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

+ **FAO(OS) (COMM) 26/2017 & CM 4038/2017**

KASHYAP COMMERCIAL PVT LTD

..... Appellant

Through: Mr Sandeep Sethi & Mr Abhinav Vashist,
Sr. Advs. with Mr P.S. Bindra and Mr
Anand M. Mishra, Advs.

versus

MAC RESTAURANT PVT LTD & ORS

..... Respondents

Through: Mr Jayant K. Mehta with Ms Madhavi
Khare, Advs. for R-1
Mr Prag P. Tripathi, Sr. Adv. with Mr
S.L. Gupta, Adv. for R-2
Mr P.V. Kapur, Sr. Adv. with Mr
Purushottam M. Jha & Mr Anuj Sharma,
Advs. for R-3.

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ORDER

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16.02.2017

We have heard the learned counsel for the parties at some length. It is now agreed by the learned counsel for the parties that the impugned order be set aside primarily because the appellant, who is defendant no.2 in the suit (CS(COMM) 1690/2016), was not heard when the impugned order dated 30.12.2016 was passed. This means that IA No.16292/2016 which is an application under Order XXXIX Rule 1 & 2 CPC would have to be heard afresh by the learned single Judge. The learned single Judge may thereafter arrive at a decision in accordance with law without being influenced by the earlier observations in the impugned order. The learned counsel for respondent no.3 states that bank guarantee no.0505116BG00348 for Rs.1 crore which had been issued by respondent no.1 in favour of respondent no.3 had been encashed. The sum of Rs.1 crore which had been received by respondent no.3 has been refunded to the bank. The learned counsel for respondent no.1 states that in view of the fact that the impugned order is

being set aside and the invocation has also been withdrawn, a fresh bank guarantee in the same terms as the earlier bank guarantee would be issued within a week in favour of respondent no.3.

Respondent no.3 is presently operating the Burger King outlet in unit GF-29 of the Ground Floor of Gourmet Mall, Paschim Puri, New Delhi. The operation of this outlet started on 31.12.2016 immediately after the impugned order dated 30.12.2016 was passed. According to the learned counsel for respondent no.3, the preparation and furnishing had, of course, started much earlier.

Accordingly, as agreed by the learned counsel for the parties, the impugned order is set aside. IA No.16292/2016 has to be reheard. No further notice would be necessary to any of the parties because they are all represented before this Court. The appellant shall file the reply to IA No.16292/2016 within a week. A rejoinder, if necessary, be filed by respondent no.1 within a week thereafter. Consequently, the matter be listed in the first instance before the learned single Judge on 07.03.2017.

We are making it clear that it would be open to the learned single Judge to pass any order in accordance with law. The fact that respondent no.3 is in the premises as indicated above would not create any equity in favour of respondent no.3. All amounts due under the arrangement from respondent no.3 to respondent no.1 shall be deposited in Court till further orders passed by the learned single Judge. This order should not be considered as the Division Bench giving its imprimatur to the continuance of respondent no.3 in the said premises. That would be open to the learned single Judge to take a call on. We have not expressed any view on merits of the matter. All rights and contentions are open to the parties.

The appeal stands disposed of in the above terms.

BADAR DURREZ AHMED, J

FEBRUARY 16, 2017/ns

ASHUTOSH KUMAR, J