

# IN THE COURT OF SMALL CAUSES AT MUMBAI ORDER BELOW EXH. 1

IN

Execution Application N. 116 of 2018

IN

L. E. C. Suit No. 386 / 441 of 1985

The Board of Trustees of the Port of Bombay A statutory Corporation, Having its Office at Vijay Deep, S V Marg, Fort, Mumbai 400 038

.. Plaintiff

Versus

1. Fojushankar Devyam Panaji Vyas and Ors.

.. Defendant

Advocate for the Plaintiff : S.K. Legal

Advocate for Obstructionists: Sabnis Subhash B.

Coram: Shri. S. S. Ghuge

Judge, C. R. No.24

Date: 17.03.2021

## ORDER:

- 1. The execution application is filed for the execution of decree passed in L E C Suit No. 386 / 441 of 1985 on 01.12.1999.
- 2. Notice under Order 21 Rule 22 under CPC to the defendant.

Defendant no. 3 appeared in the matter and filed reply at Exh. 21.

- 3. The defendant has submitted that the execution application is misconceived, malafide and and not maintainable. The defendant has further submitted that the defendant no 1, 2 and 4 have died long back. The copies of death certificates were submitted to the plaintiff on 29.09.2011, however no steps are taken till today for taking legal heirs on record.
- 4. The defendant has further submitted that Appeal No. 162 / 2000 against the judgment and decree dated 01.12.2009. The Appeal was admitted on 07.08.2000.
- 5. The defendant has further submitted that the plaintiff has offered a scheme of settlement to all its tenants. As per the said scheme, defendant has deposited entire arrears of rent and enhanced rent as well as other charges to the plaintiffs.
- 6. The defendant has further submitted that pursuant to the settlement scheme, the plaintiff has issued letter to the defendant on 16.11.2010 and forwarded draft application for regularization of breaches and for grant of fresh lease in favour of defendants. The plaintiff has also called other information from the defendant to enable the plaintiff to enter into a fresh lease with the defendant in respect of the suit premises.
- 7. The defendant has further submitted that he alongwith its letter dated 29.01.2011 submitted to the plaintiffs all necessary documents required by them and also made payment of Rs. 50,000/- for the execution of fresh lease period of 15 months. The defendant has made payment of entire rent which was due till date.
- 8. The defendant has further submitted that they were informed by the plaintiff that unless the Appeal No. 162 / 2000 withdrawn by them, the process of entering into a fresh lease deed will not be initiated. Relying upon the assurance given by the plaintiff for settlement, the defendants withdrew the Appeal on 03.02.2011. Thereafter, the defendants advocate informed the plaintiff about the same by his letter dated 29.07.2011. The defendant has paid the rent regularly to

the plaintiffs.

- 9. The defendant has further submitted that the plaintiff has suppressed the above facts from the Court. As the defendants have complied with the settlement terms, hence they are bound to get fresh lease executed in therefore, however by suppressing it the plaintiff has filed the execution application and it needs to be dismissed with costs.
- 10. The plaintiff has filed rejoinder to the reply at Exh. 22. The plaintiff has submitted that the defendant has not submitted original death certificates hence the plaintiff is not able to act on the xerox copies of the death certificate.
- 11. The plaintiff has denied that it has offered a scheme of settlement and draft application was also forwarded to the defendant. The plaintiff has denied that the defendant has cleared all dues till date. The plaintiff has submitted that the payment receipts are issued without prejudice to the rights and contention of the plaintiff.
- 12. The plaintiff has stated that the defendant has again committed fresh breaches and unauthorizedly constructed iron angle frame work at south side of the plot. The plaintiff has stated that the breaches committed by the defendant are communicated to them by letter dated 26.06.2018 and it is acknowledged by the defendant.
- 13. The plaintiff has stated that whenever any settlement is arrived with it then there is always a document in writing, approval of the board is required in writing and for recording the settlement a lease deed, tenancy agreement or charge certificate is issued and the same is signed by both parties.
- 14. The plaintiff has stated that as per the bailiff report dated 08.05.2018 and 28.05.2018 none of the defendants were found on the suit plot and third parties were found in possession of the suit property. The plaintiff has submitted that the plaintiffs execution be proceeded further.
- 15. From the contents in the application and say filed there on , following points arose for my determination and I record my findings thereon as under :-

Sr. No.	Points	Findings
1.	Whether the execution application is maintainable?	In Negative.
2.	Whether the proceeding abates due to the death of	In Negative
	defendants no. 1, 2 and 4?	
3.	What order ?	As per final order.

#### **ARGUMENTS**

- Adv. Sabnis has filed written notes of arguments at Exh. 22. It is submitted that as per the compromise policy of the plaintiff, letter was issued on 16.11.2010 by the plaintiff to the defendant directing the plaintiff to make compliance of documents. The defendant has made the requisite compliance as referred in the letter dated 16.11.2010 therefore, the plaintiff was bound to execute lease deed in favour of the defendant but plaintiff failed to do so. It is further submitted in the written notes that defendants no. 1, 2 and 4 have died long back and the death certificates were submitted to the plaintiff, however plaintiff failed to take further steps. It is further submitted that the plaintiff is not entitled to proceed with the matter and it be disposed off.
- 17. Adv. Abhishekh Bhatt Associates for the plaintiff argued that there is no settlement in the matter and the defendant has committed fresh breaches therefore, the matter may be proceeded further.

## AS TO POINTS NO. 1 AND 2

- 18. It is the contention of the defendant that as per the judgment of Hon'ble Supreme Court in case of Jamshed Wadia Vs. BPT, the plaintiff has formulated settlement proposal. The Hon'ble Supreme Court has upheld the compromise proposals which were approved in the board meeting dated 13.08.1991. The proposals which were approved in the board meeting are as under:-
  - "(i) Nature of occupations may continue as at present on revised rents.

Development may be in accordance with the Development Plan and the Development Control Regulations and BPT Master Plan including restructuring from time to time to cater for port's and city's needs.

- (ii) Occupations may be classified for the purpose of levy of rents either as 'Non- Home Occupation' or as 'Home Occupation' as defined in the Development Control Regulations on the basis of actual use.
- (iii) Letting rates for 'Non-Home Occupation' per sq. metre of floor space per month of built up area (as derived from valuation by Kirloskar Consultants) shall be as under for the period 1.10.1982 to 30.9.1992.
  - (a) Sassoon Dock Estate: Rs.22.03
  - (b) Wellington & Apollo

    Reclamation Estates: Rs.26.91
  - (c) Ballard and Mody Bay
    Estates: Rs.24.00
  - (d) Elphinstone Estates (TPS): Rs.14.44
  - (e) Bunders South: Rs.21.38
  - (f) All other Estates: Rs.12.66

Letting rate for 'Home Occupation' may be at 20 per cent of the above rates. Letting rates for future years from 1.10.1992 to 30.9.2012 for 'Non-Home Occupation' and 'Home Occupation' shall be as given in the Annexures". Notwithstanding the fixation of letting rates for 20 years for good and sufficient reasons, Board may review and revise the letting rates.

(iv) Minimum rent may be for built up area upto 0.5 FSI irrespective of whether the area is built up or not. Minimum rent from 1.10.1982 to 30.9.1992 for non- hazardous trade/use will be Rs.6.33 per sq. metre

per month and for POL and hazardous trade/use will be Rs.8 per sq. metre per month or for 0.5. FSI of built up area, whichever is more. The rent will increase proportionately to the built up area but maximum rent may not exceed the rent that would have been payable on the basis of Fair Market Rents recommended by Kirloskar Consultants Ltd.

- (v) In case of letting of BPT structures, the revised rate of rent per sq.

  metre of floor space may be at 2.5 times the letting rates. The repairs

  and maintenance of the structure shall be done by the tenant/lessee. For

  this purpose the lessee/tenant shall retain 0.5 times the rent and pay to

  BPT a net rent at twice the letting rates.
- (vi) Rent in respect of occupations having mixed use may be in proportion of the floor space under use for 'Home Occupation' and 'Non-Home Occupation'. In case of change of use from 'Home Occupation' to 'Non-Home Occupation' rents will be regulated at the letting rate for 'Non-Home Occupation' for the floor space so changed with effect from date of change of use.
- (vii) Rents shall be increased by 4 per cent every year over the rent in the previous year from 1.10.1992.
- (viii) Arrears for the period from 1.10.1982 upto 30.9.1991 in the case of monthly tenancies and 15 monthly lease would be recovered respective of the built up area at a flat rate of Rs.6.33 per sq. metre per month in case of non-hazardous trade/use or at a rate of Rs.8 per sq. metre per month in case of POL and hazardous trade/use with simple interest at 8 per cent per annum.
- (ix) Arrears in respect of structures would be recovered at the applicable rate from 1.10.1987 upto 30.9.1991 with simple interest at 8 per cent per

annum.

- (x) In case of monthly tenancies/15-monthly leases where the pre-revised rent is more than the rent under above terms or where allotments have been made through auction/tender at rates higher than the rate applicable under the above terms, the rents will continue at the earlier rates till the applicable letting rate for a year exceeds that rate of rent where after the rent will increase to the applicable letting rate and will further increase at 4 per cent annum.
- (xi) In case of expired lease, fresh lease on new terms shall be at the sole discretion of the Board. Grant of fresh lease may be considered taking into account restructuring requirements for the City's Development Plan, BPT's Master Plan and the Development Control Regulations.
  - Where a fresh lease is granted, arrears may be recovered in the form of premium at the applicable letting rate for respective use with simple interest at 15 per cent per annum from the date of expiry of lease till grant of fresh lease. In case of expired leases without a renewal clause, additional premium may be recovered at 12 months' rent at the applicable letting rate.
- (xii) In the case of monthly tenancies the applicable rates used to be more than the above rates to cover general property taxes. However, in view of the restrictive tenure, the tax liability is to be borne by BPT.
- (xiii) In the case of subsisting leases, assignments and consequent grant of lease on new terms would be at the prevailing letting rate at the relevant time and in relation to use. However, in case of amalgamation revised rent would be at the letting rate prevailing at the time of amalgamation subject to a ceiling that the revised rent will not be more than 12 times the earlier rent. Where lessee is already paying rent at the prevailing

- letting rate, assignment would be permitted on levy of revised rent at 25 per cent over the applicable letting rate or on levy of premium at 12 months rent at the applicable letting rate as may be desired by the lessee/tenant.
- (xiv) Subletting, change of user, transfer, occupation through an irrevocable power of attorney and any other breaches may be regularized by levy of revised rent at the applicable letting rate at the time of such breach from the date of breach. Where lessee/tenant is already paying rent at the prevailing letting rate, such regularization be permitted on levy of revised rent at 25 per cent over the applicable letting rate or a levy of premium at 12 months' rent at the applicable letting rate as may be desired by the lessee/tenant.
- (xv) In case of hardship where effect of the terms is harsh, such cases may be brought up before the Board for consideration on merits.
- (xvi) The above proposals are applied to properties failing outside the port limits which is within the Board's power to sanction. For properties failing within the port limits, proposals on the above lines may be made to Government for approval. Para no. XIV of the proposal reveals that "Subletting, change of user, transfer, occupation through an irrevocable power of attorney and any other breaches may be regularized by levy of revised rent at the applicable letting rate at the time of such breach from the date of breach. Where lessee/tenant is already paying rent at the prevailing letting rate, such regularization be permitted on levy of revised rent at 25 per cent over the applicable letting rate or a levy of premium at 12 months' rent at the applicable letting rate as may be desired by the lessee/tenant."

- 19. The plaintiff has issued letter to the defendant on 16.11.2010 directing the defendant to present proper application in standard format as prescribed by the Mb. P. T.
  - 1) Proper application is standard format as pronounce by MbPT duly signed by each registered / authorized tenants of MbPT the obstructionists on record with requisite documents for settlement and willingness to pay revised rent / arrears.
  - 2 ) Self declaration forms as per enclosed former declaring all the breaches committed till date.
- 20. The letter further reveals that the defendant has committed breaches in the term of non payment of contractual rent and unauthorized sub letting and unauthorized construction. The said letter was issued as per the judgment of Hon'ble Supreme Court in case of Jamshed Wadia Vs. BPT. The defendant has further filed the letter at Exh. B along with pay order of Rs. 50,000/-. The said document is the application made by the defendant to the plaintiff for settlement as per the letter issued on 16.11.2010. The said letter was received by the office of the plaintiff. The defendant has filed the copy of Appeal Memo at Exh. E. The said document is Appleal Memo in Appeal No. 162 / 2000. The said appeal was withdrawn by the defendant. The defendant has further filed the copy of Exh. 38. This application was filed by the defendant in Appeal No. 162 / 2000 to withdraw the appeal on the ground that the defendant has submitted application to the plaintiff for settlement and also paid the amount of Rs. 50, 000/- for the execution of fresh lease for 15 months. The order passed on the said application reveals that both parties and their advocates were present. It does not reveal that the plaintiff and its advocate i.e. BPT and its representative have opposed the application stating that there is no settlement with the defendant. The defendant has further filed rent receipts it shows that the rent is paid by the defendant from time to time.
- 21. It is pertinent to note that offer was given by the plaintiff to the defendant on 16.11.2010 by their letter for settlement of the matter and

regularization of the breaches committed by the defendant in the nature of non payment of rent , unauthorized sub letting and unauthorized construction. The said breaches were regularized after the payment was received by the plaintiff from the defendant and hence, the plaintiff was bound to execute fresh lease of 15 months, hence settlement is arrived between the parties in view of the judgment of Jamshed Wadia Vs. BPT, therefore the execution application does not survive , hence I answer point no. 1 in negative.

#### As to point no. 2

- 22. The defendant has submitted that defendants no. 1, 2 and 4 have died and intimation was given to the plaintiff, however no steps are taken for bringing legal heirs on record.
- 23. It is pertinent to note that the tenancy in the name of defendant is joint tenancy. In view of Order 22 Rule 2 of the CPC Procedure "Where one of several plaintiffs or defendants dies and right to sue survives Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."
- 24. In the present matter suit was filed against four defendants and out of them three have died, however the cause of action survives as one of the defendant is on record. Moreover the tenancy is joint tenancy and right to sue survives, therefore there is no abatement of the suit, therefore I answer point no. 2 in negative.

#### As to point no. 3

25. As per above discussion on points no. 1 and 2, it is held that the suit does not abate due to the death of the defendants however, as the defendant has complied with the settlement terms of the plaintiff, the execution application does

not survive and needs to be disposed off with costs, therefore I proceed to pass the following order :-

## ORDER:

1. The Execution application is dismissed with costs.

(S. S. Ghuge) Judge, C.R. No. 24

Place :Mumbai. Date : 17.03.2021