rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL (L) NO.4317 OF 2022

WITH

INTERIM APPLICATION NO.2116 OF 2023

WITH

INTERIM APPLICATION (L) NO.4320 OF 2022

IN

COMMERCIAL APPEAL (L) NO.4317 OF 2022

Pantheon Infrastructure Pvt. Ltd. .. Appellant

vs.

First Rand Services Pvt. Ltd. .. Respondent

Mr.Karl Tamboly a/w Mr.Aman Kacheria, Ms.Anisha Didwania, Mr.Rishabh Dhanuka, Mr.Zaki Ansari and Mr.Rohan Palhal i/b Agarwal & Dhanuka Legal for the Appellant.

Mr.Viraj Parikh a/w Mr.Shubham Salot, Mr.Raj Yadav and Mr.Akhil Rao i/b Karansingh Shekhawat for the Respondent.

CORAM : BHARATI DANGRE &
ASHISH S. CHAVAN , JJ

DATE : 10th SEPTEMBER, 2026.

JUDGMENT (PER BHARATI DANGRE, J) :

1 The Commercial Appeal raises a challenge to the order passed by the learned Single Judge (N.J. Jamadar, J) on 05/01/2022 in Summons for Judgment No.13 of 2021 in Commercial Summary Suit No.2 of 2021.

RAJSHREE KISHOR MORE Digitally signed by RAJSHREE KISHOR MORE Date: 2026.09.11 19:48:10 +0530

The Summary Suit was instituted for recovery of sum of Rs.3,66,58,175/- comprising of the security deposit of Rs.1,72,82,430/- in respect of the Leave and License Agreement dated 12/08/2016 and a sum of Rs. 1,77,97,164/- in respect of another Leave and License Agreement dated 27/02/2018 alongwith the interest at the rate of 18%.

In response to the writ of summons, when the Defendant entered the appearance, the Plaintiff took out Summons for Judgment and by the order under challenge, it was made absolute by directing the Defendant to pay to the Plaintiff a sum of Rs.2,06,70,775/- alongwith interest at the rate of 18% from 31/05/2020, till its realization.

Accordingly, the Decree was directed to be drawn and sealed expeditiously.

The order also granted leave to the Defendant to defend the Suit in respect of the rest of the claim, but it was made subject to deposit of sum of Rs.1 Crore in Court within a period of six weeks.

Further, the learned Single Judge directed that if the deposit is made within the stipulated time, then the Suit shall be transferred to the list of Commercial Causes and Defendant shall file its written statement within a period of four weeks from the date of deposit.

It is this order, which is called in question by the Appellant (original Defendant), the Licensor.

2 We have heard Mr.Karl Tamboly for the Appellant.

The Respondent (original Plaintiff) First Rand Services Pvt. Ltd., the Licensee, who instituted the Commercial Summary Suit

is represented by Mr.Viraj Parikh.

With their able assistance, we have perused the pleadings in the Commercial Suit alongwith the Summons for Judgment taken out by the Plaintiff and the response filed by the present Appellant alongwith the Rejoinder/Sur-rejoinder, presented before the learned Single Judge.

We have also carefully perused the impugned order which is assailed before us by filing the Commercial Appeal under Section 13(1A) of the Commercial Courts Act, 2015.

3 Pantheon Infrastructure Pvt. Ltd. (for short 'Pantheon') had given out the commercial premises on second floor of Raiaskaran Tech Park to First Rand Services Pvt. Ltd. (for short 'First Rand') on leave and license basis by executing an Agreement on 12/08/2016 and amongst various conditions, clause 4 thereof provided that the licensee shall provide security deposit of Rs.1,72,82,430/- to the Appellant i.e. Licensor.

Another Agreement was executed on 27/02/2018 under which the Licensor Pantheon gave a commercial premises on the first floor of the same building on leave and license basis as against the security deposit of Rs.1,77,97,164/- by mutual consent. All Agreements were to stand terminated on 31/03/2020.

The First Rand, on 01/01/2020 addressed two letters to Pantheon expressing its intention to terminate Agreements on 31/03/2020 and calling upon it to hand over the security deposit simultaneously with the handing over of the possession. However, on 09/03/2020 two further letters were addressed

seeking extension till April, 2020. Furthermore, in the month of April, 2020, further extension was sought till 31/05/2020 and all the while this request by licensee was accepted by Pantheon.

According to the Plaintiff, First Rand, the Licensee, it had paid the entire amount of license fee due and payable upto 31/05/2020 and also expressed its willingness to hand over peaceful and vacant possession of the premises before the said date and called upon the Defendant Lessor, to complete all the formalities necessary for handing over of the premises and it also sought return of the security deposit of Rs.3,50,79,594/- lying with the Pantheon. However, since it failed to refund the same and falsely staked the claim that it is entitled to deduct a sum of Rs.1,44,08,819/- and according to it's own case, a sum of Rs.2,06,70,775/- being admittedly due and payable to the Plaintiff, the purported deduction remained to be a moonshine and a dishonest attempt to unjustly hold to the amounts. With this cause of action, the First Rand filed the Suit with a claim that Pantheon is liable to refund the entire security deposit amount to the Plaintiff as it has unequivocally expressed readiness and willingness to hand over the premises, well before the mutually agreed date of determination i.e. 31/05/2000.

4 Mr. Tamboly, the learned counsel for Pantheon, would place before us the list of dates and events to point out that the commercial premises being handed over to the First Rand, involving security deposits of Rs. 1,72,82,430/- and Rs.1,77,97,164/- and two letters were addressed in respect of the premises by the license, expressing its intention to terminate

the Agreements on 31/03/2020 and two letters were issued by the Licensee seeking extension till April, 2020. Further extension was sought till 31/05/2020 and this request was accepted by the Licensor.

Though our attention is invited to various dates on which the correspondence was exchanged between the Parties, it is only relevant to note that the Licensor raised two invoices for the license fee due for the month of May 2020 for the premises and received a reply on 06/05/2020 through an email that the Licensee had already vacated the premises on 30/04/2020 and was willing to hand over the first floor after carrying out all the formalities. Thereafter, a joint inspection of both the licensed premises was carried out and a Joint Inspection Note in respect of both the premises was prepared.

The Licensor, according to Mr. Tamboly, on 01/07/2020 communicated the snag list for both the premises and it called for quotation for undertaking the repair work from two distinct agencies. After inspection and on receipt of the quotations regarding the repairs of the damages to the premises it is on 20/07/2020 the Licensor informed the Licensee regarding deduction of Rs.1,44,08,819/- from the security deposit and one month's license fees if the Licensee was unable to hand over the premises as per the Agreement. Ultimately on 25/07/2020 the possession of both the licensed premises was taken by the Licensor.

According to Mr.Tamboly, the Licensee levelled several allegations/claims vide its communication dated 29/07/2020 and sought refund of security deposit of Rs.3,40,00,000/- alongwith

interest.

A Suit was filed in which Summons for Judgment came to be filed alongwith Affidavit in support of the Commercial Suit. This received a response from the Licensor raising an objection on various grounds and also staking a counter claim as regards the rent from 01/07/2020 to 25/07/2020 alongwith the rent to be paid for one more month as the premises required extensive repair and one more month being required to make the premises ready to be given on leave and license.

5 Inviting our attention to the impugned order it is the contention of Mr.Tamboly that the learned Single Judge, clearly noted that the controversy revolve around the nature of the damage and loss to the licensed premises, furniture and fixture and in particular observed thus :=

> "24. From the very nature of the controversy, the question as to whether a particular item included in the snag list shared op 22"" May, 2020 and 20"" July, 2020 falls within the ambit of reasonable wear and tear or warrants rectification by the licensee at the cost and expenses of licensee, is essentially rooted in facts. Similarly, the estimate of the expenses for making good the loss or damage and restoring the particular items to its prior position, is again a matter of evidence. To put it in other words, whether the defendant has included items which do not fall within the ambit of loss and/or damage to the licensed premises and amount to reasonable wear and tear and whether the defendant has allegedly inflated the estimated expenses for the repairs/rectification are the questions which warrant determination on facts.
>
> 25. Indisputably, the parties had agreed that the licensed premises would be delivered back to the licensor in good condition. Under Clause 21. the parties had agreed that the licensee would be liable to make good the loss and/or damage to the licensed premise. What was, however, excluded was the loss or damage which could properly be termed to be as a result of reasonable wear and tear of the premises on account of its use. Viewed through this prism, the defence sought to be raised by the defendant that the licensed premises wa.s not handed over to the defendant in a good condition and required extensive

repairs, entailing huge expenditure, can be said to legitimately raise a triable issue."

6 By relying upon the aforesaid observation, according to Mr. Tamboly, the law as laid down in granting leave to defend the Suit under Order XXXVII of CPC, is that the leave can be declined, when the Court is of the opinion that the grant of leave would merely enable the Defendant to defend the litigation by raising untenable and frivolous defences and, therefore, the test is to determine whether the defence raises a real issue and not a sham one.

According to Mr. Tamboly, the learned Single Judge referred to the decision of the Apex Court in case of ***IDBI Trustship Limited vs. Hubtown Limited***[1] had reproduced the principles laid down to the effect that if the Defendant on marking appearance, disclose such facts as he deems sufficient to entitle him to defence, apply on such summons for leave to defend such Suit and then the leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court to be just, provided that the leave shall not be refused unless the Court is satisfied that the facts disclosed by the Defendant do not indicate that he has a substantial defence to raise or when the defence intended to be put up by the Defendant is frivolous or vexatious.

According to Mr.Tamboly, with the aforesaid observations made by the learned Single Judge in Para 24 and 25, when he has clearly observed that the defence sought to be raised by the Defendant that the licensed premises were not handed over to

1 (2017)1 SCC 568.

him in a good condition and require repairs, entailing huge expenditure, can be said to be a legitimately raised triable issue. Therefore, according to Mr. Tamboly, the learned Single Judge has granted the Decree in favour of the Plaintiff, by merely acting upon the communication of the Defendant dated 20/07/2020, wherein it stated that it will be deducting Rs.1,44,08,819 /- from the security deposit towards repair of the assets and premises and one months license fee as the licensee was unable to hand over the premises as per the terms and conditions of the Agreement.

It is, therefore, his contention that if on the basis of the aforesaid communication the learned Single Judge had decreed the Suit in the sum of Rs.2,06,70,775/- and clearly observed that as regards the balance amount/claim it warrant evidence to be laid, clearly indicating that the Defendant had a substantial defence to raise and that it is not a defence which is frivolous or vexatious, in that contingency, the grant of leave subject to deposit of Rs.1 Crore is completely unjust and, therefore, the impugned order deserve to be quashed and set aside.

7 The learned counsel Mr.Parikh representing the Licensee/ Plaintiff would raise a preliminary objection about maintainability of the Appeal and it is his specific submission that the grant of leave to defend the Suit subject to imposition of condition is not an order which can be challenged under Order XLIII of the Code of Civil Procedure and, therefore, the Commercial Appeal itself is not maintainable.

He would place reliance upon the decision of this court ***Skil-***

Himachal Infrastructure & Tourism Ltd. vs. IL&FS Financial Services Ltd.[2] and he would invite our attention to the conclusion, which reads thus :-

> "An Appeal from an Order granting conditional leave to defend in a Summons for Judgment in a Commercial Suit is not maintainable in view of Section 13 of the Commercial Courts Act."

Mr. Parikh would also place reliance upon the decision of the Full Bench in case of ***Sicom Ltd. v. Prashant S. Tanna***[3], in support of his submission that the Court is vested with the power to pass a Decree for part of the claim and grant unconditional leave to defend the Suit in respect of the balance claim and it is also empowered to grant conditional leave to defend in respect of part of the claim and unconditional leave to defend for the remaining part of claim at hearing of the Summons.

8 Apart from the preliminary objection, Mr. Parikh would vehemently submit that the learned Single Judge has not only passed a decree based on a communication addressed by the Defendant, but by inviting our attention to the Affidavit in Reply filed by the Defendant in the Summons for Judgment , he would submit that the Defendant had specifically adopted the following stand :-

> "35. No party can be allowed to take advantage of Its own wrong and the Defendant submits that therefore the Plaintiff not only owes the Defendant at least INR 1.44.08.819 (Rupees One Crore Forty Four Lakhs Eight Thousand and Eight Hundred and Nineteen) as cost of rent (for the period 1st June 2020 to 30th June. 2020) and repairs for damage (which itself Is subject to upward revision given that 9 months have passed since the last vendor quotes were obtained) caused by Plaintiff/lts personnel to both the licensed premises, but also the following amounts:

2 2022 SCC OnLine Bom 3152.
3 AIR 2004 Bom 186.

a) Plaintiff owes the Defendant rent aggregating to INR 61,74,015 (Rupees Seventy Four Lakhs Eight Thousand Eight Hundred and Eighteen) at the contractually prevailing rate for occupation and use of both the licensed premises for a period of 1 month (from 1st July. 2020 to 25th July. 2020) which was in excess of the agreement between the parties;
b) Since the Plaintiff has failed to repair and rectify the damage It has caused to both the licensed premises, the Defendant anticipates ,that It Is likely to take at least one month for the Defendant to repair and rectify the damage so caused. As a result, Plaintiff owes the Defendant one month's rent aggregating to INR 74,08,818 (Rupees Seventy Four Lakhs Eight Thousand Eight Humdred and Eighteen) at the contractually prevailing rate for the expected period of time it will take the Defendant to repair both the licensed premises and rectify the damage caused by the Plaintiff and its personnel; and thereafter
c) Plaintiff owes the Defendant one month's rent aggregating to INR 74,08,818 (Rupees Seventy Four Lakhs Eight Thousand Eight Hundred and Eighteen) at the contractually prevailing rate for the expected period of time It will take the Defendant to put each of the licensed premises on rent."

9 From the above response it is seen that the Defendant/ Lessor specifically adopted a stand that if the Plaintiff had honoured its commitment to vacate both the premises after having repaired and rectified the damage it caused to them, then the Licensor would have been able to license the said premises and such a licensee would have deposited a fresh security deposit as well as advance of six months license fee for a period of at least 60 months. It, therefore, calculated the interest at the rate of 6% per annum for last 9 months on the sum of the aforesaid security deposit and made a categorical statement that the license fee would have earned the Defendant an additional Rs. 35,75,380/- and, therefore, the Plaintiff owe to the Defendant a sum of Rs.3,89,75,850/- cumulatively. It is specifically pleaded that putting forth this data, it has raised a genuine and bonafide issue in dispute between itself and the Plaintiff which deserved a

trial and, therefore, it should be granted unconditional leave to defend the Suit strictly in consonance with Order XXXVII Rule Sub Clause 5.

10 According to Mr. Parikh, the learned Single Judge has clearly segregated the two aspects and by relying upon the communication from the Pantheon, the Licensor, that it will deduct Rs.1,44,08,819/- from the security deposit towards the repair of the assets and premises and one months license fee, as the licensee was unable to hand over the premises as per the terms and conditions of the Agreement granted a Decree in the sum of Rs.2,06,70,775/- by noting that no triable issue seems to have been raised as regards the liability to refund the said amount. But since triable issues are raised as regards the entitlement of the Defendant to deduct the amount towards the expenses of repairs and claim for license fee, and, therefore, while granting the the Decree in the sum of Rs.2,06,70,775/-, the Defendant was granted leave to defend, but subject to deposit of Rs.1 Crore.

11 Dealing with the preliminary objection raised by Mr. Parikh we must note that the Appeal under Section 13 of the Commercial Courts Act, 2015, shall lie against any Judgment or order of Commercial Court at the level of the District Judge or the Commercial Division of High Court and though the proviso has attempted to limit the operation of sub-section (1) and sub-section (1-A) of Section 13, by restricting it to only such Appeals, that are specifically enumerated under Order XLIII of CPC as

amended by the Act of 2015 and Section XXXVII of the Arbitration and Conciliation Act, 1996, we must refer to the latest decision of the Hon'ble Apex Court in case of ***MITC Rolling Mills Pvt. Ltd. and Anr. v. Renuka Realtors and Ors.***[4] where the Division Bench of the Apex Court in Para 17 observed thus :-

> "17. Section 13(1A) of the CCA, 2015, is in two distinct parts. The main provision contemplates appeals against 'judgments' and 'orders' of the Commercial Court to the Commercial Appellate Division of the High Court. The proviso, operating as an exception, must be construed harmoniously with the main provision and not in derogation thereof. Where the language of the main provision is plain and unambiguous, the proviso cannot be invoked to curtail or whittle down the scope of the principal enactment, save and except where such exclusion is clearly and expressly contemplated. The proviso merely restricts appeals against interlocutory orders to those specifically enumerated under Order XLIII CPC and Section 37 of the Arbitration and Conciliation Act, 1996. Consequently, only such interlocutory orders as are expressly specified therein would be amenable to an appeal under the proviso; orders not so enumerated would not fall within the restricted fold of the proviso."

12 In any case, in the present matter, we are not expected to examine the maintainability of the Appeal on this count, as we find that the Appeal is filed raising a challenge to the order, which has made the Summons for Judgment partly absolute as it has directed the Defendant to pay a sum of RS. 2,06,70,775/- i.e. part of the claim of the Plaintiff alongwith the interest at the rate of 18% till its realization and the Decree is directed to be drawn accordingly.

For the balance of the claim in the Commercial Summary Suit instituted by the First Rand, for recovery of the entire security deposit in respect of the two premises, since by filing reply to the Summons for Judgment taken out by it and which received various defences including a response to the pleading in

4 2025 SCC OnLine SC 2375.

the Suit as regards the dispute existing regarding the valuation and deduction of Rs. 1,44,08,819/- from the security deposit given by the Licensee to the Licensor under the Agreement and the Suit itself raising a dispute as regards the quantum of this deduction centering around ; i) determination of what constitute reasonable 'wear and tear', under the terms of the Agreement; ii) determination of what would fall within the purview of reasonable 'wear and tear' under the terms of the Leave and License Agreement and iii) questions regarding variance in valuation of repair works as well as the very need of certain repairs.

Apart from this, from the submissions advanced before us, since we have noted that it is the case of the Licensee that it was ready to hand over the possession on a particular date, but it was not accepted by the Licensor and the Licensor specifically denied the same, we find that this being the disputed question and this being raised by filing a response to the Summons for Judgment, we find that the learned Single Judge on that count expressed a clear view that there is a substantial defence for the Defendant to raise and in Para 24 and 25 of the order has clearly set out as to on what counts the trial is warranted.

13 The Hon'ble Apex Court in ***IDBI Trustship Limited*** (supra) has clearly culled out the principles governing the Order XXXVII of CPC and the procedure to be followed, being clearly set out in the following words :

> "17. Accordingly, the principles stated in paragraph 8 of Mechelec case [(1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3, and the binding decision of four Judges

in Milkhiram case, as follows:

17.1 If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave Io sign judgment, and llie defendant is entitled to unconditional- leave to defend the suit:

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend:

17.3 Even if the defendant raises triable issues, if a doubt is left with the trial judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to lime or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security:

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith:

17.6 If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him. leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

14 Relying upon the aforesaid decision, the learned Single Judge adverting to the facts of the case noted that the controversy between the Parties revolve around the nature of the damage and loss to the licensed premises of furnitures and fixtures and on behalf of the Plaintiff i.e. the Licensee, an attempt was made to canvass the point that most of the items in purported snag list shared alongwith email dated 22/05/2020, would fall within the ambit of the term 'reasonable wear and tear'. This statement being controverted by inviting attention

of the Court to the items in the list appended to the communication dated 20/07/2020 which was preceded by a joint inspection of the licensed premises by the officials of C B Richard Ellis (CBRE) in the presence of representative of both the parties.

It is in this background the learned Single Judge specifically arrived at a conclusion that what would amount to reasonable 'wear and tear' and what would be the estimate of expenses for making good the loss or damage and restoring the particular items to its prior position is the matter of evidence and even the aspect whether the premises were handed over in good position or that it require extensive repairs in entailing huge expenditure, is also a triable issue.

15 In the wake of the specific observation, with reference to Clause 21 of the Agreement which gave the licensor the right to recover the expenditure incurred in carrying out the repairs and rectification of the damage from the licensee, in our view the triable issues arose and acting upon the communication by the Pantheon, we find that the trial Court has rightly fastened the liability of refund of the amount of Rs.2,06,70,775/-, by relying upon its own communication and partly allowed the Summons for Judgment , but for rest of the issue, the learned Single Judge granted leave to defend , but subject to it depositing a sum of Rs. 1 Crore.

16 In our considered view, this stipulation of deposit of Rs.1 Crore as a condition to grant the leave to defend, deserve to be set

aside as in terms of Order XXXVII Rule(3) sub clause 5, a leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the Defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the Defendant is frivolous or vexatious.

In light of the observations of the learned Single Judge in Para 24 and 25 to be preceded by the discussion on the facts of the case and particularly in the wake of the communication addressed by the Defendant – Licensor to the Plaintiff Licensee, that it will be deducting Rs. 1,44,08,819/- towards repair of assets and premises and one month's license fee, we cannot find any fault with that part of the order where the impugned order has made the Summons for Judgment partly absolute directing the Defendant to make payment of Rs.2,06,70,775/- alongwith the interest of 18% p.a. from 31/05/2020 till its realization to the Plaintiff.

However, that part of the order which has granted the Defendant, the leave to defend subject to deposit of Rs.1 Crore, is in the teeth of the proviso appended to Clause 5 of Rule 3 of Order XXXVII once it is observed that there is substantial defence to be raised and even in our view, the reply filed to the Summons for Judgment definitely make out a case for substantial defence and that the defence that would be taken is not frivolous or vexatious, and definitely triable and, therefore, the leave should not have been granted subject to stipulation of deposit of Rs.1 Crore.

17 For the reasons recorded above, though we refuse to entertain the Appeal, as far as Summons for Judgment being made partly absolute, we only quash and set aside the conditional

leave granted in favour of the Defendant being made subject to deposit of sum of Rs.1 Crore and we set aside that part of the order.

By order dated 18/02/2022 while the Appeal was admitted, the Appellant i.e. original Defendant was directed to provide a bank guarantee of nationalized bank in the sum of Rs. 2,06,70,775/- to the satisfaction of the Prothonotary and Senior master and also directed to deposit a sum of Rs.1 Crore with the Prothonotary and Senior Master within two weeks and we are informed that the said condition has been complied with.

Since we have partly allowed the appeal, we direct the the Prothonotary and Senior Master to refund the sum of Rs.1 Crore to the Appellant. However, at the same time, since we have confirmed the Decree in favour of the Plaintiff in the sum of Rs.2,06,70,775/-, we permit the Plaintiff to execute the said Decree.

We leave it open for the Plaintiff to stake its claim for grant of interest on the said amount before the learned Single Judge.

With this direction, the Appeal stand disposed of.

[ASHISH S. CHAVAN, J.] **[BHARATI DANGRE, J.]**