IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 16035 OF 2023
WITH
CIVIL APPLICATION NO. 3524 OF 2018
WITH
FIRST APPEAL NO. 1330 OF 2018

Rekha Vipin Khakhar .. Applicant

Versus

Nishant Mitrasen Mahimtura & Anr. .. Respondents

Mr.Satyavan N. Vaishnav a/w. Ms. Nupur J. Mukherjee i/b. M/s. N.N. Vaishnawa & Co., Advocate for the applicant/ori. Respondent No.1.
Mr.Raju Narula a/w. Mr. Ashish Dubey a/w. Mr. Rahul Tripathi a/w. Ms. Shahnaaz Chougule, Advocate for respondent No.1.
Mr. Umesh R. Mankapure a/w. Mrs. Stety Dias, Advocate for respondent No.2.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 09.02.2024
PRONOUNCED ON : 26.04.2024

PC :-

01. This application is for appointment of Receiver on the suit property by the original Plaintiff who succeeded in getting a decree against Defendants/Appellants in the First Appeal.

<u>Facts in Short</u>

02. The applicant/original plaintiff, had filed a suit in this Court,

which was subsequently transferred to the City Civil Court in view of the enhancement of the pecuniary jurisdiction of the City Civil Court. The suit was for possession of the suit premises from defendant No.1 and for declaration that defendant No.3 has no right title in the suit premises and for possession of the suit premises.

03. The City Civil Court after the trial and after recording evidence, decreed the suit. It is declared that defendant No.3 i.e. present Respondent No.2 in the appeal has no right over the suit premises. It is declared that the plaintiff is owner of 1/2 share in the suit premises and was held to be entitled to get her share by partition by metes and bounds. If the partition is not possible, it was directed to put suit property for public auction by giving liberty to defendant Nos. 1 and 2 and the plaintiff to take part in public auction. From auction proceeds, 50% amount was to be given to the plaintiff and 25% each to be given to defendant Nos. 1 and 2. The decree of mesne profit was also passed @ Rs.300/- per sq. ft. per month from the date of institution of the suit till the receipt of possession or amount of share. The amount of Rs. 15 lakhs was to be deposited towards mesne profit and thereafter defendant Nos. 1 and 2 were held liable to pay it regularly.

04. It is the case of the plaintiff that one Dr. Shivshankar Soneji died leaving behind three daughters, namely, Dr. Jayanti Mahimtura, Dr. (Ms.) Labhuben Soneji and Mrs. Rekha Vipin. Defendant Nos. 1 and 2 are son and daughter of Dr. Jayanti, who died in August, 2002. Dr. Labhuben Soneji died on 11.01.2005 intestate. Defendant No.3 is carrying business in the disputed property. Late Dr. Labhuben was absolute owner of the flat No.1A, Shanti Building, 19, Dr. Deshmukh Road, Peddar Road, Mumbai, situated on the ground floor. After death of Dr. Labhuben the plaintiff and defendant Nos. 1 and 2, who are her legal heirs, succeeded 1/2 share in the suit property. Defendant Nos.1 and 2 have jointly succeeded remaining 1/2 share.

05. It is further the case of the plaintiff that on the death of Dr. Labhuben on 11.01.2005, the defendant No.1 illegally, unauthorizedly demolished a wall of the suit flat and took forcible possession of the suit premises within 24 hours after death of Late Dr. Labhuben. Defendant No.1 demolished the wall between the suit premises and his adjoining flat and converted both flats into one premises. The defendant also claimed ownership of the suit premises by letter dated 17.01.2005. The plaintiff, therefore, filed a suit under section 6 of the Specific Relief Act. However, she

withdrew the said suit. Defendant No.1 thereafter carried additions, alterations and construction in the suit premises. Defendant No.1, thereafter, inducted defendant No.3 in the suit premises. The suit premises is stated to be located at a prime location in mumbai near Jaslok Hospital at Peddar Road. It was capable of fetching compensation of Rs.1,12,500/- per month. The suit premises is admeasuring 750 sq. ft. carpet area and thus she is entitled to 375 sq. ft. carpet area.

06. It is the case of the defendants that defendant No.2 is owner of the flat in the building, namely, Chandan Building. Deceased Dr. Labhuben was residing in the said flat as defendant No.2 was living in USA. It is their case that the property of Dr. Labhuben was in the custody of the plaintiff. The plaintiff took away various belongings from that flat. In short the case is that in view of share of the plaintiff she had agreed to accept Rs.15 lakhs in the suit filed by the plaintiff. The amount was also deposited in the Court. Defendant No.1 with consent of the plaintiff demolished the dividing wall between his flat and suit flat and created a single continuous premises as a shop. He received keys of the suit premises with the consent of the plaintiff from driver of Dr. Labhuben and defendant No.1 is in possession in lawful

manner. Defendant No.3 has not filed any written statement.

07. On this case, the Trial Court recorded finding in favour of the plaintiffs and answered the issues in favour of the plaintiff and decreed the suit.

08. The appellants/original defendant Nos. 1 and 2 have thus filed appeal in this Court. This Court has granted stay by allowing Interim Application No. 17780 of 2022 by order dated 10.07.2023, in terms of prayer clause (b), which is reproduced as under :-

> “(b) The Appellants be ordered and directed to deposit/pay mesne profit @ Rs.1,12,500/- per month for the period from 11th January, 2006 till date and continue to deposit/pay to the Applicant without prejudice to rights of both the parties.”

. The impugned order was stayed by directing the appellants to deposit mesne profit @ Rs.1,12,500/- per month for the period from 11.01.2006 till date and to continue to deposit/pay to the applicant without prejudice to rights of both the parties. The defendant however failed to deposit any amount pursuant to the above order.

09. Present application is thus filed for directions to appoint the Court Receiver on the suit premises i.e. 'Libas' show room, with all powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908 to take possession of the suit premises and to recover the amount of the mesne profit as directed by order dated 10.07.2023 by inviting bids to sell the suit premises. Other prayer is that if the appellants deposit the amount of compensation as per earlier order, the Court Receiver be appointed in execution of order dated 10.07.2023 and to ensure that the Appellants continue to deposit the same within the stipulated period. Third prayer made is to permit the applicant/plaintiff to withdraw the amount that may be recovered or deposited by appellant Nos. 1 and 2 towards 50% share in the suit property.

10. This application is resisted vehemently by the respondent/appellant. The appellant after arguing for quite sometime, ultimately made submission that in-case the Court is not inclined to reject the application, the appellant has instructions to withdraw the appeal itself, keeping it open to the respondents/ original plaintiffs to pursue the execution. The appellant/respondent in their application, has given chart of the mesne profit showing that the compensation for Flat No.2 is Rs.1,72,55,000/-and

Flat 1A is Rs.1,46,46,750/-. By deducting the share of his part and deducting the amount deposited by the defendant in this Court, the payable amount is said to be Rs.34,67,531=25 and he has also filed valuation report to show rental value in the market of the suit premises.

11. The defendant is thus not ready to deposit the amount as per the directions and instead he is ready to withdraw the appeal.

12. During the course of the arguments, now it is clear that the defendants are not ready to make payment, though reply is filed on record. He has also filed on record a withdrawal pursis on affidavit.

13. The learned Advocate for the plaintiff Mr. Vaishnav vehemently opposes the request of withdrawal. He mainly submits that even if the appeal is withdrawn, the Court still has the power to appoint a receiver in view of Order 40 Rule 1, which reads as under :-

> "1. Appointment of receivers
>
> (1) Where it appears to the Court to be just and convenient, the Court may by order-
>
> (a) appoint a receiver of any property, whether **before or after** decree;
>
> (b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver, and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

. He mainly relies upon clause (a) of Rule 1(1) submitting that the Court can appoint a receiver of any property before or even after decree. He relies on following judgments :-

(i) **Ouseph Eapan and Others. Vs. Joseph Abraham and Others** [1]

(ii) **Rusi Hormusji Pavri & Ors. Vs. Perin Faramroze Pavri & Ors.**[2]

(iii) **Pabbathi Venkataramaiah Chetty Vs. Pabbathi N. Rathnamaiah Chetty & Ors.**[3]

(iv) **Marshall Sons & Co.(I) Ltd. Vs. Sahi Oretrans (P) Ltd. & Anr.** [4]

(v) **Padmawati & Ors. Vs. Harijan Sewak Sangh**[5]

(vi) **Dnyandeo Sabaji Naik & Anr. Vs. Pradnya Prakash Khadekar & Ors.**[6]

14. It is clear from the submissions of the appellants/original

1) AIR 1958 KERALA 250.
2) MANU/MH/0588/2012
3) (2007) 3 SCC 151
4)(1999) 2 SCC 325
5)2008 SCC OnLine Del 1202
6)(2017) 5 SCC 496

defendant Nos. 1 and 2 that in-case the Court is inclined to allowed this application, then they would not continue with the appeal and will withdraw the same.

15. On hearing the parties, this Court proceeds to consider the submissions and the judgments cited by the parties.

16. In the case of **Ouseph Eapan (Supra)**, the Kerala High Court by considering provisions of Order 40 Rule 1 of the CPC, held as under :-

> "The appointment now made is for the collection of mesne profits accrued subsequent to that Ordinance, and there is nothing in S.4 to bar the appointment. It cannot be disputed that the plaintiff could have brought a separate suit for future mesne profits, and the fact that he chose to combine such a suit with a suit for eviction cannot affect the position."

. In the case of **Rusi Hormusji Pavri (Supra)**. This Court considering the Notice of Motion directed appointment of Court receiver and to appoint defendant No.2 in that case as a joint Court Receiver on payment of royalty for the area in her use and occupation on usual terms and conditions with certain other conditions.

. In the case of **Pabbathi Venkataramaiah Chetty (Supra)**, the Supreme Court imposed condition of payment of Rs.25,000/- per month (for stay of possession) as estimated minimum monthly loss to the respondent during pendency of the appeal while granting stay to the operation of a decree.

. In the case of **Marshall Sons & Co. (Supra)**, the Hon'ble Supreme Court decided mesne profit towards delay in the Court proceeding equivalent to the market rate to be paid by the parties for wrongful possession from taking undue advantage of lengthy delays in proceedings and execution. In that case the landlord had obtained decree of eviction. However, there was stay to the decree in appeal filed by the tenant. In such facts, the Hon'ble Supreme Court held that unscrupulous parties to the proceedings take undue advantage and a person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It was further held that, therefore, it was necessary to pass appropriate orders so that reasonable mesne profit which may be equivalent to the market rent is paid by a person who is holding over the property.

. In the case of **Padmawati & Ors. (Supra)**, the Delhi High Court held that by prolonging the litigation the rights of a person to enjoy fruits of decree are delayed. In such cases, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. In that case the petitioners enjoyed a large premises holding the same for 24 years and 4 months. The average rental value was taken as Rs.10,000/- per month. Costs was also imposed equivalent to the market rent of that period, while disposing of the petition.

. In the case of **Dnyandeo Sabaji Naik (Supra)**, the Hon'ble Supreme Court in paras 12 and 13 held as below :-

> "12. This case indicates a blatant abuse of the process of the Court. The petitioners not only took the benefit of an order of the High Court granting them one year's time to vacate the premises but obtained a further extension of a period of four months to vacate. The petitioners then filed a Review Petition before the High Court and moved another application, this time seeking an extension of five years to vacate the premises. The time of the High Court and, unfortunately, of this Court as well had to be devoted to a thoroughly frivolous proceeding. Learned counsel for the petitioners in fact sought to urge that as a result of the judgment of the City Civil Court, the petitioners have been deprived of establishing that their status as licensees fructified into a tenancy with effect from 1 February 1973. Quite apart from the fact that such a plea would not be open to the petitioners in the

> background of what has been observed earlier, we find even on merits that the submission requires only be stated to be rejected. We have extracted in the earlier part of this judgment the specific finding of the Trial Court based on the admissions of the predecessor-in-interest of the petitioners that the premises were granted to them on the basis of a conducting agreement. Besides this, in the earlier proceeding that was instituted in the Small Causes Court, it was found that the premises have been granted under a conducting agreement and there was no relationship of licensor and licensee. That being the position, the petitioners would not acquire status as tenants with effect from 1 February 1973, there being no licence in their favour.
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> 13. This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth."

In para 13 it is specifically held that any attempt by a litigant to abuse the process must been seen with disfavour. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt firmly. Under such circumstances, exemplary costs are inevitable and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth. It is further held that it is the duty of every court to firmly deal with such situations. The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases. In that case the SLP was dismissed. The petitioner was directed to vacate the premises. The petitioners were directed to pay all arrears for use of premises computed at the rate fixed in the order passed by the Supreme Court within four weeks and to pay costs of Rs. 5 lakhs to the respondents.

17. In this case, it is clearly seen that the appellants/defendant Nos. 1 and 2 have obtained stay from this Court. Order dated 10.07.2023 shows that the applicant had withdrawn her earlier suit dated 5th December, 2018. The report of the valuer was considered. As per the report the market rate of the premises of Libas was shown to be Rs. 4,08,45,951/-. The plaintiff's share of 50% was to the tune of Rs.2,04,22,975/-. By deducting amount of Rs.15,00,000/-, which was earlier paid, the payable amount was calculated to be Rs.1,89,22,975/-. Thereafter, the order was passed in terms of prayer clause (b). One more aspect that needs to be seen is that the plaintiff/present applicant is a widow of 85 years of age with no source of income. She is still deprived of the fruits of the decree. On the other hand, original defendants/present respondent Nos. 1 and 2 are occupying entire premises by depriving the plaintiff 50% share and are enjoying income out of the property by giving it to defendant No.3 for his business. Now, after enjoying stay from this Court from 2018, now the appellant wants to withdraw the appeal. It is

true that when a litigant does not want to proceed with the appeal, this Court normally would not compel him to continue with the appeal. This Court, however, certainly has to take into consideration that since 2018, the appellant has enjoyed the property earlier in view of statement of the applicant and lateron of the stay order and has successfully deprived the plaintiff of legitimate fruits. It is clear from conduct of the Appellant that he is not willing to pay anything though he enjoyed stay. By considering the ratio in the case of **Padmawati & Ors. (Supra),** this Court finds that certainly this is a case where heavy costs needs to be imposed upon the appellant/original defendant/present respondent Nos. 1 and 2.

18. Hence, the following order is passed :-

i) This Application is allowed with cost of Rs.1,00,000/- to be paid by the Respondent Nos.1 and 2 to the Applicant. Receiver is appointed to take possession of the suit property.

ii) Appellants be appointed as an agent of Receiver and Appellants to pay amount of royalty as determined by the Receiver and to deposit the same in this Court. The Applicant shall be entitled to withdraw the amount deposited in this Court till amount as directed by this Court *vide* interim order dated 10.07.2023 in IA/17780/2022 is fully recovered.

iii) If in case Appellants are not in position, present Applicant be appointed as an agent of the Receiver without royalty till the amount as per order dated 10.07.2023 in IA/17780/2022 is fully recovered.

iv) Leave to withdraw Appeal is refused.

19. The Application stands disposed off.

[KISHORE C. SANT,J.]

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