

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Reserved on: July 05, 2022**
Pronounced on : July 12, 2022
+ RFA(COMM) 40/2022 & CM APPL.26156-158/2022
SIDDHATHA SINGH APPELLANT
Through: Mr. Harsh Gokhale, Advocate.
versus
AJIT SINGH BAWA (DECEASED)
THROUGH LRS RESPONDENT
Through: None.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J.

1. Appellant-tenant, the original defendant before the learned trial court (hereinafter referred as “**Appellant**”), has preferred the instant appeal against the impugned judgement dated 19.02.2022, whereby, the learned trial court has allowed the application under Order XIII A of The Code of Civil Procedure, 1908 (hereinafter referred as “**CPC**”) read with Section 151, CPC read with Section 3 of The Commercial Courts Act, 2015 (hereinafter collectively referred as “**Order XIII A application**”) filed by the respondent-landlord, the original plaintiff before the learned trial court (hereinafter referred as “**Respondent**”) and decreed the suit in favour of the respondent and against the appellant.

2. Succinctly put, the respondent instituted a suit for possession, arrears of rent along with *mesne profits* (hereinafter referred to as “**suit**”) against the appellant, *inter alia*, claiming the following reliefs:-

“3.1. Pass an Order/ Judgment/ Decree in favour of the Plaintiff and against the Defendant directing the Defendant to vacate the said Property at 19F, Basant Lok, Vasant Vihar, New Delhi 110057; super area ad-measuring 1000 sq. ft. and deliver the peaceful, vacant possession to the Plaintiff;

3.2. Pass an Order/Judgment/Decree in favour of the Plaintiff and against the Defendant directing the Defendant to make a payment of INR 94,215.80/- [Indian Rupees Ninety Four Thousand Two Hundred Fifteen and Eighty Paise Only] as arrears of rent for the period of 23.05.2020 to 08.07.2020;

3.3. Pass an Order/ Judgment/ Decree in favour of the Plaintiff and against the Defendant directing the Defendant to pay liquidated damages to the Plaintiff for unauthorized occupancy of the Said Property @10000/- [Indian Rupees Ten Thousand Only];

3.4. Pass an Order/ Judgment/ Decree in favour of the Plaintiff and against the Defendant directing the Defendant to pay all dues (water, electricity, gas, maintenance and service charges) pertaining to the said Property, up till the date of delivering actual, physical and legal possession of the said Property to the Plaintiff;

3.5. Pass an Order/ Judgment/ Decree in favour of the Plaintiff and against the Defendant thereby restricting the Defendant from transferring/ alienating/ encumbering/ creating third party rights or parting with possession of the Said Property at 19F, Basant Lok, Vasant Vihar, New Delhi 110057.”

3. Being the absolute owner of the commercial property bearing No. 19

F, Basant Lok, Vasant Vihar, New Delhi-110 057 (hereinafter referred as “**premises**”), the respondent had given the said premises on lease to the appellant for it to carry out authorised commercial activity like running a spa or any other activity vide a registered Lease Deed dated 18.12.2010 (hereinafter referred as “**Lease Deed**”) for a period of 15 years, commencing from 15.05.2010 to 14.05.2025 as per the terms and conditions set out therein.

4. It was during the subsistence of the aforesaid Lease Deed, that the unfortunate outbreak and spread of COVID-19 pandemic across India caused suffering to the public, including the appellant, primarily during the then prevailing lockdown period since and from March, 2020 for the ensuing months. This resulted in non payment of rent in compliance of the Lease Deed by the appellant to the respondent which in turn resulted in the respondent issuing legal notice(s) on 20.04.2020, 11.05.2020 and 28.05.2020 to the appellant calling upon him to pay the monthly rent as per the Lease Deed. So much so, in one such legal notice the respondent voluntarily offered to suspend the obligation of the appellant to pay the monthly rent for a period of 60 days with effect from 23.03.2020 to 22.05.2020 on compassionate grounds. However, the appellant never

responded to the aforesaid offer and thus never availed of the same and instead chose to remain in possession of the premises, till termination of the Lease Deed by the respondent, without exercising his right to terminate the Lease Deed.

5. Facing the lull from the appellant, the respondent was constrained to terminate the Lease Deed by issuing a termination notice dated 07.06.2020. It was then that the appellant vide its reply dated 10.06.2020 took the plea of '*force majeure*' contained in clause 14 of the Lease Deed and denied its liability.

6. However as the appellant was not relenting to comply with the mandatory provisions stipulated in the Lease Deed, the same led to an institution of a suit by the respondent against the appellant before the learned trial court. During pendency of the said suit and before framing of the issues therein, the respondent filed an Order XIII A application pleading that in terms of clause 7 of the Lease Deed the appellant was permitted to use the premises in question for carrying on authorised commercial activity like running a spa or any other activity deemed fit or proper by it during the period of lockdown in dispute and further that in terms of clause 2 of the same Lease Deed the premises was never rendered '*unfit for use*' during the

period of lockdown in dispute.

7. After completion of pleadings in the aforesaid Order XIII A application the learned trial court heard both the counsel for the parties and took their respective written synopsis on record. Upon consideration thereof, the learned trial court, after discussing the mechanism to be followed in an Order XIII A application and placing reliance upon various judgements came to the conclusion that the parties were bound by the terms of the contract i.e. Lease Deed executed inter-se and that the appellant always retained the possession of the premises during the period of lockdown in dispute without vacating the same and that the said premises was always '*fit for use*' during the said period of lockdown in dispute and also that the appellant was always free to carry out any commercial activity permissible by the authorities, not limited to running of a spa.

8. In view thereof, the learned trial court came to conclusion that as the appellant had failed to establish any ground of defence, he had no real prospects to defend the claim(s) of the respondent and thus allowed the Order XIII A application vide its impugned judgement.

9. Being aggrieved, the appellant has challenged the impugned judgement on various grounds but primarily agitated and pressed three basic

grounds. *Firstly* the learned counsel for the appellant sought to contend that the learned trial court had overlooked the fact that the premises was ‘*unfit to use*’ alleging thereby that because of the then prevailing lockdown situation during the period in dispute and passing of different circular(s) issued by various Government(s) from time to time the appellant was unable to carry on the activity of running a Spa from the said premises.

10. *Secondly*, the learned counsel for the appellant sought to contend that the learned trial court had wrongly applied the provision of Section 108(e) of the Transfer of Property Act, 1882 even though the parties were admittedly bound by the terms of the Lease Deed executed inter-se and that the Transfer of Property Act was not applicable to the facts and circumstances of the case.

11. *Thirdly*, the learned counsel for the appellant sought to contend that as there was no commercial use of the premises permissible and/ or possible during the aforesaid period in dispute before the learned trial court, the respondent was not entitled to rent for the said period.

12. Before dwelling into the factual aspects of the case and the arguments addressed by the learned counsel for the appellant, this Court feels that it would be in the interest of things to pen down some facts about the

introduction, emergence and purpose of Order XIII A, CPC:

12.1 The said provision of Order XIII A was introduced in the CPC by way of an amendment in the year 2015 with respect to all kinds of commercial disputes only. The said Order XIII A, CPC is a provision enabling the courts to take up and decide claim(s) in the commercial disputes without recording oral evidence, i.e. without following the ordinary procedure to be adopted and followed in an ordinary suit. For this, it is mandatory for all the parties involved to mandatorily follow all the stipulations contained in Order XIII A, CPC whereby, during the pendency of the proceedings, i.e. a suit, all the parties to the dispute can apply for a *summary judgment* at any stage after the service of the summons but prior to the framing of the issues. While deciding the said application for passing a summary judgment under Order XIII A, unlike the provision of O XII rule 6, CPC, there need not be an '*admission*' and it is not a pre-condition. Two fundamental grounds which have to be satisfied while deciding an Order XIII A application are that a party has to show that the other party has no real prospect of succeeding in and/ or defending the claim *and* that there is no other compelling reason as to why the claim should not be disposed of before commencement of trial, i.e. recording of oral evidence.

12.2. In an Order XIII A application, the applicant has to mandatorily contain the matters relating to a statement that *firstly* it is for passing of a summary judgment and *secondly* it must precisely disclose all material facts and identify the point of law, if any and *thirdly* if any reliance upon any documentary evidence is placed then it should contain and include such documentary evidence and *fourthly* further identify the relevant content thereof on which the reliance is placed upon and *fifthly* it must contain the reason why there are no real prospects of succeeding and/ or defending the claim, as the case may be and *sixthly* it must contain the specific relief sought and *lastly* briefly state the grounds for seeking such relief. Additionally the Order XIII A application may also contain any other relevant matters.

12.3. Upon the hearing fixed for summary judgment, the non-applicant has to be given at least *thirty days* notice containing all the details qua the date fixed for the hearing and the claim proposed to be decided at the time of the said hearing. Thereafter, the non-applicant may, within *thirty days* of the receipt of notice of application of summary judgment or notice of hearing (whichever is earlier), file a reply, mandatorily containing the matters *firstly* disclosing all the material facts and *secondly* identifying the point of law, if

any and *thirdly* stating the reasons why the relief sought by the applicant should not be granted and *fourthly* if any reliance upon any documentary evidence is placed then it should contain and include such documentary evidence and *fifthly* further identifying the relevant content thereof on which the reliance is placed upon and *sixthly* stating the reason why there are no real prospects of succeeding and/ or defending the claim, as the case may be and *seventhly* concisely stating the issues that should be framed for trial and *eighthly* identifying what further evidence shall be brought on record at trial that could not be brought on record at the stage of summary judgment and *lastly* stating why, in light of the evidence or material on record if any, the application for passing a summary judgment should not be proceeded with, in addition to other relevant matters.

12.4. Furthermore and if the non-applicant wishes to rely upon additional documentary evidence during the hearing then it must file such documentary evidence and serve copies of such documentary evidence on every other party to the application at least *fifteen days* prior to the date of the hearing. Similarly, if the applicant for summary judgment wishes to rely on documentary evidence in reply to the documentary evidence by the non-applicant, the applicant must file such documentary evidence in reply and

serve a copy of such documentary evidence on the said non-applicant at least *five days* prior to the date of the hearing. As further stipulated, notwithstanding any of the aforesaid, no documentary evidence shall be required to be filed if such documentary evidence has already been filed or served upon a party on whom it has already been served.

13. On a careful analysis of the aforesaid, it emerges that the provision of Order XIII A, CPC has been specifically introduced by the legislature so as to adjudicate and decide the issue(s) at the threshold itself without proceeding to the unnecessary rigours of a prolonged trial and to save time, effort and money by making it more convenient and expeditious for all concerned, be it the court(s) and/ or the parties involved. Furthermore, an Order XIII A application can be allowed and a court can proceed to pass a *summary judgment* if a party has a real prospect of succeeding and/ or defending in the claim and there is no real purpose of proceeding to trial, i.e. recording oral evidence.

14. This Court, upon hearing the learned counsel for the appellant at length and carefully perusing all the documents on record before it, finds that the respondent was able to make out a case showing 'real reason' and a 'real justification' in his favour before the learned trial court to consider in

order to invoke the *force majeure* clause and all the aforesaid requisites were squarely covered by the parties in the Order XIII A application. Another vital aspect to be noted is that all the grounds raised and adjudicated by the appellant before this Court had already been raised and agitated before the learned trial court and under the garb of the instant appeal, the learned counsel for the appellant is merely trying to reagitate the same issues in the form of grounds which have all been heard, taken note of and decided by the learned trial court in the impugned judgment once again by simply giving a different flavour to them.

15. Be that as it may, on the basis of the documentary evidence on record and the arguments addressed by the learned counsel for the appellant this Court is of the opinion that it is undistinguishable that there is a relationship of respondent-landlord and the appellant-tenant inter-se the parties and that they are bound by the contractual terms and conditions set out in the Lease Deed executed inter-se and that as the appellant neither chose to exercise his right to terminate the Lease Deed nor chose to vacate the said premises at any point of time until termination thereof by the respondent, he was always in possession of the said premises all throughout the period of lockdown in dispute. As such, there is no such clause in the Lease Deed by virtue

whereof the appellant could claim non-payment of rent to the respondent, however, he was bound to continue paying the rent in terms of the clear stipulation contained in the Lease Deed. Thus, the appellant was clearly guilty of breach of the Lease Deed and as the respondent was denied the receipt of its legitimate dues and had to suffer losses during that period, he was well and truly liable to pay the lease rentals as per the Lease Deed alongwith interest thereon for the period in issue as rightly held by the learned trial court in the impugned judgment.

16. Furthermore, as per the own contention of the appellant, though the premises was not in use due to the then prevailing lockdown but admittedly as there was never complete destruction thereof nor it was ever unfit for use at any point of time. The premises were always fit to use and in terms of the Lease Deed, the appellant was free to carry on any kind of commercial activity barring running a Spa. Thus, it could be of no avail to the appellant to not pay the rent in terms of the Lease Deed. It is a well settled law that temporary non-use of premises during the lock down period cannot be construed as rendering either the stipulated term of the Lease Deed void or giving any benefit to the tenant i.e. appellant to claim suspension of rent on the ground of mere non-use thereof.

17. Lastly, the argument advanced by the learned counsel of the appellant qua the wrongful application of the provision of Section 108(e) of The Transfer of Property Act, 1882 is totally incorrect and wrong as the learned trial court has not applied the said provision anywhere in the impugned judgment. It is worthwhile to note that the learned counsel for the appellant failed to show any averment qua the implementation of the said Section 108(e) of The Transfer of Property Act, 1882 by the learned trial court in the impugned judgment. Even otherwise, admittedly the parties had executed a Lease Deed inter-se themselves and thus were admittedly bound by the terms thereof. As such and even otherwise, said Section 108(e) of The Transfer of Property Act, 1882 is inapplicable to the facts of the instant case. The said argument further falls flat on its face in view of the judgement rendered by the Hon'ble Supreme Court in re.: ***Energy Watchdog v. Central Electricity Regulatory Commission & Ors.***: (2017) 14 SCC 80 wherein it has been held that in case the contract itself contain an express or implied term relating to *force majeure* condition the same shall be governed by Section 32 of the Contract Act 1872 and the fact that the learned trial court has, rightly, placed reliance upon the Lease Deed executed inter-se the parties. It is a settled law that if a contract contains a clause providing for

some sort of waiver and/ or suspension of rent, it is only then that the tenant could claim the same. In the instant case as the appellant willingly chose to retain the possession of the premises and as there was no clause giving any respite to it, the appellant was bound to pay the monthly charges to the respondent in terms of the clear stipulations contained in the Lease Deed.

18. Considering all the aforesaid and taking the overall facts and circumstances and position of law, in response to the three contentions (*supra*) raised by the learned counsel for the appellant, this Court finds that, as noted hereinabove, they all have been already heard, taken note of and decided by the learned trial court vide the impugned judgment. In view thereof, this Court finds no infirmity, perversity or illegality in the impugned judgment passed by the learned trial court which would require interference in the present appeal.

19. Appeal is accordingly dismissed.

**(SAURABH BANERJEE)
JUDGE**

**(SURESH KUMAR KAIT)
JUDGE**

JULY 12, 2022/So