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

\+ **IA No.10279/2010 in CS(OS) 672/2009**

SHRI SATISH C. SHARMA & ORS. ..... Plaintiffs
Through: Mr. Neeraj Kishan Kaul, Sr. Advocate with Mr. Akshay Makhija, Advocate

versus

M/S S.A.S. LEASING PVT. LTD. & ANR. ..... Defendants
Through: Mr. P.V. Kapur, Sr. Advocate with Ms. Shraddha Deshmukh, Ms. Pragya Ohri and Mr. Varun Kumar, Advocates for defendant No.1.
Mr. L.K. Bhushan and Mr. Kartik Bajpai, Advocates for defendant No.2.

% Date of Decision : July 10, 2012

**CORAM:**
**HON'BLE MS. JUSTICE REVA KHETRAPAL**

**J U D G M E N T**

**: REVA KHETRAPAL, J.**

**IA No.10279/2010 (under Order XII Rule 6 CPC filed by the plaintiffs)**

**1.** This application is filed by the plaintiffs under the provisions of Order XII Rule 6 Code of Civil Procedure praying for a decree of possession against the defendants in respect of property bearing Shop

No.E-2, Connaught Place, New Delhi; more specifically shown and delineated in the site plan annexed with the suit.

**2.** The essential facts are not in dispute. The plaintiffs are the owners/landlords of the suit property – Shop No.E-2, Connaught Place, New Delhi, admeasuring 2,000 sq. ft. on the ground floor and 1,500 sq. ft. on the mezzanine floor. The defendant No.1 – M/s. S.A.S. Leasing Pvt. Ltd. is the tenant in respect of the said shop at a monthly rent of ₹ 450/- per month. The tenancy of the defendant No.1 in respect of the suit property commences on the first day of each calendar month and ends on the last day of the same English calendar month. The tenancy is from month to month.

**3.** It is the case of the plaintiffs that on or about October, 2004 the defendant No.1 has entered into a sub-tenancy agreement with defendant No.2 and even though the agreement between defendant No.1 and defendant No.2 has been termed as a Consignment Sales Agreement, the terms and conditions of the agreement clearly establish that the said agreement is nothing but a camouflage and that the agreement is, in fact and in substance, a tenancy agreement.

**4.** Both the defendants filed written statements contesting the suit. The defendant No.1–M/s. S.A.S. Leasing Pvt. Ltd. in the written statement filed by it denied the fact that the Consignment Sales Agreement is a tenancy agreement and that there was any camouflage and stated that it (the defendant No.1) is selling the products of the defendant No.2–M/s. Wills Lifestyle. It denied that the defendant No.1 is being paid a monthly rent of ₹ 26 Lacs as alleged by the plaintiffs and submitted that the defendant No.1 is in complete control and possession of the shop in question under the Consignment Sales Agreement dated 22nd January, 2007.

**5.** The defendant No.2 in the written statement filed by it adopted the same stance as the defendant No.1 and elaborated that they had entered into a Consignment Sales Agreement dated 11th October, 2000 and Supplemental Agreement dated 12th October, 2000, followed by another Consignment Sales Agreement dated 22nd January, 2007 and Supplemental Agreement dated 27th January, 2007.

**6.** The plaintiffs thereupon issued a notice to the defendants dated 7th November, 2009 under Order XI Rule 16 CPC requiring the defendants to produce the aforestated Consignment Agreements and

Supplemental Agreements. The plaintiffs also filed IA No.15859/2009 seeking production of the said agreements. The said application was disposed of on 15th April, 2010 in the following terms:-

> *"**IA No. 15859/2009***
>
> *Learned counsel for defendant No.2 states that copies of the documents sought for will be produced and made available to the plaintiff, within three weeks. The said documents shall be furnished to the plaintiffs and filed in the Court with the affidavit as required by the Court."*

**7.** In compliance with the aforesaid order, the defendant No.2 filed the aforesaid documents with the affidavit of the Constituted Attorney of the defendant No.2 on 1st July, 2010. This led to the institution of the present application on 3rd August, 2010 on the premise that a bare reading of the Consignment Sales Agreement along with the Supplemental Agreements (which documents, according to the plaintiffs, the defendants had tried to conceal from this Court) makes it evident that the so-called commission to be paid under the Consignment Sales Agreement has been given a complete go-bye in the Supplemental Agreements and "minimum guarantee" has been fixed. It is alleged that pertinently the first Consignment

Sales Agreement is dated 11th October, 2000 and the same is followed by a Supplemental Agreement which is executed one day after the Consignment Sales Agreement, i.e., on 12th October, 2000. Similarly, Consignment Sales Agreement dated 22nd January, 2007 is followed by a Supplemental Agreement five days thereafter, i.e., dated 27th January, 2007. The Supplemental Agreement dated 12th October, 2000 fixes a "minimum guarantee" of ₹ 66 Lacs per annum, while the Supplemental Agreement dated 27th January, 2007 fixes a "minimum guarantee" of ₹ 2.88 Crores per annum with effect from 1st December, 2006, payable in equal instalments every 45 days. The said agreement also provides that the said "minimum guarantee" shall stand enhanced by 20% after every three years. It is, thus, *ex-facie* evident that there was never any intention to have a Consignment Agreement whereunder payment was to be made on the basis of percentage of sale and the intention all along was to have annual rent in the shape of a fixed "minimum guarantee". Thus, the initial agreement is only a camouflage created with a view to taking the premises out of the purview of the Delhi Rent Control Act.

**8.** It is further alleged in the application that the fact that the system of commission is not being followed is also evident from the bank statement of defendant No.1 filed by the defendant No.1 itself, which clearly shows that the daily sales in its entirety is being transferred to an account in Kolkata, where the Head Office of the defendant No.2 is situated. It is submitted that if the Consignment Sales Agreement was being followed then the amounts remitted to defendant No.2 would have been remitted after deducting 5% towards the commission payable to the defendant No.1. It is, thus, *ex-facie* evident that the defendant No.1 has sub-let the premises to the defendant No.2 for an annual rent which is currently ₹ 3,45,60,000/-. Accordingly, notice of the termination of the tenancy dated 12th February, 2009 was duly served upon the defendants. It is submitted that the defendants though have denied receipt of the said notice in their written statement, it is settled law that if the notice is sent by registered post to the correct address of the defendant and the acknowledgment card is received back, there is a presumption of valid service. In the present case also, it is stated, notice has been served at the correct address, both by registered A.D. post and UPC,

and the A.D. cards have been received back, the originals whereof have been placed on the record. Thus, bald denial of service is of no consequence as held in the case of ***Jindal Dyechem Industries Pvt. Ltd. vs. Pahwa International Pvt. Ltd., 2009 VIII AD (DELHI) 535*** and ***Mrs. Rama Ghai vs. U.P. State Handloom Corporation, 2001 IV AD (DELHI) 471***.

**9.** Reply to the aforesaid application was filed by the defendant No.1 as well as by the defendant No.2 praying for dismissal of the application with exemplary costs, which reply shall be presently adverted to.

**10.** The Court has heard the arguments addressed by Mr. Neeraj Kishan Kaul, Senior Advocate on behalf of the plaintiffs, Mr. P.V. Kapur, Senior Advocate on behalf of the defendant No.1 and Mr. L.K. Bhushan, Advocate on behalf of the defendant No.2.

**11.** The principal contention of Mr. Kaul on behalf of the plaintiffs is that a bare reading of the Consignment Sales Agreements, the Supplemental Agreements and their clauses in totality would establish that the agreements are in effect tenancy agreements and the clauses with regard to Consignor and Consignee relationship are nothing but

a camouflage. The detailed commission formula set out in Clause 4 of the agreements has been given a complete go-by in the Supplemental Agreements, which were executed only a day later/five days later and which provided for a minimum guarantee payment of ₹ 66 Lacs payable in equal installments every 45 days in the year 2000, which was enhanced to ₹ 2.88 Crores payable in equal installments every 45 days with effect from 1st December, 2006.

**12.** On the strength of the judgments of this Court rendered in ***P.S. Jain Company Ltd. vs. Atma Ram Properties (P) Ltd. & Ors., 65 (1997) DLT 308 (DB)*** and ***Atma Ram Properties (P) Ltd. vs. Pal Properties (India) Pvt. Ltd. & Ors., 91 (2001) DLT 438,*** Mr. Kaul contended that it is well settled that if a tenant is paying less than ₹ 3,500/- per month to the landlord and sub-lets the tenanted premises for a rent of ₹ 3,500/- per month or more, then in that case the tenant cannot seek protection under the Delhi Rent Control Act. Identical question had come up for consideration before the Division Bench of this Court in the case of ***P.S. Jain Company Ltd. (supra)*** and subsequently before a learned Single Judge in ***Atma Ram Properties (P) Ltd. (supra)***, in both of which cases it came to be held that the

relevant rent is the one which is paid by the sub-tenant to the tenant and where such rent is more than ₹ 3,500/- per month, no protection under the Delhi Rent Control Act would be available to the defendants and consequently the suit would not be hit by Section 50 of the Delhi Rent Control Act. It was pointed out that after relying upon four Supreme Court judgments dealing with purposeful construction of a statute rather than adopting mechanical approach, the Division Bench in ***P.S Jain Company Ltd. (supra)*** held as follows:-

> *"In our view, the intention behind Section 3(c) is that a premises which fetches a rent of Rs. 3,500/- p.m. should be exempt and that protection should be restricted to buildings fetching a rent less than Rs. 3,500/- p.m. In case a tenant paying less than Rs. 3,500/- p.m. to his landlord has sublet the very same premises – may be lawfully – for a rent above Rs. 3,500/- p.m., then the question naturally arises whether such a tenant can be said to belong to weaker sections of society requiring protection. By sub-letting for a rent above Rs. 3,500/- p.m., the tenant has parted with his physical possession. He is receiving from his tenant (i.e. the sub-tenant) more than Rs. 3,500/- p.m. though he is paying less than Rs. 3,500/- p.m. to his landlord. The above contrast is well illustrated by the facts of the case before us. The appellants tenant is paying only Rs. 900/- p.m. to the plaintiff, while he has sublet*

*the premises in two units, one for Rs. 40,000/- p.m. and another for Rs. 4,500/- p.m. In regard to each of these units, the sub-tenants have no protection of the Rent Act. In our view, the purpose of Section 3(c) is not to give any protection to such a tenant."*

**13.** With respect to the interpretation of the Consignment Sales Agreement, Mr. Kaul contended that whether the document is a Consignment Sales Agreement or a sub-tenancy cannot be determined on the basis of the label of the agreement and the paramount test would be the intention of the parties which is to be determined by the Court from the clauses of the agreement itself. He relied upon the decision of the Supreme Court in the case of ***Delta International Limited vs. Shyam Sundar Ganeriwalla & Anr., (1999) 4 SCC 545*** and in particular on the following extract of the said judgment:-

*" From the aforesaid discussion what emerges is:*
*(1) To find out whether the document creates lease or license* ***real test is to find out 'the intention of the parties'****; keeping in mind that in cases where exclusive possession is given, the line between a lease and a licence is very thin.*
*(2) The intention of the parties is to be gathered from the document itself. Mainly ,the* ***intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that document is a***

***camouflage***. *If the terms of the document evidencing the agreement between the parties are not clear,* ***the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.***

*(3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be the most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.*

*(4) If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole.* ***But in cases where the landlord alleges that the tenant has sublet the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed; the tenant and the subtenant may jointly set up the plea of a license against the landlord which is a camouflage; in such cases, the mask is to be removed or the veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances.*** *Same would be the position where the owner of the premises and the person in need of the premises executes a deed labelling it as a licence deed to avoid the operation of rent legislation.*

*(5)* ……..
*(6)* ……..”

**14.** Reliance was also placed by Mr. Kaul on the judgment rendered in the case of ***R.N. Sachdev vs. Ram Lal Charitable Trust, 1997 III AD (Delhi) 997,*** wherein, in a case under Order XII Rule 6 CPC, it was held that the collaboration agreement entered into between the parties was, in fact, a lease agreement. Mr. Kaul sought to urge on the strength of this judgment that the true intention behind a document can be gone into under Order XII Rule 6 CPC.

**15.** Mr. Kaul next contended that a cumulative reading of the clauses of the agreement in the instant case was clearly indicative of the fact that the Consignment Sales Agreement was in effect a Rent Agreement though labeled a Consignment Sales Agreement. He argued that there were various clauses in the agreement which were wholly inconsistent with the relationship of landlord and tenant and mitigated against the theory of the defendant No.1 having an agency relationship with the defendant No.2. Specific reference was made to the following clauses:-

(A) Clause 2 relating to consignment and delivery and providing only for transfer of stocks from the Consignor to the Consignee:-

> *"……The goods so consigned by the Consignor to the Consignee shall not be deemed to be a sale by the Consignor to the Consignee but shall only be a* ***transfer of stocks*** *from the Consignor to the Consignee for the purpose of sale by the Consignee on behalf of the Consignor. …… The Consignor shall always take due and proper care of the goods so consigned and shall inform the Consignor in writing in case the Consignee is storing the Goods in place(s) other than the Showroom* ***to enable the Consignor to arrange insurance appropriately.****"*

(B) Clause 3(e) relating to providing for positioning a point of sale and hardware and software in the backroom, and vesting of all proprietory rights therein with the Consignor:-

> *"(e) ……The Consignor shall also position hardware and software in the "backroom" of the showroom and the Consignor, its auditors and authorized representatives shall have total access to the data and complete proprietary rights thereof shall vest with the Consignor. ……"*

(C) Clause 4 relating to commission and payments which according to the plaintiffs has been given a complete go-by by the Supplemental Agreement:-

> *"4(a) During the term of this Agreement, the Consignee shall be entitled to a commission of 5% per cent on the Basic Sale Price ("BSP") of the goods……..*

> *4(b) Upon sale of the Goods, the proceeds thereof less Consignee's commission thereon shall immediately vest in the Consignor, and the Consignee shall remit the same to the Consignor forthwith.*
> *4(c) The Consignee shall remit the sale proceeds to the Consignor daily, but not later than the early banking hours of the succeeding Business day on which banks are open. These sale proceeds shall be remitted after deducting commission and taxes payable as set out above and also discounts as may be approved by the Consignor by way of an inter-account transfer from the Consignee's bank account to the Consignors nominated bank account. …….. The Consignee's failure to remit sales proceeds under this clause for a continuous period of seven working days shall amount to a material breach entitling the Consignor to terminate this agreement forthwith and/or without notice enter the showroom and the Consignee's godown, if any, and take possession of the Goods and also sue to recover the dues along with interest, and compensation for the breach."*

(D) Clause 5(i) providing that the Consignor can carry out all such changes in the premises as it may deem necessary; and Clause 5(iii) providing that the Consignee shall carry out all activities in the manner prescribed by the Consignor:-

> *"5(i) In order to ensure that the ambience of the Showroom is of the highest standards in line with the quality and image of the Goods, the Consignee consents to the Consignor carrying*

*out at the Consignor's cost such works including creation of a "backroom" within the Showroom if so required by the Consignor, as per the latter's design, to be used for related activities of the Showroom, modifications and design changes to the Showroom etc. as the Consignor deems necessary. The Consignee shall provide independent access to the "backroom" in order to ensure that sales operations are not hampered during stock receipts. The Consignee has declared that it is at liberty to carry out the necessary modifications under the terms of its tenancy of the Showroom. ……..*

*5(iii) The Consignee shall carry out activities in the Showroom aimed at promoting the sale of the Goods when called upon to do so and in a manner prescribed by the Consignor. The Consignor will reimburse the costs of such promotional campaigns."*

(E) Clause 6 relating to the vesting of title in the goods in the Consignor:-

*"**6. <u>Title</u>***

*The title in the Goods consigned under this agreement by the Consignor shall vest at all times with the Consignor until the Goods are sold by the Consignee and, until such sale, the Goods shall remain in the custody of the Consignee and the Consignee shall be the custodian of the same. The Consignee shall not be entitled to claim any lien, charge or any right or interest whatsoever in or to the goods kept with it by the Consignor even if any claims of the Consignee are pending with the Consignor……."*

(F) Clause 7 providing for insurance of goods by the Consignor and all fixed assets, interiors and other materials to be also insured by the Consignor:-

> *"**7. Insurance***
> *The Consignor will at its own cost take an insurance cover, as it deems appropriate for the Goods held by the Consignee as well as for the Goods in-transit……..*
> *Further, the Consignor will at its own cost, insure all fixed assets and other material belonging to them at the Showroom……..."*

(G) Clause 11(v) providing for reimbursement by the Consignor to the Consignee of the costs of electricity and telephone; and Clause 11(x) enabling the Consignor to place at its sole discretion any fixed assets in the premises:-

> *"11(v) The Consignee shall ensure provision of adequate power for operating the Showroom as per the Consignor's design. The costs of electricity and generator operations (as may be mutually agreed between the parties) and telephones will be reimbursed to the Consignee at actuals before the seventh day of the following month on production of necessary supporting.*
> *11(x) The Consignor at its sole discretion shall be entitled to place for use in the Showroom such fixed assets and other materials belonging to it which, in the opinion of the Consignor are necessary……."*

(H) Clause 13(b) requiring the Consignee to follow all processes of Consignor:-

> *"The Consignee shall follow all processes/controls as per the guidelines prescribed by the Consignor from time to time as contemplated in clause 1."*

(I) Clause 16.2 stipulating that the appointment of personnel by the Consignee is required to be with the prior approval of the Consignor and further, the Consignor may place its own consultants and employees in the showroom:-

> *"16.2 ……. Both parties agree that any appointment of personnel made by the Consignee at the Showroom shall be with prior consent and approval of the Consignor. ……. Notwithstanding anything to the contrary stated herein, both parties agree and confirm that the Consignor shall be entitled to place such consultants and employees in the Showroom as it may desire for the smooth functioning of the Showroom."*

**16.** It is argued by Mr. Kaul that even if the case is sent to trial there is no other evidence which the plaintiffs can lead which will bring forth material other than what is already before this Court. The defendants, in any event, are going to deny the suggestion of sub-letting. Thus, even post-trial this Court would not be in a better

position *qua* the interpretation of the Consignment Agreements and the Supplemental Agreements as there was no likelihood of any further material emerging on the record during trial. Reference in this context was made by Mr. Kaul to a recent decision rendered by this Court in the case of ***Sarwan Dass Bange vs. Ram Prakash, 2010 IV AD (DELHI) 252***. In the said case, in a case under the Delhi Rent Control Act, the Court while deciding the question whether leave to defend is to be granted or not voiced its thoughts as follows:-

> *"21. I have also wondered as to what further can the landlord do, even if compelled to appear in the witness box. The landlord can at best again depose of his intent to settle down or spend considerable time in Delhi in his old age. The tenant would at best in cross examination suggest otherwise to the landlord. The position would be no different than it is today. For this reason also I find no triable issue to be arising on this account either."*

**17.** Mr. Kaul also relied upon the enunciation of the law relating to the provisions of Order XII Rule 6 of the Code of Civil Procedure in various decisions which may be catalogued as follows:-

(i) ***Uttam Singh Duggal and Co. Ltd. vs. United Bank of India & Ors., 2000 (7) SCC 120*** at para 12,

(ii) ***Charanjit Lal Mehra & Ors. vs. Kamal Saroj Mahajan & Anr., 2005 (11) SCC 279*** at para 8,

(iii) ***Karam Kapahi & Ors. vs. Lal Chand Public Charitable Trust & Anr., 2010 (4) SCC 753*** at paras 37 to 46.

(iv) ***Assocham vs. Y.N.Bhargava, 185 (2011) DLT 296*** at paras 7 to 9.

**18.** Since the law laid down in the aforesaid decisions is oft quoted and well settled, detailed discussion of the aforesaid judgments is not being undertaken and it is only noted that the aforesaid judgments highlight the futility of the Court insisting upon a full blown trial when there exist on the record admissions of the opposite party to the pleadings of the plaintiff or where such admissions can be inferred from the facts and circumstances of the case and fully justify the passing of a decree without the parties undergoing the rigmarole of trial.

**19.** Rebutting the contentions of Mr. Kaul, Mr. P.V. Kapur argued that the present case is not a case for the grant of any relief under the provisions of Order XII Rule 6 as there are serious disputed questions

of fact and law involved in the suit, which are raised by the plaintiffs themselves. The suit is based on the misconceived notion that there is a tenancy relationship between the defendant No.1 and the defendant No.2. The assertion of the plaintiffs that the Consignment Sales Agreement is nothing but a camouflage and the said agreement is in fact and in substance a Sub-Tenancy Agreement is categorically denied by the defendants, and as such it cannot be said that these assertions are either admitted in the *pleadings* or they are admitted *otherwise*. The plaintiffs' contention in the present application that the theory of "commission has been given a go-by in the Supplemental Agreements and minimum guarantee fixed" is strongly refuted by the defendants. As such, serious issues of fact and law arise and there can be no question of the plaintiffs seeking a decree of possession as claimed or otherwise on the basis of admissions.

**20.** Mr. Kapur contended that the plaintiffs can only be said to be entitled to a decree under Order XII Rule 6 CPC if on a plain reading of the Consignment Sales Agreement and Supplemental Agreements, it can be conclusively stated that no two opinions are possible and the agreements conclusively reflect a landlord tenant relationship

between the defendant Nos.1 and 2. If, however, on a plain reading of the Consignment Sales Agreement and Supplemental Agreements, two opinions are possible, then the defendants can by no stretch claim a decree under Order XII Rule 6 CPC. He pointed out that in the plaint, there is no assertion at all that possession has been parted with by the defendant No.1 to the defendant No.2 and it is the defendant No.2 who is in exclusive possession of the demised premises. On the other hand, in the written statements filed by the defendant No.1, the defendant No.1 has made a categorical assertion that it is in exclusive possession and control of the premises in question.

**21.** Mr. P.V. Kapur also contended that a Consignment Sales Agreement is by no means a red herring but is a commercially known and accepted mode of business. In ***Black's Law Dictionary, 6th Edition*** at page 307, the terms "Consign", "Consignment" and "Consignment Contract" are defined as under:-

> ***"Consign***
>
> *To deliver goods to a carrier to be transmitted to a designated factor of agent. To deliver or transfer as a charge or trust. To commit, intrust, give in trust. To transfer from oneself to the care of another. To send or transmit goods to a merchant, factor, or agent for sale. To deposit with another to be sold,*

*disposed of, or called for, whereby title does not pass until there is action of consignee indicating sale."*

***"Consignment***

*The act or process of consigning goods; the transportation of goods consigned; an article or collection of goods sent to a factor; goods or property sent, by the aid of a common carrier, from one person in one place to another person in another place; something consigned and shipped. Entrusting of goods to another to sell for the consignor. A bailment for sale.*

*The term "consignment", used in a commercial sense, ordinarily implies an agency and denotes that property is committed to the consignee for care or sale. Parks v. Atlanta News Agency, Inc., 115 Ga.App. 842, 156 S.E.2d 137, 140."*

***"Consignment contract***

*Consignment of goods to another (consignee) for sale under agreement that consignee will pay consignor for any sold goods and will return any unsold goods. A bailment for sale."*

He also relied upon the following definitions of "Consignment for Sale" and "Consignment for Sale on Commission" in ***Words and Phrases, Volume 8A***:-

*"**Consignment for sale***

*Ordinarily, under "Consignment for sale", title to goods remains in consignor, but whether "consignee" is to be considered as a "buyer" or "agent" depends on intention of*

*parties and on real nature of transaction, rather than the language which parties may have employed. C.V.Hill & Co. vs. Interstate Electric Co. of Shreveport, La.App., 196 So. 396, 399."*

*"**Consignment for sale on commission***

*A consignment to a commission merchant of grain to be stored, the intention being that the consignee shall sell the same when so instructed by the consignor, is a "consignment for sale on commission" within the protection of the commission merchant's bond required by Section 7472. Swisher vs. Fidelity & Casualty Co. of New York, 204 N.W. 383, 384, 113 Neb. 592."*

**22.** It was contended by Mr. Kapur that the provision of a minimum guarantee in a closing sale transaction by no means conclusively establishes a landlord-tenant relationship between the Consignor and the Consignee. Even otherwise, as set out in the reply filed by it, the defendant No.1 has received only the following commissions from the defendant No.2 for the past three years:-

| **Period** | **Commission Received** |
|---|---|
| 2007-2008 | 2,88,00,000 |
| 2008-2009 | 2,64,00,000 |
| 2009-2010 | 1,71,00,000 |

Thus, factually in the years 2008, 2009 and 2010, the defendant No.1 had received less than the minimum guaranteed amount, and only the commission on sales was being given.

**23.** The learned senior counsel for the defendant No.1 also pointed out that the clauses in the Consignment Sales Agreement were clearly inconsistent with the relationship of Lessor and Lessee and on a holistic reading of the clauses in the Consignment Sales Agreement read with the Supplemental Agreement, it cannot be said that any sub-lease has been created by the defendant No.1 in favour of the defendant No.2. Reference in particular was made by him to Clause 3 of the Agreement, which reads as follows:-

> ***"3. The Consignee declares that it is in lawful possession and will continue to be in lawful possession as monthly tenant, of a showroom (hereinafter referred to as the 'Showroom') at E-2, Connaught Place, New Delhi 110 001 (more fully described in the ground plan attached hereto and marked Annexure "A").***

**24.** Referring to Clause 2 of the Agreement relating to ***Consignment and Delivery***, Mr. Kapur contended that the provision in the said clause that the goods so consigned by the Consignor shall not be deemed to be a sale by the Consignor to the Consignee but shall only be a **transfer of stocks** from the Consignor to the Consignee is the very essence of a Consignment Sales Agreement. The fact that the Consignor was arranging for the insurance of the

goods in the showroom also does not detract from the case of the defendants that the defendant No.1 agreed to sell the branded goods and apparel of the defendant No.2. Clause 4 of the Agreement clearly provided for the entitlement of the defendant No.1 to commission of 5% on the basic sale price of the goods sold and laid down the manner in which such calculation was to be made. It further provided that upon sale of the goods the proceeds thereof less Consignee's commission would vest in the Consignor, and the Consignee would remit the same to the Consignor forthwith/daily. The Consignee was to open a separate bank account for the aforesaid purpose in the same bank and branch in which the Consignor maintained its bank account in order to facilitate instant intra-branch account transfer. That the title in the goods was to vest in the Consignor is also reflective of the fact that the agreement between the parties was for consignment sales.

**25.** Mr. Kapur further contended that under Clause 10 of the Agreement, the Consignee was to furnish to the Consignor within three weeks of the agreement, security in the form of an irrevocable bank guarantee of ₹ 20 Lacs. Had it been a sub-tenancy, there was no question of the landlord furnishing security to the tenant. He pointed

out that Clause 11 of the Agreement also enumerates the responsibilities of the Consignee and is not at all consistent with the theory of landlord-tenant relationship between the defendant No.1 and the defendant No.2. Sub-clause (xii) of Clause 11 is significant which reads as under:-

> *"(xii) The Consignee shall forward "Form F" to the Consignor for all Goods received under the terms of this agreement, whenever required under the sales tax laws."*

**26.** Mr. Kapur strongly contended that the fact that "Form F" was to be filed by the Consignee/defendant No.1 conclusively shows and establishes that the Consignment Sales Agreement was not a camouflage for a sub-tenancy. He buttressed his contention by drawing the attention of this Court to Section 6A of the Central Sales Tax Act, 1956 and Sub-rule (5) of Rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957. The said provisions for the sake of ready reference are reproduced hereunder:-

**Section 6A of the Central Sales Tax Act, 1956**

> *"**6A. Burden of proof, etc., in case of transfer of goods claimed otherwise than by way of sale** – (1) Where any dealer claims that he is not liable to pay tax under this Act, in respect of any goods, on the ground that the movement of such goods from one State to another was*

*occasioned by reason of transfer of such goods by him to any other place of his business or to his agent or principal, as the case may be, and not by reason of sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer and for this purpose he may furnish to the assessing authority, within the prescribed time or within such further time as that authority may, for sufficient cause, permit, a declaration, duly filled and signed by the principal officer of the other place of business, or his agent or principal, as the case may be, containing the prescribed particulars in the prescribed form obtained from the prescribed authority, along with the evidence of despatch of such goods and if the dealer fails to furnish such declaration, then, the movement of such goods shall be deemed for all purposes of this Act to have been occasioned as a result of sale.*

*(2) If the assessing authority is satisfied after making such inquiry as he may deem necessary that the particulars contained in the declaration furnished by a dealer under sub-section (1) are true he may, at the time of, or at any time before, the assessment of the tax payable by the dealer under this Act, make an order to that effect and thereupon the movement of goods to which the declaration related shall be deemed for the purpose of this Act to have been occasioned otherwise than as a result of sale."*

**Rule 12(5) of Central Sales Tax (Registration and Turnover) Rules, 1957**

*"(5) The declaration referred to in sub-section (1) of Section -6A shall be in Form 'F'."*

**27.** Mr. Kapur contended that thus the law of Sales Tax in India clearly provided for filing of "Form F" where any dealer claims that he is not liable to pay tax under the Act in respect of any goods on the ground that the movement of such goods was occasioned by reason of transfer of such goods to his agent or principal as the case may be, and not by reason of sale. In the present case, the defendant No.1 was to furnish "Form F" in terms of the aforesaid provision by way of a declaration and the furnishing of "Form F" by the defendant No.1 to the statutory authorities is wholly inconsistent and demolishes the theory of sub-tenancy evolved by the plaintiffs.

**28.** He submitted that the remaining clauses of the Agreement were also *in tandem* with a Consignor-Consignee relationship *inter* se the defendant Nos.1 and 2. Clause 16 provided that all the personnel employed in the showroom would be the employees of the Consignee, and the Consignee would be wholly responsible for filing all statutory returns in respect of its employees and for making all payments to such employees. Clause 16.7.1 clearly provided that nothing contained in the agreement would be construed as creating any interest in the immovable property of the showroom, while

Clause 16.11 provided that the **Consignee shall at all times be in exclusive legal and physical possession of the premises and the premises shall always be under the lock and key of the Consignee** who shall open the premises in the morning and close it in the evening and his right to the premises as a Lessee shall not be disturbed or interfered by the Consignor in any manner.

**29.** Mr. Kapur contended that the reliance placed by the plaintiffs upon the decisions rendered in ***Uttam Singh Duggal (supra), Karam Kapahi (supra)*** and ***Charanjit Lal Mehra (supra)*** is wholly misplaced. He particularly relied upon the following extract from the case of ***Charanjit Lal Mehra (supra)*** to urge that no admission can be inferred in the present case relying upon the aforesaid judgment, wherein it is held that the admission inferred should be **"without any dispute"** and there should be **"no two opinions"** in the matter:-

> *"In fact, Order 12 Rule 6, C.P.C. is enacted for the purpose of and in order to expedite the trials it there is any admission on behalf of the defendants or an admission can be interred from the facts and circumstances of the case without any dispute; then, in such a case in order to expedite and dispose of the matter such admission can be acted upon. In the present case,* ***looking at the terms of lease deed, there can be no two opinions that the tenancy was***

> ***joint/composite and not an individual one****……. Therefore, in the present case, as appearing to us, there is a clear admission on behalf of the defendants that there existed a relationship of landlord and tenants, the rent is more than Rs. 3500/-and the tenancy is a joint and composite one.* ***As such, on these admitted facts, there are no two opinions in the matter*** *and the view taken by the learned Single Judge of the High Court appears to be correct and there is no ground to interfere in this Special Leave Petition and the same is dismissed."*

**30.** He submitted that the judgment in the case of ***R.N. Sachdeva (supra)*** relied upon by the plaintiffs is not an authority for the proposition that payment of minimum guarantee would amount to creation of a tenancy. The said case was in fact clearly distinguishable on facts, in that the Collaboration Agreement between the parties which was relied upon by the plaintiffs nowhere stated that the possession of the premises would remain or remained with the plaintiffs or the plaintiffs had any right or control over the affairs of the nursing home set up by the defendants in the premises. The Court, therefore, arrived at the conclusion that none of the terms and conditions agreed to in the said Agreement were inconsistent to the relationship of landlord and tenant and accordingly proceeded to pass

a decree of possession under Order XII Rule 6 CPC on the ground that the notice of termination of tenancy stood proved and no further proof was required. In direct contrast, in the present case it is the defendant No.1 who is in exclusive possession of the premises as per the agreement between the parties and the defendant No.2 has no right or control over the premises. The clauses in the agreement are also wholly inconsistent with the theory of sub-tenancy.

**31.** Mr. Kapur further contended that in any event under the provisions of Order XII Rule 6 CPC, an interpretative exercise cannot be undertaken by the Court. In this context, he relied upon the Division Bench decision of this Court rendered in the case of ***Raj Kumar Chawla vs. Lucas Indian Services, 129 (2006) DLT 755 (DB)***. While dealing with the provisions of Order XII Rule 6 CPC, the Court in the said case made the following apposite observations:-

> *"5. …….. Admission has to be unambiguous, clear and unconditional and the* ***law would not permit admission by inference as it is a matter of fact. Admission of a fact has to be clear from the record itself and cannot be left to the interpretative determination by the Court, unless there was a complete trial and such finding could be on the basis of cogent and appropriate evidence on record.****"*

**32.** By way of analogy, reliance was placed by learned senior counsel for the defendant No.1 on the decision of the Supreme Court rendered in ***Mrs. Raj Duggal vs. Ramesh Kumar Bansal, AIR 1990 SC 2218***. In the said case, while dealing with an application for leave to defend in a suit under Order XXXVII of the Code the Court made the following pertinent observations:-

> *"If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied."*

**33.** Mr. Kapur contended that on a parity of reasoning in the present case it would not be appropriate for the Court to decree the suit at this preliminary stage without the parties going to trial. He also relied upon the judgment rendered by this Court in ***Manisha Commercial Ltd. vs. N.R. Dongre and Anr., AIR 2000 DELHI 176***, and in particular relied upon the following extract from the said judgment to contend that where there is a serious dispute regarding the interpretation to be given to a legal document/legal regime, the

only option for the Court is to frame issues and allow the parties to proceed to trial, though the Court in an appropriate case may possibly dispense with the trial and proceed directly to the stage of final arguments:-

> *"6. ……The Apex Court has enjoined the trial Court to meaningfully fulfill this judicial exercise. Order XII, Rule 6 in fact prescribes this duty shall be a suo motu exercise. This Rule however, predictably invests discretion with the Court that is even if there is an unequivocal admission by a party but the passing of a judgment would work injustice on it, judgment could be declined. In the case at hand, even though counsel for the defendants have not denied that there is no controversy concerning the factual matrix, there is a serious dispute regarding the interpretation to be given to the legal regime (found in the Indian Trusts Act). A conjoint reading of this Rule with Order XV Rule 1 renders the position free from doubt. Could it be reasonably argued that the parties are not at issue with each other in the present case. I think not. Even on the admitted facts it is highly debatable whether the judgment should be delivered as pleaded for in the plaint. The only option for the Court is to frame issues, and since facts are not in contest, possibly dispense with the 'Trial' and proceed directly to the stage of 'Final Arguments'. But it would be wholly inappropriate to permit any party to employ Order XII, Rule 6 in those instances where vexed and complicated questions or issues of law have arisen……"*

**34.** The learned senior counsel next contended that parting of possession of premises by the tenant and exclusive possession of sub-tenant were the essential ingredients to be proved in the present case and the burden of proving them was squarely upon the plaintiffs. The present case was, therefore, not a fit case for the Court to exercise its discretion under Order XII Rule 6 CPC. In other words, the exclusive possession of the premises being the first criteria for establishing sub-letting and the same not being established, the plaintiffs cannot be allowed to press into service the provisions of Rule 6 of Order XII CPC, more so, when no admissions had been made by the defendants in this regard.

**35.** On the same aspect, Mr. Kapur referred to the judgment in ***Celina Coelho Pereira (Ms) and Ors. vs. Ulhas Mahabaleshwar Kholkar and Ors., (2010) 1 SCC 217***, wherein the Supreme Court after reviewing the entire gamut of case law on the aspect of sub-letting summarized the legal position as follows:-

> *"25. The legal position that emerges from the aforesaid decisions can be summarised thus:*
> *(i) In order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, (one)*

*parting with possession of tenancy or part of it by tenant in favour of a third party with exclusive right of possession and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.*

*(ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to sub-letting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.*

*(iii) The existence of deed of partnership between tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.*

*(iv) If the tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.*

*(v) Initial burden of proving subletting is on the landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.*

> *(vi) In other words, initial burden lying on landlord would stand discharged by adducing prima facie proof of the fact that a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted."*

**36.** On the strength of the aforesaid judgments, Mr. Kapur contended that there was not even an averment in the plaint or even in the application under Order XII Rule 6 CPC that the defendant No.1 had parted with possession of the premises to the defendant No.2 and thus no admission could be inferred by this Court.

**37.** Reliance was also placed by Mr. Kapur on the judgment rendered by the Supreme Court in the case of ***Balraj Taneja and Anr. vs. Sunil Madan and Anr., (1999) 8 SCC 396*** to contend that it is a matter of the Court's satisfaction and only on being satisfied that there is no fact which needs to be proved on account of the deemed admission, the Court can pass a judgment against the defendant who has not filed the written statement; but if the plaint itself indicated that there were disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself and the Court had to choose between two different versions put forth before it, it would not be safe for the Court to pass a judgment

without requiring the plaintiff to prove the facts so as to settle the factual controversy.

**38.** Mr. N.K. Kaul, the learned senior counsel for the plaintiffs rejoined to the aforesaid contentions raised on behalf of the defendants by submitting that though the "minimum guarantee" by itself may not be conclusive; however, the fact that it finds mention in a separate document executed a day after the Consignment Agreement *ex-facie* demonstrates that the Consignment Agreement was a camouflage and the commission formula was never meant to be implemented. As regards the contention of the defendants that in the years 2008, 2009 and 2010, the defendant No.1 had received less than the "minimum guarantee" amount, Mr. Kaul countered the same by stating that the said figures which are mentioned in the reply under Order XII Rule 6 CPC could easily have been manipulated by the defendants in collusion with each other, since the suit was filed on 1st April, 2009 and the aforesaid figures could have been tabulated post 31st March, 2009.

**39.** Mr. Kaul submitted that the reliance of the defendant No.1 on the judgment of ***Mrs. Raj Duggal (supra)*** was misplaced as the said

decision was rendered by the Court while dealing with the provisions of Order XXXVII of the CPC. He, in turn, relied upon the judgment in ***P. Chandrasekharan and Ors. vs. S. Kanakarajan and Ors., (2007) 5 SCC 669*** to contend that as held by the Supreme Court in the said case the interpretation of a document which goes to the root of the title of a party gives rise to a substantial question of law.

**40.** Having heard the learned senior counsel for the parties at length, in my considered opinion, this is not a fit case for exercise of discretionary power vested in the Court by Rule 6 of Order XII CPC. I say so for the reason that it cannot be said that there is any admission either of fact or law in the present case which can be inferred or gleaned from the pleadings or the documents filed by the defendant No.1 or the defendant No.2. There is no dispute as to the fact that the defendant No.1 has not parted with the possession of the premises to the defendant No.2 which is a *sine qua non* for the creation of a sub-tenancy. There is not even an assertion in the plaint or in the application under Order XII Rule 6 CPC that the premises are in the possession of the defendant No.2. A holistic reading of the Consignment Sales Agreements with the Supplemental Agreements

also do not point to the creation of a sub-lease, notwithstanding the provision for "minimum guarantee" in the Supplemental Agreements. The plaintiffs have nowhere disputed the fact that the defendants are carrying on the sale of the branded goods/apparel of the defendant No.2, M/s. Wills Lifestyle. The question which arises is why would a landlord sell the goods of his tenant? A doubt is also created as to why personnel will be employed by the landlord for the benefit of his tenant taking on the statutory responsibilities consequent thereto. Then again, why would the defendant No.1 file "Form F" mandated by the Central Sales Tax Act, if not for the purpose of consignment sales.

**41.** The defendants have also placed on record their statements of account to show that they were incurring various expenses from time to time in order to comply with the provisions of the agreement. Although the plaintiffs' counsel sought to pick holes in the said account by submitting that Bank Account No.00030420000243 with HDFC Bank clearly shows that the entire amount deposited in defendant No.1's account was being transferred to two different accounts ending with Nos.0237 and 0250 and the balance in the

account of the defendant No.1 keeps coming to zero, I find from the record that the defendant No.1 thereafter filed two other bank statements pertaining to Bank Account Nos. 00030420000250 and 00030420000243 both with HDFC Bank and bank account ending with No.0234 with HDFC Bank (pages 55 to 242 of Part-III file) to clarify the matter. The defendants' counsel then submitted that neither of these accounts shows any expenses being incurred by the defendant No.1 and in fact these amounts only reflect transfer between the defendant No.1 and defendant No.2 as well as payment received from credit card companies. Be that as it may, in the opinion of this Court, the accounts further reflect that the matter needs to be gone into and cannot be summarily disposed of at this stage by passing a decree as prayed for by the plaintiffs.

**42.** Most importantly, a categorical assertion has been made by the defendant No.1 that possession has not been parted with by the defendant No.1 to the defendant No.2. The defendant No.2 has reinforced the said statement by stating that the defendant No.1 is only selling the products of the defendant No.2 from its showroom and under its own supervision and control and that the defendant No.1

is in lawful possession of the showroom. The plaintiffs have not been able to refute the aforesaid assertion made by the defendant No.1 that it is in exclusive possession of the showroom. It cannot be lost sight of that the premises in question are of a commercial nature eminently suitable for running a showroom. Why then should the defendant No.1 be precluded from running a showroom of M/s. Wills Lifestyle in the premises. The record shows that the defendant No.1 has been running its agency business since the year 2000 and the present suit has been filed in April, 2009, i.e., more than nine years after the defendant No.1 commenced its aforesaid business. The plaintiffs, however, allege that they came to know of the same *"very recently"* without specifying the date. In such circumstances, a legitimate doubt arises as to why the plaintiffs who reside in Delhi did not protest any sooner and came to file the present suit nine years after the defendant No.1 commenced running its showroom of M/s. Wills Lifestyle in the tenanted premises.

**43.** As regards the interpretation of the Consignment Sales Agreement, I am of the opinion that the meaning and interpretation of a document raises a triable issue. It is not a legal exercise simplicitor,

as is sought to be made out by the learned senior counsel for the plaintiffs. The intention of the parties is of paramount importance and such intention, in my opinion, must be gathered from the surrounding facts and circumstances. The Court must determine from the evidence on record the pith and substance of the transaction between the parties, irrespective of the labelling of the document under which the parties have transacted. A mere reading of the clauses may not sufficiently indicate the nature of the transaction which the parties intended to chronicle. Indubitably, the intention of the parties has ultimately to be inferred by the Court but there must be a foundation for the Court to infer the intention of the parties and such foundation must necessarily be laid by the parties through trial. It is only upon gleaning the evidence adduced that the Court may be able to decipher whether the document is a camouflage and whether it masks a sham transaction or a transaction which the law does not countenance. To say that because there is a "minimum guarantee" amount provided for in the present case the same must be interpreted to mean "rent" would be to oversimplify the matter. The question for all intents and purposes is a vexed one and no precise mathematical

test or litmus test can be applied to determine the intent of the parties nor it is possible or indeed proper for the Court to conjecture or surmise the intent of the parties at this stage.

**44.** For all the aforesaid reasons, in my opinion, the present case is a fit case which must proceed to trial. I am unable to glean or gather any admission(s) which may enable me to adopt the easier course of passing a decree forthwith. It is, therefore, inevitable that the plaintiffs must go through the rigors of a trial to prove and establish their case. The present application is accordingly dismissed and the case directed to be listed for admission/denial before the Joint Registrar on 13th August, 2012.

**45.** IA No.10279/2010 stands disposed of in the above terms.

**REVA KHETRAPAL**
**JUDGE**

**July 10, 2012**
***km***