IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14241 OF 2023.

Rukhsana Khalid Ghaswala & Anr. ...Petitioners
V/s.
M/s Mahendra Builders & Ors. ...Respondents

Mr. Vineet Naik, Senior Advocate a/w Mr. Mayur Khandeparkar, Darshit Jain, Chirag Sarawagi, Yash Dhakkad, Viraj Bansod i/b Tushar Goradia, for the Petitioners.
Mr. Aspi Chinoy, Senior Advocate a/w Mr. Karl Tamboly, Ms. Nikita Mishra, Ms. Feroza Bharucha, Ms. Abhyarthana Singh i/b M/s.Rashmikant & Partners for Respondent No.1.

CORAM : SHARMILA U. DESHMUKH, J.
RESERVED ON : 11th DECEMBER, 2023
PRONOUNCED ON : 2nd JANUARY, 2024

ORDER :

1. By this Petition filed under Article 227 of the Constitution of India, the challenge is to the order dated 29th September, 2023 passed below Exhibit 9 in Appeal No.127/2022 in RAE Suit No.294/663 of 1993 directing the Petitioners to deposit interim compensation of Rs.25,00,000/- per month from the date of decree till disposal of the Appeal as a condition of stay of the impugned judgment and decree of the Trial Court dated 22nd March, 2022. For the sake of convenience the parties are referred by their status before the Trial Court.

2. Briefly stated the facts are that RAE Suit No.294/663 of 1993 was filed seeking *inter alia* decree of eviction in respect of suit premises described as the entire 3rd floor of Mahendra Chambers, situated at 134-136, Dr. D. N. Road, Mumbai-400001 admeasuring approximately 10,000 sq. ft. carpet area. Vide judgment and decree dated 22nd March, 2022, the suit came to be decreed as against which Appeal No.127 of 2022 came to be filed in which an Application below Exhibit 9 seeking stay of the impugned judgment pending the hearing of the Appeal was filed.

3. The Plaintiff filed its valuation report dated 16th June, 2022 of Architect Patidar Alliance computing the compensation at Rs.16,64,032/- per month. The Defendants submitted the valuation report dated 28th June 2022 of Perfect Valuation and Consultants computing the monthly compensation was Rs.2,95,065/-. The Appellate Court vide order dated 22nd August, 2022 assessed the monthly compensation at Rs.2,50,000/ which was challenged before this Court. Vide order dated 5th July, 2023, the matter was remanded to the Appellate Court to consider afresh in view of the consensus between the parties that the impugned order therein does not contain any reasons and with an understanding that Defendants will give inspection of the suit premises to the Plaintiff and thereafter fresh report may be filed.

4. Accordingly, after inspection fresh valuation report of Shrinivas M. Kini & Co dated 27th July, 2023 was submitted by the Plaintiffs computing the monthly compensation @ Rs.49,55,092/-. The Defendant's valuer prepared a report dated 20th August, 2023 on the comparative valuation of the two reports submitted by the Plaintiff raising objections. The Defendants thereafter submitted the valuation report of its valuer Nadkarni & Co. dated 30th August, 2023 computing the monthly compensation @ Rs.4,27,000/-.

5. The Appellate Court in the impugned order dated 29th September, 2023, has considered the valuation reports produced subsequent to the remand by this Court and taking into consideration the disparity inasmuch as as per the Defendant No. 1 the computation works out at Rs.4,27,000/-, whereas as per the Plaintiffs works out to Rs.49,55,092/- has granted amount of Rs.25,00,000/- per month as compensation as just and reasonable. It needs to be noted that although there is a discretion which is vested in the Appellate Court while granting a stay in exercise under Order XLI Rule 5 of CPC, the monthly compensation although incapable of being arrived at with mathematical precision has to be fair and reasonable. The Appellate Court has adopted an arbitrary figure of Rs.25,00,000/- which is without any basis and as such, is impermissible.

6. Heard Mr. Vineet Naik, learned Senior Advocate for the Petitioners and Mr. Aspi Chinoy, learned Senior Advocate for the Respondent No.1.

7. Mr. Naik, learned Senior Advocate for the Petitioners submitted that the suit premises is Schedule W property and the Defendant's valuation report dated 30th August, 2023 takes into consideration the condition of the building, the age of the building which has been constructed in the year 1908. He submits that the 3rd floor premises is used as a dormitory style guest house, lodging and boarding hotel to facilitate temporary affordable stay for the lower and middle class strata of society visiting the city. According to him, considering the condition of the suit premises certain area of the suit premises is utilised for the purpose of letting out and as such, their valuer has taken into consideration the area which has been let out i.e. 7201.36 sq.ft.

8. Pointing out to the Plaintiff's valuation report dated 27th July, 2023, he submits that the valuation report is based on leave and license agreements of other properties which are in respect of smaller areas and also in respect of building in better condition. He submits that the Defendant's valuer by its report dated 30th August, 2023, has factored the physical condition of the building and the usable area as also the fact that the building is a Schedule W building. He would urge that considering that the Plaintiff's business caters to low and middle class people, the annual turnover is approximately Rs.60,00,000/- and profit is of Rs.5,00,000/- only, which according to him is a factor to be taken into consideration. Drawing attention to their valuation report dated 30th August, 2023, he submits that the valuer has averaged the monthly compensation arrived at by adopting the three methods viz: comparable instances of leave and license agreements, reasonable return on the fair market value of premises, and letting out rate method adopted by MCGM and has rightly arrived at figure of Rs.4,27,000/- per month. Assailing the order of the Appellate Court he submits that there is no basis for the figure of Rs.25,00,000/- per month. He relies upon the decision in the case of ***State of Maharashtra & Anr. vs. Super Max International Pvt. Ltd. & Ors. [(2009) 9 Supreme Court Cases 772].***

9. *Per contra,* Mr. Chinoy, learned Senior Advocate for the Respondents submits that the Appellate Court has observed that neither the Defendant's valuation of Rs.4,27,000/- nor the Plaintiff's valuation of Rs.49,55,092/- per month are appropriate and as such, have arrived at the monthly compensation of Rs.25,00,000/- which is almost 50% of the valuation computed by their valuer factoring in the condition of the building. He draws support from the decision of the Apex Court in ***Anderson Wright***

And Co. vs. Amar Nath Roy And Ors. in [AIR 2005 SC 2457], where it has been held that the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises on being vacated by the tenant. He submits that the valuation report submitted by its valuer has taken into consideration the comparable instances and as such, had arrived at the monthly compensation of Rs.49,55,092/-.

10. I have considered the rival contentions and have perused the valuation reports produced on record.

11. Before proceeding further, it would be profitable to refer to the principles governing the grant of compensation seeking stay of the eviction.

12. In the case of ***M/s. Atma Ram Properties (P) Ltd. vs. M/s. Federal Motors (P) Ltd.,*** the Apex Court held that in exercise of its powers under Rule 5 of Order XLI of Civil Procedure Code, 1908, the appellate Court has the jurisdiction to put the applicant to such reasonable terms as would in its opinion reasonably compensate the decree-holder for the loss occasioned by delay in execution of decree by grant of stay order in event of the Appeal being dismissed, caveat being that such terms shall be reasonable. As regards the date from which the *mesne* profit or compensation for use or occupation of the premises is to be paid, it is the date of the passing of the decree for eviction and the tenant is liable to pay at the same rate at which landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The Court further held that 'Robust common sense, common knowledge of human affairs and events gained by judicial experience and judicially noticeable facts, over and above the material available on record – all these provide useful inputs as relevant facts for exercise of discretion while passing an order and formulating the terms to put the parties on. Common sense which is a cluster of life's experience, is often more dependable than the rival facts presented by warring litigants.'

13. In the case of ***Niyas Ahmed Khan vs. Mahmood Rahmat Ullah Khan & Anr. in [(2008) 7 SCC 539]***, the Apex Court held that the compensation awarded as condition precedent should not be unreasonable or oppressive or in terrorem. The order of compensation should not make the stay illusory. Adopting some arbitrary figure as the prevalent market rent without any basis and directing the tenant to pay absurdly high rent would be considered oppressive and unreasonable.

14. In the case of ***Chandrakant Dhanu & Anr. vs. Sharmila Kapur & Ors. in [2009 (2) MHLJ 243]***, learned Single Judge of this Court held that that the Court needs to consider and take note of (i) the rent control legislation governing the particular premises-residential or non-residential; (ii) the location/area of the premises; (iii) the age/nature of construction of the building/premises; (iv) the facilities in the premises and outside the premises, advantages and disadvantages; (v) the market value and the rental value of the premises based on valuation reports; (vi) other instances of rent/ license fees of similarly situated premises; and (vii) the date of termination of the tenancy.

15. In the case of ***State of Maharashtra and Anr. vs. Super Max International Private Limited & Ors.*** (supra), the Apex Court held that the Court would exercise restraint in fixing the amount subject to payment of which the execution of order/decree is stayed and would not fix any excessive, fanciful or punitive amount. The Apex Court observed in facts of that case that the amount was fixed with reference to the stamp duty ready reckoner and hence its reasonableness cannot be doubtful.

16. Conspectus of the above decisions would indicate that the power of the Appellate/Revisional Court to impose reasonable conditions includes a direction of payment of interim compensation, which is liable to be paid from the date of the decree at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. At the same time, the Courts have been cautioned to exercise restraint and not to fix any excessive, fanciful or punitive amount. The above quoted decisions lays down succinctly the factors to be considered while fixing interim compensation and these clearly defined parameters are required to be applied in the present case.

17. The suit premises is located on 3rd floor of building known as "Empire Building" situated at Dr. D. N. Road, Fort, Mumbai. The building is located opposite CST Railway station and as per the Plaintiffs, the building has been constructed in the year 1908 whereas, as per the Defendant No. 1 the building has been constructed in the year 1915. The suit premises is located in close proximity to the CST railway station where number of outstation trains arrive and depart. The suit building is also easily accessible from Churchgate Station. The suit building is located in the heart of the city in the midst of bustling commercial area having all public amenities such as bus stations, theaters, restaurants in close proximity and is accessible by all modes of public transport. The suit premises is used as guest house/dormitory and considering its proximity to the amenities and facilities can be said to be situated in a location advantageous to the business carried out.

18. The photographs placed on record by the Plaintiff's valuer shows the entrance, the dormitories, luggage rooms, reception area, waiting rooms etc.

which appears to be in good condition whereas the Defendant's valuer has produced the photographs depicting the external condition of the suit building, the lift area, part of the 3rd floor, staff room, toilet and bathroom, main lobby, terrace entrance, portion of terrace which shows that the building is in a bad state and need of repairs. Pertinently the Defendant has not produced a single photograph of the portion of the premises which is let out for purpose of lodging and boarding. Both parties have for obvious reasons produced photographs that suit their purpose.

19. Before this Court, there are four valuation reports. The Plaintiff's first valuation report dated 16th June, 2022 was prior to the order of remand and while submitting the said report, the valuer had not inspected the suit premises. The Plaintiff's valuation report dated 16th June, 2022 of Patidar Alliance has computed the monthly compensation by adopting the method of return of investment on the fair market value of the property based on the Ready Reckoner rate. The valuer has taken into consideration the Ready Reckoner rate of the year 2022-2023 for the land and the structure. The age of the building was taken as 80 years and the depreciation factor was applied at 70%. After deducting the rate for the land from the rate for the structure, the rate without the land was computed at Rs.1,96,570/- per square meters. Applying the depreciation @ 0.30%, in respect of structure, the rate arrived at is Rs.58,971/- per square meter. Adding the rate for the land at Rs.1,64,930/- to the rate for the structure at Rs.58,971/-, the market value is worked out at Rs.2,23,901/- per square meter. The suit premises admeasures 10,000 square feet carpet area and Plaintiff's valuer has considered the built up area at Rs.1114.80 per square meters. The market value of the property is arrived at Rs.24,96,04,835/- and the monthly rental value of Rs.16,64,032/- is worked out by dividing the rate by 150 times.

20. The Defendants prior to the remand have submitted the valuation report of Perfect Valuation and Consultants dated 28th June, 2022. The Defendants valuer has inspected the premises and observed that less than half of total carpet area, is available for letting out and as such, the revenue is low. The valuer has considered the audited profit and loss statement and observed that the profit is Rs.5 lakhs only. The valuer has adopted two methods of valuation, firstly, MCGM's letting out rate method for particular user class property and secondly, return on investment on fair market value of freehold property. By the first method, the valuer has arrived at monthly rent of Rs.1,79,430/ - and by the second method at Rs.4,15,200/-. As far as the first method is concerned, the valuation report states that the MCGM's letting out method is based on the Property Tax RR Mumbai 2009-2010 Mumbai Municipal Corporation guideline for letting rates to be adopted for properties protected under Maharashtra Rent Control Act, 1999. It is well known that the letting out rate of the Corporation is very much on the lower side and the rate of Rs 1,883/- per 10 square meter is abysmally low and cannot be the basis for arriving at the market rate at which the property could have been let out by the landlord.

21. While calculating the monthly compensation by the second method, the valuer has considered rebate @15% on Ready Reckoner rate and factored in the aspect of the property being tenanted by considering 75% of the free hold rate. In my view, the valuer erred in factoring in the rebate of 15% and the aspect of the property being tenanted by considering the rate @ 75% of the free hold rate. As held by the Apex Court, the tenant is liable to pay at the same rate at which landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The factoring in of the rebate component as well as considering the free hold rate @75% of the free hold property is without any basis.

22. After remand the Plaintiffs have placed on record the valuation report of their valuer Shrinivas M. Kini & Co. dated 27th July, 2023. The valuer took into consideration that the building has been constructed in or about 1915 and that the total built up area works out to 12204.66 sq. ft. The valuer has adopted the method of comparable instances and has taken into consideration two instances of leave and license agreements, the first is in respect of a premises admeasuring 1170 sq.ft. which is let out on monthly compensation of Rs.4,25,000/- per month and the second, was in respect of premises admeasuring 1522.30 sq.ft. let out on monthly compensation of of Rs.6,00,000/- averaging at Rs.386.73 paise per square feet and by factoring inflation @ 5% per annum worked out the rate at Rs.406/- per square feet per month arriving at the monthly compensation of Rs.49,55,092/-. The report states that the two instances are at the distance of about one kilometer from the suit premises.

23. The plaintiff's valuation report dated 27th July, 2023 adopts method of comparable instances. While doing so, the valuer has considered the leave and license agreements of areas admeasuring 1170 sq.ft. and 1522.30 sq.ft. which are not comparable. Further the premises taken for comparison is situated at a distance of about 1 km and the report does not indicate about the age and condition of the building in which the other premises are located. The valuer has factored in inflation @ 5% on the rate per square feet which has no basis. In the instant case the building is Corporation owned building constructed in the year 1908/1915 and the instances appears to be of private freehold property and the monthly compensation will definitely be on the higher side. In my view, considering the difference in the location as well as in the condition and age of the building, the valuation report of the Plaintiff is based on instances which are not comparable. As such I am not inclined to accept the computation of monthly compensation of Rs.49,55,092/-.

24. The Defendants have placed on record the objection to the Plaintiff's valuation also their own valuation report dated 30th August, 2023. The objection to the Plaintiff's valuation report dated 27th July, 2023 is that the instances are not comparable as the instance No.1 is a private freehold property and well maintained in which the licensee is occupying a small portion and as regards the suit premises, the same is a Government property which is badly maintained and lacking in adequate amenities.

25. As regards the Defendant's valuation report of 30th August, 2023, the valuer has adopted three methods of valuation. Firstly, by comparable instances of leave and license in the vicinity, secondly, on the basis of reasonable return on the value of property and thirdly on the basis of letting rate method adopted by MCGM. By the first method of comparable instances, five instances were taken into consideration out of which three pertains to smaller premises admeasuring from 330.3 sq. ft. to 2000.70 sq.ft. for which the license fees ranged from Rs.110 to Rs.134 per sq.ft. per month. The valuation report notes that the smaller premises commands high rates than larger premises and the other two instances whereof large office premises admeasuring about 8,686.00 sq.ft. and 8,408.80 sq.ft. with the license fee being at the rate of 140 per sq.ft. per month. The valuation report records that these premises are corporate offices located in a far better building in a better locality and considering the difference in the condition and location and the use of the premises, the monthly compensation payable for the premises was assessed at 50% of the prevalent rate of the office premises in "Construction House" i.e. at Rs. 70/- per sq. ft.

26. The second method adopted was reasonable return of the fair market value of the premises. The valuer considered the rate per square meters for the commercial premises @ Rs.3,61,500/- and rate per square meter for open/developed land @ Rs.1,64,930/-. Thereafter the difference was arrived at Rs.1,96,570/-. By applying the prescribed percentage of 15% the depreciated rate was arrived at Rs.1,94,416/-. and the depreciated rate per sq.ft. was arrived at Rs.18,062/- and with the reasonable return at 6%, the monthly compensation was assessed at Rs.90/- per sq. ft.

27. As regards the third method the letting out rate as per the guidelines for adopting letting rates for the premises occupied by tenants protected under Maharashtra Rent Control Act was arrived at Rs.18/- per sq.ft. The valuer has thereafter taken the average of the three methods in respect of the premises which according to them is actually available for letting out i.e. 7,201.36 sq.ft. and has arrived at a monthly compensation at Rs.4,27,000/-.

28. As regards the Defendant's valuation report dated 30th August, 2023, as regards the first method of comparable two instances which pertain to smaller area obviously cannot be considered as it is well known that smaller premises commands much higher rates than the larger premises and as regards the other two instances, pertaining to the larger offices are concerned, the same are situated in a better location and in a well maintained building. In my opinion, the same cannot be said to be comparable instance for the purpose of computing the monthly compensation. Similarly, the third method of adopting the letting rate of the premises occupied by the tenants protected under the Maharashtra Rent Control Act is concerned, the same is an obviously on a much much lower side of Rs.18/- per sq. ft. and as such, I am not inclined to consider the same. As such, the averaging of the value arrived at by the three methods is not acceptable as the monthly compensation computed by the other two methods is not an indicator of prevalent letting out rate of the suit premises.

29. The Plaintiff's earlier valuation report dated 16th June, 2022 as well as the Defendant's valuation report dated 30th August, 2023, which adopts the method of return on investment on fair market value of the property can be considered as same method is adopted. The Apex Court in the case of ***State of Maharashtra Vs. Super Max International Pvt. Ltd. & Ors.*** (supra), has upheld the computation of the monthly compensation computed on the basis of stamp duty rate of ready reckoner and observed that its reasonableness cannot be doubted.

30. The method of instances of leave and license agreements of similar based properties cannot be adopted as both parties have not placed cogent material of comparable instances. Either the areas differ, or the location differs or condition of building differs. The letting out rate of MCGM cannot be considered as indicator of prevalent letting out rate. The Ready Reckoner rate arrived at by both the parties is the same and the only difference is the depreciation factor which is applied. As such, in my opinion, the method of return of investment on the fair market value of the property based on the Ready Reckoner rate can be adopted for the purpose of computation of the monthly compensation. Comparison of the report of 16^{th} June, 2022 of the Plaintiffs and the report of 30^{th} August, 2023 of the Defendant indicate that as far as the Ready Reckoner rate is concerned both the valuers have arrived at the rate without land of Rs.1,96,570/-. Thereafter the Plaintiffs have considered the depreciation factor at 0.30%. Whereas the defendants have calculated the depreciation factor at 0.15%. By adopting this method and dividing the value by 150 times, the Plaintiffs have computed the monthly compensation at Rs.16,64,032/- whereas the Defendant No. 1 has assessed the return on investment at 3.5 % and has computed the monthly compensation at Rs.4,15,200/-. In my opinion, the return of 3.5% p.a. is not a reasonable return, whereas the rate of return of 8% p.a. is on the higher side. A return of 6% p.a. on the fair market value would be reasonable rate of return. The admitted position is that the building has been constructed in the year 1908/1915 and as such, the depreciation factor to be applied is 85%.

31. Taking into consideration the valuation report of the Plaintiff and the Defendant the rate of land is Rs.1,64,930/- per square meter and for the structure is Rs.3,61,500/-. Deducting the rate of land from the rate of the structure the rate without land is Rs.1,96,570/- per sq. mtr. which is common in both the valuation report. The Depreciation factor to be considered is the maximum depreciation of 85% as per the valuation report of the Defendants which has not been disputed by the counsel for the parties as the age of the suit building is about 115 years. Applying the depreciation factor of 85%, the rate comes to Rs.1,64,930/- + Rs.1,96,570 x 15% = Rs.1,64,930/- + Rs.29,485.50/- i.e. Rs.1,94,415/- per sq. mtr.

32. Considering the built up area at 1114.80 square meters the value of the property works out Rs.21,67,33,842/- (Rupees Twenty One Crores Sixty Seven Lakhs Thirty Three Thousand Eight Hundred Forty Two Only). Applying the rate of return @ 6% p.a. the monthly compensation comes to Rs.10,83,669.21/-.

33. Even going by the Defendant's valuation considering the second method adopted of return on investment on fair market value of the property @ Rs.90/ per square feet, the monthly compensation comes to Rs.10,79,973.65.

34. Adopting the method of return on investment @ 6% p.a. on the fair market value of the land, the reasonable monthly compensation is computed at Rs.10,80,000/-, as a condition of stay during the pendency of the Appeal. As regards the contention about the low turnover of the Defendant, it needs to be noted that the Defendant's valuer has adopted the same method and arrived at figure of Rs.10,79,973.65/-. The Defendant's valuer has considered the area at 7201.36 sq.mtrs. as the suit premises layout consumes large areas by passages and common areas resulting in low actual usable area. For this, support is taken from MCGM's licenses granted for the guest house. The decree of eviction is passed in respect of the suit premises and the monthly compensation is to be assessed at the rate at which the premises can be let out by the landlord. For that purpose, the actual usable area cannot be the basis as the entire premises could be let out by the landlord if the tenant had vacated. The licenses granted by MCGM cannot form the basis for computing the area which could be let out. The landlord could have let out the premises to a tenant carrying on some other business utilising the entire area. The Defendant's valuation report taking into consideration the actual usable area and applying factor of 40% for common area has no basis.

35. In light of the above, the impugned order of the Appellate Court is modified as under:

(a) The Petitioners shall deposit the interim compensation with the Appellate Court @ Rs.10,80,000/- per month with effect from 22nd March, 2022;

(b) The arrears of interim compensation be deposited by the Petitioners within a period of two months from the date of the order;

(c) **For the succeeding months the Petitioner to deposit interim compensation in the Appellate Court on or before 15th of each month. This order will automatically stand vacated if the Petitioner fail to comply with the terms and conditions of the order as directed.**

36. Petition is allowed in the above terms.

(SHARMILA U. DESHMUKH, J.)

37. At this stage a request is made by learned counsel appearing for the petitioner for stay of the execution proceedings. The request is opposed by the learned Senior Advocate appearing for respondent No.1.

38. The interim compensation has been directed to be deposited as a condition of stay under Order 41 Rule 5 of CPC. The petitioner cannot seek stay of the execution without complying with the amount of deposit. Upon query by this Court as to whether the petitioner is willing to deposit at least part of the amount directed by this Court, learned counsel appearing for the petitioner submits that he has no instructions in that regard. In that view of the matter, I am not inclined to grant any stay of the execution proceedings.

(SHARMILA U. DESHMUKH, J.)

This order is corrected as per Speaking to the Minutes order dated 22nd January, 2024.