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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 71 OF 2018
IN
COMM SUMMARY SUIT NO. 205 OF 2017

APP (India) Paper Pvt Ltd ...Plaintiff
Versus
Renaissance Indus Infra Private Limited ...Defendant

Mr Pradeep Bakhru, *with Ms Mitakshi Lakhani, i/b Wadia Ghandy & Company, for the Plaintiff.*
Mr Amjith M Anandhan, *with Mr Nikhil Mallelwar, i/b Mr Sachin R Pawar, for the Defendant.*
Mr Suhas Sawant, *Dy Official Liquidator, for Official Liquidator*.

CORAM: G.S. PATEL, J
DATED: 25th January 2019

PC:-

1. The Plaintiff filed this suit under Commercial Division of this Court under Order XXXVII of the Code of Civil Procedure 1908 (**"CPC"**) for recovery of an amount of Rs.1,30,22,743.14/- with interest at 18% per annum from 10th June 2014. Exhibit "N" to the Plaint at page 77 contains the particulars. The entire amount is claimed as a refund of a security deposit under a leave and license agreement dated 26th September 2013.

2. The Plaintiff served the Writ of Summons. The Defendant entered appearance. The Plaintiff filed this Summons for Judgment. There are affidavits in reply and rejoinder.

3. The case of the Plaintiff, briefly, is this. The Plaintiff entered into a leave and license agreement dated 26th September 2013. This is registered. It was an agreement by which the Plaintiff agreed to take on a leave and license, a portion of an industrial shed at the Renaissance Industrial Warehousing Complex for five years (60 months) on an agreed monthly license fee. What is important is that this agreement, the execution of which is not in dispute, required the Defendant to deliver possession by 1st April 2014, within a period of six months of the date of commencement of the agreement.

4. There followed a Rectification Deed of 11th October 2013 modifying some portions, most importantly, Article 2.4 that governed what is called the lock-in-period, initially for a period of 20 months. I will return to this briefly. The rectification increased this lock-in-period to three years or 36 months from the possession date. There is also some controversy about an interpretation of this clause and this is really the only point that falls for determination. That the Rectification Deed also registered was also not in dispute. The Plaintiff deposited Rs.1,30,22,743.14 — the exact amount claimed in the suit and computed as six months' license fee to be held by the Defendant as this interest-free security deposit. That this deposit was to be refunded at the end of the license period is not in dispute. The only question is about the lock-in-period and the clause in that regard.

5. Moving quickly forward, the Plaintiff's case is that there was a delay in delivering possession. Indeed, possession was never given to the Plaintiff at any time. The Plaintiff accepts that it agreed to an extension of the possession delivery date from 1st April 2014 to 9th June 2014. It then became apparent to the Plaintiff that even this deadline was not one that the Defendant was in any position to meet. There is some reference to some correspondence but that need not detain us for, by its letter of 5th June 2014, the Plaintiff said that it had inspected the site and realised that delivery by 9th June 2014 was not in the realm of possibility. The response to this on 7th June 2014 from the Defendant was to claim an amount in excess of Rs.6 crores by invoking clause 2.4 of the license agreement and clause 1(a) of the Rectification Deed for the lock-in-period. The Defendant also agreed that it had not been able to deliver possession by the initial stipulated date of 1st April 2014.

6. The Plaintiff then followed with this demand for a refund by its e-mail of 23rd June 2014. At this stage the Defendant said, and this is important, that they could deliver possession only by 9th July 2014 and this response from the Defendant is reproduced at Exhibit "I" to the Plaint at pages 56 and 57. On its own this is the clearest possible acceptance by the Defendant that it could not deliver possession by 1st April 2014 nor by the agreed extended date of 9th June 2014. Moving slightly ahead, this also takes care of the defence sought to be raised that the so called termination on 5th June 2014 was premature since it was before the agreed extended of 9th June 2014. The Defendant itself has accepted that it could never have delivered possession by that date.

7. The Plaintiff then took proceedings in winding up and filed Company Petition No. 714 of 2014. The order of the Single Judge was carried in appeal and the Division Bench recorded the statement made by the Advocates on behalf of the present Defendant to deposit of an amount of Rs.60 lakhs initially within two weeks. On 2nd November 2018 the Single Judge required a deposit of the remaining amount and thus the entire amount of claim has already been deposited in this Court. The further amount deposited was included in Consent Terms filed before the Division Bench. Ultimately, SJ Kathawalla J disposed of the Company Petition on 5th December 2018, allowing the Petitioner to withdraw it since the claim in this suit was now entirely secured.

8. The two agreements in question are undisputed. The controversy is about how they are to be read and what the meaning of the relevant clauses are. Coming first to the leave and license agreement itself, on behalf of the Defendant it is urged that the agreement commencement date is defined as 1st October 2013. Clause 2.3 then defines a possession date and clause 2.4 provides for the lock-in-period. This is how those clauses read.

> "1b) "Agreement Commencement Date" means 1st October 2013.
>
> **2.3 Possession Date**
>
> Both the parties agree that the possession of the licensed premises will be handed over by the licensor to the licensee six months from (including 10 days for freezing of DBR and Capex approval for additional work) the Agreement Commencement Date i.e. on 1st April 2014.

2.4 Lock-in-period

(a) The initial period of 20 months commencing from the possession date including period between Agreement Commencement date to possession date shall be regarded as the lock-in-period, during which period, the license and the licensor shall have no right to terminate the license except in accordance with this Article 2.4 (hereafter referred to as "Lock-in-Period").

(b) The licensor shall not be entitled to terminate this agreement during the license period except in accordance with Article 6.1(a) and (b).

(c) The license may terminate the agreement at any time pursuant to Articles 6(1)(a) (Termination), 6.1(c) (Grounds of Termination for the License) and Articles 7(4) (Event of Force Majeure).

(d) After the Lock-in-Period, the license may terminate the Agreement by giving four months advance written notice to the licensor of their intention to terminate the Agreement and the Agreement will terminate on expiry f such four months notice provided that no such notice may be given prior to the date falling 16 months after the possession date."

9. The other clause referred to in submissions before me is sub-clause (d) of Article 4(2)(d) at page 27. As I have noted this leave and license agreement was rectified or altered by the Rectification Deed of 11th October 2003, and one of the changes in that Rectification Deed was to Article 2.4 of the leave and license agreement. This is how clause 1 of the Rectification Deed reads:

"1. Article 2.4 sub-clause (a) & (d) of the said leave and license agreement shall be replaced in its entirety as follows:

Article 2.4 Lock-in-period

"(a) The initial period of 36 months commencing from the possession date including period between Agreement Commencement Date to Possession Date shall be regarded as the lock-in-period, during which period, the licensee and the licensor shall have no right to terminate the license except in accordance with this Article 2.4 (hereinafter referred to as "Lock-in-Period")".

10. On this basis it is urged in opposition that since the possession date includes the period between the agreement commencement date and the date of actual possession, physical possession of the premises was never necessary for the lock-in-period clause to operate. In other words, the lock-in-period began to operate from the date the agreement commenced, irrespective of when actual physical possession was given, or even if it was ever given. This is actually the only defence taken.

11. I am not persuaded that it is a defence of any substance at all.

12. The essence of a leave and license agreement is possession, because what is being granted to the licensee is a bare right to use the premises and nothing more. No one can use premises without being put in possession. The consequence of accepting the Defendant's would lead to unimaginable consequences: where a security deposit agreed to be refundable, though interest-free, would be taken upfront and then possession delayed almost indefinitely throughout the lock-in-period on the basis that the licensee was not entitled to a refund of that amount despite the licensor not adhering to its obligations to deliver possession. Any such agreement must be read in the context of commercial integrity and fair dealings and not in a manner that would promote commercial dishonesty or allow a Defendant to escape altogether its contractual obligations. After all, the basis for a lock-in period is that the licensor is not, during that time, being put to the trouble of finding another licensee or risking having his premises kept vacant. But the very concept of a lock-in period therefore posits that the licensee is put in possession in the first place. A lock-in period clause is not to be read as an interest-free refundable friendly loan wholly divorced from the licensor's primary obligation to deliver possession.

13. It is true that the agreement itself specifies the agreement commencement date to be 1st October 2013 although the agreement is of 26th September 2013 and provided for a later possession date initially of 1st April 2014. The initial lock-in-period was for a period of 20 months. The Rectification Deed only enlarged this period to 36 months. This cannot, I think, be read to mean that while the licensee was obliged to place the security deposit on time (and which it did), it could not get that security deposit refunded irrespective of whether the Defendant delivered possession or not. The lock-in-period is itself locked into the concept of possession and cannot be distanced, disengaged or separated altogether from possession in the manner that the Defendant seeks to do. Indeed the lock-in-period itself postulates the giving of possession and while that possession date may be some date in future or even an extended date, it cannot be no date at all. As we have seen, there is e-mail correspondence from the Defendant itself that firmly establishes that it was, on its own showing, not able to deliver possession by either the contractually stipulated date or the extended date as agreed between the parties.

14. What is to be made of such a defence? Is it even plausible to suggest that simply by relying on some literal construction of a contract and separating it wholly from its factual conspectus, and, more importantly, overlooking entirely the failure of the Defendant to adhere to its contractual obligations, the Plaintiff should be disentitled to summary relief? It does not even stand to common sense that any party will place interest-free large amounts like this for years on end without any benefit attached to that deposit. What the defence actually suggests is that the Plaintiff waived the requirement of timely delivery of possession, and, indeed, of possession at all; yet gave the Defendant an interest-free deposit for three years. This is no answer at all. In my view the defence is the most complete moonshine. It is utterly *mala fide* dishonest. This level of commercial dishonesty is to be deprecated in a city like this where real estate prices are extremely high and demand large security deposits.

15. In this view of the matter, finding that there is no merit in the defence, the summons for judgment is made absolute.

16. The suit is decreed in the amount of Rs.1,30,22,743.14/-. There will be a interest at what I considered to be a commercially viable rate of 18% per annum from the date of the suit till payment or realisation. The Plaintiff will be entitled to apply for a withdrawal on production of an authenticated copy of this order of the entire amount deposited with all accrued interest in full or partial satisfaction of this decree and will be at liberty to execute the decree for the balance amount, if any, and costs as awarded below.

17. The Plaintiff has paid a Court fees of Rs.1,70,430/- on suit. They are entitled to a refund. The remaining will be an award of costs.

18. This being a suit under the Commercial Courts Act, the Plaintiff are entitled to costs under amended Section 35 of the CPC. I estimate those costs, having regard to the adjournments and the volume of the filings as being Rs.3.5 lakhs. I believe this is a reasonable estimate of litigation expenses. The decree for costs will not carry interest.

19. Drawn up decree expedited.

20. The Summons for Judgment and the Commercial Summary Suit are disposed of in these terms.

(G. S. PATEL, J)