IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: March 03, 2021

\+ CS(COMM) 618/2019 & CM. No. 8431/2020

PARSVNATH DEVELOPERS LIMITED ..... Plaintiff
Through: Mr. Vijay Nair, Adv. & Mr. Manoranjan Sharma, Adv.

versus

MR. VIKRAM KHOSLA .... Defendant
Through:

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This is a suit filed by the plaintiff, Parsvnath Developers Ltd. which is a company incorporated under the provisions of the Companies Act, 1956, against the sole defendant, Vikram Khosla for recovery of monies and possession, with the following prayers:

> *"(a) Pass a decree of directing the defendant, their agents, heirs, representatives and successors to vacate the suit premises i.e the portion of the Parsvnath Metro Mall, admeasuring approximately 10,200 Sq.ft Super Area (Covered area being 8,500 sq. ft. i.e. efficiency of approximately 83.3%) comprising of 10 (ten) Shops/Outlets and 3 (three) kiosks on the First Floor situated at Parsvnath Mall, Games Village Metro Station on Indraprastha- New Ashok Nagar Corridor, New Delhi, and to handover the vacant possession of the same to the Plaintiff;*

(b) Pass a Decree of Recovery in favour of the Plaintiff and against the Defendant, their agents, heirs, representatives and successors, for an amount of Rs. 2,42,47,498/- (Rupees Two Crores Forty Two Lakhs Forty Seven Thousand Four Hundred and Ninety Eight Only) along with interest @24% p.a. pendent-lite and future till realisation, payable by the Defendant to the Plaintiff in respect of outstanding dues towards the Sub License Fees, Electricity Charges, Service Tax, Mesne Profit and delay interest; and

(c) Any other order(s) that this Hon'ble Court may deem fit and proper."

2. When this case came up for hearing for the first time on November 07, 2019 summons were issued to the defendant through all modes. On the second date of hearing, it was recorded that the service report was refused by one Pradeep, after which fresh summons were issued again. On the next date of hearing on March 02, 2020, the service report came back with the comments 'refusal by wife of defendant'. Thereafter the matter was placed before Court by the learned Joint Registrar. This Court vide order dated March 13, 2020 proceeded *ex-parte* against the defendant, in view of deemed service. The question which arises is whether the plaintiff should be directed to lead *ex-parte* evidence. The Plaint having been verified and is also supported with affidavit / Statement of Truth on behalf of the plaintiff, and the defendant having been proceeded *ex-parte* no purpose would be served if the plaintiff was directed to lead *ex-parte* evidence. A Coordinate bench of this Court in the case of ***Satya Infrastructure Ltd. and Ors. v. Satya Infra and Estates Pvt. Ltd., 2013 (54) PTC 419 (Del***), has held as under:

"4. I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record. I have therefore heard the counsel for the plaintiffs on merits qua the relief of injunction."

3. I have heard the counsel for the plaintiff in respect of the reliefs prayed. The case of the plaintiff in the plaint is the following:

i. The plaintiff Co. entered into a Concession Agreement dated September 09, 2007 with the Delhi Metro Rail Corporation Limited ('DMRC' for short) whereby DMRC gave to the plaintiff a specified area at Games Village Metro Station on Indraprastha – New Ashok Nagar Corridor, New Delhi on a licence basis for a period of 30 years expiring on September 19, 2037 (Concession period) for development into a shopping mall/ complex by the name of 'The Parsvnath Mall', which the plaintiff was entitled to sub-license.

ii. The defendant had approached the plaintiff for taking on the sub-licensed portion situated on the first floor at Parsvnath Mall, Games Village Metro Station on

Indraprastha – New Ashok Nagar Corridor, New Delhi measuring 10,200 Sq. ft. Super Area (Covered area being 8,500 Sq. ft. being 83.3% of super area), comprising of ten Shops/outlets and three kiosks ('Suit premises' for short) in order to run a food joint from there.

iii. It is the case of plaintiff that, that the defendant had taken suit premises on sub-license from the plaintiff and had entered into a Sub Licence Agreement ('SLA' for short) and an Amenities Agreement both dated January 28, 2016 with the plaintiff, for the purpose of running a food joint there under the name and style of "*Platters Food Court*". Under the clause 4.1 of the SLA the defendant is liable to pay the sub-license fees of Rs. 5,00,000 per month to the plaintiff for the first three years of the term and further under clause 4.6 of the SLA the defendant is liable to pay service tax or any other levies directly attributable to the use of the suit premises, in addition to the sub-license fees under clause 10.1 of the SLA. The defendant is also to pay charges for consumption of electricity and water as per actuals. As per Clause 4.7 of the SLA the above payments on account of the sub-license fees and service tax and other levies is to be made before the seventh day of each calendar month in advance, failing which the defendant is required to pay interest calculated at 18% per annum for the period of delay.

iv. As per clause 4.1 of the Amenities Agreement the defendant is liable to pay a sum of Rs. 4,00,000 per month to the plaintiff towards amenities fees. Further under clause 4.5 of the Amenities Agreement the defendant is also liable to pay the service tax as applicable on the amenities fee and under Clause 4.3 of the said agreement, the defendant is liable to pay the said amount of amenities fees and Service Tax to the plaintiff before seventh day of the calendar month in advance and in case there is a failure to make the said payments, an additional interest calculated at 18% p.a. for the delayed period on amenities fee is to be paid from the due date.

v. Further, Clause 5.1 of the SLA, states that there would be a lock-in period of thirty-six months commencing from the Sub License Commencement date i.e., from January 28, 2016 and as per the plaintiff the period of lock-in was till January 27, 2019. As per the said clause, in case of termination of the sub-license or vacation of the suit premises by the defendant, or in case of default by the defendant in performing its obligations, leading the plaintiff to determine the sub-license during the lock-in period, the defendant shall be liable to pay the entire sub-license fee and amenities fees and other applicable charges for the unexpired portion of the Lock-in-period by way of adjustment of the amount lying with the plaintiff as security deposit and further by paying the balance.

vi. It is the case of plaintiff that clause 7.1 of the SLA, the plaintiff is entitled to receive an amount of Rs. 60,00,000 as interest fee refundable security deposit ('IFRSD' hereinafter). Further under clause 7.3 of the SLA, it is agreed that the plaintiff carried out the work as described in the SLA before handing over the suit property to the defendant. It had been agreed between the parties, that in lieu of depositing the said IFRSD, the defendant would carry out the said work in the said premises, which was evaluated at Rs. 60 lacs. The plaintiff argued that the said amount of IFRSD would be adjusted upon the defendant providing detailed statement of accounts with supporting documents to the plaintiff of the works undertaken. It has been submitted that till date the defendant has not provided the details of expenses incurred towards the works that had been carried out in the said property.

vii. It is the case of the plaintiff that they handed over the possession of the suit premises to the defendant and that the defendant has started its business therein. As per clause 2.2 of the SLA, liability to pay the applicable sub-license fee to the plaintiff shall commence from April 01, 2016. The plaintiff has stated in the plaint, that on the request of the defendant rent, from the period between April 01, 2016 to March 31, 2017 was waived off by the plaintiff and as such sub-license fee, amenities charges along with applicable service tax, other charges along with applicable service tax and other charges from the month of April, 2017 onwards were to be paid by the plaintiff.

viii. The plaintiff's case is that, since the commencement of period of payment for sub-license fee i.e. from the month of April, 2017 onwards there has been regular defaults by the defendant in making the payment of sub-license fees. It is the case that the defendant also committed default in making payment of the Amenities Fees, Service Tax/GST and Electricity bills and from October 2017, onwards the defendant completely stopped making any payment to the plaintiff towards the sub-license fees and Amenities fees and other applicable charges.

ix. As per clause 32.2 of the SLA in the event of sub-license fee or amenities fee or any other charges being in arrears of three months, or the defendant being in breach of any other material terms of SLA, the plaintiff (licensee) shall be entitled to terminate the SLA by giving written notice requiring the defendant to rectify the breach or make payment for such sub-license fee, amenities fees or any stipulated other amount within ninety days of the notice. In accordance with the said clause, the plaintiff issued a demand-cum-termination notice dated February 22, 2018 calling upon the defendant to pay the outstanding dues till February 2018 i.e., Rs. 91,76,680. It is the plaintiff's case that even after the expiry of 90 days of receipt of said notice under clause 32.2, till date the defendant has not paid the outstanding dues.

x. Moreover under clause 32.3 of the SLA, stipulates on the expiry of 90 days' notice mentioned in clause 32.2, if the defendant fails to make the payment defined in clause 32.2, the plaintiff shall have the right to re-enter the suit premises after serving a further notice of 15 days for terminating the SLA and in such an event the defendant shall have no lien, right, title or interest in the suit premises and shall immediately on the expiry of those 15 days handover the vacant physical possession of the suit premises to the plaintiff. It is also specifically mentioned that in the eventuality of termination on these grounds during the lock-in-period, the defendant shall be liable to pay all applicable charges for remaining lock-in-period also i.e., till January 27, 2019.

xi. The plaintiff then issued a termination notice dated August 11, 2018 in accordance with clause 32.3 of the SLA. It is the plaintiff's case that even after the expiry of 15 days, the dues were not paid by the defendant and the SLA stood terminated with effect from August 26, 2018 and the defendant was liable to hand over the possession of the suit premises on or before the said date. The plaintiff avers that the possession has not been handed over till date; and that the occupation of the suit premises by the defendant remains illegal from August

27, 2018 onwards.

xii. The plaintiff's case is that although the SLA does not have any Arbitration Clause, however the same finds mention in the Amenities Agreement; due to which the plaintiff issued a notice to the defendant under section 21 of the Arbitration and Conciliation Act, 1996 and had nominated an arbitrator. This notice too was not replied to. Subsequently the plaintiff filed a petition under section 9 of the Arbitration and Conciliation Act, 1996 numbered as OMP (I) (COMM) 126/2019, which was withdrawn on July 09, 2019 with liberty to file appropriate proceedings. Since the claim for the amenities cannot be demanded in the present suit; the plaintiff has chosen to relinquish its claim with respect to the amenities as per Order II Rule 2 of the Civil Procedure Code, 1908 ('CPC', for short).

xiii. It is the case of the plaintiff that the cause of action first arose on January 28, 2016 when the SLA was entered into between parties and then again on February 22, 2018 when the demand cum termination notice was issued and it continues since the defendant is in possession of the suit premises.

4. Mr. Vijay Nair and Mr. Manoranjan Sharma, learned Counsels who appeared on behalf of the plaintiff have argued that since the defendants have been proceeded *ex-parte* hence there are no issues that require trial. They have argued that, the suit has been filed for recovery of possession of the suit premises.

Additionally, the plaintiff also seeks recovery of amount of Rs. 2,42,47,498 (details of the same have been produced hereunder) which is due on account of sub-license fees, electricity charges, service tax, damages/ *mesne* profits with *pendente lite* and future interest till realisation; *mesne* profits to the tune of Rs. 10,00,000 per month from September 01, 2019 till handing over of possession. Details of plaintiff's claim as on August 31, 2019 have been reproduced below:-

S. No.	Particulars	Period	Outstanding (INR)
1.	Sub Licence Fee	01.04.2017 to 31.08.2018	61,65,000/-
2.	Service Tax/GST	01.10.2017 to 31.08.2018	9,90,000/-
3.	Delay interest @ 18% p.a, on Sub License Fee and Service Tax	01.04.2017 to 31.08.2019	19,99,682/-
4.	Electricity Charges	14.01.2016 to 31.03.2018	20,88,761/-
5.	Mesne Profit towards illegal possession	01.09.2018 to 31.08.2019	1,20,00,000/-
6 .	Interest @ 15,% P-a. On Mesne Profit towards illegal possession	01.09.2018 to 31.08.2019	10,04,055/-
Total Claim of the Plaintiff			2,42,47,498/-

5. Mr. Nair has argued that the defendant neglected in clearing outstanding dues despite reminders, after which the

plaintiff issued a Demand-cum-Termination Notice dated February 22, 2018 under clause 32.2 of the SLA calling upon the defendant to pay the outstanding dues till February, 2018 amounting to Rs. 91,76,680 within ninety days of receipt of the said notice. When the defendant failed to honour the notice dated February 22, 2018, the plaintiff followed it up by issuing a termination notice dated August 11, 2018 under clause 32.2 of the SLA calling upon the defendant to vacate and hand over the possession of the suit premises to the plaintiff within fifteen days, from the date of receipt of notice. The defendant was also asked to clear the outstanding dues with interest of 18% *per annum*. It is his case that, that in terms of the termination notice dated August 11, 2018, the defendant was liable to hand over possession of suit premises to the plaintiff on or before August 26, 2018; which the defendant failed to do and has been in illegal possession of suit premises since August 27, 2018.

6. Mr. Nair has argued, that as on the date of filing of the suit, the defendant is liable to handover vacant and peaceful possession of the suit premises to the plaintiff and is further liable to pay a total sum of Rs. 2,42,47,498 along with interest at 24% *per annum*, *pendent lite* and future interest till realisation to the plaintiff in respect of the outstanding dues towards the sub-licence fees, electricity charges, service tax, *mesne* profit and delayed interest, etc. as detailed in paragraph 8 of the plaint. Mr. Nair has also argued for payment of *mesne* profit of Rs. 10,00,000 per month since September 01, 2019 onwards till the date of handing over of possession to the plaintiff.

7. Mr. Nair contended, since the defendant has been proceeded *ex-parte*, and since the present matter is a commercial suit, the defendant has no prospect of succeeding. According to him, once the SLA by which the defendant came in possession of the suit premises, is terminated, the defendant ceased to have any right in the suit premises. It is his argument that since the defendant has refused to appear in these proceedings and in absence of any challenge(s) against the facts as stated in the instant proceedings; the same be treated as admitted by the defendant and in such circumstances no issue arises for adjudication and the reliefs as prayed for in the plaint be granted and the suit may be decreed accordingly.

8. He has placed reliance on the following judgments of Coordinate benches of this Court in support of his submissions: -

i. ***Everstone Capital Advisors Pvt. Ltd. vs. Akansha Sharma 2018 SCC Online Del 10167;***
ii. ***Tata Sia Airlines Limited vs. Vistara International Private limited 2018 SCC Online Del 9943;***
iii. ***VRS Foods Ltd. vs. Prem Chand 2018 SCC Online Del 11055;***
iv. ***Super Cassettes Industries Pvt. Ltd. vs. I-Vision Digital LLP 2018 SCC Online Del 12384;*** and
v. ***Thermax Limited vs. Thermax Engineers Pvt. Ltd. 2019 SCC Online Del 9331.***

9. Having heard the learned counsel for the plaintiff, it is noted that the defendant has not cared to appear before this Court and was proceeded *ex-parte*. The law with regard to Order VIII Rule 10 CPC is clear, which stipulates that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within time permitted or fixed by the Court as

the case may be, the Court shall pronounce judgment or make such orders in relation to the suit as it thinks fit and on the pronouncement of same, the decree sheet shall be drawn up. Accordingly, in view of the provisions of order VIII Rule 10 CPC, I proceed to decide the present suit. Further, I am in agreement with the judgments of the Coordinate Benches of this Court as relied upon by the plaintiff in paragraph 8 on the issue that in *ex-parte* matters no purpose would be served if evidence is directed to be led. There being no written statement filed, the averments in the Plaint being unrebutted, the same are deemed to be correct.

10. From the facts as narrated above, it is clear that the parties herein had entered the SLA and Amenities Agreement dated January 28, 2016 with respect to the suit premises. The claim of the plaintiff in the suit is with respect to sub-license fee, electricity, *mesne* profits, service tax / GST. It may be clarified here that there being an arbitration clause in the Amenities Agreement, Mr. Nair, learned counsel for the plaintiff has fairly stated that any claim under the Amenities Agreement is not part of the suit. The claim as per prayer clause is for Rs.2,42,47,498/-. The breakup of the aforesaid amount is in the following manner:

TOTAL OUTSTANDING		
Head	Outstanding	Period Due
Rent (rent + service tax / GST)	91,54,682	April 2017-August 2018
Electricity	20,88,761	January 14, 2016-March 01, 2018
Mesne Profit	1,30,04,055	September 2018-August 2019

TOTAL OUTSTANDING	2,42,47,497	

11. From the above, it is also seen that the defendant has defaulted in paying sub-license fee April 01, 2017 onwards. On failure to pay sub-license fee and to rectify to the breach even after the issuance of the demand cum termination notice and the defendant was required to hand over the possession of the premises, it is clear that the defendant has no lien, right or interest in the suit premises as per the SLA and is liable to restore the possession to the plaintiff.

12. It is also the case of the plaintiff that the defendant has not handed over the possession of the suit premises till date which makes the possession of the suit premises by the defendant illegal/unauthorised, and in absence of any defence the plaintiff is entitled to a decree of possession of the suit premises. Further the plaintiff is entitled to a decree for an amount of Rs. 91,54,682/- as license fee (including GST / service tax) for the period from April 01, 2017 till August 31, 2018 and also damages/*mesne* profits for the period September 01, 2018 at the rate of Rs. 5,00,000/- per month till handing over of possession. Though an amount of Rs.10,00,000/- per month is claimed by the plaintiff, the same is not sustainable, as no such stipulation exists in the SLA, further no evidence is led by the plaintiff that the suit premises would fetch Rs. 10,00,000/- per month. The plaintiff shall be entitled to a decree for recovery of electricity charges for an amount of Rs. 20,88,761/- for the period of January 14, 2016 till March 31, 2018. The amount of license fee shall be paid to the plaintiff at the

rate of 18% (in terms of clause 4.7 of the SLA) w.e.f September 1, 2018 till realisation. The plaintiff is also entitled to interest at 6% *per annum, pendente lite* and future interest; till realisation on the amount of electricity charges of Rs. 20,88,761/- w.ef. April 1, 2018.

13. The plaintiff shall file the deficient court fee in view of the reliefs granted to the plaintiff in terms of this order. Decree sheet be drawn up. Pending application (s), if any, are dismissed as infructuous. No costs.

V. KAMESWAR RAO, J

MARCH 03, 2021/*aky/jg*