IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.357 OF 2017

Vijay Anant Gangan ... Applicant
Versus
Zenabibi Gulam Rasool
And Others ... Respondents

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Mr. S.C. Naidu a/w Ms. Shamiana Hussain a/w Mr. Anikesh Pujary i/b Mr. Rakesh Sawant for the Applicant.

Mr. Ranjeev Carvalho a/w Mr. Hiren G. Shah i/b Prakash & Co. for Respondent No.10.

Mr. G.S. Godbole a/w Ms. Gauri Sakhardande i/b Mr. Tushar Goriadia for Respondent No.19.

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CORAM : S.C. GUPTE, J.

RESERVED ON : 22 OCTOBER 2019
PRONOUNCED ON : 5 NOVEMBER 2020

Judgment :

. This civil revision application challenges a judgment and decree passed by the appellate bench of the Court of Small Causes at Mumbai reversing a decree of dismissal passed by the trial court in an eviction suit and decreeing the suit by ordering eviction of the Applicant herein.

2 The facts of the case may be briefly set out as follows :

2.1 By a lease deed dated 16 August 1949, one Abubaker Gulam Rasool Jerullah ("original lessor") demised a piece or parcel of land known as "Dorachi khar" together with structures standing thereon in favour of one Chunilal Ukabhai Padia ("original lessee") for a period of 30 years. The lease deed *inter alia* permitted the lessee to construct on the land and own such construction.

2.2 The original lessee erected a building comprising of ground and four upper storeys, which came to be known as "Garment House", and carried on business of power laundry there under the name and style as "The Garment Cleaning Works". In front of Garment House there were two chawl-like structures having about 20 tenements.

2.3 It was the case of the original plaintiffs (i.e. predecessors of the Respondents) that on or about 22 January 1968, after the death of the original lessor, his legal heirs entered into a supplementary indenture of lease permitting the original lessee to demolish the old structures standing on the property and erect new structures. The duration of the supplementary lease was for a period of 98 years commencing from 1 February 1968, with an option of renewal for a further period of 10 years.

2.4 On or about 1 April 1987, the original lessee died. Prior to

his death, on or about 1 July 1985, he had executed a last will and testament creating *inter alia* a charitable trust and appointing the Applicant herein and one Amritlal Gordhandas Jajal ("Amritlal") as executors and trustees.

2.5 In or about 1988, one Zenabibi Gulam Rasool Jarullah and others, claiming to be legal heirs of the original lessor, filed the present ejection suit against three defendants, namely, the Applicant therein, Amritlal and 'unnamed heirs and legal representatives of the original lessee'. During the pendency of the suit, Amritlal expired and his name was deleted from the cause title. Also, during the pendency of the suit, purportedly after learning about the identities of heirs and legal representatives of the original lessee, original defendant Nos.3A to 3K were brought on record in place and stead of defendant No.3 (i.e. unknown heirs and legal representatives of the lessee). According to the original plaintiffs, defendant Nos. 1 and 2 (i.e. the Applicant herein and Amritlal) had no right to the tenancy of the suit property and were in wrongful use, occupation and possession of the same. The basis of the eviction suit was -

(a) wrongful transfer of tenancy of the suit property in breach of Section 13(1)(e) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 ("Rent Act") ;

(b) arrears of rent ; and

(c) non-user of the suit property for a continuous period of more than six months preceding the suit without sufficient cause (this ground having been introduced later by way of an amendment).

In addition to eviction, the suit sought a money decree towards statutory rent/compensation.

2.6 By a judgement and decree dated 25 June 2004, the trial court dismissed the suit. The trial court *inter alia* found against the plaintiffs on all counts, i.e. unlawful subletting, arrears of rent and continuous non-user of the suit property for preceding six months.

2.7 The decree was challenged by the original plaintiffs before an appellate bench of the Court of Small Causes. During the pendency of the appeal, one Sumer Corporation, claiming to be a transferee of the suit property from the legal heirs of the original lessors by a registered deed of conveyance, applied for joinder to the appeal.

2.8 By its order and judgment dated 4 May 2017, the appellate bench of the court allowed the appeal, set aside the decree of dismissal passed by the trial court and decreed the suit

ordering eviction of the defendants (including the Applicant herein).

2.9 Being aggrieved, the Applicant has filed the present civil revision application. During the pendency of the CRA, Sumer Corporation applied for impleadment and has been added as Respondent No.19 to the CRA.

3 By order dated 2 April 2018, this court issued Rule in the CRA, observing *inter alia* that the CRA raised a moot question as to whether in view of Clause 5 of the lease deed dated 22 January 1968, the appellate court was justified in decreeing the suit under Section 13(1)(e) of the Rent Act. Rule was also issued on interim relief and made returnable, whilst granting ad-interim relief in terms of prayer clause (ii), and making it clear that the court would, at the hearing of Rule on interim relief, consider fixing of compensation. That is how the matter has been placed before me.

4 I have heard the parties on interim relief and compensation, if any, to be fixed as a condition of interim relief. Mr. Naidu, learned Counsel appearing for the Applicant, submits that the Applicant has a very good case on merits in the CRA and on that basis, is entitled to an unconditional stay of the impugned judgment and decree of eviction passed by the lower Appellate court. Alternatively, he contests the Respondents' claim for interim compensation. Learned Counsel questions the *locus* of both Respondent Nos.10 and 19 to apply for such interim compensation. Learned Counsel also disputes the valuation reports submitted by the

Respondents (i.e. Respondent Nos.10 and 19) including the basis of the valuations.

5 Respondent Nos.10 and 19, who are the main contestants for far as the Applicant's claim for interim stay of the decree of eviction is concerned, firstly, claim compensation on the basis of valuation of the building 'Garment House'. This is objected to by Mr. Naidu for the Applicant on the ground that Garment House is not the suit property; the suit property is an open piece of land; the subject lease deed (the deed of 22 January 1968) makes it clear that the lessee was permitted to construct on the suit property and such construction would belong to the lessee alone.

6 Respondent No.19 has, thereafter, made another application for interim compensation on the basis of valuation of the land alone. Valuation Report dated 29 June 2019, prepared by Mr. Harshad Maniar, Approved Valuer, has been produced by Respondent No.19 in support of such valuation. Respondent No.10 has not submitted any valuation report in respect of the demised land. It, however, adopts the valuation of Maniar at the hearing.

7 The eviction decree passed by the appellate bench of the Court of Small Causes is under Sections 13(1)(e) and 13(1)(k) of the Rent Act. The Appeal Court held that the lease deed of 24 January 1968 did not permit the lessee to transfer the leasehold rights in any manner; and the bequest of tenancy rights by the lessee in favour of the Applicant and another would amount to a transfer prohibited by Section 13(1)(e). The court also

held that on and from the death of the original tenant, the suit property had not been used by the legal heirs of the tenant (i.e. Defendant Nos.3 or 3A to 3K) for the purpose for which it was let out and such non-user had continued throughout the period of six months prior to the date of filing of the suit. The court did not accept the use of the suit property by the transferees (i.e. Defendant Nos.1 and 2) as user within the meaning of Section 13(1)(k). These conclusions are contested by Mr. Naidu, learned Counsel for the Applicant, *inter alia* by relying on several authorities. Mr. Naidu has a fair case to argue in the CRA. But then, the Plaintiffs' case for eviction is also arguable; it cannot be thrown out as unstatable. If that is so, since the Plaintiffs have already succeeded in their suit and secured a decree of eviction, stay of such decree pending the CRA cannot be ordered unconditionally; there must be judicious balancing of equities. Such balancing may call for deposit of interim compensation by the judgment debtor, though it need not be made over to the owners of the suit property but retained in court and invested so that it is available to such of the parties as may be found entitled to it at the hearing of the CRA. Even the question of *locus*, that is to say, which of the Respondents is entiteld to receive such compensation, may well be left open, to be decided at the hearing of the CRA.

8 So far as the question of compensation is concerned, Mr. Naidu is right that it cannot be based on the valuation of the building 'Garment House'. After all, what was leased out was the land; the construction on the land, if any, made during the subsistence of the tenancy, was to belong to the lessee. Compensation can accordingly be based only on the value of

the land, the fruits of which may be said to be lost unto the Plaintiffs as a result of the stay of the eviction decree obtained by them. There is another way of looking at the land value. The land may well be commercially exploited either by retaining the structure (since the terms of the lease permit such retention upon payment) or, alternatively, by demolishing the existing structure and constructing on the land. In either case, the landlord would have to incur capital cost by purchasing the building or paying for the new construction. In either premises, commercial letting of constructed premises cannot be the basis of valuation; it would have to be letting of land.

9 Coming now to the valuation of the land, Mr. Maniar has adopted alternative methods of valuation such as Fair Investment Method (based on development potential of the suit property) and Market Letting Rate Method. Mr. Maniar has proceeded to make an estimation of monthly compensation based on both methods.

10 Mr. Naidu criticizes Maniar's valuation by Fair Investment Method on the basis that the suit property has been fully built upon. He submits that the entire FSI has been consumed in the construction of the building 'Garment House' and also the two existing chawl-like structures. The valuation of the plot, in other words, according to Mr. Naidu, must be on the basis of a sterile (i.e. undevelopable) plot of land. Mr. Naidu also submits that the fact that the property taxes and amenity charges for the suit property are being borne by the lesees or their transferees is relevant for determining interim compensation payable by them. Mr. Naidu submits

that the figure of interim rent must be fair and reasonable; it cannot be oppressive or unreasonable. Learned Counsel relies on the case of **Niyas Ahmed Khan Vs. Mahmood Rahmat Ullah Khan**[1], in support. He also relies on **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd**.[2], where the court fixed interim compensation at 40 times the contractual rent, and the case of **Previn Govind Sharma Vs. Dinyar Jal Jamshedji**[3], where it was fixed at 20.83 times the contractual rent. Based on these cases, Mr. Naidu suggests a fair compensation in our case at a rate not exceeding 21 times of the contractual rent, i.e. Rs.8,50,000 per annum. Learned Counsel submits that his client is prepared to furnish a fixed deposit receipt duly endorsed in favour of the Registrar General of this court for a sum of Rs.85 lakh (based on an estimated period of pendency of the CRA for 10 years) towards such compensation.

11 The suggestion of Mr. Naidu to fix market rental at 21 times the contractual rent, relying on the cases of **Atma Ram Properties** and **Previn Govind Sharma**'s cases, does not commend itself to this court. Fixation of monthly compensation can only be premised on individual facts and circumstances in each case. The cases of **Atma Ram Properties** or **Previn Govind Sharma** are no authorities for any particular multiplier to be applied to contractual rent for fixation of interim compensation. At the same time, Mr. Naidu is right in submitting that the inquiry for compensation envisaged under Order 41 Rule 5 is different from fixation of mesne profits under Order XX Rule 12 of CPC. As observed by a learned

1 JT 2008 (7) 104
2 (2005) 1 Supreme Court Cases 705
3 CRA (St.) No.33250 of 2018, decided on 21 June 2019

Single Judge of our court in **Previn Govind Sharma**, there is bound to be some kind of ad-hocism, some guess work in the matter of fixing such compensation. It is just that for stay of a decree, the judgement-debtor must subject himself to reasonable terms, which may well include payment of a fair compensation for preventing his eviction from the suit property which is what the decree requires; and this compensation must have some nexus with the resultant loss of fruits of the decree suffered by the decree holder.

12 Examined from this point of view, the valuation report of Mr. Maniar, which professes to work out monthly compensation on the basis of land value (rather than the letting value of constructed property, which, as I have held above, cannot be the right basis even as a matter of principle), has several difficulties. In the first place, it works out the monthly rental as something relatable to the land's development potential and not its existing letting value by any reckoning. There is no difficulty about the fair rate of return adopted by Mr. Maniar (6.5 per cent annually), but whilst assessing the land value he appears to have taken into account the Ready Recknor rate of the land with applicable permissible FSI (of 1.33). At this rate, the market value is said to work out to Rs.3,02,841/- per sq. mtr.; and applying the multiplier of 6.5 per cent to this value, the valuer appears to have worked out a monthly compensation of Rs.1640/- per sq. mtr. That can hardly be the basis of someone agreeing to occupy the land during the pendency of the CRA. So also, the market letting rate, which is typically applied for working out mesne profits, based on letting rates of constructed premises in the vicinity, can hardly fit the bill in the facts of our case, where

there is an existing construction owned by the lessee who cannot be evicted from the land except after payment of compensation for such construction or allowing him to take away the materials. Absent this construction, the letting value of the land notionally worked out backwards by deducting the letting value of the construction carried out thereon is far too artificial to be adopted as a basis for fixing interim compensation during the pendency of the CRA.

13 The only legitimate basis for working out interim compensation in our case appears to be the actual price paid for the suit property (i.e. essentially the land) by Respondent No.19. Respondent No.19 has acquired reversionary right of the lessors in the suit property for a sum of Rs.5.50 crores. Evidently, this has been a concrete deal at arms length between men of commerce; it does take into account or, at any rate, must be presumed to have taken into account, all aspects arising out of the lessee's right to the existing structure at the expiry of the lease. It may safely, at least for our purposes, which, as we have seen above, in any event, involve a certain ad-hocism, be taken as the basis for working out a fair interim compensation. Indeed, it is even Mr. Naidu's submission that interim compensation may be premised on this valuation. In his submission, Mr Naidu has worked out fair return of Rs.2,56,654 per month (for 4354 sq. yds., i.e. excluding the land appurtenant and below the two chawl like structures) by estimating return at 6.5 per cent per annum on the price paid by Respondent No.19 (Rs.5.50 crores). Mr. Naidu, however, terms this amount of Rs.2,56,654 to be exhorbitant, without telling us why. (He probably contends so in the light of the judgemtns of **Atma Ram**

Properties and **Previn Govind Sharma,** supra.) Mr. Naidu suggests 50 per cent of this amount (i.e. Rs.1,28,327/- per month) as a fair return on investment for fixing interim compensation.

14 There is no basis for reducing the amount of fair return to 50 per cent as suggested by Mr. Naidu. The amount is not exhorbitant *per se* and cannot be said to be so on the basis of the cases of **Atma Ram Properties** and **Previn Govind Sharma**. As I have noted above, the multipliers in **Atma Ram Properties** and **Prevind Govind Sharma** are not benchmarks to be used as precedents for fixing compensation generally. In the peculiar facts of our case, it is this return (Rs.2,56,654/- per month) which may be termed as a fair return on investment, which the eventually successful party may be said to have lost as a result of the stay on eviction and which may be taken as a reasonable compensation to be fixed during the pendency of the CRA as a condition of the stay. There may, at best, be a case for rounding it off to Rs.2,50,000/- per month.

15 Accordingly, reasonable monthly compensation as a condition of stay in terms of prayer clause (ii) of the CRA is fixed at Rs.2,50,000/-. The Applicant shall furnish a security for the arrears of compensation payable from 2 April 2018 till date in the sum of Rs.77.50 lacas by deposit of a fixed deposit receipt of like amount endorsed in favour of the Registrar General of this Court with intimation to the issuing bank. Such deposit shall be made on or before 10 December 2020. Compensation payable with effect from today shall be deposited in court on or before 10 day of each succeeding month beginning from December 2020. This amount

shall be invested by the Registrar General in Fixed Deposits of nationalized bank and shall abide by further orders to be passed in the CRA. Subject to deposit of FDR and monthly deposits of Rs.2,50,000/- as ordered above, ad-interim stay of the decree of eviction passed by the Appellate Bench of the Court of Small Causes at Mumbai operating in the CRA is confirmed as interim relief pending hearing and final disposal of the CRA.

(S.C. GUPTE, J.)