

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

% **Date of decision: 9th December, 2016.**

+ **CS(COMM) 9/2016 & IAs No.14374/2016 (u/O 7 R-14 CPC) & 14376/2016 (u/O 16 R-1(2) CPC)**

**M/S COSMOS INFRA ENGINEERING (I) LTD
& ORS**

.....Plaintiffs

Through: Ms. Nandita Abrol, Adv.

Versus

**M/S TIRUPATI BUILDINGS & OFFICES (P) LTD
& ORS**

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiffs M/s Cosmos Infra Engineering (I) Ltd., Mrs. Kavita Mittal and Ms. Megha Mittal instituted this suit (i) for recovery of Rs.2,41,14,000/- with interest; (ii) for mandatory injunction directing the defendant No.1 M/s Tirupati Buildings & Offices (P) Ltd. (TBOPL) to not accept any license fee in respect of “suit property”; (iii) for mandatory injunction to direct defendants No.5&6 M/s Krishna Store and Mr. Saurabh Saini, partner M/s Krishna Store to pay license fee in respect of “suit property” to the plaintiffs; (iv) for permanent injunction to restrain the defendant No.1 TBOPL from accepting any license fee on behalf of the plaintiffs from the defendants No.5&6 Krishna Store and Mr. Saurabh Saini;

(v) for permanent injunction to restrain the defendants No.5&6 Krishna Store and Mr. Saurabh Saini from paying any further license fee to defendant No.1 TBOPL; and, (vi) for recovery of *mesne* profits from defendants No.5&6 Krishna Store and Mr. Saurabh Saini for the period from 23rd November, 2015 till the premises are vacated by the said defendants No.5&6 Krishna Store and Mr. Saurabh Saini with interest.

2. Besides the defendants No.1,5&6 against whom reliefs are claimed, Mr. Subhash Dabas, Ms. Rosy Dabas and Mr. Ayush Dabas have been impleaded as defendants No.2 to 4 describing them as Directors of defendant No.1 TBOPL, and M/s Golden India Expotrade Pvt. Ltd. (GIEPL) and Mr. Vaibhav Singhal have been impleaded as defendants No.7&8.

3. The suit was entertained and summons thereof issued to the defendants, though interim order sought of restraining defendant No.1 TBOPL from accepting license fee from defendants No.5&6 and directing defendants No.5&6 to deposit license fee in this Court not granted.

4. None appeared for any of the eight defendants despite service and all the defendants were, vide order dated 4th April, 2016, proceeded against *ex-parte*.

5. The plaintiffs in their *ex-parte* evidence have filed affidavit by way of

examination-in-chief of their power of attorney holder Mr. Jitender Jain and which was tendered in evidence and closed their evidence.

6. It is the case of the plaintiffs:

(i) that the plaintiff No.1 M/s Cosmos Infra Engineering (I) Ltd. is the absolute owner of undivided commercial space measuring 5000 sq. ft., plaintiff No.2 Mrs. Kavita Mittal is the absolute owner of undivided commercial space measuring 2400 sq. ft. and the plaintiff No.3 Ms. Megha Mittal is the absolute owner of undivided commercial space measuring 2500 sq. ft., situated in Pinnacle Complex (Pinnacle Mall), Plot No.3, Dwarka City Centre, Sector-10, Dwarka, Delhi, vide separate registered Sale Deeds all dated 3rd September, 2012;

(ii) that all the Sale Deeds aforesaid were executed in favour of the plaintiffs by the defendant No.1 TBOPL;

(iii) that the aforesaid total 9900 sq. ft commercial space owned by the plaintiffs together is part of Welcome Hotel Compound being run and managed by the defendant No.1 TBOPL;

(iv) that the defendant No.1 TBOPL at the time of execution of Sale Deeds had 'agreed that in due course of time he will transfer all the

existing license fees in favour of the plaintiffs of all the licensees present in the suit properties’;

(v) that the defendants “also agreed to start paying the licensee fee immediately from 3rd September, 2012;”

(vi) that as on 3rd September, 2012, defendant No.7 GIEPL was the licensee vide lease deed dated 30th March, 2012 at a monthly rent of Rs.5 lakhs besides other charges and the defendant No.1 TBOPL had also taken a sum of Rs.42 lakhs as interest free security from the defendant No.7 GIEPL;

(vii) that the defendant No.7 GIEPL had filed a civil suit against defendant No.1 TBOPL averring that defendant No.1 TBOPL was not allowing defendant No.7 GIEPL to beneficially use and enjoy the premises;

(viii) that the defendant No.1 TBOPL has not paid a single penny to the plaintiffs towards license fee / rent realised from the property aforesaid of the plaintiffs, inspite of the repeated requests and reminders of the plaintiffs;

(ix) that the defendant No.7 GIEPL remained a licensee till 3rd May, 2015 at a rental of Rs.5 lakhs per month and a sum of Rs.1,65,00,000/-

is due to the plaintiffs from the defendant No.1 TBOPL together with interest @ 24% per annum with effect from the date of receipt of the licensee fee till realisation;

(x) that the plaintiffs during their visit to Pinnacle Mall in the last week of May, 2015 found that their aforesaid property was in possession of defendants No.5&6 Krishna Store and Mr. Saurabh Saini and on enquiry learnt that the defendant No.1 TBOPL had entered into a lease deed dated 3rd May, 2015 with defendants No.5&6 Krishna Store and Mr. Saurabh Saini claiming itself to be the owner of the property;

(xi) that the plaintiffs had never authorised defendant No.1 TBOPL to let out their property to defendants no.5&6;

(xii) that the defendant No.1 TBOPL was also learnt to have received a sum of Rs.40.5 lakhs from the defendants No.5&6 Krishna Store and Mr. Saurabh Saini towards interest free security deposit;

(xiii) that the defendant No.1 TBOPL has thus misappropriated the monies due to the plaintiffs;

(xiv) that though the plaintiffs before instituting the suit got sent notices to the defendant No.1 TBOPL as well as defendants No.5&6

Krishna Store and Mr. Saurabh Saini, but without any avail.

7. The affidavit by way of examination-in-chief in *ex-parte* evidence filed on behalf of the plaintiffs is a reproduction of the plaint save that on photocopies of the three Sale Deeds Ex.PW1/4, PW1/5 and PW1/6 were put, on the photocopy of the site plan Ex. PW1/7 was put, on the photocopy of the lease deed dated 30th March, 2012 Mark A was put and on the photocopy of the lease deed dated 23rd May, 2015 Mark B was put. Though exhibit marks were put on photocopies of some other documents also but need to record the same herein is not felt.

8. The suit came up for hearing on 30th August, 2016, when it was *inter alia* ordered as under:

“4. A perusal of the copies of the sale deeds filed by the plaintiffs though technically not admitted into evidence show that the plaintiffs therein have confirmed having received vacant physical possession of the portions of the hotel purchased by the plaintiffs from the defendant No.1. However the case of the plaintiffs here is that at the time of execution of the sale deed, the said portions were in occupation of the other defendants who were paying licence fee to the defendant no.1 and that though the defendant no.1 had agreed to have the licences transferred in favour of the plaintiffs but failed to do so and continued to receive the licence fee.

5. I have enquired from the counsel for the plaintiffs as to how the pleadings and evidence to the aforesaid effect which is contrary to the terms of the registered document relied upon by the plaintiffs themselves can be looked into.

6. *The plaintiffs, to prove the rate of licence fee, have also filed photocopies of the licence deeds and which have not even been admitted into evidence.*

7. *The plaintiffs have not produced a single original document and have put exhibits / marks on photocopies only.*

8. *Prima facie, it appears that the plaintiffs, in their ex parte evidence, have utterly failed to prove their case.*

9. *The counsel for the plaintiffs states that the defendant no.1 has since transferred the licences of the present occupants in favour of the plaintiffs.*

10. *There is nothing on record in this respect also.*

11. *Though the suit is liable to be dismissed but since the counsel for the plaintiffs is young, it is deemed appropriate to give her an opportunity to consider and make amends.”*

9. Thereafter on 27th October, 2016, the following order was passed:

“1. Though it was recorded in the order dated 30th August, 2016 that the suit was liable to be dismissed on that day, but in view of the young age of the counsel opportunity was given to her to consider and make amends but inspite thereof no steps have been taken till date and adjournment is sought today.

2. Today’s adjournment is granted subject to the plaintiffs depositing costs of Rs.10,000/- with the Delhi High Court Bar Association Lawyers’ Social Security and Welfare Fund, New Delhi.

3. List on 9th December, 2016.”

10. The plaintiffs have filed IA No.14374/2016 under Order VII Rule 14 of Code of Civil Procedure, 1908 (CPC) and IA No.14376/2016 under Order XVI Rule 1(2) CPC. Along with the former application, certified copies of the three Sale Deeds and a license deed dated 3rd February, 2016 between the

three plaintiffs as licensor and defendant No.5 Krishna Store as licensee have been filed. Vide the latter application, the plaintiffs seek to re-open their *ex-parte* evidence and to summon the record keeper of Sub Divisional Magistrate (SDM), Office of the Sub Registrar-IX, Kapashera, Delhi to produce documents before the Court.

11. The licence deed dated 3rd February, 2016 executed between the plaintiffs on the one hand and the defendant No.5 Krishna Store through its proprietor defendant No.6 Mr. Saurabh Saini on the other hand is with respect to 4950 sq. ft. carpet area on the ground floor of Pinnacle Mall of which 2500 sq. ft. is described as in the ownership of the plaintiff No.1 M/s Cosmos Infra Engineering (I) Pvt. Ltd., 1250 sq. sq. ft. in ownership of plaintiff No.3 Ms. Megha Mittal and 1200 sq. ft. in ownership of plaintiff No.2 Mrs. Kavita Mittal. The same is indicative of the defendant No.5 Krishna Store, with effect from the date of the said licence deed, being in use and occupation of 4950 sq. ft. out of total 9900 sq. ft. with the consent of the plaintiffs. Though the said licence deed is dated 3rd February, 2016 but is with effect from 15th April, 2015.

12. With the production by the plaintiffs of the licence deed aforesaid and the statement of the counsel for the plaintiffs as recorded in para 9 of the

order dated 30th August, 2016 (reproduced above) it follows that the reliefs claimed in the suit i) of injunction directing the defendant No.1 TBOPL to not accept licence fee from defendants No.5&6 Krishna Store and Mr. Saurabh Saini directing the defendants No.5&6 to pay license fee to the plaintiffs; ii) of restraining the defendant No.1 TBOPL from accepting any further license fee from defendants No.5&6 Krishna Store and Mr. Saurabh Saini on behalf of the plaintiffs; and, iii) of restraining the defendants No.5&6 Krishna Store and Mr. Saurabh Saini from paying any licence fee to the defendant No.1 TBOPL, do not survive.

13. The claim in the suit against the defendants No.5&6 Krishna Store and Mr. Saurabh Saini for *mesne* profits with effect from 23rd November, 2015, in the absence of the relief of recovery of possession of the property, along wherewith only a claim for future *mesne* profits can be made was in any case misconceived. Ordinarily, in a suit, only the relief to which the plaintiff is entitled to on the date of institution thereof can be claimed and not to what the plaintiff may become entitled in future. However Order XX Rule 12 of CPC carves out an exception to the said ordinary rule and empowers the Court to in a suit for recovery of possession of immovable property, to also pass a decree for recovery of *mesne profits* which accrue after the institution

of the suit also. Reference can be made to *Santosh Arora Vs. M.L. Arora* 211 (2014) DLT 312.

14. Thus, the only claim in the plaint which remains to be adjudicated is of recovery of monies claimed to be owed to the plaintiffs towards license fee of the 9900 sq. ft. area aforesaid acquired by them vide Sale Deeds claimed by the plaintiffs.

15. As observed by me in the order dated 30th August, 2016, the plaintiffs have not proved the Sale Deeds. Though an opportunity was given by me to the counsel for the plaintiffs but in availing thereof also, the counsel for the plaintiffs has only filed certified copies of the Sale Deeds and sought to summon the record holder of the office of the Sub Registrar with which the Sale Deeds are registered. I have today enquired from the counsel for the plaintiffs, as to how the plaintiffs by summoning the Sub Registrar would prove the Sale Deeds. The counsel for the plaintiffs inspite of the opportunity given has not studied as to how a document in the nature of a Sale Deed is to be proved.

16. Be that as it may, even if the Sale Deeds were to be read in evidence, as recorded in para 4 of the order dated 30th August, 2016 reproduced above, as per the Sale Deeds, vacant, peaceful and physical possession of the

property sold was taken over by the plaintiffs at the time of execution of the Sale Deeds. The relevant clauses of the Sale Deeds identically worded are as under:

“4. That the VENDOR, his legal heirs, successors, survivors and assignees shall have no claim, title and interest in the said property and the VENDEE shall hereinafter hold, use, enjoy or sell the said property as he likes or make some additions and alterations in the aforesaid property as his own personal property without any hindrance, interruption, claim or demand whatsoever from the VENDOR or anyone of the heirs, successors, survivors, administrators and assignees etc. of the VENDOR.

5. That since entire consideration has already been received by the VENDOR and the actual vacant physical possession of the said property has been handed over to the VENDEE at the time of execution and registration of this Sale Deed absolutely and forever.

6. That the VENDEE is fully entitled and authorised to get the aforesaid property mutated/transferred/substituted in his own name in the relevant records of Municipal Corporation of Delhi or any other concerned Government/Local authorities by presenting this SALE DEED or its certified true copy in the office of the concerned authorities in the absence of the VENDOR and this Sale Deed by itself shall be deemed and construed to grant the No Objection Certificate by the VENDOR in favour of the VENDEE for all intents and purposes.

7. That the VENDOR hereby assures the VENDEE that the said property is at present free from all kinds of encumbrances, prior sale, mortgage, exchange, lien, court injunction, court decree, surety, security, acquisition, notification, Will, gift, dispute, legal flaw, burden, court notice, litigation, charge, claim, demand court case, liability, attachment, prior sale etc. etc. and there is no legal defect in the title of the VENDOR and

if proved otherwise or if the VENDEE are deprived of the said property under sale or any part thereof owing to the above reasons then the VENDOR shall be liable to indemnify the VENDEE in full or part to the extent of the losses sustained by the VENDEE with costs, expenses, damages etc.”

17. The claim of the plaintiffs in the suit and in the *ex-parte* evidence, of having not been delivered vacant, peaceful and physical possession of the space / portion purchased under the Sale Deeds aforesaid and of the defendant No.7 GIEPL being in possession thereof and the defendant No.1 TBOPL having continued to receive license fee / rent from defendant No.7 GIEPL thereafter is thus contrary to the registered Sale Deeds.

18. The counsel for the plaintiffs today offers the explanation that the Sale Deeds were as per “Standard Language” and do not represent the “actual transaction”. It is further stated that the defendants No.1 to 4 had “orally stated that they will get the lease deeds / licence deeds with defendant No.7 GIEPL attorned in favour of the plaintiffs” but did not do so.

19. Having not found the plaintiffs to have pleaded so or having deposed so in the evidence of their sole witness, it is not understandable on what basis, can the aforesaid, if at all acceptable and tenable in law, be accepted / believed.

20. No answer has been forthcoming.

21. The sole witness of the plaintiff in his affidavit by way of examination-in-chief has put mark 'A' on the photocopy of the lease deed dated 30th March, 2012 between the defendant No.1 TBOPL and defendant No.7 GIEPL. I may in this regard notice that at the time of tendering of the affidavit by way of examination-in-chief in evidence, finding that the documents on which exhibit marks were sought to be put were photocopies, the learned Joint Registrar de-exhibited the documents and marked them as A to I respectively. Technically thus the lease deed has not been proved. Not only so, the lease deed though of immovable property and for a period of nine years, is neither properly stamped nor registered and is found to have been engrossed on a stamp paper of Rs.100/- only. For this reason also, it cannot be read in evidence. There is thus no evidence to the effect that the defendant No.7 GIEPL was in possession of the property of the plaintiffs or on what terms.

22. Even if the aforesaid documents were to be read in evidence, therefrom, it cannot be made out that the defendant No.7 GIEPL was in possession and occupation of the portion of Pinnacle Mall belonging to the plaintiffs. The said document describes the area leased to defendant No.7 GIEPL as 10,000 sq. ft. in Pinnacle Mall, without describing on which floor

thereof. Moreover, as per the site plan placed by the plaintiffs on record, admittedly, the area of the ground floor is much more than 10,000 sq. ft.

23. I have checked whether there is any oral evidence to that effect. The sole witness of the plaintiffs in his examination-in-chief has merely deposed that as on 3rd September, 2012, defendant No.7 GIEPL was continuing as a licensee in the suit property vide lease deed dated 30th March, 2012 on a monthly rent of Rs.5 lakhs. The said lease deed, as aforesaid, cannot be read in evidence. Moreover, the said oral deposition being contrary to what is recorded in the registered document, even otherwise cannot be read by virtue of the bar contained in Sections 91&92 of the Indian Evidence Act, 1872.

24. I may also notice that the present suit was filed on 16th December, 2015 and the claim therein for license fee / rent with effect from 3rd September, 2012 till 16th December, 2012 would also be barred by time.

25. Though the suit for the reliefs for which it survives is thus liable to be dismissed but I may record that finding that the defendants have chosen not to contest the suit and further finding a ring of truth in the version of the plaintiff, I have wondered whether the relief can be granted. I am however of the considered opinion that no indulgence / leniency has to be displayed in such manner. Though the Courts in the past have been liberal in *ex-parte*

matters, even if the plaintiffs therein had failed to prove their case inspite of defendants being *ex-parte*, but the same is resulting in the lowering of the standards of the Bar. Time has thus come for the Courts to enforce law as per its terms, so that the practitioners thereof learn to satisfy the requirements thereof.

26. The suit for the relief of recovery of money is thus dismissed. Though the plaintiffs have consumed the time of the Court without making any real effort to prove / establish their case but I refrain from imposing costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 09, 2016

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(corrected & released on 22nd December, 2016)