

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

+ **RFA No. 760/2017**

% **5th September, 2017**

INDUS TOWERS LTD. Appellant

Through: Mr. Rohit Jain, Advocate.

versus

SANTOSH JAIN Respondent

Through: Mr. Arvind Nayar, Sr.
Advocate with Mr. Arun
Aggarwal and Ms. Nachiketa
Suri, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CAV No. 791/2017

Since counsel for the caveator has entered appearance, the
caveat stands discharged.

RFA No. 760/2017 and C.M. Appl. No. 32070/2017 (for stay)

1. This Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgment and decree of the trial court dated 8.5.2017

decreeing the suit for a sum of Rs.12,03,560/- along with interest. Suit has been decreed for an amount of arrears of license fee as also *mesne* profits payable after termination of license.

2. Facts of the case are that respondent/plaintiff filed the subject suit for possession, recovery of license fee, damages for use and occupation with respect to the suit property comprising an area over 800 sq. ft. at roof top of Anchal Plaza Building at Local Shopping Centre Commercial Plot no. 7, Pocket no. 7, Sector-B, Vasant Kunj, New Delhi. As regards the issue of possession no dispute remains because possession of the licensed premises has already been handed over to the respondent/plaintiff/licensor by the appellant/defendant/licensee. The issue is with respect to claim of payment of license fee of three months from 9.1.2012 to 8.4.2012 and damages for use and occupation after termination of license from 9.4.2012 till 28.1.2013 i.e date of filing of the suit.

3. On the aspect of arrears of recovery of license fee there is no dispute and appellant does not dispute the liability for payment of three month's license fee from 9.1.2012 to 8.4.2012 at Rs.14,520/- per month. As regards the claim of damages/*mesne* profits for the period from 9.4.2012 till 28.1.2013 is concerned trial court has granted

damages at Rs.1,20,000/- per month. To arrive at the figure of damages the trial court has placed reliance upon the license agreement Ex.PW1/22 dated 16.1.2015 showing rent at Rs.32,500/- per month entered into by the respondent/plaintiff with Reliance Jio Infocomm Limited for 100 sq. ft. area. Trial court has also relied upon another agreement dated 16.5.2015 Ex.PW1/24 for another area of 100 sq. ft. with rent of Rs.49,500/- per month. Trial court has rightly relied upon the agreements Ex.PW1/22 and Ex.PW1/24 because they are more or less contemporaneous to the period in question because the appellant/defendant vacated the premises on 13.12.2014 and after 16 days the premises were again put on rent in terms of the fresh agreement with Reliance Company vide Ex.PW1/22. The relevant observations of the trial court in this regard are contained in paras 32 to 40 of the impugned judgment and which paras read as under:-

“32. In support of his claim of damages plaintiff has proved on record Ex PW1/22 which is a license agreement dated 16.01.2015 entered by plaintiff with Reliance Jio Infocomm Limited through which 100 sq feet area of the premises, which was earlier in occupation of defendant, was given on rent to the reliance company @ Rs 32,500/- per month. Subsequent thereto, a separate agreement for additional license fee of Rs 49,500/- of same 100 sq feet area was executed between plaintiff and Reliance company on 16.05.2015 vide Ex PW1/24.

33. Learned counsel for defendant submits that in the present suit plaintiff has claimed damages w.e.f 09.04.2012 to 28.01.2013. The documents being agreements with reliance company, cannot be considered while examining the claim for damages by plaintiff as these documents were executed subsequent to the period for claim of damages. Learned counsel for defendant has also drawn attention of the court to cross examination of

PW-1, where he admitted that no telecommunication company except the defendant, approached him for installation of tel-communication tower during the period between April 2012 to July 2014.

34. Court is however, in agreement with the submissions of learned counsel for plaintiff that loss of opportunity to put the premises on rent or license, with some other party, is a valid ground for claiming damages by plaintiff.

35. Defendant vacated the premises on 13.12.2014. After about 16 days the premises were again put on rent/license to reliance company vide Ex PW1/22 for consideration of Rs 32,500/- per month. Some time might have been taken for negotiation of deal and documentation with reliance company. In the facts and circumstances, it is to be presumed that had the defendant vacated the premises, complying the termination notice dated 11.2.2012 Ex.PW1/10, plaintiff could have been successful to put the premises on rent/license for a handsome amount.

36. In his cross examination DW-1 admitted that defendant is paying sum of approximately Rs1,90,000/- for other half portion of the some rooftop.

37. Counsel for defendant submits that additional equipments are installed by defendant in the said other half portion and therefore, the rent paid for the same, cannot be compared or considered for considering the damages in this case.

38. From the facts on record, it is clear that as on date the plaintiff is receiving a rent of Rs82,000/- per month(Rs 32,500 vide Ex PW1/22 + Rs 49,500 vide Ex PW1/24) from reliance company for an area of 100 Sq feet out of area of 800 sq feet vacated by defendant. Defendant is also paying rent/Occupation charges of Rs 1,90,000/- per month for other half portion measuring around 850 sq feet of the same roof.

39. It has already been observed that defendant withheld the possession of the premises despite notice of termination.

40. In the facts and circumstance, this court is of the opinion that the plaintiff be compensated for loss of opportunity to put her premises on lease/license. Since, the defendant is responsible for the said loss of opportunity and since the defendant is already paying user/occupation charges @ Rs 1,90,000/- per month for similarly situated other half portion of roof and since the 100 sq feet out of 800 sq feet, vacated by defendant is fetching a rent of Rs 82,000/-, this court is of the opinion that the amount of damages @ Rs 1,20,000/- per month, claimed by plaintiff is justified."

(underlining added)

4. Charges for use and occupation or damages or *mesne* profits are payable taking comparable rent of similar premises. Once with respect to very same premises immediately after vacation by the

appellant the licensee fee charges are found at a particular amount, then no illegality can be said to have been committed by the trial court by granting such rate of license fee as damages. This Court can only interfere with the reasoning and conclusion of the trial court if the same is illegal or perverse, and merely because trial court takes one possible and plausible view, will not mean that this Court will interfere with such a view which is taken simply because an alternative view is possible.

5.(i) Learned counsel for the appellant argued that in the license agreement dated 8.4.2002 Ex.PW1/2 entered into by the appellant with the respondent only limited equipment could be fixed whereas it is seen that in the agreements with Reliance Company various equipments could be fixed and therefore the trial court has committed an error in fixing rate of *mesne* profits in terms of the agreements with the Reliance Company.

(ii) In my opinion, the argument urged is misconceived for various reasons. Firstly, it is seen that factually the argument urged on behalf of the appellant is wrong because as per para 1 of the license agreement Ex.PW1/2 dated 8.4.2002 there is no restriction on any equipment which could have been fixed by the appellant on the

licensed premises. Obviously, this would be so because what is let out are licensed premises and thereafter what is to be fixed on the licensed premises is in the prerogative of the licensee. Para 1 of the license agreement dated 8.4.2002 reads as under:-

“1. The LICENSOR hereby gives to the LICENSEE and the LICENSEE hereby accepts from the LICENSOR a license to use and occupy and portion admeasuring approx. 800 sq. ft. of terrace and roof area for installation of Pre-fabricated Temporary Assembled Air-conditioned Shelter, Tower/Antennae Poles and such other equipment as it may deem necessary, on the building known as “Plot No. 7th a building constructed on the land situated, lying and being at Pocket No.7, Sector B, Vasant Kunj, New Delhi for a period of 10 years commencing from 10.04.2002 with the sole and exclusive option with the LICENSEE to renew the same for a further 2 (two) terms of 5 (five) years each on the same terms and conditions as herein contained. The LICENSOR hereby assures the LICENSEE that the LICENSOR is entitled to the Licensed Premises and also assures that he is fully and absolutely entitled to grant this license and deliver unto the LICENSEE the Licensed Premises.”

(iii) I, therefore, reject the argument urged on behalf of the appellant that the agreement with Reliance Company is distinguishable because as per the agreement with Reliance Company various additional equipments could be fixed and which allegedly could not be fixed by the appellant.

(iv) The second reason for rejecting the argument urged on behalf of the appellant is that charges for use and occupation are with respect to maximum permissible user available in law with respect to licensed premises and once appellant/trespasser would have vacated then there

was no restriction on the respondent to let out the licensed portion in an unrestricted fashion so as to derive maximum amount of license fee by allowing maximum equipment which can be fixed, and therefore, it does not lie in the mouth of the appellant to argue that the respondent is not entitled to higher rate of damages allegedly because the new licensee is fixing more equipments. At the cost of repetition, license is of an area for maximum permissible usage and license fee which is fixed is for maximum usage and not for any assumed restricted usage of the licensed premises.

6. There is no merit in the appeal. Dismissed.

SEPTEMBER 05, 2017

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VALMIKI J. MEHTA, J