

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

% *Date of Decision: January 18, 2017*

+ **FAO(OS) (COMM) 13/2017**

SURINDER SINGH ARORA

..... Appellant

Represented by: Dr.Sarbjit Sharma, Advocate
with Ms.Archana Maharaj,
Ms.Devika Bhagat, Advocates

versus

RAJEEV DHINGRA & ORS

..... Respondents

Represented by: Ms.Mani Gupta, Advocate with
Mr.Rohit Mehra,
Ms.Aishwarya Nabh, Mr.Rajat
Kumar, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

1. We note the admitted facts and then the controversial ones projected by the appellant.
2. The admitted facts are that respondents No.1 and 2, Rajiv Dhingra and Atul Dhingra are brothers and are owners of the first, second and third floor of property bearing municipal No.G-3, Pushkar Enclave, Paschim Vihar, New Delhi, which they let out to M/s Mind & Soul Fitness Pvt.Ltd. by a registered lease-deed dated September 29, 2014 for a period of nine years. Rent for first three years is ₹2.7 lacs per month. Service tax has to be borne by the lessee.

3. Clauses 2.2 and 6.16 of the registered lease-deed read as under:-

“2.2 The Lease Rentals shall become due and payable by LESSEE to LESSORS after the expiry of the Lease Rentals free time period i.e. 120 (one hundred twenty) days from the date of execution of this Lease Deed or commencement of business by the LESSEE, whichever is earlier. Further the Lease Rentals would become due and payable only after the conditions laid down in Clause 5 have been completed. The Lease Rentals free time period would be granted by the LESSORS to the LESSEE for carrying out the fit outs at the premises.”

“6.16 LESSORS have assured that a lift shall be installed at the Property and shall be made operational by the date of commencement of full operations by LESSEE or 120 days of signing of this lease deed whichever is later. First time lift/elevator is to be provided by LESSORS. The periodic/annual maintenance of lift for first year shall be free. After first year annual/other maintenance charges shall be borne by LESSEE. It is agreed to by the Parties that 20% of lift maintenance cost shall be borne by the LESSORS/lessee of upper ground floor from the date of commencement of commercial operation by such upper ground floor lessee. However, in case lessee of upper ground floor agrees to non-usage of lift than entire lift maintenance will be borne by the LESSEE.”

4. Both parties agree that the premises became fit for use and were put to use in February, 2015. That only four months' rent has been paid. Service tax has not been paid at all.

5. The controversial facts are that the appellant and other shareholders of the lessee company are in litigation with each other regarding who holds majority shares. As per the appellant Mr.Dipak Goyal a shareholder and a

director agreed to transfer ownership of the lessee to him and wrote to respondents No.1 and 2 that henceforth the appellant shall pay the rent. Mr.Dipak Goyal agreed to pay ₹55 lacs to the appellant because he claimed that ₹50 lacs was spent to renovate the leased premises. The obligation to refund membership fee in sum of ₹35 lacs had to be also factored in. As per the appellant later on Mr.Dipak Goyal turned dishonest and filed a suit against him. As per the appellant he had incurred expenditure in sum of ₹1.25 crores in installing machinery in the Gym. He claims that liability towards loan taken from financial institutions has to be met by the lessee company. Due to water logging at the entrance of the building the Gym could not be put to use.

6. Vide impugned order dated January 02, 2017 the learned Single Judge has directed the lessee company to hand over vacant physical possession of the leased premises because outstanding rent for over one year is payable.

7. Though not stated in the impugned order as per clause 10.2 of the registered lease in case of two months consecutive default the lease is liable to be terminated. The lessors have terminated the lease.

8. Notwithstanding appellant not being a party to the proceedings before the learned Single Judge, we find no legal infirmity in the directions given by the learned Single Judge that whosoever is the human face of the company and is in actual physical possession would be liable to discharge the obligation/liability of the company to hand over possession.

9. Averments made in paras 8 to 10 of the appeal relate to inter-se dispute between the shareholders of the company and thus have no concern with the directions issued by the learned Single Judge. Similarly the

averments in para 19 are irrelevant, for whatever may be the money spent in making the Gym functional would be irrelevant for liability to pay rent. Learned counsel for the appellant argued, with reference to pleadings in para 21 of the appeal that on account of cheap material used to construct the building the member of the club declined would not in our opinion entitle the lessee not to pay the rent. It is not the case of the appellant that the building is totally unfit to be put to any use and would entitle the lessee to suspension of rent. At best, that would give the right to the lessee to proceed under clause (f) of Section 108 of the Transfer of Properties Act, 1882. Neither the lessee company nor the appellant has proceeded to be so. The direction issued by the learned Single Judge as an interim measure to hand over possession of the property cannot be faulted. When respondents No.1 and 2 filed the petition under Section 9 of the Arbitration and Conciliation Act outstanding rent was ₹32,22,127/-. Service tax is also payable. As of now, the outstanding rent exceeds ₹50 lacs. At best, would be the obligation of the lessee company whose possession is unauthorised because the lease-deed envisages determination of the lease if there is default of payment of rent for two consecutive months. The default has occurred.

10. That the financial condition of the lessee company is poor and if the Gym is closed the appellant would be ruined because the machinery purchased by him would be rendered useless is neither here nor there because liability to pay rent is not linked with profit or loss made by the lessee. If a business venture fails, the lessee cannot claim a right to continue to occupy the leased premises without paying the rent. That there is a dispute between the appellant who is a shareholder of the company and Mr.Dipak Goyal who is also a shareholder concerning the affairs of the

lessee company is also irrelevant to adjudicate the right between the lessor and the lessee.

11. The argument that no rent is payable for a period of 240 days because clause 2.2 and clause 6.16 each defer payment of rent by 120 days, is prima-facie incorrect for the reason both clauses envisage grant of said benefit to enable the lessee to make the lease premises fit for use as a Gym and within said time a lift had to be made operative by the lessor. In fact it is clause 2.2 which defers payment of rent for period of 120 days or when business commences, whichever is earlier. Clause 6.16 obliges the lessor to make a lift operational in the building.

12. The appeal is accordingly dismissed with costs in sum of ₹25,000/- against the appellant and in favour of respondents No.1 and 2.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

JANUARY 18, 2017
skb