
(2024) 01 BOM CK 0014

In the Bombay High Court

Case No : Appeal From Order No.797 Of 2016, Interim Application No.10083 Of 2022, Civil Application No.1002 Of 2016

Manilal Premji Gala And Others

APPELLANT

Vs

Boman P. Irani And Others

RESPONDENT

Date of Decision : 03-01-2024

Acts Referred:

Partnership Act, 1932 — Section 46

Citation : (2024) 01 BOM CK 0014

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : Girish Godbole, Nirajan Parekh, Mohammed Lokhandwala, Mansukhlal Hiralal, Karl Tamboly, Pheroza Mehta, Nainesh N. Amin, N.N. Amin, Laxman V. Madgundi

Final Decision : Disposed Of

Judgement

Sandeep V. Marne, J

A. THE CHALLENGE

1 These Appeals are filed challenging the order dated 17 May 2016 passed by the City Civil Court allowing Notice of Motion No. 4443 of 2015 filed by the Plaintiff No.2 in terms of prayer clauses (d) and (e). The City Civil Court has proceeded to reject Notice of Motion No.4970 of 2015 filed by the heirs of Defendant No.1. The order dated 17 May 2016 has been corrected by the City Civil Court by order dated 19 July 2016. The issue before the City Civil Court was about appointment of agent of Court Receiver in respect of business and property of the partnership firm. The net result of the impugned orders passed by the City Civil Court is that Notice of Motion No.4443 of 2015 filed by Plaintiff No.2 is allowed which contemplates Court Receiver of this Court taking back the possession of business and properties of the partnership firm and appointment of Plaintiff No.2 as the agent of the Court Receiver in respect thereof. Notice of Motion No.4970 of 2015 filed by legal heirs of Defendant No.1 for appointment of Manoj Manilal Gala

(Defendant No.1b) as Agent of the Court Receiver in respect of business and properties of partnership firm has been rejected.

2 Defendant No.1b-Manoj Manilal Gala is aggrieved by direction for appointment of Plaintiff No.2 as Agent of Court Receiver and rejection of his application for appointment as the agent of Court Receiver and has filed the present Appeals.

3 Plaintiff No.2 had also filed Appeal from Order No.887 of 2016 challenging the order dated 17 May 2016 of the City Civil Court to the extent of rejection of prayer clauses (a) to (c) in Notice of Motion No.4443 of 2015. When the Appeals came up for hearing before this Court on 17 September 2019, he has withdrawn Appeal No.887 of 2016 and the same has been disposed of. This is how only Appeal from Order Nos. 797 of 2016 and 798 of 2016 continue to survive and are decided by this common judgment.

B. FACTS

4 Considering the limited scope of enquiry in the present Appeals, which essentially deal with exercise of discretion by the City Civil Court in granting temporary injunction in favour of Plaintiff No.2 and rejecting the same in favour of Original Defendant No.1b, it is not necessary to deal with facts in detail. However, a very brief factual background is narrated for better understanding of the exact controversy before the Court:

One Boman P. Irani was the tenant in respect of the suit premises. On 15 April 1971, a Deed of Partnership was entered into between Boman P. Irani, Khodadad H. Irani, Damji Gala, Shamji Vora and Ratan C. Vora for carrying on business of cloth in the name and style as 'Roopsons' in the suit premises. On 20 April 1972 a Deed of Reconstitution of Partnership of the firm was executed between Boman P. Irani, Khodadad H. Irani, Shamji Vora, Ratan C Vora and Manilal Gala. On 12 November 1973, Deed of Reconstitution of Partnership was executed between Boman P. Irani, Khodadad H. Irani, Manilal Gala and Eruch Khaver. On 28 May 1975 a further reconstitution of partnership was executed between Boman P. Irani, Khodadad H. Irani, Manilal Gala and Eruch Khaver.

5 The building 'Xavier Galaries', in suit premises are situated, was owned by M/s. Pam Beach Trust. By Deed of Conveyance dated 27 April 1978, M/s. Pam Beech Trust conveyed the building 'Xavier Galaries' in the name of Manilal Gala, Dhirajlal Premji Gala and Damji Gala. The tenure of the partnership as reconstituted on 28 May 1975 came to an end on 31 March 1990. Therefore, partnership was further reconstituted on 1 April 1990 by Manilal Gala, Boman Irani, Khodadad H. Irani and Eruch Khaver to continue the partnership upto 31 March 1994. Upon expiry of the term of the firm on 31 March 1994, no further document was executed for continuation of the partnership firm. It is Plaintiff's case that Manilal Gala continued conducting the business of the firm from the suit premises without the consent of other partners. On 26 May 1994, Boman P. Irani sent notice to Manilal Gala for discontinuation of business of the firm and for final accounts. In July 1994 Manilal Gala filed RAD Suit (L) No.1804 of 1994

before the Court of Small Causes seeking a declaration that Manilal Gala had become a sub-tenant of Boman P. Irani and that partnership deeds were merely a camouflage. On 1 August 1994, ad-interim order was passed restraining Boman Irani, Eruch Khaver and Khodadad H. Irani from alienating the suit property.

6. In September 1995 Suit No. 3699 of 1995 was filed by Boman P. Irani and Eruch Khaver against Manilal Gala and Khodadad H. Irani in this Court for a declaration of dissolution of partnership. Notice of Motion No.2737 of 1995 was filed for appointment of Court Receiver in respect of the firm and suit premises. On 10 November 1995, a Single Judge of this Court appointed Court Receiver in Notice of Motion No.2737 of 1995 filed in Suit No.3699 of 1995. Manilal Gala filed Appeal No.803 of 1995 challenging order of the learned Single Judge dated 11 October 1995 and the Division Bench modified the order of the learned Single Judge by its order dated 13 October 1995 and directed the Court Receiver to appoint Manilal Gala as the Agent of the Court Receiver in respect of the firm and the suit property. In Special Leave Petition No.25401 of 1995 filed by Boman Irani, the Apex Court passed order dated 24 November 1996 modifying the order of the Division Bench and directed that Manilal Gala would pay to Boman P. Irani, Khodadad H. Irani and Eruch B. Khaver, average of the amount paid in last three years in terms of the partnership deed dated 1 April 1990. On 2 January 2002, Boman Irani passed away and his legal heirs were brought on record. On 28 September 2012, Suit No.3699 of 1995 was transferred to the City Civil Court and renumbered as Suit No.109070 of 2015.

7 In the meantime another battle ensued between the parties on the issue of jurisdiction of this Court and of the City Civil Court to entertain the Suit as Manilal Gala claimed that the suit involved determination of tenancy dispute. This Court framed a preliminary issue of jurisdiction. After transfer of the Suit to City Civil Court, the learned Judge of the City Civil Court held that Small Causes Court did not have jurisdiction to entertain the suit and upheld its jurisdiction. Manilal Gala filed Civil Revision Application (L) No.4958 of 2014 challenging the City Civil Court's order dated 9/10 January 2014. A Single Judge of this Court remanded the matter to the City Civil Court for fresh consideration by its order dated 21 March 2014. After remand, the City Civil Court passed order on the preliminary issue on 19 May 2014 once again holding that it has jurisdiction to decide the suit since the same does not involve any tenancy dispute. Manilal Gala filed Civil Revision Application No.848 of 2014 challenging the City Civil Court's order dated 19 May 2014. This Court passed order dated 21 January 2015 upholding the order of the City Civil Court. Special Leave Petition filed by Manilal Gala was also dismissed on 13 April 2015. Thus the issue of jurisdiction of the City Civil Court to entertain the suit attained quietus.

8 On 4 August 2015 Manilal Gala, who was appointed Agent of the Court Receiver, passed away leaving behind Ruxmani Gala, Manoj Gala and Asha Gala as his legal heirs. Khodadad Irani passed away on 20 August 2015.

9 After death of Manilal Gala, an application was addressed on behalf of the legal heirs of Boman P. Irani to the Court Receiver to take steps to protect the suit premises. The Court Receiver attempted to take possession of the suit premises on 23 September 2015 when Manoj Manilal Gala refused to hand over possession of the suit premises to the Court Receiver. In the above background, Eruch B. Khaver (Plaintiff No.2) filed Notice of Motion No.4443 of 2015 seeking his appointment as Agent of the Court Receiver and for various other reliefs such as preliminary order for dissolution of the partnership firm etc. Simultaneously, Manoj Manilal Gala filed Notice of Motion No.4970 of 2015 seeking his appointment as the Agent of the Court Receiver. By common order dated 17 May 2016, the City Civil Court has partly allowed Notice of Motion No.4443 of 2015 filed by Eruch B. Khaver (Plaintiff No.2) in terms of prayer clauses (d) and (e) by granting the relief of direction to the Court Receiver to take back the business and property of the partnership firm and for appointment of Eruch B. Khaver as the Agent of the Court Receiver. The Notice of Motion No.4970 of 2015 filed by Manoj Manilal Gala was rejected. There was an error in the order dated 17 May 2016 in recording that stock in trade was to go to Plaintiffs when the same was actually required to go to Manoj Manilal Gala. The observation was therefore corrected by order dated 19 July 2016 after filing an application to that effect by Manoj Manilal Gala. The common order was stayed by the City Civil Court for a period of 12 weeks which expired on 9 August 2016.

10 Manoj Manilal Gala has filed Appeal from Order No.797 of 2016 to the extent of rejection of his Notice of Motion No.4970 of 2015. He has also filed Appeal from Order No.798 of 2016 to the extent of partly allowing Notice of Motion No.4443 of 2015 filed by Eruch B. Khaver (Plaintiff No.2). Appeal from Order No.887 of 2016 was filed by Eruch B. Khaver (Plaintiff No.2) challenging the common order dated 19 May 2016 to the extent of non-grant of prayer clauses (a) to (c) in Notice of Motion No.4443 of 2015. As observed above, Eruch B. Khaver (Plaintiff No.2) has withdrawn Appeal from Order No.887 of 2016 on 17 September 2019.

11 When the Appeals came up before this Court, this Court passed following order on 21 July 2017.

"1. The Appellant in Appeal from Order No.797 of 2016 is in possession of an area of 1,250 square feet. This is said by Mr Godbole for the Appellant, Manoj Manilal Gala, to be the area of the suit shop at Breach Candy, known as Roopsons. Mr Joshi disputes the accuracy of this area statement.

2. Mr Joshi's submission is that his client who is also Appellant in Appeal from Order No.887 of 2016 is the only person entitled to possession of this premises and to continue the business, which, according to him, was a partnership business. Mr Joshi's submission is that Mr Gala's claim of sub-tenancy has failed all the way to the Supreme Court and this defence is no longer open to him. He states that in terms of the reconstituted partnership, it was specifically agreed that on dissolution the business and the premises were to be returned to the

Appellant, Eruch Khaver, in Appeal from Order No. 887 of 2016.

3. The fact of the matter is that the Gala family appears to have been maintaining and operating this business from these premises for several years. While the rival contentions are being considered, and particularly since it is Mr Joshi's case that he is entitled to a preliminary decree even though issues in the suit have not yet been framed, it will be necessary to preserve the parties and the property in status quo. The only way to do this is to appoint a Court Receiver of the premises. However, the Court Receiver will only take symbolic possession of the premises and will not evict or disturb the possession of Manoj Manilal Gala. For the present, the Court Receiver is not to put his board on the premises either.

4. Mr Manoj Manilal Gala will enter into an agency agreement with the Court Receiver containing the usual undertakings. If necessary, the Court Receiver may ask for a separate undertaking as well.

5. As to the question of security and royalty, there is a divergence of views as to what the property will fetch. The Court Receiver will make a report about the appropriate royalty and security. For this purpose, the Court Receiver may appoint a valuer from his panel. In preparing the estimation or valuation report for both security and royalty, the valuer is requested to consider in particular the prevailing rates in the area and if possible the amounts being fetched by the commercial premises on either side of this unit, as that will probably yield the most accurate figure of what the property is likely to fetch at market rate on commercial terms.

6. The Report should be filed within four weeks from today. Copies of the report will be given to the Advocates on both sides. The Receiver is not required to hear either side at the time of preparing this report.

7. List the matter for orders on 24th August 2017."

12 In pursuance of order passed by this Court, Court Receiver filed its Report No.171 of 2017 based on valuation report from Mr. Amol Bora & Company. The Appeals were further heard by this Court on 17 September 2019. When the Appeals came up before this Court on 17 September 2019, this Court passed following order:

"1. This order disposes of the civil application filed by the Original Appellant in Appeal from Order No.887 of 2016.

2. Appeal From Order No.887 of 2016, along with the companion appeals, namely, Appeal from Order Nos.797 of 2016 and 798 of 2016, challenges a common order, namely, the order passed by the City Civil Court at Bombay on interim applications of the parties in Suit No.9070 of 2015 (in short "the suit") which is for dissolution and accounts of partnership. By the impugned order, the City Civil Court partly allowed the notice of motion of the Appellants.

3. The Appellants in Appeal from Order No. 887 of 2016 challenge the impugned

order to the extent it denies the other prayers made by them. These other prayers pertain to (a) preliminary decree of dissolution of suit partnership; (b) appointment of a commissioner for taking accounts of the suit partnership, and (c) for possession of the suit premises occupied by the Respondents. These Appellants are successors in interest of the original managing partners of the suit firm. So far as the companion appeals are concerned, namely, Appeal from Order Nos. 797 of 2016 and 798 of 2016, they are filed by the other partners, who claim to be in possession of the suit premises, and entitled to carry on the suit business in their own right.

4. After the matter is heard at some length, it is agreed by learned counsel for the Appellants in Appeal from Order No. 887 of 2016, that his clients would not press this appeal. Learned counsel, however, submits that their civil application taken out in the appeal from order may be considered as an interim application in the other two companion appeals. Appeal from Order No. 887 of 2016 is accordingly disposed of as not pressed, by making it clear that the civil application of the Appellants in this appeal shall be considered as an interim application in the other two pending appeals, namely, Appeal from Order Nos. 797 of 2016 and 798 of 2016.

5. After that civil application is heard at some length, it is agreed by learned counsel for the parties, after taking instructions from their respective clients, who are present in Court, that the civil application may be disposed of in terms of the following order and it is accordingly ordered as follows:-

(A) Respondent No.1(b) to the civil application shall continue to occupy the suit premises, namely, Shop No.7 (part), ground floor of the building known as Zaver Gallery, now known as Premsons House', 63, Bhulabhai Desai Road, Breach Candy, Mumbai-400 026, as an agent of the Court Receiver on payment of ad-hoc royalty of Rs.300/- per sq. ft. per month.

(B) Considering the area of the suit premises, which is presently considered as 1250 sq.ft., the ad-hoc royalty comes to a sum of Rs. 3,75,000/- per month. This amount shall be deposited by Respondent No.1(b) with the Court Receiver, High Court, Bombay. The amount for the month of September 2019 shall be deposited latest by 30 September 2019 and the amount for each succeeding month shall be deposited on or before the 10th day of such month. Considering the fact that Respondent No.1(b) has already deposited a sum of Rs. 1,20,000/-for the month of September 2019, his liability shall be for deposit of Rs. 2,55,000/- for the month of September 2019.

(C) M/s Nadkarni and Associates are appointed as valuers for assessing the fair rent of the suit premises described above for being fixed as monthly royalty and also for determining the value of the security for the agency of the suit premises.

(D) M/s Nadkarni and Associates shall hear the parties, take into account such material as may be produced by the parties in support of their respective cases of valuation, and make their report within a period of six weeks from today.

(E) Based on the report sent by M/s Nadkarni and Associates, the Court Receiver, High Court, Bombay shall place the Receiver's report before this Court in Appeal from Order Nos. 797 of 2019 and 798 of 2019 seeking directions for fixation of royalty as well as security for the agency of the suit premises.

(F) The parties will be heard on the Receiver's report and accordingly the amounts of royalty and security shall be determined.

(G) In the meantime, the security amount presently deposited by Respondent No.1(b) with the Court Receiver shall be treated as an Ad-hoc security, to be adjusted in accordance with the amount that may be fixed by the Court on the Receiver's report.

(H) M/s Nadkarni and Associates shall assess the fair market rates and propose amounts of royalty and security without being influenced in any way by the ad-hoc determination of royalty and security fixed under the present order.

(I) M/s Nadkarni and Associates shall consider specific instances of sale as well as rental/licence agreements of comparable premises within the same locality and preferably premises in the same building or building/s in the vicinity on either side of the suit premises.

(J) M/s Nadkarni and Associates shall also take into account the ready reckoner rates for their determination and arrive at a fair estimate of royalty and security.

(K) From the royalty amount deposited by Respondent No.1(b) in accordance with this order, the Applicant shall be entitled to withdraw a sum of Rs.1,87,500/- per month. The Applicant undertakes to this Court to bring back such amount or any other amount as may be ordered by the Court in its further orders passed in the matter. The undertaking is accepted.

(L) Rival contentions of the parties on the amount of royalty and security to be determined as well as the date from which such royalty and security may become payable, as also the entitlement of Respondent No.1(b) to use the name "Roopsons" and any amount payable for such user, and withdrawal by the Applicant to be permitted from the deposits made by Respondent No.1(b), are all kept open, to be determined as and when the receiver presents his report in accordance with this order.

6. In view of the disposal of the civil application in the above terms, Court Receiver's Report No. 171 of 2017 is also disposed of. The cost of the report is fixed at Rs. 3000/-. This cost shall be recovered from the amount held by the Court Receiver to the account of the suit.

7. Appeal from Order Nos.797 of 2016 and 798 of 2016 shall appear on board for admission as and when the Court Receiver's report is made before the Court in terms of this order along with such report."

13 This is how by way of ad-interim orders dated 21 July 2017 and 17 September 2019, this Court has permitted Manoj Manilal Gala to occupy the suit

premises as the Agent of the Court Receiver on payment of adhoc royalty of Rs. 300/- per square feet i.e. Rs. 3,75,000/- per month. Plaintiff No.2- Eruch B. Khaver is permitted to withdraw amount of Rs.1,87,500/-per month out of the amount deposited by Manoj Manilal Gala.

14 In terms of directions in paragraph No.5C(ii)(e) in order dated 17 September 2019, M/s. Nadkarni and Associates, the valuer appointed by this Court for assessment of fair rent of the suit premises, has prepared report dated 23 October 2019 quantifying the royalty at the rate of Rs.2,52,000/- per month and security of Rs.7,56,000/-. The report of the valuer is filed on record by the Court Receiver vide Report dated 22 November 2019.

15 Both Appellant as well as Plaintiff No.2 have disputed the valuation of M/s. Nadkarni & Associates. Appellant has relied on two valuation reports of Shri Avinash Pendse suggesting royalty of Rs.1,18,637.50 per month (@ 94.91 square feet per month) and security deposit of Rs.4,74,550/- and of Shri Ravi Redij of Impact Designs Group suggesting the royalty of Rs.1,38,000/- per month (@138.30 square feet per month) and security deposit of Rs.4,14,000/-. On the contrary Plaintiff No.2 relies on valuation report of Mr. V.K. Lad suggesting royalty of Rs.8,30,000/- per month (@664.63 square feet per month) and security deposit of Rs.24,90,000/-.

16 Before proceeding further to record submissions of the learned Counsel appearing for parties, it is necessary to observe that the Plaintiff No.2 has accused Appellant of breaching the order passed by this Court on 17 September 2019 by which Appellant was directed to pay ad hoc royalty of Rs.3,75,000/- per month. Appellant deposited amount of Rs.22,50,000 towards ad hoc royalty for the period October 2019 to March 2020. Since April 2020, Appellant stopped paying the amount of ad hoc royalty to Plaintiff No.2. Appellant moved a praecipe before this Court on 23 April 2020 seeking reduction/waiver of adhoc royalty during lockdown period. However this Court directed that the regular court would take up the issue with regard to payment of royalty. Plaintiff No. 2 has filed IA No. 4092 of 2023 for direction to deposit the arrears of royalty with interest. In pursuance of this Court's order dated 26 September 2023, the Appellant has deposited an amount of Rs.50,00,000/- towards arrears of ad hoc royalty and according to Plaintiff No.2, the arrears of ad hoc royalty is to the tune of Rs.1,18,75,000/- as on 31 December 2023.

C. SUBMISSIONS

17 Mr. Godbole, the learned senior advocate appearing for the Appellant would submit that the impugned order of the City Civil Court allowing the Notice of Motion No.4443 of 2015 in terms of prayer clauses (d) and (e) suffers from a clear error as the suit business has always been conducted by the Appellant/his father since inception. That the arrangement of partnership was merely camouflage and the real intention of the parties was to create sub-tenancy in respect of the suit premises in favour of Manilal Gala. Relying on Section 46 of

the Partnership Act 1932, he would contend that every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of debts and liabilities of the firm. That Manilal Gala is also the owner of the building in which the suit premises is situated. That in such circumstances, the City Civil Court could not have passed an order directing removal of possession of suit business from Appellant and appointing Plaintiff No.2 as the agent of the Court Receiver in respect of the suit business. That Plaintiff No.2 has never taken part in the suit business and is incapable conducting the same. Considering this position, this Court appointed Manilal Gala as the agent of the Court Receiver by order dated 13 October 1995 and that the said arrangement is continued for the last 28 long years and did not be disturbed during pendency of the suit merely because of death of Manilal Gala. That after death of Manilal Gala, his son Manoj Manilal Gala has been conducting the suit business and is willing to pay royalty to the other partners. That as per the order of the Apex Court dated 24 November 1996 Manilal Gala was directed to pay to the other partners average of the amount paid in the last three years in terms of the partnership dated 1 April 1990. That therefore, what is required to be paid to the other partners is not rent in respect of the suit premises, but the royalty out of the partnership business. That Plaintiff No.2 is erroneously claiming rent in respect of the suit premises, when his rights, at the highest, would be that of share in partnership business. Mr. Godbole would submit that on account of advent of malls and other modern shopping complexes, the suit business is not able to generate sufficient profits so as to pay ad hoc royalty amount of Rs.3,75,000/- per month fixed by this Court. That during COVID outbreak, the business of the firm has come to standstill and that therefore Appellant needs to be granted waiver for the period from April 2020 to March 2021. Thereafter firm's business was negligible during 2021-22 for which Appellant pleads 50% concession in royalty and after April 2022 he requests for 30% concession in royalty. Mr. Godbole would claim that the firm's turnover has been very low during past 4 years: 2019-20: 49.63 Lakhs, 2020-21: 20.09 lakhs, 2021-22: 30.06 Lakhs, 2022-23 43.17 Lakhs. That the Appellant is willing to pay royalty @ Rs.1.50,000/- during pendency of suit,. Alternatively, he would submit that as per Supreme Court's earlier order, Appellant is willing to pay 10% of net profit to each of the three partners (total 30%). Mr. Godbole would submit that the hearing of the suit be expedited by permitting the Appellant to continue as agent of Court Receiver upon payment of monthly royalty of Rs.1,50,000 or 30% of net profit of the firm.

18 Per contra, Mr. Tamboly, the learned counsel appearing for Respondent No.2/ Plaintiff No.2 would oppose the Appeals submitting that having breached the order of this Court (passed on agreement), Appellant cannot be heard by this Court and the Appeals deserve to be dismissed. That Plaintiff No.2 is entitled to seek possession of the suit premises. He would submit that the suit premises were brought into partnership by the father and uncle of the Plaintiff No.2 as their capital contribution. That as per the clause 7 of the Partnership Deed, the

trade name 'Roopsons' and suit premises were allowed to be used on leave and license basis during subsistence of the partnership and that upon dissolution of the partnership firm, the suit premises would stand returned to the family of Plaintiff No.2 together with trade name and goodwill of the partnership business. That the duration of the partnership has come to an end on 31 March 1994 and therefore the suit premises together with the trade name and goodwill of the firm must be restored to the family of Plaintiff No.2. That suit filed by Manilal Gala in the Small Causes Court making false claim of tenancy has been dismissed by order dated 9 April 2019.

19 That once the claim of Manilal Gala and Appellant about tenancy/sub-tenancy in respect of the suit premises is rejected, they do not have right to hold on to the possession of the suit premises. Since the Appellant has no right to continue in possession of the suit premises, the possession thereof must be delivered to Plaintiff No.2. Additionally, the preliminary issue sought to be raised by Manilal Gala about jurisdiction of Civil Court on the ground of partnership deed being a camouflage and Manilal Gala being tenant/sub-tenant has also been rejected by City Civil Court's order dated 19 May 2014, this Court's order dated 21 January 1995 and the Supreme Court's order dated 13 April 2015.

20 Mr. Tamboly would further submit that the Appellant has repeatedly breached orders passed by this Court. That despite agreeing to pay ad hoc royalty of Rs.3,75,000/- for continuing to carry on the suit business and inviting order of this Court dated 17 September 2019 Appellant has stopped depositing any amount of royalty after March 2020 and is in arrears of ad hoc royalty of Rs.1,18,75,000/- as on 31 December 2023. That Appellant has neither capacity nor intention to pay the ad hoc royalty determined by this Court and therefore Plaintiff No.2 is required to be appointed as agent of the Court Receiver by upholding the order passed by the City Civil Court.

21 Mr. Tamboly would alternatively submit that in the event this Court permitting the Appellant to continue as agent of Court Receiver, the Appellant must be made to pay royalty of Rs.8,30,000/- per month. He would place reliance on valuation report of Mr. V.K. Lad, Government Approved Valuer who has taken into consideration the license fees payable in respect of the shop in the vicinity. Mr. Tamboly would submit that the suit premises is situated at a strategic location on Warden Road (Bhulabhai Desai Road) at Breach Candy and would fetch rent @ Rs. 600- 700 per square foot per month. That the valuation of M/s. Nadkarni & Associates @ Rs.200/- per square foot per month is based on mere conjunctures by ignoring the comparable instances in the vicinity. That the said valuer has disregarded the instances in the same building provided by Plaintiff No.2 and has erroneously taken into consideration the instances in the locality, which are not comparable. In support of his contentions Mr. Tamboly would rely upon judgment of this Court in Super Max International Private Limited vs. State of Maharashtra, 2009 (2) Mh.L.J. 134 as upheld by the Apex Court in State of Maharashtra vs. Super Max International Private Limited, (2009) 9 SCC 772 holding that the

return on leave and license basis would not be less than 6% of the value of the property as per ready reckoner rates. He would also rely upon judgment of this Court in Sanjeev alias Sanjay Subhash Grover vs. Vertex Trading Co. 2013 SCC OnLine Bom 1199 holding that the royalty can be fixed in reference to valuation reports and ready reckoner rates. He would pray for dismissal of the Appeals.

D. REASONS AND ANALYSIS

22 Suit No.3699 of 1995 filed in this Court, which is transferred to City Civil Court and renumbered as Short Cause Suit No.109070 of 1995, is filed by Boman Irani and Eruch Khaver against two partners Manilal Gala and Khodadad Irani seeking a declaration that the partnership firm stood dissolved as on 31 March 1994 and for possession of the suit premises and appointment of Court Receiver. In the Suit, said Boman Irani and Eruch Khaver filed Notice of Motion No. 2737 of 1995 seeking appointment of Court Receiver in respect of the firm and suit premises. Single Judge of this Court passed order dated 11 October 1995 in the said Motion appointing Court Receiver. In Appeal, Division Bench of this Court modified the order dated 11 October 1995 and directed that Manilal Gala be appointed as an agent of the Court Receiver in respect of the partnership firm and the suit premises without any security or royalty. The Apex Court modified the order of the Division Bench by its order dated 24 November 1996 and directed that while Manilal Gala can continue as agent of the Court Receiver, he shall pay to the three other partners Boman Irani, Eruch Khaver and Khodadad Irani average of the amount paid in the last three years in terms of the partnership deed dated 1 April 1990. This arrangement continued till Manilal Gala passed away on 4 August 2015. In the meantime, the other two partners Boman Irani and Khodadad Irani also passed away on 2 January 2002 and 20 August 2015 respectively. Since Manilal Gala, who acted as agent of the Court Receiver since 1995, passed away on 4 August 2015, the surviving partner Eruch Khaver sought his own appointment as agent of the Court Receiver by filing Notice of Motion No.4443 of 2015. Manilal Gala's son Manoj Gala (Appellant) filed Notice of Motion No.4970 of 2015 seeking his own appointment as agent of Court Receiver. By common impugned order dated 17 May 2016, the City Civil Court has rejected Appellant's Notice of Motion No.4970 of 2015 while partly allowing Notice of Motion of Eruch Khaver (Plaintiff No.2) by directing Court Receiver to take back possession of the suit business and suit premises and to appoint Eruch Khaver as the agent of the Court Receiver. The present two Appeals are filed by Manoj Gala challenging the common order dated 17 May 2016 rejecting his Motion for appointment as agent of the Court Receiver and partly allowing the Motion of Plaintiff No.2 directing his appointment as agent of the Court Receiver.

23 Thus the arrangement of Manilal Gala continuing as agent of the Court Receiver and conducting suit business in the suit premises made in the year 1995, has been disturbed 21 years later on 17 May 2016, on account of the impugned order of the City Civil Court.

24 When the Appeals came up before this Court on 25 July 2017, this Court

observed that the Gala family was maintaining and operating the business of the firm in suit premises for several years. This Court therefore directed appointment of Court Receiver for taking symbolic possession of the suit premises with further direction to enter into agency agreement with Manoj Gala (Appellant). The Court Receiver was directed to make a report about royalty and security payable by appointing a valuer. When the Appeals further came up before this Court on 17 September 2019, this Court recorded agreement of both the parties and fixed adhoc royalty at the rate of Rs.300/- per square foot per month i.e. Rs.3,75,000/- per month. This Court further directed appointment of M/s. Nadkarni & Associates to assess fair market rates and to suggest monthly royalty and security for agency of the suit premises. Accordingly, M/s. Nadkarni & Associates has submitted a report dated 23 October 2019 quantifying the royalty at the rate of Rs.200/- per square feet per month i.e. Rs.2,52,000/- per month and security equivalent to three months' compensation of Rs.7,56,000/-.

25 Before I go into the issue of correctness of the royalty suggested by the Court appointed valuer M/s. Nadkarni & Associates, it is necessary to first decide the issue as to whether Appellant can be permitted to act as agent of the Court Receiver during pendency of the suit. Mr. Tamboly is at pains to point out the partnership has been dissolved on 31 March 1994 and since the suit premises are in the form of capital contribution by the other partners, the suit premises must be restored to Plaintiff No.2 during pendency of the suit. Inviting my attention to the Partnership Deed, Mr. Tamboly has further submitted that even use of the trade name 'Roopsons' is on a license basis to the partnership firm and upon its dissolution, even the trade name alongwith all goodwill must be restored to the Plaintiff No.2. However as observed above, despite dissolution of the partnership on 31 March 1994, Gala family has been permitted to conduct the suit business since the year 1995 on account of the orders passed by this Court and by the Apex Court. The agency arrangement made in favour of Manilal Gala continued for 20 long years until Manilal's death on 4 August 2015. The current controversy has arisen only on account of Manilal's death, when the Plaintiff No.2 made an attempt to seek conduct of suit business and possession of the suit premises. Though his Notice of Motion is partly allowed by the City Civil Court by appointing him as agent of the Court Receiver, the said directions have not been executed on account of the orders passed by this Court in the present Appeals appointing Manoj Manilal Gala as agent of the Court Receiver. This is how Gala family have been conducting the suit business in the suit premises despite dissolution of the partnership on 31 March 1994 for the last several decades. I do not see any reason why this arrangement should be disturbed during pendency of the suit. Instead the suit is required to be taken up for hearing which is pending for last 28 long years. I am therefore of the view that the arrangement of Gala family conducting the suit business need not be disturbed during pendency of the suit.

26 Since the suit business is being conducted by Gala family for the last several decades, it would otherwise not be prudent to permit Plaintiff No.2 to conduct

the business during pendency of the suit. Instead, the City Civil Court can be requested to take up the suit for disposal in an expeditious manner and in the meantime the Appellant can be permitted to continue with the agency arrangement in respect of the suit business. To this extent, the order passed by the City Civil Court appointing Plaintiff No.2 as agent of the Court Receiver is unsustainable and liable to be set aside. It is however clarified that this arrangement is without going into merits of the dispute about dissolution or existence of partnership and is made only in the light of Gala family conducting the business for substantially long time.

27 The next issue is about fixation of royalty and security payable by the Appellant for conducting the suit business in the suit premises. This Court has fixed adhoc royalty of Rs.3,75,000/- per month with liberty to Plaintiff No.2 to withdraw 50% of such adhoc royalty. This arrangement has continued since 17 September 2019. M/s. Nadkarni & Associates had submitted a report suggesting royalty at the rate of Rs.200/- per square foot (Rs.2,52,000/- per month) and security equivalent to three months' royalty of Rs.7,56,000/-. Both the parties have seriously disputed the amount of royalty suggested by M/s. Nadkarni & Associates. According to Plaintiff No.2, the suit premises would easily fetch monthly license fees of Rs.8,30,000/- (@ Rs.664.63 per sq ft). On the contrary, according to Appellant, the monthly license fees payable in respect of the suit premises cannot be higher than Rs. 94.91 psf or Rs.138.30 psf. On the basis of these rates, Appellant has suggested monthly royalty of Rs.1,50,000.

28. I have gone through the report of M/s. Nadkarni and Associates. The valuer has taken into consideration valuation reports submitted by the rival parties and the instances of leave and license agreements of premises in the locality. It has rejected the valuation suggested by Mr. V.K. Lad (valuer of Plaintiff No.2) on the ground that the instance cited by him suggesting license fees (@ 732/- psf) as one off incident pertaining to the past period. After considering the instances in the locality, M/s. Nadkarni & Associates has suggested royalty @ Rs. 200/- psf per month. In this regard, it would be apposite to reproduce paragraphs 6 to 10 of the valuation report of M/s. Nadkarni & Associates as under:

'6: Approach to the Valuation:

(a) Our approach to this valuation based on the directions of the Hon'ble Court and the various contentions of both parties as listed above is as follows:

i. The Order dated 17 September, 2019, mentioned at 1(a), above directs us to assess "the fair rent of the suit premises described above for being fixed as monthly royalty and also for determining the value of security for the agency of the suit premises." Accordingly it is understood that valuation of the premises and not the business that is being conducted therein is to be carried out.

ii. The Order also directs us to take into account the ready reckoner rates. However, the ready reckoner prescribes only the capital value of premises and not the rental value and also does not indicate any ratio between the two.

iii. While valuing commercial premises for fixing the royalty to paid for use and occupation thereof, the limitations of a certain nature of business cannot be considered. It is obvious that when other more lucrative businesses are legally permissible and commercially viable in the same premises, the owner of such premises would look to let out the premises to the business willing to pay the highest rent.

iv. Out of the two groups of parameters as classified at 5(a) above, Group I pertain to valuation of the business, while Group II pertain to valuation of the premises, For the same reasons, out of the two parameters suggested at 5(c)(v) above, the nature of business would be classified in Group I, while size of the premises would be classified in Group II. Hence only the parameters classified in Group II have been considered for this valuation.

v. The documents mentioned at 5(b) (i) to (iii) above, being dated from 2011 to 2016, are too old to be considered to the date of this valuation;

vi. The valuation report pertaining to the suit premises mentioned at 5(a)(iv) above is the opinion of an independent professional, and with due respect to Mr. V. K. Lad, who is a senior and respected valuer, we would prefer to rely on our own independent judgement;

vii. The Leave and License Agreement mentioned at 5(b)(v) above is obviously a one-off case with unusually high rental and cannot be considered as a general indicator;

viii. The higher footfalls admitted in case of the three more successful establishments mentioned at 5(c)(i) above indicate that footfalls are more a factor of the business rather than the premises;

ix. The contention made at 5(c)(ii) above is not found in any of the two Orders of which copies are furnished to us;

x. During the joint hearing mentioned at 4(c) above, we had asked for written opinion of the many valuers consulted to be shared. So far the undersigned has received by 'WhatsApp' from Defendant 1(b), a screenshot of a message from Mr. Avinash Pendse, also a senior and respected valuer, who opines "in fact all these factors are considered for business valuation purpose but this is not considered for land and building valuation. However during valuation of a showroom sale, business valuation has to be considered." The factors referred to by Mr. Pendse, which would have been contained in the query raised by the party, have not been conveyed to us. Yet it is obvious that Mr. Pendse agrees that business valuation differs from valuation of land and buildings and that certain factors that are relevant to the former may not be relevant to the latter. It is not clear if the term "showroom sale" refers to sale of a going concern including the premises, in case of which the business valuation would have to be considered;

xi. Both valuation reports of Mr. V. K. Lad furnished by the Advocates for the Plaintiffs, have not been considered for reasons already stated above.

7: Disclaimer:

(a) This valuation report has been prepared on the basis of our understanding of the instructions contained in the Order and the approach detailed above. In case the Hon'ble Court directs us that our understanding is incorrect, or that a different approach needs to be taken, this valuation would vary accordingly.

8: Arriving at the Rate for Royalty & Security:

a) Based on such understanding and approach, we would assess the royalty and security in respect of the suit premises, by comparing with prevailing rates of compensation and security in case of 'leave & license' in case of comparable commercial premises in the locality.

(b) For ascertaining the prevalent rates of compensation and security for comparable commercial premises in the locality, we arranged to take search in the instances of 'leave & license' of commercial premises in the locality, registered with the Sub-Registrar of Assurances. An extract of the instances of 'leave & license' obtained are annexed to this report, marked 'Annexure-III'.

(c) Four out of the eight instances cited pertain to small premises with areas ranging from 145 to 275 Sq. Ft., commanding very high rates of compensation ranging from Rs. 475 to Rs. 731 per Sq. Ft. per month.

(d) Two other instances cited pertain to premises with areas of 376 and 390 Sq. Ft., commanding rates of compensation of Rs. 377 and Rs. 282 per Sq. Ft. per month, respectively.

(e) The remaining two instances cited pertain to premises with areas of 590 and 800 Sq. Ft., commanding lower rates of compensation of Rs. 267 and Rs. 213 per Sq. Ft. per month, respectively.

(f) Thus there is a clear correlation between the size of the premises and the rate of compensation, where smaller premises command higher rates of compensation. However, the decline in rate against area is sharper at the lower end of the curve, and flattens out as the size of the premises increases.

(g) Considering the above instances and factors, we would suggest the royalty for the suit premises at flats at Rs.200/- per Sq. Ft. per month.

(h) It is also prevalent practice for licensors to retain an interest free security deposit to cover for defaults in timely payment of compensation as also as deterrent against any damage to the premises by the licensee. It is observed from the instances cited that the amount of security retained ranges from 3 to 6 times the monthly compensation. Considering the security of the directions of the Hon'ble Court enhancing timely payment of the compensation, we would suggest an amount equivalent to 3 months compensation as security for the suit premises.

9: Correlation with the Parameters Suggested:

(a) The parameters classified into Group II at, which have been considered as relevant for reasons explained above, have been factored into this valuation as follows:

i. Movement Pattern : while such patterns may be more relevant to malls, where vantage placement near lifts or escalators offer an advantage vis-à-vis movement patterns, the suit premises is fronting on to a public road, affording visibility to all such premises, and hence should not have a bearing on the valuation;

ii. Look and size: It is prevalent practice for premises such as these to be let out in bare and unfurnished condition. The look of the establishment - essentially the interior fit-out including the shop front - would be the responsibility of the licensor, and hence cannot be considered to be relevant to this valuation. The size of the premises, however, is a major factor as described above, and has been considered while working out the valuation.

iii. Economic conditions: This is undoubtedly a major factor affecting the valuation, and hence all indicators cited by the parties which are more than a year old have been ignored as they would not be in tune with the present economic conditions and outlook.

10: Quantifying the Royalty and Security:

A: Royalty:

1,261.40 Sq. Ft. @ Rs.200/-

per	Sq.	Ft.	per	month
:				

Rs.2,52,280/- per month

SAY : Rs.2,52,000/- per month

B: Security:

: Rs.7,56,000/-

Equivalent to 3 months compensation'

29 M/s. Nadkarni & Associates has been appointed by this Court to assess the royalty and security payable by the Appellant for acting as agent of the Court Receiver. The selection and appointment of M/s. Nadkarni & Associates is by consent of both the parties. The said valuer has taken into consideration the valuation reports relied upon by the rival parties. It has also heard the rival parties and has independently taken into consideration instances in the locality. I therefore do not find any reason not to accept the amount of royalty suggested by the said valuer. In my view therefore, royalty at the rate of Rs.200/- per square ft per month i.e. Rs.2,52,000/- per month suggested by M/s. Nadkarni & Associates would be the correct amount of royalty which should be paid by the Appellant during pendency of the suit towards agency arrangement. Additionally,

the Appellant must also pay security amount of Rs.7,56,000/- as suggested by the Court appointed valuer.

30 The next issue is about the date from which the royalty of Rs.2,52,000/- per month should be paid by Appellant. The amount of Rs.3,75,000/- fixed by this Court was 'adhoc royalty'. The amount of adhoc royalty was fixed awaiting receipt of final valuation report from M/s. Nadkarni & Associates. Since this Court has accepted the amount of royalty suggested by M/s. Nadkarni & Associates, the same would be from the month of September 2019 onwards. This Court has already directed in para 5(G) of order dated 17 September 2019 that the security amount deposited by the Appellant would be treated as adhoc security to be adjusted in accordance with the amount that may be fixed by this Court after receipt of the valuer's report.

31. Appellant has prayed for waiver of royalty for the period April 2020 to March 2021 on account of partnership firm not doing any business on account of lockdown. The royalty payable for agency agreement will have to be connected with the partnership business. This was done by the Apex Court by Order dated 24 November 1995, when Manilal Gala was directed to pay to the other partners average amount under the partnership deed during past 3 years. Taking judicial note of the fact that all shops were directed to be kept fully or partially shut during various the lockdown periods, it cannot be denied that Appellant may not have been able to do much business during the period April 2020 to March 2021. Appellant has prayed for concession post April 2021 as well on account of partial restrictions due to various waves of COVID-19 outbreak. In my view, ends of justice would meet if some if royalty fixed by this Court is reduced by 50% for the period during April 2020 to March 2021 to average out the losses suffered by the firm during COVID-19 outbreak.

E. ORDER

32 I accordingly proceed to pass the following order:

i) Order dated 17 May 2016 passed by the City Civil Court in Notices of Motion No.4443 of 2015 and 4970 of 2015 is set aside.

ii) The Appellant shall continue to act as agent of the Court Receiver for conducting the suit business in the suit premises upon deposit of royalty at the rate of Rs. 2,52,000/- per month and security of Rs.7,56,000/-.

iii) The Appellant shall deposit in this Court security of Rs. 7,56,000/-and royalty as follows:

(a) Rs.2,52,000/- per month for period between September 2019 to March 2020;

(b) Rs.1,26,000 per month for period between April 2020 to March 2021;

(c) Rs.2,52,000/- per month for period from April 2021 onwards.

iv) Such deposit be made within a period of eight weeks from the date of this

order by adjusting the amounts already deposited by the Appellant in this Court.

v) The Respondent/Plaintiff No.2 is permitted to withdraw 50% of the amount so deposited by the Appellant in this Court.

v) Failure on the part of the Appellant to deposit the royalty and security as directed above within the time stipulated shall result in revival of the order dated 17 May 2016 passed by the City Civil Court.

vi) The City Civil Court is requested to expedite the hearing of the Suit No.109070 of 2015 and to make an endeavor to decide the same as expeditiously as possible, preferably within one year.

33 Both the Appeals, Civil Applications, Interim Applications and Court Receiver's Report are disposed of accordingly.