(2020) 01 DEL CK 0644

In the Delhi High Court

Case No : Civil Suit (COMM) No. 140 Of 2019

Friends Motel Pvt. Limited Through Its Director Mr. Arun Dwivedi — APPELLANT

Vs

Shreeved Consultancy LLP & Ors — RESPONDENT

Date of Decision : 15-01-2020

Acts Referred:
Code Of Civil Procedure, 1908 — Section 151, Order 7 Rule 11
Transfer of Property Act, 1882 — Section 108(q)

Citation : (2020) 01 DEL CK 0644

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Sandeep Sethi, Shankar Kr. Jha, Manu Monga, Rajesh Rana, Joydeep Mazumdar, Rohit Dutta

Final Decision : Disposed Of

Judgement

Mukta Gupta, J

I.A. 15309/2019

1. By this application the defendant seeks condonation of delay of 16 days in filing the reply affidavit to I.A. 11236/2019 filed by the plaintiff under Section 108 of the Transfer of Property Act read with Section 151 CPC.

2. For the reasons stated in the application delay of 16 days in filing the reply affidavit is condoned. Reply affidavit to I.A. 11236/2019 filed by the defendant is taken on record.

3. Application is disposed of.

CS(COMM) 140/2019 &

I.A. 9165/2019 (u/O XXXIX R 10 CPC),

I.A. 11236/2019 (u/S 151 CPC r/w Section 108(9) of Transfer of Property Act)

1. By the present suit, plaintiff has inter alia prayed for a decree of possession in favour of the plaintiff of the subject suit premises built on plot No. 104, Babar Road, admeasuring 18,000 square feet comprising of a basement, ground floor, first floor, second floor, third floor and the four rooms in the annex block, as also a money decree for the unpaid arrears of rent for a sum of ☐ 1,20,17,858/- till its realization, damages, decree for payment of unpaid electricity bills, unpaid water charges and other statutory dues besides interest pendente-lite and future.

2. Summons in the suit were issued on 18th March, 2019 to the defendants who are the firm being defendant No.1 and its two partners being defendant No.2 and 3 respectively. As per the affidavit of service filed on behalf of the plaintiff, summons on defendant No.1 were served on 13th April, 2019. Written statement in response to the plaint was filed by the defendants along with an affidavit of defendant No.3 as partner and duly authorized on 9th August, 2019 i.e. 117th day of receipt of summons. Though the written statement was accompanied with affidavit of admission/ denial, however no application seeking condonation of delay in filing the written statement was filed.

3. Today when the matter came up before this Court after three dates intervening, learned counsel for the defendant states that the application seeking condonation of delay was filed on 28th August, 2019. The said application is not on record till date and on inquiry learned counsel for the defendant fairly submits that an objection was raised to the said application on 29th August, 2019 and the defendant's counsel neither took the application back from the Registry nor removed the objections and hence it was lying under objections with the Registry.

4. It is thus evident that though the written statement and affidavit of admission/ denial have been filed within 120 days, however the necessary application seeking condonation of delay in filing the written statement was not filed within the period of 120 days. It is the requirement of the law that written statement has to be filed within 30 days and on sufficient cause being shown recording exceptional circumstances, the Court may condone the delay up to a period of further 90 days in filing the written statement thereby indicating that within the period of 120 days as an outer limit the process of filing the written statement should be complete.

5. The issue in the present suit is whether this mandate of the law that the written statement has to be filed within 120 days as an outer limit can be frustrated by delaying filing of the application for condonation of delay in filing the written statement and not pursuing the same. The answer thereto has to be in the negative. The application seeking condonation of delay in filing the written statement as noted above was not filed within the period of 120 days and thereafter also not followed up and objections removed for more than four and a half months i.e. for more than further 120 days. In the absence of a proper application seeking condonation of delay in filing the written statement, the written statement could not have been taken on record and is thus not on record of this Court. Consequently, the written statement not being on record, the suit

is liable to be decreed in favour of the plaintiff and against the defendant, in case the facts as pleaded in the plaint and documents filed so justify.

6. There is yet another ground for striking off the defence of the defendant for the reason the plaintiff filed an application under Order XXXIX R 10 CPC being IA 9165/2019 by the plaintiff and despite directions of this Court to pay arrears of rent the same has not been paid till date.

7. The grievance of the plaintiff in the present suit and application is that since September 2018 despite the defendant not paying the rent, the suit property has not been vacated and possession thereof not handed-over. Further, by I.A. 11236/2019 under Section 108 (q) of the Transfer of Property Act, learned counsel for the plaintiff also points out that the period of lease for a period of three years having expired, the lease agreement has come to an end and thus the defendant is liable to vacate the suit premises handing over peaceful and vacant possession thereof to the plaintiff.

8. In reply to this application i.e. I.A. 11236/2019 plea of the defendant is that if Clauses 3A, 3B and 3C are read together which fact is clarified by Clause 3C of the agreement, the lease period was intended to be extended for a period of 9 years and it is a matter of right for the lessee to demand extension of lease till 9 years but after 9 years, extension of lease is with the exclusive discretion of the plaintiff. It is further stated in the reply that despite Clause E of the said lease agreement dated 22nd May, 2017 the plaintiff did not give the defendants a legally permissible suit premises to run their business, as the suit premises did not have the commercial electricity meter, although the said premises was used as a guest house and hence due to over-use of the electricity, due to lesser load limit in electric meter, the defendants have been burdened with penalty and also electricity misuse charges amounting to crores. It is also claimed that the air-conditioners in the suit premises were not working since the beginning of the lease and the suit premises was damaged with the seepage in the walls. Thus the defendant had to get ACs repaired and renovate the premises causing huge expenses and loss to the business. It is further claimed that the electricity to the suit premises was disconnected at the behest of the plaintiff thereby causing serious loss to the defendants.

9. Case of the plaintiff is that the plaintiff and defendant entered into a lease agreement dated 22nd May, 2017 which was duly signed and executed by defendant No.2 and registered on 25th May, 2017. Defendant had agreed to pay monthly rent of ☐ 18 lakhs per month payable on or before 7th day of each calendar month in advance to the plaintiff in terms of Para 4.1 to 4.4 of the lease deed by means of an account payee cheque or by order or by demand draft. The defendants also defaulted in making payments towards electricity bills and other statutory bills like TDS and service tax. Thus, in terms of Clause 11.2 of the lease dated 22nd May, 2017, plaintiff had issued the legal notice dated 27th November, 2018 to the defendants granting 15 days time for payment of arrears of rent. Despite the legal notice dated 27th November, 2018 defendant defaulted

in making any payment and thus from 14th December, 2018 the defendants were occupying the suit premises as tress-passers/ illegally unauthorized lessees in terms of Clause 6E of the lease deed. Hence, the plaintiff filed the present suit seeking recovery of possession, arrears of rents, arrears of electricity and water dues, besides other statutory dues, interest, cost, damages, etc.

10. Before proceeding further it would be appropriate to note the relevant clauses of the lease deed dated 22nd May, 2017 arrived at between the plaintiff and the defendants:

"A. The LESSOR is the owner, seized and possessed of or otherwise well and sufficiently entitled as the absolute legal and beneficial owner of the residential premises admeasuring approximately 18000 sq.ft., which premises comprises of the basement, ground floor, first floor, second floor, third floor and four rooms in the annexe block on Plot No. 104, Babar Road, New Delhi - 110001 along with the undivided and importable proportionate share in the land underneath the building, more particularly described in schedule ?A" hereto (hereinafter referred as the "Said premises").

B. The LESSOR has purchased the land underneath the said premises from (1) Mr. Anil Kumar Anand, son of Late Amar Nath, and (2) Mr. Vishwa Nath Anand, son of late Shri Moti

Ram Anand, for a sum of ☐ 3,50,00,000/- (rupees three crores fifty lakh only) by virtue of a conveyance deed dated 29/05/2004, registered with the office of Sub Registrar at New Delhi, on 29/05/2004. Thereafter, the LESSOR with its own funds constructed the building and is the owner of the said premises.

C. The LESSOR has represented and warranted that they are in sole and lawful possession of the said premises and are competent to enter into this Lease Deed.

D. The LESSEE, being desirous of taking on lease a suitable space for operating a guest house had requested the LESSOR to grant the lease of the said premises.

E. The LESSOR has represented to the LESSEE that the said premises is legally permissible to be used as guest house under mixed land use clause of Master Plan of Delhi, 2021. The said premises was also given on lease for the purpose of running guest house since the year 2010 and the LESSEE has also verified the same from its own source.

F. Acting upon the said representations, the LESSEE agreed to take on lease and the LESSOR agreed to give on lease the said premises and a right to use the terrace.

G. The parties are now desirous of executing this Lease Deed containing the terms, conditions and covenants as mutually agreed between the parties and set out herein below.

LEASE DEED

....xxx

3. Term

The lease shall be for an initial period of 3 (three) years (approx) with effect from 15/08/2016 to 31/07/2019 (the "Lease Period"). The LESSOR shall not be entitled to terminate this Lease Deed without case (i.e. other than for Material Breach by the LESSEE) for the entirety of the lease period. Notwithstanding what has been stated above, the LESSEE shall, in addition to termination for cause (i.e. in the event of Material Breach by the LESSOR or on the occurrence of a Force Majeure event, as the case may be), shall be entitled to terminate the Lease Deed upon 3 (three) months notice (get out right) at any time after a period of 21 (twenty one) months ("Lock-in Period") from 15/08/2016.

3A. The Parties agree that upon expiry of the Lease Period, the LESSEE shall have the right to renew this Lease Deed for a further period of 3 (three) years ("Renewal Right") i.e. from 15/08/2019 to 31/07/2022. The Parties agree that the Renewal Right shall be exercisable at the sole discretion of the LESSEE subject to payment of monthly rental of ☐ 20,70,000/- (Rupees twenty lakh seventy thousand i.e. 15% enhancement of the previous rent). Rest of the terms and conditions shall remain the same.

3B. The parties agree that after the expiry of the above referred three years extended period (i.e. ending on 31/07/2022); the LESSEE shall have the right to renew this lease deed for a further period of three years (i.e. from 01/08/2022 to 31/07/2025) subject to the condition of enhanced monthly rent of 5% over and above the previous years rent or as mutually agreed. The same is more particularly defined in clause-4 below. Rest of the conditions shall remain the same.

3C. After the expiry of the second extended period of lease which shall end on 31/07/2025; the LESSOR at its sole discretion and with mutual understanding extend the lease further on renewed terms as per the situation operating. However, it is agreed between the parties that the LESSEE shall not get the further renewal of lease as a matter of right and the same is the exclusive discretion of the LESSOR who may refuse the same without assigning any reason.

4. Consideration

4.1 The LESSEE shall pay Monthly Rent less tax deductible at source and incorporating service tax component as per the applicable statutory provision except in the case of termination of this lease; through cheques/pay order/ demand drafts in favour of Friends Motels Pvt. Ltd", against receipts issued by the LESSOR evidencing the payment as follows:

01/08/2016 to 31/07/2017 - ☐ 16,00,000/-

01/08/2017 to 31/07/2019 - ☐ 18,00,000/-

01/08/2019 to 31/07/2022 - ☐ 20,70,000/-

01/08/2022 to 31/07/2023 - ☐ 21,73,500/-

01/08/2023 to 31/07/2024 - ☐ 22,82,175/-

01/08/2024 to 31/07/2025 - ☐ 23,96,283.75/-

(rounded off to ☐ 23,96,284/-)

The payment details from 15.08.2016 to 31.05.2017 are mentioned Schedule-E.

4.2 The monthly rent for any calendar month stipulated in Clause 4.1 above during the Lease Period shall be payable [in advance] on or before the 7th day of each calendar month.

4.3 The month of tenancy shall be the first of each calendar month and the last day of each calendar month.

4.4 That it is agreed between the Parties that the LESSEE shall handover the cheques for the period 01/06/2017 to 31/07/2019 (as mentioned in Schedule-F) in advance to the lesser with due date duly mentioned and the LESSEE further undertakes to keep sufficient balance in its bank account for honour of the said cheques. In case of termination or dispute of/under this Agreement, any and all remaining of the said cheques shall be deemed cancelled from the date of termination/dispute and shall be returned to the LESSEE post haste.

6. Conditions of Lease

The LESSEE shall observe & perform the following covenants and conditions;

a) The LESSEE covenants with the LESSOR to keep the said premises in good condition, subject to normal wear and tear arising out of the conduct of Business in the ordinary course. However, the LESSEE shall not be responsible for wear and tear arising out of the conduct of business in the ordinary course or arising out of any Force Majeure event or Material Breach by the LESSOR.

b) The LESSEE shall permit the LESSOR an inspection of the said Premises on being provided an advance notice of 7(Seven) days outside of business hours. Any scheduling for the work undertaken by the LESSOR in relation to the Said Premises shall be as mutually agreed and shall be done in a manner that does not disrupt the normal conduct of LESSEE"s Business. It is specifically acknowledged and agreed that the right of access granted by the LESSEE to the LESSOR under Clause 2A does not in any way prejudice or in any manner supersedes the condition set out in this Clause 6b.

c) The LESSEE shall use the Said Premises to conduct the Business subject to applicable law.

d) The LESSEE agrees to notify the LESSOR, upon the receipt of any notice, requisition, direction or any order from a competent authority affecting, or likely to affect, the interest of the LESSOR in the said Premises, if and when the same be directly served on the LESSEE. The LESSEE agrees to deleiver, or cause to be delivered, the same or a copy thereof to the LESSOR and shall comply with the same in so far as it relates to LESSEE"s obligations, as LESSEE of the Said Premises.

e) Subject to the provisions of Clause 5.2 the LESSEE shall hand over the possession of the Said Premises, reasonably in the condition in which it was received (normal wear & tear and modifications would be acceptable by the LESSOR) on the expiry or on earlier termination of this Lease Deed. If due to any reason on termination of this Lease Deed, the LESSEE fails to handover the possession of the said Premises to the LESSOR, the LESSEE shall be deemed to be a trespasser and an unauthorized LESSEE, and the LESSEE shall be liable to pay to the LESSOR for lease of the said premises, at the rates agreed upon under this agreement till the date of actual handing over of the peaceful vacant possession of the Said Premises to the LESSOR, which if not paid by the LESSEE, may be suitably deducted from the amount of Security Deposit. The parties agree that upon expiry or earlier termination of the Lease Period, if due to any reason, the LESSEE fails to hand over the said premises to the LESSOR within a period of 15(fifteen) business days from the date of expiry or the earlier termination of the lease period, the LESSEE shall be liable to pay the LESSOR for lease of the Said Premises at the rate of ☐ 1,00,000/- (One lakh) per day during such period till the date of actual handing over of the Said Premises to the LESSOR. Notwithstanding anything contained in this Clause, the LESSEE shall not be liable to pay any amount hereunder if such failure to handover the premises to the LESSOR by any reason attributable to the LESSOR.

11. Termination

11.1 Termination without Cause

a) The Lease Deed shall, unless terminated earlier in accordance with the provisions contained herein, stand terminated upon the expiry period of the lease if not extended by the Parties in accordance with the provisions of this Lease Deed, or upon the LESSEE exercising its Get out Rights.

b) Upon the termination of this Lease Deed on the expiration of the tenure of the Lease Deed, the LESSEE, subject to Clause 3, shall be provided with a period of 15(Fifteen) Business Days for removal of all fit-outs while ensuring the structural integrity of the Said Premises ("Interim Occupation Period") to restore the Said Premises reasonable to its agreed condition (subject to natural wear and tear). The LESSEE shall hand over vacant and peaceful possession of the Said Premises to the LESSOR on the expiry of such Interim Occupation Period. On such handing over of the Said Premises as above, the LESSOR shall forthwith and no later than the date of handling over vacant and peaceful possession to the LESSOR, after deducting such charges as may be agreed between the Parties, refund the Security Deposit to the LESSEE in accordance with the provisions of Clause 5 herein.

c) In the event of termination of this Lease Deed, upon the exercise of Get Out

Rights by the LESSEE detailed above, the LESSEE, shall at the end of the 3 (three) month notice period, be liable to (i) hand over vacant and peaceful possession of the Said Premises, and (ii) if so required, remove all fit-outs while ensuring the structural integrity of the said Premise and restore the Said Premises to its agreed condition, subject to natural wear and tear. On such handling over of the Said Premises as above, the LESSOR shall forthwith and no later than the date of handling over vacant and peaceful possession to the LESSOR, after deducting such charges as may be agreed between the Parties, refund the Security Deposit to the Lessee in accordance with the provisions of Clause 5 herein.

11.2 Termination for Cause

a) Material Breach of LESSEE : This Lease Deed may be terminated by the LESSOR in case of Material Breach by the LESSEE. Upon the issue of a notice by the LESSOR of Material Breach by the LESSEE (the "LESSEE Material Breach Notice"), the LESSEE shall be provided with a creative period of 15(fifteen) days, where such Material Breach is capable of being cured and within which the LESSEE would be required to cure such Material Breach as claimed by LESSOR (the "Cure Period") and in the event that the LESSEE fails to remedy the Material Breach within the Cure Period, the LESSOR would be entitled to forthwith terminate this Lease Deed.

Upon the exercise of the right of terminations by the LESSOR of a Material Breach by the LESSEE, the LESSEE would as a full and final settlement of all of the amounts payable by it to the LESSOR, (i) be required to pay the LESSOR the amounts owed to it by way of Monthly Compensation and other charges, if any, up to the date of termination, and/or (ii) be required to pay the LESSOR all (reasonable) costs to be incurred in connection with repair and restoration of the Said Premises to its agreed condition, subject to normal wear and tear except where the need of such repair and restoration has arisen due to any act attributable to the LESSOR due to Force Majeure events; and/or (iii) all statutory levies, fines and duties impose on the LESSOR and/or LESSEE, as a consequence of the LESSEE"s gross negligence or wilful misconduct. The LESSOR shall be entitled to deduct such amounts, if any, from the Security Deposit and, if there is a remainder, return such amounts to be LESSEE no later than 7(seven) days from the date of termination. However, if the amount required to be Paid by the LESSEE hereunder exceed the Security Deposit, the LESSEE shall make the payment of the excess amounts forthwith and no later than 7(seven) days.

b) Material Breach of LESSOR: This Lease Deed may be terminated by the LESSEE in case of Material Breach by the LESSOR. Upon the issue of a notice by the LESSEE or Material Breach by the LESSOR, the LESSOR shall be provided with a Cure Period, and in the event that the LESSOR fails to remedy the Material Breach within the Cure Period, the LESSEE would be entitled to forthwith te4rmiate this Lease Deed.

Upon the exercise of the right of termination by the LESSEE for a Material Breach b y the LESSOR, the LESSEE would, Subject to the LESSEE, at all times being paid the liquidated damages in accordance with the provisions of the Lease Deed and receiving back the Security Deposit, (i) be required to pay the LESSOR the amounts owed to it by way of Monthly rent and Other Charges, if any up to the date of termination; and/or (ii) all (reasonable) costs to be incurred in connection with repair and restoration of the Said Premises, subject to normal wear and tear, except where the need of such repair and restoration has arisen due to any act attributable to the LESSOR or Force Majeure events. The LESSOR shall be required to refund the Security Deposit to the Lessee no later than 7(seven) days from the date of termination. In the event of the LESSEE being required to make any payments to the LESSOR under the present Clause, the LESSEE shall make such payments to the LESSOR not later than 7(seven) days from the date on which the Security Deposit is refunded to it by the LESSOR.

On termination of this Lease Deed by the LESSEE due to the Material Breach by the LESSOR, in addiction to returning the Security Deposit, the LESSOR would, forthwith and no later than 7(seven) days from the date of termination of the Lease Deed, be required to pay to the LESSEE liquidated damages covering all losses, including but not limited to loss of business and so on shall not exceed the aggregate of one year rentals accruing under this Lease Deed. The parties agree that these liquidated damages are genuine, reasonable and pre-estimated damages and do not amount to a penalty on the LESSOR. Additionally all liability towards the lock-in-period shall cease upon the date of termination {only after deducting any dues if any} and the LESSEE shall not be liable to make any payments for remaining months of the lock-in-period, if that be the case."

11. As noted above, written statement has not been filed by the defendant within 30 days from the receipt of summons and no application for condonation of delay in filing the written statement being on record, the written statement cannot be read. Case of the plaintiff is that the defendant defaulted in making payments for the monthly rent from August 2018, thus constraining the plaintiff to issue a legal notice dated 27th November, 2018 served on 28th November, 2018. Clause 4 of the lease deed provides that the monthly rent for any calendar month as stipulated in Clause 4.1 shall be payable in advance on or before 7th day of each calendar month and the plaintiff was handed-over advance cheques as mentioned in Clause 4.4 but on presentation the same were dishonoured. Clause 11.2 of the lease deed provides for termination of lease by the lessor in case of material breach by giving 15 days notice, wherein such material breach is capable of being cured and within which the lessee would be required to cure such material breach as claimed by the lessor, the cure period being 15 days which if not cured and the lessee fails to remedy the material breach between the cure period, the lessor would be entitled forthwith to terminate the lease deed.

12. Non-payment of monthly rent on or before the 7th day of each calendar

month is a material breach of the terms of contract and despite the notice dated 27th November, 2018 being served on the defendants on 28th November, 2018 no remedy was taken within the cure period i.e. 15 days. Hence the reply to the application that the lessee was entitled to retain the lease premises for a period of three years which was further extendable cannot be accepted in view of the material breach having been caused by the defendant in non-payment of the rent amount.

13. Grievance of the defendant in the reply to the application under Section 108 (q) of the Transfer of Property Act is that the plaintiff did not give the defendants a legally permissible suit premises to run their business as the premises did not have commercial electricity meters although the premises were being used as a guest house and thus the defendant was required to pay penalty due to heavy load on the domestic meters. It is not disputed in the application that the premises in question was on a land for mixed use as per Master Plan of Delhi 2020-2021 and prior to the defendant the same was being used for the purpose of running a guest house since the year 2010. As per the recital E besides representation of the lessor that the premises was legally permissible to be used as guest house, the lessee had also verified the same from its own source. Thus, the burden that the premises did not have commercial electricity meters cannot be put entirely on the plaintiff i.e. the lessor.

14. Plea of the defendant that the air-conditioners in the suit premises were not working since the beginning of the lease and the suit premises was damaged with seepage in the walls cannot also be looked into without any document in the form of notice being issued by the defendant to the plaintiff. Learned counsel for the defendant also refers to the letter of the plaintiff dated 30th April, 2019 stating that the electricity in the suit premises has been discontinued at the request and behest of the plaintiff who had written to the Executive Engineer, NDMC to disconnect the electricity connection.

15. As noted above, the defendant had not paid rent to the plaintiff since September, 2018. It is also the case of the plaintiff that the electricity and water charges were not being paid and thus subsequent to the termination of the lease deed, the statutory dues not being paid by the defendant, the plaintiff/ lessor was within his right to have asked for disconnection of the electricity on 30th April, 2019 after having terminated the lease deed.

16. Consequently, the suit is liable to be decreed in favour of the plaintiff and against the defendants who are directed to hand-over vacant peaceful possession of the suit property within one month from today. A decree is also passed in favour of the plaintiff and against the defendant directing it to pay arrears of rent for the month of September, October and November 2018 @ ☐ 18 lakhs per month. The defendant would also pay damages to the plaintiff from December 2018 since when the lease got terminated @ ☐ 18 lakhs per month till realization along with an interest @ 9% per annum. The decree is passed in favour of the plaintiff and against the defendant who would pay the electricity dues till 30th

April, 2019 i.e. day when the plaintiff sought disconnection of the electricity in the suit premises. The decree is passed in favour of the plaintiff and against the defendant for clearing the arrears of water bills till the date of handing-over the possession. The defendant would also pay the statutory charges such as TDS, license fee, guest house fee and GST charges.

17. The defendant would be entitled to deduct a sum of ☐ 1,08,00,000/-from the amount due towards the plaintiff.

18. Suit and applications are accordingly disposed of.