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

\+ CS(COMM) 344/2024, I.A. 9477/2024, I.A. 9478/2024, I.A. 9479/2024 & I.A. 9480/2024

M S COSMOS INFRABUILD PRIVATE LIMITED ..... Plaintiff

Through: Mr. Achal Gupta, Mr. Vipin Singh and Ms. Sania, Advocates.

versus

M S KALYAN JEWELLERS INDIA LIMITED ..... Defendant

Through: Mr. Arjun Garg, Mr. Aakash Nandolia and Ms. Sagun Srivastava, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

% **30.04.2024**

1. The plaintiff has filed this suit in respect of a commercial dispute, alongwith an application for exemption from pre-litigation mediation [I.A. 9479/2024].

2. The provisions of Section 12A of the Commercial Courts Act, 2015 ["the Act"], which provides for pre-litigation mediation, are mandatory, as held by the Supreme Court in *Patil Automation Private Limited and Ors. v. Rakheja Engineers Private Limited* [(2022) 10 SCC 1]. The only exception provided in the statute is if the suit contemplates urgent interim relief.

3. The plaintiff has filed two applications for interim relief, being I.A. 9477/2024 and I.A. 9478/2024.

4. The prayers in I.A. 9477/2024 are as follows:

"*a. Allow the present application and pass an order directing the Defendant to handover the physical possession of the subject property i.e. entire Ground Floor and the First Floor of the property no. 24-B, Pusa Road, Rajinder Nagar, near Karol Bagh, Delhi-110005 to the Plaintiff till the pendency of the present suit; OR IN THE ALTERNATIVE Pass an order directing the Defendant to pay Rs. 24,19,000/- per month to the Plaintiff from the date of filing of the present suit till the actual handover of the physical possession of the subject property i.e. entire Ground Floor and the First Floor of the property no. 24-B, Pusa Road, Rajinder Nagar, near Karol Bagh, Delhi-ll0005 to the Plaintiff till the pendency of the present suit;*

b. Any other relief(s) which this Hon'ble Court may deem fit and proper may also be awarded in favour of the petitioner."

5. The prayers in I.A. 9478/2024 are as follows:

"*a. Allow the present application and pass an order thereby appointing a local commissioner to check the actual status of the suit property in terms of the construction and position of the property as on date and to prepare a site plan of the actual status;*

b. Any other relief(s)which this Hon'ble Court may deem fit and proper may also be awarded in favour of the Petitioner."

6. The considerations, which ought to weigh with the Court in deciding whether a plaintiff is entitled to an exemption from pre-institution mediation on this ground, have been elaborated by the Supreme Court in *Yamini Manohar v. T.K.D. Keerthi* [2023 SCC OnLine SC 1382], which also considered the judgment in *Patil Automation* (*Supra*), and held as follows:

"*9. We are of the opinion that when a plaint is filed under the CC Act, with a prayer for an urgent interim relief,* ***the commercial court should examine the nature and the subject matter of the suit, the cause of action, and the prayer for interim relief. The prayer for urgent interim relief should not be a disguise or mask to wriggle out of and get over Section 12A of the CC Act.*** *The facts and circumstances of the case have to be considered holistically from the standpoint of the plaintiff. Non-grant of interim relief at the ad-interim stage, when the plaint is taken up for registration/admission and examination, will not justify dismissal of the commercial suit under Order VII, Rule 11 of the Code; at times, interim relief is granted after issuance of notice. Nor can the suit be dismissed under Order VII, Rule*

11 of the Code, because the interim relief, post the arguments, is denied on merits and on examination of the three principles, namely, (i) prima facie case, (ii) irreparable harm and injury, and (iii) balance of convenience. The fact that the court issued notice and/or granted interim stay may indicate that the court is inclined to entertain the plaint.

10. ***Having stated so, it is difficult to agree with the proposition that the plaintiff has the absolute choice and right to paralyze Section 12A of the CC Act by making a prayer for urgent interim relief. Camouflage and guise to bypass the statutory mandate of pre-litigation mediation should be checked when deception and falsity is apparent or established. The proposition that the commercial courts do have a role, albeit a limited one, should be accepted, otherwise it would be up to the plaintiff alone to decide whether to resort to the procedure under Section 12A of the CC Act.*** *An 'absolute and unfettered right' approach is not justified if the pre-institution mediation under Section 12A of the CC Act is mandatory, as held by this Court in Patil Automation Private Limited (supra). The words 'contemplate any urgent interim relief' in Section 12A(1) of the CC Act, with reference to the suit, should be read as conferring power on the court to be satisfied. They suggest that the suit must "contemplate", which means the plaint, documents and facts should show and indicate the need for an urgent interim relief. This is the precise and limited exercise that the commercial courts will undertake, the contours of which have been explained in the earlier paragraph(s). This will be sufficient to keep in check and ensure that the legislative object/intent behind the enactment of section 12A of the CC Act is not defeated.*"

[Emphasis supplied.]

7. In the present case, the suit concerns a property owned by the plaintiff, i.e., 24-B, Pusa Road, Rajinder Nagar, near Karol Bagh, Delhi-110005 ["the suit property"], which was originally leased to the defendant by an agreement dated 17.09.2013, and subsequently by an agreement dated 06.01.2020 ["Agreement"]. The defendant has already filed a suit in this Court with regard to its rights under the very same Agreement. An application, filed by the defendant under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908, [I.A. 17963/2023]

was disposed of by an order of this Court dated 02.02.2024. Although terms of settlement were agreed between the parties in Court and recorded in an order dated 01.02.2024, the present plaintiff ultimately did not accept the settlement. The aforesaid application of the defendant herein, was disposed of with the following orders:

> "*13. In these circumstances, having regard to the express terms of the lease deed dated 06.01.2020 which provides that the plaintiff can remain in rent-free possession of the premises until refund of the security deposit, the plaintiff has made out a prima facie case for grant of the injunction sought. As noted in the order dated 01.02.2024, the defendant was given the option of recovering possession upon agreed terms and conditions, which it has declined. It is clear that a significant amount, equal to more than 15 months' rent has been placed with the defendant by way of security deposit, which the defendant refuses to secure on the basis of an inchoate claim for repair/demolition/removable charges. The balance of convenience is also therefore in favour of the plaintiff. I am also satisfied that the plaintiff is likely to suffer irreparable loss and injury, if the possession of the suit property is interfered with during the pendency of the suit.*
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> *14. The application of the plaintiff i.e. I.A. 17963/2023, is therefore allowed and the defendant is restrained from interfering with the plaintiff's possession of the suit property or its ingress and egress from the suit property during the pendency of the suit.*"

8. The plaintiff herein carried the matter to the Division Bench in FAO(OS)(COMM) 51/2024, which was decided on 22.03.2024. The Division Bench recorded as follows:

> "*22. As would be evident upon perusal of Clause 6 of the second lease agreement, the appellant/defendant i.e., the lessor is obligated to refund the security deposit at the time of receipt of the vacant possession of the premises. The refund of the security deposit is subject to specific deductions listed out therein. These are i) rent, ii) service tax, iii) unpaid electricity charges [until the date of handover], iv) water charges [until the date of handover].*
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> *22.1 This part of Clause 6 presents no difficulty.*
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> *22.2 The difficult part, and something peculiar to the instant arrangement obtaining between the parties, is contained in the latter part of clause 6, which makes the refund of the security deposit a*

prerequisite for handing over possession of the subject premises.

22.3 The latter part of Clause 6 states that in the event the appellant/defendant/lessor defaults in refunding the security deposit, the respondent/plaintiff/lessee will have the right to use the premises without payment of lease rent, till the security deposit along with interest accrued [for the delayed period] is refunded to the respondent/plaintiff/lessee.

22.4 The said part of clause 6 also provides that if the respondent/plaintiff/lessee were to, in such circumstances, hold over the property, it would not be treated as trespass or illegal possession of the subject premises.

22.5 Furthermore, the last limb of Clause 6 provides that in case repairs, demolition, or removal of temporary structures at the premises are to be carried out, the same would have to be carried out by the respondent/plaintiff/lessee at its own cost or costs as is mutually and amicably agreed to by the disputants at the time of vacation of the subject premises by the respondent/plaintiff/lessee, or at the expiry of the lease tenure.

23. It is the submission of Mr Achal Gupta, learned counsel, who appears on behalf of the appellant/defendant/lessor, that a plain reading of the last part of the said clause, to which we have referred above, would show that the appellant/defendant/lessor is entitled to adjust the amounts that would have to be incurred to restore the premises against the security deposit made over by the respondent/plaintiff/lessee.

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*28. **<u>Having heard learned counsel for the parties and perused the record, we are of the view that the way Clause 6 of the second lease agreement is framed, in plain terms, gives the respondent/plaintiff/lessee the right to use the premises till such time the security deposit is made over by the appellant/defendant/lessor to the respondent/plaintiff/lessee. As noticed above, the contestation between the disputants is what can be adjusted against the security deposit under the second lease agreement. The respondent/plaintiff/lessee says, and in our view, quite correctly, that only arrears towards rent, service tax, unpaid electricity and water charges can be adjusted.</u>***

29. The reason that we have come to this conclusion is that, although the marginal heading of Clause 6 adverts to the security deposit, there is a clear disjunct between those expenses which can be straightaway adjusted against the security deposit and those qua which quantification is required to be made, i.e., costs that may have to be *incurred concerning repairs, demolition or removal of any of the temporary structures.*

29.1 The two parts of clause 6 do not seem to meld.

30. The cost concerning repairs, demolition, or removal of temporary structures is to be incurred by the respondent/plaintiff/lessee. The disputants are also given leeway to arrive at a mutually acceptable amount that would have to be incurred for carrying out repairs, demolition, or even removal of any temporary structure.

31. ***A plain reading of the last limb of Clause 6 of the second lease agreement shows that the expenses qua restoration, repair, demolition, or removal of any temporary structure cannot be adjusted against the security deposit retained by the appellant/defendant/lessor as they could require quantification, which would then fall in the realm of adjudication, as in this case.*** *As noted above, the learned Single Judge has quantified the refundable security deposit at Rs. 2,30,00,000/- Therefore, in any event, the appellant/defendant/lessor can hold over Rs.70,00,000/- which was deductible towards rent and GST for the three-months between the date of termination notice and the date of termination of the lease.*

32. The next logical issue, therefore, which arises for consideration is: can the respondent/plaintiff/lessee hold over the subject premises after 14.09.2023 because the appellant/defendant/lessor refuses to make over the amount retained towards security deposit?

33. It is Mr Tiwari's submission that as per the learned Single Judge's order, Rs.2,30,00,000/- is what the appellant/defendant/lessor is required to remit to the respondent/plaintiff/lessee if it is to be called upon to vacate the subject premises.

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38. ***As noted above, the arrangement that obtains between the parties is peculiar which allows the respondent/plaintiff/lessee to hold over the subject premises till such time the appellant/defendant/lessor fails to make over the security deposit.***

38.1 In this context, we may note that Mr Tiwari also points out that when the first lease agreement was entered into between the disputants, what was given to the respondent/plaintiff/lessee was a bare-bone structure and, therefore, the respondent/plaintiff/lessee had to incur substantial expenses to make the suit property fit for its business purposes.

39. It is, therefore, Mr Tiwari's contention that this aspect would have to be borne in mind while appreciating the framework of Clause 6.

40. Since the disputants were not able to agree to a practical way forward, in our opinion, no interference is called for with the impugned order as on a plain reading of Clause 6, the Court could not have arrived at any other conclusion. ***The parties will get their rights settled in the suit that is pending adjudication before the learned Single Judge or in appropriate proceedings that they may wish to institute for adjudicating their respective rights.***"

9. The Division Bench has thus, clearly found that the defendant herein has the right to remain in possession of the suit property, until refund of the security deposit by the petitioner herein, and that the question of compensation for restoration of the suit property to its original condition, requires adjudication. In light of these findings of the Division Bench with regard to the interim arrangements that prevail between the parties, I am unable to accept that the plaintiff's request for urgent interim relief in the present suit is *bona fide.*

10. Although an attempt had unsuccessfully been made in the course of the earlier suit, to forge a settlement between the parties, even today, Mr. Achal Gupta, learned counsel for the plaintiff, makes various suggestions in an attempt to find common ground. He submits that the failure of the present plaintiff to accept the terms of settlement, suggested in the defendant's suit, were misguided. These very submissions show that an attempt ought to have been made to institute pre-litigation mediation in the present case. This is the very purpose of Section 12A of the Act, as explained by the Supreme Court.

11. Consequently, I.A. 9479/2023 is rejected. The suit is, therefore, not maintainable and is dismissed. It is open to the plaintiff to institute a fresh suit on the same cause of action, after compliance of Section 12A of the Act, if so advised.

12. Mr. Gupta seeks refund of the court fees. However, the prayer is rejected, in view of paragraph 84 of the judgment of the Supreme Court in *Patil Automation Private Limited* (*Supra*), which holds as follows:

> "*84. One of the arguments of Shri Saket Sikri is that, if a plaint is rejected under Order 7 Rule 11, the plaintiff would be saddled with the deprivation of the court fee paid. He would contend that this aspect may be considered, when the Court decides the question as to whether the provision is mandatory or not. Whenever a plaint is rejected on the ground that the suit is barred under any law, this consequence is inevitable. [We may only, in this context, observe, that under Section 4-A of the Kerala Court Fees and Suits Valuation Act, 1959, the plaintiff needs to pay only one-tenth of the total court fee at the time of institution of the suit. The balance is to be paid not later than fifteen days from the date of framing of issues, inter alia. Section 4-A further provides that if the parties further settle the dispute within the period specified or extended by the court for payment of the balance court fee, the plaintiff shall not be called upon to pay the balance court fee.] If a plaint is rejected for failure to give a notice, as contemplated in Section 80CPC, the court fee paid, may be lost. Equally, for violation of Section 69 of the Partnership Act, if the plaint is rejected, the plaintiff loses the court fee. While it may appear to be hard on the plaintiff, the effect of the provision contained in Order 7 Rule 11, cannot be diluted. Therefore, we are not impressed by the argument, subject to what we will hold later on.*"

13. The suit and all pending applications are disposed of, with liberty as aforesaid.

PRATEEK JALAN, J

APRIL 30, 2024
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