

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 09.05.2012

+ **CS(OS) No. 2398/2010**

Shri Arun Khullar Plaintiff
Through: Mr. Vishwdenra Verma, Adv.

Vs.

M/s Ess Aay Fashions (India) Pvt. Ltd. Respondent
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J.

1. The plaintiff has filed the present suit for possession, recovery of damages, mesne profit and permanent injunction against the defendant.

2. Brief facts of the case as set out by the plaintiff in the plaint inter-alia are that the plaintiff is the absolute owner of shop bearing No. 27/1, Malhotra Building, Connaught Place, Delhi – 110001 and that he had entered into a lease agreement with the defendant dated

6.7.2009 for letting out the said property. It is the case of the plaintiff that the said premises were let out by the plaintiff for a period of 9 years with a lock in period of 3 years from the date of execution of the agreement. It is also the case of the plaintiff that the said premises were let out by the plaintiff in favour of the defendant on a monthly rent of Rs. 3 lakhs and after deducting the TDS the defendant was obligated to pay a sum of Rs. 2,70,000/- per month and that the defendant was required to pay service tax @ 10.3% on the rent amount from 1.4.2010. It is also the case of the plaintiff that the defendant had failed to make the payment of the rent amount for the period of August, 2010 (for 15 days), September, 2010, October, 2010 and November, 2010. It is also the case of the plaintiff that the defendant had issued cheques to the plaintiff towards the amount of rent, but the same were dishonored. It is also the case of the plaintiff that in terms of the lease agreement it was agreed between the parties that if the defendant failed to make the payment of the rent for a period of two months then the plaintiff shall be free to lock the premises and in such event it shall be deemed that the lessee had vacated the premises. It is also the case of the plaintiff that a legal notice dated 14.9.2010 was served by the plaintiff upon the defendant

requesting them to vacate the suit property and to make the payment of the arrears of rent amount but the defendant neither made the payment of the rent amount nor vacated the suit property. It is also the case of the plaintiff that he has filed criminal complaints under Section 138 of the Negotiable Instruments Act against the defendant based on the dishonoured cheques and on the date of the filing of the present suit, the criminal complaints were pending. It is also the case of the plaintiff that he had separately filed suit under Order XXXVII CPC for the recovery of arrears of rent based on the dishonoured cheques issued by the defendants. It is also the case of the plaintiff that the defendant made payment of monthly rent up till August, 2010 and thereafter failed to make any payment towards the rent.

3. Based on these averments, the plaintiff has claimed from the defendant Rs. 9,000/- per day according to the terms of the lease agreement. The plaintiff has also claimed a decree for possession in terms of the suit premises shown red in the site plan attached to the plaint. The plaintiff has also claimed a decree for permanent injunction against the defendant to restrain them, their family members, agents, employees, servants, legal heirs or any other persons acting for and on behalf of the defendant from selling,

transferring, alienating, mortgaging or creating any kind of third party interest in the suit property.

4. The defendant had caused appearance in the matter and the written statement was also filed by the defendant. Subsequently, the defendant stopped appearing in the matter and vide orders dated 6th February, 2012 the defendant was proceeded ex parte. Ex parte evidence was filed by the plaintiff through his own affidavit. Ex parte evidence of the plaintiff was closed vide orders dated 2nd March, 2012 and final arguments in the matter were heard by this Court on 9th May, 2012.

5. In the ex parte evidence adduced by the plaintiff, he has proved on record the site plan showing the leased property in question in red colour as Exhibit PW 1/A. The plaintiff has also proved on record photocopy of the certified copy of the lease agreement dated 6.7.2009 as Exhibit PW1/2. The plaintiff has further proved on record copy of the dishonoured cheque dated 21.8.2010 for an amount of Rs. 1,35,000/- as Exhibit PW 1/3. The plaintiff has further proved on record certified copy of the bank advice dated 24.8.2010 as Exhibit PW 1/4, copy of the legal notice dated 14.9.2010 as Exhibit PW 1/5, copy of the cheque dated 28.8.2010 for a sum of Rs. 1,35,000/- as

Exhibit PW 1/6, copy of the bank advice dated 3.9.2010 as Exhibit PW 1/7. The plaintiff has also proved on record office copy of legal notice dated 14.9.2010 as Exhibit PW 1/8. The plaintiff has also proved on record copy of another legal notice dated 14.9.2010 on record as Exhibit PW 1/9 and postal receipt as Exhibit PW 1/10. The plaintiff has further proved on record judgment and decree dated 13.4.2011 in respect of the recovery suit filed by the plaintiff based on the dishonoured cheques as Exhibit PW 1/11. The plaintiff has deposed in his affidavit Ex.PW1/X that the defendant had made payment of the lease rent only till August, 2010 and thereafter stopped making payment of further monthly rent to the plaintiff. The plaintiff further claimed damages @ Rs. 9,000/- per day in terms of the lease agreement. The said testimony of the plaintiff remained unchallenged and unrebutted. In the written statement filed by the defendant, the defendant claimed protection under Section 112 and 113 of the Transfer of Property Act. The defendant further claimed that the plaintiff had agreed to waive three months rent against the force-majeure clause (vi) in the lease agreement. The defendant further claimed that during the period from August, 2010 to November, 2010 the plaintiff had received an amount of Rs. 4,90,000/- in cash from the

defendant against vouchers. However, in the absence of any evidence led by the defendant and also in view of the unrebutted testimony of the plaintiff no weightage can be attached to the said defence raised by the defendant in the written statement. This Court also cannot lose sight of the fact that similar defence was raised by the defendant in the recovery suit filed by the plaintiff in Civil Suit No. 114/2010 and the same was rejected by the Civil Court vide judgment and decree dated 13th April, 2011. No material has been placed on record by the defendant that the judgment and decree dated 13th April, 2011 was challenged by the defendant and in the absence of any such material it can be believed that the said judgment and decree dated 13th April, 2011 has attained finality. The ownership of the plaintiff in respect of the tenanted premises cannot be disputed as through the registered lease agreement dated 6.7.2009 the plaintiff alone had created tenancy in favour of the defendant. In terms of clause III (1) of the lease deed the said lease of the defendant could be terminated by the plaintiff by giving 2 months written notice in the event of the defendant/lessee in arrears of rent for a period of two months or failure on the part of the lessee to observe any of the covenants as contained in the said lease deed. In terms of sub clause 9 of clause III

of the lease agreement on such failure of the lessee to pay the rent for two consecutive months or dishonouring of any of its cheques, the said lease agreement would stand terminated and in such eventuality the lessor was set free to lock the premises and in such case it would be deemed that the lessee had vacated the premises. No further notice in this regard was necessary to be given by the lessor. In terms of sub-clause 4 of clause III of the lease deed, the lessee was liable to pay compensation of an additional sum of Rs. 9,000/- per day as user charges in addition to the rent payable for over stay either after the expiry of the agreement or on premature determination of the said agreement. The said relevant clauses of the lease agreement are reproduced as under:-

1. If any rent shall be in arrears for two months, or if the LESSEE fails to observe any covenant or conditions then in such case it shall be lawful for the LESSORS to determine the lease, without prejudice to any claim or right, affection or remedy which either of the Parties hereto may have against the other in respect of any breach, non-performance, non-observance, of any of the covenants herein contained. "either party can determine this agreement by giving a two months written notice to the other party or compensate the other party with the rent in lieu of the said two months notice period."
4. The LESSEE on expiry of this agreement or on premature determination of this agreement is liable to immediately handover vacant possession of the premises to the LESSORS or his authorized representative. In case the

LESSEE fails to do so the LESSEE shall be liable to pay compensation an additional sum of Rs.9,000/- per day as usage charges in addition to the rent payable for such period of overstay.

9.If the LESSEE fails to pay the rent for two consecutive months or dishonoring of, any cheque, it shall be understood that this lease agreement has been terminated. The LESSORS shall be free to lock the premises and it shall be deemed that the LESSEE has vacated the premises and no notice whatsoever shall be required to be given in this regard."

6. After having given my due consideration to the averments of the plaint and the ex parte evidence adduced by the plaintiff, which remained unchallenged and unrebutted along with the documents proved on record and the said terms of the lease deed, this Court is of the considered view that the plaintiff is entitled to the reliefs as claimed by him in the present suit. The suit filed by the plaintiff is accordingly decreed for the recovery of possession of the suit property more, specifically shown by the plaintiff in the site plan proved on record as Exhibit PW 1/A. The plaintiff is also entitled to recover damages @ Rs. 9,000/- per day in terms of sub clause 4 of clause III of the lease agreement from the date of the filing of the suit till the date of handing over of the possession of suit property in favour of the plaintiff on the plaintiff paying requisite Court fee from the date of filing of the suit till the date of passing of this judgment

and decree. A decree for permanent injunction is also passed in favour of the plaintiff and against the defendant thereby restraining the defendant, their family members, agents, employees, servants, legal heirs or any other person acting for and on behalf of the defendant from selling, transferring, alienating, mortgaging or creating any third party interest in the suit property.

7. Decree sheet be drawn up accordingly.

KAILASH GAMBHIR, J

May 09, 2012
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