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

% *Date of Judgment: 16th October, 2018*

+ **FAO(OS) (COMM) 238/2018 & CM No.43512/2018**

M/S ORCHID SALON SERVICES PVT LTD Appellant

Through: Ms.Manali Singhal, Ms.Shreya Singhal,
Ms.Vinita Sasidhar, Mr.Tanveer Oberio and
Mr.Deepak Rawat, Advocates.

versus

PRADYUMAN KUMAR AGGARWAL & ORS Respondents

Through: Mr.Rahul Gupta, Mr.V.K. Jain and
Mr.Shekdhar Gupta, Advocates for R-1 to 4.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

CM No.43513/2018 (exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

CAV 961/2018

1. Mr.Rahul Gupta, counsel for the respondents No.1 to 4 enters appearance. Accordingly, caveat petition stands disposed of.

2. Counsels for the parties submit that all necessary pleadings and documents on which they wish to rely upon form part of this appeal.

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3. The present appeal is directed against the order dated 14.09.2018 passed by the learned Single Judge while dealing with an application under Order XII Rule 6 and XIII A of CPC and an application under Order XXXIX Rule 10 of CPC.

4. Subject matter of the present appeal is a property known by the number M-32, Ist floor, Greater Kailash-1, M Block Market, New Delhi. The appellant (hereinafter referred to as the tenant) had entered into a registered lease deed with the respondents No.1 to 4 (hereinafter jointly referred to as the landlord) on 30.06.2015 for a period of nine years at a monthly rent of Rs.7 lacs per month on various terms and conditions as mentioned in the lease deed.

5. The tenant continued to pay rent to the landlord up to 08.06.2017. Since the tenant defaulted in making payment of the rent the landlord issued a legal notice dated 16.05.2017 to the appellant/tenant. Subsequently, another legal notice was issued to the tenant on 12.12.2017 and also to the defendant no.2 (hereinafter referred to as the sub-tenant) in the suit. Since the arrears of rent were not paid, this led to filing of a suit in the month of January, 2018 for recovery of possession, arrears of rent, damages, Mesne profits, recovery of service tax and GST and other relief so mentioned in the plaint. Written statements were filed. Post filing of the written statement, the landlord filed an application under Order XII Rule 6 for passing a decree of possession based on the admissions made in the written statement by the tenant i.e. (i) the acceptance of a landlord and tenant relationship, (ii) acceptance of rent @ Rs.7 lacs per month and (iii) the existence of a registered lease deed between the landlord and the tenant.

6. We are informed that post passing of this order, the possession of the subject premises has been handed over by the sub-tenant to the landlord on 12.10.2018. This part of the order is not being challenged for the reasons which we will notice in the paragraphs subsequently. On the application filed by the landlord under Order XXXIX Rule 10, the learned Single Judge has

directed the tenant to deposit with the Registrar General of this Court the arrears of rentals w.e.f. June, 2017 till the date of passing of the order within four weeks and continue to deposit till the possession is handed over to the landlord. A direction has also been issued for releasing the arrears of rent in favour of the landlord, wherein the landlord will furnish an undertaking that the amounts released would be re-deposited in the Court within four weeks if so directed. The learned Single Judge also held that “Qua the dues of the TDS, damages, mesne profits, service and maintenance charges of lift etc. the suit shall continue”.

7. Learned counsel for the appellant submits that the learned Single Judge has completely lost track of the fact that the landlord and tenant had entered into an agreement on 02.02.2016. However, the landlord was orally informed that the deposit was made by the Director of sub-tenant. Learned counsel further submits that with the consent, concurrence and knowledge of the landlord, the appellant entered into an unregistered lease with the sub-tenant who has been arrayed as the defendant no.2 in the suit filed on 02.02.2016. Counsel contends that since the defendant no.2/sub-tenant occupied, enjoyed and utilized the tenanted premises, he alone would be responsible for payment of rent and further for the reasons that the landlord had accepted him to be his tenant and allowed him to function and continue in the tenanted premises. Counsel submits that in view of these subsequent developments, no order under order XXXIX Rule 10 CPC could have been passed against the appellant herein nor the appellant could have been saddled with the burden of rent. The Court in view of the disputed question of fact should have awaited the recording of evidence and only thereafter saddled the appellant with the liability which he is not liable to pay. It is further

pointed out that till September, 2017 the tenant had cleared all its liability and issued four cheques total amounting to Rs.13 lacs to the landlord which was accepted and encashed without any protest or demur. It is also contended that a sum of Rs.13 lacs was paid in full and final settlement between the landlord and the tenant and the amount was not for any specific period but on the express understanding between the landlord and tenant.

8. Learned counsel for the respondents No.1 to 4/landlord submits that there is no infirmity and illegality in the order passed by the learned single Judge. It is contended that the parties had entered into registered lease. In support of his contention that the tenant could not have sub let the premises without the express leave and permission of the landlord. Reliance is placed on clause 2(5) which is reproduced below.

“The LESSEE shall have no right and/or authority under any circumstances to assign, sublet, underlet, mortgage, or grant license to use or otherwise part with the possession of THE DEMISED PREMISES or any part thereof. Change in constitution in the LESSEE company shall tantamount to sub-letting for the purposes of this clause. It is clarified that the possession of THE DEMISED PREMISES shall not be parted away to anybody by the LESSEE under any circumstances.”

9. Mr. Gupta further submits that even as per the unregistered lease dated 02.02.2016, the liability of the payment of rent to the landlord was on the tenant herein. He further submits that the sub lease was also created for a sum of Rs.7 lacs per month and this amount was to be received from the sub-tenant to the tenant. It is thus contented that whether as per the registered

lease or the unregistered lease the liability to pay rent to the landlord was on the appellant herein being the tenant.

10. Mr.Gupta, further submits that the order so passed under Order XXXIX Rule 10, no way precludes the appellant herein from raising the defence as per the written statement for the reason that the order so passed under the Order XXXIX Rule 10 and the question so raised in the written statement has been left open which is evident upon reading of paragraphs 9 and 10 of the impugned order.

11. We have heard the learned counsel for the parties.

12. We do not find any infirmity or illegality in the order passed by the learned Single Judge. The learned Single Judge has taken into consideration all the parameters which are required to be considered while deciding an application under Order XXXIX Rule 10. However, we may hastened to add that the appellant herein/tenant has raised various pleas which are required to be considered only post evidence and the paragraphs 9 and 10 of the impugned order would show that the learned Single Judge has not precluded the appellant herein from raising the defence which have been taken in the written statement. The learned Single Judge has also directed that the amount released in favour of the plaintiff (landlord) shall be on his furnishing an undertaking that the amount would be re-deposited in the Court if so directed.

13. As per the registered lease entered into between the parties, the appellant herein was to pay the rent of Rs.7 lacs per month to the landlord. Not a single document has been placed on record to show at any point of time any rent was paid or accepted by the landlord from the sub tenant. It is contended that a deposit was made by one of the Directors of the sub-tenant

even prior to execution of the registered lease deed which is denied by Mr.Gupta. Reliance placed by counsel for the appellant on the unregistered sub lease, in our view even that can be of no help to the appellant herein for the reason that even as per the sub lease which was executed subsequently, the rent was to be paid by the sub-tenant to the appellant herein and not to the landlord directly. Moreover, during the subsistence of the registered lease between the appellant (tenant) and respondent no.1(landlord), the appellant cannot escape payment of rent.

14. Even as per the arrangement entered into between the tenant and sub tenant, the liability to pay rent was on the tenant and not on the sub tenant. Thus, in our prima facie view, the tenant cannot escape his liability to pay the rent. However, we make it clear that any observation made by us in the order passed today, shall not come in the way of Single Judge while deciding the suit after the issues are framed and the evidence is led. We also make it clear that the defence which has been raised by the appellant herein and all the objections raised by the appellant herein are kept open to be decided at the time of final arguments in the suit.

14. We find no ground to entertain the appeal. The appeal is dismissed.

CM No.43512/2018

In view of the order passed in the appeal, no orders are required to be passed in the application.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

OCTOBER 16, 2018/afa