement or at such rate as may be deemed fit and proper.

2.1. The Petitioner resisted the suit contending that although leave and licence agreement was executed, it was always presumed and understood by the owner and the petitioner that leave and licence agreement would be converted into tenancy basis. It was contended that a sum of more than Rs.41 lakh has been expended by the petitioner towards interior designing of suit premises and that after the expiry of leave and licence agreement, the petitioner has been recognised as tenant of the premises and that rent receipts have been issued by the respondents in favour of the petitioner.

2.2. An application below Exhibit-16 came to be filed under Order XXXIX Rule-1 and 2 of CPC by the respondents seeking an order of interim injunction restraining the petitioner from creating third party rights in the licensed premises and a direction to the petitioner to pay mesne profits @ Rs.10,000/- per day or at such other rate as may be deemed fit and proper by the Court. The Petitioner filed its affidavit-in-reply dated 4th March 2022 contending that petitioner has already filed R.A.D. Suit No.44 of 2022 in Small Causes Court seeking declaration of tenancy. It was contended that there is no relationship between the parties as licensor and licensee and the rent had been paid in respect of the suit premises to the respondent for which rent receipts were issued.

2.3. The Small Causes Court by its order dated 3rd August 2022 allowed the application below Exhibit-16 and restrained petitioner from creating third party rights in respect of the suit premises. The Small Causes Court also directed the petitioner to deposit liquidated damages @ Rs.10,000/- per day from May 2016 till the disposal of suit in the Court within 4 weeks from the date of order.

2.4. In the meantime, in R.A.D.Suit No.44 of 2022 an application was made by the petitioner seeking permission to deposit rent in the Court in respect of the suit premises for the month from November 2019 to July 2022 @ Rs.18,000/- per month, which came to be allowed by order dated 1st April 2023.

2.5. Against the order passed below Exhibit-16 in L.E.& C. Suit No. 113 of 2019, petitioner preferred Appeal No.163 of 2023 and Revision Application No.127 of 2022. By the impugned orders dated 2nd September 2023, the revision as well the appeal has been dismissed by the appellate Court.

3. Heard Mr. Vashi, learned Senior Advocate appearing for the petitioner and Mr. Rajeev Narula, learned Counsel appearing for the respondents.

4. Mr. Vashi submits that the leave and licence agreement executed between the parties was in fact a camouflage and the intention of parties was to create a tenancy. He would submit that in the declaratory suit filed by petitioner, the petitioner had been permitted to deposit rent and, as such, the finding of trial Court that the petitioner has not paid the license fees to the Respondents is perverse. Drawing attention to Clause 19 of the leave and license agreement and finding of the Trial Court, he submits that amount of Rs.10,000/- per day is in the nature of liquidated damages which would require evidence to be led and could not be directed to be deposited in an application filed under Order-XXXIX Rule 1 and 2 of CPC. He submits that the Respondents have claimed the sum as mesne profits and the trial Court has construed it as liquidated

damages. He would further submit that the direction to deposit is passed by considering the application as one filed under provisions of Order XV-A of CPC, which is not applicable. Taking this Court to the findings of the Appellate Court, he submits that the Appellate Court has rendered a finding on the aspect of tenancy put forth by the Petitioner which is required to be tested during trial. He has drawn the attention of this Court to the rent receipts stated to be issued by the respondent, annexed at page nos.72 to 76 and would submit that the tenancy was in fact created between the parties. He submits that the decision relied upon in the case of *Ida Celene Mathias & Ors vs Mobin Khan [2018 SCC Online Bom 16391]* cannot be considered as binding precedent in the absence of *ratio decidendi*. He would further submit that the application is not one under Order XXXIX Rule-10 of CPC or Order XV-A of CPC, but is an application under Order XXXIX Rule-1 and 2 of CPC, which is inapplicable when the demand is for payment of liquidated damages. In support of his contentions, Mr. Vashi relied upon following decisions :

[i] B.P.C.L. v. Thakorbhai [2003(3) Mh.L.J. 617];

[ii] Kailash Nath Associates v. Delhi Development Authority [(2015) 4 SCC 136]; and

[iii] Mahanagar Telephone Nigam Ltd v. TATA Communications Ltd [AIR 2019 SC 1233].

5. *Per contra* Mr. Narula, learned counsel for the respondent submits that relationship between the parties was a pure licensor-licensee relationship. He would question the rent receipts on the ground that leave and licence agreement was for the period from 2013 to 2016 and the rent receipts annexed at page nos.72 to 74 of petition are for the years 2014 and 2015, for which there is no explanation. He would further submit that it is improbable that monthly tenancy would be created for a rent of Rs.18,000/- when the monthly license compensation was Rs.91,600/-. He would further submit that claim is not in the nature of a penalty and, as such, following the decision of this Court in the case of *Ida Celene Mathias (supra)*, the liquidated damages could be directed to be paid without any evidence. He would further point out that the specific case of respondents has been set out in the legal notices dated 23rd July 2018, 28th October 2018 and 29th March 2019 addressed to the Petitioner, to which there is no denial. He would urge that clause 19 of the leave and licence agreement would demonstrate that liquidated damages of Rs.10,000/- is a genuine pre-estimate of damages and is not in the nature of penalty. He would further submit that the application was filed under Order XV-A of CPC and the nomenclature cannot be decisive of the nature of relief sought. According to him, liquidated damages is synonymous with mesne

profits and under the provisions of Section 74 of the Indian Contract Act, 1872, proof of damages is dispensed with. He would counter the submissions of Mr. Vashi that rent and compensation both cannot be permitted to be levied and would submit that the order permitting rent to be deposited clearly states that the petitioner is ready to deposit the alleged rent of Rs.18,000/- and, as such, rent is deposited in the Court. He would submit that application to deposit the rent was filed subsequent to the application filed by respondent for deposit of Rs.10,000/- per day as liquidated damages and was an attempt to overreach the order passed under the provisions of Order XV-A of CPC. In support of his contentions, Mr. Narula relied upon following decisions :

[i] ONGC Ltd v. Saw Pipes Lts [(2003) 5 SCC 705]; and

[ii] Indiabulls Properties P. Ltd v. Treasure World Developers P. Ltd [2014 SCC Online Bom 4768]

6. In rejoinder, Mr. Vashi would submit that the decisions would indicate that what can be granted is only a reasonable compensation.

7. Considered the submissions and perused the record.

8. L.E.& C. Suit No.113 of 2019, apart from the other reliefs, sought the relief of payment of mesne profits @ Rs.10,000/- per day as per the agreement of leave and license. In the interim

application styled as under Order XXXIX Rule-1 and 2, the relief of payment of mesne profits @ Rs.10,000/- per day was sought. The Trial Court linked the claim of Rs.10,000/- per day to Clause 19 of the leave and licence agreement and held the claim to be in the nature of liquidated damages which could be granted under Order XV-A of CPC by relying on the decision of this Court in the case of *Ida Celene Mathias (supra)*. The Trial Court held that the claim for liquidated damages was justified as there was breach of the terms of the agreement as the possession of the licensed premises was not handed over after the expiry of the term of the license.

9. The Appellate Court while rejecting revision application and appeal negated the Petitioner's contention about existence of tenancy on comparative analysis of the monthly license fees and the monthly rent and held that there was breach of the conditions of leave and license agreement entitling the Respondent to liquidated damages though mentioned as mesne profits.

10. The Trial Court has granted liquidated damages by exercising the powers under Order XV-A of CPC. By virtue of Bombay Amendment, Order XV-A was introduced in the year 1983 which came to be further amended in the year 1990. It will be relevant to take a look at Order XV-A of CPC [Bombay amendment], which reads

thus :

"Order XV-A

[Bombay].– Insert the following as Order XV-A before Order XVI:–

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.

(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."

11. Bare reading of Order XV-A of CPC [Bombay amendment]

would indicate that the said provision applies to a suit by a lessor or licensor seeking eviction of lessee or licensee for his eviction whether with or without a claim for arrears of rent or license fee and future mesne profits. The provision empowers the Court to direct the Defendant to deposit the amount on account of "*arrears*" upto the date of order and thereafter to continue to deposit in each succeeding month the "*rent or license fee*" claimed in the suit. The provision specifies the class of suits to which the provision applies, i.e. suit between the lessor or licensor against a lessee or licensee for eviction and the nature of the charges which can be directed to be deposited by the Court, i.e., arrears of rent or license fees, and further continuous monthly payment of rent or license fees. The provision has no application to any other nature of charge say for example claim for maintenance amount or taxes etc which under the agreement the lessee or the licensee may be liable to pay.

12. The claim in the plaint and the interim application is for mesne profits. Mesne profits are in the nature of unliquidated damages and defined in Section 2(12) of CPC as those profits which the person in wrongful possession of such property actually received or might with due diligence have received. The foundation for the claim on account of mesne profits is wrongful possession and unless

there is determination by the Court that a person is in wrongful possession, no order for deposit of mesne profits can be passed. It is not debatable that the claim for mesne profits requires adjudication.

13. On the other hand, liquidated damages is the sum stipulated in the contract to be paid in event of breach of contract. In case of *Kailash Nath Associates V. DDA [(2015) 4 SCC 136],* the Apex Court has succinctly summarized the law on compensation for breach of contract under Section 74 of the Indian Contract Act, 1872 in paragraph 43 which reads thus:

> "43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:
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> 43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.
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> 43.2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

> 43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.
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> 43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.
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> 43.5. The sum spoken of may already be paid or be payable in future.
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> 43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.
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> 43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

14. The above enunciation of law by the Apex Court clearly lays down that the party complaining of breach is entitled to the sum named as liquidated damages as reasonable compensation only if the same is a genuine pre-estimate of damages fixed by both the parties and found to be such by the Court. That, as Section 74 awards reasonable compensation for damage or loss caused by breach of contract, damage or loss is a *sine qua non* for the applicability of section. That, where it is possible to prove actual damage or loss, such proof is not dispensed with and it is only in cases where damage

or loss is difficult to prove, that the liquidated amount named in the contract, if a genuine pre-estimate of damage, can be awarded.

15. In the decision of *Indiabulls Properties P.Ltd* (supra), learned Single Judge of this Court was considering the issue whether the license fee for the remainder of lock-in period amounts to debt within the meaning of Sections 433 and 434 of Companies Act, 1956. The Court reviewed the various decisions on the subject and has observed in paragraph 38 as under:

> *"38. Thus, where the claim is for liquidated damages, this must be established in a court. It is, as Chagla, CJ held, the fiat of the court that makes it a debt due. A court must assess whether the claim, styled though it may be as liquidated damages, is in the nature of a penalty or is a genuine pre-estimate of damages. It is only after this judicial enquiry that a court will decide whether or not to award liquidated damages. The court may, possibly, require proof of loss and also, possibly, evidence of steps taken in mitigation of that loss, though this may not be necessary where it finds that the claim is a genuine pre-estimate of damages. A provision for liquidated damages is only the outer limit beyond which a claim cannot be made."*

16. The decisions quoted above clearly lay the controversy in the present issue to rest. It is evident that where the claim is for liquidated damages, it is the fiat of the Court that makes it a debt due. The amount even if held to be a genuine pre-estimate of damage is required to be found by the Court as such. In the present

case, the Trial Court considered Clauses 8 and 16 of the Leave and License Agreement and rendered a finding that the Defendant is not a tenant of the Plaintiff. The Trial Court in the absence of any evidence has held that there is breach of contract and, as such, the Respondent is entitled to liquidated damages. At the interim stage without any evidence being led, a finding has been rendered on the aspect of tenancy, which is still pending for adjudication in the declaratory suit.

17. Even assuming that there is breach of contract, the liquidated damages stipulated in the contract is required to be ascertained as genuine pre-estimate of damages. There is no such adjudication by the Trial Court that there was damage or loss caused for award of compensation. Mr. Narula contends that there is no submission that the same is in nature of penalty and the amount is to be awarded if it is a genuine pre-estimate of damages. This argument is liable to be rejected for the reason that the contract was one for leave and license and considering the nature of contract, it is easily possible to prove the damage or loss caused by non vacating of the premises by placing on record the comparable instances of letting out rate of the premises in the vicinity. That being the position, proof of actual damage or loss was not dispensed with as

held by Apex Court in *Kailash Nath (supra).*

18. The impugned order is also unsustainable for the reason that at the interim stage, claim for liquidated damages has been granted by applying Order XV-A of CPC. The reliance placed by Mr. Vashi on the decision of this Court in the case of *B.P.C.L. (supra)* is well founded. Learned Single Judge of this Court in that case was dealing with an identical fact situation of grant of damages by invocation of Order XV-A of CPC. The Court held that neither under Order XXXIX nor Order XV-A of CPC, there is any provision for grant of damages as such during the pendency of suit and what can be ordered to be paid under both the provisions of law are specifically described thereunder and those powers do not include power to order payment of damages during the pendency of suit between the landlord and tenant on the claim that the tenancy is terminated and therefore landlord is entitled to eviction of tenant. The Trial Court has held the decision in *B.P.C.L.(supra)* as inapplicable as in that case the document was a lease. I do not find that any distinction can be made to the applicability of Order XV-A on the ground of lease and leave and license document as Order XV-A deals with suits between lessor and lessee or licensor or licensee.

19. The Trial Court has considered the decision of *Ida Celene*

Mathias (supra) and has directed the deposit of liquidated damages at the interim stage. What constitutes a binding precedent is the principle of law upon which the case is decided, which is arrived at by a process of reasoning. With utmost respect, to my reading, I do not find that the decision in *Ida Celene Mathias(supra)* lays down any ratio to constitute a binding precedent. To my mind, the decision does not indicate the process of reasoning for coming to a finding that for awarding damages evidence is not required to be led. That apart, in the case of *Ida Celene Mathias(supra),* the issue as regards the applicability of Order XV-A of CPC was not under consideration, which issue is specifically raised in the present case.

20. Even if it is assumed that Order XV-A of CPC is applicable to the facts of present case, the obstacle which prevents the grant of liquidated damages at the interim stage is that in a claim for damages-liquidated or unliquidated, no pecuniary liability arises till the claim is adjudicated by the Court and the Court comes to a finding that there is breach committed which entitles the other party to the sum stipulated to be paid for breach of the contract. The contractual stipulation to pay liquidated damages implies breach of contract to deliver the possession after license has come to an end. Breach of contract is a pre-requisite for claim of liquidated damages

and requires adjudication by the Court and cannot be done in summary fashion as is sought to be done by the Trial Court.

21. In light of the above, Petition succeeds. Clause 3 of the order dated 3rd August, 2022 passed by the Trial Court below Exhibit 16 directing the deposit of liquidated damages @ Rs.10,000/- per day from May 2016 till the disposal of suit in the Court is quashed and set aside.

[Sharmila U. Deshmukh, J.]