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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.288 OF 2018
IN
APPEAL FROM ORDER NO.711 OF 2014**

M/s Deccan Retreat
M/s Regent Bhairvai Corporation ... Applicant.
V/s.
Maharashtra State Development
Corporation Ltd and anr ... Respondents

Mr. Ruchir L. Tolat a/w Ms. Arwa Lunawadawala i/by
L.C. Tolat, for the applicant.
Mr. Arun Siwach a/w Ms. Priyanka Mitra i/by Cyril
Amarchand Mangaldas, for respondent No.2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 8th OCTOBER, 2018.

P.C. :

- 1] Heard learned counsel for the appellant and respondent.
- 2] This application is preferred, seeking certain modification in the order dated 27th August, 2017, passed by this Court in Appeal from Order No.711 of 2014.
- 3] The said appeal came to be disposed off in the light of the consent terms and minutes of the order, filed by the parties on 26.8.2014. The modification is sought specifically in paragraph Nos.7 and 8 of the said Minutes of the order, which read as under:-

“7. The appellants shall pay to the Respondent No.1 an ad-

hoc amount of Rs.24,00,000/- (Twenty four lakhs) per month, along-with service tax, as applicable, with effect from 10th September, 2014 for Food Mall and Food Track collectively. It is made clear that the said ad-hoc amount of Rs.24 lakhs is exclusive of applicable service tax and other statutory liabilities. In the event of the suits, for any reason, not being disposed off in the period of one year, amount of Rs.24,00,000/- (Twenty Four Lakhs) paid every month, will be increased by 15% annually with effect from 10th September, 2015 and by 15% each successive year. It is the case of the respondent that the Respondents are entitled for an amount of Rs.31,05,799/- inclusive of service tax per month and any increase thereof as per the Agreement which is exclusive of any other statutory liabilities etc. It is also made clear that, claim of the Respondent in respect of the said amount of Rs.31,05,799/- which is disputed by the appellant, will be subject to the final outcome of the Special Civil Suit No.503 of 2011 and Special Civil Suit No.634 of 2011, which are pending before the Learned Civil Judge Senior Division, Panvel.

8. The Appellants shall pay to the Respondent No.1 the aforesaid ad-hoc amount of Rs.24,00,000/- (Twenty Four Lakhs) along with the service tax, as applicable, on or before 10th September, 2014 for the month of September, 2014 and thereafter on or before 10th day of every succeeding month during the pendency of the suits”.

4] It is submitted that under the impression that the suits will be decided within a period of one year, the appellant has agreed for the enhancement in the amount at the rate of 15% per annum over and above amount of Rs.24 lacs per month each successive years. It is submitted that the suits are yet not decided. Hence, the appellant is finding it difficult to pay the enhanced amount, especially, considering that the respondent has already given permission to some other persons to conduct the food mall nearby, that too on lesser rent and thus, the appellant is suffering loss in business. Hence it is requested that the order be modified, exempting the appellant from paying enhanced charges as agreed.

5] Learned counsel for respondent strongly resists this application by submitting that it is the appellant, who is not conducting the suits diligently and bonafide. As a result thereof only, the hearing of the suits could not be completed. According to learned counsel for respondent, since last two dates, the appellant has sought the adjournments, before the trial Court, for filing affidavit-in-lieu of evidence. Hence it is contended that no such modification can be made, especially, when it was consent order passed by this Court.

6] I also find much substance in the submission advanced by learned counsel for respondents. When the appellant has entered into the consent terms with respondents agreeing to pay 15% increase per

month over and above the amount of Rs.24 lakhs, he was very much aware of the possibility that the suits may not be concluded within a period of one or two years. Despite that, if appellant has entered into the consent terms, now merely because the hearing of the suits could not be completed, he cannot seek modification of such order.

7] Secondly and most importantly, it is the appellant himself, who is not diligent in proceeding with the hearing of the suit. It is not disputed that on last two occasions, appellant has sought adjournments before the trial court for filing affidavit in lieu of evidence. Hence, he cannot blow hot and cold at the same time.

8] As regards the submission of learned counsel for appellant that the appellant is ready to give an undertaking that he will pay the enhanced amount, after the decision of the suit, such submission also cannot be accepted as the consent terms were arrived at between parties and when the appellant was present at the time of passing the order.

9] This application, therefore, is devoid of merits, hence stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]