

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

+ **RFA 72/2005**

CAPT. PRAVEEN DAVAR (RETD.) & ANR. Appellants
Through: Mr. A.K. Singla, Sr. Advocate
with Mr. Pankaj Gupta and
Mr. J.K. Sharma, Advocates.

versus

HARVANSK KUMARI AND ORS. Respondents
Through: Mr. Ravinder Nath, Mr. P.K. Jain,
Mr. Rajesh Roshan, and
Mr.D.N. Jha, Advocates.

% **DATE OF DECISION: August 27, 2010**

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

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

J U D G M E N T
27.08.2010

: **REVA KHETRAPAL, J.**

1. This appeal seeks to assail the decree for possession dated 11th January, 2005 in respect of premises bearing No.B-32, Connaught Place, New Delhi-110 001 in favour of the respondents and against the appellants.
2. The case of the respondents, who were the plaintiffs in the suit filed by them in the trial court being Suit No.217/1995, was

that they were the owners/landlords of the aforesaid residential premises, where Dr.M.C.Dawar was a tenant at a monthly rent of ₹58.63 exclusive of other charges. The tenancy of Dr.M.C.Dawar was duly terminated by a legal notice dated 07.06.1974, to which a reply dated 12.07.1974 was sent by Dr. M.C.Dawar. Dr. M.C.Dawar died on or about 08.11.1977 as a statutory tenant in view of the fact that his tenancy had already been terminated during his lifetime.

3. After his demise, his widow Smt. Leelawati Dawar became the statutory tenant to the exclusion of all other legal heirs of late Dr. M.C.Dawar in accordance with Section 2 (1) (iii) of the Delhi Rent Control Act, 1958 (as amended by Act 18 of 1976 w.e.f. 01.12.1975). Smt. Leelawati Dawar allegedly did not pay the rent and damaged the tenanted premises which resulted in service of legal notice dated 12.02.1990 to her by the respondents herein. The notice, though was addressed only to Smt. Leelawati Dawar, was replied to by all the legal heirs of late Dr. M.C.Dawar (the defendants 1 to 5 in the suit) by letter dated 29.03.1990. Significantly, in the said reply, it was denied by all the legal heirs of late Dr.M.C.Dawar that the respondents were the owners of the suit premises. In view of the said denial of title, the respondents filed a suit for possession and damages against Smt. Leelawati Dawar and the other legal heirs of late Dr. M.C.Dawar under Section 114 of the Transfer of Property Act on the ground of

forfeiture of tenancy. Smt Leelawati Dawar died during the pendency of the suit in November, 1993. After her death, the suit was dismissed by the learned trial court on 01.10.1994 holding that as Smt.Leelawati Dawar had inherited the tenancy rights of late Dr. M.C. Dawar, consequent to her death only the Civil Court had jurisdiction to entertain and try the suit.

4. The instant suit was instituted on 30.03.1994 on the ground that since Smt.Leelawati Dawar had died and all the rights of late M.C.Dawar had come to an end in respect of the suit premises as per the Delhi Rent Control Act, the appellants were not legally entitled to retain the possession of the premises. It was alleged that since the appellants were illegally occupying the premises, they were liable to pay damages @ ₹ 4,000/- per day, but only a sum of ₹ 4,99,296/- in all was being claimed in order to bring the suit within the pecuniary jurisdiction of the Court. It was prayed that a decree for possession with regard to the suit premises be passed, and an enquiry under Order 20 Rule 12 CPC be held for determining the actual damages and compensation payable by the appellants to the respondents.

5. A joint written statement was filed by the defendants 1 to 4 (the appellants herein), while the defendant No.5 filed a separate written statement, more or less adopting the same pleas as those taken by the defendants 1 to 4 in their written statement. In a nutshell, the defence raised by the appellants/defendants was that:-

- I. The present suit is barred by res judicata, as a similar suit filed by the respondents against the appellants had been dismissed by the Court of Shri N.K.Kaushik, the then Civil Judge, Delhi by his judgment and decree dated 01.10.1994.
- II. The suit is barred under Section 50 of the Delhi Rent Control Act, as the appellants are the tenants-in-common in the suit premises, and hence the suit is liable to be dismissed.
- III. The alleged previous notice terminating the tenancy of Dr.M.C.Dawar dated 07.06.1974 was not valid, and even assuming the same to be valid, would be deemed to be waived by issuance of a fresh notice dated 12.02.1990.

6. On merits, it was not admitted that the respondents were the owners of the suit premises. It was averred that late Dr.M.C.Dawar had taken the premises on rent from the previous owner/landlord of the property, namely, Khan Bahadur Raza Akbar Ali, Contractor, Bara Khamba Road, New Delhi in the year 1940-41 for the dual purpose of residential-cum-commercial, and also for running his medical clinic as well as for editing and publishing of his renowned monthly journal 'The Supreme Saviour' from the suit premises and, till date, the suit premises were being continuously and uninterruptedly used as such. In the alternative, it

was submitted that even if it is held that the premises were let out for residential purposes, then also, the premises had been used for residential plus commercial purposes with the knowledge, tacit consent and acquiescence of the landlord Khan Bahadur Raza Akbar Ali and later on, his successor-in-interest, Shri Bishan Lal Kuthiala. After the demise of Dr.M.C.Dawar, it was asserted that all the appellants, being his legal heirs, have inherited the tenancy rights in the suit premises as tenants-in-common. It was consequently denied that late Dr.M.C.Dawar had died as a statutory tenant and that his widow alone had inherited his tenancy rights or that after the death of Smt. Leelawati Dawar the other legal heirs did not inherit the tenancy rights, and were liable to hand over the possession of the suit premises.

7. On the pleadings of the parties, the following issues were framed by the learned trial court for consideration and adjudication of the suit on 22.05.1997:-

“(i) Whether the plaintiffs are owners and landlords? OPP.

(ii) Whether the suit is barred by Section 50 of the DRC Act? OPD.

(iii) Whether the plaintiff is estopped from bringing the present suit in view of the averments in para no.3 of the Written Statement of defendant no.1 to 4? OPD.

(iv) Whether the tenancy of the defendant is terminated by a valid and legal notice? If not, its effect. OPP.

(v) Whether the defendants are still continuing as tenants? OPD.

(vi) Whether the premises were taken for residential-cum-commercial purpose? OPD.

(vii) *Whether the plaintiff is entitled for the possession of the premises as claimed? OPP.*
(viii) *Whether suit is barred by res judicata? OPD.*
(ix) *Whether the plaintiff is entitled for the damages as claimed? If so, at what rate? OPP.*
(x) *Relief."*

8. On the aforesaid issues, the parties went to trial resulting in the passing of the impugned judgment and decree for possession in favour of the respondents and against the appellants.

9. Arguments in the appeal were addressed by Mr.A.K.Singla, the learned senior counsel for the appellants and Mr.Ravinder Nath, the learned counsel for the respondents.

10. Since the appellants have assailed the findings of the learned Addl. District Judge on each and every issue, it is proposed to deal with the matter issue-wise, in the same order as dealt with by the trial court.

Issue No.1: *Whether the plaintiffs are owners and landlords? OPP.*

11. At the outset, it may be noted that in para 1 of the joint written statement filed by the appellants 1 to 4, it is stated that the ownership of the respondents is "not admitted". It is submitted in para 2 thereof that the premises in question were taken on rent by late Dr.M.C.Dawar from the previous owners/landlords, namely, Khan Bahadur Raza Akbar Ali in the year 1940-41. In para-9 of the written statement, however, there is a categorical admission as follows:-

“The property in suit still stands in the name of Bishan Lal Kuthiala, who was the owner and landlord of the same.”

In the separate written statement filed by the appellant No.5, in answer to the assertion made in the plaint that the plaintiffs are the owners/landlords of the premises, it is stated that these are matters of record.

12. The learned counsel for the respondents contended that in view of the categorical admission made in para-9 of the written statement by the defendants (the appellants herein), issue No.1 has been rightly decided in favour of the respondents and against the appellants. Strong reliance was placed by the learned counsel for the respondents on the provisions of Order 8 Rules 3,4 and 5 of the Code of Civil Procedure to contend that where specific averments are made in the plaint, vague denial of the same tantamounts to admission of the said averments. Reliance was placed by him in this regard on the judgment of the Hon'ble Supreme Court in ***Badat & Co. v. East India Trading Co. AIR 1964 SC 538***, wherein His Lordship Subha Rao, J speaking for the majority, held as under:-

“Rules 3,4 and 5 of Order 8 of C.P.C form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof

is necessary.”

[See also : Ramchandra Jamnadas Katariya v. Nuruddinbhai and others AIR 2005 Bombay 107 where the Bombay High Court has relied upon the observations quoted above].

13. The aforesaid proposition of law was not disputed by the learned senior counsel for the appellants. Furthermore, it has come on record that in the year 1940-41, Dr.M.C.Dawar had taken the premises on rent from Khan Bahadur Raza Akbar Ali, who, on partition, migrated to Pakistan, whereafter the property was declared as evacuee property, and was subsequently purchased by Bishan Lal Kuthiala in a public auction from the Custodian of Evacuee Property vide Perpetual Lease Deed and Certificate of Sale (Ex.PW-1/D-7). To be noted that by a letter dated 08.11.1960 (Ex.PW-1/9), Dr.M.C.Dawar congratulated Shri Bishan Lal Kuthiala on the aforesaid acquisition of property by the latter; and tendered rent to him by cheque for the period intervening 28.08.1960 to 31.10.1960. Thus, Shri Bishan Lal Kuthiala had attorned to Dr. M.C. Dawar as his landlord and owner by the aforesaid letter of attornment. Subsequently, Dr. M.C. Dawar again sent the rent to Shri Bishan Lal Kuthiala by a cheque with a covering letter (Ex.PW-1/8), and thereafter he continued paying the rent till he (Bishan Lal Kuthiala) died in or about the year 1964. After his death, Dr. M.C. Dawar continued paying rent to the respondents/plaintiffs, being the widow and sons of late Bishan

Lal Kuthiala. On 07.06.1974, the respondents, as stated above, served a legal notice on Dr.Dawar (Ex.PW-1/3), which legal notice was acknowledged by Dr.Dawar by his reply dated 12.07.1974 (Ex.DW-2/P1). In his reply notice, Dr.M.C.Dawar did not deny the relationship of landlord and tenant between the parties and, as a matter of fact, specifically accepted the respondents as his landlords. After his death, his widow Smt.Leelawati Dawar paid rent to the respondents vide rent receipts Ex.DW-2/12 to DW-2/16. Admittedly also, the premises in question are assessed to house tax and the respondents are paying the house tax, receipts whereof are Ex.PW-1/D1 to PW-1/D5.

14. Apart from the aforesaid, DW-2, Shri Praveen Dawar and DW-4, Shri Kamlesh Dawar in the course of their cross-examination could not deny that the respondents were the owners and landlords of the suit property. Thus, not only did Dr.Dawar by letter Ex.PW-1/9 attorn in favour of Late Shri Bishan Lal Kuthiala, (who was the successor-in-interest of Khan Bahadur Raza Akbar Ali) and continue to pay rent to Shri Bishan Lal Kuthiala, but later on he continued to pay rent to the legal representatives of Late Shri Bishan Lal Kuthiala and, after Dr.Dawar's death his widow Smt.Leelawati Dawar continued to pay rent to the legal heirs of Shri Bishan Lal Kuthiala – the respondents herein.

15. From the aforesaid, in my opinion, there is no manner of doubt that the learned trial court rightly decided issue No.1 in

favour of the respondents and against the appellants. Reliance placed in this regard by the learned trial court on the provisions of Section 116 of the Evidence Act and the following observations of the Supreme Court in **Anar Devi v. Nathu Ram**, reported in **1994 (2) RCJ 103**, conclusively clinches the issue:

“Section 116 of the Evidence Act applies and estops even a person already in possession as tenant under the landlord from denying the title of his subsequent landlord when once he acknowledges him as his landlord by attornment of conduct. Therefore, a tenant of immovable property under landlord who becomes a tenant under another landlord by accepting him to be the owner who had derived title from the former landlord, cannot be permitted to deny the latter's title, even when he is sought to be evicted by the latter on a permitted ground.”

16. An attempt was made by Mr.Singla, the learned senior counsel for the appellants to contend that none of the plaintiffs having entered into the witness box to assert their title, the evidence of PW-1 Shri Bihari Lal Walia, the Attorney of the respondents, could be of no assistance to the respondents. Relying upon the judgment of the Hon'ble Supreme Court in **Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others** reported in **AIR 2005 Supreme Court 439**, the learned senior counsel for the appellants contended that the word “acts”, employed in Order 3 Rules 1 & 2 CPC, was confined to acts done by the power of attorney holder in exercise of powers granted by the instrument and was not inclusive of deposing in place and instead of the principal in respect of the matters in which the acts

were done by the principal and not by him, and in which only the principal could have a personal knowledge. Apart from the fact that this point was not urged before the learned trial court and has been taken up for the first time in this appeal, there is, even otherwise, in my view, no merit in the same. The provisions of Order 3 Rules 1 and 2 CPC, as is clear from a reading thereof, contain no impediment to the Attorney deposing in place of and instead of the landlord. In ***Smt.Ramkubai (since deceased) by L.Rs and others v. Hajarimal Dhokalchand Chandak and others, AIR 1999 Supreme Court 3089***, the Supreme Court while dealing with a case where the landlady did not appear in the witness box herself, but instead produced her son, who was also her G.P.A. holder, held that it was not important or essential for the landlord/landlady to enter the witness box to support the case. [See also: ***Om Prakash Vs. Inder Kaur 2009 (107) DRJ 263 and Satnam Channan v. Darshan Singh 2006(2) RCR (Civil) 615 Punjab and Haryana***].

17. The judgment in ***Janki Vashdeo Bhojwani's*** case (supra) relied upon by the learned senior counsel for the appellants also does not come to the aid of the appellants and is clearly distinguishable. It has been held in the said case that if the power of attorney renders some acts in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the

principal and not by him. Further, it has been held that he cannot depose for the principal in respect of the matters, in which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. It nowhere states that even though the facts deposed are not facts within the personal knowledge of the principal alone, the power of attorney holder cannot depose on behalf of the principal.

18. Keeping in view the aforesaid, I am of the opinion that it can safely be concluded that the non-appearance of the respondents in the witness box was not fatal to their case. Further, on this aspect it cannot be lost sight of that the attorney PW-1 Shri Bihari Lal Walia, when he appeared in the witness box and proclaimed Smt. Harbans Kaur to be the owner, was not cross-examined by the learned counsel for the appellants. It is settled law that when a witness is not cross-examined, his evidence on the aspect on which he has deposed must be accepted by the Court in [See ***Ramchandra Jamnadas Katariya*** (supra)]. Further, no question was put to PW-1 to challenge his competence to depose. Accordingly, the findings of the learned trial court on this issue cannot be faulted.

Issue No.6: *Whether the premises were taken for residential-cum-commercial purpose? OPD.*

19. This issue was taken up by the learned trial court and dealt with before dealing with issue Nos.2 to 5, as the decision of issues

Nos.2 to 5 rested on the decision of this issue. Accordingly, this Court is also dealing with issue No.6 prior to dealing with the remaining issues.

20. Indubitably, the tenancy of Dr.M.C.Dawar was an oral tenancy and there was no written agreement by virtue of which the premises were let out to Dr.Dawar. PW-1 Shri B.L.Walia proved on record the site plan (Ex.PW-1/7) of the demised premises, consisting of three bedrooms, kitchen, bathroom, toilet and verandah. The correctness of the site plan was not challenged before the learned trial court, nor any site plan to the contrary was filed by the appellants herein. Thus, the premises let out to Dr.M.C.Dawar (apart from the kitchen, bathroom, toilet and verandah) comprised of three bedrooms, and from the site plan alone it stands proved that the premises were residential in nature. Further, as noted by the learned trial Judge, PW-1 Shri B.L.Walia, the attorney of the respondents categorically deposed that the premises were being used for residential purposes, and that even the water and electricity charges were being raised on residential basis.

21. As against the above, DW-2 Capt. Praveen Dawar (the appellant No.1 herein) deposed that the suit premises were taken from Khan Bahadur Raza Akbar Ali by his father in the year 1939 for residential-cum-commercial purposes, that his father set up a homeopathic dispensary in the said premises, and that he thereafter

used the premises for the publication of his fortnightly journal called 'Supreme Saviour' of which he was the editor and which is still continuing. Copies of the said journal were proved on record by him as Ex.DW-2/1 to DW-2/11. Another witness, DW-3 Shri Vinay Bhargav, claiming himself to be a friend of DW-1 Praveen Dawar, deposed that he used to get medicines from Dr.M.C.Dawar whenever he fell ill and Dr.Dawar had also treated his father. Apart from this, he stated that Dr.Dawar used to practice and also used to reside in the suit premises. DW-4 Kamlesh Dawar deposed on the same lines as DW-2, apart from producing three letters (Ex.DW-4/1 to DW-4/3). In his cross-examination, however, it was admitted by DW-4 Kamlesh Dawar that two out of the aforesaid three letters (Ex.DW-4/1 and Ex.DW-4/3) did not bear even the Municipal Number and that the address mentioned was only B-Block, Connaught Place, Delhi, while in the third letter, Ex.DW-4/2, the address of Dr.M.C.Dawar was merely given as "General Secretary, Indian Homeopathic Mission, Connaught Place, New Delhi". As such, it is clear that none of these letters prove that Dr.Dawar was running his clinic from the suit premises.

22. A close perusal of the testimonies of the aforesaid witnesses also shows that there are glaring inconsistencies and contradictions in the testimonies of these witnesses, inasmuch as DW-4 Kamlesh Dawar, while admitting that there were three bedrooms in the demised premises which were let out to his father stated that apart

from these three bedrooms, there was a wooden cabin constructed by his father, in the '**verandah**', where he used to run his clinic. According to DW-4, this cabin was '**very old**' and was constructed "**in the 1940s**". In direct contradiction, DW-3 Shri Vinay Bhargav deposed that Dr.M.C.Dawar had constructed a wooden cabin inside the '**hall**', which was a '**new one**', where he used to carry on his medical profession. Thus, it is not known as to whether the wooden cabin was constructed in the verandah or the hall. However, even assuming that such a wooden cabin was constructed by Dr.Dawar from where he used to carry on his homeopathic practice that, in my view, would not alter the nature of the premises and convert the same from residential to residential-cum-commercial. There is no dearth of legal precedent in this regard and the law is well settled that the letting purpose can be inferred from the nature of the premises, its design, its location and its dominant use [See *Trilochan Singh vs. Mrs.Usha Dhir 1993 RCJ (2) 149 (DB)*]. Where the dominant use has been established to be the residence of the tenant and his family, the nature of the premises must be taken to be residential. Mere fact that a lawyer sees his client in his house and transacts some legal business, or a doctor examines his patient in his house or any other professional incidentally carries on some work from a portion of his residence, does not amount to conversion of a residential premises into non-residential one. [See: *Kidar Nath Sodhi versus*

T.R.Kapoor 1989(1) RCJ 112 and Mrs.C.Colaco v. Urban D' Silva 1970 RCJ 883].

23. Then again, it deserves to be noted that it is the undisputed case of the parties that on 07.06.1974 the respondents had served on Dr.M.C.Dawar a legal notice (Ex.PW-1/3), alleging that the property was let out for the residential use of Dr.M.C.Dawar and that Dr.M.C.Dawar had acquired “another suitable house” and as such the tenancy was being terminated w.e.f. 31.07.1974 or on such date when the tenancy ends. The aforesaid legal notice was duly acknowledged by Dr.M.C.Dawar vide his reply (Ex.DW-1/P1). In his said reply, significantly, it was nowhere stated that the purpose of letting was non-residential. In other words, there was no denial to the fact that the purpose of letting was residential. In the circumstances, the plea taken by the appellants herein that the premises were let out to them for dual purpose clearly appears to be an after-thought. Not only this, as already stated, the said plea is belied by the following facts and circumstances:-

- (i) No document has been placed on record to show that Dr.M.C.Dawar was running his clinic from the demised premises.
- (ii) The site plan Ex.PW-1/7, which shows that the premises comprised of three bedrooms, toilet, kitchen and verandah, stands duly proved and no counter site plan has been set up by the appellants herein. The site

plan itself demonstrates that the premises were residential in nature.

(iii) The purpose of letting was not denied by Dr.Dawar to be residential during his lifetime as is clear from the document Ex.DW-1/P1, i.e., the reply to the legal notice dated 07.06.1974.

(iv) For the first time the legal representatives of Dr.Dawar in their reply (Ex.PW-1/6) to the legal notice dated 12.02.1990 (Ex.PW-1/5) belatedly raised the plea that the premises were let out to Dr. Dawar for the dual purpose of residence and running of medical clinic, that is, after the death of Dr. Dawar himself and after a span of 15 years of issuance of the notice to quit.

(v) There is a clear contradiction in the testimonies of DW-3 and DW-4 even with regard to the “wooden cabin” allegedly constructed by Dr.Dawar for setting up his homeopathic dispensary, and as to whether the same was located ***in the hall or in the verandah*** and as to whether it was an **old** construction of the year 1940 or a **new** construction.

(vi) DW-4 Shri Kamlesh Dawar categorically stated in his cross-examination that his father had the license to work as a medical practitioner, but the license is yet

to see the light of the day.

(vii) In the letters (Ex.DW-4/1 and DW-4/3) addressed to Dr.M.C.Dawar by various authorities (relied upon by the appellants), the address of Dr.Dawar is mentioned as B Block, Connaught Place, Delhi without even the Municipal Number and, in any case, none of these letters prove that Dr.Dawar was running his clinic from the suit premises.

(viii) The appellants themselves have filed document (Mark X3) which is a letter from Dr.M.C.Dawar to Dr.Saheb Singh, requesting him to send quinine tablets. A perusal of the letter makes it abundantly clear that the “head office” is mentioned as Connaught Place, but the Municipal Number of the premises is not given and three branches have been mentioned as: No.30, The Maal, Shimla; Qarol Bagh, Delhi and Darya Ganj, Delhi. Thus, as per the appellants' own showing Dr.Dawar was not carrying on his medical profession from the suit premises.

(ix) The testimonies of DWs 2,3 and 4 that the magazine 'Supreme Saviour' was being published since 1940-41 is belied by the documentary evidence on record, which shows that the magazine was registered in February, 1965 (Ex.DW-1/1). A perusal

of the back of the magazine further goes to show that the address “*For the purpose of correspondence only*” is mentioned as “D-32, Connaught Place, New Delhi”.

(x) Though the premises were let out as residential in the year 1940-41, the same were claimed to be residential-cum-commercial for the first time in the year 1990.

24. To clinch the matter, it deserves to be noticed that during the pendency of the present appeal, on the respondents' filing the application being C.M.No.4710/2008, under Section 151 of the Code of Civil Procedure, praying for directions to the appellants to deposit a sum of ₹ 2 lacs per month as compensation for the use and occupation of the suit premises from December, 1994 till the final decision in the present appeal, **the appellants filed an affidavit clearly admitting that the premises were “residential” in nature.**

25. This is how the aforesaid affidavit came to be filed. A Division Bench of this Court on 8th May 2008 issued the following direction in C.M.No.4710/2008, referred to in the preceding paragraph:-

“In order to arrive at a fair market rent which the property can fetch if let out, both the parties are permitted to file their respective affidavits along with the valuation report so as to enable the Court to consider prayer of the respondent in terms of CM No.4710/2008. This would be also necessary in the light of the pronouncement in 2005 (2) SCC 705.

List on 3rd July, 2008.”

26. Pursuant to the aforesaid order, the appellants filed affidavit dated 10th June, 2008, which is at page 417 of the court record. In paragraph 3 of the said affidavit, reference is made to the current rent paid by “**other occupants of residential units**” in the Inner and Outer Circles of Connaught Place, New Delhi.

27. In paragraph 5, it is stated as follows:-

*“5. That conditions laid down by principal lessor (L & DO, New Delhi) do not permit letting of premises situated at first floor (premises in occupation of appellant being a premises falling in such class) for purpose other than residential use. The premises at first floor in the Connaught Place area got vacated by owner/landlords in the past 5-7 years have not gained/attracted any tenant. Presently no person is willing to take premises in this area for a residential purpose and that **the letting of premises at First Floor in such blocks of Connaught place for a commercial use is not permitted. The same is prohibited by the principal lessor.** Some of the instances are as under.....”*

In paragraph 11, it is again stated as under:-

*“11. That “**other residential units**” as per records of L & DO provided for in building known as 'Kuthiala Building' are premises described as No.B-30, B-31, B-33, all situated at First Floor and B-52 and B-55 situated at the second floor besides another unit in the Middle Circle assigned as B-12/7-8”*

28. On being faced with the aforesaid, Mr.A.K.Singla, the learned senior counsel for the appellants sought to press his application under Order 41 Rule 27 CPC, being C.M.No.7444/2005 seeking permission to adduce additional

evidence through the following documents: -

- (1) Register of patients.
- (2) NDMC Bill dated 29th November, 1940.
- (3) Letter dated 11th December, 1940.
- (4) Pamphlet issued by Dr. M.C.Dawar.
- (5) NDMC Bill dated 13th November, 1975.

29. At the time of arguments, Mr. Singla confined his prayer to the production of the Register of patients mentioned at serial no.(1) in paragraph 4 of the application, to show that Dr. M.C. Dawar was carrying on his medical practice at the suit premises.

30. The said application was contested by the learned counsel for the respondents, Mr.Ravinder Nath, who contended that the permission to adduce additional evidence can be granted by this Court only if the conditions and limitations prescribed in Order 41 Rule 27 exist, which have been delineated by the Supreme Court in

Mahavir Singh and Ors. vs. Naresh Chandra and another, AIR

2001 Supreme Court 134. In the said case it was held as under:-

“5. Before we proceed further we would like to refer to the scope of an application under Order XLI, Rule 27 CPC. Section [107](#) CPC enables an appellate court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order XLI, Rule 27 CPC. Principle to be observed ordinarily is that the appellate court should not travel outside the record of the lower court and cannot take evidence on appeal. However, Section [107\(d\)](#) CPC is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The Court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence

and the matter is entirely in the discretion of the court, which is, of course, to be exercised judiciously and sparingly. The scope of Order XLI, Rule 27 CPC was examined by the Privy Council in Kesowji Issur v. G.I.P. Railway (1907) ILR 31 Bom 381 in which it was laid down clearly that this rule alone can be looked to for taking additional evidence and that the court has no jurisdiction to admit such evidence in cases where this rule does not apply. Order XLI, Rule 27 CPC envisages certain circumstances when additional evidence can be adduced:

(i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(iii) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

In the present case, it is not the case of either party that the first situation is attracted. So far as the second circumstance noticed above is concerned, question of exercise of due diligence would not arise because the concerned scientific equipment from which examination is sought to be made itself was not in existence at the time of trial and so that clause is also not attracted. In the third circumstance the appellate court may require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. The expression "to enable it to pronounce judgment" has been subject of several decisions including Syed Abdul Khader v. Rumi Reddy AIR 1979 SC 553, wherein it was held that when the appellate Court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The

ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of Court delivering it. It is only a lacuna in the evidence that will empower the Court to admit additional evidence. [See: *The Municipal Corporation of Greater Bombay v. Lala Pancham* AIR 1965 SC 1008.] But a mere difficulty in coming to a decision is not sufficient for admission of evidence under this rule. The words "or for any other substantial cause" must be read with the word "requires", which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate Court requires additional evidence, that this rule would apply as noticed by the Privy Council in *Kesowji Issur v. G.I.P. Railway* [supra]. It is under these circumstances such a power could be exercised. Therefore, when the first appellate Court did not find the necessity to allow the application, we fail to understand as to how the High Court could, in exercise of its power under Section 115 CPC, could have interfered with such an order, particularly when the whole appeal is not before the Court. It is only in the circumstances when the appellate Court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances. When the first appellate court passed the order on the application filed under Order XLI, Rule 27 CPC, the whole appeal was before it and if the first appellate Court is satisfied that additional evidence was not required, we fail to understand as to how the High Court could interfere with such an order under Section 115 CPC. In this regard, we may notice the decision of this Court in *Gurdev Singh v. Mehnga Ram* (1997) 6 SCC 507, in which the scope of exercise of power under Section 115 CPC on an order passed in an application filed under Order XLI, Rule 27 CPC was considered. When this decision was cited before the High Court, the same was brushed aside by stating that the principle stated therein is not applicable to the facts of this case. We do not think so. The High Court ought not to have interfered with such an order.

31. Reference was also made by the learned counsel for the respondents to the decision of the Supreme Court in ***K.R.Mohan***

Reddy v. M/s. Net Work Inc. Rep. Tr.M.D., AIR 2008 Supreme Court 579, and to the decision of the Karnataka High Court in ***Smt. Girijamma and Ors. vs. M/s. Kamala Engineering Works, Bangalore***, ***AIR 2000 Karnataka 239***. In the latter case, the permission to produce the lease deed by way of additional evidence was declined on the ground that additional evidence under Order 41 Rule 27 can be permitted only if it is established that even after the exercise of due diligence the party seeking production of additional evidence was unable to secure that evidence during the trial of the case.

32. The learned counsel for the appellants, on the other hand, sought to rely upon the decisions rendered in ***North Eastern Railway Administration Gorakhpur Vs. Bhagwan Das (Dead) By L.Rs reported in 2008 (8) SCC 511***. The said decision, however, can to my mind afford no assistance to the appellants for the reason that what was held in the said case was that the High Court was bound to consider the application under Order 41 Rule 27 CPC before taking up the appeal on merits. It was also laid down that the appellate court has power to allow additional evidence not only if requires such evidence “to enable it to pronounce judgment” but also for “any other substantial cause”. It was observed in the said case that the High Court had altogether failed to consider the application filed by the appellant under Order 41 Rule 27 CPC. Taking notice of the judgment of the Constitution Bench of the

Hon'ble Supreme Court in *K.Venkatramaya V. A. Sitamareddy*, the Hon'ble Supreme Court held that there may well be cases where even Courts find that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence “to enable it to pronounce judgment”, it will still insists that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Pertinently, the aforesaid observations were made in the context of a case where the respondent who was a simple *pattedar* in 1969 (State Govt. being the owner of the land), later on in 1971, obtained a *bhumidar sanad* by playing a fraud and the trial court held that the respondent was a *bhumidar* and in possession of the suit land. Against the said decree, the appellant filed an appeal before the District Judge which was dismissed. The appellant then preferred second appeal before the High Court wherein to support its pleas and contentions, the State Govt. sought to bring on record the copies of the revenue and other records by way of an application under Order 41 Rule 27 CPC before the High Court. It was asserted by the State Government that the additional evidence sought to be brought on record, which was nothing but a part of the official record, would have exposed the fraud which was played by the respondent but the High Court had failed to even take note of the application under Order 41 Rule 27 of the Code of Civil

Procedure. The Supreme Court thereupon remitted the matter back to the High Court to take a fresh decision in the application under Order 41 Rule 27. Thus, no rule was laid down in the said judgment that all the applications under Order 41 Rule 27 CPC must be allowed by the High Court under all circumstances, even if due diligence is not exercised by the appellants to produce the same in the court below and even if the same are not necessary for the purpose of enabling the court to pronounce its judgment. In the present case, no cogent explanation has been given by the appellants as to why they should be allowed to adduce additional evidence at this belated stage, more particularly when the same was within their power and possession at the relevant time. Furthermore, the appellants themselves having admitted the premises to be residential, in my opinion, no useful purpose would be served in allowing the appellants to adduce additional evidence at this stage.

33. For all the aforesaid reasons, I do not deem it proper to allow the prayer of the appellants to adduce additional evidence at this stage, since, in my view, even if such additional evidence is taken into account, it will be of no consequence in determining the purpose of letting off the premises and the dominant user thereof.

34. Assuming such additional evidence had been allowed by this Court and assuming further that the appellants successfully discharged the onus placed upon them of proving that the said

Register was in the handwriting of Dr.M.C.Dawar as alleged, such evidence would be of no consequence in determining the purpose of letting of the premises in suit, keeping in view the other aspects adumbrated hereinabove, viz., the dominant user of the premises, the purpose of letting and the admissions made by the appellants themselves, albeit unwittingly, that the premises were residential in nature.

35. Issue No.6 was, therefore, rightly decided by the learned trial court in favour of the respondents.

Issues no.2 to 5 and 7

36. Issues no.2 to 5 and 7 being interconnected and intertwined are being dealt with together. Issue no.2 relates to the plea taken by the appellants that the suit is barred under Section 50 of the Delhi Rent Control Act as the appellants claim themselves to be tenants-in-common in the suit premises. Issue no.3 relates to the plea of estoppel taken by the appellants, stating that the respondent-plaintiffs are estopped in law from filing the suit, in as much as according to their own showing Mrs. Leelawati Dawar was a contractual tenant and for that reason her tenancy was sought to be terminated by the respondents by the notice dated 12th February, 1990 which, in effect, meant that the previous notice to Dr. M.C. Dawar (even assuming the same to be valid) would be deemed to be waived. Issue no.4 is to the effect whether the

tenancy of the appellants was terminated by a valid and legal notice. Issue no.5 is whether the defendants are still continuing as tenants. Issue no.7 is whether the respondents are entitled to possession of the premises as prayed by them.

37. Adverting first to the alleged jurisdictional bar by virtue of the provisions of Section 50 of the Delhi Rent Control Act, it is trite that for invoking the provisions of Section 50, one of the pre-requisites is that there should exist a relationship of landlord and tenant between the parties. In the instant case, the contention of the respondents is that since the appellants have not inherited the tenancy rights, no such relationship of landlord and tenant exists and hence the respondents could not have taken recourse to the filing of an eviction petition before the Controller under the Act.

38. This takes me to the inter-related question as to whether the tenancy of Dr.M.C. Dawar stood validly terminated during his lifetime by virtue of the notice dated 6th July, 1974, Ex. PW1/3 and to other inter-related question as to whether the said notice was deemed to be waived by the issuance of the notice dated 12th February, 1990. The answer to these two question would ultimately determine whether the appellants are still continuing as tenants and are tenants-in-common as claimed by them. It is only if the appellants are held to have inherited the tenancy rights of Dr. M.C. Dawar are held to have inherited the tenancy rights of Dr.

M.C. Dawar that the question of jurisdictional bar to the suit under Section 50 of the Delhi Rent Control Act would arise.

39. At the outset Mr. Singla, the learned counsel for the appellants sought to contend that at the time of the lease tenancy in favour of the original tenant Dr. Dawar, which was created in the year 1939-40, the rights of the parties were governed and covered by the provisions of the Punjab Urban Rent Restriction Act, 1941, which came into effect on the first day of December, 1942. Section 10 of the said Act, he contended, afforded protection to the original tenant who was a statutory tenant. The said section reads as under: -

“5.10 Conditions of Statutory tenancy –
No order for recovery of possession of any premises shall be made so long as the tenants pays or is ready and willing to pay rent to the full expenditure allowable by this Act and performs the other conditions of the tenancy: Provided that the court shall make an order for the recovery and possession if the landlord satisfies the court that six months notice to quit or notice of such period as may be required under the contract of tenancy, whichever be longer, has been served on the tenant.”

40. Thus, according to Mr. Singla, the notice received by Dr. Dawar not being a six months' notice to quit fell foul of the provisions of the aforesaid section.

41. Reference was also made by Mr. Singla to sub-Section (1) to Section 15 of the Delhi and Ajmer-Merwara Rent Control Act,

1947 whereby and whereunder, the Delhi Rent Control Ordinance, 1944, the New Delhi House Rent Control Order, 1939 and the Ajmer-Merwara Control of Rent Eviction Order, 1946 were repealed; and to Sub-section (2) of Section 15 of the said Act which provided that the Punjab Urban Rent Restriction Act [Punjab Act [X of 1941] shall cease to have effect in the province of Delhi. Mr. Singla contended that the Punjab Urban Rent Restriction Act, 1941 was a temporary statute, and the law in respect of a temporary statute, as opposed to a repealed statute was quite different. In other words, what was sought to be contended was that despite the fact that the Punjab Urban Rent Restriction Act, 1941 had ceased to have effect in Delhi (by virtue of the provisions of Section 15 of the Delhi and Ajmer-Merwara Rent Control Act, 1947), the tenancy of the original tenant could not have been terminated except by giving to him a notice of six months as envisaged by Section 10 of the Punjab Rent Restriction Act, 1941. In order to emphasize the distinction between a temporary Statute and a repealed Statute, the learned counsel for the appellant placed reliance on the decision of the Supreme Court in *State of Orissa vs. Bhupendra Kumar Bose*, AIR 1962 SC 945 and in particular referred to paragraphs 19 and 20 of the said decision which read as follows: -

“19. It is true that the provisions of section 6 of the General Clauses Act in relation to the effect of repeal do not apply to a temporary

Act. As observed by Patanjali Sastri, J., as he then was in *S. Krishnan vs. State of Madras*, 1951 SCR 621 ; (AIR 1951 SC 301), the general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires. That is why the Legislature can and often does, avoid such an anomalous consequence by enacting in the temporary statute a saving provision, the effect of which is in some respects similar to that of s. 6 of the General Clauses Act. Incidentally, we ought to add that it may not be open to the Ordinance making authority to adopt such a course because of the obvious limitation imposed on the said authority by Art. 213(2)(a).

20. XXXX XXXX XXXX

21. In our opinion, it would not be reasonable to hold that the general rule about the effect of the expiration of a temporary Act on which Mr. Chetty relies is inflexible and admits of no exceptions. It is true for instance that offences committed against temporary Acts must be prosecuted and punished before the act expires. If a prosecution has not ended before that day, as a result of the termination of the Act, it will ipso facto terminate. But is that an inflexible and universal rule ? In our opinion, what the effect of the expiration of a temporary Act would be must depend upon the nature of the right or obligation resulting from the provisions of the temporary Act and upon their character whether the said right and liability are enduring or not. As observed by Parker, B. in the case of *Steavenson v. Oliver*, 1841 151 E.R. 1024 at pp.1026-1027.

"there is a difference between temporary statutes and statutes which are repealed: the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect

to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction."

In this connection, it would be useful and interesting to consider the decision in the case of *Steavenson*, (1841) 151 E.R. 1024 at pp.1026-1027 itself. That case related to 6th Geo. 4, c. 133, section 4 which provided that every person who held a commission or warrant as surgeon or assistant surgeon in His Majesty's Navy or Army, should be entitled to practise as an apothecary without having passed the usual examination. The statute itself was temporary and it expired on August 1, 1826. It was urged that a person who was entitled to practise as an apothecary under the Act would lose his right after August 1, 1826 because there was no saving provision in the statute and its expiration would bring to an end all the rights and liabilities created by it. The Court rejected this contention and held that the person who had acquired a right to practise as an apothecary, without having passed the usual examination, by virtue of the provision of the temporary Act, would not be deprived of his right after its expiration. In dealing with the question about the effect of the expiration of the temporary statute, Lord Abinger, C.B. observed that

"it is by no means a consequence of an act of Parliament's expiring, that rights acquired under it should likewise expire. Take the case of a penalty imposed by an act of Parliament would not a person who had been guilty of the offence upon which the legislature had imposed the penalty while the Act was in force, be liable to pay it after its expiration ? The case of a right acquired under the Act is stronger. The 6 Geo. 4, C. 133, provides that parties who hold such warrants shall be entitled to practise as apothecaries; and we cannot engraft on the statute a new qualification, limiting that enactment."

It is in support of the same conclusion that Parker, B. made the observations which we have already cited. "We must look at this act", observed Parker, B., "and see whether the restriction in the 11th clause, that the provisions of the statute are only to last for a limited time, is applicable to this privilege, in question. It seems to me that the meaning of the legislature was that all assistant-surgeons, who were such before the 1st of August, 1826, should be entitled to the same privileges of practising as apothecaries, as if they had been in actual practise as such on August 1, 1815, and that their privilege as such was of an executory nature, capable of being carried into effect after the August 1, 1826."

Take the case of a penalty imposed by a temporary statute for offences created by it. If a person is tried and convicted under the relevant provisions of the temporary statute and sentenced to undergo imprisonment, could it be said that as soon as the temporary statute expires by efflux of time, the detention of the offender in jail by virtue of the order of sentence imposed upon him would cease to be valid and legal ? In our opinion, the answer to this question has to be in the negative. Therefore, in considering the effect of the expiration of a temporary statute, it would be unsafe to lay down any inflexible rule. If the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. If a penalty had been incurred under the statute and had been imposed upon a person, the imposition of the penalty would survive the expiration of the statute. That appears to be the true legal position in the matter."

42. I am afraid there is no substance in the contention of the appellants that the Punjab Rent Restriction Act being a temporary Statute would enure to the benefit of the original tenant, rendering

invalid the notice to quit issued on 6th July, 1974, long after the said enactment had ceased to be in force. The interpretation sought to be placed by the learned counsel for the appellants on the paragraphs 19 and 21 of the judgment of the Supreme Court in the case of **Bhupendra Kumar Bose** (*supra*) is entirely misplaced. The Supreme Court was dealing with the question as to whether certain proceedings had become infructuous in view of the lapse of an Ordinance which was a “temporary statute” and it was in this context that it was stated that the general rule in regard to a temporary statute is that in the absence of a special provision to the contrary, proceedings which are being taken against a person under it, will *ipso facto* terminate as soon as the statute expires. However, the Supreme Court went on to state that this was by no means an inflexible and universal rule. It further observed that, for this reason the legislature can, and often does avoid anomalous consequences by enacting in the temporary statute itself, a saving provision. Admittedly, there is no such saving provision enacted in the Punjab Urban Rent Restriction Act, 1941 or even in the Delhi and Ajmer-Merwara Rent Control Act, 1947. Hence, this argument is of no avail to the appellants.

43. Next, it was sought to be urged on behalf of the appellants that the notice dated 6th July, 1974 (Ex.PW1/3) was not in any event a legal and valid notice as the same was contrary to the provisions of Sections 106 and 111 of the Transfer of Property

Act. The reasoning given is that the use of the expression “**hereby terminates**” in the said notice terminated the tenancy on the date on which the notice was given. A notice which terminates tenancy *in praesenti* is not a proper notice to quit within the meaning of Section 111(h) read with Section 106 of the Act.

44. The matter is no longer *res integra* as there is a catena of decisions of the Supreme Court as well as various High Courts on this aspect, but first a look at the meaning of the word ‘**hereby**’ in the Black’s Law Dictionary, 7th Edition. The meaning as stated is as under:

“**hereby**, *adv.* By this document; by these very words < I hereby declare my intention to run for public office>.”

45. In the case of **Bhagabandas Agarwalla vs. Bhagwandas Kanu and others** AIR 1977 Supreme Court 1120, the Supreme Court made the following pertinent observations with regard to the construction and interpretation of a notice to quit: (AIR, Page 1122-1123)

“3. Now, it is settled law that a notice to quit must be construed not with a desire to find faults in it, which would render it defective, but it must be construed *ut res magis valeat quam pereat*. “The validity of a notice to quit” as pointed out by Lord Justice Lindley L.J. in *Sidebotham v. Holland*, (1895) 1 QB 378 “ought not to turn on the splitting of a straw”. It must not be read in a hyper-critical manner, nor must its interpretation be affected by pedagogic pendantism or over refined subtlety, but it

must be construed in a common sense way. See *Harihar Banerji v. Ramsashi Roy*, 45 Ind App 222 = (AIR 1918 PC 102). The notice to quit in the present case must be judged for its validity in the light of this well recognised principle of interpretation.

4. It is indisputable that under Section 106 of the Transfer of Property Act the notice to quit must expire with the end of the month of the tenancy, or in other words, it must terminate the tenancy with effect from the expiration of the month of the tenancy. If it terminates the tenancy with effect from an earlier date, it would be clearly invalid. Now, here the notice to quit required the respondents to vacate the premises “within the month of October 1962” and intimated to them that otherwise they would be “treated as trespassers from 1st November” in respect of the premises. The question is: What is the meaning and effect of the words “within the month of October 1962” in the context in which they are used in the notice to quit? Do these words mean that the tenancy of the respondents was sought to be terminated at a date earlier than the expiration of the month of October 1962 and they were required to vacate the premises before such expiration? We do not think so. When the notice to quit required the respondents to vacate “within the month of October 1962”, what it meant was that the respondents could vacate at any time within the month of October 1962 but not later than the expiration of that month. The last moment up to which the respondents could, according to the notice to quit, lawfully continue to remain in possession of the premises was the mid-night of 31st October, 1962. We fail to see any difference between a notice asking a tenant to vacate “within the month of October, 1962 and a notice requiring a tenant to vacate latest by the mid-night of 31st October, 1962, because in both cases, the tenant would be entitled to occupy the premises up to the expiration of 31st October, 1962 but not beyond it. This

position would seem to follow logically and incontestably, as a matter of plain natural construction, from the use of the words, “within the month of October 1962” without anything more, but here it is placed beyond doubt or controversy by the notice to quit proceeding to add that otherwise the respondents would be treated as trespassers from 1st November, 1962. This makes the intention of the authors of the notice clear that they are terminating the tenancy only with effect from the end of the month of October 1962 and not with effect from any earlier point of time during the currency of that month. If the respondents do not vacate the premises within the month of October 1962, they would be treated as trespassers from 1st November, 1962 and not from any earlier date, clearly implying that they would lawfully continue as tenants up to the expiration of the month of October 1962. The tenancy was, therefore sought to be determined on the expiration of the month of October, 1962 and not earlier and the notice to quit expired within the end of the month of tenancy as required by Section 106 of the Transfer of Property Act. It was in the circumstances a valid notice which effectively determined the tenancy of the respondents with effect from the mid-night of 31st October, 1962.”

46. Following the aforesaid decision of the Supreme Court in the case of **Bhagabandas Agarwalla** (supra), the Madras High Court in the case of **Karthikeya Press vs. Madarsa Dawoodiya Arabic College Trust** reported in **2002 (1) RCR 417 Madras**, held that it is clear that merely because the word “**hereby**” is used in the notice, it cannot be construed therefrom that the tenancy was terminated *in praesenti* or terminated forthwith. But it should be understood that the tenancy is terminated by the notice in question. Reliance in

this judgment was placed upon the following judgments of the High Courts of Andhra Pradesh, Kerala, Rajasthan, Allahabad and Madras:

- (1) **Y. Krishnamurthy vs. A. Subba Rao** AIR 1988 AP 193;
- (2) **Mohammed Haji vs. Umananda Kamath** AIR 1976 Kerala 26;
- (3) **M/s. General Auto Agencies vs. Hazari Singh** AIR 1976 Rajasthan 56
- (4) **Chandika vs. Sukhnandan** AIR 1981 Allahabad 312
- (5) **Abdul Jalil vs. Haji Abdul Jalil** AIR 1974 Allahabad 402
- (6) **P.P. Subba Rao vs. E.S. Guruswamy** AIR 1989 Madras 320

47. The common thread running through all the aforesaid decisions is that the use of the expression “**hereby**” means “through this notice” and cannot be read to mean “terminated forthwith”. Thus, the contention of the appellants that their tenancy was sought to be terminated forthwith and that such termination of tenancy being “*in presentii*” was not in accordance with law, is wholly unsustainable.

48. In **Burmah Shell Oil Distributing (now known as ‘Bharat Petroleum Corporation Ltd.’) vs. Khaja Midhat Noor and Ors.** [1988] 3 SCC 44, the Supreme Court while examining the validity of the notice to the lessee laid down the cardinal rule of

interpretation of such notices. It referred to a decision of the Judicial Committee in the case of **Harihar Banerji vs. Ramsashi Roy**, AIR 1918 P.C. 102 and quoted the following passage: -

“..... that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants, presumably conversant with all these facts and circumstances; and, further, that they are to be construed, not with a desire to find faults in them which would render them defective, but to be construed *ut res magis valeat quam pereat*’.

49. It may be mentioned that in **Bhagabandas Agarwalla** (supra), the Supreme Court had also quoted with approval the above passage from the judgment of the Judicial Committee in **Harihar Banerji's** case (supra) and observed that it was well-settled that a notice to quit must be construed not with a desire to find fault in it, which would render it defective, it must be construed *ut res magis valeat quam pereat*.

50. In the case of **Mani Mann vs. Ram Dulari (Decd.)** 90 (2001) DLT 305 (DB) this Court held that it is not permissible for the appellant to read the notice to quit too technically and such a notice if substantially complies with the provisions of S.106 of the Act, is valid. A notice under Section 106 of the Act is not to be read so as to find fault with it. Reference in this case was also

made to two earlier decisions of this Court on this aspect in the cases reported as **Smt. Chander Kanta Singhal vs. M/s. Kapadia Exports** reported in **1996 V AD (Delhi) 108: 65 (1997 DLT 926 (DB)** and **Captain Boot House and Ors vs. Intercraft Limited** **1999 (51) DRJ (DB) 245.**

51. There is yet another aspect of this matter. In the instant case there is no denial to the fact that the notice to quit was duly received by Dr.M.C. Dawar and a reply to this notice was also given by him, being Ex.DW2/P1. No objection was taken by Dr. M.C. Dawar in the aforesaid reply to the validity of the notice to quit. Such objection to the validity of the notice, it is settled law, must be raised specifically and at the earliest, otherwise it would be deemed to be waived. In the case of **Parwati Bai vs. Radhika** **AIR 2003 SC 3995**, the following apposite observations were made in this context by the Supreme Court: (AIR, P.3996)

“The singular question to be examined in the present case is whether the tenancy was terminated in accordance with the provisions of S.106 of the Transfer of Property Act. The receipt of notice by the defendant is admitted in the written statement. The defendant has not raised any specific objection as to the validity of the notice. An objection as to invalidity or infirmity of notice under S.106 T.P.Act should be raised specifically and at the earliest; else it will be deemed to have been waived even if there exists one. It cannot, therefore, be said that the notice in the present case suffered from any infirmity. A copy of the notice was exhibited and proved by the plaintiff as Exh.P-4.”

52. In *Delhi Development Authority vs. Durga Chand Kaushish* popularly known as the ‘Shiela Cinema case’, reported in *AIR 1973 SC 2609*, the Supreme Court referring to the dicta laid down by it in an earlier case, held as under: (AIR, Page 2614)

“Another rule which seems to us to be applicable here was thus stated by this Court in *Radha Sunder Dutta v. Mohd. Jahadur Rahim*. AIR 1959 SC 24 at p.29.

Now, it is settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim “*ut res magis valeat quam pereat.*”

53. Adverting next to the plea of waiver sought to be urged by the learned counsel for the appellant, there is no force in the plea of the appellant that the first notice dated 7th June, 1974, served on Dr. M.C. Dawar stood waived on the service of the second notice dated 12th February, 1990, which was served upon his wife, Smt. Leelawati Dawar. A bare glance at the said notice shows that the entire tenor of the said notice (Ex.PW1/5) was that Dr. Dawar’s tenancy was being treated by the appellants as a statutory tenancy. The mere fact that in this notice it was mentioned that the tenancy of Smt. Leelawati Dawar was terminated, does not mean that the earlier notice sent to Dr. M.C. Dawar stood waived. In paragraphs 2 and 3 of the notice sent to Smt. Leelawati Dawar, it is clearly

stated as under: -

“2. That your husband died as a statutory tenant and his tenancy was duly terminated vide a legal notice dated 7th June, 1974

3. That after the death of your husband Dr. M.C. Dawar you by operation of law became the tenant under the Delhi Rent Control Act as amended being the widow of Dr. M.C. Dawar to the exclusion of all other legal heirs of late Dr. M.C. Dawar, under our clients.”

54. A look now at the provisions of Section 2 (b) (iii) of the Delhi Rent Control Act, 1958, which govern and circumscribe the nature and extent of the protection available on the death of a statutory tenant in respect of residential premises. The said Section runs as follows:

2. Definitions. - In this Act, unless the context otherwise requires-

(b) "tenant" means any person by whom or on whose account or behalf the rent of any premises is, or, but for a special contract, would be, payable, and includes-

(i) a sub-tenant;

(ii) any person continuing in possession after the termination of his tenancy; and

(iii) in the event of the death of the person continuing in possession after the termination of his tenancy, subject to the order of succession and conditions specified

respectively, in Explanation I and Explanation II to this clause, such of the aforesaid person's-

- (a) spouse,
- (b) son or daughter, or, where there are both son and daughter, both of them,
- (c) parents,
- (d) daughter-in-law, being the widow of his pre-deceased son,

as had been ordinarily living in the premises with such person as a member or members of his family up to the date of his death, but does not include,-

(A) any person against whom an order or decree for eviction has been made, except where such decree or order for eviction is liable to be re-opened under the proviso of section 3 of the Delhi Rent Control (Amendment) Act, 1976 (18 of 1976);

(B) any person to whom a licence, as defined by section 52 of the Indian Easements Act, 1882 (5 of 1882), has been granted.

Explanation1.- The order of succession in the event of the death of the person continuing in possession after the termination of his tenancy shall be as follows:-

- (a) firstly, his surviving spouse;
- (b) secondly, his son or daughter, or both, if there is no surviving spouse, or if the surviving spouse did not ordinarily live with the deceased person as a member of his family up to the date of his death;
- (c) thirdly, his parents, if there is no surviving spouse, son or daughter of the deceased person, or if such surviving spouse, son or daughter or any of them, did not ordinarily live in the premises as a member of the family of the deceased person up to the date of his death; and

(d) fourthly, his daughter-in-law, being the widow of his pre-deceased son, if there is no surviving spouse, son, daughter or parents of the deceased person, or if such surviving spouse, son, daughter or parents, or any of them, did not ordinarily live in the premises as a member of the family of the deceased person up to the date of his death.

Explanation II.- If the person, who acquires, by succession, the right to continue in possession after the termination of the tenancy, was not financially dependent on the deceased person on the date of his death, such successor shall acquire such right for a limited period of one year; and on the expiry of that period, or on his death, whichever is earlier, the right of such successor to continue in possession after the termination of the tenancy shall become extinguished.

Explanation III.-For the removal of doubts, it is hereby declared that, -

(a) where, by reason of Explanation II, the right of any successor to continue in possession after the termination of the tenancy becomes extinguished, such extinguishment shall not affect the right of any other successor of the same category to continue in possession after the termination of the tenancy; but if there is no other successor of the same category, the right to continue in possession after the termination of the tenancy shall not, on such extinguishments, pass on to any other successor, specified in any lower category or categories, as the case may be;

(b) the right of every successor, referred to in Explanation I, to continue in possession after the termination of the tenancy, shall be personal to him and shall not, on the death of such successor, devolve on any of his heirs”

55. A bare glance at the aforesaid Section shows that the position of law with regard to the heritability of residential

premises in the case of a Statutory tenancy is that if the tenant, at the time of his death, leaves behind a widow who was ordinarily residing with him at the time of his death, she alone will get a right to inherit the statutory tenancy to the exclusion of all other heirs, and that too for her own lifetime only. This right does not pass on to any other heir or legal representative of the deceased-tenant. In other words, the person mentioned in Category 'A' i.e. spouse living with the statutory tenant inherits the tenancy rights and upon his/her death they do not devolve on the next category, i.e., sons and daughters financially dependent on the statutory tenant and living with him in the demised premises.

56. In **Gian Devi Anand vs. Jeevan Kumar & Ors. (1985) 2 SCC 683**, a Constitution Bench of the Supreme Court held that the legislature had thought it fit in the case of residential premises to limit the right of the heirs of a statutory tenant "in the manner and to the extent" provided in Section 2 (l) (iii). The relevant portion of the judgment reads as under: -

"31. We now proceed to deal with the further argument advanced on behalf of the landlords that the amendment to the definition of 'tenant' with retrospective effect introduced by the Delhi Rent Control Amendment Act (Act 18 of 1976) to give personal protection and personal right of continuing in possession to the heirs of the deceased statutory tenant in respect of residential premises only and not with regard to the heirs of the 'so-called statutory tenant' in respect of commercial premises, indicates

that the heirs of so-called statutory tenants' therefore, do not enjoy any protection under the Act. This argument proceeds on the basis that in the absence of any specific right created in favour of the 'so called statutory tenant' in respect of his tenancy, the heirs of the statutory tenant who do not acquire any interest or estate in the tenanted premises, become liable to be evicted as a matter of course. The very premise on the basis of which the argument is advanced is, in our opinion, unsound. The termination of the contractual tenancy in view of the definition of tenant in the Act does not bring about any change in the status and legal position of the tenant, unless there are contrary provisions in the Act; and, the tenant notwithstanding the termination of tenancy does enjoy an estate or interest in the tenanted premises. This interest or estate which the tenant under the Act despite termination of the contractual tenancy continues to enjoy creates a heritable interest in the absence of any provision to the contrary. We have earlier noticed the decision of this Court in Damadilal case. This view has been taken by this Court in Damadilal and in our opinion this decision represents the correct position in law. The observations of this Court in the decision of the seven Judge Bench in the case of V. Dhanapal Chettiar v. Yesodai Ammal which we have earlier quoted appear to conclude the question. The amendment of the definition of tenant by the Act 18 of 1976 introducing particularly 2(1)(iii) does not in any way mitigate against this view. The said Sub-clause (iii) with all the three Explanations thereto is not in any way inconsistent with or contrary to Sub-clause (ii) of Section 2(l) which unequivocally states that tenant includes any person continuing in possession after the termination of his tenancy. In the absence of the provision contained in Section 2(l)(iii) the heritable interest of the heirs of the statutory tenant would devolve on all the heirs of the 'so-

called statutory tenant' on his death and the heirs of such tenant would in law step into his position. This sub-clause (iii) of Section 2(l) seeks to restrict this right insofar as the residential premises are concerned. The heritability of the statutory tenancy which otherwise flows from the Act is restricted in case of residential premises only to the heirs mentioned in Section 2(l) (iii) and the heirs therein are entitled to remain in possession and to enjoy the protection under the Act in the manner and to the extent indicated in Section 2(1)(iii). The Legislature, which under the Rent Act affords protection against eviction to tenants whose tenancies have been terminated and who continue to remain in possession and who are generally termed as statutory tenants, is perfectly competent to lay down the manner and extent of the protection and the rights and obligations of such tenants and their heirs. Section 2(l)(iii) of the Act does not create any additional or special right in favour of the heirs of the 'so called statutory tenant' on his death, but seeks to restrict the right of the heirs of such tenant in respect of residential premises. As the status and rights of a contractual tenant even after determination of his tenancy when the tenant is at times described as the statutory tenant, are fully protected by the Act and the heirs of such tenants become entitled by virtue of the provisions of the Act to inherit the status and position of the statutory tenant on his death, the Legislature which has created this right has thought it fit in the case of residential premises to limit the rights of the heirs in the manner and to the extent provided in Section 2(l) (iii). It appears that the Legislature has not thought it fit to put any such restrictions with regard to tenants in respect of commercial premises in this Act.”

57. The aforesaid dicta laid down in **Gian Devi Anand's** case (supra) was followed by this Court in the case of **Kishori Lal vs.**

Siri Krishan. Nigam and Anr. 63 (1996) DLT 577 where it was held that if a tenant leaves behind a widow, she alone will get a right to inherit the statutory tenancy to the exclusion of all other heirs and that too for her own lifetime only. This right does not pass on to any other heir or legal representative of the deceased-tenant. (See also **Bipin Bihari vs. Kishori Lal 1981 (1) RLR 241** and **Jagdish Chander Chatterjee and Ors. vs. Sh. Sri Kishan and Another AIR 1972 SC 2526.**

58. In view of the aforesaid, in my view, the findings of the learned trial court on issues no.2 to 5 and issue no.7 must be upheld and are accordingly upheld.

Issue No. 8

59. This issue pertains to the preliminary objection taken in the written statement that the present suit is barred by *res judicata* in view of the fact that the respondents had filed a similar suit which was dismissed by the Court of the learned Civil Judge by judgment and decree dated 1st October, 1994. No appeal having been filed against the said decree, it is sought to be contended that the said judgment became final and binding between the parties and the present suit is liable to be dismissed on this ground alone.

60. It is on record that Smt. Leelawati Dawar, when she denied the title of the respondents (pursuant to the legal notice Ex.PW1/5), the respondents had filed a suit for possession under Section 114 of the Transfer of Property Act on the ground of forfeiture of tenancy.

The said suit was dismissed by the Civil Judge on 1st October, 1994 by holding that since it related to a dispute between a landlord and a tenant, the Civil Court had no jurisdiction to entertain the same. However, after the death of Smt. Leelawati Dawar on 20th November, 1993, in view of what has been stated herein above, there did not exist any relationship of landlord and tenant between the respondents and the appellants herein. In such circumstances, the respondents could not have resorted to the provisions of the Delhi Rent Control Act which envisage the existence of relationship of landlord-tenant between the parties. Accordingly, the judgment passed by the learned Civil Judge on 1st October, 1994 in my considered view, does not and cannot operate as *res judicata*, a fresh cause of action having accrued to the respondents upon the death of Smt. Leelawati Dawar.

61. A Division Bench of this Court in **Smt. Krishna Prakash and Anr. vs. Dilip Harel Mitra Chenoy 93 (2001) DLT 777 (DB)**, while holding that a civil suit seeking recovery of possession from the legal heirs of the deceased statutory tenant, who have acquired no right to continue in possession of the tenanted premises beyond the period of one year and have become trespassers, was not barred by virtue of the provisions of Section 50 of the Delhi Rent Control Act, 1958, made the following apposite observations in paragraphs 51 to 54 of its judgment:

“51. To constitute a matter *res judicata*, it is

essential that apart from other conditions, the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit **Sheodan Singh v. Daryao Kunwar**, 1966 SC 1332.

52. In the present case, the Supreme Court evidently did not at all delve into the merits of the earlier suit and disposed of the matter simply by holding that the Civil Court had no jurisdiction to try the suit on the date of institution of the suit. This was so held as the defendant/appellant No.1, being the widow of the deceased statutory tenant, had in any case a right to continue in possession of the suit premises for one year, irrespective of her financial dependence or otherwise on the deceased tenant on the date of his death, by virtue of Explanation II to Section 2(1) of the Rent Act.

53. In the instant case, contended Mr.Arun Mohan, learned counsel for the plaintiff/respondent, with reference to a number of decisions in **State of Maharashtra and Another v. National Construction Company Bombay And Another**, (1996) 1 SCC 735; **Bhagwati Singh Vs. The Board of Revenue, Allahabad & Others**", AIR 1978 Allahabad 323(FB); **"Pandurang Mahadeo Kavade & others Vs. Annaji Balwant Bokil & Others**, AIR 1971 SC 2228 = 1971(3) SCC 530; **P.Dasa Muni Reddy Vs. P.Appa Rao**, AIR 1974 SC 2089; **State of UP Vs. Civil Judge, Nainital & Others**, AIR 1987 SC 16 ; **Sayyed Ali & Others Vs. A.P.Wakf Board, Hyderabad & Others**, II (1998) SLT 445= (1998) 2 SCC 642; **Mathura Prasad Bajoo Bajwa Jaiswal & Others Vs. Dossibai N.B.Jeejeebhoy**, (1970) 1 SCC 613; and **Richpal Singh & Others Vs. Dalip**, (1987) 4 SCC 410, that the plea of *res judicata* is not available to the defendants/appellants. Instead of making a detailed reference to the above referred cases individually, it suffices to take note of the following observations of their Lordships of the Supreme Court in

National Construction Company (supra):

“The important words are "has been heard and finally decided". The bar applies only if the matter directly and substantially in issue in the former suit has been heard and finally decided by a court competent to try such suit. That clearly means that on the matter or issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as *res judicata*."

54. As pointed out, Suit No.456/72 was disposed of in appeal by the Supreme Court, without looking into the merits of the case, on a technical ground that on the date of institution of that suit, the Civil Court had no jurisdiction to deal with the same. Thus, Suit No.456/72 cannot be held to have been heard and finally decided by the Supreme Court. Issue No.6A was, thus, correctly decided against defendants/appellants and there is no reason to interfere with the finding of the Trial Court.”

62. In paragraph 8 of the aforesaid judgment, the Supreme Court further observed as under: -

“8. This statement of the law by the High Court is, with respect, incorrect in view of the decision of this Court in **Sheodan Singh v. Daryao Kunwar** (AIR at p.1336 : SCR at p.307) where, while considering the meaning of the words "heard and finally decided", used in Section 11 of the Code, it was held :

Where, for example, the former suit was dismissed by the trial court for want of jurisdiction...or on the ground of non-joinder of parties...and the dismissal is confirmed in appeal (if any), the decision

not being on the merits would *not be res judicata* in a subsequent suit.” (emphasis supplied)

This Court in its recent decision, *Ignacio Martins v. Narayan Hari Naik* [1993] 3 SCC has reiterated this proposition. It is, therefore, clear that the dismissal of the short cause suit and the subsequent appeal could not have operated as a bar to Special Civil Suit No. 27/83. The plea based on the principle of resjudicata fails.”

63. Keeping in view the aforesaid law laid down by the Supreme Court on the applicability of the principle *res judicata*, clearly the present case cannot be held to be barred by *res judicata*.

64. Issue no.8 is decided accordingly.

Issues no.9 and 10 :-

“(ix) Whether the plaintiff is entitled for the damages as claimed? If so, at what rate? OPP

(x) Relief.”

65. Since it has been held above that the appellants are in unauthorized occupation of the suit premises, the necessary corollary is that the appellants must pay damages for the period of their unauthorized occupation of the suit premises. As regards the quantum of damages payable by the appellants, this Court by its order dated 17th July, 2008, had directed the appellants to deposit a sum of ₹ 30,000/- per month from the date of filing of the application i.e. 24th March, 2008 till the date of the passing of the order and thereafter on or before the 10th of each month. It was

further directed that the amount so deposited shall be invested in a short-term fixed deposit and the principal and interest earned thereon shall enure to the benefit of the successful party in the appeal. In view of the fact that the appeal must fail, the aforesaid amount lying deposited in this Court shall enure to the benefit of the respondents herein. However, this being an interim arrangement only, the suit is remanded back to the learned trial court for the purpose of holding an enquiry in terms of the provisions of Order XX Rule 12 of the Code of Civil Procedure and adjudging the final liability of the appellants herein. The Registry shall send the file back to the concerned Court to enable it to adjudicate the quantum of damages payable by the appellants to the respondents after recording the necessary evidence in this regard. Parties are directed to appear before the concerned learned District Judge on 20th September, 2010.

66. The appellants shall hand over peaceful and vacant possession to the respondents herein at the earliest and, in any case not later than one month from the date of the passing of this order.

67. In view of the aforesaid the appeal stands dismissed with costs of ₹ 1 lakh.

REVA KHETRAPAL, J

August 27, 2010
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