

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

+ **CS (OS) No. 131/2005**

% Decided on: July 30, 2010

Sh. Mohinder Pal Singh Khurana & Anr. ...Plaintiffs
Through : Mr. Arun K. Verma with
Mr. Aman Anand, Adv.

Versus

M/s Modi Alkalies & Chemicals Ltd. & Ors. ...Defendants
Through : Mr. Rahul Gupta with
Mr. Rajnish Mishra, Adv.

AND

CS(OS) 206/2002

S. Mohinder Pal Singh Plaintiff
Through : Mr. Arun K. Verma and Mr. Aman
Anand, Adv.

Versus

Modi Alkalies & Chemicals Defendant
Through : Mr. Rahul Gupta and Mr. Rajnish
Mishra, Adv.

AND

CS (OS) No.594/1998

Sh. S. Mohinder Pal Singh Khurana & Anr. ...Plaintiffs
Through : Mr. Arun K. Verma with Mr. Aman
Anand, Adv.

Versus

M/s Modi Alkalies & Chemicals Ltd. & Ors. ...Defendants
Through : Mr. Rahul Gupta with Mr. Rajnish
Mishra, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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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 |

MANMOHAN SINGH, J.

1. The plaintiff No.1 and original plaintiff No.2 (since deceased and now represented by his widow) after purchasing a plot of land from D.D.A. by virtue of a perpetual lease dated 7th April, 1980 which is exhibited as PW1/1 constructed a commercial building on 18, Community Centre, New Friends Colony, New Delhi. The property consisting of basement, ground floor, mezzanine floor and first floor totally 9492.10 Sq. ft. (hereinafter referred to as suit premises) was rented out to defendants in Suit No.131/2005.

2. The plaintiffs as mentioned above have filed three suits against the defendants as per details given as under:

- i) Suit No.131/2005 (original number 344/1998) for recovery of possession of the suit premises.
- ii) Suit No.594/1998 for recovery of Rs.25,44,000/- towards mesne profits for unauthorized construction and its use by the defendants and for mandatory injunction against the defendants seeking removal of a large hoarding put up by them on the suit premises.

iii) Suit No.206/2002 for mandatory and other injunctions to stop the defendants from carrying out alterations, demolitions and for stopping the use of part of the suit premises for a coffee shop by the name of Barista Espresso Bar (Defendant No.4).

3. The said three suits filed by the plaintiffs herein were consolidated by this Court vide order dated 8.8.2005. This Court was further pleased to direct that CS(OS) 131/2005 (Old No.344/1998 & 174/2003), the suit for recovery of possession in respect of the aforesaid property, would be treated as the lead suit.

4. The said suits of the Plaintiffs have been contested by the Defendant No. 1 by filing its written statement.

5. The entire litigation between the parties revolve around the document lease-deed which is the admitted document by the parties. The tenancy was created by a Lease Deed dated 14.12.1981 Ex.PW1/2, which was registered on 22.02.1982. Salient features of the Lease Deed are:

- a) The plaintiffs are the lessors.
- b) The defendants in suit No.131/2005 are the lessee being different companies of the Modi Group.
- c) Commencement date of tenancy was 16.12.1981.
- d) Total area rented out was 7647.12 Sq. ft. apportioned amongst the three companies.
- e) The rate of rent was Rs.3 sq. ft. payable monthly by the 7th day of each month. After four years the rate of

rent was to be paid @ Rs.3.70 sq. ft. and then was to increase by 10% every 4 years.

6. The relevant clauses of the lease deed are as follows:

“2. The tenancy will commence by the 16th of December 1981 and after the expiry of first four years the rent would be revised to Rs.3.70 paise per sq ft, per month and would be revised by 10% on the first of the expiry of every four years.

In case permanent electricity connection is not provided by 16/12/1981 then the rent will be charged from the date the permanent connection is given.

3. The tenants shall be entitled to make alterations in the tenanted premises in accordance with the plan to be approved by the Municipal and/or other authorities but shall restore the same in the same conditions if the tenants vacate the premises on their own. In case of any illegal construction or alterations violating the laws of DDA or municipal corporation, the penalty, if any, levied would be paid by the Tenants.”

4. The tenants shall be entitled to use the said tenanted premises for commercial purposes and/or for the purpose of running their offices and/or carrying on business therein.

5. The Tenants, if they of their own decided to vacate the premises, will be entitled to remove all fixtures, fittings or additional equipment brought in by them by way of air-conditioning or for any other purposes in the tenanted premises. The Landlords will not in any manner claim any ownership for retaining all those fixtures and fittings and additional materials brought in by the Tenants in the tenanted premises and will not in any manner cause any difficulty in their removal by the Tenants.

6. (iii) The Tenants will have the right to use the whole or any part of the tenanted premises during the tenancy for companies, firms, trusts, associates of the Tenants. However, the responsibility of paying the rent will be of the Tenants under this Deed.

7. The Landlords do hereby covenant with the Tenants in the manner followings:

(a) the tenants paying the rent and other charges and outgoings hereby reserved on the days and in the manner hereinbefore mentioned and observing and performing all covenants and conditions herein contained and on their part to be observed and

performed shall peacefully and quietly held, occupy and enjoy the tenanted premises and the said fittings and fixtures free from all disturbances by the Landlords or any person or persons rightfully claiming from, under on in trust for the Landlords.

(b) To bear and pay the Municipal rates and taxes, house-taxes any imposition by DDA or other authority or authorities in respect of the tenanted premises during the said term of tenancy.”

7. In the Lease Agreement there was no clause for the termination of lease by the Lessor. The Defendant No.1 in view of the above terms and clauses of the lease agreement has set up the defence of perpetual and permanent tenancy in its favour.

8. The parties also entered into a supplementary agreement of tenancy dated 19.9.1985 Ex. PW1/4. As per the said supplementary agreement of tenancy, the landlord leased out the extended area of 1845 sq. ft., which had been recently constructed on the mezzanine floor. It was decided that for the extended portion too, the terms of the agreement dated 14.12.1981 would be applicable. The rate of rent of the area was Rs.6/- sq. ft. per month.

9. Total rent of the entire premises on the date of filing of the suit was Rs.49,570/- per month.

10. The plaintiffs in the year 1997/1998 issued two notices to the defendants for termination of lease and for recovery of possession of the suit premises, the details of which are given as under:

- i) First notice of termination of the lease deed was sent by the plaintiffs to the defendants on 29.11.1997.
- ii) As per the plaintiffs since the earlier notice could not

be served on the defendants properly another notice without waiving the earlier notice was sent by the plaintiffs to the defendants on 21.1.1998.

11. Despite due service of the Notice dated 21.1.1998, no reply was given by the defendants and they failed to vacate the premises and the plaintiffs filed Suit No.344/1998 (now numbered as Suit No.131/2005).

12. The defendants No.2 and 3 were proceeded ex-parte in this suit on 6.4.2000.

13. The main defences raised by the defendants in the first suit are as under:

- a) Tenancy in question is perpetual in nature and therefore could not be terminated and the suit for possession filed upon such a termination is liable to be rejected.
- b) The plaint does not disclose any cause of action.
- c) Notice of termination of tenancy was not served on the Defendant No.1.
- d) Suit is bad for mis-joinder and non-joinder of parties.
- e) One suit is not maintainable against three companies.

14. On the pleadings filed by the parties, the following issues were framed in CS (OS) No.131/2005 on 8.8.2005:

- “1) Whether the plaintiff is entitled for recovery of possession of property bearing no. 18, Community Centre, New Friends Colony, New Delhi? OPP*
- 2) Whether the tenancy in favour of the defendants was perpetual and could not be terminated by the plaintiff as stated in the preliminary objection of the written statement,*

if so to what effect? OPD

3) Whether the plaint does not disclose any cause of action as alleged in the preliminary objections of the written statement? OPD

4) Whether notice for termination of tenancy was not served on the defendant no. 1 as alleged in the written statement, if so to what effect? OPD

5) Whether the suit is bad for mis-joinder and non-joinder of causes of action? OPD

6) Whether the defendant Nos. 1 to 3 are three separate independent companies and same suit for possession is not maintainable against them? OPD

7) Relief”

15. The second suit bearing no. CS(OS) No.594/1998 was filed by the plaintiffs for recovery of Rs.25,44,000/- towards mesne profits for unauthorized construction and its use by the defendants and for mandatory injunction against the defendants seeking removal of a large hoarding put up by them on the suit premises. Issues were framed on 4.2.2000.

16. The third suit being CS (OS) No.206/2002 was filed by the plaintiffs for mandatory and other injunctions to stop the defendants from carrying out alterations, demolitions and for stopping the use of part of the suit premises for a coffee shop by the name of Barista Espresso Bar (defendant No.4). Issues were framed on 8.8.2005.

Evidence of the Plaintiff

17. CS (OS) No.131/2005 being suit for recovery of possession was ordered to be treated as the main suit. The parties were directed to lead their evidence in all the three suits together and they produced their respective evidence in CS (OS) No.131/2005. Sh. Mohinder Pal Singh Khurana, plaintiff No. 1, in his affidavit Ex. PW1/A deposes that the

deponent is the joint owner of the suit premises. The lease deed dated December 14, 1981 has been admitted along with the fact that it was registered on February 22, 1982. Rent of the suit premises was paid with effect from February 1982 although possession was given on December 16, 1981. The increase of Rs. 3.70 paise as per the lease deed has been admitted. It has been deposed that a supplementary lease deed was executed on September 19, 1985 with regard to additionally constructed 1845 sq. ft. area on the mezzanine floor, which was leased out to the defendants at Rs. 6/- per sq. ft. per month. Further, the rent of the suit premises has always been paid by defendant no. 1 on behalf of all of the tenants. Two notices dated November 29, 1997 and January 21, 1998 have been admitted to have been sent by the plaintiffs to the defendants calling upon the latter to vacate the premises. It is also deposed that the defendants have unauthorisedly trespassed over the roof of the first floor for the construction of a room of about 1000 sq. ft. and a toilet of about 200 sq. ft. Damages have been demanded @ Rs. 48,000/- per month for the unauthorizedly constructed area. The putting up of a hoarding has been mentioned, for which damages of Rs.30,000/- per month has been prayed for. Further, for wrongful removal of the water tanks on the terrace, Rs. 24,000/- has been prayed for as damages. It has also been deposed that the defendants have demolished three WCs on the first floor and have removed and constructed new walls and changed the colour scheme etc. of the entire suit premises. All the damages have been prayed for a period of 3 years prior to the filing of the suit though

the illegal construction had been existent earlier.

17.1 During cross examination, Mr. Mohinder Pal Singh, PW1 stated that the lease deed dated December 14, 1981 was not intended to be perpetual in nature. He further stated that no lease agreement was executed after the above-mentioned lease deed on its expiration after four years except the supplementary lease deed dated September 19, 1985. He further stated that the defendant no. 1 was the only lessee in the original lease agreement. He then volunteered that all the three defendants were joined and rent was paid by defendant no. 1. He denied that the plaintiffs constructed any additional area in 1985 and gave the same to the defendants vide supplementary lease deed. He then stated voluntarily that the defendants have themselves secretly constructed the newly constructed area without seeking any permission from the plaintiff and in gross violation of the bye-laws of the DDA. He stated that he made no complaint against the defendants for raising the unauthorised construction. He then stated voluntarily that he tried to make complaints but was told that the same would be a waste of time. He denied that the lease deed of December 1981 afforded no condition for the plaintiffs to terminate the lease or raise any dispute in case of illegal construction by the plaintiff. Further, he denied that legal notices were never sent to the defendants as alleged by him in the plaint.

17.2 On being recalled for further cross examination, PW1 stated that he did not remember the date and time when the defendants companies got construction made on the terrace. He stated that he

seldom went to the suit property after 1981 and it was the other co-owner Sardar Khushbir Singh Baweja (now deceased since May 18, 2004) who visited the same. He stated that he never interfered with or enquired into the matter of the suit property, though he was told once by the deceased co-owner that the guards did not allow him to enter the suit premises. He has then stated that since his partner was taking care of the matter, he has no idea when the alleged illegal construction was carried out by the defendants nor does he know if the same has been stated in the plaint or not. However, he has knowledge as to construction on the ground floor of the suit premises, though the defendants have not allowed him to enter the premises, as he has seen the same from outside. He cannot tell if any written notice was sent to the defendants as his partner (legal representatives of deceased partner) might have done so. He could not point out the notices from the documents stating that he has a poor eye sight due to glaucoma. He then stated that around 1981 there was already existing construction on the first floor and neon sign, however, the same may have been made of asbestos sheets. In the end, when questioned whether the witness has any personal knowledge about the three cases filed by him against the defendant companies, he replied that he had no knowledge as regards the said cases.

Evidence of the defendants

18. On behalf of the defendants, affidavit has been filed by Mr. S.K. Nair, Director of defendant no. 1 marked as Ex.DW-1/A, who has deposed: “that the lease deed and supplementary lease deed both created

perpetual tenancy in favour of the defendants as they were not terminable. The 10% increase in rent every four years was agreed upon by both parties and payment was made accordingly by the defendants to the plaintiffs. He denied in his examination-in-chief that the defendants ever received any notices dated November 29, 1997 and January 21, 1998 from the plaintiffs for vacation of the suit premises. He deposed that illegal construction alleged by the plaintiffs to have been raised by the defendants had existed since 1981 when the structure was made of asbestos sheets. Further, as per the terms of the lease deed of December 1981, the defendants were liable to pay the penalty etc. for violation of any MCD/DDA bye-law etc. The defendants were entitled to raise hoardings on the suit premises as they were carrying on commercial business at the same. Even if they were not, the plaintiffs never objected to the same since 1981 and their suit is clearly time barred. Further, since the plaintiffs have filed one suit for recovery of possession against three companies which are three separate legal entities and independent tenants, the suit is liable to be dismissed due to mis-joinder of parties. As regards mesne profits and damages, no evidence or particulars have been furnished.

18.1 In his cross examination, Mr. S.K. Nair stated that he was not the Director of defendant no. 1 on December 14, 1981. However, he has been an Officer working with defendant no. 1 from the first day that the suit premises were leased out. He stated that he could not recall if the lease deeds were signed or not. Further, as per him no specific areas

were demarcated for each of the defendants. Two temporary structures on the terrace were also given to the defendants, though the same were not mentioned in the lease deeds and it was understood between the parties that the same would be used by the defendants.

18.2 On being recalled for further examination, Mr. Nair stated that the words 'perpetual lease' do not appear in the lease deeds as there was no need for the same, considering that there was understanding between the parties and there were huge investments made by the defendants in the bare structure of the suit premises to make the same usable. It is also mentioned that the rent was paid by defendant no. 1 alone due to some internal arrangement between the defendants. Further, the three defendants are companies which belong to Modi Group. However, he has stated that the tenancy was not a single tenancy just because defendant no. 1 was paying the rent. On being further questioned, Mr. Nair stated that it was wrong to suggest that his affidavit was drafted by his counsel without his instructions and that the construction over the terrace which is allegedly illegal existed since 1981. However, on being asked whether after 1981 the entire construction on the terrace was carried out by the defendants, Mr. Nair contradicted his earlier statement and said that it would be wrong to say that the entire construction had been carried out by the defendants. When questioned as to the size of the hoarding put up at the suit premises, he seemed not to recall the detailed of the same. He admitted that Barista was allowed to use the suit premises and that there was an agreement to

this effect. On being questioned whether the sale of coffee is an authorized purpose in the memorandum of association of defendant no. 1, he stated that though it may not appear as a main or supplementary object therein, there were enough clauses allowing the company to have associates and new businesses which may sell coffee.

19. The other two witnesses Mr. Ashok Kumar and Mr. G. Raj Kumar from the defendant No.1's company were not called upon by the defendant No.1 for the purpose of cross-examination.

20. DW2, Sh. M.P. Singh, Assistant (Commercial land) DDA, Vikas Sadan, I.N.A., New Delhi in his statement has stated as under:

“that as per records, the suit premises were in the name of Smt. Harcharan Kaur and Sh. Mohinder Pal Singh. As per records, the DDA never received any complaint/notice of any nature from the owners of the suit property. On further examination, he stated that in the DDA file of the suit property there is an office noting on August 30, 1983 which states that on inspection, misuse of the basement of the suit premises were found and approval was sought for determination of the lease. Thereafter, the contents of a series of office notings of the DDA as regards the suit premises have been referred to by the cross-examiner and

confirmed by the witness DW2. Office noting dated February 2, 1984 states that Modi Alkalies is running its office in the basement of the suit premises whereas as per office noting dated May 8, 1985 the basement of the suit premises could only be used for storage, and the ground and the upper floors could be used for shops and offices respectively. According to office noting dated August 20, 1985 the basement and ground floor of the suit premises were being used as offices at that time. Further, office noting dated August 22, 1985 states that the misuse of the mezzanine and basement as offices needs to be stopped. Office noting dated March 27, 1986 states that two rooms have been unauthorisedly constructed on the second floor and are being used for residential purposes and due to the same, a show cause notice is to be issued to the plaintiffs. Further, office noting dated January 17, 2003 states that there is unauthorized construction of two rooms and a toilet on the terrace of the suit premises as well as misuse of the basement and mezzanine floors and a show cause notice

dated February 24, 2003 as regards the former was issued by the DDA to the plaintiffs. The plaintiffs' reply to the said show cause is located on page 109 of the DDA's records, and the plaintiffs vide the said reply brought the DDA's attention to the various instances of misuse and unauthorized construction in the said property which had been brought to the DDA's notice on earlier occasions also. At the end, the witness admitted that his statement during examination-in-chief that the DDA never received any complaint of any nature from the owners of the suit property as regards the suit property was incorrect."

21. The following documents have been filed and exhibited by the plaintiffs:

- i.) Exhibit PW1/1 is the copy of lease deed dated 07.04.1980 between DDA and plaintiffs.
- ii.) Exhibit PW1/2 is the photocopy of agreement of tenancy dated 14.12.1981 between the parties.
- iii.) Exhibit PW1/3 is the certificate issued by the defendant confirming the agreement between the parties.
- iv.) Exhibit PW1/4 is the supplementary agreement of tenancy dated 09.09.1985.
- v.) Notice dated 29.11.1997 marked as Exhibit P1/5 and its Regd A/D receipts marked as

Exhibit PW1/6 to 1/8A. Notice dated 21.01.1998 marked as Exhibit PW1/11 and its Regd. AD marked as Exhibit PW1/12 to PW1/16.

vi.) Notice dated 26.07.2000 to produce original documents marked as Exhibit PW1/17.

vii.) Copies of sanctioned plans marked as Exhibit PW1/18 to PW1/20.

Case of the defendants

22. The main submissions of the Defendant No.1 in the three suits are:

I. That the lease created in favour of defendant No.1 was a perpetual and permanent tenancy. From a mere reading of the lease agreement dated 14.12.81 the following conditions and also the intentions of the parties are clear—

- (i) there is no time period prescribed in the lease for its expiry,
- (ii) there is not a single clause providing any right of termination of tenancy on the part of the landlords under any circumstances;
- (iii) the terms in clause 2 clearly mentioned that on revision of rent by 10% every four years the lease will continue,
- (iv) in terms of clause 3 of the lease agreement, the defendant No.1/tenant had been authorized to make alterations in the tenancy premises and to

restore the premises in the same condition if the tenants vacate the suit property on their own. It was even provided that any violation of DDA / MCD Laws, the defendant No.1/tenant will apply any penalty,

(v) in terms of clause 5 the defendant No.1/tenant had been given the right to vacate the premises of its own and without any right given to the plaintiffs to recover back the possession of the premises,

(vi) in terms of clause 6(iii) defendant No.1 tenant has been given the right to use the whole or any part of the tenancy premises for companies, firms, trusts, associates of the tenants. This clause also make the intentions clear that the tenant would use the tenancy premises either by itself or through any of its associates. The defendant no.1 has been able to prove its case by production of evidence as per the case set-up in the written statement in the matter.

II. From the beginning of the tenancy vide lease agreement dated 14.12.81 till the time when the plaintiffs issued legal notices dated 29.11.97 and 21.1.98 and filed the suit in the year 1998, there had never been a single example of any complaint or exchange of notice or any demand by the

plaintiffs, for a period of 16 years i.e. from 1981 to 1997, nor a single document has been produced by the plaintiffs for 16 years to show that the plaintiffs had ever asked the defendant No.1 to vacate the suit premises.

III. The suit filed by the plaintiffs against three separate and independent companies i.e. defendants No. 1 to 3 and who had been leased out separate specified areas and also since rent was being paid separately by all the three companies, the legal notices dated 29.11.97 and 21.1.98 issued by the plaintiffs to only one of the three companies all show that the single suit filed by the plaintiffs against all the three companies is illegal and not maintainable in law.

IV. The plaintiffs stated to have terminated the tenancy of the defendant No.1 to 3 vide legal notices dated 29.11.97 and 21.1.98 on the basis that the tenancy was month to month commencing from 16.12.81. But the real matter is that tenancy had not commenced from 16.12.81. The terms continued in clause 2 of the lease agreement dated 14.12.81 clearly mention that in case permanent electricity connection is not provided by 16.12.81 then the rent will be charged from the date the permanent connection is given. Admittedly in the present case the permanent connection had been sanctioned and supplied and electricity started from the month of February, 1982 and as such the defendant No.1 had

started making the payment of monthly rents only w.e.f. February, 1982. As such the tenancy commenced between the parties only w.e.f. February, 1982. Hence alleged termination notices of tenancy are bad and the suit itself is not maintainable.

23. Firstly, it is argued on behalf of the defendant No.1 that there is no cause of action in favour of plaintiffs and against the defendants because the lease was permanent and perpetual in nature and further there was neither any clause in the lease agreement to terminate the lease agreement nor any right to claim back possession by the plaintiffs. The nature of the tenancy created must be determined by construing the document as a whole. For determining whether the character of the tenancy is permanent or perpetual in nature, entire clauses of the Lease Agreement are to be examined in order to see the intention of the parties as per facts of each case.

24. It is also argued that the statement of plaintiff's witness PW-1 Sh. Mohinder Pal Singh, who was cross-examined by the defendant No.1, made total contradictory statements in evidence. In the plaint, the case set up by the plaintiffs was that the tenancy in favour of defendants was month to month commencing from 16.12.1981, whereas in the affidavit by way of evidence filed by plaintiff No.1, he nowhere stated that tenancy was month to month. On the contrary, the witness in his cross-examination had stated that the tenancy was for 4 years period and to be revived after 4 years with consent of the parties. Later during the

cross-examination PW1 answered one of the questions stating that he had no knowledge about the 3 cases filed by the plaintiffs against the defendants. As the plaintiffs only produced one witness PW-1 who had failed to prove issue No.1, his evidence is not reliable and cannot be relied upon, thus the suit of the plaintiffs is liable to be dismissed as the plaintiffs here failed to discharge the burden of proving the case. The answers given by him in the cross-examination were contrary to the pleading and documents placed on record.

25. The learned counsel for the defendant No.1 has referred the following judgments in support of his submissions:

- i) In ***Mrs. Sapna Singh Pathania & Anr. Vs. Jagdish Chander Mehta & Ors.***, 1998 (75) DLT 725, the Court held that an affidavit must contain the evidence of deponent as to such facts of which he is in a position to speak of to his knowledge and such fact must be verified on personal knowledge.
- ii) In ***Ranjit Construction Co. Ltd. Vs. National Highways Authority of India & Anr.***, 2003 (107) DLT 249 (DB), the Court held that the affidavit should not be vague or general. It should be confined to such facts as deponent is able to take from his own knowledge to prove.
- iii) In ***Pawan Kumar Vs. State of Haryana***, 2003 11 SCC 241, the Court held that under Section 60 of Evidence Act, 1872, Hearsay Evidence can be used only to

corroborate the substantive evidence.

iv) In ***Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank***

Ltd. & Ors., 2005 (2) SCC 217, the Court held that a Power of Attorney holder cannot depose on behalf of principal of such acts of which only the principal had the personal knowledge.

v) In ***Binapani Paul Vs. Pratima Ghosh & Ors.***, 2007 (6)

SCC 100, the Court held that in absence of any direct and conclusive evidence a question has to be decided on reasonable probabilities and legal inferences. The intention of the parties have to be gathered from the totality of the circumstances both preceding and subsequent to the transaction.

26. In reply, learned counsel for the plaintiffs has argued that PW1 has clearly stated in his cross-examination that matters related to the suit premises were taken care of by his partner, i.e. the co-owner Sardar Khushbir Singh Baweja. It is because of this that PW1 was confused as regards the questions being posed to him. Secondly, PW1's testimony was required only for two purposes being proving the factum of issuance of the two notices of vacation and proving the case of the plaintiffs in CS(OS) No. 206/2002 as regards unauthorized construction. PW1 did not fault with the evidence in this regard and his testimony, as far as it pertains to the same, should be accepted. In this regard, the case of ***Nishi Kant Jha Vs. State of Bihar***, AIR 1969 SC 422 was referred

which states that of the entire evidence placed before the court, the court can take into account the circumstances under which evidence was recorded and then take a decision as to which part of the evidence was worthy of belief and which part should be ignored. Further, as per the observation in ***Binay Kumar Singh & Ors. Vs. State of Bihar***, (1997) 1 SCC 283, the procedure under Section 145 of the Indian Evidence Act must be complied with before any benefit can be derived out of any contradictions apparent from the cross-examination of a witness. Section 145 requires a confrontation of the said contradictions with the witness and a subsequent opportunity to him/her to explain the said contradiction. Only after the witness's failure to explain the contradiction can the court either disregard his testimony or draw adverse inference from the same.

27. The plaintiffs' counsel's contention is that in this case, the procedure under Section 145 has not been followed and so, no adverse inference may be drawn from PW1's testimony.

28. In the present case the plaintiffs have produced their evidence by way of affidavit of PW-1 which show that it is similar to the statement made in the plaint. It is mentioned that contents of the affidavit are true and correct to the best of the witness's knowledge and belief. The testimony of PW-1 shows that firstly he has tried to prove the factum of the issuing and service of notice to quit on the defendants and secondly to prove the case relates to the unauthorized construction carried out by the defendant in the suit property.

29. Further in Suit No.206/2002 a Local Commissioner Sh. Pawan Gulati, Adv. appointed by this Court has filed his report dated 24th April, 2003. In the said report it has been reported that structures had been constructed on the terrace floor and certain walls were demolished on the ground floor of the demise premises. Thus, despite there being contradiction in the cross examination of PW-1 relating to the unauthorized construction, the factum of issuing and service of notice of quit and execution of lease deed between the parties is proved evidence. In view of above, the argument of the defendants cannot be accepted to the effect that the suit is not maintainable and liable to be dismissed.

30. Now I shall deal with the submissions of the parties issues wise. First I shall take up the issue No.4 which reads as under:

“4. Whether notice for termination of tenancy was not served on the defendant no. 1 as alleged in the written statement, if so to what effect?”

31. The defendant No.1 in its written statement as well as in its deposition as DW-1 has deposed that no notices were received by the defendant. The plaintiff No.1 has filed his affidavit by way of evidence. In his affidavit statement has been made that the first notice dated 29.11.1997 Ex.PW-1/5 was issued by the plaintiff to the defendant. The relevant postal receipts have been exhibited as Ex.PW-1/6, Ex.PW-1/7, Ex.PW-1/8 and Ex.PW-1/8A. The second notice dated 21.1.1998 was issued by the plaintiff as no acknowledgement due of first notice were received by the plaintiff. The said notice is exhibited as Ex.PW-1/11 in

the affidavit of PW-1. The relevant documents i.e. postal receipts and AD cards have been exhibited as Ex.PW-1/12, Ex.PW-1/13, Ex.PW-1/14, Ex.PW-1/14A, Ex.PW-1/15 and Ex.PW-1/16 respectively. In the evidence of DW-1 Sh. S.K. Nair which was produced by way of affidavit although he has deposed that no notices were received by the defendant but in cross-examination he admits the address of the defendant No.1 on AD card Ex. PW-1/15 is correct. Thus, it appears that the contention raised by the defendant No.1 is evasive and cannot be accepted. In the case of ***Bhagabandas Agarwalla vs. Bhagwandas Kanu & Ors.***, AIR 1977 SC 1120, it is held that notice to quit should be dealt with positively. Thus, I hold that the notices as required under Section 106 of Transfer of Property Act, 1882 have been proved and served upon the defendant before filing of the suit. Issue No.4 is accordingly decided in favour of the plaintiffs and against the defendants.

Issues No.5 & 6:

“5. Whether the suit is bad for mis-joinder and non-joinder of causes of action?

6. Whether the defendant Nos.1 to 3 are three separate independent companies and same suit for possession is not maintainable against them?”

32. The above mentioned issues were framed on the basis of preliminary objections raised by the defendant No.1 in its written statement. The contention of the defendant is that since the lease deed related to three individual tenants, single notice to all the defendants to quit is invalid and the suit is also therefore bad for mis-joinder of parties.

33. It is not the disputed fact that all the three companies i.e. defendants in the lease deed as lessees are related to each other and are part of the Modi Group. The apportionment of the covered area amongst the three companies in the lease deed was done for the purpose of payment of rent. Admittedly, no separate areas were demarcated in the leased premises for three different defendants. The defendants No.2 and 3 are already proceeded ex-parte vide order dated 6.4.2000. The reliance has been placed by the plaintiff on ***Moti Lal and another Vs. Kartar Singh and others***, AIR 1930 Lahore 515 wherein it has been held that when a lease is held by more than one person under one lease, the entire body of tenants constitutes the single tenant qua a landlord. Therefore, the present suit filed against all the three tenants on the basis of one single lease deed is maintainable and is not bad for mis-joinder of parties or cause of action.

34. In the other case of ***Ajit Kumar Roy and others Vs. Satya Bala Dutt and others*** reported in AIR 1973 Calcutta 339, it has been held that if a notice to quit is addressed to all the tenants (whether they are joint tenants or tenants in common) and served on one of them, it is sufficient compliance of requirement of law and there is no necessity to send separate notice to quit to the tenants.

35. In the present case the notice to quit was addressed to all the three companies and sent separately at their respective addresses. Acknowledgment receipts of two of the companies are on record. As such the notice is valid and has been served on all the three companies.

36. The other objection relating to this issue raised by the defendants is that the tenancy commenced from 1.2.1982 when the rent was paid for the first time and not on 14.12.1981, the date of lease deed, the contention of the defendant is that as per the lease the rent was to be paid when the electricity is duly sanctioned. Since the electricity is sanctioned subsequently therefore, the date of commencement of tenancy is from 1.2.1982 and not from 14.12.1981. Therefore, even issuance of notice to quit on the basis of commencement of tenancy from the month of December 1981 is invalid under the provision of Section 106 of Transfer of Property Act, 1882 because of the reasons that it does not comply with the requirement of Section 106 whereby 15 days notice is required to expire with the end of the tenancy month.

37. I am of the view that the said objection raised by the defendant No.1 is not tenable and the contention itself is against the defence set up by the defendant No.1 in the written statement. In case the tenancy commenced from 1.2.1982 and not from the date of lease deed i.e. 14.12.1981 then it means that the tenancy was not created on that date and as a result of that the defendant No.1 is barred from setting up case for perpetual tenancy.

38. Regarding second limb of the argument of the defendants that there is no compliance of Section 106 of the Transfer of Property Act, 1882 about 15 days notice required to expire before the tenancy month, the said objection of the defendant is also not sustainable as Section 106 of the Transfer of Property Act was amended by virtue of Transfer of

Property (Amendment) Act, 2002 with effect from 31.12.2002. The requirement of expiry of notice with the end of tenancy month was deleted from the said amended section. The suit was filed after the said amendment which was made retrospective in operation by virtue of Section 3 of the Amendment Act. Therefore, the submission made by the defendant in relation to issues No.5 and 6 is without any substance and the said issues are accordingly decided in favour of the plaintiffs.

Issue No.3:

“3. Whether the plaint does not disclose any cause of action as alleged in the preliminary objections of the written statement?”

39. The defendant No. 1 has not been able to prove this issue which was framed on the basis of preliminary objection in any manner whatsoever in the evidence. Therefore, as per the pleading and documents produced by the plaintiff, it appears that the plaint discloses cause of action. Hence issue is decided against the defendant.

40. Let me now deal with the most crucial issues involved in the matter which would determine the main controversy in the three suits. The same are:-

Issues No. 1 and 2:

1) Whether the plaintiff is entitled for recovery of possession of property bearing no. 18, Community Centre, New Friends Colony, New Delhi? OPP

2) Whether the tenancy in favour of the defendants was perpetual and could not be terminated by the plaintiff as stated in the preliminary objection of the written statement, if so to what effect? OPD

41. Learned counsel for both the parties have relied upon certain

clauses from the lease deed itself to prove their case. The plaintiffs have submitted that the intention of the parties must be the most important consideration for deciding whether the tenancy was meant to be in perpetuity or not. Further, Learned counsel for the plaintiffs has stated that the plea of perpetual lease deed was not taken up at all by the defendants in the original written statement filed on 16 April, 1999. The said plea was taken up only in the amended written statement. It is the plaintiffs' contention that if the defendants considered the lease deed to be in perpetuity, the said defence should have been taken in the first written statement itself.

42. The lease deed in question is absolutely silent as to the duration of the tenancy, the onus of proving that the same is perpetual lies upon the defendants and in their failure to do so, the rule of construction in Section 106 of Transfer of Property Act, 1882 (hereinafter referred to as 'the Act') would apply as per the arguments of the counsel for the plaintiffs.

43. It is settled law in India a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. As regards the lease in perpetuity the following proposition of law has been correctly laid down by the A.P. High Court:

- (i) In India, the law does not prohibit a perpetual lease; clear and unambiguous language would be required to infer such a lease. If the language is ambiguous the court would opt for an interpretation negating the plea of the perpetual lease;
- (ii) To find an answer to the question whether a covenant for renewal contained in the lease deed construed properly and in its real context, entitles the tenant to

continue as long as he chooses by exercising the option of renewal at the end of each successive period of 5 years subject to the same terms and conditions depends on the deed of lease being read as a whole and an effect made to ascertain the intention of the parties while entering into the contract. No single clause or term should be read in isolation so as to defeat other clauses. The interpretation must be reasonable, harmonious and be deduced from the language of the document;

- (iii) The court always leans against a perpetual renewal and hence where there is a clause for renewal subject to the same terms and conditions, it would be construed as giving a right to renewal for the same period as the period of the original lease, but not a right to second or third renewal and so on unless, of course, the language is clear and unambiguous.

44. Mr. Arun K. Verma, learned counsel for the plaintiffs has referred the certain decisions on the aspect of the interpretation of lease.

In ***Anwarali Bepari and others Vs. Jamini Lal Roy Choudhury and others***, AIR 1940 Cal. 89 at page 90 it has been held that a lease is the outcome of the rightful separation of the ownership and possession. The essential characteristic of a lease is that a subject is occupied and enjoyed, but the corpus of the subject does not disappear by the user. Before the lease the owner had the right to enjoy possession of the land but by the lease he excludes himself during its currency from the right.

45. In ***Debendra Nath Dhang and others Vs. Pashupati Nath Deb***, AIR 1932 Cal. Page 198 wherein it has been held that even although there be a considerable number of facts which point to the tenancy having a permanent structure the effect of these facts as evidence may be entirely destroyed by a single piece to negative evidence.

46. In the case of ***Atyam Veerraju And others Vs. Pechetti Venkanna and others***, AIR 1966 SC 629 in para 9 while referring to an earlier judgment the Supreme Court held that the Court made refuse to draw the inference of a permanent tenancy at a fixed rent where the demised land belonged to a Hindu Religious Endowment for a manager of the endowment had no power to grant such a lease in the absence of legal necessity and the courts were not to presume a breach of duty on his part.

47. In ***Hamidullah (dead) by his legal representatives and others Vs. Abdullah and others***, AIR 1972 SC 410 at para 17 it has been held that the onus of proving a permanent tenancy is on a tenant and mere fact that the tenant occupied the tenancy for long at a fixed rent does not raise the presumption of permanent tenancy. The cumulative effect of the various circumstances coupled with several other facts has to be taken into account to infer permanent tenancy.

48. The submission of the defendant No.1 is that under clause 3 of the lease deed and clause 5 of the lease deed the tenancy in question is only at the will of the defendants and only they have right to terminate it any point of time, as there is no clause in the lease deed reserving a similar right in favour of the plaintiffs it shows that the intention of the parties was to create a perpetual lease.

49. Mr. Rahul Gupta, learned counsel for the defendant No.1 has referred various decisions passed by the Courts in support of submissions. The first decision referred by him is ***Bejoy Gopal***

Mukherji Vs. Praful Chandra Ghose, AIR 1953 SC 153, wherein the Supreme Court observed that in spite of the increase in land value and letting value the landlords through whom the plaintiff derives his title did not at any time make any attempt to eject the tenant. Thus it was held to be a case of perpetual tenancy.

The said decision does not help the case of the defendant as while holding the tenancy in that case to be permanent the reasons taken into account by the Supreme Court were the passage of tenancy from one person to other by inheritance, by will or by transfer, the deeds of transfer gave the right to enjoy the property from generation to generation for ever, permanent structures were permitted to be built by the Lessee and mortgages were created by the Lessee for substantial amounts. These factors do not exist in the present case.

50. The second decision referred by the defendants is ***Bavasaheb Walad Mansursaheb Kotri & Anr. Vs. West Patent Press Co. Ltd. & Ors.***, AIR 1954 Bom. 257, wherein it has been held that the nature of the tenancy created must be determined by construing the document as a whole.

The facts of the said case are that the plot was let out to the tenant for building purposes, the period stipulated under the lease was 30 years and even at the expiration of this period of 30 years the lessee was allowed to remain in possession of the property so long as he paid Rs.40 as rent every year to the landlord. The document added that in case the lessee wanted to quit and leave the premises he should remove the wood work and machinery and leave the walls on the land for the benefit of the lessor. It is

perfectly true that there is a clause which seems to give the option to the lessee to vacate the premises when he likes. But reading the lease as a whole we think that the lessee is given the right to continue on the plot so long as he pays the rent.

In other words, we take the view that the words “so long as you choose or desire” must be read along with the proviso which gives the lessee the right to remain in possession of the land as long as he pays the rent and the effect of reading the two clauses together is to emphasise the lessee’s right to remain in possession for an indefinite period subject only to the condition that he pays the agreed rent every year. The dominant intention of this document appears to be to allow the tenant to remain in possession so long as he pays rent. It is of course true that under this clause itself the tenant may refuse to pay rent and make himself liable to be evicted.

The subsequent clause which gives him the option to determine the lease must be read in the light of the principal clause which permits him to remain in possession so long as he pays the rent. The emphasis is on the right of the tenant to remain in possession subject to payment of rent and the subsequent clause giving him the option to terminate the lease is merely incidental and subsidiary. In our opinion, therefore, on a fair and reasonable construction of this document, it must be held that the lessee was entitled to remain in possession of the property as lessee for his life.

The Bombay High Court has also discussed the clauses of the lease deed and one of the clauses in which the option was given the lessee to determine the lease at his pleasure. The observation made by the High Court in this regard is referred in para 6 of the judgment relevant portion of which reads as under:

“(6)

(A) At the end of the remaining years out of the agreed period of 30 years, you may continue on the premises, so long as you choose or desire, provided you go on paying me Rs.40 as rent every year. You may erect buildings or lay out lanes on the premises and I have no objection for the same, if you do so, with the permission of the Government. In case you want to quit and go, you should remove your wood-work and machinery and leave the walls on the land for us.....”
.....

In view of the facts referred, the decision referred is not applicable to the facts and circumstances of the present case as there is no clause of this nature available in the lease deed involved in the present matter.

51. The third decision referred by the defendants is ***Sivayogeswara Cotton Press, Devangere & Ors. Vs. M. Panchaksharappa & Anr.***, AIR 1962 SC 413, wherein on a construction of the terms of the lease deed the tenancy was held to be perpetual.

In the said case at para 3, 15, 16 and 17 after reproducing the clauses of the lease in that case, the Supreme Court laid down the criteria which is required to be followed to conclude about the intention of the parties in relation to the tenure of the lease deed. The Supreme Court took into account various clauses of the lease deed which expressly provided that the lease was for carrying out building activities, was heritable and assignable and had expressly taken away the right of the lessor to terminate the tenancy etc. before coming to the conclusion that it was perpetual lease. The clause 2 of the lease deed dated 26.10.1914 reads as under:

“2. After the expiration of the said period of 20 (twenty)

years mentioned in the 1st clause hereby you shall be at liberty to continue the lease of the said land and the said road and keep the said land and the said road in your possession as long as you may desire to do. In case of your thus continuing the lease of the said land and the said road you shall pay to me annually the sum of Rs.400 (four hundred rupees) as rent of the said land the said road for 1st ten years beginning from the 1st October, 1934, and ending on the 30th September, 1944, and after the expiration of the period of ten years the annual rent payable by you for the said land and the said road will be Rs.500 (five hundred rupees) per annum but you shall always be at full liberty to give up the said land the said road and terminate this lease at any time you may desire so to do after the 1st October, 1934 and the rent payable in respect of the said land the said road shall cease to be paid by you from the time you may give up the said land and the said road after the 1st October, 1934. But I agree and bind myself not to call upon you at any time to give up the possession of the said land and the said road as long as you may desire to keep the same for your purposes observing the terms of this agreement.”

In view of the said clause it appears that the law laid down by the Supreme Court is correct. However, the said term of the clause does not exist in the lease deed.

52. The next judgment referred by the defendant is **B.P. Sinha Vs. Som Nath**, AIR 1971 All. 297, wherein it was observed that in case the option to determine the lease is only with the lessee and he can remain in possession as long as he wants then the document cannot be construed as a tenancy at will.

The said judgment is also not applicable to the facts of this case as in one of the clauses, the lessor permitted the lessee to remain in possession as long as he paid rent. There was a letter issued by the lessor in this case which reads as under:

“I want to let out my entire bungalow in the western corner of which you live to the A.G.’s Office. I hope you will

vacate this. In place of this you will please go to the house behind this Kothi. You will pay Rs.40/- per month as rent of that and in that you can live as long as you desire and you will receive the same facility which you had in the old house.”

53. The fourth decision referred by the defendants is ***MCD & Ors. Vs. Shashank Steel Industries (P) Ltd. & Anr.***, (2003) 66 DRJ 1 (FB), wherein the Full Bench of this court held that even a lease without a term may be a permanent lease. It was further held that even in relation to a perpetual lease, rent can be enhanced.

The facts of the said case are entirely different from the facts of the present case. As a matter of fact, the Full Bench of the High Court has observed that even a lease deed without a term may be permanent lease deed which has no bearing in the facts and circumstances of the present case as none of the parties has disputed the concept of permanent lease deed.

54. The next decision referred by the defendants is ***State of UP & Ors. Vs. Lalji Tandon (dead) through LRs***, (2004) 1 SCC 1, wherein the Apex court held that the concept of perpetual lease is possible and there is no prohibition to the same.

Learned counsel for the plaintiff has not disputed the finding arrived at by the Apex court in this matter. I agree with the learned counsel for the plaintiff that the facts in the present case are totally different as far as the law of perpetual lease deed in India is concerned, there is no dispute that a lease may be in perpetuity however, if the language is ambiguous, the Court would opt for an interpretation

negating the plea of perpetual lease. Therefore, the said judgment does not help the case of the defendants.

55. The next judgment referred by the defendants is ***Janaki Nath Roy and others Vs. Dina Nath Kundu and others***, AIR 1931 PC 207, wherein privy council took into consideration the facts that the parties expressly agreed to a “Bemeyadi Settlement” and in 1901 a Sum of Rs.350/- was paid as a premium along with an annual rent of Rs.800/-. In these facts the privy counsel held that one of the important test of permanent tenancy was payment of the premium and therefore the tenancy in that case was held to be permanent.

In the present case no such conditions exist. Therefore, facts are different in the case referred.

56. The reference is made to ***Syed Jaleel Zane Vs. P. Venkata Murlidhr and others***, AIR 1981 Andhra Pradesh 328 by the defendant. The Head Note B and paras 14 and 19 of the judgment while holding that the document of lease has to be read as whole and no single clause or term should be read in isolation so as to defeat the other clauses. The said proposition of law is not denied by the plaintiff.

57. From the case law referred both by the plaintiffs and the defendants, it is clear that the law requires reading of the entire document as a whole for arriving at a conclusion about the intention of the parties for the term/period of the lease deed.

58. The submission of the defendant No.1 is that clause 6(iii) permits the defendants to use the whole or any part of the premises for

companies, firms, trusts, associations of the defendants. Thus, the said clause indicates the intention of the parties to create a permanent lease.

This Court is of the view that this clause does not prove any intention to create a perpetual lease as similar clause exists in the other lease deeds also where a period is expressly mentioned. In another clause, no right to sublet or re-let the whole or any part of the premises has been given to the defendants and further clause provided that irrespective of who is allowed to use the premises, the liability to pay rent to the plaintiffs would always be that of the defendants. Thus, the submission of the defendant on the aspect is without any substance.

59. The defendant No.1 has given another example by referring clause 3 of the lease deed which permits the defendants to make alterations in the tenanted premises which shows the intention of the parties to create a perpetual lease.

The clause like this is a normal clause which could be found in any sort of lease even if it is for a fixed period of time. It is a matter of fact that the entire building was let out to the defendants which was to be used as their offices, it is obvious that certain alterations suiting the proposed user by Lessee would be necessary for best utilization of the premises. Thus, it is difficult to come to conclusion in favour of the defendants about the intention of the parties to create a permanent lease.

60. Similarly the defendant No.1 has referred clause 7(a) wherein it is mentioned that the plaintiff would not disturb tenants from peaceful occupation and enjoyment of the premises.

A bare reading of clause 7(a) shows that the said clause was incorporated in for physical enjoyment of the property by the defendants without any disturbance by the plaintiffs. Such like clauses are found in all kinds of leases and are provided for peaceful occupation and enjoyment of the tenanted premises by the Lessee. Therefore, I am of the view that the defendant no.1 cannot derive any benefit out of it.

61. Further submissions of the defendant No.1 is that clause 8 of the lease deed binds the plaintiff to give any additional construction made by them in future to the defendants on rent. This shows the intention to create a perpetual lease.

The said contention of the defendants is unsustainable and in fact this clause only gives the first right of refusal to the defendants in case any additional construction is made by the plaintiffs and is proposed to be rented out to any third party, meaning thereby that plaintiffs are not debarred from carrying out any additional construction and using the same for their own benefit without renting out to anybody. In case the submission of the defendant No.1 is accepted, it means no right of additional construction could have been retained by the plaintiffs. As the entire building was rented out to the defendants, probably that is the reason a first right of refusal before any third party was inducted as a tenant in the suit property.

62. It is also alleged by the defendants is that since the lease, from the date of its execution, has continued for a period of 16 years i.e. till 1998, it shows the plaintiffs intention of creating a perpetual tenancy.

The said contention of the defendants is also without any substance. No period of time is specified in law whereby the Lessor has to take action against the Lessee for recovery of possession of tenanted premises. There is a force in the submission of learned counsel for the plaintiffs that at the time of execution of lease deed the relationship of the plaintiffs and defendants in the suit property was covered by the Delhi Rent Control Act and it could only be got vacated on any of the grounds under Section 14 of the Delhi Rent Control Act, 1958 and by no other means. In 1988, when the Delhi Rent Control Act was amended and it might be that the property in question came out of the scope of the Delhi Rent Control Act, 1958 thereby enabling the plaintiffs to recover back the possession of the property under the provisions of the general law.

63. Learned counsel for the plaintiffs referred some clauses of the lease in order to impress the Court that the said clause shows intention of the parties to create a non-perpetual lease and this Court can draw the inference from the same, are as follows:

- a) As per clause 3 if the intention was to create a perpetual lease, there was no need for putting a condition on the defendants to restore the tenanted premises to its original condition upon vacation by them.
- b) In clause 7(b) the mentioning of the phrase “said term of tenancy” shows that some term of tenancy was to be mentioned in the earlier parts of the lease, which is not

there. In case it was the intention to create a perpetual lease there was no question of mentioning any term of tenancy.

- c) In clause 7(c) the word 'term' has been mentioned in this clause. It shows on the intention of the parties to create a non perpetual tenancy.
- d) As per clause 8, the right to construct additional floor/floors is retained by the plaintiffs.
- e) In clause 2 (supplementary agreement of tenancy), it has been mentioned "for such period as mentioned in the original agreement of tenancy."

64. Learned counsel for the plaintiffs has relied upon the following tests for determining the intention of the parties in relation to the lease deed in question:

- i) An extract from the textbook "The Interpretation of Contracts" by Kim Lewison. In para 5.08 the author lays down the following test:

"The term will not be implied if it is inconsistent with the express terms of the contract or its general tenor".

- ii) A quotation from **Tamplin (F.A.) Steamship Co. Ltd. V. Anglo Mexican Petroleum Products Col Ltd. (1916) 2 A.C. 397** has been reproduced. The positive test for determining the intention of the parties has been mentioned as:

"It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any inconsistency."

65. To my mind if the intention of the parties was to create a perpetual / permanent tenancy in favour of the defendants, the plaintiffs would be perpetually / permanently divested of any right to enjoy the possession or use of the subject matter of the lease i.e. the entire building leased out to the defendants. This exclusion would come into effect from the date of the lease deed which is 14.12.1981. However, this intention could not have existed in view of clause 8 of the lease deed whereby even after creation of the lease on 14.12.1981 the plaintiffs had the right to carry out additional construction without any objection by the defendants. This express clause of the lease deed is completely inconsistent with the so called intention of the parties to create a perpetual lease in favour of the defendants and therefore no such clause of perpetuity/permanency can be implied in the said lease deed.

66. Admittedly, Ex.PW-1/1 is the perpetual lease granted by DDA in favour of the plaintiffs in respect of the land on which the demised premises was constructed by them. Clause 6 appearing on page 3 of this perpetual lease dated 7.4.1980 clearly prohibits the plaintiffs from creating any tenancy in respect of the building erected upon the plot in question other than from month to month or for a term not exceeding 5 years. There is a force in the submission of the learned counsel for the plaintiffs that it is highly improbable that after spending a huge amount of money in purchasing the plot from DDA in 1980 and constructing a building thereupon, the plaintiffs would have intended to divest themselves of the building in question for all times to come and

that too by running the major risk of losing the building at the hands of DDA by virtue of the above clause in the perpetual lease. According to him, it might be possible that at the time of execution not lease deed the plaintiff was not intending to create the perpetual lease in favour of the defendants because firstly the perpetual lease from DDA prohibited this and secondly clause 8 of the lease deed dated 14.12.1981 would not have been incorporated in the lease deed in case the intention was to create the perpetual lease.

67. Learned counsel for the defendants on the other hand has argued that since the lease deed is silent about the term of tenancy, it is a perpetual lease deed and has also contended that since the lease deed is a registered document, and lease deeds from year to year or exceeding a year are registered, the tenancy in this case could not have been month to month, therefore Section 106 of the Act cannot be involved by the plaintiff under any circumstances and they are not entitled to take any relief under this provision.

68. In support of his submission, the learned counsel for the defendant No.1 has referred the judgments of ***Adit Prasad Vs. Chhaganlal & Anr.***, AIR 1968 Patna 26, wherein it was held that in the absence of valid lease, the duration of the tenancy must be determined by Section 106 of the Transfer of Property Act; ***Jagat Taran Berry Vs. Sardar Sant Singh***, AIR 1980 Delhi 7, wherein it was held that it could not be said that as the lease was for the purpose specified in Section 106 of the Transfer of Property Act, it should be deemed to be a yearly lease.

The parties have an option under Section 107; and ***Samir Mukherjee Vs. Davinder K. Bajaj & Ors***, 2001 (5) SCC 259, wherein the Apex Court held that Section 106 of the Transfer of Property Act lays down a rule of construction which is to apply when the parties have not agreed as to whether the lease is yearly or monthly. Under Section 107 the parties have an option to enter into a lease either for a term less than a year or from year to year or for any term exceeding one year. There can be no valid lease from year to year or for any term exceeding one year without a registered instrument.

69. The said decisions referred by the defendants are not applicable in the facts and circumstances of the present case as it is settled law by the Apex Court that Section 106 of the Transfer of Property Act lays down a rule of construction which is to be applied when there is no period agreed upon between the parties. In those cases, the duration of lease has to be determined by reference to the object or purpose for which the tenancy is created. (See **Ram Kumar Das v. Jagdish Chandra Deb Dhabal Deb and Anr.**, AIR 1952 SC 23). Similar is the finding given by the Supreme Court in the case of **Samir Mukherjee v. Davinder K. Bajaj & Ors. (supra)**.

70. His further submission is that the duration of tenancy would be determined under Section 106 of the Transfer of Property Act, 1882 only if there is no valid lease between the parties. The said section comes into play only if there is no arrangement of lease or there is no valid lease as provided in the Transfer of Property Act. In the facts of

the present case, the instant case does not come under the purview of Section 106 of Transfer of Property Act as the lease itself is for more than one year and therefore the tenancy was not a month to month tenancy as alleged by the plaintiffs.

71. The other contention of the defendants is that since the lease deed dated 14.12.1981 is a registered document, the intention of the parties could not be to have a month to month tenancy. The first para of Section 107 of the Transfer of Property Act, 1882 mandates that wherever a lease for a period of more than one year or year to year or where an yearly rent has been fixed that is compulsorily registered. Section 107 of Transfer of Property Act in its second para provides for any type of a lease to be created by a registered document. It means that other kinds of leases can either be by registered document or by unregistered document depending on the circumstances and mutually agreed by the parties.

72. Countering this contention, the plaintiffs' counsel has submitted that while the first para of Section 107 of the Act mandates compulsory registration of a lease from year to year or exceeding a year, second para provides that any type of lease deed can be registered by mutual decision of parties.

73. Chapter V of the Transfer of Property Act, 1882 deals with leases of immovable property. Section 105 of the Act defines lease. Section 107 describes as to how leases are made. It provides that in case the lease of immovable property is from year to year or for a term

exceeding one year it can only be made by registered document.

74. Section 111 deals with the manner in which a lease can be determined. Sub-clause (a) provides determination of a lease by efflux of time in case the time is limited by the lease. Sub-clause (g) provides for determination by forfeiture where a condition of the lease is breached, the lease can be determined as a result of this forfeiture. Sub-clause (h) provides when a notice to determine a lease is given by one party to the other, a lease stands determined on the expiration of the period mentioned in the notice.

75. Section 108 – Part (B) – Sub-clause (q) provides that once a lease is determined the lessee is bound to put the lessor into the possession of the property.

76. Section 106 has a dual purpose. The first being a rule of providing a rule of construction of a lease deed. The second provides the manner in which a notice terminating a lease has to be served. This section provides that a lease for an immovable property for agricultural or manufacturing purpose shall be deemed to be a lease from year to year terminable by giving a 6 months notice by either of the parties and in case of lease of immovable property for any other purpose it shall be deemed to be a lease from month to month terminable by either of the parties by giving a 15 days notice to the other.

77. From the above, it is clear that the lease for an immovable property can be for a specified period or can be perpetual. Irrespective of the nature of the lease, it can be determined by giving a notice to quit.

On determination of the lease, the lessee is bound to put the lessor back in possession of the property. In a situation where a lease deed does not provide a period of the lease, Section 106 comes into play as a rule of construction to find out the nature of the lease i.e. either year to year or month to month. Action can be taken for getting back of the possession of the leased property only after serving a notice to quit in the prescribed manner.

78. In the present case since the tenancy was created for purposes other than agricultural and manufacturing, by applying the legal fiction contained in Section 106 of the Transfer of Property Act, 1882 the tenancy is to be treated as month to month tenancy. Therefore, I am of the considered view that even if no right to determine the tenancy by the landlord is mentioned in the lease deed, such a right exists.

79. The contention of the plaintiffs is that parties had decided to get the document registered in 1981 so as to authenticate the said document without any intention to create any lease that may be covered by para 2 of Section 107 of Transfer of Property Act.

80. The said contention of the defendant has no force because the right to terminate would have to be read into in lease deed by virtue of Section 108 (B) (q) of Transfer of Property Act, 1882 wherein it is the liability of the Lessee to put the Lessor in possession of the property upon determination of the lease by the Lessor. The above provision read with Section 111(h) of Transfer of Property Act, which provides that a lease of an immovable property is determined on the expiration of a

notice to determine the lease given by one party to the other.

81. Thus, unless there is a contract to the contrary/specifically saying that the Lessor has no right to terminate tenancy, the Lessor has a right to terminate any tenancy and such a right is a statutory right provided by the Transfer of Property Act itself.

82. In the case of ***Padam Singh Jain v. M/s Chandra Brothers and Ors.***, 1990 (2) RCR 121 at para 33 and 34 it has been said that even if a lease does not contain any covenant of termination of any tenancy the right of landlord to determine the tenancy would still arise under the Transfer of Property Act.

83. In ***Babu Lall Seth and Ors. v. Gopi Lal Sethi & Ors.***, AIR 1957 Patna 490, in paras 2 and 3 the references have been made to some earlier decided cases. It has been said that if a tenancy is determinable at the will of either landlord or tenant and although upon its creation it is expressed to be at the will of the landlord only or at the will of the tenant only, yet the law implies that it shall be at the will of other party also.

84. So, there are clauses in the lease deed dated 14.12.1981 which had been expressly agreed between the parties and in the presence of such clauses, implying the intention of creating a perpetual lease would be wholly inconsistent. The document does not convey any such intention, therefore, it is not possible to infer that the parties intended to create a perpetual lease.

85. From the foregoing paras, the only conclusion that can be drawn is that the lease deed dated 14.12.1981 is not clear about the

period for which the tenancy was created between the parties. In view of this lacuna left in the document, the defendants have attempted to take advantage by asking this Court to read the lease deed in a manner construing it to be a perpetual lease deed. However, the defendants are not able to discharge the onus cast upon them to make good the aforesaid attempt of proving it as a perpetual lease. Thus, issue no.2 is decided against the defendants. Upon this failure, the rule of construction as embodied under Section 106 of Transfer of Property Act comes into play and the purpose of lease being commercial (other than agricultural and manufacturing). Issue no.1 is accordingly decided in favour of the plaintiffs and against the defendants.

86. Thus the present suit filed by the plaintiffs seeking possession from the defendants of the suit premises and restoration thereof to the plaintiffs deserves to be decreed with costs in favour of the plaintiffs and against the defendants or anyone else found in the possession including defendant No.4 in suit No.206/2002.

87. The defendants are granted six months time to restore the peaceful possession of the suit property i.e. Commercial Building 18 Community Centre, New Friends Colony, New Delhi, consisting of basement, ground floor, mezzanine floor and first floor totaling 9492.10 sq. ft. to the plaintiffs which is subject matter of lease deeds dated 14th December, 1981 and 19th September, 1985.

88. The suit of the plaintiff is accordingly decreed. Decree sheet be drawn accordingly.

89. Now I shall take up Suit No. 594/1998 which is for recovery of Rs. 25,44,000/- towards mesne profits for unauthorized construction and its use by the defendants and for mandatory injunction against the defendants seeking removal of a large hoarding put up by them on the suit premises.

90. The above said suit, as already mentioned, is consolidated with the main CS(OS) No. 131/2005. The suit has been contested by the defendant no.1 who has taken the defence of the written statement that the defendant no.1 never made any unauthorized construction in the suit property at any point of time. There was temporary construction of asbestos sheets already existing at terrace floor when the premises was let out in the year 1981. The defendant no.1 has specifically challenged the statement of the plaintiff that the plaintiffs did not give any particulars about the time, i.e. month and year when the alleged construction had taken place.

91. As regards the putting up of hoarding by the defendant no.1 is concerned, it is alleged by the defendant no.1 that the tenanted premises was commercial in nature and was let out for commercial and business purposes and, therefore, it is a common practice in the trade that the premises which are let out for commercial purposes, hoardings are normally fixed in those properties. Even otherwise, there was no clause in the lease deed for permission of the same.

92. The following issues were framed vide order dated 04.02.2000:

- “1) Whether the notice of termination of tenancy is illegal, if so, its effect? OPP*
- 2) Whether the plaintiffs are entitled to claim mesne profits, if so, at what rate and for which period? OPP*
- 3) Whether the defendants have trespassed into and raised construction of two rooms and a toilet over and above the first floor roof after creation of tenancy? OPP*
- 4) Whether the two rooms and toilet over and above the first floor existed at the time of letting and formed part of tenancy? OPP*
- 5) Whether the defendants are entitled to raise a hoarding without the consent of the plaintiffs? OPD*
- 6) Whether the plaintiffs are entitled to injunction for demolition and removal of unauthorized structures as alleged and prayed for? OPP*
- 7) Whether the defendants are liable to pay compensation, damages or mesne profits for the unauthorized constructions and affixing of hoarding, if so, at what rate and for which period? OPP*
- 8) Whether plaintiffs are entitled to interest, if so, at what rate? OPP*
- 9) To what amount plaintiffs entitled? OPP*
- 10) Relief”*

93. Common evidence has been filed by the plaintiffs in Suit No. 131/2005 by way of affidavit of Sh. Mohinder Pal Singh Khurana, PW-1, relevant paragraphs of which reads as under:

“17. The defendants have raised the said illegal constructions much earlier but plaintiffs have claimed compensation for a period of 3 years prior to the date of the suit i.e. from 24.3.1995 to 23.3.1998. The defendants are also liable to pay the compensation for said illegal use during the pendency of the suit and till they vacate the suit property. The plaintiffs have thus claimed as sum of Rs. 14,40,000/- for the area of 1200 sq. ft. illegally occupied by them for office and toilet for the said period, Rs. 10,80,000/- towards the illegal hoarding of 1000 sq. ft. and Rs. 24,000/- towards illegal removal of water tanks. The 3 sums thus claimed total to Rs. 25,44,000/-. Hence defendants are not only liable to vacate the suit premises but are also liable to pay Rs. 25,44,000/- to the plaintiffs towards use of

illegal and unauthorized construction of 1200 sq. ft. for the illegal and unauthorized hoarding, and for illegal removal of the water tanks.

19. The defendants have done unauthorised construction, and have made illegal modifications and alterations in the suit property, without the knowledge or consent of the plaintiffs, and the defendants are liable to restore the suit property to its original state as let out to them.

21. I learnt about the illegal construction and contravention of the rules and regulations only on 15th January 2002 when I visited the suit premises. When I tried to enter the suit premises for verifying the violations, the Guards appointed by the defendants prevented me from entering the suit premises.

24. That on 15th March 2002 a Local Commissioner, Mr. Pawan Gulati, was appointed by this Hon'ble Court to determine the status of unauthorized construction pursuant to which the Local Commissioner executed the commission and filed his report dated 24th July 2003.”

94. Issues No.3 and 4 relate to the factum of unauthorised construction made by the defendants as alleged by the plaintiffs. The onus of these issues is on the plaintiff. In the written-statement, it is alleged by the defendants that there is temporary structure of the rooms and bathrooms. No doubt, a report of the Local Commissioner appointed in suit No.206/2002 indicates that on first floor two toilets have been constructed which were not shown in the original sanctioned building plans and on the terrace floor a temporary masonry structure had been constructed with GI sheet roofing system.

95. No doubt, DW-2 Sh. M.P. Singh, Asstt. (commercial lease) DDA in his examination-in-chief stated that DDA has never received

any notice or complaint of any nature from the plaintiff but in his cross-examination, the details of unauthorized construction has come out and he admitted that his statement in examination-in-chief was correct. The plaintiffs had produced the original sanctioned building plans which are Ex. PW1/18 and PW1/19 and some photographs of the suit property. Learned counsel for the plaintiffs has argued that the property was let out in the year 1981 and additional construction was made by the plaintiff in 1985, therefore, the plaintiff had no access to the property thus the presumption can be drawn that unauthorized construction must be carried out after 1985. The present suit was filed in 1998. The plaintiff, in fact, during the course of the hearing was mostly relying upon the cross-examination of DW-2 M.P. Singh wherein some details of the unauthorised construction have come out.

96. Nobody can forget that it is the plaintiffs' suit, the burden of proof heavily lies upon the plaintiffs to prove the issues. From the testimony of the PW-1 and his cross examination, it is clear that he had made various contradictory statements which are contrary to the facts pleaded in relation to the unauthorised construction carried out if any by the defendants in the property.

97. PW-1 was not able to prove the statement made in the Plaint as well as in his affidavit. In most of the answers to the question raised by the defendant in the cross examination, the answer of the PW-1 was totally vague. The detail of part of the cross-examination conducted before the Joint Registrar is reproduced hereunder:

“Ques: Can you tell and show from the entire records of your case before the court which period the defendant had made construction on the first floor?”

Ans: I do not know if I had mentioned in my plaint any date when the defendant had started and completed the unauthorized construction on the first floor.

Ques: I put it to you that in the entire records of your case you have not mentioned anywhere the time when the alleged construction is stated to have been made on the roof of the first floor.

Ans: I do not know if it is mentioned in the plaint or not. Volunteered: Since my partners were handling the entire matters.

Ques: You do not have any knowledge as to when the defendant company had made construction on the first floor?

Ans: I have the knowledge since I have seen the construction going on from the ground floor though the defendant No.1 did not permit to enter the premises.

Ques: On which date you visited and seen the construction from the ground floor?

Ans: I cannot say the date.

Ques: When you were restrained from entering the premises by the guard of the premises had you sent any written notice to defendant No.1?

Ans: I had not given any notice. My partner might have given. I do not know.

Ques: Can you show from the records if any notice given by your partner is placed on record?

Ans: I cannot show from the records. Volunteered: Since I have a poor eye sight due to glucomana.

I cannot tell the month, year or date when I had visited the suit property.

Ques: I put it to you that since 1981 onwards when the suit premises were taken on lease the construction on the first floor has continued to remain on the same and no further construction was carried out by the defendant at any point of time.

Ans: Around 1981 there was already existing construction on the first floor and neon side.

The area which was existing in 1981 on the first floor was about 1200 sq. ft. and 400 sq. ft. It may be that the construction on the first floor which existed in 1981 was made up of asbestos sheets. I do not know if between 1981 till 1997 any notice or complaint to the defendant and to MCD and to DDA was ever given by the plaintiffs in regard to the construction on the first floor. Volunteered: I do not remember all these details since my partner used to look after all these matters and he has expired two years back. I do not remember and cannot tell when the defendant company had put up the hoarding on the suit property since my memory is weak and I do not remember. I had personally gone and visited the suit property and found the hoarding fixed there. I do not remember the date, month or year of my visit when I saw hoarding. It is wrong to suggest that the defendant company had a right to put hoarding on the suit property or that they had put up the same since 1981 when the suit premises were taken on rent. I do not know if from 1981 onwards till 1997 there had been given any notice by the plaintiffs to the defendant company regarding the fixing of hoarding in the suit premises. Same is my reply regarding any complaint to DDA, MCD and any other concerned authority. I cannot say and explain the basis of the calculation of the damages claimed against the defendant company since I had no knowledge and information about the same and it was my partner who used to look after the affairs in respect of the premises.”

98. From the above, it is clear that the plaintiffs have failed to prove the time, date, month and year by producing consent specific and cogent evidence as to when the alleged unauthorized construction was made by the defendants. The plaintiffs have also failed to prove notice, if any, issued by him to the DDA or to the defendants in this regard. Therefore, the present suit has no force and the same is dismissed. The

plaintiffs have failed to discharge this burden on issue No.3 and which are the main issues. Hence, the suit is liable to be dismissed. No costs.

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99. The above mentioned suit has been filed by the plaintiff for mandatory and other injunctions to stop the defendants from carrying out alterations, demolitions and for stopping the use of part of the suit premises for a coffee shop by the name of Barista Espresso Bar by the defendant no.4.

100. The suit was contested by the defendant no.1 who has admitted the opening of Barista Coffee Shop on the ground floor of the premises as permitted under Clause 4 of the lease deed dated 14.12.1981. The defendant has submitted that by virtue of agreement dated 02.07.2001 between the defendant no.1 and Barista Coffee Company Ltd., defendant no.4 has been allowed to conduct the said business.

101. By order dated 8.8.2005, the following issues were framed:

- “1) Whether the defendants have raised unauthorized construction and carried out alterations in the suit property contrary to and in violation of the Municipal Bye Laws and the approved plans? OPP*
- 2) Whether the suit is not maintainable against defendants no. 1 to 3, they being separate companies as alleged in the written statement? OPD*
- 3) Whether the suit of the plaintiff is bad for non-joinder of Municipal Corporation of Delhi, if so to what effect? OPD*
- 4) Whether the lease in favour of defendant no. 1 is a perpetual and could not be determined by the plaintiff, if so to what effect? OPD*
- 5) Whether the plaintiff is entitled for the relief of mandatory injunction as prayed for? OPD*
- 6) Whether the plaintiff is entitled for perpetual injunction as prayed for? OPP*

7) Whether the suit of the plaintiff is liable to be stayed in view of pendency of other suits as detailed in written statement? OPD

8) Whether the defendant no. 1 is liable to pay penalty only on account of any illegal construction or alteration made in violation of the bye-laws of MCD/DDA and the lease could not be determined on this ground? OPD

9) Relief”

102. In view of the order passed by this court in CS(OS) 131/2005, the present suit has become infructuous and the same is accordingly disposed of.

103. No cost.

MANMOHAN SINGH, J.

JULY 30, 2010
dp/jk