

**(2012) 05 DEL CK 0023**

**In the Delhi High Court**

**Case No :** Regular First Appeal (OS) 57 of 2012

Enigma Gym "N" SPA

APPELLANT

Vs

Shehanshah Real Estate

RESPONDENT

**Date of Decision :** 28-05-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 10  
Partnership Act, 1932 — Section 45

**Citation :** (2012) 05 DEL CK 0023

**Hon'ble Judges :** Siddharth Mridul, J;Pradeep Nandrajog, J

**Bench :** Division Bench

**Advocate :** V.P. Singh, instructed by Mr. D.K. Rustgi, Mr. B.S. Bagga and Mr. Arpit Bhargava, for the Appellant; Hemant Chaudhary and Mr. Chander M. Maini, for the Respondent

## Judgement

Pradeep Nandrajog, J.—The respondent/plaintiff, a partnership firm duly registered with the Registrar of Firms on August 31, 2007; having three partners: Avinash Puri, Harish Sondhi and Tarun Sharma, owns the suit property bearing Unit No. 201 & 202 on the second floor of a building constructed at 15-16, District Centre, Janakpuri and let out the same under a written registered lease-deed Ex.P-1 dated May 08, 2009 to the appellant/defendant, a partnership firm. The lease-deed Ex.P-1 records that the appellant has three partners: Sunil Dev, Ajay Solanki and Mohinder Singh Solanki.

2. It is recorded in the lease deed that the duration of the lease is 12 years, commencing from December 25, 2008 and ending on December 24, 2020. Monthly rent payable for the first year is Rs.9,50,000/-(Rupees Nine Lakh Fifty Thousand only). For the next two years the rent payable is Rs.10,00,000/-(Rupees Ten Lakh only) and for the next three years the rent payable is Rs.11,50,000 (Rupees Eleven Lakh Fifty Thousand only).

3. Vide Clause-2 of the Lease Deed it is recorded:

2. That the Landlord will hand over/vacant peaceful physical possession of the said property to the Tenant, along with all fittings and fixtures including 109 tons of air conditioning and 2 DG's of 125 KW installed in the above said property, and in case any defect occurs in the above aide fitting and fixture which is installed in the above said property, the Tenant shall be liable and responsible to repaid the same at his own cost and expense. Any major alteration in the rented premises made by the tenant at his cost will be executed with prior express permission of the landlord.

4. As per Clause 12 of the Lease Deed it stands recorded that a sum of Rs.28,50,000/-(Rupees Twenty Eight Lakh Fifty Thousand only) has been received by the respondent as interest-free security deposit, liable to be returned upon vacant physical possession of the tenanted premises being returned. Clause 19 records that the tenant shall pay monthly maintenance @ Rs.8/-per sq.ft. per month to the landlord. As per Clause 20, the service tax in respect of the property is the liability of the tenant.

5. Clause 7 of the Lease Deed records as under:

7. That if the tenant/second party fails to pay the rent of above two months and Electricity charges, water charges to the concerned authorities, departments, the landlord shall have the right to get the said property vacated from tenancy from the tenant/second party and the landlord shall have also right to release/recover all the arrears from the tenants, from the security amount as per Para 12 of this Agreement.

6. Alleging that the appellant defaulted in paying rent commencing from the month of May 2009, when it paid rent only in sum of Rs.4,25,000/-(Rupees Four Lakh Twenty Five Thousand only) as against Rs. 9,50,000/-(Rupees Nine Lakh Fifty Thousand only), and further stating that thereafter there was a continuous default to pay rent for the months of June, July, August and September 2009, respondent filed a suit seeking recovery of possession, recovery of rent, maintenance charges and service tax, pleading in the plaint that notwithstanding lease being automatically determined in view of Clause 7 of the Lease Agreement, by a notice dated November 02, 2009 sent under registered AD post the appellant was informed of the tenancy being determined; and that in spite thereof the appellant did not hand over possession.

7. Alleging further defaults of non-payment of full rent and acknowledging part payment of rent in the month of November, December, February and April 2010, plaint claimed possession, arrears of rent in sum of Rs. 92,43,750/-(Rupees Ninety Two Lakh Forty Three Thousand Seven Hundred Fifty only) till when the suit was filed, arrears of maintenance charges in sum of Rs. 13,99,600/-(Rupees Thirteen Lakh Ninety Nine Thousand Six Hundred only) and damages in sum of Rs. 60,00,000/-(Rupees Sixty Lakh only) for two tenancy months i.e. the tenancy months June 25, 2010 till July 24, 2010 and July 25, 2010 till August 24, 2010. It was also pleaded that the fittings detailed in Annexure P-1 to the plaint,

being provided by the respondent was also liable to be returned to it, and suffice would it be to state that in Annexure P-1, equipments used in a gym are enlisted apart from 16 split air-conditioners of various tonnage and two DG sets of 125 KW.

8. The appellant was impleaded as defendant No. 1. Its partners Sunil Dev, Ajay Solanki and Mohinder Singh Solanki were impleaded as defendants No. 2 to 4.

9. With hiccups in complying with the time within which written statement had to be filed, a written statement was filed on behalf of all the defendants, but we find it being signed only by Sunil Dev. In the written statement filed the tenancy agreement was not disputed. It was pleaded that the equipment mentioned in Annexure P-1 to the plaint was never provided and thus prayer in the plaint in relation to Annexure P-1 was opposed. It was pleaded that maintenance services not being provided, the defendants were not liable to pay any maintenance charges. Pleading further to have made a cash payment in sum of Rs. 23,80,000/-in August 2010, the suit was opposed.

10. Relevant would it be to note that in the written statement filed no pleas were taken pertaining to Mohinder Singh Solanki having died on March 18, 2010 and his wife Phoolwati Devi being inducted as a partner on April 23, 2010.

11. The respondent filed an application under Order XXXIX Rule 10 of the CPC praying that in view of the fact that the appellant had admitted the lease-deed Ex.P-1 and its terms, it should be directed to pay the arrears of rent and maintenance charges till the date when the suit was filed as also for subsequent months and for future months as well till the suit was decided. As regards the payments stated to have been made in cash, as pleaded by the appellant in the written statement, the respondent pleaded in the said application that there was no receipt evidencing said payment being made to it; it denied having received any money in cash.

12. The application, registered as IA No. 11487/2010 was debated over a period of six months and the order dated July 28, 2011 under which the application was decided notes that while arguing said application the defendants stated that apart from Rs. 23,80,000/-pleaded in the written statement to have been paid in cash in the month of August 2010, it had also paid Rs. 6,75,000/-in cash in the month of May 2010. It also took a stand that the partnership firm which took the property on rent was no longer in existence inasmuch as upon the death of Mohinder Singh Solanki on March 18, 2010 the firm was dissolved, as pleaded, and that the firm under the same name which was reconstituted on April 23, 2010 was a new firm.

13. The application was allowed vide order dated July 28, 2011. The plea that the defendant No. 1 firm was not a tenant was negated. It was directed that arrears in sum of Rs. 1,69,99,625/-towards rent, Rs. 20,97,324/-toward maintenance charges up to May 24, 2011 shall be deposited and future rent and maintenance charges as also future rent shall be deposited each month. The

learned Single Judge noted that the plea urged, which was not a part of the written statement, that Rs. 6,75,000/-, was even otherwise false inasmuch as it was argued that said amount was deposited by the respondent in its bank account, which was not found to be so. The plea of having paid Rs. 23,80,000/-in cash was also negated in the absence of any proof of said payment being made.

14. The said order has admittedly not been complied with.

15. Vide impugned judgment and order dated March 26, 2012, striking out the written statement filed on account of non-compliance with the order dated July 28, 2011, the suit has been decreed.

16. Only the partnership firm "Enigma Gym "N" SPA" has challenged the impugned decree, inter-alia, pleading that Shri Mohinder Kumar Solanki, one of its three partners, died on March 18, 2010 and his wife Phoolwati Devi was inducted as a partner in the firm on April 23, 2010. It is thus pleaded in the appeal that the suit was filed against a dissolved firm; in any case it is pleaded that the tenant was the old firm and not the new firm. It is pleaded that whether or not the firm paid Rs. 6,75,000/-and Rs. 23,80,000/-in cash was a matter of fact in dispute and in spite of the written statement being struck off, the respondent had to prove its case. Similarly, it is pleaded that with respect to maintenance charges, the plaintiff had to prove having provided the same before being entitled to the monthly maintenance charges. With respect to fittings and fixtures statedly provided and listed in Annexure P-1 to the plaint, it is pleaded that the plaintiff had to establish having provided the same.

17. On the subject of Mohinder Singh Solanki having died on March 18, 2010 and his wife being inducted as a partner on April 23, 2010, suffice would it be to state that no such plea was raised in the written statement. In any case, the written statement has been struck off the record in view of non-compliance with the order dated July 28, 2011.

18. It is settled law that if a partnership firm is a tenant in a premises, it is the firm which is the tenant. The partners, having an interest in the assets of the firm : a tenancy right being an asset, the partners would have an interest in the tenancy and upon the assets of a firm devolving on a legal heir of a deceased partner and said legal heir being inducted as a partner in the firm, would be a case of the firm being reconstituted and not a firm dying and a new firm being born. That for purposes of taxation the matter would be treated differently, is no ground to hold, as the appellant alleges, in the appeal.

19. Now, the decree is against the firm and its partners i.e. defendants No. 2 and 3. Said defendants cannot deny liability in view of Section 45 of the Indian Partnership Act 1932 inasmuch as there is no public notice given of the firm being dissolved upon the death of Mohinder Singh Solanki. This is just our observation. We highlight that defendants No. 2 and 3; namely, Sunil Dev and Ajay Solanki have not filed any appeal challenging the impugned order and qua them the matter has obviously attained finality and thus we need not discuss on

the subject of the liability of partners of a firm upon a partner dying and the business being continued by the remaining partners without a public notice of the firm being reconstituted.

20. On the subject of payments received by the respondent from the appellant, admittedly, and this is the case of both parties, following payments have been tendered and thus received by cheque:

S.NO.

Cheque No.

Amount

Date of clearance

1.

385096

9,50,000/

10.01.2009

2.

350484

5,00,000/

04.04.2009

3.

358056

4,50,000/

18.04.2009

4.

358094

3,73,000/

01.05.2009

5.

815772

3,00,000/

24.06.2009

6.

815773  
3,50,000/  
27.06.2009  
7.  
815771  
3,00,000/  
01.07.2009  
8.  
817030  
3,00,000/  
22.07.2009  
9.  
817031  
3,00,000/  
24.07.2009  
10.  
817032  
3,50,000/  
30.07.2009  
11.  
817034  
2,25,000/  
13.08.2009  
12.  
817035  
2,50,000/  
25.08.2009  
13.  
360952  
6,34,125/

10.10.2009

14.

360954

70,720/

10.10.2009

15.

362638

5,00,000/

05.11.2009

16.

362685

6,75,000/

20.11.2009

17.

362691

70,756/

20.11.2009

18.

198696

2,00,000/

15.12.2009

19.

822953

4,22,750/

16.12.2009

20.

831274

3,00,000/

31.12.2009

21.

822951

4,22,750/

26.02.2010

22.

822955

4,22,750/

04.03.2010

23.

RTGS

2,50,000/

16.04.2010

24.

RTGS

4,25,000/

27.04.2010

25.

015011

15,00,000/

18.03.2011

26.

326699

10,00,000/

18.03.2011

21. This totals Rs. 1,15,41,851/-.

22. We have already noted herein above clause-2 of the lease agreement, on the subject of fittings and fixtures provided, and suffice would it be to state that there is a vague reference to fittings and fixtures provided apart from a specific reference to a 109 Ton AC equipment and two 125 KWA DG sets. The respondent alleges that fittings and fixtures as per Annexure P-1 to the plaint were also provided. But it has filed no documents to prove ownership thereof, and to this extent we hold that with respect to the liability of the appellant to return the fittings and fixtures listed in Annexure P-1, save and except the air-conditioning

equipment and the DG sets, the respondent would have to prove having provided the same, even in the absence of a defence.

23. On the subject of cash payments statedly paid, suffice would it be to state that in the written statement filed, in paragraph 3, there is an averment of appellant having paid Rs. 23,80,000/- in cash in August 2010. By whom and to whom has not been pleaded. The date has not been pleaded. No receipt has been filed to prove said fact. There is no plea of appellant having paid Rs. 6,75,000/-, and in respect whereof we may note that during arguments in IA No. 11487/2010 a tabulation was filed alleging cash payment being made in the month of May 2010 and it was argued that proof of said fact is said sum being deposited in the account of the respondent firm in the month of May 2010 and the learned Single Judge calling for the statement of bank account of the respondent and finding no such payment.

24. Ignoring no such plea being taken in the written statement, suffice would it be to state that notwithstanding the written statement being struck off, the plaintiff need not prove in the negative i.e. not having received said payment as well as payment in sum of Rs. 23,80,000/-.

25. On the subject of maintenance charges to be proved, prima-facie, notwithstanding written statement being struck off, the plaintiff would be required to prove having provided the maintenance services, and this would obviously be linked to the fittings and fixtures provided by the plaintiff, as pleaded in the plaint, with reference to Annexure P-1. In the absence of any details in the lease-deed except to 109 Ton air-conditioning equipment and two DG sets, the plaintiff would have to prove having provided the fixtures as per Annexure P-1 and upon proof thereof would be required to further prove having rendered the necessary maintenance services.

26. The appeal is partially allowed. The impugned decree is affirmed to the extent, after adjusting the security deposit, the admitted lease rental payable as of the date of the decree i.e. March 26, 2012 comes to :

(a)

Lease rental @ Rs. 9,50,000/- per month for 12 months i.e. 25.12.2008 till 24.12.2009

Rs. 1,14,00,000/-

(b)

Lease rental @ Rs. 10,000/- per month for 24 months i.e. 25.12.2009 till 24.12.2011

Rs. 2,40,00,000/-

(c)

Lease rental @ Rs. 11,50,000/- per month from 25.12.2011 till 24.03.2012

Rs. 3,45,000/-

TOTAL

: Rs. 3,57,45,000/-

(d)

Less total payment received in cheque plus security deposit

Rs. 1,15,41,851/-

Total:

Rs. 2,42,03,149/-

27. The respondent would be required to prove having provided the fittings and fixtures as listed in Annexure P-1 to the plaint except the air-conditioning equipment and two DG Sets and also to have provided the maintenance services qua them if it is proved that the equipment was provided.

28. The appeal accordingly stands disposed of affirming the impugned decree in-so-far it decrees respondent's suit for possession of the tenanted premises. The decree is set aside in-so-far it directs return of the equipments detailed in Annexure P-1, save and except two DG sets and the air-conditioning equipment, to which extent alone the decree is affirmed qua fittings and fixtures. As against the money decreed by the learned Single Judge, decree is passed in sum of Rs. 2,42,03,149/-together with costs.

29. The suit is restored for adjudication qua the rest, requiring respondent to prove the case pleaded with respect to having provided fittings and fixtures as per Annexure P-1, except air-conditioning equipment and DG sets, as also to prove having rendered the necessary maintenance services for the same. There shall be no order as to costs in appeal.