

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

+ **CS(OS) No. 1439/2008**

% **Date of Decision: April 06, 2009**

M/s Satya Narain Sharma-HUF.

..... Plaintiff

! Through: Mr. Hemant Chaudhri, Advocate

Versus

\$ M/s Ashwani Sarees Pvt. Ltd.

.....Defendant

^ Through: Mr.R.P.Bansal, Sr. Advocate with
Mr.Atul Sharma, Mr.Ajay Saroya
and Mr.Abhishek Agarwal for the
defendant.
Mr.Girish Aggarwal with Ms.Mugdha
Pandey for the applicants.

CORAM:

HON'BLE MR. JUSTICE S.N. AGGARWAL

1. Whether reporters of Local paper may be allowed to see the judgment? **YES**
2. To be referred to the reporter or not?**YES**
3. Whether the judgment should be reported in the Digest?**YES**

S.N.AGGARWAL, J

The legality, validity and enforceability of a 'three years lock-in-period Clause' contained in the agreement to lease between the parties to the suit is the only question that needs consideration and

an answer by the Court in the present suit.

2 The brief facts of the case giving rise to the above question are as follows:-

The plaintiff is the owner and landlord of suit premises bearing No. G-27 on the ground floor of MGF Metropolitan Mall, Saket, New Delhi. The defendant is in the business of manufacturing and dealing in garments for children under the name and style 'CATMOSS'. The defendant is a private limited company incorporated under the Companies Act.

3 It is stated that the defendant had approached the plaintiff with a letter of intent dated 05.09.2007 expressing a desire to take the suit premises on lease. As per letter of intent issued by the defendant to the plaintiff and signed by both the parties, the suit premises were sought to be taken on lease by the defendant on a monthly rent of Rs.3,00,000/- for a fixed period of three years with an option to the lessee for the renewal of three years term each with the stipulation to increase the rent @ 15% after a period of every three years. It was specifically stipulated in the letter of intent dated 05.09.2007 that the defendant can vacate the suit property at any time but only after an initial period of three years. It was stipulated that the initial three years of the lease shall be a

'lock-in-period'. However, an option was given to the defendant to terminate the lease by giving a 90 days notice after the lock-in-period of initial three years of the lease.

4 In furtherance of letter of intent dated 05.09.2007, a registered agreement to lease dated 27.09.2007 was executed between the plaintiff and the defendant w.e.f. 15.11.2007 for a fixed period of three years ending on 14.11.2010. Since a lock-in-period of three years was provided in the agreement to lease dated 27.09.2007 executed between the parties, the plaintiff is alleged to have planned to invest the monthly rent to be received by the plaintiff from the defendant in his interior furnishing business and is alleged to have made further commitments on the basis of fixed period of three years.

5 It was further provided in Clause 4 of the agreement to lease dated 27.09.2007 that the liability for payment of rent by the defendant will stand deferred in case the Mall in which the suit premise is situated does not become fully operational by 15.11.2007 till the date of operation of the Mall. The plaintiff has stated in para 6 of the plaint that as the Mall became fully operational, the defendant started making the payment of rent w.e.f. 15.11.2007. As per the plaint, since the plaintiff did not

receive rent for the months of April and May, 2008, the plaintiff got served a legal notice dated 17.05.2008 upon the defendant calling upon the defendant to pay a sum of Rs.6,74,160/- being the rent and taxes for the months of April and May, 2008 along with interest @ 36% per annum for the delayed period. The said legal notice dated 17.05.2008 was duly served on the defendant and the defendant gave reply dated 05.06.2008 to the said legal notice. In the reply dated 05.06.2008, the defendant took a plea of the Mall being allegedly not fully operational and there being allegedly low foot fall in the Mall. Through the reply dated 05.06.2008, the defendant sought to terminate the lease agreement dated 27.09.2007 w.e.f. 30.09.2008 and thus refused to pay the arrears of rent. However, the defendant in the reply dated 05.06.2008 did not deny its liability to pay a sum of Rs.6,74,160/- being the rent for the months of April and May, 2008 along with interest @ 36% per annum for the delayed period but called upon the plaintiff to adjust the same from the security deposit of Rs.18 lacs lying deposited with the plaintiff.

6 The plaintiff got served a rejoinder/rebuttal notice dated 10.06.2008 to the defendant through its counsel whereby the plaintiff again drew attention of the defendant to the stipulation in

the lease agreement of a lock-in-period up to 14.11.2010 and brought to the notice of the defendant that in view of lock-in-period of three years, the defendant is liable to pay a sum of Rs.1,10,97,990/- to the plaintiff being the rent, maintenance charges, taxes and interest on the delayed period of rent for the period up to 14.11.2010. The plaintiff also informed the defendant that the purported termination of the lease by the defendant w.e.f. 30.09.2008 is neither valid nor legal and does not alter the terms of the lease agreement in any manner. By means of rebuttal/rejoinder notice dated 10.06.2008, the plaintiff again called upon the defendant to pay a sum of Rs.10,11,240/- being the rent for the months of April, May and June, 2008 along with interest @ 36% per annum for the delayed period. It is alleged that the defendant has not paid any rent to the plaintiff after 01.04.2008.

7 The plaintiff, immediately after serving rebuttal/rejoinder notice dated 10.06.2008 upon the defendant, filed the present suit for declaration seeking a declaration that the termination of the lease agreement dated 27.09.2007 by the defendant is invalid and for further declaration to declare the lease to be subsisting and continuing till 14.11.2010. The plaintiff has also prayed for a decree of mandatory injunction directing the defendant to pay a sum of

Rs.3,37,080/- every month w.e.f. 01.08.2008 till 14.11.2010 in advance on or before 10th day of each English calendar month. The plaintiff has further prayed for a decree of Rs.14,02,320/- being the arrears of rent and taxes and interest for the delayed period for the months of April to July, 2008.

8 In response to summons of the suit, the defendant has filed its written statement. In the written statement filed by the defendant, execution of agreement to lease dated 27.09.2007 which is the basis of the plaintiff's suit has not been denied. However, the defendant has taken a plea that at the time of first settling the terms of the proposed agreement to lease, there was no meeting of minds or intention of the parties to incorporate or agree on a term of lock-in-period for the termination of lease. The defendant has denied its liability under the lock-in-period Clause contained in the agreement to lease dated 27.09.2007. The defendant has taken an alternative plea that a stipulation of lock-in-period for the defendant with a right to the plaintiff to terminate the lease during the lock-in-period, as set out in the Clause 10(e), is onerous, void and unenforceable. The further stand of the defendant is that the agreement to lease has become impossible to perform. The defendant has stated that in terms of Clauses 9(f), 9(k) and 10 (g)

of the agreement to lease, the suit premises can be used by the defendant only for commercial purposes. It is stated that the defendant though tried to use the premises for commercial purposes but for the reasons beyond its control and due to world wide economic meltdown in the economies, the defendant started incurring losses in its business and was not able to pay hefty monthly rent to the plaintiff for the premises from where it was having no income. It is alleged that due to these reasons, the agreement to lease executed between the parties became impossible of performance as the defendant cannot use the premises for commercial purposes as envisaged in the agreement to lease. The defendant has denied ownership of the plaintiff in respect of the suit premises and according to the defendant, MGF Metropolitan Mall is the owner of the suit property. The defendant has alleged that this suit is not maintainable for non-impleadment of MGF Metropolitan Mall as party/ defendant in the said suit. The defendant has prayed for dismissal of the present suit.

9 For deciding the present suit filed by the plaintiff against the defendant, the only legal issue that arises from the pleadings of the parties is whether 'three years lock-in-period Clause' contained in the agreement to lease dated 27.09.2007 executed between the

parties is binding on the parties. The other objection taken by the defendant in its written statement to the grant of prayers made by the plaintiff in the suit do not merit any consideration because the defendant has admitted the execution of the agreement to lease dated 27.09.2007 which is the foundation of the plaintiff's claim in the said suit. The decision in the suit virtually depends on the construction and interpretation of various clauses contained in the agreement to lease in respect of the suit premises.

10 On 19.01.2009, counsel for both the parties had made a statement at Bar that the case does not require admission/denial of documents to be carried out as according to them also, the decision in the present suit depends upon the interpretation of the lease agreement between the parties which is made basis of the suit. On this statement being made by the counsel for the parties before the Court on 19.01.2009, case was adjourned for hearing for 30.01.2009. On 30.01.2009 arguments of counsel for both the parties were heard in the matter and the case was reserved for judgment. Before the judgment could be delivered, Mr. Ram Phal Bansal, Senior Advocate came and appeared on behalf of the defendant and mentioned to the Court on 02.02.2009 that the Court should not hasten to pronounce the judgment because he

wants to make certain submissions and satisfy the Court that the case cannot be decided without framing of issues. On this request being made by Mr. Ram Phal Bansal in presence of counsel for the plaintiff on 02.02.2009, pronouncement of judgment was deferred and on that day case was adjourned for further hearing for 13.02.2009. However, in the meanwhile, the defendant filed a review application under Order 47 Rule 1 read with Section 151 CPC (Review Application No. 57/2009) for review of order dated 19.01.2009 and this Court vide its order dated 06.02.2009 passed on the review application of the defendant observed that the parties will be given an opportunity for admission/denial of their respective documents at appropriate stage of the suit. This observation came to be made in the review application of the defendant because of a stand taken on behalf of the defendant that Mr. Abhishek Aggarwal, Advocate who made a statement before the Court on 19.01.2009 that admission/denial of documents was not required was not authorised to make such a statement. However, the plea of the defendant that Mr. Abhishek Aggarwal was not competent to make a statement to the court on 19.01.2009 appears to be an absolutely false, vexatious and an after-thought plea. Mr. Abhishek Aggarwal who appeared in the matter on behalf

of the defendant and made a statement on 19.01.2009 that admission/denial of documents is not required, has in fact replied to the legal notice of the plaintiff and has also filed his vakalatnama on behalf of the defendant in the suit. Therefore, it cannot be said that Mr. Abhishek Aggarwal acted without instructions on 19.01.2009.

11 I have heard the arguments of the counsel for the parties and have also gone through the entire case file and the documents of the parties available on record.

12 In view of the order dated 06.02.2009 in the review application No. 57/2009, the first question that arise for consideration is whether there is any document of either of the parties on record which require admission/denial by them. Though I have observed in my order dated 06.02.2009 in review application No. 57/2009 that the parties will be given an opportunity for admission/denial of documents at appropriate stage but upon hearing the counsel for the parties and upon perusal of the record, I find that there is no document on record which require admission/denial by either of the parties. The agreement to lease dated 27.09.2007 is the foundation of the plaintiff's claim in the present suit. The execution and contents of the document

described as 'agreement to lease' is not disputed by the defendant. The decision of the suit depends upon the construction of various clauses contained in the said document described as 'agreement to lease' and also on the legal notice of the plaintiff dated 17.05.2008, reply of the defendant dated 05.06.2008 and rejoinder/rebuttal notice of the plaintiff dated 10.06.2008. None of these documents is in dispute by either of the parties. I would like to mention that I had repeatedly asked Mr. Ram Phal Bansal, learned senior counsel appearing on behalf of the defendant whether there is any document on record either filed by him or by the plaintiff which require admission/denial by the parties. Mr. Bansal did not point out any such document which require admission/denial by either of the parties. In that view of the matter, I did not consider it necessary to send the case for admission/denial of documents before the Joint Registrar.

13 Mr. Ram Phal Bansal, learned senior counsel appearing on behalf of the defendant had argued that the suit cannot be decided by the Court without framing of issues notwithstanding whether there is a dispute or no dispute between the parties on any factual aspect. Mr. Bansal was repeatedly told that the only issue that arise for decision in the present suit is a legal issue regarding the legality

and validity of the 'lock-in-period clause' contained in the agreement to lease between the parties and he was asked to address the Court on this legal issue and show why and how the said 'lock-in-period clause' contained in the lease agreement is not binding on the parties. Though Mr. Bansal has addressed his arguments on this legal issue but he has insisted for framing of following issues. (Copy of proposed issues handed over by Mr. Bansal to the Court)

1. *Whether Court has pecuniary jurisdiction to try the suit?*
2. *Whether the plaint is not liable to be rejected for not disclosing any cause of action?*
3. *Whether the suit is not liable to be dismissed for deficiency of court fee as the amount for which the declaration is sought comes to Rs.1.8 crores but the court fee affixed by the plaintiff is only Rs.57000/-.*
4. *Whether any lease deed subsists between the parties, as the document on which the plaintiff relies for maintaining the suit is only agreement to lease and not lease deed?*
5. *Whether there exists any lock in period regarding the tenancy of the defendant in the suit premises and if so whether the defendant has no right to terminate the lease during the lock in period?*
6. *Whether the suit is maintainable in the present form in the absence of any lease deed? Whether the plaint is not liable to be rejected, as it does not provide material Particulars regarding the*

ownership of the plaintiff over the suit premise.

7. *Whether any cause of action arose in favour of the plaintiff to file the present suit?*
8. *Whether the suit is maintainable as the plaintiff has claimed in the suit future rent which has not accrued in his favour so far?*

14 Mr. Bansal has relied upon a Division Bench judgment of this Court in ***S. Shandi (Mrs.) VS. D.A.V. College Managing Committee 2006 III AD (DELHI) 598*** and has laid emphasis on para 7 of the said judgment which is extracted below:-

“We cannot appreciate the approach adopted. It needs hardly be said that the procedure laid down by law has to be followed while deciding a civil suit. The Code of Civil Procedure requires that after a written statement is filed contesting the claim of the Plaintiff, issues need to be framed and those issues are required to be decided. A perusal of the Trial Court record shows that issues were not framed in the case and it was straightaway taken up for decision on its maintainability. It is not clear why it was felt that the suit was not maintainable. It is not as if the right of the Appellant to approach a civil Court was barred by any law nor could it be said that judicial review was prohibited. Learned counsel for the Respondent has also not been able to give us any

reason why the civil suit filed by the Appellant was not maintainable.”

15 Relying on the above judgment, particularly para 7 of the said judgment extracted above, Mr. Bansal had argued that this suit should not be finally disposed of unless issues as proposed above are framed and an opportunity is given to the parties to adduce their evidence on the said proposed issues. I do not agree with this submission made on behalf of the defendant. The issues in this suit may be issues of fact or issues of law or may be mixed issues of fact and law. In case the suit raises only issues of law, then the parties need not be sent for trial in every case as the case can be conveniently disposed of on hearing being given on the issues of law. However, in case the issues of fact arises in any suit then those issues can be decided only after giving opportunity to both the parties to produce their evidence on such issues. The judgment in S. Shandi's case (Supra) relied upon by learned senior counsel appearing on behalf of the defendant is not applicable to the facts of this case. The trial court, in that suit, dismissed the suit as not maintainable without framing of issues that arose from the pleadings of the parties and it was in this context that the Division Bench observed that the trial court should not have dismissed the

suit on the ground of its maintainability alone without framing of issues. However, this is not the case here in the present suit.

16 The present suit can conveniently be decided on the basis of a legal issue regarding legality and validity of 'lock-in-period Clause' contained in the lease agreement. Notwithstanding that, I have heard Mr. Bansal on the issues proposed by him extracted hereinabove. Even the issues proposed by the counsel for the defendant can be conveniently decided without evidence. Therefore, in order to allay any confusion in the matter, I even propose to deal with the issues proposed by learned senior counsel for the defendant so that the case may be decided to the satisfaction of both the parties.

17 The first issue raised on behalf of the defendant is regarding the pecuniary jurisdiction of this Court to try the present suit. Learned senior counsel appearing on behalf of the defendant has not given any reason why this Court has no pecuniary jurisdiction to try this suit. The objection of the defendant at best on the point of pecuniary jurisdiction of this Court could have been that since the plaintiff has prayed for a decree of mandatory injunction directing the defendant to pay a sum of Rs.3,37,080/- every month w.e.f. 01.08.2008 till 14.11.2010 and for a decree of Rs.14,02,320/-

towards arrears of rent, taxes and interest for the delayed period till the date of filing of this suit, he ought to have filed this suit before the Court of lowest pecuniary jurisdiction competent to entertain the said claim being the Court of District Judge. This objection, if taken, would have no merit because the main relief claimed by the plaintiff in this suit is a declaration declaring the termination of the lease agreement dated 27.09.2007 by the defendant as invalid and to direct the lease to be subsisting and continuing till the expiry of lock-in-period of three years i.e. 14.11.2010. The plaintiff has valued his suit for declaration @ Rs.36 lacs on which ad-valorem Court fee has been paid. Since the main relief claimed by the plaintiff in the suit exceeds the pecuniary jurisdiction of the District Court, the plaintiff was well within its right to file the present suit in this Court. Hence the issue proposed to be framed on the point of pecuniary jurisdiction of this Court is not tenable. It may be noted that the defendant has not taken any objection to the pecuniary jurisdiction of this Court in its written statement and therefore issue on this point even otherwise does not arise from the pleadings of the parties.

18 The third issue proposed by the defendant is on the point of Court fees. The pleadings regarding valuation of the suit are

contained in para 16 of the plaint. The defendant has vaguely denied in reply to para 16 of the plaint that the valuation of the suit has not been correctly done. The defendant has not explained as to how the valuation of the suit has not been correctly done or that deficit court fee has been paid on the plaint. However from the proposed issue No. 3, the stand of the defendant appears to be that the relief for declaration ought to have been valued at Rs.1.8 crores but Court fee affixed by the plaintiff is only Rs.57,000/-. This plea is not there in the written statement of the defendant. The relief of declaration seems to have been correctly valued by the plaintiff at Rs.36 lacs on the basis of rent in respect of the suit premises for the preceding 12 months. Therefore, the issue proposed on the point of court fee is not relevant.

19 Proposed issue No. 4 is not an issue of fact. The decision on this issue depends upon the interpretation to be placed on various clauses contained in the agreement to lease dated 27.09.2007 between the parties. Mr. Ram Phal Bansal, learned senior counsel appearing on behalf of the defendant has referred to Clause 6 contained in the agreement to lease dated 27.09.2007 to contend that the document on which the plaintiff relies for maintaining the suit is only an agreement to lease and not the lease deed. Relying

on Clause 6, he has further submitted that since the lease deed in terms of the said Clause was not executed, the lease in respect of the suit premises between the parties does not subsist.

20 Per contra Mr. Hemant Chaudhri, learned counsel appearing on behalf of the plaintiff has argued that the agreement to lease dated 27.09.2007 is virtually a lease deed in respect of the suit premises and was executed on a non-judicial stamp paper of Rs.72,100/-. The contention of Mr. Chowdhary is that the agreement to lease dated 27.09.2007 has all the trappings of a lease deed and is a duly registered document and according to him, 'lock-in-period Clause' contained in the said document is binding on the parties to the suit. The rival stand taken by the parties on the question whether the agreement to lease dated 27.09.2007 relied upon by the plaintiff is an agreement simplicitor or can be treated as a lease deed does not raise a dispute of fact. The same, therefore, does not require any evidence. The agreement to lease relied upon by the plaintiff is executed on a non-judicial stamp paper of Rs.72,100/- and is a duly registered document. Having regard to the same, I am of the view that the present suit filed by the plaintiff cannot be dismissed as not maintainable on the ground that the said document is only an agreement to lease and not the lease deed.

Therefore proposed issue No. 4 does not arise for adjudication.

21 Issue No. 6 proposed by the defendant is in relation to ownership of the plaintiff in respect of the suit premises. According to the defendant, the plaintiff is not the owner of the suit premises as according to it, the suit premises is owned by MGF Metropolitan Mall. The dispute regarding the ownership of the suit premises raised by the defendant in the written statement appears to the vexatious and false to the own knowledge of the defendant. The defendant in its written statement has admitted the basic document i.e. agreement to lease dated 27.09.2007 in which the plaintiff is described as the owner of the suit premises. The defendant does not dispute that it had taken the suit premises on lease from the plaintiff. Not only that, the defendant has also acted upon the terms and conditions contained in the said document in as much as before filing of the present suit, the defendant has paid rent in respect of the suit premises to the plaintiff for more than four months up to March, 2008. Besides rent being paid up to March, 2008, the defendant also deposited Rs.18 lacs with the plaintiff towards security being six months rent to be returned at the time of vacation of the suit premises. In case the defendant had any doubt about the ownership of the plaintiff in respect of the suit

premises, then he ought not to have taken the suit premises on lease from him or paid rent or deposited security. This clearly belies the stand of the defendant that the plaintiff is not the owner of the suit premises. Even otherwise, I am of the view that the defendant being the lessee of the suit premises has no locus-standi to challenge the ownership of the plaintiff. I am further of the view that the parties need not be sent for trial for proving the ownership of the plaintiff in view of what has been stated and discussed by me above.

22 Issues No. 2, 5 & 7 proposed by the defendant are inter-linked. In fact proposed issues No. 2 & 7 are overlapping and they are linked with proposed issue No. 5. These are legal issues and findings on the same can be returned on the basis of interpretation to be placed on the various clauses contained in the agreement to lease between the parties. Mr. Bansal, learned senior counsel appearing on behalf of the defendant has not disputed Clause 10(a) contained in the agreement to lease which provide for a lock-in-period of three years before which the defendant cannot vacate the suit premises. The argument of Mr. Bansal was that the 'lock-in-period Clause' contained in the agreement to lease was not intended to be incorporated in the lease deed to be executed

between the parties as per Clause 6 of the agreement to lease dated 27.09.2007. Mr. Bansal had further argued that 'lock-in-period Clause' contained in the agreement to lease is onerous, void and unenforceable because according to him, the said Clause restrict the right of the defendant to vacate the suit premises before three years lock-in-period whereas Clause 10 (e) of the same document described as agreement to lease gives a discretion to the plaintiff to terminate the lease even before expiry of lock-in-period of three years on happening of any of the contingencies provided in sub-clause (e) of the said clause of the lease agreement. On the other hand, Mr. Hemant Chaudhri, learned counsel appearing on behalf of the plaintiff had argued that the parties had entered into the agreement to lease and had expressly agreed to provide a lock-in-period of three years for creating lease in respect of the suit premises in favour of the defendant. The submissions of Mr. Chowdhari was that since the parties had entered into lease agreement with eyes wide open, the defendant cannot be permitted to resile from the terms of the contract contained in the lease agreement. It was further submitted on behalf of the plaintiff that agreement to lease dated 27.09.2007 is binding on the parties and the defendant cannot be permitted to come out of the 'lock-in-

period Clause' contained in the said agreement merely on the plea that the said document is only an agreement and not a lease.

23 I have given my anxious consideration to the above rival arguments advanced by the counsel for the parties. I am unable to persuade myself to agree with the submissions made on behalf of the defendant. I do not find any merit in the arguments advanced on behalf of the defendant that the parties had entered into an oral agreement while executing the agreement to lease on 27.09.2007 that the 'lock-in-period clause' contained in the said agreement will be deleted while executing the lease deed as per Clause 6 of the said document. The defendant is precluded from pleading oral agreement in regard to the 'lock-in-period Clause' contained in the lease agreement dated 27.09.2007 in view of provisions contained in Section 91 & 92 of the Indian Evidence Act, 1872. It may be noted that the lease agreement between the parties which is made basis of the plaintiff's claim in the present suit is executed on non-judicial stamp papers of Rs.72,100/- and is a duly registered document. The lease agreement between the parties has all the trappings of a lease deed. The lease agreement dated 27.09.2007 is accompanied by delivery of possession of the suit premises by the plaintiff to the defendant. The defendant before arising of the

dispute emanating from the 'lock-in-period Clause' had been paying the rent in respect of the suit premises to the plaintiff which stood paid for the period upto 31.03.2008. This conduct of the defendant will work as estoppel to plead an oral agreement contrary to his own action in implementing the terms of the lease agreement.

24 The defendant in its attempt to find an escape route to come out of the 'lock-in-period Clause' took a stand in its reply dated 05.06.2008 to the plaintiff's legal notice dated 17.05.2008 that as the Mall is not fully operational because of which there has been very low foot fall in the mall and resultantly there has been negligent foot fall into the store of the defendant i.e. suit premises in the Mall. The stand taken by the defendant in its reply dated 05.06.2008 to come out of the 'lock-in-period Clause' is relevant and the same is extracted below:-

“ At the out set all the allegations made in the notice under reply are denied. Further, it is stated that as the mall is not fully operational hence there has been very low footfall into the mall and resultantly there has been negligent footfall into the store of our client. The closure of some of the prominent branded stores has further resulted in significant rather drastic drop in the footfall into the mall and to the store of our client. In view of above it has become commercially unviable for our client to continue the business from the aforesaid leased premises as our client is incurring huge loss on account of rent of the leased premises and no business thereof which is costing dear to our client

as the mode of recovery of the said loss occasioned and due to be incurred by our client has become practically impossible and this fact was brought into the knowledge of your client.

For the reasons cited above, our client is left with no other option but to shut down the said shop as being discussed with your client for the last three months though our client will be incurring considerable loss because our client has invested huge capital in the said shop for its interiors, exterior, advertisement etc. of the said shop but all in vain.

Therefore, take note that our client shall close their leased premises w.e.f. 30.09.2008 and consequently the agreement dated 27.09.2007 also stands terminated hereby. You are requested to adjust the outstanding rents from the Security deposit of Rs.18 lacs lying in your custody and the balance dues, if any, shall be paid to you upon confirmation from you in this regard."

25 It may further be noted that on 18.09.2008, the counsel appearing on behalf of the defendant had given a statement to the Court that the defendant has vacated the suit premises on 01.09.2008 and on that day, he brought the keys of the said premises for being handed over to the counsel for the plaintiff. However, the counsel for the plaintiff declined to take the keys stating that he cannot accept the keys since the entire case of the plaintiff against the defendant is that the defendant cannot be allowed to terminate the lease during lock-in-period. The defendant

thereafter filed an application being IA No. 1698/2009 for permission to deposit the keys of the suit premises with the Court. This application was dismissed vide order passed by this Court on 06.02.2009.

26 In view of the above, the question that really calls for determination is whether the termination of the lease agreement by the defendant w.e.f. 30.09.2008 prior to the lock in period of three years provided in the lease agreement is legal and valid or can such a termination be sustained in law. The ancillary question that also arises for consideration is the effect of the offer made by the defendant before the Court to handover the keys of the suit premises to the plaintiff. Obviously the decision on these questions is dependent upon findings to be returned on the legal issue whether the 'lock-in-period Clause' contained in the agreement to lease is binding on the parties or not.

27 Mr. Bansal learned senior counsel appearing on behalf of the defendant has argued that the liability of the defendant for payment of rent in terms of the lease agreement does not arise because according to him, in terms of Clause 4 of the said agreement, the liability for payment of rent was deferred till the Mall becomes fully operation. According to him, since the mall did

not become fully operational, the defendant was not liable to pay rent in respect of the suit premises. He submitted that the point that mall did not become operational require evidence for which an opportunity to lead evidence should be given to the defendant. I am afraid, I do not agree with this submission made on behalf of the defendant. It may be noted that the defendant in reply to para 6 of the plaint in its written statement has not denied that it had started paying rent in respect of the suit premises to the plaintiff w.e.f. 15.11.2007 since the Mall had become operational on that day. It does not lie in the mouth of the defendant to approbate and reprobate and make inconsistent pleas on factual aspect.

28 Having heard the learned counsel for the parties and upon giving my anxious consideration to their arguments, I am of the view that the 'lock-in-period Clause' contained in the lease agreement is binding on the parties and the defendant cannot be permitted to come out of the said Clause before expiry of initial lock-in-period provided in the lease agreement. The lease agreement does not envisage any eventuality conferring a right or an option to the lessee to terminate the lease de hors the lock in period clause. It may be noted that the concept of providing a 'lock-in-period Clause' in the lease agreement is recent in its origin and

the need for providing such a Clause is necessitated having regard to the fact that more and more malls are coming all around not only in Delhi but through out the country. The owner/landlord of the spaces in the Malls also need some assurance from their prospective tenants that the suit premises intended to be taken on lease will be retained by their tenant for a certain specified period so that the owner/landlord can accordingly plan for investment of the rent to be realized by them.

29. I am of the view that the various clauses contained in the lease agreement between the parties have to be read harmoniously and on a close reading of the various terms and conditions contained in the lease agreement, it appears to me that the parties have voluntarily and with full sense of responsibility agreed to incorporate a lock in period clause in the agreement to lease and therefore the defendant cannot come out of the said clause on the ground that it has become unprofitable for it to retain the suit premises any more. The plea of the defendant that it is commercially unviable for it to continue in the suit premises cannot even otherwise be sustained because the plaintiff is not a partner in the profits or losses in the defendant company. Once the defendant company had entered into a contract, it must honour and fulfill its

obligations, irrespective of the consequences, as laid down in Section 37 of the Indian Contract Act. The law is well settled that the Court cannot modify, vary or substitute the intention of the parties ascribed in the document. We are considering here a contract between the parties contained in the lease agreement dated 27.09.2007 in which they have consciously and with eyes wide open provided for a 'lock-in-period Clause' giving a complete protection to the lessee (the defendant herein) against eviction at least for a lock-in-period of three years. Assuming the rental of the suit property had gone high after creation of the tenancy, whether the defendant being the lessee would have agreed to pay the higher market rent or could the plaintiff in such a situation have asked for eviction of the defendant. The answer to this is in simple 'No'. I am of the view that the agreement between the parties contained in the lease agreement is binding on them. Since this agreement contains three years lock-in-period clause, I am of the view that the defendant cannot be allowed to terminate the lease before expiry of the lock-in-period of three years provided in the lease agreement. Hence the termination of the lease by the defendant through its reply dated 05.06.2008 is invalid and the same is not sustainable in law. In case the defendant wants to

vacate the suit premises before the expiry of the lock-in-period then it is under a contractual obligation to pay the rental for the period until the expiry of lock-in-period i.e. up to 14.11.2010. The defendant, in my view, has rendered itself liable to pay rent in respect of the suit premises to the plaintiff w.e.f. 15.11.2007 and in fact the defendant has paid rent up to March 31, 2008. The defendant, thereafter, stopped paying rent as it found unprofitable to retain the suit premises for low intensity of clients attracted to its store in the suit premises. This plea of unprofitability taken by the defendant cannot stand in law. The Court would be reluctant to mould and interpret a document taking into consideration the profits and losses and the written contract between the parties entered voluntarily and with full sense of responsibility. It will have pernicious consequences in laying down a sound principle of law. Then the decision of every case will not depend on law of contract but on the pleas of the parties regarding profitability or non-profitability. In my view, the plaintiff has acquired a right under the lease agreement to insist the defendant that it must abide by the 'lock-in-period Clause' contained in the lease agreement. Since the defendant admittedly did not pay any rent after March, 2008, it is liable to pay rent at the agreed rate of Rs.3 lacs per month plus

taxes and interest for the delayed period as agreed in the lease agreement till the expiry of the three years lock-in-period provided in the lease agreement.

30 I do not find any merit in the plea taken by the defendant that the 'lock-in-period Clause' contained in the lease agreement is onerous, void and unenforceable in view of Clause 10 (e) contained in the lease agreement giving an option to the plaintiff being the landlord to terminate the lease even before expiry of three years lock-in-period in the event of default or breach of terms and conditions of the contract on the part of the defendant. It may be noted that the right under the agreement to lease given to the plaintiff for terminating the lease even before expiry of three years lock-in-period is not absolute. This right given to the plaintiff is given to him only in the eventuality of breach of the contract being committed by the defendant being the lessee of the suit premises. Hence it cannot be said that the 'lock-in-period Clause' contained in the lease agreement is onerous, void and unenforceable. The defendant cannot be permitted to take advantage of its own fault and thereby compel the plaintiff to terminate the lease in terms of Clause 10 (e) of the lease agreement. In terms of Clause 10 (e) of the lease agreement it is optional to the plaintiff to terminate the

lease even before expiry of three years lock-in-period but it is up to him whether to exercise such a discretion or not.

31 In case the plaintiff wants to enforce the 'lock-in-period Clause' contained in the lease agreement, the defendant cannot resist the same because what the plaintiff is asking is to enforce a Clause contained in the registered lease agreement which is of binding nature. Thus looking from any angle, I am of the considered view that the 'three years lock-in-period Clause' contained in the lease agreement is binding on the parties and termination of the lease by the defendant is legally untenable and is therefore illegal.

32 For the foregoing reason, the suit of the plaintiff is decreed. The termination of the lease agreement dated 27.09.2007 by the defendant through its reply dated 05.06.2008 is declared as invalid and it is directed that the lease in terms of the lease agreement dated 27.09.2007 will be deemed to be subsisting and continuing till the date of expiry of the lock-in-period i.e. 14.11.2010. A decree of Rs.14,02,320/- towards arrears of rent and taxes and interest for the delayed period for the months of April to July, 2008 is also passed in favour of the plaintiff and against the defendant. The defendant is further directed to continue to pay rent of the suit premises at the agreed rate mentioned in the lease agreement

dated 27.09.2007 to the plaintiff every month w.e.f. 01.08.2008 till 14.11.2010 in advance on or before 10th day of each English calender month. The defendant is directed to clear the arrears of rent for the period from 01.08.2008 till 31.03.2009 within 8 weeks from today subject to the plaintiff's paying Court Fee on the amount of arrears within four weeks from today. The decree in terms referred hereinabove be prepared.

April 06, 2009
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S.N.AGGARWAL
[JUDGE]