

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO (OS) No. 168/2009 & CM 1497/2009 in FAO(OS) 448/2008**

Reserved on : May 26, 2009

Date of decision : July 03, 2009

1. FAO (OS) No. 168/2009

DTC

...Appellant

Through: Ms. Avnish Ahlawat, Advocate.

VERSUS

M/s INTERNATIONAL AVENUES

....Respondents

Through: Mr. A.S.Chandioke, Sr. Advocate with
Mr. Maniktala, Mr. Alok Tripathi,
Advocates.

2. CM 1497/2009 in FAO(OS) 448/2008

DTC

...Appellant

Through: Ms. Avnish Ahlawat, Advocate.

VERSUS

M/s INTERNATIONAL AVENUES

....Respondents

Through: Mr. A.S.Chandioke, Sr. Advocate with
Mr. Maniktala, Mr. Alok Tripathi,
Advocates.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see
the judgment?

No.

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes.

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JUDGMENT

VALMIKI J.MEHTA, J.

1. By this common order two proceedings are being decided. The first one is FAO(OS) 168/2009 and the second is CM 1497/2009 in FAO(OS) 448/2008. FAO(OS) 168/2009 has been filed against the order dt 2.3.2009 whereby the respondent herein was allowed, without notice to the appellant herein, to withdraw the OMP 452/2008 which was filed before the learned Single Judge of this court by the respondent under Section 9 of the Arbitration and Conciliation Act, 1996 and without any directions for restitution of the benefit derived by the respondent under the ex parte injunction order dt 29.8.08 passed in favour of the respondent. CM 1497/09 seeks revival of the appeal being FAO(OS) 448/08 and which FAO(OS) 448/2008 was filed by the appellant against the grant of the ex parte injunction order dated 29.8.2008 and which was not pressed after the orders were reserved by the learned Single Judge on the application of the appellant under Order 39 Rule 4 CPC.

2. Both these appellate proceedings arise out of and relate to the original OMP 452/2008 filed by the respondent before the learned Single Judge of this court in the original side. In the OMP 452/2008, the respondent prayed

for the relief of injunction for restraining the appellant herein from interfering in any manner in the display of commercial advertisements of the respondent on the Bus Queue Shelters (BQSs) and Time Keeping Booths (TKBs) displayed by the respondent in the four zones of Delhi namely Shahdara (N) 1, Shahdara (S)-1 and West Zone-II and the Rohini Zone. The respondent is an advertising agency engaged in the business of outdoor publicity on the sites allotted by various government agencies including the appellant. The respondent was a successful bidder with respect to the said zones and was granted the sole rights to display the advertisements on the BQSs and TKBs of the appellant for a period of 3 years from 16.9.2005 so far as the Shahdara and the West Zone is concerned, and from 27.12.2005 with respect to Rohini Zone. There were various other earlier disputes between the respondent and the appellant which had earlier also resulted in filing of OMPs by the respondent in this court being OMP 465/2005, 466/2006 and OMP 353/2008. OMP 353/2008 and in which the respondent had failed to secure any interim relief was dismissed as withdrawn on 6.8.2008, just 20 days before the subject OMP 452/2008 was filed.

3. The respondent in OMP 452/2008 alleged certain breaches on behalf of the appellant herein, inter alia, pertaining to missing/non-existing shelters, entitlement to its claims seeking adjustment for alleged excess amount paid, seeking adjustment of the security amount lying deposited with the

appellant. Since the appellant had threatened to terminate the contract on account of breaches by the respondent No.1 in payment of the licence fee, this resulted in filing of the OMP 452/2008 on 28.8.2008. As already stated, an OMP 353/2008, was dismissed as withdrawn barely around a fortnight before the filing of the OMP 452/2008.

4. OMP 452/2008 came up before the court for admission on 29.8.2008 and on which date the learned Single Judge of this court by an ex parte order directed that the appellant herein shall remain restrained from removing commercial advertisements of the respondent from the Bus Queue Shelters and the Time Keeping Booths in the four zones already mentioned. It may be noted that the order of injunction was not conditional upon payment of licence fee by the respondent during the operation of the restraint orders, i.e., the respondent was allowed the benefit of display advertisements on the BQs and TKBs and earning revenue therefrom without fulfilling its corresponding contractual obligation for payment of the licence fee with respect to the BQs and TKBs. Being aggrieved by the ex parte order dated 29.8.2008, the appellant preferred FAO(OS) 448/2008 in this court. Before filing the appeal on 22.10.2008, the appellant had preferred an application under Order 39 Rule 4 CPC for vacation of the ex parte injunction vide its I.A 1178/2008 and which application came before the learned Single Judge on 24.9.2008. No interim orders were granted and simply notice was issued in the said I.A for 16.10.2008

and even on 16.10.2008, the matter was not heard *on account of the reply of the respondent herein being not on record* and the matter was adjourned to 19.11.2008. The FAO (OS) 448/2008 filed against the ex parte order dated 29.8.2008 was firstly listed on 10.11.2008 and ultimately disposed of by this court by its order dated 26.11.2008 recording that arguments have been concluded before the learned Single Judge in the appellant's application under Order 39 Rule 4 CPC. Liberty was however given to the appellant to take recourse to whatever legal remedies which were available to it.

5. After the orders were reserved by the learned Single Judge in OMP 452/2008 on 24.11.2008, no orders however came to be passed, and then the OMP 452/2008 was suo moto listed by the learned Single Judge on 2.3.2009 for directions. OMP 452/2008 was dismissed as withdrawn as a statement was made by the respondent that the petitioner (respondent herein) desired to withdraw the petition, firstly, as the contract in question has come to an end on 31.3.2008 (sic 27.12.2009) and the petitioner had removed himself from the site and secondly, a Dispute Settlement Committee has been constituted by the respondent (appellant herein).

6. The appellant thereafter filed the FAO(OS) 168/2009 seeking quashing of the order dated 2.3.2009 whereby the respondent herein was allowed to withdraw OMP 452/2009 without passing any directions of

restitution that the respondent shall pay licence fee for the period for which it had used the sites for advertisements pursuant to the ex parte injunction order dated 29.8.2008.

7. We, are therefore, called upon to decide the following aspects : -

(i) Whether a petitioner who has obtained ex parte orders and enjoyed the benefit thereof can be permitted to withdraw his petition without directions for performance of his contractual obligations and restitution of the benefit which the petitioner has received pursuant to interim orders in his petition;

(ii) Whether compensation can be granted by this court or in other words can the court order restitution of the benefit received under interim orders in a petition which has been voluntarily withdrawn by the petitioner;

(iii) Whether the appellant is entitled to file and seek orders in CM 1497/2009 although the main appeal was disposed of vide order dated 26.11.2008?

8. The principle of law is well established that where proceedings filed by any person have come to an end whether by withdrawal or by the same being dismissed then such person is bound to restitute the benefit which he has received under interim orders which he was successful in seeking during the pendency of the proceedings. This principle is unexceptionable because

otherwise a person would simply take benefit of interim orders and thereafter not pursue either the interim proceedings or the final proceedings till its conclusion because the same may go against him and consequently he may prefer to quietly withdraw the proceedings and pocket the benefit derived out of interim orders which he had obtained in his favour. In fact, even if, proceedings are not withdrawn but are ultimately unsuccessful i.e., the same are dismissed, even then the principle of restitution will govern the parties.

9. The legal provision dealing with restitution is contained in Section 144 of the Code of Civil Procedure, 1908 and the same reads as under:-

144. Application for restitution.—(1) Where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order].

Explanation.—For the purposes of sub-section (1), the expression “Court which passed the decree or order” shall be deemed to include,—

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

10. The object of Section 144 is that no person can be allowed to retain a benefit derived pursuant to an order/judgment of a court if such order/judgment is ultimately finally not sustained. This provision and the principles of restitution contained therein have been extensively discussed by the Hon'ble Supreme Court in its judgment reported as ***Kavita Trehan Vs. Balsara Hygiene Products Limited, 1994 (5) SCC 380***. In fact, the Hon'ble Supreme Court has laid down that the provision of Section 144 is not exhaustive of the doctrine of restitution and which principle is much larger than as contained in Section 144 CPC. The relevant paras of this judgment are as under : -

“16. The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment. ‘Restitutionary claims are to be found in equity as well as at law’. Restitutionary law has many branches. The law of quasi-contract is “that part of restitution which stems from the common indebitatus counts for money had and received and for money paid, and from quantum meruit and quantum valebant claims”. [See *The Law of Restitution* — Goff & Jones, 4th Edn., page 3.] *Halsbury's Laws of England*, 4th Edn., page 434 states :

“*Common Law*. Any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

For historical reasons, quasi-contract has traditionally been treated as part of, or together with, the law of contract. Yet independently, equity

has also developed principles which are aimed at providing a remedy for unjustifiable enrichment. It may be that today these two strands are in the process of being woven into a single topic in the law, which may be termed 'restitution'."

20. In *Binayak Swain v. Ramesh Chandra Panigrahi*⁵, this Court stated the principle thus : (SCR p. 27)

"The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from."

21. Section 144 CPC incorporates only a part of the general law of restitution. **It is not exhaustive.** (See *Gangadhar v. Raghubar Dayal*⁶ and *State Govt. of A.P. v. Manickchand Jeevraj & Co.*⁷)

22. The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words : "Where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, ..." The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court."

(Emphasis added)

11. The Hon'ble Supreme Court in the decision reported as *South Eastern Coal Fields Limited Vs. State of M.P. 2003 (8) SCC 648* has further reiterated this principal of restitution and in fact, has said that this flows from the fact that an act of the court should do no harm to a litigant. The relevant paras of this judgment are reproduced below.

“25. On the principle which we have upheld just hereinabove, it would not have been necessary to enter into this aspect of the issue, however, it becomes necessary to deal therewith inasmuch as it was submitted on behalf of the consumers/purchasers that their non-payment of enhanced amount of royalty was protected by judicial orders, though of an interim nature, passed by the courts, and therefore, they should not be held liable for payment of interest so long as the money was withheld under the protective umbrella of the court order. Merely because the writ petitions were finally held liable to be dismissed, it cannot be urged that the interim orders passed by the courts were erroneous. Soon on dismissal of their writ petitions, the payment of the enhanced amount of royalty which was disputed earlier was promptly cleared by the writ petitioners and, therefore, their act was *bona fide*. We find no merit in this submission either.

26. In our opinion, the principle of restitution takes care of this submission. The word “restitution” in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see *Zafar Khan v. Board of Revenue, U.P.*¹⁰) In law, the term “restitution” is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (See *Black’s Law Dictionary*, 7th Edn., p. 1315). *The Law of Contracts* by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that “restitution” is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

“Often, the result under either meaning of the term would be the same. ... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed.”

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the

stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

27. Section 144 CPC is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In *Jai Berham v. Kedar Nath Marwari*¹¹ Their Lordships of the Privy Council said: (AIR p. 271)

“It is the duty of the court under Section 144 of the Civil Procedure Code to ‘place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or  reversed’. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved.”

Cairns, L.C. said in *Rodger v. Comptoir D’Escompte de Paris*¹²: (ER p. 125)

“[O]ne of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression, ‘the act of the court’ is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case.”

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (*A. Arunagiri Nadar v. S.P. Rathinasami*¹³). In the exercise of such inherent power the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the “act of the court” embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the

order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. **Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation.** ⁶⁶⁵ **Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced.** We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.”

(Emphasis added)

12. The Supreme Court in the case of *Commissioner of Income Tax Vs. Vinod Kumar Didwania AIR 1987 SC 1260* held that it is an abuse of the process of law where interim injunction is obtained and thereafter benefit is derived of the same by removing the goods of the assessee from the godowns and then withdrawing the writ petition. The Supreme court said that in such a case, without going into the validity of prohibitive order issued by the Income Tax Authority since the process of law was abused for an undeserved advantage, the petitioner was liable to restitute the value of goods which were removed from the godowns taking benefit of the interim orders passed by the court. The relevant paras of this judgment are reproduced below:-

“2. It is obvious from the above narration of facts that strategy of obtaining an ex parte order of injunction from the Court and thereafter removing the goods from the three godowns on the strength of this ex parte order of injunction and then withdrawing the Writ Petition was adopted by the 1st respondent with a view to defeating the prohibitory orders issued against the 1st

respondent and taking the goods out of the reach of the Income – tax Authorities. We are not concerned whether the prohibitory orders issued by the Income-tax Department were valid or not. It is enough that the prohibitory orders were there and by using this stratagem the goods were removed from the three godowns and the prohibitory orders were set at naught.

3. The learned Attorney General appearing on behalf of the Deputy Director of Inspection submitted before us that the amount representing the value of the goods removed from the three godowns should be restituted by the 1st respondent since the goods were removed by him under an ex parte order of injunction obtained from the High Court of Calcutta in the Writ Petition filed by him and the nefarious purpose of filing the Writ Petition having been accomplished by removal of the goods, the writ petition was withdrawn. There is great force in his submission of the learned Attorney General. There is no doubt that the 1st respondent has abused the process of the Court for securing removal of the goods from the three godowns and he cannot be allowed to retain that advantage.”

(Emphasis added)

13. Before us, both the parties have raised claims and counter-claims with regard to amounts which are due to them. On one hand, appellant has sought to justify its claims by strongly disputing the case of the respondent, on the other hand the respondent has sought to justify its claims and stand and has sought a decision from the court that the injunction order which was passed in favour of the respondent on 29.8.2008 was valid and in fact, the respondent was not only entitled to benefit and certain payments, adjustments of security deposits and other aspects, but has further contended that no amount towards licence fee was therefore liable to be paid by the respondent to the appellant and

it was claimed that in fact the respondent was entitled to refund of amount from the appellant.

14. We feel that in a case such as the present, we are not required to go into the merits of the disputes between the parties, which would be the subject matter of arbitration as per the arbitration clause between the parties, and which disputes/claims will ultimately be decided by the arbitrator. We for the present are only concerned with the situation which has arisen because the respondent had a contractual liability to pay licence fees for the period it enjoyed the benefit of displaying its advertisements on the subject BQs and TKBs and which it did not by virtue of the ex parte injunction order granted in its favour, and, in proceedings which were simply withdrawn i.e. without inviting any decision thereon. If the respondent had a valid case in which it felt it may have succeeded then, it was bound to have invited a decision on its injunction application being OMP 452/2008 and it should not have withdrawn the same, merely because it was listed by the learned Single Judge suo moto for directions. We do find that the explanation given by the respondent that it had argued the matter and the orders were not being pronounced by the learned Single Judge and since its contract had come to an end and the other disputes were referred to the Conciliation Committee, therefore, it withdrew the OMP 452/2008, as an honest explanation, because, had that been so the respondent

inter alia would have submitted to the court on 4.3.2009 that since the matter is listed for directions suo moto by the court, therefore, court notice be issued to the respondent therein before it was allowed to unconditionally withdraw the petition. Not only this, the explanation of the respondent herein is not so innocent becomes clear from the fact that the order dated 4.3.2009 does not show that the respondent informed the court that it had taken benefit of the interim order by earning revenues from the sites but has not paid the licence fees for the duration of the injunction period to the appellant. We also feel that courts ought to be slow in granting an injunction in cases of highly disputed questions of fact in favour of a person who claims adjustments on account of his payments to the other party and the effect of such an injunction would be that not only the said claim of excess payment is adjudicated in its favour by the interim injunction application, but also, the injunction granted in fact amounts to execution of such an adjudication whereby it takes benefit of its contention/averment that it can continue to enjoy the benefit of earning revenues by advertisements on the sites and not pay any contractual licence charges for the period of injunction.

15. Accordingly, we hold that any person who withdraws proceedings without seeking adjudication of the same, or equally, even when proceedings are dismissed, such plaintiff/applicant/petitioner is bound to restitute the benefit which it has received under interim orders of the court and a simplicitor

withdrawal of proceedings without restitution of benefit cannot be granted by the court. In fact, even on non-appearance by a person who is the initiator of the litigation, the proceedings need not be dismissed for non appearance or non-prosecution, and the court can and indeed must suo moto ensure that restitution, which the opposite party claims and deserves from the applicants/petitioner/plaintiff who has obtained the interim orders. Since this court has inherent powers of restitution we hold that CM 1497/2009 is maintainable in the disposed off FAO(OS) 448/2008.

16. We find that the simplicitor withdrawal of the OMP 452/2008 by the respondent before the learned Single Judge is an abuse of the process of law and justice more so as the withdrawal was done on a date when a matter was listed (no doubt, suo moto by the learned Single Judge) without notice to the opposite party and especially in the light of the factual position stated above. Accordingly we also hold that the appellant is entitled to the contractual amount of licence fee for the period when the injunction order continued viz from 29.8.2008 till 29.12.2008. There is however a dispute as to the date on which the respondent withdrew from the sites and removed its advertisements. Whereas the respondent contends that it removed the advertisement at the end of the contractual period i.e. 29.12.2008, the appellant contends that the advertisements were not removed till 4.2.2009. Since no evidence has been led before us as to the date on which the respondent withdrew itself from the sites

in question and which will be a subject matter of the arbitration proceedings, we for the present, refrain from any such finding, and only direct that subject to any decision in the arbitration proceedings, that the contractual licence fee be paid by the respondent to the appellant from 29.8.2008 to 29.12.2008 i.e. only till end of the contractual period. If during the arbitration proceedings, the arbitrator comes to a finding that the respondent did enjoy the benefit of the advertisements on the sites in question beyond 29.12.2008, then, the arbitrator will be fully entitled to pass an award for such amount to the appellant for this additional period beyond the contractual period in addition to any Award for claim of interest as claimed by the appellant.

17(i) We therefore direct the respondent to pay within a period of four weeks from today the sum being the amount of contractual licence fees payable for the period from 29.8.2008 to 29.12.2008. The contractual amount of licence fees for this period will be calculated by the appellant and intimated to the respondent within one week. In case of failure of the respondent to pay the amount to the appellant within four weeks the appellant shall be at liberty to execute this order by filing an execution petition and such amount shall be recovered irrespective of any dispute which may be raised by the respondent to such amount before the arbitrator or otherwise. We would clarify that in case ultimately it is found in arbitration proceedings that the respondent was not liable to pay the contractual amount of licence fees for the period from

29.8.2008 to 29.12.2008 then the arbitration will pass an Award inter alia for such amount along with such rate of interest as the arbitrator deems fit.

17(ii) We find the actions of the respondent as a gross abuse of the process of law and impose costs of Rs.1,00,000/-(Rupees one lakh) upon the respondent because it is the illegal action of the respondent in withdrawing the OMP 452/2008 without inviting a decision thereupon that the appeal and the application have been necessitated to be filed.

18. Before parting with the case we may note with concern that the learned Single Judge who had thought it fit to grant an unconditional ex-parte injunction did not however pass any final orders either on the application of the appellant under Order 39(4) CPC and nor on the main OMP 452/2008 even after hearing arguments of the parties and reserving orders. The orders were reserved on 24.11.2008 after hearing the parties and for over three months no orders came to be passed. OMP 452/2008 was thereafter allowed to be unconditionally withdrawn on a date of which the appellant herein had no actual notice as the learned Single Judge listed the matter suo moto on 2.3.2009, the matter being reserved by him for orders. The learned Single Judge ought to have been more conscious of the effect of his various orders particularly when the appellant corporation, a public transport undertaking, had been subjected to revenue deprivation and had been pressing for vacation of the ex-parte unconditional

interim order. Courts ought to be alive to the consequences of its orders in cases such as the present one.

VALMIKI J. MEHTA, J

JULY 3rd, 2009
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MUKUL MUDGAL, J