

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

Reserved on: 29.04.2013
Pronounced on: 04.07.2013

+ **RFA (OS) 116/2011, C.M. APPL. 4178/2012**

M/S. SILICON GRAPHICS SYSTEMS INDIA PRIVATE
LIMITED Appellant

Through: Sh. Rajiv Tyagi, Advocate.

Versus

NIDAS ESTATES PRIVATE LTD. Respondent

Through: Sh. T.K. Ganju, Sr. Advocate with
Sh. Mannmohit. K. Puri, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT

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FACTS

1. The present appeal arises against the decree passed by the learned Single Judge in CS(OS) 1661/2003 and CS(OS) 2108/2011 for the recovery of Rs. 45,23,414/-.

2. The appellant and respondent, both private limited companies registered under the Companies Act, 1956 entered into a license agreement dated 01.09.1995 in respect of premises bearing No 305A and 305B, Embassy Square, 148 Infantry Road,

Bangalore (“suit premises”). The said premises were licensed by the respondent to the appellant company for 36 months, with a condition enabling renewal for 3 further years. The agreement was renewed till 31st August 2001. A security deposit of Rs. 27,45,000/- was paid through cheques to the respondent by the appellant. The agreement expired by efflux of time and the appellant shifted its office from the suit premises.

3. The appellant applied and secured permission from the Karnataka Electricity Board for additional load, for the said licensed premises; it made a refundable security deposit of Rs. 2,02,100/- (in terms of Clause 6 of the license agreement). It also installed standby generating sets and made a refundable security deposit of Rs. 6,25,000/- for maintenance etc. The appellant argued that the respondent opted to retain the additional electricity load and the generating systems installed, and had agreed to reimburse the security deposit paid in this regard by the appellant. On 04.09.2001, the appellant by a letter, called upon the respondent to renew the license agreement or to take back possession of the premises upon refunding the security deposit after adjustments. The respondent, however, did not agree to the terms of the agreement offered for renewal and made a counter offer for which no reply was received from the appellant till 28.09.2001. On 05.10.2001, a meeting was held between the representatives of both parties, the minutes of which is in the record of this Court. The

learned single Judge notes that the parties in the meeting had agreed to as follows:

1. *NEPL acknowledge the receipt of security deposit of Rs. 27,45,000.*
2. *NEPL also has confirmed from Embassy Group, the deposit of Rs. 6,25,000/- for genset paid by SGI to Embassy Group on NEPL's behalf. This amount needs to be refunded to SGI. Embassy Group and NEPL to decide amongst themselves as to who would refund this.*
3. *NEPL have claimed that rent for the month of September, 1995 (Rs.152,500.00 less TDS of Rs.35,075.00) has not been received by them. SGI to reconcile this account by Tuesday the October 9, 2001 and get back to NEPL.*
4. *NEPL has also claimed Rs. 1,37,250.00 being the balance due against arrears received in the month of May, 1998. SGI to reconcile this as well by Tuesday the October 9, 2001 and get back to NEPL.*
5. *NEPL has requested SGI not to surrender the additional electrical load obtained by SGI to KEB since NEPL wants to retain the same, NEPL to apply to KEB for transferring the same from SGI to NEPL. All charges pertaining to this would be borne by the NEPL.*
6. *The vacant possession has already been offered by SGI to NEPL at the end of the license period, against refund of Security Deposit.*
7. *SGI offers the following to NEPL against payment. Amounts to be mutually decided.*
 - *False Ceiling*
 - *Air condition ducting with pipes.*

- *Fire Protection pipes*
- *Electrical Control Panel.*

4. The appellant alleges that subsequent to this meeting too, the respondent did not take possession of the premises and subsequently sent a legal notice dated 27.12.2001 (to the appellant) claiming Rs. 25,29,582.50/- as rent/license fee for the months of September/ October 1995 and September – December, 2001. The appellant replied to the same through a legal notice dated 22.01.2002 where it reiterated its willingness to handover possession of the premises. In a subsequent legal notice dated 14.02.2002, the respondent informed the appellant of taking over possession of the premises by it, using the duplicate keys and the induction of M/s AT&T, a multinational corporation as the new tenant in the premises. Through that notice, the respondent also claimed an additional sum of Rs. 9,58,448/- from the appellant after adjusting the security deposit completely. The appellant alleges that the respondent did not mention anything about the other security deposits it was liable to pay the appellant and did not account for the worth of the furniture and fixtures taken over by the respondent. The appellant contends that the respondent with a *mala fide* intent of appropriating the security deposits and the other deposits worth Rs. 35,72,100/- used the duplicate keys to obtain possession when the appellant was ready to give possession earlier.

5. The respondent filed a suit for injunction against the appellant in the City Civil Court, Bangalore seeking an order of permanent injunction from interfering with the possession of the suit premises. The respondent instituted a Suit No. 1164/2002 claiming a decree for Rs. 9,58,448/- from the appellant. Subsequently, the appellant filed a suit bearing Suit No. 1661/2003 against the respondent seeking a sum of Rs. 45,23,414/-.

6. The learned Single Judge, by its order dated 30.08.2011 decreed the suit in favour of the appellant for a sum of Rs. 20,41,939/- with interest of 6% per annum. Aggrieved by the said order, the appellant has preferred this appeal.

7. The appellant has argued that the impugned judgement is in error of law in proceeding on irrelevant considerations and returning contradictory findings. It is urged that the learned Single Judge erred in placing the burden of proof on the appellant in respect of the alleged unpaid fee of Rs. 1,17,425/- for the month of September 1995 along with an interest of 18% p.a amounting to Rs. 1,28,410/- (from 7.9.1995 to 5.10.2001) out of the security deposit paid by the appellant. Further, it is submitted that the claim relating to September, 1995 is one barred by limitation. It has been urged that the learned Single Judge relied upon certain documents while allowing this claim whereas rejected similar documents for other similar claims.

8. Learned counsel for the appellant argued that the Single Judge failed to appreciate that the onus was upon the respondent to

prove that the license fee of September, 1995 was due and payable (by the appellant) and further contended that the Respondent did not lead any evidence to show that rent was due from September 1995. Further, it was contended that the Single Judge contradicted himself by rejecting the other alleged arrears on license fee stating that the respondent had to lead positive evidence to prove the total amount payable whereas the same was not followed in regard to the license fee payable for September 1995. It was argued that the learned Single Judge wrongly relied upon the minutes of the meeting on 5th October, 2001 for allowing the payment/ adjustment of licence fee relating to September 1995, whereas the appellant had only agreed to reconcile, re-check and confirm if the said amount was paid or not.

9. Learned counsel for the appellant contends that the learned Single Judge had erred in not allowing the refund of Security Deposit of Rs. 6,25,000/- paid to the service provider upon confirmation by the respondent upon the expiry of license that the deposit may not be claimed from the service provider and that they shall refund the amount to the appellant. It was urged that the learned Single Judge failed to appreciate that the respondent did not deny the allegation regarding the payment of Rs. 6,25,000/- in any proceeding before the court. The respondent had used its right under Clause 6 of the agreement to retain the infrastructure for uninterrupted power supply.

10. The appellant also contended that the learned Single Judge erred in holding that it was liable to pay the respondent additional license fee of Rs, 3,73,276/- along with interest at 18% p.a. from 1.10.2001 to 5.10.2001 as it had actually and physically vacated the premises on 31.08.2001 and the respondent had refused to take possession of the vacant premises till 14.02.2002. Further, the grant of interest @ 18% p.a. for the respondents and at 6% p.a. for the appellant has been questioned. It was contended that the Single Judge should have treated the rival claims on equal footing and should have allowed interest of 18% p.a. Lastly, the Appellant contends that the award of license fee with interest at 18% p.a. in favour of the Respondent for June 2001 to August 2001 though the appellant had given notice to the respondent to adjust the aforesaid licence fees against the security deposit in May 2001 itself is erroneous since the amount was with the respondent prior to the expiry of the licence agreement due to efflux of time.

Respondent's Arguments

11. The respondent argued that the appellant never tendered vacant possession of the premises as admittedly fitting and fixtures of the appellant were lying in the suit premises. Further, it is contended in support of the counter claim that the learned Single Judge has failed to hold that the appellant ought to have removed all its goods including fitting and fixtures from the suit premises and in the absence of the same, it cannot be held to have been vacated. Learned counsel for the respondent contends that the

learned Single Judge erred in holding that the vacant premises was offered for possession on 5th October, 2001 when the fittings and fixtures were in the premises and alleged that the appellant offered to the respondent to keep the fitting and fixtures for a sum of Rs. 5,00,000/- on 22.01.2002. It is further contended that the learned Single Judge equated damages for restoration of premises to its original condition to vacating the premises whereas one relates to the damage caused to the premises and the other relates to physically vacating the premises which is *sine qua non* of the license agreement.

12. It was urged that the learned Single Judge erred in holding that in the absence of issue in regard to the institution of the suit by a competent person the court cannot adjudicate on that question; the respondent had led evidence on that. Counsel submits that the facts relating to lack of competence was in the exclusive knowledge of the appellant and hence the learned Single Judge erred in holding the denial for want of knowledge as a ground for not taking the issue for consideration. It is next urged that the impugned judgement erred in holding that the respondent did not prove its entitlement to arrears in rent of Rs. 9,58,448/-. The appellant did not specifically deny that these amounts were due nor did it file any document to prove that it has paid such amounts. The appellant was liable to pay the said amounts along with an interest at 18% p.a. for the period from 01.09.2001 to 14.02.2002. Further, it was argued that the Single Judge erred in holding that the

respondent ought to have offered to return the security deposit after adjusting the arrears of rent when the appellant had not vacated the premises. Counsel also contended that the Single Judge erred in holding that the respondent was liable to pay the security deposit of Rs. 2,02,100/- on the basis of the minutes of the meeting dated 05.10.2001. It was contended that the learned Single Judge placed undue reliance on the authorities and the board resolution filed by the respondent.

Analysis of Arguments

13. The appellant's arguments relating to award for payment of license fee with interest for the period of September, 1995 would be dealt with first. The first question is regarding the placing of burden of proof upon the appellant and the argument that the claim is barred by limitation. This Court sees no merit in these submissions as both parties had agreed in their meeting on October 5, 2001 that the Appellant would reconcile its accounts and write back to the respondent, although the appellant did not agree to any liability. This Court finds no such evidence on record to see that the appellant actually reconciled its accounts and wrote back to the respondent. Further, once there was a claim for recovery of dues, the burden to prove that the rent was paid is on the licensee/tenant and in this case, the appellant has failed to extend such proof. Also, the appellant, in its affidavit through Mr. Sanjay Bhanot, did not claim that no dues were liable to be paid for the month of September, 1995, thereby failing to meet the requirements of Order

8, Rule 3 read with Order 8, Rule 5 of the CPC requiring specific denial of allegations. It was observed by the Supreme Court in *Badat and Co. v. East Indian Trading Co.* AIR 1964 SC 538 that if a denial of fact is not specific but evasive that fact shall be taken to be admitted and in such an event the admission itself being proof, no other proof is necessary. Thus, in the absence of any specific denial, the admission being construed as adequate proof in the case at hand, the learned Single Judge was correct in placing the burden to disprove the same on the appellant.

14. This Court finds no merit in the contention that the claim of the respondent for the month of September, 1995 is time-barred. We agree with the finding of the learned Single Judge that the period prescribed under the Limitation Act bars the remedy of filing suit for recovery of an amount which has become barred by limitation, but it does not bar the claim of an amount which is otherwise due and payable. Further, Clause 3 of the agreement also empowered the respondent to adjust the security deposit against its dues and the same is not barred by limitation. In *Punjab National Bank v. Surendra Prasad Sinha* AIR 1992 SC 1815, a security bond was executed by a guarantor and a Fixed Deposit Receipt was handed over by him which would mature on 1.11.1988. The debt for which the concerned party stood as surety became barred by limitation, on 5.5.1987. After the period of limitation provided for filing a suit against the principal debtor, the bank enforced the security and adjusted the amount due from the FD of the surety.

The surety filed a complaint against the bank alleging offences under Sections 409 and 109/114 of the Indian Penal Code. Dealing with that case the Supreme Court held thus:

“Though the right to enforce the debt by judicial process is barred under Section 3 read with the relevant Article in the Schedule, the right to debt remains. The time barred debt does not cease to exist by reason of Section 3. That right can be exercised in any other manner than by means of a suit. The debt is not extinguished, but the remedy to enforce the liability is destroyed. What S.3 refers is only to the remedy but not to the right of the creditors. Such debt continues to subsist so long as it is not paid. It is not obligatory to file a suit to recover the debt. It is settled law that the creditor would be entitled to adjust, from the payment of a sum by a debtor, towards the time barred debt. It is also equally settled law that the creditor when he is in possession of an adequate security, the debt due could be adjusted from the security in his possession and custody.”

Further, the Kerala High Court in *Thankappan.V.K., Manager vs Uthiliyoda Muthukoya* 2011 (2) KLT 953 held:

“In the case of a debt barred by lapse of time, the right of the creditor to recover the debt is not transferred to or conferred upon the debtor. It becomes dormant and becomes unenforceable in a court of law. That does not mean that debt is destroyed or extinguished and that the creditor is not entitled, under any circumstances, to claim or recover it in any manner whatsoever.”

From the above discussion, it is clear that mere delay does not bar the party of a right to claim it in a form other than by a suit.

That part of the decree was not time barred; the Court finds no infirmity in the impugned judgment on this aspect.

15. The appellant had contended that the Single Judge contradicted his findings by holding that the onus of proof was upon the appellant (to prove that there were no dues for the month of September, 1995) whereas for other dues, he has demanded positive evidence from the respondent. No such contradiction exists in the finding of the learned Single Judge. The appellant did not make any clear denial of liability to pay for the month of September, 1995 and despite having agreed to reconcile accounts, failed to do so. These were relevant facts in placing the burden of proof on the appellant. The learned Single Judge did not fall into error in holding as he did on this aspect.

16. Counsel for the appellant further contended that the learned Single Judge erred in not decreeing the security deposit of Rs. 6,25,000/- paid towards the installation of gen-sets to Embassy Group. It was argued that the respondent exercised its right under clause 6 of the agreement to retain such installations made by the appellant. This Court is unable to agree to this submission as no conclusive evidence was adduced before this court to show that the respondent exercised its option under clause 6 of the agreement. The minutes recorded on October 5, 2001 read as follows:

“2. NEPL also has confirmed from Embassy Group, the deposit of Rs. 6,25,000/- for genset paid by SGI to Embassy Group on NEPL’s behalf. This amount needs to be refunded to SGI. Embassy Group and NEPL to

decide amongst themselves as to who would refund this.”

This was a mere agreement by the respondent to negotiate with the Embassy group to decide whether it would retain the genset or the security deposit of Rs. 6,25,000/- should be refunded to the appellant. This did not impose any liability on the respondent to pay the security deposit as was contended by the appellant. Further, the agreement for installation of the gensets was between the appellant and a third party (Embassy Group); the respondent was a stranger to the agreement. There was no privity of contract between the respondent and such third party; consequently, no liability ensued on the respondent. The appellant also did not lead any evidence that even after the premises were vacated, the deposit was used by the succeeding tenant, as was contended by it. Therefore, the claim for Rs. 6,25,000/- made by the appellant against the respondent was meritless.

17. It was contended that the impugned judgment erred in holding the appellant liable to pay rent till 4.10.2001 whereas it had vacated the premises by 31.08.2001. This contention is not acceptable and has no force, because the appellant by a letter dated 28.09.2001 had called upon the respondent to send a representative in person to take possession of the premises, which clearly showed that complete and unequivocal possession was not given to the respondent. The appellant was well aware of being in the possession of the said premises as of 28.09.2001. There is no infirmity in the findings of the learned Single Judge on this point.

18. On the question of interest, this Court notices that the learned Single Judge granted interest @ 18% from 5.10.2001 to 22.08.2003 (date of the suit) treating all rival rights in equal footing. The interest rate of 6% granted was only in respect of cost, *pendente lite* and future interest, in consonance with Section 34 of the CPC. This Court notices that the award of interest for the period prior to the suit and for a later period, has to be based on exercise of discretion. So long as the Court exercising it is shown to have not judiciously exercised such power, the appellate court would be slow in interfering with the award of the court of first instance. In this case, there is nothing to suggest that such differential treatment for different periods was not based on sound exercise of discretion. The argument on this aspect is consequently rejected. The appellant had argued that the learned Single Judge erred in granting interest at the rate of 18% p.a to the respondent (for dues relating to June to August 2001) while the appellant, through a letter in May, 2001 itself had asked to respondent to adjust the dues with the security deposit. The license agreement clearly mentioned that all dues, adjusted with the security deposit shall be with an interest rate @ 18% p.a. and the said letter mentions nothing about the interest rate, nor was an interest free adjustment agreed to by the respondent. Further, the license agreement makes no mention of an obligation to adjust security against rent for a period mentioned by the appellant and thus, this Court finds that contractually, the respondent was not obliged to adjust the security deposit upon the request of the appellant without

any interest as imposed. For these reasons, the Court finds no need to interfere with this reasoning of the learned Single Judge.

19. The final claim of the appellant is that the learned Single Judge erred in not providing interest in regard to the sum of Rs. 2,02,100/- paid by the appellant in favour of Karnataka Electricity Board for additional electricity. The reasoning behind the said decision of the learned Single Judge seems to us to be unsustainable in law. The learned Single Judge held that the parties during their minutes on 05.10.2001 agreed only to pay the original amount of security deposit and no interest was contemplated. While the same is true, upon denial to pay the same, the court does possess a statutory power under Section 34 of CPC to grant *pendente lite* interest in respect of the dues claimed. We find no reason to deny the appellant interest in the instant matter, when the respondent, despite agreeing to refund the security deposit has failed to do so for over a decade. Thus, we reverse the decision of the learned Single Judge on this issue, and grant interest for the period from 01.01.2001 till date of the decree or date of payment, whichever is later, at the rate of 6% per annum.

20. As regards the cross objections raised of the respondent, learned counsel for the respondent contended that the Single Judge has erred in holding that absolute and vacant possession of the premises was tendered to the respondent on 5.10.2001 whereas the appellant had sent a letter dated 22.01.2002 seeking Rs. 5,00,000/- for the fittings. It is also contended that the learned Single Judge

had erred in holding that the security deposit should have been tendered by the respondent after making legitimate deductions. This Court is unable to agree with this contention as the respondent on 14.02.2002 itself had taken the possession of the property by using duplicate keys with all the fittings still intact whereas it could have done so as early as 05.10.2001. The law ensues upon every claimant, the duty to take due care to reduce and mitigate the damage or injury caused and neglect in that regard, does not confer upon the claimant any special right to claim damages for such default. This is one such case where the respondent deliberately refused to take possession as offered on 05.10.2001 whereas it did so unilaterally on 14.02.2002. If the respondent was not interested in the fittings, it could have either sent a notice to the appellant to remove such fixtures or could have done the same and deducted the cost of doing so from the security deposit. However, the respondent failed to take any such action. Further, it is not the case of the respondent that the fixtures created any damage to the premises even during its claims on 05.10.2001. It is indeed the responsibility of every party to an agreement to perform the same in good faith and the respondent ought to have tendered the security deposit back after making legitimate deductions, including some part for the purpose of removing the fixtures and fittings. The respondent had relied on some correspondence to show that the appellant, despite holding out the offer to vacate, kept corresponding for extension of lease, or for favourable terms. That however, does not in any manner advance the cross objector's case

further, because no mutually agreed terms were arrived at; the offer to hand over possession therefore, stood. For these reasons, we are unable to agree with this contention of the respondent.

21. Learned counsel for respondent contended that the Single Judge had erred in holding that the court could not go into the question of incompetence of the person filing the suit when a question to that effect is not framed by the court. It has been contended before us that lack of knowledge of this fact was the reason behind non-framing of such issue. As a general rule, courts will not go into issues which are not framed by the court unless it has been proven to the satisfaction of the court that a new fact has arisen which, in the interest of justice, should be taken note of by the court and a new issue relevant to the fact should be framed. In the case at hand, we find that no material fact, with detailed averments have been made to the court. A simple statement which is not substantiated in any manner squarely falls within the ambit of Order 8, Rule 3 and it cannot be construed as a substantial allegation before the court. Even presuming lack of knowledge, there was nothing prohibiting the respondent to make an application under Order 6, Rule 17 CPC for amendment of its pleadings to add any new fact which had come to its knowledge. However, no such application has been made in this case. Further, the Karnataka High Court in *B.R. Mulani v. Dr. A.B. Aswathanarayana* AIR 1993 Kant 257 held that whenever a party raises a plea and does not have the issue raised in that regard and

goes to trial and have the matter decided without having an issue raised on the plea, the party is deemed to have given up such plea. The same has also been held in *Chiranji Lal v. Shankar Lal and Anr.* AIR 1951 Raj 36. The non-framing of an issue after raising a plea is thus fatal to the claim as far as the main claim for adjudication has been dealt with by the court and substantial justice has been done. This court therefore affirms the findings of the learned single judge on this point that the court could not have adjudicated upon a question on which no issue has been framed by the court.

22. Learned counsel for the respondent contended that the learned Single Judge has erred in holding that the burden to prove the existence of any dues is on the respondent as there had been no specific denial by the appellant. It is settled law from section 101 of the Evidence Act that the burden to prove claims is on the person asserting the right. The finding of the learned Single Judge falls squarely within this ambit of this section and jurisprudence therein and the allegation of absence of specific denial seems baseless. Thus, we agree with the findings of the learned Single Judge. The other contention that the learned Single Judge has placed imbalanced relevance on authorities and documents cited by the respondent has not been established and is meritless.

23. In view of the above discussion, the appeal succeeds in part, only to the extent indicated in Para 19 of the judgment, so far as interest on Rs. 2,02,100/- for the period 01-01-2001 till date of the

decree or date of payment, whichever is later, at the rate of 6% per annum is concerned. The rest of the appeal, and the cross objections fail; the decree arising from the impugned judgment shall stand modified to the extent indicated. The appeal is partly allowed, to that extent; the cross objections are dismissed. There is no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

JULY 04, 2013