IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 377 OF 2015

G.R Infrastructure Private Limited	)
a company incorporated and registered under the	)
provisions of the Companies Act, 1956 and having its	)
office at 202, Poonam Chambers, "A" Wing, Dr. A.B.	)
Road, Worli, Mumbai-400 018	)..Plaintiff

Versus

Mr. Arakal Pandikasalakal Bava	)
Indian Inhabitant, carrying on business in the	)
name and style of M/s. HAJI A P Bava & Co.	)
76/D, Kalyan Housing Society, 8th Main Road,	)
RPC Layout, Vijaynagar, Bangalore-560 040	)
Karnataka	)..Defendant

Mr. Vishal Sheth a/w Ms. Ritcha Sahay i/b Bimal Rajasekhar for the Plaintiff.
None for the Defendant.

CORAM: S.J KATHAWALLA, J.

DATE: 28th FEBRUARY, 2017

ORAL JUDGMENT:

1. This is an action by the Plaintiff, who is in the business of providing cranes on hire. According to the Plaintiff, the Defendant is a proprietary concern, the proprietor of which is one Mr. Arakal Bava.

2. The case made out by the Plaintiff in pleadings and evidence is summarized below:

(a) The Plaintiff provided a 250 MT crawler crane to the Defendant on hire under a work order ("**Contract**") dated 9th March 2011.

(b) The crane was used by the Defendant between May 2011 and 3rdnJuly 2012 (on which day it was de-hired).

(c) In terms of the Contract the Plaintiff raised hire invoices upon the Defendant. These invoices were based on "daily log sheets" which record the daily usage of the crane.

(d) The Plaintiff asserts that some invoices raised upon the Defendant were fully paid, but 9 of its invoices remained partly / or fully unpaid. The principal sum outstanding under these 9 invoices, according to the Plaintiff, aggregated to INR 76,88,073, against which the Defendant made part payment of INR 6,03,421, on or about 20th October 2012. On this basis, the Plaintiff alleges that on the date of filing of the suit (10th April 2015) the principal amount due to it works out to INR 70,84,652. The Plaintiff also claims interest of INR 25,47,563 up to the date of filing of the suit and further interest, from the date of filing of the suit on the principal amount of Rs. 70,84,652, @ 15% p.a.

3. The Writ of Summons was served upon the Defendant at its address mentioned in the cause title. An affidavit in proof of service dated 1st December 2015, is on record. Despite service the Defendant did not appear before this Court or file its Vakalatnama. Consequently, on 6th January 2016 and thereafter again on 24th August 2016, this Court directed this suit to be placed under the caption *"For Ex-*

parte Decree". On both these occasions the Defendant was absent.

4. The suit was listed before me under the caption *"For Ex-parte Decree"* on 28th February 2017. On that day also, none appeared for the Defendant. The Plaintiff led evidence of Mr. J.S Bedi (Plaintiff's General Manager), by filing his Affidavit of Evidence in lieu of Examination in Chief (**"Affidavit of Evidence"**) and Affidavit of Documents, both dated 11th November 2016. Mr. Bedi was present in Court on 28th February 2017 and confirmed the correctness of the contents of his Affidavit of Evidence. The Affidavit of Evidence filed by Mr J. S Bedi is thus taken on record and marked as **Exhibit "P-1"**. The Plaintiff also tendered a Compilation of Documents comprising 25 documents (**"COD"**) relied upon by it and in respect of which Mr. Bedi has deposed to in his Affidavit of Evidence. This Compilation is also taken on record and is marked as Exhibit **"P-2 (Colly)"**. The Plaintiff has also filed a certificate as contemplated by Section 65-B of the Indian Evidence Act, 1872.

5. In the Affidavit of Evidence, Mr. Bedi elaborated upon the Plaintiff's case. Mr. Bedi's deposition, as set out in the Affidavit of Evidence, is summarized below:

(a) The Plaintiff provided its crane to the Defendant for use by the Defendant at its site at Angul, Odisha. The crane was used by the Defendant between May 2011 (even though the Contract states that the crane's reporting date is 10th March 2011) and 3rd July 2012. According to Mr. Bedi, the crane was used by the Defendant without demur or protest and that in terms of the Contract the Plaintiff raised invoices upon the Defendant. These invoices were based on "daily log sheets" which record the number of hours the crane was used every-day. The daily log sheets were signed by both, the Plaintiff's and the Defendant's representative as is standard industry practice.

(b) Mr. Bedi informs the Court that some of the Plaintiff's invoices raised upon the Defendant were fully paid, but that 9 invoices remained partly / or fully unpaid. The (principal) sum outstanding under these 9 invoices, according to the Mr. Bedi, aggregated INR 76,88,073. At **Sr. No. 2** of the COD the Plaintiff produced a photostat copy of the Contract (i.e. the work order issued by the Defendant). At **Sr. Nos. 5 to 13** of the COD, the Plaintiff produced photostat / office copies of the 9 partly / fully unpaid invoices, along with the daily log-sheets (where available). Mr.Bedi identifies the signatures / initials appearing on the said invoices.

(c) Mr. Bedi deposes that on 16th August 2012, a meeting was held at Defendant's office in Udaipur to resolve the issue of the Plaintiff's outstanding invoices. Mr. Bedi claims to have personally attended the meeting along with Mr. Ashok Chandani (Plaintiff's Deputy General Manager) on Plaintiff's behalf. The Defendant was represented by Mr. K. Ramachandran (General Manager) and Mr. Sujit Kumar (Accountant). At the meeting it was agreed that a sum of INR 30,12,107 (due under the invoices produced by the Plaintiff at Sr. Nos. 11 to 13 of the COD) will be paid by the Defendant from its Udaipur office in 5 instalments, each of INR 6,03,421. The instalments were to be paid within 3 months with effect from 16th August, 2012. According to Mr. Bedi it was also agreed that the balance sum of INR

46,70,966 (due under the invoices produced at Sr. Nos. 5 to 10 of the COD) will be paid by the Defendant from its Chaliyam office immediately. Lastly, parties agreed that if the Defendant fails to make payment, the Plaintiff is entitled to interest on the outstanding sum of INR 76,88,073 @15% pa (as opposed to interest @18% pa mentioned on the invoices).

(d) Mr. Bedi states that after the meeting, minutes were drawn up and signed by Mr. Ramachandran and Mr. Kumar on Defendant's behalf and Mr. Chandani and himself on Plaintiff's behalf. However, inadvertently the agreement relating to payment of INR 46,70,966 and interest @15% was not recorded in the minutes. When Mr. Bedi noticed this, he asked Mr. Chandani to send a letter to the Defendant recording that at the meeting the Defendant also agreed to pay INR 46,70,966 to the Plaintiff from its Chaliyam office. Mr. Chandani thus prepared a letter and a statement of accounts reflecting how the sum of INR 46,70,966 was arrived at. By his email of 20th August 2012 addressed to the Defendant, Mr. Chandani circulated (as attachments to the email), the aforesaid letter, a statement of accounts and a scanned copy of the executed minutes of the meeting. A printout of the email of 20th August 2012 and attachments thereto are produced by the Plaintiff at **Sr. No. 14** of the COD. Mr. Bedi deposes that as far as the agreement relating to payment of interest was concerned, that was not recorded because one of the Defendant's representative represented that there is no need to record this since the Defendant will not default in making payment and that he accepted this representation.

(e) Mr. Bedi deposes that even post the meeting of 16th August 2012 and Mr. Chandani's email of 20th August 2012, the Defendant did not release payments as promised. Accordingly, on 27th August 2012 Mr. Chandani addressed payment reminders asking Defendant to pay the first instalment. Printouts of these emails are produced by the Plaintiff at **Sr. Nos. 15 and 16** of the COD. Mr. Bedi is copied into these emails and confirms the correctness of the same. Since the Defendant did not respond to the aforesaid emails Mr. Chandani addressed further emails to the Defendant on 11th and 17th September 2012. Printouts of these emails are produced by the Plaintiff at **Sr. No. 17** of the COD. Mr. Bedi is copied into these emails. Mr. Bedi confirms the correctness of the same.

(f) On 4th October 2012 Mr. Chandani addressed another letter to the Defendant. Mr. Bedi states that since the Defendant has not released payments as committed, in this letter the Plaintiff claimed interest of INR 4,15,684 (reckoned @15% pa) from the Defendant. Towards this end, the Plaintiff prepared a Debit Note for INR 4,15,684 being the interest on the principal amount of INR 76,88,073 (reckoned @15% pa). The said Debit Note along with statement of interest (as of 4th October 2012) was sent to the Defendant as enclosures to the letter of 4th October 2012. A photocopy of the letter along with the enclosures are produced at **Sr. No 18** together with the original RPAD card evidencing service of the letter on the Defendant (which RPAD card is produced at **Sr. No.18A** of the COD). Mr. Bedi confirms the correctness of the contents of this letter and the enclosures.

(g) On 18 October 2012, the Plaintiff received payment of INR 6,03,421 from the Defendant. On 20th October 2012 Mr. Bedi received an email from the Defendant informing him that the payment was made as per the minutes of the meeting. On the same day, Mr. Bedi instructed Mr. Kiran Gujarathi (Asst. Manager Marketing & Operations of the Plaintiff) to reply to Defendant's email. In its reply, the Mr. Gujarathi sought to explain how the Plaintiff adjusted the payment of INR 6,03,421. Printouts of the emails dated 20th October 2012 exchanged between the Plaintiff and Defendant are produced at **Sr. No 19** of the COD.

(h) Mr. Bedi states that post 20th October 2012 no further payment was received from the Defendant and so he asked Mr. Chandani to follow up with the Defendant. At that time he realized that the manner in which the Plaintiff adjusted the payment of INR 6,03,421 (set out in Mr. Gujarathi's letter) was incorrect. Mr. Bedi thus told Mr. Chandani that when sending out reminders he must clarify the correct manner in which the payment of INR 6,03,421 was adjusted by the Plaintiff. In accordance with Mr. Bedi's instructions Mr. Chandani sent an email of 16th November 2012 to the Defendant. Mr. Bedi confirms the correctness of this email of 16th November 2012, subject to a minor error which he explains at paragraph 16, Page 9 of his Affidavit of Evidence. According to Mr. Bedi, Mr. Chandani whilst correctly adjusting the instalment received of INR 6,03,421 received from the Defendant, inadvertently recorded that a sum of INR 6,0**6**,421 was received, when in fact a sum of INR

6,0**3**,421 was received. Thus, in his email of 16th November 2012 Mr. Chandani recorded that the balance amount receivable by Plaintiff works out to INR 74,97,336 [i.e. INR 70,81,652 being the principal outstanding amount + INR 4,15,684 being interest reckoned @ 15% p.a.)]. However, the balance outstanding amount receivable by the Plaintiff as of 16th November 2012 was INR 75,00,336 [i.e. INR 70,84,652 being the principal outstanding amount + INR 4,15,684 being interest reckoned @ 15% p.a.].

(i) Mr. Bedi states that post 16th November 2012, he followed up telephonically with Mr. Monicka Vasagam of the Defendant and that he also asked Mr. Chandani to chase the Defendant for payment. Acting on Mr. Bedi's instructions follow up emails were sent by Mr. Chandani to the Defendant. Mr. Bedi was copied (or sometimes BCCed) into these emails exchanged between Mr. Chandani and the Defendant as trail emails. Mr. Bedi confirms the correctness of Mr. Chandani's emails. Printouts of the exchange of emails between Mr. Chandani and the Defendant commencing 16th November 2012 up to 22nd April 2013 is produced at **Sr. No. 20** of the COD. My attention is specifically invited to the Defendant's emails of 8th January 2013 and 16th March 2013, in which Mr. Monicka Vasagam admitted liability and cited poor financial health of the Defendant as an excuse for non-payment.

(j) Mr. Bedi states that in view of non-receipt of its dues the Plaintiff caused legal notices dated 7th August and 9th October 2013 to be served upon the Defendant. Original office copies of these notices are produced at **Sr. Nos. 21 and 22** of the

COD. Mr. Bedi confirms that the said notices were drawn up on his instructions. However, Mr. Bedi clarifies that the notices contained errors which skipped his attention at that time. Specifically, the notices are addressed to "Hajee AP Bava & Co Constructions Pvt Ltd". It is Mr. Bedi's deposition that this entity is a company incorporated by the Defendant's proprietor having a deceptively similar name, which caused the confusion. Further the amount mentioned in the notices is incorrect. On 18th October 2013, Plaintiff's advocate received a response to the notices from one Mr K. Alikoya, Advocate. The original response is produced at **Sr. No. 23** of the COD. In his response Mr.Alikoya, *inter alia* stated that his Client never contracted with the Plaintiff and denied all the allegations contained in the Plaintiff's notice. When Mr. Bedi realized that the initial legal notices were addressed to an incorrect entity, he instructed his lawyers to address a notice dated 5th September 2014 (photostat copy produced at **Sr. No. 24** of the COD) upon the Defendant. This notice was also prepared in accordance with Mr. Bedi's instructions and he confirms the correctness of the contents thereof, save and except clarifying that the amount mentioned in the notice was incorrect. This clarification is provided by Mr. Bedi in paragraph 17 of his Affidavit of Evidence.

(k) Despite service of the legal notices, since payment was not received from the Defendant, the Plaintiff has filed the present suit praying *inter alia* for a decree in its favour against the Defendant for a sum of INR 1,15,35,401 together with interest @ 18% per annum to be reckoned from the 16th August 2012 till 28th February 2015 as set out in prayer clause (a) of the Plaint. Mr. Bedi clarifies that the calculations set out in the plaint are incorrect and consequently the Plaintiff now seeks to reduce its claim. Mr. Bedi clarifies that the correct amount which the Plaintiff is entitled to recover as of date of filing of the suit is INR 1,00,44,899 as per the table produced at **Sr. No.25** of the COD. Mr. Bedi confirms that he has prepared the table and that it is correct.

6. I have perused the Plaint, the Affidavit of Evidence filed by Mr. Bedi and the documents produced by the Plaintiff in support of its claim (contained in the COD). In view of Mr Bedi's deposition, the documents relied upon by the Plaintiff are admitted in evidence.

7. There is nothing on record which militates against anything that has been averred to in the plaint and set out in the Affidavit of Evidence filed by Mr. Bedi. Pertinently, I see that Mr. Bedi's deposition is supported by the documents produced in the COD, which have been taken on record. Thus, the evidence led for / on behalf of the Plaintiff is in line with the Plaint and is uncontroverted. The discrepancies between amounts claimed in the Plaint and mentioned in Mr. Bedi's Affidavit of Evidence are satisfactorily explained away by Mr. Bedi in his Affidavit. Pertinently, the Plaintiff seeks to reduce its claim and consequently no prejudice can be caused to the Defendant if the reduced claim amount is accepted. In view of the foregoing, coupled with the written admissions of liability contained in the Defendant's emails of 8th January 2013 and 16th March 2013 (which have not been explained away by the

Defendant), I have no hesitation in accepting the Plaintiff's case.

8. Lastly, in view of the part payment made by the Defendant on 18th October 2012 and the written admissions of liability issued by the Defendant on 8th January and 16th March 2013, the present suit is filed within limitation.

9. In the circumstances and for the reasons stated above, I am of the opinion that the Plaintiff has proved its case. The suit is accordingly decreed in terms of prayer clause (a) subject to the decretal sum being reduced to INR 1,00,44,899. Further, having been deprived of its dues the Plaintiff is entitled to interest on the principal amount of INR 70,84,652 @ 15% pa WEF the date of filing of this suit till payment / realization (as this is the rate of interest which parties agreed will be paid). Accordingly, there shall be a decree in favour of the Plaintiff and against the Defendant to the extent of INR 1,00,44,899 together with interest @ 15% pa on the principal amount of INR 70,84,652 WEF the date of filing of the suit till payment and / or realization.

10. Since the suit is decreed ex-parte, the Plaintiff is entitled to refund of the court-fees, as per rules.

11. The office shall return the Compilation to the Plaintiff's advocate upon the Plaintiff's advocate furnishing a True Copy of this order along with the photostat copy of the Compilation duly certified by him as True Copy.

12. Drawn up decree expedited.

(S. J KATHAWALLA, J.)