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

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RESERVED ON: 10.03.2016
PRONOUNCED ON: 18.05.2016

+ **RFA (OS) 106/2015, CM NOS.24414, 24415 & 24417/2015**

M/S TRANS ASIAN INDUSTRIES EXPOSITIONS PVT. LTD.. Appellant
Through: Mr. Reyaz A. Jan, Sr. Advocate with
Ms. Nidhi Prashar, Advocate.

versus

M/S G.S. BERAR & CO PVT. LTD & ANR. Respondents
Through: Mr. Saurabh Prakash and Ms. Pragya
Srivastava, Advocates.

+ **RFA (OS) 107/2015, CM NOS.24418, 24419 & 24421/2015**

M/S TRANS ASIAN INDUSTRIES EXPOSITIONS PVT. LTD.. Appellant
Through: Mr. Reyaz A. Jan, Sr. Advocate with
Ms. Nidhi Prashar, Advocate.

versus

SONI DAVE Respondent
Through: Mr. Saurabh Prakash and Ms. Pragya
Srivastava, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J.

1. These are defendants' appeals. They are directed against orders made in two proceedings, being C.S (OS) No. 2330/2008 (filed by Ms. Soni Dave - hereafter called the "Soni Dave" suit) and CS (OS) No.2331/2008 (filed by M/s G.S. Berar & Co. (P) Ltd-hereafter "the Berar suit"). In the first suit,

recovery of possession and damages with respect to the suit/tenanted premises - being front portion on the ground floor of property M-1, Hauz Khas, New Delhi admeasuring approximately 1200 sq. ft. was sought. In the second suit, recovery of suit premises being (a) basement measuring 5250 sq. ft. approx. and (b) a portion of the ground floor behind front flat measuring 127599 ft. of M-1, Hauz Khas, New Delhi-110001 was sought. In both suits, the plaintiffs sought recovery of *mesne profit*. Both were decreed under Order 12, Rule 6, Code of Civil Procedure by orders dated 05.08.2015. The review petitions filed by the appellant were dismissed on 13.10.2015.

2. In the Berar suit, the appellant was a tenant under the plaintiffs, i.e. the mother of plaintiff no.2 (Sonia Dave) Late Smt. Raj Kumari Berar in respect of the suit premises. The lease - initially entered into in 1989, was on month-to-month basis. Late Smt. Raj Kumari Berar passed away on 03.06.2008, leaving the second plaintiff as her sole surviving heir. The suit alleged that the plaintiffs were demanding payment towards service tax, from the defendant/tenant, ever since December 2007 but the latter was evading from paying it, on one excuse or another. It was also alleged that the Defendant stopped paying the rent with effect from February 2008. Its officers avoided the plaintiffs and refused to discuss the question of arrears of rent. The parties according to the suit held negotiations and on 21.05.2008 it was agreed that the rent would be revised to ₹ 5 lakhs per month with effect from 01.06.2008. The defendant-appellant also agreed to forthwith - tender outstanding and overdue rent for the period from February 2008 to June 2008. These payments were to be made after deduction of tax at

source; the parties further agreed that the permitted use of the property would be in accordance with the rules and regulations and bye laws governing it. Furthermore the defendant agreed to remove and take apart the unauthorized constructions and other items such as the electricity generator and or obtain the requisite permission to keep it. The suit alleged that the appellant started tendering the enhanced rental at ₹5 lakhs per month towards rent with respect to the same property. The plaintiff alleged that in all about ₹ 5 lakhs after deduction of tax at source was paid to both plaintiffs on 10th of July 2008 after which it did not tender any service tax as agreed. The suit stated that despite being called upon to do so the defendant did not pay the service tax arrears. Therefore notices dated 22.08.2008 and 26.08.2008 were issued by the plaintiff, whereby the defendant was asked to vacate the suit premises and deliver vacant and peaceful vacant possession thereof within 15 days of the receipt of the notice.

3. The defendant-appellant did not vacate the premises and instead resisted the legal notice by letter dated 30th August 2008. The defendant sought to create confusion with respect to the property and its occupation. The defendant was a tenant under the plaintiff and another entity with respect to basement and another portion of a ground floor but under a separate lease. The 2nd plaintiff had called upon the defendant to vacate her portion of the suit premises. The suit referred to various other allegations in the plaint as far as the cause of action was concerned and lastly alleged that the rent in respect of comparable premises in the area of similar size would be ₹ 7 lakhs a month. Service tax in addition would be payable. In the light of these averments a decree for eviction in respect of the suit premises was sought in the Berar suit.

4. In the second suit, filed by Ms. Soni Dave, too similar averments with respect to the other suit premises were made; it was averred that the premises, measuring 1200 square feet, was let out for a lease rental on monthly tenancy basis; the rental was increased and the period was extended up to June, 2008. At that time, the agreed lease amount was ₹1,60,000/- per month. The appellant, it was alleged, did not pay any amount after June, 2008. Furthermore, the defendant/appellant raised disputes with respect to payment of service tax, which was payable in accordance with law, since June, 2007. In this suit also, the plaintiff mentioned about the use of electricity generator and its attempts to make the defendant agree to remove it. Upon being unsuccessful, the plaintiff caused legal notice to be issued on 08.08.2008, demanding handing over of vacant and peaceful possession of the suit property. It was submitted that the defendant resisted the demand; this led to the filing of suit for possession and *mesne profits*.

5. In the written statements, the defendant/Trans Asia contended that the issuance of legal notice was *mala fides*; it also alleged that substantial amounts were spent by it to repair and refurbish both the suit premises. It allege that these changes led to payment of conversion charges to the Municipal Corporation to the tune of ₹7,77,946/- since the property used was changed from residential to commercial. An allegation was also made that attempts to pay the plaintiff after the notice of termination, by handing over a cheque for ₹1,60,000/- was made but to no avail, because the plaintiffs refused to accept the amounts. Trans Asia further stated that it owned Flat C on the first floor of the very same building, which it had purchased through a Sale Agreement, dated 20.09.1992. The defendant Trans Asia also alleged that the plaintiff held unadjusted security deposits.

According to the defendants, the plaintiff had secured advantage because of their occupancy as they had paid all electricity charges, etc.

6. On 8th April, 2009, the plaintiffs filed two applications - one in each of the suits (IA 1422/2009 in the Soni Dave suit and IA 1440/2009 in the Berar suit) claiming decrees on admission. In both these applications, it was averred that the written statements filed by Trans Asia, in both suits admitted receipt of legal notices; since the tenancies were on month to month basis, in the absence of any legal right to continue in the premises, the defendant Trans Asia had no triable defense in the suits. Trans Asia resisted these two applications, alleging that the suit had to be proceeded with in full and that there were no unambiguous and clear admissions in the suit, entitling the court, under Order XII Rule 12 to draw a decree for possession.

7. The applications under Order XII Rule 12 CPC remained pending. Another application, i.e. IA 15680/2008 under Order XXXIX Rule 10 CPC was filed by the plaintiff seeking payment of charges@ ₹7 lakhs per month, in the Berar suit. A similar application (IA 6038/2010) was filed for increase of monthly damages/use charges in the Soni Dave suit. Another application, IA 12168/2009 was filed in the Berar suit, by the plaintiff, saying that the parties had entered into a composite lease arrangement and that the defendant/Trans Asia should be directed to execute the lease deed.

8. By order dated 25.02.2009, in the Berar suit, IA 15680/2008 under Order XXXIX Rule 10 CPC was disposed of; Trans Asia was directed to deposit ₹ 5 lakhs per month, in respect of the suit premises. On 22.01.2010 the court recorded that the application under Order 12, Rule 6, CPC (IA 1422/2008) was dismissed as not pressed, in view of the enhancement of

usage charges, made in IA 12168/2009. I.A.No. 7839/2014 (Under order 12 Rule 6 CPC) was thereafter filed by Berar. On 22.04.2014, that application was permitted to be withdrawn, with liberty to the plaintiff to file a better application seeking decree on admission. The same day, the defendant/Trans Asia sought time to seek instructions to report as to whether the usage charges could be enhanced to ₹ 7.5 lakhs per month. Trans Asia stated before Court, on 13.05.2014, that it was willing to pay ₹ 7.5 lakh per month with effect from 01.05.2014 without prejudice to its rights, in the Berar Suit.

9. In the above background of circumstances, the learned single judge made similar orders, decreeing both the Berar and the Soni Dave suits, on 05.08.2015. The order in the Soni Dave suit reads as follows:

“I.A.No. 1440/2009 (U/o 12 Rule 6 CPC by plaintiff)

1. The subject suit is a suit filed by the landlord for recovery of possession and damages with respect to the suit/tenanted premises being front portion on the ground floor of property M-1, Hauz Khas, New Delhi admeasuring approximately 1200 sq. ft..

2. I am happy to note that counsel for both the parties have taken up a very fair stand and therefore it is agreed that the suit for possession with respect to the suit property will stand decreed subject however to the condition that the decree which is being passed will not be executable till 31.7.2016.

3. The decree however will not be executable subject to the defendant paying to the plaintiff user charges of the suit premises at the rate of Rs.2,25,000/- from 1.8.2015 till 31.7.2016, and which rate is fixed without prejudice to the respective rights and contentions and which rate will achieve finality in terms of the decree for damages/mesne profits when so passed in favour of the plaintiff.

4. It is clarified that for the present in view of the plaintiff receiving a sum of Rs.2,25,000/- no service tax will be liable to be paid by the defendant to the plaintiff.

5. The defendant will also ensure that all charges towards any amenity, such as electricity, water etc as payable to the local authorities for use of the property, including any charges for using the property for commercial purposes, shall be paid and cleared by the defendant regularly in terms of the bills raised by the appropriate authorities.

6. The application is therefore allowed and disposed of by decreeing the suit for possession with respect to the premises bearing no. M-1, Hauz Khas, New Delhi, subject however, to the aforesaid observations.

I.A.No.6038/2010(U/o 39 Rule 10 CPC on behalf of the plaintiff)

7. This application is disposed of with the consent order that plaintiff from 1.5.2010 till 1.4.2015 will be entitled to receive a sum of Rs.1,85,000/- per month inclusive of service tax and whatever amount which the defendant has already paid for this period from 1.5.2010 till 31.7.2015, will be adjusted towards the amount now payable for this period at the rate of Rs.1,85,000/- per month. The defendant will clear the difference and use the arrears of the difference within a period of three months from today.

This application is therefore allowed and disposed of in terms of the aforesaid consent observations, of course without prejudice to rights of parties qua determination of the aspect of mesne profits as per the final decision in the suit.

8. For the payment to be made from 1.4.2015 till 31.7.2015, the same would be paid at the rate of Rs.1,60,000/- per month inclusive of service tax, and which arrears shall be cleared within a period of six weeks from today. It is again clarified that payment of this amount and receipt of this amount is without prejudice to rights and parties

qua respect rights and contentions with respect to the mesne profits/damages to be awarded in the suit as prayed for.

I.A stands disposed of.”

The order in the Berar suit read as follows:

“I.A.No. 7839/2014 (U/o 12 Rule 6 CPC by plaintiff)

- 1. The subject suit is a suit by the landlord for recovery of possession and damages with respect to the suit/tenanted premises being (a) basement measuring 5250 sq. ft. approx. and (b) a portion of the ground floor behind front flat measuring 127599 sq. ft. of M-1, Hauz Khas, New Delhi-110001.*
- 2. I am happy to note that counsel for both the parties have taken up a very fair stand and therefore it is agreed that the suit qua relief of possession with respect to the suit property will stand decreed subject however to the condition that the decree which is being passed will not be executable till 31.7.2016.*
- 3. The decree however will not be executable subject to the defendant paying to the plaintiff user charges of the suit premises at the rate of Rs.7,00,000/- plus service tax from 1.6.2010 till 30.4.2014 every month, and which rate is fixed without prejudice to the respective rights and contentions and which rate will achieve finality in terms of the decree for damages/mesne profits when so passed in favour of the plaintiff. User charges at the same rate will be confined to be paid from 1.5.2014 till the premises are vacated by 31.7.2016. For the period till 1.6.2010 charges will be paid as per the order of a learned Single Judge of this Court dated 25.2.2009.*
- 4. It is clarified that for the present in view of the plaintiff receiving a sum of Rs.7,00,000/- no service tax will be liable to be paid by the defendant to the plaintiff.*
- 5. The defendant will also ensure that all charges towards any amenity, such as electricity, water etc as payable to the local authorities for use of the property, including any charges for using the*

property for commercial purposes, shall be paid and cleared by the defendant regularly in terms of the bills raised by the appropriate authorities.

6. It is clarified qua para 3 above that, for the period from 1.3.2010 to 31.10.2010, charges of only 2,75,000/- plus service tax till be paid by the defendant and not the higher rate of Rs.5,50,000/-/7,50,000/-.

7. The application is therefore allowed and disposed of by decreeing the suit for possession with respect to the premises bearing no. M-1, Hauz Khas, New Delhi, subject however, to the aforesaid observations.

I.A.Nos. 4477/10(for reduction of use and occupation charges), 6101/10 (u/O 39 Rule 10 CPC), 13392/11 (for bringing on record an addl. Affidavit), I.A No. 536/12 (U/o 39 R 10 CPC), 944/14 (U/o 39 R 5 CPC), 6856/14 (U/o 6 Rule 17 CPC)

8. In view of the order passed in I.A.No. 7839/2014, these applications stand disposed of accordingly.”

10. Trans Asia moved review petitions for recall of the above orders. It was contended, *inter alia*, that the concession given by counsel was unauthorized; It was also argued that the enhancement of usage charges was made without any determination or consideration of evidence. The common reasoning of the learned single judge, which led to the dismissal of the review petitions, is as follows:

“9. I have already indicated above that there was no defence to the suit so far as the relief of possession is concerned. The application, in spite of such a situation and the legal position under Order XXII Rule 6 CPC, unfortunately remained pending from the year 2009. Surely, the counsel who appeared for the defendant/tenant and who argued the matter was duly authorized to give statement as per the vakalatnama. Today the defendant cannot by a convenient statement being made on behalf of the defendant cannot be said to have not

given instructions to give consent for the Order dated 5.8.2015. In fact, I must note that the matter had earlier come up on 10.7.2015 when another counsel had appeared for the defendant and prima facie the matter was examined, and therefore counsel for the defendant who had appeared on 5.8.2015 was not only aware of what had transpired earlier on 10.7.2015, but had also argued the case with respect to the non-existent defence so far as the relief of possession is concerned. Ultimately, finding the defendant to be on a sticky wicket counsel for the defendant, and obviously which was/would be for the benefit of the defendant, agreed to the consent Order on 5.8.2015 by which defendant got the benefit of not immediately surrendering the possession of the suit premises, of being entitled to vacate till 31.7.2016. In my opinion, therefore endeavour of the defendant through this review petition to urge that counsel did not have instructions or the counsel acted beyond his brief, when admittedly the counsel who had appeared for the defendant on 5.8.2015 had been appearing for many years in this suit for the defendant, is obviously only for the reason that the defendant wants to illegally and malafidely back out of the consent Order dated 5.8.2015. That the present application is mala fide and dishonest is clear from the fact that the same is not supported by an affidavit of the earlier counsel, and who obviously would not have given the affidavit because he would have acted not only as per the instructions of the defendant on 5.8.2015 but also in the best interest of the client, inasmuch as, as noted above, on the application under Order XXII Rule 6 CPC being allowed by a judgment on 5.8.2015, the defendant would have had to forthwith vacate the suit premises.”

11. In these appeals, it was urged that there was no valid consent in the eyes of law that could have justifiably led to the drawing of decree under Order 12, Rule 6 CPC. Mr. Reyaz A. Jan, learned senior counsel for Trans Asia contended that having regard to the express provisions of Order 23 Rule 3, CPC which prescribe a specific mode for recording a compromise and drawing up of decree based on its terms, there could not have been a consent decree. That provision contemplated filing of a joint application and

the recording of statement of the parties. Admittedly, that procedure was not followed; resultantly, the so called consent decree had no effect in the eyes of law and had to be recalled. *Banwari Lal v Chando Devi* AIR 1993 SC 1139 was relied upon; the Supreme Court had held in that decision, that:

“12. The present case depicts as to how on 27.2.1991 the Court recorded the alleged agreement and compromise in a casual manner. It need not be impressed that Rule 3 of Order 23 does not require just a seal of approval from the Court to an alleged agreement or compromise said to have been entered into between the parties. The statute requires the Courts to be first satisfied that the agreement or compromise which has been entered into between the parties is lawful, before accepting the same. Court is expected to apply its judicial mind while examining the terms of the settlement before the suit is disposed of in terms of the agreement arrived at between the parties. It need not be pointed out that once such a petition of compromise is accepted, it becomes the order of the Court and acquires the sanctity of a judicial order.”

12. It was contended, secondly that since Trans Asia had filed its written statement and reply to both applications under Order 12 Rule 6, having regard to the nature of the controversy, there was no way the court could have escaped adjudicating the dispute. Mr. Jan submitted that reading the written statement and the reply to the applications under Order 12 Rule 6 as a whole, there was no doubt that Trans Asia continued to contest the suit allegations. Therefore, the issue of consenting to vacate the property, or to pay amounts in excess of what had been agreed to at the earlier stage of the proceedings, did not arise. Learned counsel submitted that there was no unambiguous or unequivocal admission within the meaning of the expression as explained in *Jeevan Diesel & Electricals Limited Vs. Jasbir Singh Chadha & Another*, (2010) 6 SCC 601. It was argued that for the grant

of a decree on admissions under Order XII Rule 6 CPC, the admission would have to be unequivocal or unambiguous and not one which is qualified.

13. Counsel for Trans Asia lastly urged that there was no manner of doubt that at earlier stages of proceedings, whenever its counsel had to seek consent, adjournments were sought; on the next date of hearing, the counsel invariably indicated the terms of consent given by Trans Asia. This clearly revealed a consistent pattern of conduct, which belied the submission that the appellant never authorized its counsel to make statements that bound it. Rather, this conduct showed that invariably counsel sought time to obtain instructions. In the circumstances, the single judge erred in holding that the parties had agreed to passing of a consent decree.

14. Learned counsel for the respondent/plaintiffs, Mr. Saurabh Prakash relied on the written statements filed by Trans Asia and submitted that in the absence of any registered lease deed or other document authorizing the defendants' possession in the premises, there could be no question of its legal right to continue in the suit premises. The defendant had admitted to receiving the legal notices; a triable issue on the question of decree for possession would have arisen only if there were some dispute or contest about its right to continue in the suit premises. The written statement nowhere stated that the defendant had any enforceable right to continue lawfully, after receiving the notice of termination. Its reliance on terms or exchange of a draft lease deed, which took place during negotiations after the filing of the suits, was to no avail. The defendant could not rely on the averments in IA 12168/2009, particularly after it denied that any valid or binding agreement was arrived at; furthermore, that application was

withdrawn after the court recorded the parties' agreement to the defendant paying user charges during the pendency of the suit, at ₹ 5 lakhs per month.

Analysis and Findings

15. As is evident, the entire case in the defendants' review- as well as in its appeals before this court- is that its counsel was not authorized to consent. Past "practice" so to say - (wherever user charges were sought to be increased, counsel had sought adjournment, obtained instructions after which orders were made) was pressed home to say that Trans Asia never permitted its counsel to give any consent, much less consent on the issue of a decree for possession.

16. There is no doubt that Order 23 CPC compels parties to adopt a particular procedure while entering into a compromise that leads to a decree. In its absence, arguably it cannot be contended that such compromise decree was made. The question however is not if the order of 05.08.2015 was a compromise decree. It recorded *consent* of the counsel. It is interesting to note that Trans Asia does not contend that as a matter of fact its counsel did not concede to the issuance of the order (directing possession) but that he was not authorized to do so and therefore, the decree was not properly made. Now even if one assumes these to be so, *arguendo* would that automatically result in the decree requiring to be set aside?

17. This is where the merits of the case – in the two suits- become relevant. At the stage, when the order drawing decree was made, applications seeking drawing up of a decree were pending. The written statements in the two suits had not denied or contradicted that Trans Asia had received notice of termination; they were silent about the existence of any valid document or registered lease entitling it to continue in possession.

Trans Asia had relied on averments in IA 12168/2009 to say that according to the plaintiffs, during pendency of the suits, a negotiated settlement had been reached which authorized it to continue in the premises; the orders enhancing the user charges were on account of this fact. The submission, in the opinion of this court, is inconsequential. Firstly, Trans Asia disputed the averments in the application; the court made no order requiring parties to enter into such agreement (that would have meant an order in the nature of a decree for specific performance). Secondly, the application was disposed of, after the court recorded the defendant's consent to enhance user charges, *without prejudice* to the pendency of the suit. Thirdly, even the duration in the said so called agreement, ended in 2012. The only other plea urged by Trans Asia, in its written statements, was that it had spent substantial amounts towards repairs and renovation and consequently had a right to continue in possession. The court notices that no specific details about the amounts have been averred; nor has Trans Asia sought recovery of those amounts; it has not pressed even a counter claim. In these circumstances, its claim is vague and also unenforceable.

18. Order XII Rule 6 CPC reads as follows:-

"Order XII Rule 6. Judgment on admissions-(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or if its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

19. The court – in terms of the above provision - has discretion depending upon the facts of a case whether or not to decree the suit under Order XII Rule 6 CPC. If the admissions render a trial unnecessary, a court is entitled to pass a decree without requiring further trial. The Supreme Court in *Uttam Singh Duggal & Co. Ltd.* said that:

"12. As to the object of the Order XII Rule 6, we need not say anything more than what the Legislature itself has said when the said provision came to be amended. In the objects and reasons set out while amending the said rule, it is stated that "where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled." We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed.

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15. Even without referring to the expression 'otherwise' in Rule 6 of Order XII CPC, we can draw an inference in the present case on the basis of the pleadings raised in the case in the shape of the applications under that Rule and the answering affidavit which clearly reiterates the admission. If that is so, interpretation of the expression 'otherwise' becomes unnecessary.

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In *KaramKapahi v. Lal Chand Public Charitable Trust* (2010) 4 SCC 753 the Supreme Court held that the principle of Order XII Rule 6 could be pressed into service when there existed no controversy with regard to a particular claim. The provision is undoubtedly wide in its import and

that admissions may be inferred from the facts and circumstances of the case (Ref *Charanjit Lal Mehra & Ors v. Kamal Saroj Mahajan (Smt.) and Another* (2005) 11 SCC 279. Further, in *M/s Jeevan Diesels* (supra) it was held:

“Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. This question, namely whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in Karam Kapahi (supra) may be unexceptionable they cannot be applied in the instant case in view of a totally different fact situation.”

20. In *Uttam Singh Duggal* (supra) the Supreme Court with respect to Order XII Rule 6 stated that wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed, the principle will apply. The Court in this case also categorically refused to restrict the scope of the principle by refusing to hold that only those admissions, which were made in the pleadings would attract its applicability; enabling discretion. The question always is whether the pleadings taken as a whole point to an unambiguous and clear admission of the kind contemplated by law. The relevant standard, as spelt out in *Uttam Singh and Jeevan Diesel* (supra), that the Courts have to adopt, while considering pleadings and seeing if a decree on admission is to be drawn, is whether there is a “*clear and unequivocal admission of the case*” of the party defending the application. It is also not in dispute that there is no golden rule about what constitute as “*clear and unequivocal admission*”;

the Court has to proceed on a case specific approach having due regard to the overall effect of the pleadings and documents.

21. Having regard to the entire nature and tenor of the averments in the written statements of Trans Asia, there can be no doubt that no triable issue arose for the court's consideration. Once service of notice (of termination) was admitted, Trans Asia had to show how it could continue in possession. Therefore, this court finds no infirmity in the decree drawn on the basis of the orders dated 05.08.2015, in both the suits.

22. The above findings are however not dispositive of the appeals. Trans Asia had urged and the court had noticed during the hearing - that the single judge had also directed payment of user charges, on a stipulative basis, without hearing it or applying any discernable principle. In CS (OS)2330/2008 (the Soni Dave suit), the single judge disposed of I.A.No.6038/2010 (application under Order 39 Rule 10 CPC on behalf of the plaintiff) recording consent that from 01.5.2010 till 1.4.2015 the plaintiff would be entitled to receive a sum of ₹1,85,000/- per month inclusive of service tax and the amount paid by Trans Asia for this period from 01.05.2010 till 31.07.2015, was adjustable towards the amount now payable for this period at the rate of ₹1,85,000/- per month. Trans Asia was directed to pay the difference within a period of three months. The single judge also directed that:

“8. For the payment to be made from 1.4.2015 till 31.7.2015, the same would be paid at the rate of Rs.1,60,000/- per month inclusive of service tax, and which arrears shall be cleared within a period of six weeks from today. It is again clarified that payment of this amount and receipt of this amount is without prejudice to rights and parties qua respect rights and contentions with respect to the mesne profits/damages to be awarded in the suit as prayed for.”

In the Berar suit (CS (OS 2331/2008) the order on user charges was as follows:

“3. The decree however will not be executable subject to the defendant paying to the plaintiff user charges of the suit premises at the rate of Rs.7,00,000/- plus service tax from 1.6.2010 till 30.4.2014 every month, and which rate is fixed without prejudice to the respective rights and contentions and which rate will achieve finality in terms of the decree for damages/mesne profits when so passed in favour of the plaintiff. User charges at the same rate will be confined to be paid from 1.5.2014 till the premises are vacated by 31.7.2016. For the period till 1.6.2010 charges will be paid as per the order of a learned Single Judge of this Court dated 25.2.2009.

4. It is clarified that for the present in view of the plaintiff receiving a sum of Rs.7,00,000/- no service tax will be liable to be paid by the defendant to the plaintiff.

5. The defendant will also ensure that all charges towards any amenity, such as electricity, water etc. as payable to the local authorities for use of the property, including any charges for using the property for commercial purposes, shall be paid and cleared by the defendant regularly in terms of the bills raised by the appropriate authorities.

6. It is clarified qua para 3 above that, for the period from 1.3.2010 to 31.10.2010, charges of only 2,75,000/- plus service tax till be paid by the defendant and not the higher rate of Rs.5,50,000/-/7,50,000/-.”

23. In the Berar suit, the previous orders recording consent of the parties reveal that ₹5,00,000/- per month was to paid for the period from 1st September, 2008 to 22.01.2010 (order dated 25th February, 2010); ₹5,50,000/- per month was payable for the period up to 01.05.2014 (order dated 13th May 2014) and for the period 01.05.2014 onwards the amount

payable was ₹7,50,000/- per month. Now this being the position, the learned single judge could not have, in the opinion of the court without hearing the parties fixed a higher rate of user charges, in the manner he did, while imposing the condition to continue in the premises till 31.07.2016:

“3. The decree however will not be executable subject to the defendant paying to the plaintiff user charges of the suit premises at the rate of Rs.7,00,000/- plus service tax from 1.6.2010 till 30.4.2014 every month, and which rate is fixed without prejudice to the respective rights and contentions and which rate will achieve finality in terms of the decree for damages/mesne profits when so passed in favour of the plaintiff.”

In the opinion of the Court, when the issue of *mesne profits* and damages is pending trial and consideration, it was not appropriate or just on the part of the single judge to direct ₹7,00,000/- per month as user charges. As a matter of fact the order dated 25th February, 2010 had, for the period 01.09.2008 to 22.01.2010 fixed the rate at ₹5,00,000/- per month. For the later period, i.e. 22.01.2010 up to 01.05.2014, the court had fixed the rate at ₹5,50,000/- per month (order dated 13th May 2014). In these circumstances, the court should not have fixed a flat rate of ₹7,00,000/- per month as user charges for almost four years (01.06.2010 to 30.04.2014). This increase is substantial and appears to be based on an *a priori* assumption. It is consequently set aside. However, the same cannot be true for the Soni Dave suit (CS (OS) 2330/2008). The direction to pay ₹1,85,000/- per month as user charges cannot be said to be excessive, considering that no enhancement had been directed for the entire 7 year period during pendency of the suit.

24. In view of the foregoing discussion, the appeal in respect of CS (OS)2331/2008 is hereby modified; the appellant/Trans Asia's liability to

pay *pendente lite* user charges, for the period from 1.6.2010 till 30.4.2014 shall be in accordance with the previous orders in that regard in the suit, ₹5,00,000/- per month for the period from 01.09.2008 to 22.01.2010 (order dated 25th February, 2010); ₹5,50,000/- per month for the period 23.01.2010 to 01.05.2014 (order dated 13th May 2014) and for 01.05.2014 the amount payable is ₹7,00,000/- per month (this is even because though the last order had recorded that it had to pay ₹7,50,000/- per month after 01.05.2014, in the impugned order the amount has been lowered and the plaintiff has not appealed against that). Furthermore, the amounts directed are interim and all amounts paid would be subject to final adjustment or appropriation, in accordance with the final order, that determines *mesne profits* and damages. The appellant shall file an undertaking to comply with these terms within two weeks before the single judge (in both suits). The undertaking, in the form of an affidavit shall also state that all outstanding amounts shall be cleared before 31st July, 2016 and on or before that date, the appellant/Trans Asia, would hand over vacant peaceful possession of both suit premises to the plaintiffs. This decree shall not, however, be construed as disturbing the other conditions with respect to payments such as the obligation to pay the user charges on or before 10th of each month, after 01.05.2014. RFA 106/2015 is accordingly partly allowed in the above terms; RFA 107/2015 is dismissed in these terms. No costs.

**S. RAVINDRA BHAT
(JUDGE)**

**R.K. GAUBA
(JUDGE)**

MAY 18, 2016