$~4

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

\+ CS(COMM) 29/2018 & IA No.14032/218 (u/O XXXVIII R-5 CPC)

PRADYUMAN KUMAR AGGARWAL & ORS ..... Plaintiffs

Through: Mr. Shekhar Gupta, Adv.

Versus

ORCHID SALON SERVICES PVT LTD. & ANR..... Defendants

Through: Ms. Shreya Singhal & Mr. Tanveer Oberoi, Advs. for D-1.
Mr. Kamlesh Mahajan, Adv. for D-2.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

O R D E R

% **15.01.2019**

1. The plaintiffs instituted this suit for (i) ejectment of the two defendants viz. Orchid Salon Services Pvt. Ltd. and Priyanav Wellness Pvt. Ltd. from property bearing No.M-32 (Entire First Floor), M-Block Market, Greater Kailash-I, New Delhi; (ii) recovery from the defendant no.1 of Rs.47,15,000/- towards arrears of rent from 9th June, 2017 to 31st December, 2017 together with interest thereon; (iii) recovery of *mesne profits* at the rate of Rs.38,333/- per day with effect from 1st January, 2018 till the date of delivery of possession; (iv) recovery from the defendant no.1 of Rs.8,36,000/- towards service tax payable to the plaintiffs for the period 8th June, 2017 to 30th June, 2017; (v) recovery from the defendant no.1 of Rs.1,00,000/- towards maintenance charges of the lift; (vi) recovery from the defendant no.1 of Rs.1,23,666/- towards non deposit of TDS for the period 16th April, 2017 to 8th June, 2017 and in the alternative for issuance of the TDS certificates; and, (vii) permanent injunction restraining the defendants no.1 and 2 from creating third party interest in the property.

2. A decree for ejectment has already been passed in favour of the plaintiffs and against the defendants on 14th September, 2018 and the plaintiffs have already received possession of the premises in this Court on 12th October, 2018.

2. Now, the suit for the monetary claim only remains.

3. Vide order dated 14th September, 2018, the defendant no.1 was also directed to deposit in this Court the admitted arrears of rent with effect from June, 2017 till that date and to, till the possession is handed over continue to deposit the rentals and the plaintiffs were permitted to withdraw the same subject to furnishing an undertaking in this Court to refund the same if so directed.

4. The defendant no.1 preferred FAO(OS)(COMM) No.238/2018 against the said direction and which was dismissed on 16th October, 2018.

5. The defendant no.1 however did not comply with the direction for deposit and no amount has been deposited till now. Though the plaintiffs applied for striking off of the defence of the defendant no.1 on the said ground but the said application was disposed of on 26th November, 2018 observing that striking off of the defence will not get the plaintiffs their monies and by permitting the plaintiffs to execute the direction against the defendant no.1.

6. Vide order dated 12th October, 2018, the defendant no.1 was also directed to file an affidavit of its assets and which affidavit has been filed.

7. The counsel for the defendant no.1, on enquiry whether the plaintiffs have applied for execution of the direction aforesaid against the defendant no.1, states that the plaintiffs instead have issued a notice of insolvency to the defendant no.1.

8. Pleadings have otherwise been completed and the suit is ripe for framing of issues if any.

9. As aforesaid, only the monetary claims of the plaintiffs against the defendants remain to be adjudicated.

10. Though the plaintiffs in the suit have claimed *mesne profits* from the defendants with effect from 1st January, 2018 at double the rate of rent agreed, in accordance with the term in the lease deed but the counsel for the plaintiffs states that the plaintiffs are confining the claim to recovery of *mesne profits* till the date of vacation at the rate of last paid rent only.

11. As far as the claim of the plaintiffs for rent with effect from 9th June, 2017 till 31st December, 2017, when according to the plaintiffs, the tenancy was determined and for *mesne profits* thereafter at the rate of last paid rent is concerned, it is not in dispute that (i) there is a registered lease deed between the plaintiffs and the defendant no.1 whereunder the defendant no.1 had agreed to pay rent to the plaintiffs at the rate of Rs.7,00,000/- per month; and, (ii) the rent has not been paid with effect from 9th June, 2017.

It would thus appear that there is no trial required for adjudication of the claim of the plaintiffs for rent / *mense profits*.

12. The counsel for the defendant no.1 however states that the defendant no.1 has raised a plea that it was the oral agreement between the plaintiffs and the defendant no.1 that though the defendant no.1 was executing the registered lease deed with the plaintiffs but it would be the defendant no.2 who would be occupying the premises and the defendant no.2 only would be liable for all liabilities under the lease. The counsel for the defendant no.1 in this respect draws attention to paras (C) and (D) of the Brief Facts in the Preliminary Objections and Submissions in the written statement. The counsel for the defendant no.1 further states that the cheque for pagri was also issued by the Director of the defendant no.2.

13. The counsel for the defendant no.2 though denies liability for rent but admits that the defendant no.2 was in possession of the premises along with the defendant no.1. It is further stated that the Director of the defendant no.2 had not issued any cheque and in fact the Director is common to the defendant no.1 and defendant no.2.

14. Once there is a registered lease deed between the plaintiff and the defendant no.1, the defendant no.1 cannot be permitted to set up an oral agreement in contradiction thereto and the same is barred by Section 92 of the Evidence Act, 1872. No fact falling within the meaning of provisos thereto is pleaded in the written statement.

15. It is quite evident that there is a relationship between the two defendants and the defendants cannot deprive or delay the dues for the property of the plaintiffs by seeking framing of an issue to lead evidence which is barred by law. Thus, as far as the claim of the plaintiffs for

recovery of rent / *mesne profits* at the admitted rate of rent from 9th June, 2017 to 12th October, 2018 is concerned, there is no substantial question of law and / or fact affirmed by the plaintiffs and / or denied by the defendants, which requires trial.

16. The plaintiffs, besides the rent, have claimed service tax / GST and which is also not disputed to be the liability of the defendant no.1 under the lease and which has admittedly not been paid. The counsel for the defendant no.1 however has raised a misconceived argument that the liability of the defendant no.1 was to deposit the same with the authorities and not to pay to the plaintiffs. It is further contended that the same would be recovered by the authorities from the defendant no.1 only. However, on enquiry, on the basis of which provision of the Income Tax law such arguments is being made, the counsel for the defendant no.1 is clueless. The liability for service tax / GST is of the landlord and the tenant is only to reimburse the same and in the event of the tenant not depositing GST / service tax, the axe would fall on the landlord and not on the tenant.

17. However, the said liability is only during the term of the lease i.e. till 31st December, 2017 and not till the date of vacation inasmuch as the possession of the defendant no.1 after 31st December, 2017 and till 12th October, 2018 was as an unauthorized occupant and not as a tenant and the amounts payable by the defendant no.1 to the plaintiffs for the said period are towards *mesne profits* and not towards rent.

18. Thus, as far as the claim of the plaintiffs for an amount of Rs.8,36,000/- towards service tax / GST is concerned, again there is no triable issue. However, the said liability would be of the defendant no.1 only.

19. As far as the claim of the plaintiffs for Rs.1,23,666/- towards TDS is concerned, the counsel for the defendant no.1 admits that the tax for the said period has not been deducted and no certificate has been issued. Thus, the said liability also is undisputed.

20. That leaves only the claim of the plaintiff for recovery of Rs.1,00,000/- towards the maintenance charges of the lift. Though Clause 4(vii) of the lease deed makes the defendant no.1 liable therefor, but the counsel for the plaintiffs is unable to show any document of payment of the said amount by the plaintiffs. Without the plaintiffs having made the said payment, the plaintiffs are not entitled to recover the same.

21. A decree is accordingly passed (i) in favour of the plaintiff and jointly and severally against the two defendants, of recovery of an amount computed at the rate of Rs.7,00,000/- per month with effect from 9th June, 2017 till 12th October, 2018 together with interest at 9% per annum on arrears thereof with effect from the end of the month for which the rent / *mesne profits* are due till the date of payment; (ii) against the defendant no.1 for recovery of Rs.8,36,000/- and Rs.1,23,666/-; and, (iii) costs of the suit with counsels fee assessed at Rs.1,00,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JANUARY 15, 2019

'gsr'..