

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

% RESERVED ON : JANUARY 24 , 2012
PRONOUNCED ON:FEBRUARY 06, 2012

+ **RFA(OS) No.50/2000**

LALA SOHAN LAL GUPTA & ANR. Appellants

Through : Mr.Ravindra Sethi, Sr.Adv. with
Mr.Vijay Gupta, Mr.B.B.Gupta,
Mr. J.Dass, Advocates.

versus

M/S. T.R.ENTERPRISES & ORS. Respondents

Through : Mr.Harish Malhotra, Sr.Adv. with
Mr. Mohd. Farrukh, Adv.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. The appellants have challenged before us the judgment and decree dated 06.07.1999 passed by a learned Single Judge, in a suit filed by them seeking permanent injunction and damages. Vide impugned judgment, learned Single Judge has dismissed the suit.

2. Before advertng to the controversy, we deem it proper to take note of certain admitted facts as pleaded in the plaint and not disputed in the written statement.

3. The admitted facts are that the plaintiffs are co-owners of the suit premises bearing No.M-132, situated at Plot No.M-3, Connaught Circus; situated at the second floor of the building comprising of five rooms with latrine,

bathroom, store and kitchen which was let out to defendant No.1 at monthly rent of ₹ 1,000/- vide registered lease deed dated 26.11.1980. Possession was also handed over to defendants No.1 and 2 immediately after execution of the lease deed.

4. The facts in controversy are that in the month of January, 1981, NDMC sent notice about unauthorised construction of mezzanine floor in the suit premises. Second notice was sent by the NDMC on 05.02.1980 and third on 11.02.1980 thereby calling upon to demolish the unauthorised construction.

5. Claiming that based on said notices received they learnt about the unauthorised structural changes made in the property let out to the defendants, which caused substantial damage to the property, plaintiffs filed a suit seeking damages of ₹1,05,000/- as against defendants No.1 and 2 and decree for permanent injunction against defendants No.1 to 3, restraining them from carrying out any construction and making any alternation or addition in the premises let out to the plaintiffs by lease deed dated 26.11.1980.

6. The defence taken was that the mezzanine floor existed much prior to the letting out of the premises to them, hence suit was liable to be dismissed.

7. After considering the pleadings of the parties, issues arising out of the pleadings of the parties required to be determined during trial were settled as under :-

“(i)Have defendants No.1 and 2 caused damage to the demised premises or effected any unauthorised additional construction therein? If so, to what effect?;

(ii) *To what damages, if any, are the plaintiff entitled to?;*

(iii) *To what extent, the plaintiffs are entitled to seek mandatory injunction for demolition of the constructions effect?;*

(iv) *Are the plaintiffs entitled to prohibition? If so, to what extent?;*

(v) *Relief."*

Additional Issue : -

"Is the suit barred under the provisions of Section 50 of the Delhi Rent Control Act, 1958?"

8. After considering oral and documentary evidence as well rival contentions, learned Single Judge came to the conclusion that the documents Ex.DW1/A, Ex.DW2/A & B, Ex.DW3/A to C, which are all prior to execution of lease deed, indicate existence of mezzanine floor in the suit premises. On the question of claim of the plaintiffs seeking damages, learned Single Judge held that since plaintiffs could not prove that the changes in the structure had been made by the defendants, it also cannot be said that the defendants have caused any damage to the suit property for which they could be made liable to pay any damages and with these observations, learned Single Judge dismissed the suit of the plaintiffs.

9. Relying on the judgment 163 (2009) DLT 411 Sparsh Builders Pvt. Ltd. v. Maharishi Ayurveda Production Pvt. Ltd., learned counsel for the appellants referred to the lease deed dated 26.11.1980 (Ex.DW4/A) and the site plan in respect of the property leased out to the respondents which did not incorporate existence of any mezzanine floor. Thus, prayed that oral evidence to the contrary has to be excluded. The submission of the appellants is that when the possession has been handed over to the respondents

only in respect of portion specified in the lease deed and described in the site plan annexed therewith, this in itself is sufficient to prove that the mezzanine floor came into existence only after the possession was handed over to the respondents.

10. While referring to the notices undated January, 1981 Ex.P1, dated 05.02.1981 Ex.P2 and dated 11.02.1981, it has been urged that the language of the three notices is sufficient to conclude that at different stages, notices were sent to the lessee i.e. the appellants and the tenant i.e. the respondents pointing out about the unauthorised construction being started, then in progress and thereafter directions to demolish the same and the notices have been proved by summoning witnesses from the concerned department. In support of their claim that mezzanine floor did not exist prior to 26.11.1980 i.e. the date of execution of the lease deed between the parties, reliance has also been placed on notice dated 24.04.1980 Ex.PW3/2 by L&DO which did not refer any unauthorised construction in the suit premises, whereas the notice dated 02.09.1981 Ex.PW3/1 issued from the office of L&DO included the unauthorised construction and that these two notices are sufficient to establish that unauthorised construction was carried out only after the possession was handed over to the respondents. The extent of unauthorised construction also stands proved from the photographs taken on 09.11.1985 and 21.11.1985.

11. While challenging the genuineness of the documents Ex.DW3/A and Ex.DW3/B filed and proved by the respondents i.e. the letter sent by earlier occupant

Mr.R.S.Sethi alongwith site plan showing the existence of mezzanine floor, the appellants termed the same to be a fraudulent exercise by Mr.T.C.Jain – the respondent to create evidence by fabricating the documents and placing the same in NDMC record in collusion with Ex-NDMC Official DW-3 Mr.Jage Ram Rana, Receipt Clerk, UACC, NDMC. The letter dated 25.05.1979 addressed to Chief Architect was not even addressed to UACC and had nothing to do with the proposed repair work or the permission sought for the same. Not only that, DW-3 Mr.Jage Ram Rana had no authority to certify after one year the copy of letter as 'true copy' though the letter expressed the urgency to have the true copy. While questioning the credibility of DW-3 Mr.Jage Ram Rana, Ex-NDMC Official, the manner in which he was summoned by name without summoning any official from NDMC and that he appeared in the Court without receiving summons, is sufficient to infer the nexus between him and the respondents.

12. While expressing suspicion on the genuineness of letter dated 25.05.1979 written by Mr.R.S.Sethi, earlier occupant, to Chief Architect, NDMC, it has been contended that the original has not been produced from the NDMC record and follow up action, if any, on the said letter by NDMC is also not known. Not only that, the same typewriter was used for typing the two letters, one by Mr.R.S.Sethi dated 25.05.1979, another by Mr.T.C.Jain dated 29.12.1980 which has also been cited another reason to suspect the genuineness of these two letters. While submitting that using the same typewriter after lapse of 1½ year by two different persons could not have been by

coincidence, non-examination of Mr.R.S.Sethi as witness to prove the contents of letter dated 25.05.1979 has also to be viewed adversely.

13. Further it has been urged that contemporaneous notice issued by the NDMC in January and February, 1998 militates against the contentions that mezzanine floor existed prior to being leased out to him. Mr.R.S.Sethi's letters to NDMC dated 05.11.1973 (Ex.DW2/B) and 16.07.1979 (DW2/A) contain interpolation of the words "with Mezz." and "with full mezzanine" with nothing to prove that house tax was levied at any point of time.

14. The respondents, while not disputing the contents of the lease deed and the site plan annexed therewith vide which property was let out by the appellants to them, to prove that the mezzanine floor existed much prior to the premises being handed over to the respondents, relied upon letter Ex.DW3/A dated 25.05.1979 written by earlier tenant Mr.R.S.Sethi to Chief Architect, NDMC which contained the extent of accommodation available in premises No.M-132, which also included mezzanine floor and alongwith this letter, site plan was also submitted to NDMC in the year 1979. Further correspondence in this regard was undertaken by the respondent Mr.T.C.Jain enclosing the copy of Ex.DW3/A and the site plan annexed therewith, with a request to grant certified copy of both. It has been urged that how the defendant came into possession of the copy of the letter and site plan submitted by Mr.R.S.Sethi, stands explained by DW-3 Mr.Jage Ram Rana who was employed in UACC of NDMC during the relevant period.

15. Learned counsel for the respondents, relying on information annexed with assessment of house tax of premises No.M-132, Cannaught Circus furnished by Mr.R.S.Sethi, the earlier tenant way back in the year 1973 and 1979, submitted that it established that the mezzanine floor existed much prior to the premises being let out to the respondents. Referring to the correspondence from the office of L&DO, the submission made is that it was in response to plaintiff's letter. Referring to Clause 8 of the lease deed, submissions have been made that the lessor secured himself in all the eventualities as all the liabilities for any breach was that of the lessee. As it is admitted case of the plaintiffs that till date no such action has been taken by any of the authorities, hence suit in this regard was pre-mature. Referring to the statement of PW-5 Mr.N.K.Gupta, Architect, in view of his own admission that he has never visited the second floor and returned from the ground floor only, the claim seeking damages on account of unauthorised construction has been challenged as no such damage was caused or assessed.

16. We have considered the submissions made by counsels on either side and perused all the material documents as well testimony of witnesses examined by the parties. Shorn of all technicalities, we took note of the admitted position first and now narrow down the controversy. The question that arises for determination is whether the mezzanine floor in premises No.M-132, situated at Plot No.M-3, Cannaught Circus, New Delhi existed at the time of execution of lease deed dated 26.11.2980 or it has

been constructed unauthorisedly by the defendants after its execution.

17. PW-1 Mr.Bhagwan Dass appeared from the office of Sub-Registrar to prove the copy of the lease deed. Statement of PW-6 Mr.Sohan Lal Gupta, the appellant/plaintiff need to be considered to ascertain the facts regarding existence/non-existence of mezzanine floor at the time of execution of lease deed dated 26.11.1980 and handing over the possession to the defendants. As per statement of PW-6 Mr.Sohan Lal Gupta, he came to know defendant No.2 Mr.T.C.Jain in the year 1980 when he let out the premises to him through Mr.R.S.Sethi, the sitting tenant. He stated that at the time of letting out the second floor, there was no third floor existing at all but as on date there exists a mezzanine floor in the building. In January, 1981 he received notices Ex.P1 and Ex.P2 from NDMC regarding unauthorised construction of mezzanine floor and thereafter came to know that the mezzanine floor had been constructed unauthorisedly by the defendants. He also stated that he never gave consent to defendants No.1 and 2 to raise unauthorised construction or to make any addition or alteration.

18. Mr.R.S.Sethi surrendered the possession to the plaintiffs and thereafter possession was handed over to the defendants and the documents handing over possession do not contain any recital about existence of mezzanine floor. The reason is obvious if lease deed was silent on this count, the possession letter could not contain any such averment. The statement of PW-6 Mr.Sohan Lal Gupta that for the first time he came to know through notice, is contrary to the

version given during cross examination wherein he admitted that he came to know about unauthorised construction through his Chowkidar employed by him. Though he admitted that the said Chowkidar is still in his employment, he being the only person who could depose about when he noticed the unauthorised construction activity by defendants No.1 and 2, has not been examined. In cross examination, PW-6 stated that when he visited the building in the year 1981, other tenants complained about the unauthorised construction but none of those tenants have been named or examined as witness. He also claimed to have seen the construction going on from outside and could see the fresh construction and fresh plaster on the walls and the raised walls. In cross examination, he also stated that he was not allowed to go inside but then the question arises that why he did not invoke clause 6 of the lease deed which authorised him and his agent the right to inspect the leased premises or visit the same with prior notice, verbal or otherwise. We have nothing on record to indicate that he ever verbally or in writing expressed his desire to inspect the premises on seeing the unauthorised construction going on. Otherwise also, construction activity of the magnitude that the entire roof was replaced, side walls raised, construction activity going on, there could be hardly any hindrance in visiting the site, getting it photographed so that in case of any legal action by any authority for raising unauthorised construction, it could be used as defence by him that it was not he but the tenant who had breached the condition.

19. Pertaining to the decision reported as 163 (2009) DLT 411 Sparsh Builders Pvt. Ltd. v. Maharishi Ayurveda Products Pvt. Ltd., suffice would it be to state that Section 91 and Section 92 of the Evidence Act supplement each other and Section 91 would be inoperative without the aid of Section 92 and vice versa. However, the two Sections differ in some material applications. Whereas Section 91 applies to all documents, whether they are dispositive or otherwise, but Section 92 applies to documents which can be described as dispositive. Whereas Section 92 applies to documents which are bilateral as also unilateral, Section 92 applies only to bilateral documents. Both the Sections are based on 'Best Evidence Rule'. As per proviso 6 to Section 92 of the Evidence Act a fact may be proved which shows in what manner the language of a document is related to existing facts. The lease deed conveys interest in the following words: *'That the lessors within named hereby lease out to the lessee the premises No.M-132, situated on the Second Floor of the Building known as 'Ram Kishan Dass Sita Ram Building' on plot No.M-3, Connaught Place, New Delhi.'* The lease deed does not say that the second floor of the building is let out. It uses the expression, with reference to the leased premises as No.M-132 situated on the second floor. The expression 'comprised' and 'situated' are different. If a single floor in a building is intended to be given on lease, the clear expression in the lease would be, say if the floor is the second floor, to clearly state: *'That the demised premises comprises the second floor of the building bearing Municipal No.____'*. But, if the expression used is that the demised premises is situated on the second

floor, it would obviously be a case of ambiguity in the language for the reason situated on the second floor may be a mezzanine within. Normally, mezzanine floors are integral to a floor and are not having independent access. The mezzanine floors are normally accessed from within a floor. Thus, the respondent was not precluded from leading evidence to clarify as to in what manner the language of the lease deed was related to existing facts.

20. It may be relevant to mention here that prior to handing over of possession to the defendants, the premises was being used as a lodge by the earlier occupant. The covenants of the lease deed governing the contracting parties reveal that infact it is transfer of interest in the property under the garb of lease deed. This can be inferred from the nominal rent of ₹1,000/- and security of ₹ 20,000/- for a premises situated in the heart of City in Connaught Circus in respect of entire floor with right to sub-let. The contents of clause 8 of the lease deed that *“lessee will not carry out any structural additions, alternations or modification in the building that already exists and in case, he does so, he will have to pay the penalty, if any, imposed for such additions and alterations being made and in case of any re-entry notice because of addition, alternation or modification carried out by the lessee, the lessee shall either get the directions for re-entry removed or shall, without any delay, remove the additional super-structure”*, gives rise to only one inference that lease deed is only a camouflage. In the given facts and circumstances, parties were hardly expected to be honest in mentioning the vital details in lease deed Ex.DW4/A like actual rent payable,

security taken and the extent of unauthorised construction existing in the said floor.

21. We may observe that Mr.R.S.Sethi, the earlier occupant/tenant was the best witness to prove about the existence/non-existence of unauthorised construction at the time of execution of lease deed Ex.DW4/A but he has not been examined by any of the parties and there is nothing to suggest that he is not available/traceable.

22. The testimony of PW-6 is also liable to be disbelieved in view of the statement made by DW-4 Mr.Sarabjit Khosla who is a witness to the lease deed claiming himself to be an Estate Agent through whom this deal was struck. He has specifically stated that mezzanine floor was in existence at the time of handing over the possession to the defendants and lease deed did not incorporate it due to the mutual understanding between the parties.

23. This witness being independent witness though produced by the defendants has to be believed so far as existence of mezzanine floor at the time of execution of lease deed is concerned. It is said that man may lie but not the documents. Even if oral testimony of DW-4 Mr.Sarabjit Khosla is viewed with suspicion, the documentary evidence produced by DW-2 Mr.R.C.K.Saxena from NDMC is sufficient to dispel the confusion on this aspect.

24. PW-2 Mr. Ashok Kumar appeared alongwith the notice dispatch register to prove that notices were dispatched vide entries Ex.PW1/2 and 3. Now let us have a look at the three notices sent by NDMC to the lessee and occupant.

25. First undated notice of January, 1981 reads as under :-

" NO.CA/1918/UC

Dated: January 1981

RFA(OS). No.50/2000

Page 12 of 22

1. Shri Sohan Lal Gupta
8 Bazar Lane,
New Delhi
2. Shri Hakim Ram Kishan Sita Ram (owner)
C/o L.Sita Ram Katra Dhulia
Chandni Chowk, Delhi
3. Shri T.C.Jain
Through T.R.Enterprises
4771/23, Darya Ganj, Delhi.
4. Shri T.C.Jain (at site)
M-132 Connaught Place,
New Delhi

Subject : U/A construction at M-132 Connaught Place, New Delhi.

*It has been reported to this Committee by U.A.C.C. that you have **begun** to erect/re-erect the building Construction of mezzanine floor m.a. **30' x 13'** and **19' x 10'** by raising the height of **roof to 2'-6"** after demolishing the existing roof in the premises No.M-132, Connaught Place, New Delhi is in progress.*

Without the written permission of the New Delhi Municipal Committee in contravention of the terms of sanction granted."

It further contained direction to discontinue building portion from date of service of this notice failing which legal action would be taken without further warning.

26. The second notice dated 05.02.1981 extracted below:-

" NO.CA/1939/UC

Dated: 5.2.1981

1. Shri Sohan Lal Gupta
8 Bazar Lane,
New Delhi
2. Shri Hakim Ram Kishan Sita Ram (owner)
C/o L.Sita Ram Katra Dhulia
Chandni Chowk, Delhi
3. Shri T.C.Jain
Through T.R.Enterprises
4771/23, Darya Ganj, Delhi
4. Shri T.C.Jain (at site)
M-132 Connaught Place,
New Delhi

Subject: U/A construction at M-132 Connaught Place, New Delhi.

N O T I C E

*It has been reported to this Committee by Unauthorized Construction cell that you have **erected**/re-erected a building*

- 1. Erected mezzanine floor m.a. **30' x 13'** and **19' x 10'** by raising the height of **roof to 2'-6"** after demolishing the existing roof in the premises No.M-132, Connaught Place, New Delhi.*
- 2. Erected mezzanine floor m.a. 19'x10' by raising the height of roof to 2'-6" after demolishing the existing roof in the premises No.M-132, Connaught Place, New Delhi."*

This notice also mentioned that all this is without the sanction of the committee, with direction to demolish the unauthorised structure.

27. The third notice dated 11.02.1981 is a demolition notice issued on failure to comply with the notice dated 05.02.1981 with direction to remove the unauthorised construction within six hours failing which the same would be done by the NDMC through its own agency. Alongwith this notice, details of unauthorised construction were mentioned as follows :-

"(1) Erected mezzanine floor m.a. 30' X 13' and 19' X 10' by raising the height of roof to 2'-6" after demolishing the existing roof in the premises No.M-132, Connaught Place, New Delhi.

(2) Erected mezzanine floor m.a. 19' X 10' by raising the height of roof to 2'-6" after demolishing the existing roof in the premises No.M-132, Connaught Place, New Delhi."

28. A bare reading of first notice undated January, 1981 dispatched on 30.01.1981 vide Ex.PW1/2 reveals that it gives the exact measurement of the construction though as per notice, the construction had just begun. The questions that remained unanswered are : Who inspected the site on which date and took exact measurement of the construction and submitted the report. The sanction

referred to in the notice was applied for by whom for what purpose and on what terms and conditions, the sanction was granted which were claimed to have been violated.

29. The second notice speak of unauthorised construction erected/re-erected, being already completed and extent of unauthorised construction and the measurement given are exactly the same which were referred to in the notice Ex.P1 dispatched on 30.01.1981. We are left to wonder that without there being any mention of the name of the officer who conducted the inspection and submitted the report of UACC, who could find the same construction at the beginning stage as well as on completion, within a short span of five days i.e. from 30.01.1981 to 05.02.1981. The language used in the notices alongwith the details of unauthorised construction, are sufficient to prove that no such unauthorised construction was infact in progress during the period 30.01.1981 to 05.02.1981 and dispatch of notice to the respondent was at the behest of some vested interest.

30. The time gap between the two notices Ex.P1 and P2 being only five days, the extent of unauthorised construction being carried out after removing the roof, could not have been completed in such a short period even if carried on day and night because it required not only removal of roof on second floor but also raising walls and then also placing roof on the raised walls and then construction of mezzanine floor. Thus, we can safely infer that the material placed on record in the form of three notices sent by NDMC i.e. Ex.P1 & P2 and demolition notice dated 11.02.1981 to prove that mezzanine floor was

constructed after execution of lease deed Ex.DW4/A is wholly insufficient to prove the case of the plaintiffs.

31. The report of UACC of NDMC was the most crucial document to prove the case of the plaintiffs which form the basis for issuance of notices Ex.P1 and P2. We are infact surprised at the accuracy of measurement of unauthorised construction noticed at the initial stage and then within five days. As per UACC of NDMC when unauthorised construction was completed, extent and measurement of the unauthorised construction was exactly the same as reported at the initial stage. If the inspection was permitted by the occupant to enable the UACC team to discharge their duty and report the NDMC, then nothing could prevent the UACC to get the site of unauthorised construction photographed. Absence of the report as well as the photographs of the construction site which form foundation of initiating action for making unauthorised construction vide notice Ex.P1 and P2 lead to the conclusion that the contents of notices Ex.P1 and P2 about the measurement of unauthorised construction did not pertain to the period 30.01.1981 to 05.02.1981. As the appellants' case is mainly based regarding the timing when the unauthorised construction of mezzanine floor was made, there being no inspection report, on the basis of which notices Ex.P1 and P2 were issued, it is just like structure without foundation which is bound to collapse.

32. It is plaintiffs' own case that they came to know about unauthorised construction through notices sent by NDMC. If it was so, then nothing could prevent them from getting the construction site photographed from outside if he was not

permitted entry. It is very surprising that on the one hand, claim is that roof was removed, height raised and mezzanine floor constructed and on the other hand, stand taken is that entry was not permitted to inspect the unauthorised construction going on. Keeping in view that the entire building was in occupation of tenants and unauthorised construction of entire mezzanine floor could not have remained unnoticed by other occupants especially when it was being done in Connaught Circus, in the heart of the City under the nose of NDMC, the civic body under legal obligation not only to check such an unauthorised construction but also to demolish it.

33. Reference to the two letters by L&DO dated 24.04.1980 (Ex.PW3/2) and then dated 02.09.1981 (Ex.PW3/1) do not help the appellants in proving their case. In the letter Ex.PW3/2 which has been sent by the office of L&DO in continuation of its office letter dated 02.07.1979 is on the following subject :

"Premises situated on a plot of land in Block 'M' known as Connaught Circus, New Delhi, Regularisation of breaches, putting up addl. construction on the rear open portion of the premises and withdrawal of re-entry."

It does not speak of any inspection being carried out on second floor of premises No.N-132, rather Clause 5 of the letter specifically provides as under :-

"5.It may be noted that you are also liable to pay damages additional charges/addl. ground for rent for the period starting from the date(s) following the expiry of the period for which the above terms are being offered for, these breaches or any other breaches which may come to our notice hereafter (found to be existing at site beyond that date or dates). These charges will be communicated to you separately."

34. Mention of unauthorised mezzanine constructed in flat No.M-132 on second floor by demolishing original area 1611 sq.ft. in letter Ex.PW3/1 is on the basis of inspection carried on 04.07.1981. As by that date even NDMC had sent notices, if L&DO had also acted upon the unauthorised construction existing in the said flat, it does not prove that unauthorised construction was not existing on 24.04.1980 when letter Ex.PW3/2 was sent by L&DO.

35. Apart from oral testimony, we have ample documentary evidence to arrive at the conclusion that notices Ex.P1 and P2 were all manipulated to draw the attention of the civic body to demolish the unauthorised construction projecting it to be a recent one and for obvious reason at the time of execution of lease deed, they preferred to observe silence about existence of mezzanine floor. Even if the letter Ex.PW3/A written by Mr.R.S.Sethi on 25.05.1979 seeking permission to carry out the repair and annexing the site plan of the existing structure is viewed with suspicion about its genuineness in view of alleged tainted testimony of DW-3 Mr.Jage Ram Rana and assumed that the letter and the site plan being not coming from the proper custody and the certified copy being obtained by the respondent of that letter and plan, could not have been authenticated by DW-3 Mr.Jage Ram Rana – an ex-employee of NDMC, that itself is not sufficient to grant the relief to the appellants. At the outset, we would like to mention that the subject of letter Ex.DW3/A by Mr.R.S.Sethi stands corroborated through the entry in receipt and dispatch register. As per entry at serial No.884 dated 25.05.1979 Ex.DW1/A, a letter was received from Shri Ranjit Singh

Sethi, M-132, Conn. Circus, Opp. Super Bazar, N.Delhi alongwith an enclosure of rough sketch for carrying out repairs as tenant of 2nd floor of M-132. This entry has been proved by DW-1 Mr.Om Prakash, LDC, NDMC after producing the summoned record and deposing that Ex.DW1/A is the true extract of the relevant entry. DW-1 Mr.Om Prakash proved the receipt of the letter on the subject referred to above which does lend credibility atleast to the letter Ex.PW3/A and the site plan annexed which specifically mentioned the existence of mezzanine floor in premises No.M-132, Connaught Circus much prior to execution of lease deed between the parties on 26.11.1980. Thus even if Ex.DW3/C written by Mr.T.C.Jain seeking certified copy of the application and site plan given by Mr.R.S.Sethi is ignored, it has no effect on the issue to be determined.

36. Assuming for the sake of arguments that letter Ex.DW3/C and site plan are manipulated documents in connivance with DW-3 Mr.Jage Ram Rana, there is sufficient material available on record coming from official custody of the civic body responsible for levying and assessing house tax on the properties under its jurisdiction. DW-2 Mr.R.C.K.Saxena, Sr. Assistant, NDMC was examined alongwith the summoned record and his statement being very crucial, is reproduced as under :-

"I have brought with me the summoned record i.e. the file relating to property No.M-132, Connaught Circus, New Delhi. The information submitted by the tenants with regard to the occupation of the above property is also contained in this very file.

On the basis of the record, I can stated that on 16th July, 1979 we had received an information in connection with the assessment of the house tax of the above said property from

Shri R.S.Sethi, the tenant. Exhibit DW2/A is the photocopy of the above-said document (original of exhibit DW2/A is seen and returned).

In the records there is also an intimation given by said Shri R.S.Sethi on 5th November, 1973. Photo Copy of the same is exhibit DW2/B (original of DW2/B is seen and returned)."

37. In cross examination, the only fact that could emerge on record was that he was deposing on the basis of record and not on personal knowledge. So far as authenticity of the record produced and its coming from the proper custody is concerned, that remained unchallenged. DW-2 Mr.R.C.K.Saxena had no axe to grind in the matter and appeared as a witness in official capacity alongwith official record. The information in connection with the house tax submitted by Mr.R.S.Sethi – the earlier occupant on 05.11.1973 through Ex.DW2/B, in Column No.3 and 5 is given as under :-

*"3. Accommodation with each
Tenant (Occupants). : Full Flat with Mezz.
5. Date of Occupation : Since 1961-62"*

38. Similarly in Ex.DW2/A vide which the information in connection with the house tax was furnished on 16.07.1979 and in column No.3, the information given is as under :-

*"3. Accommodation with the
tenants (Occupants). : Full second floor alongwith
full mezzanine"*

39. These documents are not contrived as in the year 1973 or 1979, the defendant could not perceive that in the year 1980 he would be a lessee in the same property or a dispute would arise in respect of unauthorised construction of mezzanine floor. DW-4 Mr.Sarabjit Khosla claimed himself to be known to both the parties and in the business of real

estate, is a witness to the lease deed. Though the plaintiff denied that DW-4 was a property broker, he could not dispute his signature on the lease deed as a witness, which is the general practice with the real estate agents.

40. So far as damages claimed for damaging the building is concerned, examination of PW-5 Mr.N.K. Gupta, Architect is of no help to the plaintiffs. As PW-5 Mr.N.K.Gupta admitted that he did not visit the upper floor and only visited the ground floor, it was not possible for him to assess what construction activity had taken place on the second floor. Further if the plaintiffs were interested in assessing the damage to the property, it was not difficult for the Architect to ascertain the age of the construction existing on mezzanine floor. By not making the Architect to examine the mezzanine floor to ascertain the approximate year when the construction of the same could have been done, is an additional reason to return the findings that mezzanine floor was in existence prior to execution of the lease deed dated 26.11.1980.

41. The findings of learned Single Judge that *'since it could not be substantially proved by the plaintiffs/appellants that the defendants/respondents had made any alternations, additions and/or changed the structure of the suit premises, it also could not be said that the said defendants caused any damage to the suit premises for which they could be made liable to pay any damages'*, being arrived at after appreciation of evidence in right perspective, we concur with his finding.

42. Lastly, with reference to clause-8 of the lease deed, contents whereof have been reproduced in para 20 above,

it has to be noted that it stipulates that if the lessee carries out any alterations or modifications he would have to pay the penalty imposed and if re-entry is ordered, the lessee shall get the direction for re-entry removed, failing which the additional superstructure constructed would have to be removed. It is settled law that if parties envisage a futuristic situation and stipulate in the contract the consequence thereof, it is said consequence alone which has to be enforced for the reason the parties have contracted so. In the instant case, there is no evidence that any penalty was levied by NDMC, L&DO or any other statutory authority for the mezzanine floor constructed. There is no evidence that any re-entry was effected. Thus, the appellants would not be entitled to seek a relief as prayed for, for the reason the parties have contracted upon the consequence of unauthorized constructions if any made.

43. For the foregoing reasons, we do not find any reason to interfere with the impugned judgment. The appeal lacks in merits and is hereby dismissed. In the facts and circumstances, the parties are left to bear their own costs.

(PRATIBHA RANI)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

FEBRUARY 06, 2012
st