

* **HIGH COURT OF DELHI : NEW DELHI**

RCSA. No.8/2002 & CM No.27/2002

% Judgment reserved on: 4th August, 2009

Judgment delivered on: 27th August, 2009

Shri Pearey Lal

S/o. Shri Fateh Chand

Since deceased now represented by:-

(1) Shri Ghansham Sharma,
S/o. Late Shri Pearay Lal,
R/o. V-2, Green Park Extension,
New Delhi

....Appellants

Through: Mr. V.B. Andley, Sr.
Adv. with Mr. Rajinder
Mathur, Adv.

Versus

1. Shri Surendra Nath
S/o. Late Shri Daya Ram,
R/o. 74/1, Yusuf Sarai,
New Delhi.

2. Sarwati Devi (since deceased)
Wd/o Late Shri Pearey Lal

(a) Radhey Sham Sharma
S/o. Late Shri Pearey Lal

(b) Rakesh Sharma
S/o. Late Shri Pearey Lal

Both residents of
V-2, Green Park Extension,
New Delhi.

- (c) Veena Sharma
D/o. Late Shri Pearey Lal
R/o. 3/52, Suklan Gali,
Chota Bazar, Shahdara
Delhi-110032.
- (d) Sundri Sharma
D/o. Late Shri Pearey Lal
C/o. Shri Guru Dutt Sharma
R/o. House No.1, Jawahar Colony,
NIT, Faridabad.
- (e) Rajni Sharma
D/o. Late Shri Pearey Lal
R/o. A-64, Second Patel Nagar,
Naya Bus Adda, Ghaziabad.
- (f) Shri Ghansham Sharma
S/o. Late Shri Pearey Lal,
R/o. V-2, Green Park Extension,
New Delhi. Respondents.

Through: Mr. M.R. Shamshad and
Mr. Shahzad Hussan,
Advs for R-1.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

Present appeal has been filed against judgment dated 6th December, 2001 of Rent Control Tribunal (for short as 'Tribunal'), Delhi, vide which appeal of respondent no.1 was allowed.

2. Brief facts are that respondent no.1, filed petition under Section 14(1)(j) of Delhi Rent Control Act (for short as 'Act') in respect of a shop forming part of property No.74/5, Yusuf Sarai, New Delhi. It was alleged in the petition that Pearey Lal (since deceased)-the tenant, unauthorizedly and illegally removed the walls as shown yellow in site plan. He also unauthorizedly constructed mezzanine in the shop as shown in red in site plan and also made an opening in the roof of the shop. He also made some encroachment upon the terrace of shop on which he had no right. The tenant caused substantial damage to the premises in question and changed entire identity of the shop. The estimate loss assessed by respondent no. 1 was Rs. 50,000/-.

3. Eviction petition was contested by Pearey Lal (deceased), who in written statement, admitted

relationship of landlord and tenant between the parties. It was stated that shop in dispute was taken on rent by Sh. Fateh Chand, father of late Pearey Lal in year 1950, from Daya Ram, father of respondent no. 1, where Fateh Chand was carrying on Halwai shop. At that time, shop consisted of a Phoos chappar in front and at its back portion was having pucca roof on wooden beams and stone slabs and portion behind it, had a tin roof. In December, 1973, Daya Ram-landlord, permitted Fateh Chand-tenant, to change the said tin roof into a pucca roof and to make necessary repairs at his own costs and consequently, rent was increased to Rs. 35/- p.m. On death of Daya Ram, his son Surendra Nath-respondent no. 1 herein became the landlord, while and on death of Fateh Chand, his son Pearey Lal became tenant.

4. In January, 1985, respondent no. 1 permitted Pearey Lal to change the roof of the entire shop and to increase the height by two feet, at his own cost for the purpose of construction of mezzanine in the shop. For granting this permission, respondent no. 1, took Rs.10,000/- from the tenant. As per said permission, the tenant got roof of the

shop changed and increased the height of room by two feet.

5. Regarding removal of walls, it is alleged that petition does not specify when and how the walls were removed. With regard to construction of mezzanine, it is stated that it is neither illegal nor unauthorized. In any case, the same has been constructed with the permission of respondent no. 1, the landlord.

6. With regard to opening in roof, it is stated that it is neither unauthorized nor is it without consent and knowledge of landlord. Terrace over the shop is under tenancy of tenant. It is denied that any damage has been caused to tenanted premises or identity of shop has been changed in any manner.

7. In replication, it was denied that permission was granted to change roof of the entire shop to raise height by two feet. It is alleged that under the grab of repair of roof, height of roof had been raised and holes made in roof, besides construction of unauthorized mezzanine, much after January, 1985. It has caused substantial damage to the property by illegal construction.

8. During pendency of proceedings before Additional Rent Controller, Pearey Lal-tenant died on 27.5.1989, and his legal heirs were brought on record.

9. Additional Rent Controller, Delhi, vide order dated 20th April, 1999, dismissed the petition filed by respondent no. 1-landlord.

10. Respondent no.1, thereafter filed appeal before the Tribunal. Vide impugned judgment, the tribunal held that, case under Section 14(1)(j) of the Act is made out and consequently, passed the following order;

“Respondent shall close the opening towards the roof within two months from the date of this order. Respondent shall pay to the appellant a compensation of Rs.10,000/- for the construction of mezzanine in the shop within two months from the date of this order. In the event respondent fails to do so the Ld. ARC shall be entitled to pass the eviction order U/s 14(1)(j) of the DRC Act against the respondent.”

11. It is contended by learned counsel for appellant that in December, 1973, landlord permitted the tenant to change the tin roof into a pucca roof at his own cost. Consequently, rent was increased to Rs. 30 p.m. In January, 1985, landlord permitted the tenant to change

the roof of the entire shop and to increase the height by two feet at his own cost, for purposes of construction of mezzanine in the shop. For granting this permission, landlord took a sum of Rs.10,000/- from the tenant.

12. It is further contended that opening in roof is neither unauthorized nor is it without consent and knowledge of the landlord. This opening in roof was made in January, 1985. Moreover, terrace over the shop is also under tenancy of the appellant. Thus, appellant has not made any unauthorized construction and opening of the roof does not amount to substantial damage.

13. It is also contended by learned counsel that respondent no. 1, admitted in his statement that shop has been made beautiful as compared to what was let-out to the appellant and respondent no. 1 in his entire statement, nowhere stated that any substantial damage has been caused to the premises.

14. It is further contended that the roof over the shop in question forms part of tenanted accommodation and appellant was using the roof earlier as well from back side, with the aid of stairs and opening in roof from the shop, therefore, cannot be said to be substantial damage.

15. It is also contended that landlord also admitted in his statement, that rent was increased and tenant was permitted to change the tin roof into pucca roof and was further permitted to raise height of roof by two feet. As such, whatever has been done, it has been done with the consent of landlord and, thus, no substantial damage has been caused to the tenanted premises by opening the roof.

16. Learned counsel for appellant in support of its contentions cited following judgments;

(i) Rawal Singh vs. Kwalitiy Stores and Anr, AIR 1986 Delhi 236.

(ii) Bhal Singh Malik v. Dr. Nazar Singh and Anr. 1976, RCR Page 145.

17. On the other hand, it is contended by learned counsel for respondent that, this is second appeal and scope of second appeal is very limited. Appellant has nowhere mentioned in the appeal, as to what is the substantial question of law in this case. On this point, learned counsel cited a decision of this Court reported as;

Ramesh Bhaskar Kale (since deceased) through LRs v. Harkirat Sodhi, 134 (2006) Delhi Law Times 363.

18. It is further contended that appellant/tenant unauthorisedly and illegally removed the wall and also unauthorizedly constructed mezzanine in the shop. Moreover, tenant made an opening in roof of the shop and has made encroachment upon terrace of the shop, for which tenant has no right and, thus he had caused substantial damage to property.

19. It had been admitted by learned counsel for respondent that though appellant/tenant was permitted to carry on repairs, but no permission was

given to tenant to make hole in roof of the shop. Admittedly, appellant made a hole in the roof of the shop, which is a substantial damage to the tenanted property. On this point, learned counsel referred to decision of Supreme Court reported as;

Gurbachan Singh and Anr. v. Shivalak Rubber Industries (1996) 2 Supreme Court Case 626.

20. Short question which arises for consideration is as to what is the substantial damage and whether construction of mezzanine and opening of roof from inside the shop, constitutes substantial damage or not.

21. It is an admitted case of the parties, that Pearey Lal, deceased (tenant) was given written permission to carry out addition, alteration as per agreement Exb.- AW1/R1.

22. As per this agreement, respondent no. 1- landlord, gave permission to tenant, to change the roof of shop at his own expenses as well as to increase the height of the roof by two feet. Besides this, no other alteration could be done.

23. It is a cardinal rule of evidence, that where written documents exist, they shall be produced as being the best evidence of their own contents and oral proof cannot be substituted for the written evidence. Section 91 of Indian Evidence Act says so and it read as under:

“91. Evidence of terms of contracts, grant and other dispositions of property reduced to form of document - When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained.

Exception 1. - When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. - Wills admitted to probate in India may be proved by the probate.

Explanation 1. - This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2. - Where there are more originals than one, one original only need be proved.

Explanation 3. - The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

24. This section deal with the exclusion of oral by documentary evidence. According to it, that the contents of all documents must be proved by primary evidence, which means the document itself in original, except in those cases in which secondary evidence is admissible. It is based on the best evidence rule, viz that the best evidence existing and attainable must always be given. When fact is required to be proved by oral evidence, the evidence should be direct, and when the transaction sought to be proved has been reduced to the form of a document, that

document must, if available, be produced. Therefore, when the terms and conditions of a contract, or of a grant, or of any other disposition of property have been set out in writing by agreement of parties and in the case of all documents required by law to be in writing, the document is intended to be a record of the transaction and therefore no other evidence shall be given to prove the transaction except the document itself or secondary evidence thereof when such evidence is admissible. Oral evidence is excluded equally when a document does exist and when the law requires the matter to be reduced to the form of a document.

25. It also a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. It is

likewise a general and most inflexible rule, that whenever written instruments are appointed, either by the requirement of law, or by contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a *substitute* for such instrument, *or to contradict or alter them*. This is a matter both of principle and policy; of principle because such instruments are, in their own nature and origin, entitle to a much higher degree of credit than parol evidence; of policy, because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. The same principle applies where private parties have, by mutual compact, constituted a written document, the witness of their admission and intentions. Where the terms of an agreement are reduced to writing, the document itself, being constituted by

the parties as the exposition of their intention, is the only instrument of evidence in respect of that agreement, which the law will recognize so long as it exists for the purpose of evidence.

26. Thus, in view of Section 91 of Evidence Act when there is written document, no amount of oral evidence can be substituted for that written document.

27. It is an admitted case of parties, that vide Ex.AW1/R1, written permission was granted to tenant by landlord with respect to;

(i) Change of roof;

(ii) To increase height of roof by two feet.

28. This document specifically states that “Except for this no other alteration can be done”.

29. It is an admitted fact that, tenant constructed mezzanine floor and made hole in the roof of shop, for which no permission was granted.

30. Case of appellant is that roof forms part of tenancy and tenant was earlier using the roof. Therefore, opening from shop towards roof, does not amount to substantial damage.

31. Tribunal on this issue held;

16.“The question of causing substantial damage came in the judgments of our own High Court cited by the learned counsel for the appellant as reported in 1979(1) RCR Pg. 407. In this case lowering of the floor of the house was held to be causing substantial damage within the meaning of Sec. 14(10) of the DRC Act. Another relevant judgment is 21(1982) DLT 1. In this case one heavy big size cooler has been fixed on the ventilator on the East side door by cutting holes in the wall, One wash basin has been fixed by cutting holes in the southern wall. The wooden show almirahs have also been fixed on the walls by cutting holes in the walls. The previous Dochhati has now been extended to the whole of the shop by cutting further four holes in the 5” thick western partition wall and eastern wall by fixing two more karries in the said holes. The stability of the partition wall had weakened. The court held that substantial damage has been caused.”

17.“In the present case, therefore, it is to be considered considering the judgments aforesaid if what has been done by the respondent is substantial damage to the premises. Any construction by which the structure of the premises is altered amounts

to substantial damage to the premises as per the said judgment. Any structure which impairs the rights of the landlord amounts to substantial damage to the premises. Any structure which weakens the wall or puts additional load on the wall amounts to substantial damage to the premises. Admittedly the mezzanine has been constructed and opening has been made towards the roof. This is changing of the structure of the premises. Where structure of the premises are changed which are detrimental to the interests of landlord it amounts to substantial damage within the meaning of Sec. 14(1) (j) read with Section 14 (10) of the DRC Act. The court below being impressed by the statement of the appellant that the beauty of the shop was enhanced forgot to look into the changes in the structure which were caused which were putting loads on the wall. The result was that it dismissed the petition. Appellant was just in raising the grievance that after the permission of 1985 was granted respondent had opened the opening towards the roof from the shop and has constructed mezzanine. This opening has effected the rights of the landlord to raise the structure over the roof of shop in question. It is a substantial damage within the meaning of Section 14(10) of the DRC Act. Consequently, case u/S 14(1) (j) was made out. The impugned judgment, therefore, cannot be maintained as far as the mezzanine and opening towards the roof is concerned."

32. Tribunal further held;

“Assuming that the respondent was not entitled to use the roof since it was a single storey shop , its user was permissive and in any case roof is not part of the tenancy accommodation. At the most it could be an amenity attached to the shop in question which was given in tenancy in the form of Kutchha phoos, shop with stone slabs, wooden karies and attached tin shed. Since at the most roof falls in the category of an amenity no importance can be attached to the argument of Sh. Andlay in this regard.”

33. In **Bhal Singh Malik (Supra)** cited by learned counsel for appellant, it was observed that roof and stair case are part of building specially when it is one storeyed building and in the absence of contract to contrary, presumption is that these were let out along with the building.

34. Even assuming for sake of arguments that roof formed part of tenanted premises, tenant has no right to make hole in the roof of tenanted premises. Making of hole in the roof of a premises certainly amounts to causing substantial damage.

35. Regarding construction of mezzanine, as per Ex. AW1/R1, no permission was granted to the appellant.

36. Thus no infirmity or illegality can be found in the impugned judgment. I also find no reason to disagree with the well reasoned findings of the Tribunal. Present appeal is, therefore, not maintainable and it is dismissed with costs which are assessed at Rs. 20,000/-. Costs be paid by appellant to respondent, within four weeks, failing which trial court shall recover the same in accordance with law.

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37. Since, appeal has been dismissed, consequently this application also stands dismissed.

38. Trial court record be sent back.

27th August, 2009

J.
bhatti

V.B.GUPTA,