



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.327 OF 2021
WITH
INTERIM APPLICATION NO.2888 OF 2021
IN
APPEAL FROM ORDER NO. 327 OF 2021

Kavis Fashions Private Limited	}
a private limited company having its	}
registered office at Plot No. 87, Saki	}
Vihar Road, Powai, Mumbai -400 072	}..Appellant /
	Applicant

Versus

Rupani Spining Mills Private Limited,	}
a private limited company	}
having its registered office at 705, Maker	}
Chambers -V, 7th Floor, Nariman Point	}
Mumbai-400 021	} ...Respondent

WITH
INTERIM APPLICATION NO.3415 OF 2022
IN
APPEAL FROM ORDER NO.327 OF 2021

Rupani Spining Mills Private Limited,	}
a private limited company	}
having its registered office at 705, Maker	}
Chambers -V, 7th Floor, Nariman Point	}
Mumbai-400 021	}..Applicant

IN THE MATTER BETWEEN

Kavis Fashions Private Limited	}
a private limited company having its	}
registered office at Plot No. 87, Saki	}
Vihar Road, Powai, Mumbai -400 072	}..Appellant

Versus

Rupani Spining Mills Private Limited,	}
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having its registered office at 705, Maker	}
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Mumbai-400 021	}..Respondent

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Dr. Virendra V. Tulzapurkar, Senior Advocate a/w Mr. Mandar Soman, Mr. Vachan Bodke, Mr. Tushad Kakalia, Mr. Vaibhav Gaikwad, Mrs. Ankita Vishwakarma i/by V & M Legal for the Appellant.

Ms. Dinyar Madon, Senior Advocate a/w Mr. Prantik Majumdar, Mr. Abhineet Sharma Mr. Kandarp Trivedi i/by RHP Partners, Advocates for the Respondent.

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CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 25 OCTOBER 2023
PRONOUNCED ON : 01 NOVEMBER 2023

JUDGMENT

1. In the present appeal, Appellant has challenged order dated 4th January 2021 passed by Joint Civil Judge Senior Division, Thane thereby allowing Plaintiff's Application at Exhibit 5 and rejecting Appellant/Defendant's Application at Exhibit 16. By allowing Plaintiff's Application at Exhibit 5, the Trial Court has directed the Appellant/Defendant to deposit/pay to the Plaintiff an amount of Rs. 37,61,606/- per month towards license fees and compensation from 1st September 2020 either till decision of the

suit or till handing over possession of the suit premises, whichever is earlier. The Trial Court has granted exemption for payment of license fees for a period of 78 days during COVID with a further direction to adjust the amount of security deposit paid by the Defendants in the amount of arrears of license fees and compensation. The Defendants are also restrained from subletting or assigning the license premises till decision of the suit. The Trial Court has also awarded interest @ 15% p.a. for delay in payment of license fees. Appellants/Defendants are aggrieved by the order dated 4th January 2021 passed by the Trial Court and have filed the present appeal.

2. Facts of the case are in a narrow compass. Plaintiff-Rupani Spinning Mills Private Limited is a private limited company engaged in the business of spinning, weaving and furnishing of textiles. Appellant-Defendant-Kavis Fashions Private Limited is a company engaged in the business of tanning, dressing of leather, manufacture of luggage, hand bags, saddlery and harness. Plaintiff is lessee in respect of Plot No. B-2, Mira Industrial Area, Mira Taluka, Thane admeasuring 6254 square meters, in pursuance of lease dated 18th August 1990 executed in its favour by Maharashtra Industrial Development Corporation. Plaintiff has constructed RCC shed admeasuring 35,500 square feet and mezzanine floor admeasuring 5200 square feet on the said plot. Plaintiff and Defendant entered into registered Leave and License

Agreement dated 17th March 2015, by which Plaintiff granted license to the Defendant in respect of ground floor premises at license fees at Rs. 12,00,000/- per month and mezzanine floor by similar leave and license agreement dated 19.03.2005 granted license in respect of premises at Rs. 2,00,000/- per month. Both agreements contained provision for enhancement of license fees at compound rate of 4% for each subsequent years. By the year 2019-2020, which was a 5th year of tenure of license, the license fees in respect of both the premises was collectively Rs. 19,32,606/-. It is Plaintiff's case that the Defendant started delaying payment of license fees after December 2019 and the Plaintiff granted some credit to the Defendant for payment of license fee for the months of December 2019 in January 2020 without levy of interest. That, the Defendant defaulted on paying license fees on account of outbreak of COVID-19 pandemic. Lock-down was announced from 23rd March 2020 on account of which, Defendant did not pay license fees to Plaintiff. Some correspondence took place between the Plaintiff and Defendant due to non-payment of license fees by Defendant who sought waiver for period of three months and also reduction of license fees for the remainder of the license period. Plaintiff granted waiver of license fees for the months of April, May and 15 days in the month of June on certain conditions, which included payment of fixed costs to be paid to MIDC for subletting the premises. Defendant paid an amount of Rs.10,00,000/- on 10.06.2020 and another sum of Rs.9,32,607/- on 30.07.2020. The

Defendant demanded further reduction of license fees. Thereafter several developments and correspondence occurred between the Plaintiff and Defendant, details of which need not be narrated, considering the limited controversy involved in the present appeal. Suffice it to state that on 18th September 2022, Plaintiff lodged Special Civil Suit No. 278 of 2020 against the Defendant in the Court of Civil Judge Senior Division, Thane seeking following reliefs:-

- a. this Hon'ble Court be pleased to declare that the Defendant is in breach of the Leave and License Agreements executed between the Parties herein;*
- b. this Hon'ble Court be pleased to pass a decree and order of eviction directing the Defendant to hand over quiet, vacant and peaceful possession of the Licensed Premise in good repair and condition after removing itself, its employees, belonging, chattels, articles and effects from the said Licensed Premises in terms of the said Leave and License Agreements;*
- c. this Hon'ble Court be pleased to pass an order to permanently restrain the Defendant, its agents and servants from subletting, assigning, dealing with the Licensed Premise or parting with possession of the said Premise or any part thereof in any manner whatsoever;*
- d. this Hon'ble Court be pleased to pass an order for deposit of compensation and the payment of the same to the Plaintiff, pending the hearing and final disposal of the Suit in accordance with Order XVA of the Code of Civil Procedure;*
- e. Hon'ble Court be pleased to pass an order and direct the Defendant to pay compensation for the period of occupation beyond the license period i.e. 31.08.2020 as per Article V of the Leave and License Agreements after adjusting the balance security deposit, if any, from 1.9.2020 till the peaceful and quiet handing over of possession of the Licensed Premise; as quantified at paras 57-60 of this plaint;*
- f. this Hon'ble Court be pleased to pass an order for appointment of Court receiver for the Licensed Premise; or some other person be appointed as a Receiver of the said licensed premises with power to take custody thereof with all powers under Order 40 Rule 1 of the Code of Civil Procedure,*

19088 with further directions to put the plaintiff in possession thereof as against agent of this Court Receiver.

g. this Hon'ble Court be pleased to, after ordering enquiry as to ascertain mesne profit under Order XX Rule 12 of Civil Procedure Code, pass a decree and order for payment of mesne profit from the date of expiry i.e. 31.08.2020 until vacant and peaceful possession of the said Licensed Premise is handed to the Plaintiff by the Defendant,

h. this Hon'ble Court be pleased to pass an order for appointment of commissioners,

i. Ad-interim/interim relief in view of prayer clauses above,

j. Costs of the present Suit, and

k. Any other relief as deemed just and necessary.

3. Along with the suit, Plaintiff filed application at Exhibit-5 seeking various interim orders including an order for deposit of license fees and compensation of Rs. 37,61,606/- per month under provisions of Order XV-A of the Code of Civil Procedure **(the Code)** and for restraining the Defendant from subletting, assigning or dealing with the licensed premises.

4. The Application was resisted by the Defendant by filing a reply. Additionally, Defendant filed Application at Exhibit-16 offering to deposit license fees of Rs.10,00,000/- per month. After hearing both the sides, the Trial Court was pleased to allow Plaintiff's Application at Exhibit-5 and rejected Defendant's Application at Exhibit 16. The Trial Court has passed following order on 4th January 2021.

1] Application of plaintiff at Exh.5 is partially allowed.

2] Application of defendant at Exh.16 is rejected.

3] Defendants are hereby directed to deposit or pay to the plaintiff of Rs.37,61,606/- per month as a licensee fees and compensation from 01-09-2020 till the peaceful and vacant possession of licensed premises handed over to the plaintiff or till the decision of suit which is earlier.

4] Defendants are entitled for exemption of payment of licensee fees due to the force majeure during the period from 23-03-2020 to 08-06-2020 for 78 days, which is at about Rs.50,23,760/-.

5] Defendants are liable to pay the amount of licensee fees for early March-2020, later part of June-2020, July-2020 and August -2020 of Rs.66,99,692/- to the plaintiff.

6] Defendants are entitled to adjust the amount of security deposit deducted by plaintiff which is further amount of arrears of amount as discussed in the body of application.

7] Defendants are restrained from themselves or any other person acting on behalf of them, to sublet or assigned the licensed premises or any part of it, till the decision of suit.

8] The Plaintiff is entitled to charge interest at the rate of 15% p.a. for delay payment, if any, find after adjustment of payment and security for specified period which is required to be calculated separately.

9] No order as to costs.

5. Defendant is aggrieved by the order dated 4th January 2021 and has filed the present appeal. During the pendency of the appeal, Defendant has vacated the license premises on 4th April 2022. When the Appeal came up for hearing before this Court following order was passed on 29th November 2021:

1. The effect of impugned Order being a money decree, the Appellant is directed to deposit 50% of the amount as

has been directed by the impugned Order dated 4th January 2021 in the Registry of this Court within a period of three weeks from today.

2. Stand over to 21st December 2021.

To be placed under the caption for 'Reporting Compliance'.

6. In pursuance of order passed by this Court on 29th November 2021, Appellant/Defendant deposited an amount of Rs. 2,17,01,603/- in the Registry of this Court. This Court, by its order dated 1st March 2022, permitted withdrawal of amount of Rs.2,17,00,000/- subject to furnishing security and/or undertaking to the satisfaction of the Trial Court. Respondent/Plaintiff filed Interim Application No.3415 of 2022 complaining failure on the part of the Appellant to deposit 50% of the amount arising out of the Trial Court's order dated 4th January 2021. This Court disposed of Interim Application No. 3415 of 2022 directing the Appellant to deposit further amount of Rs. 65,00,000/- with a view to satisfy the direction for deposit made by this Court vide order dated 29th November 2021. Accordingly, the said amount of Rs. 65,00,000/- has been deposited by the Appellant in this Court which the Plaintiff/Respondent has been permitted to withdraw.

7. Dr. Tulzapurkar, the learned senior advocate appearing for the Appellant-Defendant would raise the issue of maintainability of the Suit filed by Plaintiff in the Court of Civil Judge Senior Division, Thane on the ground of territorial jurisdiction by inviting my attention to Article 28 of the License Agreement, under which

Courts in Mumbai have jurisdiction in respect of any disputes arising out of the agreement. He would submit that both the Plaintiff and Defendant carry on their business in Mumbai and therefore, the Court in Mumbai alone can have jurisdiction in view of specific agreement between the parties. He would submit that once it is proved that a particular Court, which is agreed by the parties in a contract, has jurisdiction, proceedings must be filed in that Court alone. That, the Defendant has proved that the Court in Mumbai has jurisdiction to decide the dispute arising out of the license agreement and in such a case, Article 28 of the license agreement would prevail and only Court in Mumbai will have jurisdiction to entertain the suit filed by Plaintiff. In support of his contention, Dr. Tulzapurkar would rely upon the Judgment of the Apex Court in ***A.B.C. Laminart Pvt. Ltd. & Another Vs. A.P. Agencies, Salem¹*** and ***Swastik Gases Private Limited Vs. Indian Oil Corporation Limited²***.

8. Dr. Tulzapurkar would further submit that the Trial Court has erred in directing deposit / payment of double the license fees towards compensation without appreciating the provisions of Section 74 of the Indian Contract Act, 1872. That, Article 5.4 of the license agreement providing for specific amount towards additional compensation is only a genuine pre-estimate to compensate the losses suffered by the Licensor and therefore, the Licensor must

1 (1989) 2 SCC 163

2 (2013) 9 SCC 32

prove such loss. To the extent of proof of losses, damages/compensation up to the maximum limit specified in Article 5.4 of the license agreement could be awarded, that too at the time of final hearing of the suit. In support of his contention, Dr. Tulzapurkar would rely upon the Judgment in ***Kailash Nath Associates Vs. Delhi Development Authority & Another***³. He further submit that the Judgment of Single Judge of this Court in ***Ida Celene Mathias & Others Vs. Mobin Ahmed Khan***⁴ directing deposit of even the amount of compensation has not taken into consideration the law expounded by the Apex Court in ***Kailash Nath Associates (supra)*** and therefore judgment of this Court would not constitute a binding precedent. Dr. Tulzapurkar would further submit that even under Section 24 (2) of the Maharashtra Rent Control Act, 1999 (**the Rent Control Act**), the word 'damages' are used and therefore for recovery of such damages, principle enunciated in ***Kailash Nath Associates*** would apply.

9. Dr. Tulzapurkar would further submit that couple of factor which can be taken into consideration for establishing the damages suffered by Plaintiff on account of non-vacation of premises could be subsequent leave and license agreement executed after vacation of the license premises by the Defendant which has fetched cumulative license fees of Rs. 23,00,000/- per month. That, as against amount of Rs.23,00,000/- per month

3 (2015) 4 SCC 136

4 (2018) SCC OnLine Bom 16391

ultimately earned by Plaintiff by granting license to third parties, the Trial Court has erroneously directed deposit / payment of amount of Rs.37,61,606/-. That another factor was to make an enquiry into the market rent payable in the vicinity. He would submit that though ordinarily enquiry into the amount of compensation payable needs to be conducted during the trial of the suit, even if the Trial Court was to make an order for deposit/payment of rent under Order XV-A of the Code, it ought to have determined the amount for deposit/payment of compensation by considering the said two factors.

10. Mr. Madon, the learned senior advocate appearing for Respondent-Plaintiff would oppose the appeal and support the order passed by the Trial Court. He would question the maintainability of the present appeal by submitting that the impugned order dated 4th January 2021 is passed by the Trial Court under provisions of Order XV-A of the Code and against that Order no appeal is provided under Order 43 Rule 1 of the Code. That, even though the Trial Court has also granted temporary injunction to restrain Defendant from subletting or assigning the licensed premises, the said relief no longer survives in view of Defendant's action in vacating the premises on 4th April 2022. That therefore, the scope of the present appeal is essentially restricted to the order passed by Trial Court directing deposit / payment of rent

under Order XV-A of the Code, against which no appeal is maintainable.

11. Mr. Madon would contend that both the points of jurisdiction as well as compensation/damages being a genuine preestimate were never raised by the Appellant before the Trial Court and the Appellant is therefore precluded from raising them directly in appeal before this Court. He would submit that in the present appeal, this Court is essentially concerned with correctness of findings recorded by the Trial Court and something which was never argued and about which there was no occasion for the Trial Court to records its finding, cannot be decided in the present appeal.

12. So far as the issue of jurisdiction is concerned, Mr. Madon would contend that the licensed premises are located at Thane and therefore, the Court at Thane has jurisdiction to decide the suit. Referring to the provisions of Section 41 of the Presidency Small Cause Courts Act, 1882, Mr. Madon would submit that the Court of Small Causes, Mumbai does not have any jurisdiction to try any suit in respect of premises situated outside Greater Mumbai. That therefore, if Plaintiff instituted a suit in Small Causes Court at Mumbai, the same would be outside its jurisdiction. Since, the licensed premises are situated outside Greater Mumbai, referring to the provisions of Section 33 of the Rent Control Act,

Mr. Madon would submit that the suit has rightly been instituted in the Court having jurisdiction, in which the premises are situated.

13. Mr. Madon would then counter the submission canvassed on behalf of the Appellant by relying on the Judgment in Apex Court in ***Kailash Nath Associates***. By referring to provisions of Section 24 of the Rent Control Act he would contend that the provision to pay double the license fees towards damages or the charge fixed under the agreement is a statutory provision. That, statutory payment of damages or charge provided for under Section 24 of the Rent Control Act would not be subject to principles enunciated by the Apex Court in ***Kailash Nath Associates*** for computation amount for compensation for breach of contract under Section 74 of the Contract Act. That, the judgment of *Kailash Nath Associates* relates to charge of liquidated damages in the form of forfeiture of earnest money for non-payment of balance amount of consideration payable for purchase of the plot in an auction. That, therefore, the principle enunciated in *Kailash Nath* would have no application to the present case where the amount of damages or charge is determinable under the provisions of Section 24(2) of the Rent Control Act. He would submit that knowing this is difficulty in applicability of the judgment in *Kailash Nath*, the Appellant did not rely upon that Judgment before the Trial Court. That, the amount of 'charge' fixed under the agreement of license is not liquidated damages payable under provisions of Section 74 of the Contract

Act. Mr. Madon would also place reliance of Judgment of Single Judge of this Court in ***Ida Celene Mathias (supra)*** wherein this Court has directed deposit of even the amount of compensation during pendency of the suit. He would further submit that the liability to pay liquidated damage/charge/compensation in any case is a mixed question of law and fact and the same must be proved and pleaded. That, there are no pleadings about requirement to prove actual cause of loss. There is no specific ground to that effect in the present appeal as well. He would pray for dismissal of the appeal.

14. Rival contentions of the parties now fall for my consideration.

15. The Trial Court's order dated 4th January 2021 passed on Application at Exhibit-5 and Exhibit-16 is under challenge in the present appeal. Dr. Tulzapurkar has submitted that challenge in the present appeal is now restricted only to the Direction Nos .3 and 8 of operative portion of the order which directs deposit/payment of amount of Rs. 37,61,606/- towards license fees/ compensation from 01.09.2020 till the date of vacation of the licensed premises and interest @ 15% per annum for delayed payment. Direction No.4 grants solace to the Defendant for a period of 78 days from payment of license fees and Direction No.5 computes the exact amount payable for the months of March, June, July and August

2020. Direction No.6 provides for adjustment of amount of security deposit paid by the Defendant to Plaintiff. Though Direction No.7 had enjoined Defendant from subletting or assigning license premises, the said direction would no longer survive in view of admitted position that the licensed premises have been vacated on 4th March 2022. Thus, in the present appeal, the correctness of the direction issued in Direction Nos. 3 and 8 of the order is required to be examined.

16. Mr. Madon has raised a preliminary issue of maintainability of the appeal. According to him, Direction Nos. 3 and 8 are issued by the Trial Court under Order XV-A of the Code which are not appealable under provisions of Order 43 Rule 1. Dr. Tulzapurkar, on the other hand, has submitted that the Application at Exhibit- 5 was filed by Plaintiff under provisions of Order 39 Rules 1 and 2 of the Code and that the Trial Court itself has stated so in its Order. Dr. Tulzapurkar seems to be right in that regard as the Trial Court itself has treated the Application as filed under Order 39 Rules 1 and 2 of the Code which is clear from Para 1 of the impugned order. True it is that the Plaintiff sought deposit / payment of license fees and compensation under provisions of Order XVA of the Code.

17. However, in the Application filed at Exhibit-5 Plaintiff had sought following reliefs:-

61. Therefore, under the present facts and circumstances, the Applicant humbly prays that, pending the hearing of Suit and disposal thereof, the Hon'ble Court be pleased to:

a. grant urgent and expeditious hearing of the Suit and the Application;

b. pass an order directing the Defendant to deposit and/or pay to the Plaintiff Rs. 37,61,606/- per month as License Fees for the period of possession beyond the License period i.e. 31.08.2020 as per Article 5.4 of the Leave and License Agreements from 1.9.2020 till the peaceful and quiet handing over of possession of the Licensed Premise;

c. pass an order directing the Defendant to deposit and/or pay Rs. 32,44,832/- to the Plaintiff as unpaid compensation for September 2020;

d. restrain the Defendant, its agents and servants from subletting, assigning, dealing with the Licensed Premise or parting with possession of the said Premise or any part thereof in any manner whatsoever;

e. restrain the Defendant, its agents and servants from removing, selling or any manner dealing with any plant and machinery or piece of equipment installed by the Defendant from the Licensed Premises without prior permission from the Hon' ble Court during the pendency of the Suit;

f. pass an order for deposit of interim compensation and the payment of the same to the Plaintiff, pending the hearing and final disposal of the Suit in accordance with Order XVA of the Code of Civil Procedure;

g. pass an order directing the Defendant to make and continue to make payments of the fixed costs such as electricity, water bills factory license fee etc. including any penalty on account of delay during the pendency of the Suit to any government authority or private party;

h. pass an order for appointment of Court receiver;

i. pass an order for enquiry to ascertain mesne profit under Order XX Rule 12 of Civil Procedure Code;

j. pass an order for payment of mesne profit to the Plaintiff from the date of termination i.e. 31.08.2020 until vacant and peaceful possession of the said Licensed Premise is handed to the Plaintiff by the Defendant;

k. this Hon'ble Court be pleased to pass an order for appointment of commissioners;

- 1. Ad-interim / interim relief in view of prayer clauses above;*
- m. Costs of the present Application; and*
- n. Any other relief as deemed just and necessary.*

18. Thus, the relief sought by Plaintiff in its Application at Exhibit-5 were not restricted to deposit/payment of rent under Order XV-A of the Code. Plaintiff also sought various other injunctive reliefs against the Defendant. It is, therefore, difficult to hold that the Application filed by the Plaintiff was only under Order XV-A. Apart from seeking various other injunctive reliefs in addition to the relief for payment of rent under Order XVA, the Trial Court has also granted injunction against the Defendant from subletting or assigning the license premises. That relief is undoubtedly granted under provisions of Order 39 and Rules 1 and 2 of the Code. Appellant, therefore, cannot be directed to bifurcate the order dated 4th January 2021 into two parts and file two different proceedings viz. an Appeal under Order 43 Rule 1 in respect of the injunctive reliefs and Writ Petition in respect of direction to deposit/pay rent under Order XV-A. Such a course of action would lead to multiplicity of litigation, which is not desirable. In fact, as rightly contended by Dr. Tulzapurkar, Plaintiff may seek relief under various provisions of the Code, but so long as Application is filed and decided under the provisions of Order 39 Rules 1 and 2 of the Code, appeal against such order under Order 43 Rule 1 would be maintainable. Therefore mere quotation of provisions Order XVA for seeking deposit/payment of rent during pendency of the suit would

not convert the Application filed by the Plaintiff as an application filed purely under the provisions of Order XV-A. In my view, therefore, appeal filed by the Appellant is maintainable.

19. The next issue strenuously contested between the parties is about is the jurisdiction of the Civil Judge Senior Division, Thane to try entertain the suit filed by the Plaintiff. It is admitted position that the issue of jurisdiction has neither been raised nor decided by the Trial Court while passing order dated 4th January 2021. The issue of jurisdiction of the Trial Court to try and entertain the suit of Plaintiff therefore cannot be an issue in the present appeal. The ambit of the present appeal is restricted to grant of temporary injunction in favour of Plaintiff under Order 39 and Rules 1 and 2 of the Code. Dr. Tulzapurkar has submitted that the issue of jurisdiction, being a point of law, can be raised at any stage and in any proceeding. Though he may not be entirely wrong in contending so, deciding the issue of jurisdiction in appeal filed against order passed under Order 39 Rule 2, without the issue being raised before the Trial Court is not desirable. Therefore, though extensive submissions are canvassed by the learned counsel appearing for the parties on the issue of jurisdiction, in my view, the said issue need not be decided in the present appeal. The issue of jurisdiction is accordingly left open to be agitated and decided by the Trial Court if and when an application to that effect is moved by

the Defendant. I am therefore not burdening this judgment with discussion on case laws cited by both the parties.

20. Coming to the merits of the order dated 4th January 2021, the Trial Court has directed deposit/payment of amount of Rs.37,61,606/- towards license fees and compensation in accordance with the Article 5.4 of the license agreement. As observed above, two separate license agreements have been executed in respect of the ground floor and mezzanine floor premises. Article 5.4 in respect of ground floor premises reads thus:

***5.4** In the event the LICENSEE falls or neglects to deliver the vacant and peaceful possession of the said Licensed Premises to the LICENSOR despite the LICENSOR being ready and willing to refund the Security Deposit to the LICENSEE on the expiry or termination or sooner or earlier determination of this License, hereinafter referred to as "the expired term" the LICENSOR shall, without prejudice to the other rights and remedies the LICENSOR may have under this Agreement or in law, not be liable to refund the Security Deposit till such time the LICENSEE delivers the vacant and peaceful possession of the said Licensed Premises to the LICENSOR. In addition thereto, the LICENSEE shall be liable to pay to the LICENSOR additional compensation at the rate of Rs.1,300,000/- (Rupees Thirteen Lacs) per month (over and above monthly License Fees as provided herein) calculated from the date of the expiry, or termination, or sooner or earlier determination of the License til the vacant and peaceful, possession of the said: Licensed Premises is returned by the LICENSEE to the LICENSOR.*

21. There is similar Article 5.4 in respect of mezzanine premises wherein the additional amount of compensation is @ Rs. 2,50,000/-. Thus under both the agreements, cumulative amount

payable towards additional compensation is Rs. 15,50,000/-. By the time disputes arose between the parties over non-payment of license fees, the amount of license fees payable per month, by operation of escalation clause, had risen to Rs. 19,32,606/-. After adding the amount of GST, the Trial Court had arrived at the figure of Rs.37,61,606/- as the amount payable under Article 5.4 of both the License Agreements.

22. The question raised by the Appellant in the present appeal is whether the Plaintiff would be entitled to the entire amount specified under Article 5.4 towards compensation /damages? According to the Appellants, the amount specified in Article 5.4 is merely a genuine pre-estimate of damages resulting out of breach of the contract. Reliance is placed on provisions of Section 74 of the Contract Act which reads thus:-

"74. Compensation for breach of contract where penalty stipulated for.—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.— When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in

which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

23. In ***Kailash Nath Associates*** (*supra*), the Apex Court, after considering various judgments delivered in the past on the aspect of determination of amount of compensation for breach of contract under Section 74, has summarized the principles in Para 43 as under:-

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

24. It is relying on the Judgment of the **Kailash Nath** that the Appellant contends that the Plaintiff must prove the actual damages suffered by it on account of non-vacation of premises and that, Plaintiff is not entitled to the entire amount specified in Article 5.4 of the license agreement. According to Appellant, Plaintiff has granted license in respect of the suit premises to another entity after vacation thereof at much lesser license fees of Rs. 23,00,000/- per month and therefore, the Plaintiff cannot be awarded exponentially high amount of Rs. 37,61,606/- that too by way of deposit/payment during pendency of the suit under Order XV-A of the Code.

25. On the other hand, Mr. Madon has relied upon provisions of Section 24 of the Rent Control Act which provides thus:-

24. Landlord entitled to recover possession of premises given on licence on expiry

(1) Notwithstanding anything contained in this Act, a licensee in possession or occupation of premises given to him on licence for residence shall deliver possession of such premises to the landlord on expiry of the period of licence; and on the failure of the licensee to so deliver the possession of the licensed premises, a landlord shall be entitled to recover possession of such premises from a licensee, on the expiry of the period of licence, by making

an application to the Competent Authority, and, the Competent Authority, on being satisfied that the period of licence has expired, shall pass an order for eviction of a licensee.

(2) Any licensee who does not deliver possession of the premises to the landlord on expiry of the period of licence and continues to be in possession of the licensed premises till he is dispossessed by the Competent Authority shall be liable to pay damages at double the rate of the licence fee or charge of the premises fixed under the agreement of licence.

(3) The Competent Authority shall not entertain any claim of whatever nature from any other person who is not a licensee according to the agreement of licence.

Explanation.— For the purposes of this section,—

- (a) the expression "landlord" includes a successor-in-interest who becomes the landlord of the premises as a result of death of such landlord; but does not include a tenant or a sub-tenant who has given premises on licence;*
- (b) an agreement of licence in writing shall be conclusive evidence of the fact stated therein.*

26. Thus, under sub section 2 of Section 24 of the Rent Control Act, a licensee failing to deliver possession of the licensed premises upon expiration of the license period is made liable to pay damages at double the rate of license fee or charge fixed under the agreement of license. Thus, under provisions of Section 24(2), the damages are either double the amount of license fees or the charge fixed under the agreement. In the present case, the Trial Court has taken into consideration the 'charge' agreed upon between the parties in the license agreement and has fixed the total amount payable at Rs.37,61,606/-.

27. The issue is whether the damages or charge payable for non-vacation of license premises statutorily fixed under Section

24(2) of the Rent Control Act can be made subject to the principles enunciated by the Apex Court for computation of damages for breach of contract under Section 74 in ***Kailash Nath***. In my view, at present, this issue need not be decided finally as this is an Appeal from Order directing interim deposit/payment of rent under provisions of Order XVA of the Code. If the issue about the exact liability of the Defendant to pay the quantum of damages is determined in the present appeal, there will be nothing left to be decided in the Suit by the Trial Court. In my view, therefore, this issue needs to be decided by the Trial Court, against decision of which a substantive appeal can be filed by the aggrieved parties.

28. In the present appeal, this Court is concerned with the limited question of the exact amount which can be directed to be deposited/paid by the Defendant during pendency of the suit filed by the Plaintiff for recovery of possession as well as for recovery of arrears of Rent. Under provisions of Order XVA Rule 1, the Defendant is made liable to deposit 'such amount' towards the arrears of rent and license fee and future mesne profit as the Court may direct. Order XV-A provides thus:

"ORDER XV-A

STRIKING OFF DEFENCE IN A SUIT BY A LESSOR

(1) In any suit by a lessor or a licensor against a lessee or a licensee, as the case may be, for his eviction with or without the arrears of rent or licence fee and future mesne profits from him, the defendant shall deposit such amount as the Court may direct on account of arrears up to the date of the order (within such time as the Court may fix) and thereafter

continue to deposit in each succeeding month the rent or licence fee claimed in the suit as the Court may direct. The defendant shall, unless otherwise directed, continue to deposit such amount till the decision of the suit.

In the event of any default in making the deposits, as aforesaid, the Court may subject to the provisions of sub-rule (2) strike off the defence.

(2) Before passing an order for striking off the defence, the Court shall serve notice on the defendant or his Advocate to show cause as to why the defence should not be struck off, and the Court shall consider any such cause, if shown in order to decide as to whether the defendant should be relieved from an order striking off the defence.

(3) The amount deposited under this rule shall be paid to the plaintiff lessor or licensor or his Advocate and the receipt of such amount shall not have the effect of prejudicing the claim of the plaintiff and it shall not also be treated as a waiver of notice of termination.

Explanation. — The suit for eviction shall include suit for mandatory injunction seeking removal of licensee from the premises for the purpose of this rule.

29. Thus, discretion is vested in the Court to determine the amount which Defendant can be made liable to pay towards arrears of rent or license fees and future mense profit. Order XV-A does not use the word 'damages/compensation' but restricts the deposit to 'arrears of rent or license fees'. However, the Single Judge of this Court in ***Ida Celene Mathias (supra)*** has held in paras 19 and 20 as under:-

19. *In so far as the payment of compensation and/or damages @ Rs.20,000/- per day is concerned, a perusal of the order of the Appellate Court shows that Appellate Court undoubtedly reproduced Section 74 of the Act. After reproducing Section 74, it was observed in paragraph 25 thus,*

"25. The above facts indicates that the question of awarding damages on the basis of breach of contract is a mater of evidence and is to be appreciated in the proceeding and the burden is on the party who claimed

damages. So at this stage, the question of awarding damages does not arise. The order passed by the learned trial Court regarding awarding damages of Rs. 20,000/- per day from 1-5-2016 and liberty to the plaintiffs to withdraw the same is not legal and proper and deserves to be set aside."

20. *In my opinion, the approach of the Appellate Court to say the east is perverse. After extracting Section 74, still, the Appellate Court observed that the question of awarding damages on the basis of breach of contract is a matter of evidence and is to be appreciated in the proceeding and the burden is on the party, who claimed damages. So at this stage, the question of awarding damages does not arise. In my opinion, the said finding is in the teeth of Section 74 of the Act. This is more so when in paragraph 21, the Appellate Court observed that "At this stage, we are bound by the facts that the leave and licence agreement has been registered by the parties to the proceedings. So parties to the proceedings are bound by the leave and licence agreement". In view thereof, the impugned order passed by the Appellate Court deserves to be set aside thereby allowing application exhibit-13 in the following terms:*

(a) *Pending the hearing and final disposal of L.E.& C. Suit No. 16 of 2017, Mobin Khan shall deposit the pre-estimated genuine quantified compensation and/or liquidated damages @ Rs.*

20,000/- per day from 01.05.2016 till disposal of the Suit in the trial Court;

(b) *The arrears of liquidated damages shall be deposited for the period from 01.05.2016 till 31.10.2018, within 8 weeks from today, under intimation in writing to the Advocate for Mathias;*

(c) *Upon deposit, the said amount shall be invested in any Fixed Deposit, initially for a period of 3 years and shall be renewed*

during pendency of the Suit;

(d) *Pending the hearing and final disposal of L.E.&C. Suit No. 16 of 2017, Mobin Khan is directed to deposit monthly licence fee of Rs. 2,00,000/- from 01.05.2016 till 31.08.2018 total amounting to Rs. 56,00,000/- within 8 weeks subject to adjustment of deposits/payments made to Mathias;*

(e) *Pending the hearing and final disposal of L.E.&C. Suit No. 16 of 2017, Mobin Khan shall deposit monthly licence fee @ Rs. 2,00,000/- for the period from 01.09.2018, on or before 10th day of the succeeding month/s under intimation in writing to the Advocate for Mathias;*

(f) Mathias are permitted to withdraw the amount referred in clauses (d) and (e) hereinabove, unconditionally.

30. Though, there is no elaborate discussion by this Court in ***Ida Celene Mathias*** (*supra*) about liability to pay compensation or damages during pendency of the suit, this Court has directed that the entire amount of compensation and or liquidated damages should be deposited till disposal of the suit. This Court has treated the compensations/damages as ‘pre-estimate genuine quantified compensation’ by referring to provisions of Section 74 of the Contract Act. In view of extensive submissions made by the learned counsel appearing for rival parties as to whether the statutory damages/charge payable under Section 24(2) of the Rent Control Act can be subjected to the principles for determination of compensation under Section 74 for breach of contract, this Court could have decided that issue. However, considering the limited scope of enquiry in the present appeal and with a view not to decide the entitlement of the Plaintiff in respect of compensation/damages at interim stage, I have refrained myself from deciding the said issue finally. In my view, therefore, the Judgment of this Court in ***Ida Celene Mathias*** (*supra*) does not throw any light on the issue of the liability of the Defendant failing to deliver possession of license premises to deposits/pay the amount of compensations/damages in addition to the arrears to rent/license fees.

31. As observed above, Order XV-A of the Code confers some sort of discretions on the Court by using the expression '*such amount as the Court may direct on account of arrears....*'. Furthermore, the 'arrears' are restricted to 'rent' or 'license fees'. Thus, it is difficult to hold that the Court is left with no other alternative but to direct not just the arrears of rent/license fees but also the agreed amount of compensation/damages in the license agreement. In my view, therefore, the Court is vested with necessary discretion to decide the amount which can be directed to be deposited/paid by the Defendant under provisions of Order XV-A of the Code. However, considering the language employed in Order XV-A such amount shall ideally not be less than the amount of arrears of rent or license fees.

32. In the present case, in pursuance of orders passed by this Court on 29th November 2021 and 23rd October 2023, Appellant has deposited amount of Rs.2,17,01,603/- + Rs. 65,00,000/-, total amount of Rs.2,82,01,603/-. Additionally, the amount of security deposit of Rs.98,00,000/- is already with the Plaintiff. Thus, Plaintiff has already recovered amount of Rs. 3,80,01,603/-. If the amount of license fee is payable by the Defendant at the relevant time of Rs. 19,32,606/- is taken into consideration, the amount due and payable by him till the date of vacation of premises from 01.09.2020 till 04.04.2022 would

approximately be Rs. 3,67,19,514/-. The Trial Court has already determined the license fees payable for a period from March to August 2020 as Rs. 66,99,692/-. Thus, the total amount due and payable by Defendant to the Plaintiff till 4th April 2022 would be approximately Rs.4,34,19,206/-. As pointed out above, Plaintiff has already received amount of Rs. 3,80,01,603/-. Thus, the balance amount payable towards arrears of license fees (ignoring amount of damages/compensation) would approximately to the tune of Rs. 54,17,603/-. There is provision in the license agreement for 4% compounded escalation, which is not factored in this calculations.

33. The provisions of Order XV-A are stringent and drastic. Failure to deposit/pay the arrears of rent/license fees results in striking off defence of the Defendant. Therefore the Court needs to exercise the discretion vested in it judiciously so as to balance the interest of both the parties. Considering the facts and circumstances of this case, the Trial Court has erred in directing deposit/payment of entire amount of rent plus compensation under Order XVA of the Code. Its direction to pay interest @ 15% at interlocutory stage is also unsustainable.

34. Mr. Madon has submitted that the statutory intention behind enacting provisions of Section 24(2) of the Rent Control Act is to deter a licensee from unauthorizedly occupying on the licensed premises. There can be no dispute about this proposition. However

in the present case, the Trial Court will have to decide the issue about the date from which the occupation of licensed premises by the Defendant became unauthorized and the date from which the Defendant would be liable to pay damages/compensation as provided in the license agreement. It may also take into consideration the liability to pay the amount of rent and compensation during various periods of outbreaks of Covid-19. It however, cannot be that the Defendant would be permitted to go scot-free and not pay any amount towards damages/charge to the Plaintiff for his failure to pay the license fees in time and for not vacating the licensed premises. In my view, therefore, ends of justice would meet if further amount of Rs 1,00,00,000 is directed to be deposited by the Defendant in the Trial Court under the provisions of Order XV-A of the Code.

35. I therefore proceed to pass the following order:

- i) The order dated 4th January 2021 passed by the Joint Civil Judge, Thane is modified to the extent that Appellant/Defendant shall deposit in the Trial Court further amount of Rs 1,00,00,000/- under provisions of Order XV-A of the Code, within a period of 8 weeks from today.
- ii) The Plaintiff/Respondent shall be entitled to withdraw the deposited amount on furnishing a bank guarantee of

National Bank equivalent to 75% of the deposited amount and an undertaking equivalent to the remaining 25% of the deposited amount for bringing back the said amount as and when directed by the Court.

- iii) The Trial Court shall proceed to decide the suit without influenced by the observations made in its order dated 4th January 2021 or in the present judgment.

36. With the above directions, the appeal is disposed of. There shall be no order as to costs.

37. In view of disposal of Appeal, Interim Applications do not survive and the same are also disposed of.

SANDEEP V. MARNE, J