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

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Judgment delivered on: 21.03.2018

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EX. F.A. 30/2017

G.S. BERAR & CO. PVT. LTD.

..... Appellant

Through: Mr. Saurabh Prakash, Mr. Kunal
Gosain, and Mr. Utsav Jain,
Advocates.

Versus

M/S TRANS ASIAN INDUSTRIES
EXPOSITIONS PVT. LTD.

..... Respondent

Through: Mr. Reyaz A. Jan, Sr. Adv. with Ms.
Nidhi Parashar, Adv.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. This Execution First Appeal is under Order XXI Rule 58 read with section 151 CPC from the order dated 30.10.2017 which declined relief to the appellant regarding the arrears of use and occupation charges. The case was adjourned to 19.01.2018 and put up for consideration apropos the payment of cost.

2. It is the appellant's case that the suit property bearing no. M-1, Hauz Khas, New Delhi was leased out to the respondent for some time; they vacated the premises on 21.10.2016; the property was left in a bad shape and some payments were made after the due date; hence, the appellants made *suo motu* adjustments and sought further dues; their request for the payment of the balance amount by a letter dated 16.12.2016 evinced no reply. Hence,

the suit for recovery of the balance amounts was filed. According to the appellant, the three orders passed by this Court are relevant, i.e, order dated 25.02.2009 in CS (OS) 2330/2008, order dated 05.08.2015 in CS (OS) 2330/2008 and order dated 13.10.2015 passed in Review Petition No. 487/2015 in CS OS 2330/2008. The appellant contends that for the period of August, 2015 till the time of delivery of the possession of the property by the respondent to the appellant, an amount of Rs. 44,76,064/- was payable to the appellant towards use and occupation charges. These amounts were not paid.

3. This Court's order dated 13.10.2015 had imposed a cost of Rs. 5 lacs upon the respondent, of which Rs. 2.5 lacs was to be paid to the appellant, and the remainder into the Prime Minister's National Relief Fund. Neither of the amounts has been paid by the respondent. The impugned order has put in abeyance the appellant's application for execution of the interim orders on the ground that the matter is pending for over nine years and these issues would be considered at the time of final adjudication of the suit.

4. The learned Senior Advocate for the respondent submits that in the appeal preferred against the said order of 13.10.2015, the Division Bench of this Court by order dated 18.05.2016, modified the said order to a large extent and the amounts payable by the respondent to the appellant stand satisfied. It held as under:-

“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 Rs.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 Rs. 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 Rs7,00,000/- 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 Rs. 5,00,000/- per month was to paid for the period from 1st September, 2008 to 22.01.2010 (order dated 25th February, 2010); Rs. 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 Rs.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 Rs. 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 Rs. 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 Rs. 5,50,000/- per month (order dated 13th May 2014). In these circumstances, the court should not have fixed a flat rate of Rs. 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 Rs. 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 pendent lite user charges, for the period from 1.6.2010 till 30.4.2014 shall be in accordance with the previous orders in the regard in the suit, Rs.5,00,000/- per month for the period from 01.09.2008 to 22.01.2010 (order dated 25th February,2010); Rs. 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 Rs. 7,00,000/- per month (this is even because though the last order had recorded that it had to pay Rs. 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/Tans 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”.

5. The learned Senior Advocate further contends that the impugned order is not final, hence it is not appealable. The sequitor is that the appeal is not maintainable. He further submits that the accounts are yet to be examined, adjusted and reconciled. The impugned order records the rival contentions of the appellant/ Decree-Holder and of the Judgment Debtor regarding the amounts due and amounts paid. The reconciliation exercise is yet to be undertaken and completed before the Executing Court. The order further noted that use and occupation charges are yet to be determined at the final stage and the case was simply put up for hearing on 19.01.2018.

6. According to the appellant, after adjusting the security amounts and other amounts paid, there is still an amount of Rs. 44,76,064/- and cost of Rs. 2,50,000/- payable to them by the respondent. The latter, however, states that these calculations and adjustments are yet to be determined before the Executing Court. Therefore, the impugned order in the appeal is pre-mature and should be dismissed.

7. The Court is of the view that insofar as the adjustments, in terms of the order dated 18.05.2016 of the Division Bench, is still to be determined before the court concerned, the appeal is pre-mature and would not be maintainable. Accordingly, it is dismissed.

8. It will be open for the appellant to approach the Executing Court/Trial Court for adjustment of the amounts as well as settlement of accounts, i.e., the amount received by the appellant and for the amounts due, as may be.

MARCH 21, 2018

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NAJMI WAZIRI, J.



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