

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03.01.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.439 of 2018

and

A.No.9952 of 2018

K.Venugopal

.. Plaintiff

Vs.

1.V.S.K.Kumaran
Son of V.s.Kuppan
No.104, 1st Cross Street
Chinmaya Nagar
Chennai-600 092

2.A.Arul Rajan
Son of Mr.P.Arputham
No.T/B92, Anna Fruit Market
Chennai - 600 092

.. Defendants

This Civil Suit is preferred, under Order IV Rule 1 of the O.S.Rules read with order VII Rule 1 of Civil Procedure Code read with Section 7 of Commercial Courts, WEB COPY Commercial Division and Commercial Division of High Court Act, 2015 to direct the 1st defendant to pay the plaintiff a sum of Rs.1,35,86, 887/- together with interest at 24% on Rs.1,23,97,170/- from the date of the plaint till the date of payment, to direct the defendant to pay the costs of the suit and to pass such further or other reliefs as the Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Plaintiff : Mr. R.Ramasubramaniam Raja

For Defendants : Mr.V.Lakshmi Narayanan
for Mr.Kingsly Solomon for D2

D1 set ex parte on 03.01.2019

JUDGMENT

There is a sole plaintiff and there are two defendants in the instant suit.

2.First defendant in the suit is the owner of an immovable property being a shop. This shop is Shop No.T/B-92. The land area admeasures 1379.32 sq.ft or thereabouts. The superstructure consists of 614.29 sq.ft in the ground floor, 615.79 sq.ft in the first floor, besides small structures admeasuring 56.60 sq.ft and 92.64 sq.ft. This entire shop, being Shop No. T/B-92 is situate in Koyambedu whole sale market, which in turn is situated in an extent of 51.09 acres of land comprised in several survey numbers in Block No.65. Considering the nature of the suit, it may not be necessary to go any further into its description and it will suffice to say that this shop shall hereinafter be referred to as 'demised shop' for the sake of convenience and clarity. As first defendant is the owner of the demised shop, 'first defendant' shall be referred to as 'landlord' for the sake of convenience and clarity. It is not in dispute that second defendant is a

lessee under the first defendant in respect of the demised shop. Therefore, the 'second defendant' shall be referred to as 'lessee' for the sake of convenience and clarity.

3. It is plaintiff's case that first defendant promised that second defendant's lease is in the anvil of expiring, entered into a Lease Deed with the plaintiff, took an advance of over Rs.1 Crore, but neither returned the money nor gave possession of the demised shop. Plaintiff has laid this suit claiming refund of advance that remains without being returned, arraying landlord and lessee as defendants. This is the central theme of this lis. Therefore, 'sole plaintiff' shall be referred to as 'proposed lessee' for the sake of convenience and clarity. This completes the array of parties.

4. With regard to trajectory of the litigation, the suit file placed before this Commercial Division reveals that first defendant (landlord) has been duly served on 09.07.2018. Thereafter, name of the first defendant (landlord) together with his father's name, full/complete addresses as contained in the long and short cause titles of the plaint is shown in the cause list. Name of the first defendant (landlord) called out aloud thrice. There is no response. This Commercial Division is informed that the first defendant (landlord) has not entered appearance through any counsel. In this backdrop, the first defendant (landlord) is set *ex parte*.

5.The proposed lessee has now taken out the aforesaid application being A.No.9952 of 2018 *inter-alia* under Order XIII-A of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity) seeking a summary judgment.

6.In this application, defendants 1 and 2 in the main suit have been arrayed as Respondents 1 and 2 respectively. First respondent landlord, who has been set *ex parte*, remains unrepresented in the said application also. Second respondent /second defendant i.e., lessee is not opposing this application.

7. Mr.R.Ramasubramaniam Raja, learned counsel on record for the proposed lessee/plaintiff and Mr.V.Lakshmi Narayanan, learned counsel representing the counsel on record for lessee (second respondent/second defendant) are before this Commercial Division. As mentioned supra, second respondent/second defendant lessee is not opposing this application. In this backdrop, the instant application is examined.

8. Before examining the merits of the application for summary judgment, it may be necessary to set out short facts, which are necessary for appreciating this order/judgment.

9. Learned counsel for proposed lessee/plaintiff taking me through the plaint averments as well as averments in the affidavit filed in support of the instant summary judgment application submits that landlord represented that the lease for the demised shop of the lessee is in the anvil of expiring and the possession of the demised shop will be handed over to the plaintiff /proposed lessee by 10th February 2018. On this basis, a Lease Deed was entered into between the landlord and proposed lessee. This is a registered Lease Deed being Lease Deed dated 22.01.2018 registered as Document No.273/2018 on the file of Sub-Registrar Office, Anna Nagar. To be noted, this Lease Deed has been filed as Plaint Document No.3 along with the plaint. A perusal of the Lease Deed and recitals in the Lease Deed reveals that the proposed lessee/plaintiff has issued two cheques totalling Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs only) under this Lease Deed. A further perusal of plaint documents i.e., Plaint Document Nos.4 and 5 being Statement of Accounts for the months of January 2018 and February 2018 dated 31.01.2018 and 28.02.2018 respectively reveal that one of the two cheques of Rs.1,20,00,000/- (Rupees One Crore Twenty Lakhs only) have been duly encashed by the landlord. It is submitted by learned counsel for plaintiff that the arrangement is that the other cheque for Rs.30,00,000/- (Rupees Thirty Lakhs only) was to be encashed at the time of handing over possession, but the possession was never handed over. As the

possession of the demised shop was never handed over to the proposed lessee/plaintiff and as the lessee (second defendant) continued to be in possession, plaintiff insisted on repayment of the aforesaid money. It is submitted that Rs.20,00,000/- was repaid, but the remaining Rs.1,00,00,000/- remains unpaid.

10. Under such circumstances, plaintiff /proposed lessee received a legal notice dated 15.03.2018 (Plaint Document No.7). Referring to this Plaint Document No.7, it is the submission of learned counsel for plaintiff/proposed lessee that he came to know about a suit in O.S.No.1394 of 2018 on the file of XII Assistant Judge's Court, City Civil Court, Chennai. To be noted, this suit has been filed by the lessee (second defendant in the instant proceedings). In this suit, there is a prayer to declare the above said Lease Deed dated 22.01.2018 (plaint document No.3) as null and void. There is also another limb of prayer that the lease of the demised shop should not be disturbed *de-hors* due process of law.

11. Subsequently, in exercise of powers under Clause 13 of Letters Patent, this Commercial Division directed the suit to be transferred to this Commercial Division from XII Assistant Judge's Court, City Civil Court, Chennai, it was renumbered as Tr.C.S.No.728 of 2018. In the said suit, vide proceedings dated 11.12.2018, plaintiff in the said suit (second defendant

(lessee) before me in the instant proceedings) gave up that limb of the prayer seeking declaration that the lease deed dated 22.01.2018 is null and void. In other words, the prayer with regard to possession being protected and not being dispossessed *de-hors* due process of law alone was insisted upon. To be noted, in that suit also, land lord (first defendant in the instant proceedings) remained *ex-parte*.

12. In this backdrop, the aforesaid suit came to be decreed on 11.12.2018 and there is no dispute or disagreement before me on this.

13. In this backdrop, it is submitted by learned counsel for plaintiff/proposed lessee that he had taken financial assistance for paying aforesaid sum of money to the land lord and has been incurring huge interest on such borrowing. Learned counsel also submits that he has incurred losses on account of loss of profits and he would have earned profits in the region of Rs.1,00,000/- per month if the plaintiff had taken the demised shop on lease on 10.02.2018 as promised by the land lord. However, the prayer in the plaint is restricted to refund of the aforesaid Rs.1,00,00,000/- together with expenses incurred for registration of the Lease Deed and other incidental charges.

14. The prayer in the plaint reads as follows:

'The plaintiff therefore prays for a judgment and decree against the 1st defendant as follows:

A. To direct the 1st defendant to pay the plaintiff a sum of Rs.1,35,86, 887/- together with interest at 24% on Rs.1,23,97,170/- from the date of the plaint till the date of payment.

B.To direct the defendant to pay the costs of the suit; and,

C.To pass such further or other reliefs as the Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.'

15. To support the huge loan which the plaintiff/ proposed lessee has taken and the interest which he is incurring on the same, plaint Document No.8 being a letter from the financier (letter dated 07.06.2018) has been filed.

16. Most importantly, the plaintiff/proposed lessee has also filed the Title Deed qua demised shop in the name of first defendant / land lord as plaint document No.1 and this is Title Deed dated 23.10.2009.

17. In the aforesaid backdrop i.e., factual matrix as well as trajectory of the suit and the connected suit which have all been alluded to supra, the instant application for summary judgment is before me.

18. Besides Order XIII-A of amended CPC as amended by said Act, learned counsel for proposed lessee draws my attention to Order VIII Rule 10 of amended CPC as amended by said Act which reads as follows:

'[10.Procedure when party fails to present written statement called for by Court. – Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be draw up.]

19. Taking me through Rule 10 of Order VIII of amended CPC as amended by said Act, learned counsel submitted that when a party to a lis is expected to file a written statement within the time prescribed under Order 8 Rule 1 fails to do so, the Court can proceed with pronouncement of such judgment and decree can be drawn up.

20. In other words, it is made clear that the instant summary judgment is being passed not merely because the first defendant remains *ex-parte*. It is passed in exercise of powers under Order XIII-A read with Order VIII Rule 10 of amended CPC as amended by said Act.

21. Further to be noted, the grounds on which summary judgment can be passed has been adumbrated in Rule 3 of Order XIII-A which reads as follows:

'3.Grounds for summary judgment._ The Court may give a summary judgment against a plaintiff or defendant on a claim if it considers that _

(a) the plaintiff has no real prospect of succeeding on the claim of the defendant has no real prospect of successfully defending the claim, as the case may be; and

(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.'

22. A perusal of Rule 3 reveals that in a case where defendant has no real prospect of successfully defending the claim and when there is no other compelling reason as to why the suit should not be disposed of before recording evidence, a summary judgment can be passed.

23. Learned counsel for plaintiff submits that all the parameters/ingredients for a summary judgment as well as for pronouncement of judgment under Order VIII Rule 10 are satisfied in the instant case and proposed lessee/plaintiff is entitled to a summary judgment.

24. Plaint documents alluded to supra remain unrefuted. To be noted, plaint document No.3, being a registered Lease Deed, is unrefuted

and therefore notwithstanding the fact that it is unrefuted, considering that it is a registered Lease Deed, the money claimed in this suit by the plaintiff/proposed lessee to the land lord/second defendant cannot be disputed and there is no real prospect for the first defendant/landlord to defend this claim.

25. Plaintiff document Nos.4 and 5, which are Bank Statements, show that cheque paid under plaintiff document No.3 (Lease Deed) have been duly encashed. Therefore, the money has actually been transferred from the plaintiff to the first defendant land lord.

26. Further to be noted, the suit being O.S.No.1394 of 2018 originally on the file of the XII Assistant Judge's Court, City Civil Court, Chennai, transferred to this Court and renumbered as Tr.C.S.No.728 of 2018 being decreed on 11.12.2018, fortifies the submission of the plaintiff that the possession of the second defendant before this Court qua demised shop cannot be disturbed for the present *de-hors* due process of law and therefore he is not insisting on possession and insisting on refund of money.

27. All that have been set out supra, leaves this Commercial Division with the considered opinion that the plaintiff is entitled to a summary judgment as prayed for.

28. The prayer paragraph has already been extracted supra. There are three limbs of prayer paragraph. They have been enumerated as sub paragraphs (A), (B) and (C) of unnumbered paragraph, which is a paragraph after paragraph 26 in the plaint. While, sub-paragraph (A) is for refund of moneies paid, sub-paragraph (B) is for costs and (C) is the usual residuary prayer in any prayer paragraph.

29. Mr. Ramasubramaniam Raja, learned counsel for plaintiff requests this Commercial Division to consider prayer in sub-paragraphs (B) and (C) together. In the light of trajectory of this suit, this Commercial Division has no hesitation in holding that the plaintiff is entitled to costs of the suit.

30. With regard to residuary limb of the prayer, this Commercial Division is of the considered view that the plaintiff will be entitled to compensatory costs *inter-alia* under Section 35-A of amended CPC as amended by said Act. Section 35-A deals with frivolous defence. I have already held in other judgments, that frivolous defence will include frivolous and vexatious methods of defending a suit. Conduct of the first defendant in the instant case in the light of the factual matrix of the case as well as the trajectory of the suit and the connected collateral suit clearly reveals that the first defendant land lord has adopted vexatious and frivolous means of defending the suits.

31. The first defendant, has neither returned the advance taken nor put the proposed lessee/plaintiff in possession while allowing the suit filed by the lessee, now in possession, to be decreed. This conduct certainly warrants compensatory costs to be mulcted on the first defendant/landlord. To be noted, there is no prayer against second defendant/lessee and the entire prayer is only against the first defendant/landlord.

32. It is brought to the notice of this Commercial Division that the second defendant lessee, now in possession, is so arrayed only as a proper party and not as a necessary party. Also to be noted, as alluded to supra, the second defendant is not opposing this application for summary judgment.

33. This Commercial Division is of the considered view that the plaintiff is entitled to compensatory cost of Rs.3,00,000/-.

34. It is brought to the notice of this Commercial Division that already an 'Attachment Before Judgment' ('ABJ' for brevity) order has been passed *inter alia* under Order XXXVIII Rule 5 of CPC in A.No.4844 of 2018 vide order dated 24.08.2018 and that the attachment has been effected. It is pointed out that attachment of demised shop is for securing this suit

claim. As the suit is being decreed (decreed with costs and compensatory cost), though obvious, at the request of learned counsel for plaintiff, It is made clear that attachment and all consequences will continue to operate.

In the light of the narrative supra, A.No.9952 of 2018 seeking to pass summary judgment is allowed. Consequently, suit is decreed with costs and compensatory costs against first defendant on above terms.

03.01.2019

Index : Yes/No
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M.SUNDAR, J.

gpa/mp



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