

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

% *Date of Judgment: 17.02.2011*

+ **R.S.A.No.98/2008 & C.M.Nos. 6226/2008 (for stay) and 14819/2008 (for discharge of stay order)**

M/S DELHI AUTOMOBILES & LTD. Appellant
Through: Mr. Girdhar Govind, Advocate.

Versus

KISHAN GOPAL AHUJA & ANR. Respondents
Through: Mr. Vijay Gupta, Advocate for
respondent No. 1
Mr. Sandeep Sethi, Sr. Advocate
with Mr. Syed Naqvi, Advocate for
respondent No. 2.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J. (Oral)

CM No. 754/2011 in R.S.A.No.98/2008

1 By way of this application, the appellant/defendant seeks an amendment in the written statement which had been filed by him in the present suit proceedings in the trial court. The present suit was a suit for possession, mesne profits and damages. It had been filed on 01.06.2001. Written statement had been filed on 09.06.2001. Suit was decreed in favour of the plaintiff on 23.04.2005. Regular First Appeal (RFA) filed against the said proceedings had been dismissed on 13.03.2008. Present Regular Second Appeal (RSA) was filed on 25.04.2008. Present application seeking amendment of the written statement had been filed on 10.01.2011 i.e. after a lapse of more than

one decade. These facts are admitted and not in dispute.

2 The amendments sought for in the present application are contained in paras 4, 5 & 6. They read as under:-

“That on or about 01.07.1984, the owner of the premises added a mezzanine floor and the respondent landlord let the mezzanine floor existing in between the ground floor and the first floor of the building of which entrance was from the staircase existing in the main entrance to the building at a monthly rent of ₹2,050/- and thus a separate tenancy was created by the plaintiff in regard to the mezzanine floor. The parties agreed that the defendant shall pay the rent for the ground floor at the rate of ₹1,473/- per month and for the mezzanine floor at the rate of ₹2,050/- per month. Effective from 01.04.1985 the rent payable by the defendant was ₹1,583/- per month for the ground floor and ₹2,050/- for the mezzanine floor. From 01.04.1989 the rent payable was ₹1,628/- for the ground floor and ₹2,150/- per month for the mezzanine floor. From 01.04.1990 the parties agreed that the defendant shall pay at rent at the rate of ₹1,856/- for the ground floor and at the rate of ₹2,300/- per month for the mezzanine floor.

That the defendant company was not functioning for four/five years in a regular manner. The notice alleged to have been sent by the plaintiff was not tendered nor received by the defendant nor by its any Director, Chairman or the principle officer. The alleged signatures on the A.D. is not of any authorized person.

That the plan also shows that the mezzanine floor let to the defendant has a separate and independent entrance from the staircase located in the lobby (main entrance). The defendant is a tenant in respect of ground floor and mezzanine floor. As stated in the preliminary objection there are two separate tenancies and the amount of rent payable in respect of both the tenancies is ₹1,856/- per month for the ground floor and ₹2,300/- per month for the mezzanine floor. The site plan supplied to the defendant shows that there are two separate premises constituting two separate tenancies.”

3 By way of this amendment what the defendant seeks to incorporate in the written statement is to state that there was a
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distinct and separate tenancy for the ground floor as also for the mezzanine floor; rate of rent of the ground floor and mezzanine floor was also distinct and separate; for the ground floor, the rate of rent was ₹1,856/- per month whereas for the mezzanine floor, the rate of rent was ₹2,300/- per month. He has further sought to incorporate a submission that the defendant company was not functioning for the last 4-5 years; notice had not been served upon the company. In para 7 it has been stated that the amendments are in the nature of an explanation/narration in the written statement and do not change the character of the suit; no new defence has been raised; these amendments are necessary to decide the real controversy in question.

4 Application is vehemently opposed.

5 The original written statement filed 10 years ago has been perused. In this written statement, a specific contention has been raised that on 01.07.1984, the owners of the premises had added a mezzanine floor and it had been agreed that separate rent would be paid for the ground floor and separate rent would be paid for the mezzanine floor; there was a clear and categorical averment that there are two separate tenancies qua the ground floor and the mezzanine floor; the rate of rent was Rs.1,856/- per month for the ground floor and Rs.2,300/- was being paid per month for the mezzanine floor. In para 3 of the original written statement, there was a specific denial about the receipt of the notice dated 09.05.2001; it had been denied that any such notice has been received.

6 The perusal of the original written statement with the amendment application (which seeks to incorporate new pleas by way of this application) shows that these pleas have already been taken in the original written statement. Even presuming that this application is

allowed as on date, it will not serve any purpose as this has been the defence of the defendant in the original written statement; there is nothing more either added or subtracted.

7 Learned counsel for the appellant has placed reliance upon AIR 2009 SC 2544 Sushil Kumar Jain Vs. Manoj Kumar & Anr. as also upon 30 2009 (9) Scale Olympic Industries Vs, Mulla Hussainy Bhai Mulla Akberally & Ors. to support his submissions that mere delay is not sufficient to refuse to allow amendment of pleadings; wherever a good case is made out, the court should allow the amendment.

8 Arguments have been countered by learned counsel for the respondent. Attention has been drawn to the proviso of Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as the 'Code') (which stood amended by the Amendment Act, 2002). It is pointed out that there is not a whisper in the present application that after the exercise of "due diligence", the defendant had been prevented from making this amendment in the courts below. It is submitted that this statutory provision itself bars the prayer made in the present application. Reliance has also been placed upon JT 2011 (1) SC 315 Gayathri Womens Welfare Association Vs. Gowramma & Anr. wherein the Apex Court had indicated that one of the circumstances which must be taken into consideration before an amendment is granted is the delay in making the application for such an amendment and if it is made, at the appellate stage, the reason why it was not made in the trial court. In this case, the amendment which had been permitted by the High Court of the counter claim had been set aside.

9 This is a second appeal Court. The date of filing of original written statement and the present application seeking an amendment shows that there was an intervening gap of more than one decade.

That apart as already noted supra, the amendments sought for clearly show that this is only a delaying tactic on the part of the appellant/defendant as the pleas now sought to be incorporated already form a part of his written statement; neither is there any submission nor there is new fact sought to be brought on record. There is also no explanation whatsoever on the point of delay.

10 There is no dispute that the amendment of pleadings can be allowed at any stage and if need be, even at the second appeal stage. However, each case depends upon on its facts; essential requisites are that the application must overcome the hurdle of delay in making the application; the reasons thereof should be given; there should be no prejudice to other side. None of these has been adhered to. There is not a single averment in the body of this application as to why this amendment was not sought earlier while the proceedings were pending in the trial court or even before the first appellate Court. That apart as already aforenoted this amendment would serve no purpose.

11 The result is that the application is liable to be dismissed. It is accordingly dismissed.

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12 This second appeal has impugned the judgment and decree dated 13.03.2008 which has confirmed the findings of the trial Judge dated 23.04.2005 whereby the suit filed by the plaintiff Kishan Gopal Ahuja seeking possession of the suit property and arrears of rent had been decreed in his favour. The suit premise is bearing No. 3/15-A, Asaf Ali Road, New Delhi. The plaintiff is undisputedly the owner landlord of the suit property. The defendant had been let out this property in the year 1959. The contention was that it was monthly tenancy. The ground floor and the mezzanine floor had been given to

the defendant. They had defaulted in payment of rent. They had refused to vacate the suit property inspite of legal notice dated 09.05.2001 terminating its tenancy w.e.f. 10.05.2001. Suit was accordingly filed.

13 The defence of the defendant as is evident from the written statement is that there are two separate tenancies i.e. of the ground floor and the mezzanine floor and separate rent was being paid for each of the two distinct tenancies. It was stated that the civil Court has no jurisdiction as bar of Section 50 of the Delhi Rent Control Act, 1958 (hereinafter referred to as the 'DRCA') is attracted rent being below ₹3,500/- per month. Ownership of the plaintiff was not disputed.

14 On the pleadings of the parties, following five issues were framed:-

"1. Whether the separate tenancies were created in respect of ground floor and mezzanine floor and in view of the same whether the present suit is barred under Delhi Rent Control Act? OPD

2. Whether the present suit is bad for non-joinder of the necessary parties? OPD

3. Whether the plaintiff is entitled to the decree for recovery of possession as claimed? OPP.

4. Whether the plaintiff is entitled to the pendentelite and future mesne profits as claimed? OPP.

5. Relief."

15 Trial Judge on the basis of oral and documentary evidence which included the statement of PW-1 and deposition of DW-1 held that there was single tenancy which had been created by the plaintiff in favour of the defendant; rent was being paid by a single cheque; the documents Ex. PW-1/2 and Ex. PW-1/3 which were the covering

letters tendering the rent had advanced this submission. DW-1 had himself admitted that the rent of the whole premises was being paid to the plaintiff by way of a single cheque. The cross-examination of PW-1 by the defendant's counsel was also to the effect that the cheques were being sent to the plaintiff by a single cheque.

16 While dealing with issue No. 2, the Court had returned a finding that the defendant had attorned to plaintiff No. 2; a single co-owner can also file a suit without impleading other co-owners. This legal proposition is not disputed before this Court even today.

17 On the receipt of notice, the Court had returned a finding that the legal notice dated 09.05.2001 (Ex. PW-1/5) was a valid termination of the tenancy of the defendant under the provisions of Section 106 of the Transfer of Property Act (hereinafter referred to as the 'TPA'). The postal receipts had been exhibited as Ex. PW-1/6 & Ex. PW-1/7. UPC receipt was also exhibited as Ex. PW-1/8. AD Card receipt was Ex. PW-1/10. This bore the signature of one Ghani. There was no specific denial by the defendant that no person by the name of Ghani had worked with it or that Ex. PW-1/10 was not signed by his employee. The trial Judge had also noted that the defendant had not denied the receipt of notice at the residence of Chairman/MD. Receipt of notice had been validly proved.

18 These fact findings of the trial Judge had been affirmed by the first appeal court. It had been reaffirmed that the tenancy was a month to month tenancy. The rent had been tendered by the defendant to Kishan Gopal Ahuja and Arjun Lal Ahuja. The arguments urged before this Court that the mezzanine floor was constructed in the year 1984, had also been gone into in the impugned judgment. It was noted that it was never the case of the

defendant that there was a floor between the ground floor and the first floor which was later on let out to the defendant by means of any oral tenancy; mezzanine floor was already in existence at the time when the premises had been let out to the defendant; PW-1 in his cross-examination had clarified that this mezzanine floor was in existence at the time of letting out of the premises upon which the defendant had made channels and wooden plans unauthorizedly. The first appellate court had also noted a fact finding that there was no separate floor which was let out separately to the defendant and the mezzanine floor constructed subsequently was a part of the premises which had been let out to the defendant. There were no two separate and distinct tenancies; there was a single tenancy; a single cheque was being paid by the defendant and being received by the plaintiff for the suit property. Documentary evidence including Ex. PW-1/3 & Ex. PW-1/4 had been adverted to. The defendant had also attorned to Radha Rani after the death of Arjun Lal; suit filed by a single co-owner was also maintainable.

19 This is a second appeal Court. It is not a third fact finding Court. The fact findings have been delved into in detail after scrutiny of both oral and documentary evidence. It had been established and proved before the courts below that a single tenancy of the suit property had been created by the plaintiff in favour of the defendant for which a single cheque of rent was being paid; it was a monthly tenancy. Legal notice dated 09.05.2001 had validly terminated the tenancy of the defendant; it was duly received by the defendant. The suit for possession and mesne profits was rightly decreed in favour of the plaintiff.

20 It calls for no interference. At this stage, it is also relevant to

state that three applications had been preferred by the appellant before the first appellate court; an application under Order 6 Rule 17 of the Code, the second application under Order 41 Rule 27 of the Code to lead additional evidence and the third application under Section 151 of the Code directing the plaintiff to file the lease agreements dated 24.02.1956 and 25.08.1959. All the aforementioned applications had been dismissed. The application seeking amendment had been dismissed on the premise that the plea sought to be incorporated by way of the amendment was already a part of the written statement which was on the plea of a monthly tenancy. The application under Order 41 Rule 27 of the Code was dismissed as it was noted that this provisions cannot be used to fill in any lacuna. The third application which was an application under Section 151 of the Code directing the plaintiff to place on record two lease deeds had also been dismissed on the ground that the tenancy was a monthly tenancy. Further even if there was any discrepancy in the dates of termination, in view of provisions of Section 106 of the TPA (which stood amended by the amendment of 2002 applicable to pending matters), the requirement of co-incidencing of dates was no longer necessary.

21 The substantial questions of law have been formulated at page 6 of the body of the appeal. They read as follows:-

“1. Whether the payment of rent of two different tenancies of two different tenanted portion for convenience of Land Lord, would extinguish two different tenancies and make it a single tenancy?

2. Whether the matter which was within the jurisdiction of Delhi Rent Control Act could be entertained by a Civil Court?

3. Whether the tenancy of Limited Company could be taken as terminated by determining the signatures of some stranger on A.D. Card?

4. *Whether the tenancy could be terminated by a notice sent by not all the co-owners of Property without having the consent or permission of remaining co-owners?*

5. *Whether the suit could be filed by only two co-owners, without joining all the co-owners or without having the consent and knowledge or authorization of all the co-owners.*

6. *Whether the Court could assume and presume on its own the rate of mesne profit without there being any evidence of the plaintiff claiming the mesne profits on a particular rate and admittedly leading no evidence?"*

22 They are all facts based.

23 No substantial question of law having arisen; this appeal as also pending applications are dismissed in limine.

INDERMEET KAUR, J.

FEBRUARY 17, 2011

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