

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

Judgment reserved on: 27.08.2013

% Judgment delivered on: 17.12.2013

+ CS(OS) No. 1019/2009 and I.A. No. 5351/2011

DR. SHASHI RANJAN GUPTA Plaintiff
Through: Mr. Vijay K. Gupta, Mr. Mehul
Gupta & Mr. Sandeep Kaushik,
Advocates.

versus

M/S SPRAYLAC PAINTS CORPORATION Defendants
Through: Mr. Sudhanshu Batra, Senior
Advocate along with Ms. Kamlesh
Mahajan, Advocate for defendant
No.1.
Mr. Peeyoosh Kalra, Advocate for
defendant No.2.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

J U D G M E N T

VIPIN SANGHI, J.

1. The two plaintiffs, namely, Dr. Shashi Ranjan Gupta and Mr. Sunil Kumar Gupta, have filed the present suit to seek a declaration that defendant No. 1 – M/s Spraylac Paints Corporation – a partnership firm of four partners – who are named in the memo of parties (hereinafter referred to as

‘Spraylac’) has impliedly surrendered the lease in respect of premises bearing Municipal No. M-42, Connaught Circus, New Delhi, having an approximate area of 1000 sq. feet on the ground floor and a portion of mezzanine floor with unrestricted use of mezzanine and joint toilets and back door entrance with the other tenants of premises bearing No. M-43 [hereinafter referred to as the, “suit property”] more particularly shown and described in the site plan (Exhibit ‘PW1/1’). Alternatively, the plaintiffs have sought a decree for ejectment/recovery of possession against defendant Nos. 1 and 2 in respect of the suit property. The plaintiffs also seek a decree for recovery of money towards unpaid arrears of property tax dues amounting to Rs. 13,97,153/- as on 31.03.2009. A decree of mandatory injunction has also been sought to direct defendant No. 1 to pay to the plaintiffs, or deposit with the court, the refundable security deposit received from defendant No. 2, which would be paid to defendant No. 2 at the time of vacation of the suit property by defendant No. 2. The plaintiffs pray for pendente lite and future use and occupation charges @ Rs. 2.50 lacs per month against defendant No. 2, till such time defendant No. 2 hands over vacant peaceful possession of the suit property to the plaintiffs or enters into a fresh arrangement in respect thereof with the plaintiffs. The plaintiffs pray for interest @ 18% per annum on the accrued pendente lite and future use and occupation charges till such time the amount is paid. A prayer for costs has also been made by the plaintiffs.

2. The case of the plaintiffs is that defendant No. 1 – Spraylac is a partnership firm having four partners, namely, Mr. Kapil Bhasin, Mr. Rajiv Maira, Mr. Rahul Bhasin and Mr. Rohan Maira. Defendant No. 1 was a

lessee of the plaintiff in respect of the suit property, on a monthly rent of Rs. 159.46. Defendant No. 2 – M/s Dominos Pizza India Ltd. ('Dominos' for short) is a company incorporated under the Companies Act, 1956. The plaintiffs state that they permitted defendant No. 1 to induct defendant No. 2 – company as a sub-tenant in respect of the entire suit property on a monthly rent of Rs. 1,22,000/- under an Agreement dated 01.06.1996. Though the plaintiff's witness PW1 Dr Shashi Ranjan Gupta has sought to exhibit the said agreement dated 01.06.1996 as Exh. PW1/2 in his examination in chief, only a photocopy of the said agreement has been filed. However, the defendants have not denied the execution of the said agreement in response to para 4 of the plaint – wherein the plaintiffs have averred regarding the execution of the said agreement and annexed the same as Annexure P-2 to the plaint. Even during arguments, the defendants have not questioned the admissibility of the said agreement. Accordingly, the copy of the agreement dated 01.06.1996 (Ex PW1/2) is admissible in evidence.

3. The plaintiffs further state that after inducting defendant No. 2 as a sub tenant in the suit property, a registered lease deed was executed on 24.09.1996 for a term of nine years (Ex.PW1/3). In terms of the lease (Ex.PW1/3) and the agreement dated 01.06.1996 (Ex PW1/2), defendant No. 1 consented to defendant No. 2 paying the lease rental in the ratio of $\frac{1}{3}^{\text{rd}}$: $\frac{2}{3}^{\text{rd}}$ i.e. $\frac{1}{3}^{\text{rd}}$ of the lease rental was to be paid to the plaintiffs, and $\frac{2}{3}^{\text{rd}}$ was to be paid to defendant No. 1. The plaintiffs submit that this amounts to implied surrender of the formal lease by defendant No. 1, as defendant No. 1 accepted from the plaintiffs/lessors a new lease of the suit property. The plaintiffs aver that in terms of the lease (Ex.PW1/3) and the Agreement

dated 01.06.1996 (Ex.PW1/2), the lease rental being more than Rs. 3,500/- per month, defendant No.1 ceased to be a statutory tenant under the provisions of Delhi Rent Control Act, 1958 (hereinafter referred to as, 'the Act'). The plaintiffs aver that defendant No. 1 ceased to enjoy the protection of the Act with effect from 01.06.1996.

4. The plaintiffs further state that a fresh lease deed dated 20.09.2005 (Ex.PW1/4) was executed between the plaintiffs and defendant No. 1 on similar terms and conditions, duly registered in the office of Sub Registrar on 26.09.2005. Under Ex.PW1/4, the monthly rental of defendant No. 2 became Rs. 1,30,000/- per month.

5. The plaintiffs further state that under the terms and conditions of the aforesaid leases Ex.PW1/3 and Ex.PW1/4, defendant No. 1 firm was liable to pay the property tax of the suit property to the extent of 66.7%, while the plaintiffs/owners were liable to pay the remaining property tax to the extent of 33.3%. Clause (8) of Ex.PW1/4 is relied upon by the plaintiffs which reads as follows:

“8. The liability to pay property/house tax shall be shared in the ratio of 2:1, that is, SPRAYLAC shall pay 66.7% and the owners 33.3%. SPRAYLAC shall forward a cheque drawn in favour of the New Delhi Municipal Committee or any other authority that may be then authorized to collect the property tax to the owners within the time allowed for payment of the said tax, as per bills raised by the NDMC in favour of the owners.”

6. The plaintiffs submit that in terms of the covenants of the lease deeds Ex.PW1/3 and Ex.PW1/4, defendant No. 1 had failed to pay property tax dues from 1996 onwards. They allege that the said defendants have deferred

or postponed the payment of property tax for one or the other reason. This has resulted in accumulation of substantial property tax arrears in respect of the suit property. The plaintiffs state that the New Delhi Municipal Council (NDMC), vide a Bill No. 23566 dated 26.09.2008 had raised a demand-pursuant to an order of assessment dated 04.09.2008 pertaining to the period up to 31.03.2008 vide Ex.PW1/5. The plaintiffs state that vide letters dated 30.09.2008 and 14.10.2008 i.e. Ex.PW1/11 and Ex.PW1/26, defendant No. 1 was called upon to pay the proportionate arrears of house tax dues. The details of calculation of property tax dues were also furnished to defendant No. 1. Details of calculation of property tax dues payable by defendant No. 1 was sent vide notice dated 18.11.2008 (Ex.PW1/43). (Here itself, I may notice that Ex.PW1/43 bears the typed date 18.11.2007, though it is submitted by the plaintiff, and is evident from a reading of the said document, that the year 2007 has wrongly been typed in place of 2008). The plaintiffs state that NDMC raised another Bill No. 26955 dated 05.12.2008 (Ex.PW1/47) which includes the property tax dues for the year 2008-09 upto 31.03.2009. They state that in response to the various letters and demands, defendant No. 1 paid a total amount of Rs. 13,00,726/- in the name of the Secretary, NDMC, towards property tax dues vide communication dated 24.12.2008 (Ex.PW1/49). The plaintiffs claim that in spite of the said demand, there has been a default in payment of property tax dues by defendant No. 1. The plaintiffs allege that there were other violations attributable to defendant No. 1, which continued to exist - including non-payment of property tax dues, even after the payment of Rs. 13,00,726/-.

7. The plaintiffs submit that vide notice dated 26.03.2009 (Ex.PW1/52), the breaches committed by defendant No. 1 were communicated, which also led to forfeiture of the lease. The defendant No. 1 responded to the said notice by their reply dated 22.04.2009 (Ex.PW1/108). The defendant no.1 sent another communication dated 01.05.2009 (Ex.PW1/109), providing copy of the receipt No. 22041 dated 24.04.2009 for Rs. 8,60,726/- (Ex. PW1/113) paid towards property tax dues. The defendants stated that with the said payment of dues of property tax for M-42, Connaught Circus, their account had been cleared up to the year ending 31.03.2009. It was further stated that property tax dues for the current year, ending on 31.03.2010, will be paid in due course. The plaintiffs claim that defendant No. 1 has paid a total sum of Rs. 21,61,452/- towards property tax dues to the NDMC against the total liability of Rs. 35,58,605/- as on 31.03.2009, leaving the balance outstanding dues of Rs. 13,97,153/-. The plaintiffs have set out in para 16 of the plaint the various breaches of the covenants of the lease deed Ex.PW1/3 and Ex.PW1/4 attributed to the defendant No. 1. The alleged breaches are as follows:

- “(i) *Non payment of property tax arrears for the period of 1996 to 31.03.2001 amounting to Rs. 9,96,375/- (Rupees Nine lacs Ninety Six Thousand Three Hundred Seventy Five only);*
- (ii) *Non payment of balance arrears of property tax from 2001 to 2009 amounting to Rs. 4,00,788/- (Rupees Four lacs seven hundred eighty eight only);*
- (iii) *In terms of clause No. 5, defendant No. 1 have failed to pay refundable security deposit of our clients in terms of Agreement dated 02.04.2008.*

(iv) *On account of misrepresentation of defendant no. 1 and consequential violation of the terms of the said lease deed.”*

8. The plaintiffs state that on account of subsisting and continuous default in payment of property tax dues along with other breaches of the covenants, clause (10) of the lease deed (Ex. PW1/4) is attracted, resulting in immediate forfeiture of the lease of defendant No. 1. Clause (10) of Ex.PW1/4 provides that any breach by defendant No. 1-Spraylac of their obligation under this Agreement shall result in the owners having the right to terminate the agreements arrived at between Spraylac and the sub tenant, and Spraylac shall also cease to be the tenant of the premises in question. The plaintiffs submit that violation of the covenants by defendant no.1 led to forfeiture of the lease of defendant No. 1, who ceased to be the lessees in the suit property, and that there was implied surrender of lease under Section 111 of the Transfer of Property Act, 1882 (TPA).

9. The plaintiffs state that defendant No. 1 has no right to collect the rent from the sub tenant – defendant No. 2. The plaintiffs state that since defendant No. 1 has not been in possession of the suit property, as the same is occupied by defendant No. 2 – the sub tenant, the forfeiture of the tenancy results in automatic and implied surrender of tenancy rights by defendant No. 1 firm to the plaintiffs.

10. The plaintiffs also allege that defendant No. 1 had revised the security deposit in terms of the agreement dated 02.04.2008 without sharing the same with the plaintiffs - in violation of the lease deed (Ex.PW1/4). It is claimed that privity of contract, by operation of law, stood established directly between the plaintiff and defendant No. 2 with the same obligations as

contained in the sub lease, including the payment of a sum of Rs. 2,50,000/- towards use and occupation charges directly to the plaintiffs with effect from 01.05.2009. The plaintiffs state that in response to the legal notice sent to defendant No.2, vide their reply dated 14.04.2009 (Ex.PW1/111), defendant No. 2 stated that it would continue to pay the rent to defendant No. 1 on account of their privity of contract with them and would pay rent directly to the plaintiffs on the directions of this Court. In the aforesaid background, the reliefs as sought for in the plaint have been prayed for.

11. The suit has primarily been contested by defendant No. 1 Spraylac by filing their written statement. Spraylac has denied the aforesaid averments of the plaintiffs. They claim that the registered lease deed Ex.PW1/4 is subsisting and that Spraylac is implementing the terms and conditions of the same. One of the primary defence raised by defendant No. 1 is that the present suit is not maintainable because the relationship between the plaintiff and defendant No. 1 is governed by the Act. Reliance is placed on Section 50 of the said Act which debars the jurisdiction of the civil court to entertain any suit or proceeding in which the relationship between the parties comes under the Act. Reliance is placed on clause (4) of Ex.PW1/4 to submit that relationship of the plaintiffs and defendant No. 1 continues to be governed by the Act. Spraylac submits that since the plaintiffs stopped encashing the cheque towards rent from January, 2009 onwards, defendant No. 1 has deposited the same in the court. Spraylac submits that the present suit is not maintainable because as per the registered lease deed (Ex.PW1/4), plaintiffs agreed that the defendant No. 1 will be a statutory tenant during the period

of registered lease agreement and the plaintiffs shall not seek eviction of the defendants.

12. Spraylac denies that they have not paid their share of the property tax dues. Defendant discloses that two of the partners of defendant No.1, i.e. Mr. R.B. Mehra and Ms. Chander Kanta Bhasin, who were initially impleaded as party defendants, had passed away. Here itself, I may take notice of the fact that the plaintiffs have filed the amended memo of parties deleting the said two persons on 03.08.2010. Spraylac submits that the sub lease having been created with the express consent of the plaintiffs, no cause of action has arisen in their favour. Spraylac further states that in the year 2003, defendant No.2 requested defendant No.1 to reduce the rent from Rs.1,52,000/- to Rs.1,05,000/-, or in the alternative, suggested to vacate the premises. Defendant No.1 brought this fact to the knowledge of the plaintiffs, and the plaintiffs vide their communication dated 01.12.2003 (Ex DW1/3) addressed to the defendant No.1, acceded to the request of defendant No.2, and issued a 'no objection' to defendant No.1 and further requested to amend the lease deed resulting in reduction of rent to Rs.1,05,000/-. Spraylac further states that the plaintiffs permitted it to further sub lease the suit property, and allowed the defendants to apply for and obtain a trade license. Defendant No.1 states that it entered into a fresh license deed on the same terms & conditions as the earlier license deed dated 24.09.1996 (Ex PW1/3), for a rent of Rs.1,30,000/- per month on 20.09.2005 vide Exhibit PW-1/4. It is further averred in the year 2008 defendant No.1 approached defendant No.2 for enhancement of rent and defendant No.2 agreed to enhance the amount of rent from Rs.1,30,000/- to Rs.2,50,000/-

per month w.e.f. 01.04.2008. The plaintiffs issued a letter dated 29.03.2008 (Ex DW1/5) thereby giving their 'no objection' to the defendant No.1 to amend the license deed dated 20.09.2005. The defendant No.1 further states that it approached the plaintiffs for getting their 'no objection' and for handing over 1/3rd share of the refundable security deposit given by defendant No.2. However, the plaintiffs, for the reasons best known to them, refused to issue a 'no objection' letter in favour of the defendant No.1, and clearly stated that the refundable security meant to be given to the plaintiffs may be kept with defendant No.1, as plaintiffs showed their unwillingness to accept the said refundable security deposit. Defendant No.1 states that it received the refundable security deposit from defendant No.2 to the tune of Rs.6,50,000/-, and 1/3rd share of the said amount, i.e. Rs.2,16,667/- was still lying with defendant No.1 and that the said defendant is ready & willing to hand over the cheque for the said amount, subject to the plaintiffs giving their 'no objection' in favour of defendant No.1 as was given by the plaintiffs to the defendant No.1 in a routine manner. Defendant No.1 asserts that it has never breached the terms & conditions of the lease deed dated 24.09.1996 (Ex PW1/3) and 20.09.2005 (Ex PW-1/4) and that they have complied with all the terms & conditions as provided in the said lease deeds and the law.

13. The plaintiff has filed the replication to the written statement of defendant No.1, as well as to the written statement of defendant No.2. However, it appears that the written statement of defendant No.2 has not come on record. At the same time, I may note that the suit has been

contested by defendant No.1 alone, and no submissions have separately been advanced on behalf of the defendant No.2.

14. On the basis of the pleadings of the parties, the Court framed the following issues on 21.07.2010:

“(i) Whether the plaintiff is entitled to a decree of declaration as prayed for? OPP

(ii) Whether the plaintiff is entitled to seek a decree of ejectment and recovery of possession against the defendants in respect of premises in question? OPP

(iii) Whether the plaintiff is entitled to seek recovery of arrears of property tax dues as prayed for? OPP

(iv) Whether the defendant no. 1 has not defaulted in paying property tax dues as claimed? OPD-1

(v) Whether the plaintiff is entitled to interest free refundable security deposit received by defendant no. 1 from defendant no. 2, by way of mandatory injunction or otherwise? OPP

(vi) Whether the plaintiff is entitled to Rs 2.5 lacs per month from defendant no. 2 towards use and occupation charges w.e.f 01.05.2009 till such time the premises in question is vacated/handed over to the plaintiff? OPP

(vii) Whether the plaintiff is entitled to interest at the rate of 18% per annum on the said use and occupation charges of Rs 2.5 lacs per month w.e.f. 01.05.2009 till realization? OPP

(viii) Whether the present suit of the plaintiff is not maintainable in view of the provisions of the Delhi Rent Control Act, 1958 and objections raised by the defendant no. 1? OPD-1

(ix) Relief(s)”.

15. The parties agreed that the evidence be recorded on Commission. Mr.Kalam Singh, Registrar (Retd.) was appointed as the Local Commissioner to record the evidence. The parties lead their respective evidence towards examination in chief on affidavits and produced their witnesses for cross-examination by the opposite party. The learned Local Commissioner has filed his report containing the evidence recorded by him.

16. The plaintiffs have filed the affidavit towards examination in chief of Dr.Shashi Ranjan Gupta, who has appeared as PW-1. He tendered his affidavit towards examination in chief dated 03.08.2010 before the learned Local Commissioner on 13.08.2010. His examination in chief is in consonance with the averments made in the plaint. Thereafter, he was cross-examined by the learned counsels for the two defendants. On behalf of defendant No.1 Sh. Rajeev Maira, one of the partners of defendant No.1, (arrayed as defendant No.1(iv) in the memo of parties, originally filed and defendant No.1(ii) in the amended memo of parties filed on 03.08.2010) filed his affidavit towards examination in chief dated 13.09.2011, i.e. Exhibit DW-1/A, which was tendered before the learned Local Commissioner on 13.09.2010 in evidence. Thereafter, he was cross-examined by the learned counsel for the plaintiff. Defendant No.2 has not lead any evidence of its own.

17. Defendant no.1's documents, admitted by the plaintiff are marked Exhibits P-1 to P-111. The plaintiffs documents, admitted by defendant no.1 are Exhibits PW-1/1, PW-1/3, PW-1/4, PW-1/11, PW-1/26, PW-1/43, PW-1/49, PW-1/51, PW-1/52, PW-1/108 and PW-1/109. The plaintiffs document, admitted by defendant no.2 is Exhibit PW-1/111 and the

documents of defendant no.1, admitted by defendant no.2 are Exhibits D-1 to D-6. Apart from the aforesaid, the witnesses PW-1 and DW-1 have exhibited several documents, some of which are relevant for the present purpose and have been referred to, wherever necessary.

18. The fundamental issue that first needs consideration is with regard to the maintainability of the present suit, in the light of the objection raised by defendant No.1 premised on Section 50 of the Act. The said issue has been framed as issue No.(viii), as aforesaid.

19. Section 3 of the Act clearly states that nothing in this Act shall apply, inter alia, *“to any premises, whether residential or not, whose monthly rent exceeded three thousand five hundred.”* Mr. Gupta submits that the effect of section 3(c) of the Act is that a premises which fetches rent in excess of Rs.3,500/- per month is exempted from the operation of the Act, and that protection of the Act is restricted to buildings fetching rent upto Rs.3,500/- per month. He submits that in a case, where a tenant paying less than Rs.3,500/- per month as rent to his landlord, has sublet the premises – may be lawfully – for rent above Rs.3,500/- per month, such a premises, which is so sublet, ceases to enjoy the protection of the Act.

20. In support of his submission, learned counsel for the plaintiff has placed reliance on the Division Bench judgment of this court in ***P.S. Jain Co. Ltd. V. Atma Ram Properties (P) Ltd. & Ors.*** 65 (1997) DLT 308 (DB) The facts of that case were that the appellant/tenant had been paying rent of Rs.900/- per month to his landlord under a registered lease deed dated 05.01.1978, but the appellant had sublet the premises to two tenants - one at Rs.40,000/- per month, and another at Rs.4,500/- per month. The issue arose

whether the premises in question enjoyed the protection of the Act in the light of section 3(c) of the Act. The contention of the appellant/tenant was that since he was paying rent of only Rs.900/- per month to the landlord, the premises continued to be governed by the Act. On the other hand, the landlord contended that since the premises is fetching rent of Rs.40,000/- and Rs.4,500/-, the same was exempted from the purview of the Act and the suit preferred by him before the civil court was maintainable. A learned Single Judge of this court held that the test - for purpose of the amended section 3(c) introduced in 1988, is to find out as to what rent the premises has been fetching, and not what the tenant is paying to the landlord. Even if the tenant is paying rent less than Rs.3,500/-, in case he has sublet to others and each of the sub lessees is paying more than Rs.3,500/- to the tenant, the premises was held to be beyond the purview of the protection under the Act. Reliance had been placed on the judgment of the Supreme Court in **D.C. Bhatia & Ors. v. Union of India & Ors.**, (1995) 1 SCC 104.

21. The Division Bench upheld the view of the learned Single Judge by observing as follows:

“12. In our view, the intention behind Section 3(c) is that a premises which fetches a rent of Rs.3500 p.m. should be exempt and that protection should be restricted to buildings fetching a rent less than Rs.3500 p.m.. In case a tenant paying less than Rs. 3500 p.m. to his landlord has sublet the very same premises - may be lawfully - for a rent above Rs..3500 p.m., then the question naturally arises whether such a tenant can be said to belong to weaker sections of society requiring protection. By sub-letting for a rent above Rs.3500 p.m., the tenant has parted with his physical possession. He is receiving from his tenant (i.e. the sub-tenant) more than Rs. 3500 p.m. though he is paying less than Rs.3500

p.m. to his landlord. The above contrast is well illustrated by the facts of the case before us. The appellant tenant is paying only Rs.900 p.m. to the plaintiff, while he has sublet the premises in two units, one for Rs.40,000 p.m. and another for Rs.4500 p.m. In regard to each of these units, the sub-tenants have no protection of the Rent Act. In our view, the purpose of Section 3(c) is not to give any protection to such a tenant.

13. *Indeed there will be a serious anomaly if such a tenant is to be allowed the benefit of the rent control legislation. If he should get protection, the strange situation will be that when he cannot be evicted except on limited grounds specified in the Act and that too only before the Rent Controller, he could, in his turn, evict his tenants i.e. the sub-tenants, by giving a simple notice under Section 106 of Transfer of Property Act, and then move the civil court. Further, he could after such eviction of his tenants (i.e. sub tenants) induct fresh sub-tenants at still higher rents. In our view, an interpretation which places him in such an advantageous position is to be avoided.*

14..... ..

15..... ..

16..... ..

17. *Thus, though as long as the tenant is in occupation of the premises physically and is paying rent which is less than Rs.3500, he may be entitled to the protection, once he sublets the premises lawfully and when the units which are sublet each fetch above Rs.3500 p.m., the premises becomes one "whose monthly rent exceeds Rs. 3500 and the premises loses the protection of the Act. With that, the said tenant who has ceased to occupy the premises also loses the protection of the Act vis-a-vis the said units. It was in fact pointed in Bhatia's case (supra) that the tenant does not have a vested right in the protection afforded by the rent control legislation. His right is merely a right to take advantage of the provisions of the statute and his right will cease once the premises loses the protection. The same principle has been reiterated in*

Parripati Chandrasekhara Rao & Sons vs . Alapati Jalaiah [1995] 3SCC 709, wherein the validity of a notification under the A.P. Rent Act in respect of buildings whose rental is above Rs.1000 p.m. has been upheld. In that case also, it is held that "in the case of a tenant, the protective shield extended to him survives only so long as and to the extent the special legislation operates. The rights and remedies of the tenants are not vested and could be taken away."

For the aforesaid reasons, we uphold the view of the learned Single Judge. This Appeal is accordingly dismissed."

22. Learned counsel for the plaintiffs submits that in the present case, the admitted position is that though the rent of defendant no.1 was only Rs.130/- per month, the rent being realized for the suit property from the sub tenant i.e. defendant no.2 under the lease exhibit PW-1/4 was Rs.2,50,000/- per month with effect from 01.04.2008. He, therefore, submits that the suit property did not enjoy the protection of the Act and, consequently, the present suit was maintainable.

23. On the other hand, Mr. Sudhanshu Batra, learned senior counsel for the defendant no.1 while not denying the aforesaid proposition, seeks to place reliance, firstly, on the fact that the subletting had taken place with the express consent of the plaintiff and, secondly, on the terms of exhibit PW-1/3 and PW-1/4 i.e. lease deed dated 24.09.1996 and 20.09.2005. Reliance is placed on clause 4 of exhibit PW-1/4 (a similar clause was contained in exhibit PW-1/3 is clause 5), which reads as follows:

"4. It is expressly agreed that if the premises are not sub let by SPRAYLAC then, it shall be fully entitled to use the PREMISES for its own business. SPRAYLAC shall, however, continue to pay to the OWNERS rental at the agreed rate i.e. Rs.130/- (Rupees One hundred and thirty only). The said rent,

along with the statutory increase is payable in any case and even during existing of any sub lease/license agreement, the same shall be payable by SPRAYLAC to the OWNERS apart from any other amounts payable as a result of the sub lease/license. In case, such rent along with statutory increase during the period of nine years is in excess of Rs.1,000/- (Rupees one thousand only) per month, then the amount in excess of Rs.1,000/- (Rupees one thousand only) shall be deducted from the payment being made to the OWNERS under the present agreement for the period nine years, as the case the present agreement for the period of nine after which the entire statutory increase shall be passed to the owners. It is agreed that SPRAYLAC will be statutory tenants during the period of this agreement the OWNERS shall not seek eviction of SPRAYLAC”.

24. Mr. Batra submits that the agreed rental of the suit property was only Rs.130/- per month. He submits that the defendant no.1 continuously paid the agreed rental to the plaintiff. Mr. Batra submits that the plaintiff had specifically agreed that defendant no.1 “*will be statutory tenants during the period of this agreement and the owners shall not seek eviction of Spraylac.*” He submits that the plaintiff is bound by this agreement. Mr. Batra submits that exhibit PW-1/4 being a registered instrument, the tenure whereof was 9 years (by virtue of clause 3 thereof), the plaintiff is not entitled to claim ejectment of the defendants during the currency of the said lease deed. He further submits that even after the expiry of the lease deed, the defendant no.1 shall continue to enjoy protection of the Act, as the rent of the suit property would be only Rs.130/- per month for the period thereafter.

25. Mr. Batra places strong reliance on the judgment of this court in ***Mohar Singh v. Deen Dayal Gupta***, 1996 (v) AD (Del) 704 which, in turn,

places reliance on the judgment of the Supreme Court in ***Lachoo Mal v. Radhey Shyam***, AIR 1971 SC 2213. The observations made by the Division Bench in ***Mohar Singh*** (supra), which are relied upon by Mr. Batra are contained in para 20, read as follows:

“20. From the abovesaid two decisions of the Supreme Court, it appears that the tenants being weaker section of the society, the protection given to them under the rent control law is not capable of being waived as the protection is based on public policy. However, the protection given to the landlords is not based on public policy. It is for providing benefit to the landlord which the landlord may waive in his own volition”.

26. ***Lachoo Mal*** (supra) was a case where the appellant was a tenant of the respondent in respect of a shop. The respondent wanted to construct rooms on the upper storey of the shop for his own residence. The construction was possible only with the appellant vacating the shop for some period. The parties entered into an agreement. It was agreed that the shop would be vacated by the appellant on the condition that as soon as the required construction is completed, the appellant shall resume possession of the shop. The agreement of the parties, *inter alia*, provided that “*all the sections of the U.P. Rent Control and Eviction Act shall be fully application to this house. The first party shall in no case be entitled to derive benefits from it as the property built after 01.01.1951.*” The first party, I may note, was the respondent/landlord. After the construction had been made and the appellant had resumed his possession of the shop, the respondent landlord did not accept the rent. The landlord purported to terminate the tenancy under section 106 of the TPA, following which suit for ejectment was filed. The suit was dismissed by the Munsiff by holding that the appellant was

entitled to protection conferred by section 3 of the U.P. (Temporary) Control of Rent and Eviction Act (the U.P. Act). Section 1A of the U.P. Act states that nothing in the U.P. Act shall apply to any building, or a part of the building, which was under erection or was constructed on or after 01.01.1951. The District Judge took a contrary view, which was affirmed by the High Court. On appeal before the Supreme Court, the judgment of the High Court was reversed while allowing the appeal.

27. The issue considered by the Supreme Court was whether it was open to the respondent/landlord to give up the benefit of section 1A of the U.P. Act, or waive it by means of the agreement entered into between the appellant and the respondent in June 1962. The Supreme Court observed that the said Act had been enacted for affording protection to the tenants against eviction, except in the manner provided by the said Act. It was also meant to regulate the letting of accommodation, fixing of rent etc. These provisions all intended to confer benefits on the tenants against unreasonable and capricious demands of the landlord. At the same time, the legislature was conscious of the fact that the Act might retard and slacken the pace of construction of new buildings because the landlords would, naturally, be reluctant to invest money in properties, the letting of which would be governed by stringent provisions of the said Act. It was for that purpose that section 1A appears to have been inserted. The Supreme Court observed that the question that had to be resolved was whether Section 1-A was merely in the nature of an exemption in favour of the landlord with regard to the buildings constructed after January 1, 1951 and conferred a benefit on them which they could give up or waive by agreement or contractual arrangement,

and whether the consideration or object of an agreement of the kind executed between the parties, would not be lawful within the meaning of Section 23 of the Indian Contract Act.

28. The Supreme Court while dealing with the aforesaid issue, observed as follows:

“6. The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision is cuilibet licet renuntiare juri pro se introducto. (See Maxwell on Interpretation of Statutes, Eleventh Edn., pp. 375 and 376). If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In Halsbury's Laws of England, Vol. 8, Third Edn., it is stated in para 248 at p. 143:

“As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void.”

In the footnote it is pointed out that there are many statutory provisions expressed to apply “notwithstanding any agreement to the contrary”, and also a stipulation by which a lessee is deprived of his right to apply for relief against forfeiture for

breach of covenant (Law of Property Act, 1925). Section 23 of the Indian Contract Act provides:

“The consideration or object of an agreement is lawful, unless — it is for bidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

It has never been the case of the respondent that the consideration or object of the agreement which was entered into in June 1963, was forbidden by law. Reliance has been placed mainly on the next part of the section, namely, that it is of such a nature that it would defeat the provision of any law and in the present case it would be Section 1-A of the Act.

7. Now Section 1-A does not employ language containing a prohibition against or impose any restriction on a landlord and a tenant entering into an agreement that they would not be governed by that section. We concur with the view expressed in *Neminath Appayya Hanumannavar v. Jamboorao Satappa Kocheri* [AIR 1966 Mys 154] that the words “if permitted it would defeat the provisions of any law” in Section 23 of the Contract Act refer to performance of an agreement which necessarily entails the transgression of the provisions of any law. What makes an agreement, which is otherwise legal, void is that its performance is impossible except by disobedience of law. Clearly no question of illegality can arise unless the performance of the unlawful act was necessarily the effect of an agreement. The following observations of Lord Wright in *Vita Food Products Incorporated v. Unus Company Ltd. (in liquidation)* [(1939) AC 277 at p. 293] are noteworthy in this connection:

“Nor must it be forgotten that the Rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.”

8. We are unable to hold that the performance of the agreement which was entered into between the parties in the present case would involve an illegal or unlawful act. In our judgment Section 1-A was meant for the benefit of owners of buildings which were under erection or were constructed after January 1, 1951. If a particular owner did not wish to avail of the benefit of that section there was no bar created by it in the way of his waiving or giving up or abandoning the advantage or the benefit contemplated by the section. No question of policy, much less public policy, was involved and such a benefit or advantage could always be waived. That is what was done in the present case and we are unable to agree with the High Court that the consideration or object of the agreement entered into between the parties in June 1962, was unlawful in view of Section 23 of the Contract Act.”

29. Mr. Batra submits that the plaintiff having agreed with defendant no.1 to remain bound by the provisions of the Act, cannot now claim that the suit property does not come within the purview of the Act.

30. In ***Lachoo Mal*** (supra), the Supreme Court held that the exemption granted by Section 1-A of the UP (Temporary) Control of Rent and Eviction Act, 1947 could be waived as the same was purely for the benefit of the landlord and was not based on any public policy. Therefore, what falls for consideration before this court is whether the provisions of Section 3 of the Act were enacted in the furtherance of public policy, in which case, the

provisions of Section 3 cannot be waived by the parties, or for the individual benefit of one party.

31. In particular, this court is concerned with Section 3 (c) of the Act which exempts premises, whose monthly rent exceeds Rs. Three thousand and five hundred rupees, from the purview of the Act. Sub clause (c) was added by the amendment of 1988 and its constitutional validity was upheld in *D.C. Bhatia & ors* (supra), wherein the Supreme Court examined the background which led to the insertion of (c) in Section 3. I find it relevant to produce the relevant extract from this decision, as it will be of aid in determining the purpose with which clause (c) was inserted in Section 3. In para 13, the court noted the statement of objects and reasons detailing the purpose of the amendment as follows –

“13. In the Statement of Objects and Reasons, the purpose of the amendment by the Delhi Rent Control (Amendment) Act, 1988 was stated as under:

The Delhi Rent Control Act, 1958 (59 of 1958) which came into effect on 9th February, 1959, provides for control of rents and lodging houses and for the lease of vacant premises to the Government within the Union Territory of Delhi.

2. For quite sometime, there have been demands from the Associations of house owners as well as tenants for amendment of Delhi Rent Control Act, 1958. The Committee on Petitions of Rajya Sabha, The Economic Administration Reforms Commission, Secretaries Committee and National Commission on Urbanisation have also recommended amendment of certain provisions of the Act. Considering these demands /recommendations as also the fact that with the passage of time, the circumstances have also changed, necessitating a fresh look at the tenant-landlord

relationship, the amendment of Delhi Rent Control Act, 1958 has been proposed with the following objects:

(a) To rationalise the present rent control law by bringing about a balance between the interests of landlords and tenants.

(b) To give a boost to house building activity and maintain the existing housing stock in a reasonable state of repairs.

(c) To reduce litigation between landlords and tenants and to ensure expeditious disposal of disputes between them.

3. The Bill seeks to achieve the above objects.”

(Emphasis supplied)

32. The court further examined the objective of the amending act as set out above as follows-

“27. The objects of the Amending Act are quite different from the objects of the parent Act. One of the objects of Amending Act was to rationalise the Rent Control Law by bringing about a balance between the interest of landlords and tenants. The object was not merely to protect the weaker section of the community. In fact, the representations made by the landlords' association and the reports of various Committees indicated, the laws were being very often abused by the rich tenants against poor or middle class landlords. The Rent Act had brought to a halt house-building activity for letting out. Many people with accommodation to spare did not let out such accommodation for the fear of losing the accommodation altogether. As a result of all these, there was acute shortage of accommodation which caused hardship to the rich and the poor alike. In the light of this experience, the Amending Act of 1988 was passed.

28. In order to strike a balance between the interests of the landlords and also the tenants and for giving a boost to house

building activity, the Legislature in its wisdom has decided to restrict the protection of the Rent Act only to those premises for which rent is payable upto the sum of Rs. 3,500/- per month and has decided not to extend this statutory protection to the premises constructed on or after the date of coming into operation of the Amending Act for a period of ten years. This is a matter of legislative policy. The Legislature could have repealed the Rent Act altogether. It can also repeal it step by step. It has decided to confine the statutory protection to the existing tenancies whose monthly rent did not exceed Rs. 3,500/-.” (emphasis supplied)

33. The Court upheld the vires of Section 3(c) of the Act on the ground that the Legislature in its wisdom had decided to curtail the protection of the Act only to those premises, the rent payable in respect whereof is upto Rs.3,500/- per month. The court also observed that “*the various objects, as set out earlier in the judgment, include bringing about a balance between the interest of landlords and tenants and also giving a boost to house building activity. For this purpose, not only clause (c), but clause (d) also has been inserted in Section 3. Premises construed on or after coming into operation of the Delhi Rent Control (Amendment) Act, 1988 will be out of the purview of the Act for a period of ten years. The existing premises, residential or otherwise, whose monthly rent exceeded Rs. 3,500/- will also be out of the ambit of the Act.*” (emphasis supplied)

34. A perusal of the aforesaid discussion demonstrates that the objective of the amendment was to harmonise and balance the interest of landlords and tenants. Therefore, the said clause (c) was not enacted for the benefit of a particular class, i.e. the landlords or the tenants alone, but reflected the public policy – seeking to balance the rights of both landlords and tenants,

and to prevent the abuse of the law by rich tenants against poor or middle class landlords.

35. The suit property undoubtedly is fetching rent in excess of Rs.3,500/- per month. It is the defendant no.2 – the sub tenant, who is in actual physical possession of the suit property. The decision of the Division Bench in *P.S. Jain* (supra), therefore, squarely applies to the facts of the present case. It is, therefore, clear that the Act does not apply to the suit property by virtue of section 3(c) of the Act. However, what needs examination is whether, in view of the decisions relied upon by Mr. Batra in *Mohar Singh* (supra) and *Lachoo Mal* (supra), and in view of clause 4 of Exh PW 1/4, it could be said that the parties by agreement: (i) could have still made the provisions of the Act applicable in respect of the suit property, and (ii) whether they, in fact, have contracted to make the provision of the Act applicable in respect of the suit property vis-a-vis the tenancy of defendant no.1 and, if so, on what conditions. I examine point (ii) aforesaid first.

36. The submission of Mr. Batra – that the parties had agreed that the plaintiffs - as landlords, shall not enforce their rights as landlords qua the suit property, and that the suit property shall continue to be governed by the Act, on the basis of his reading of clause 4 of Exh PW 1/4 has no merit. Exh PW 1/4 has to be read as a whole, and clause 4 thereof cannot be read in isolation. Clause 4 of Exh PW 1/4, no doubt, states that Spraylac will be a statutory tenant during the period of the agreement and the owners i.e. the plaintiffs shall not seek eviction of Spraylac. However, this clause has to be read in conjunction with clause 10 of Exh PW 1/4, which reads –

“10. Any breach by Spraylac of their obligation under this agreement shall result in the owners having the right to terminate the agreements arrived at between the Spraylac and the sub tenant and Spraylac shall also cease to be the tenant of the premises in question”. (emphasis supplied)

37. Therefore, in any event, the waiver of the rights of the plaintiffs to seek eviction of defendant No.1 by resort to the TPA, is subject to the right of the landlords i.e. the plaintiffs to terminate – not only the agreements between Spraylac and the sub tenant, but also to cease the tenancy of the defendant Spraylac. The intention of the parties, therefore, was not to provide complete and absolute protection and preservation of the rights of defendant no.1 as a statutory/protected tenant. Even on a plain reading of the terms of the lease Exh PW 1/4 it is clear that the said protection was conditional. The fact that the parties agreed in clause 10 – that upon breach by Spraylac of its obligations under the agreement, it shall entitle the owners to terminate the agreements arrived at between Spraylac and sub tenant, and to also cease the tenancy of Spraylac, shows that the intention of the parties was not to continue the blanket protection available to defendant no.1 as a statutory tenant under the Act on the premise that the rent was only Rs.130/- per month. Even if one were to proceed on the assumption that the plaintiffs/landlords could have waived their rights to sue for eviction by resort to the TPA, and had so waived their rights by virtue of clause 4 of Exhibit PW-1/4, it is clear that the said waiver was conditional, and not absolute. Had it been the intention of the parties to unconditionally and absolutely protect the tenancy of defendant no.1 under the Act – despite the sub letting being on a much higher rate of rent than Rs.3,500/- per month, the plaintiffs/owners would not have been vested with the right to cease the

tenancy of defendant no.1. Instead, the parties would have then provided that the rights of the parties would be governed by the provisions of the Act alone, and that the plaintiffs may avail of their remedies under the Act.

38. In *Lachoo Mal* (supra), the Supreme Court held that the parties could enter into a contract-if it was not prohibited by a statute, such that the landlord could waive or give up the statutory right or advantage made solely for his benefit or protection. However, such a waiver or dispensation of the personal advantage and protection could not be made if it was opposed to any right or public policy. The public policy emerging from section 3(c) of the Act is the balancing of the interests of the landlord and the tenants. Prior to the amendment of the Act in 1988, the balance was tilted in favour of the tenants. As a matter of public policy, the legislature restored the said balance by, inter alia, inserting section 3(c) of the Act and taking premises whose monthly rent exceeded Rs.3,500/- out of the purview and protection of the Act. Another aspect of public policy enacted by the Amendment Act of 1988 was to check the abuse of the law by the rich tenant against a poor or middle class landlord. The fact that the defendant Spraylac had agreed to keep two-thirds of the rent realized from the sub tenant, while remitting one-third of such rent to the landlords, itself demonstrates that it is a case of exploitation of his dominant position by the tenant/defendant no.1 over the landlords/plaintiffs. Such an agreement is akin to agreements prohibited by Section 5 of the Act which not only prohibits the landlord from charging premium or *pugree*, but also prohibits the tenant from claiming or receiving any payment in consideration of the relinquishment, transfer, assignment of

his tenancy of the tenanted premises. For the sake of convenience, Section 5 of the Act is reproduced hereunder:

“Unlawful charges not to be claimed or received

5. (1) Subject to the provisions of this Act, no person shall claim or receive any rent in excess of the standard rent, notwithstanding any agreement to the contrary.

(2) No person shall, in consideration of the grant, renewal or continuance of a tenancy or sub-tenancy of any premises,

(a) claim or receive the payment of any sum as premium or puggree or claim or receive any consideration whatsoever, in cash or in kind, in addition to the rent: or

(b) except with the previous permission of the Controller, claim or receive the payment of any sum exceeding one month's rent of such premises as rent in advance.

(3) It shall not be lawful for the tenant or any other person acting or purporting to act on behalf of the tenant or a sub-tenant to claim or receive any payment in consideration of the relinquishment, transfer or assignment of his tenancy or sub-tenancy, as the case may be, of any premises.

(4) Nothing in this section shall apply-

(a) to any payment made in pursuance of an agreement entered into before the 1st day of January, 1939: or

(b) to any payment made under an agreement by any person to a landlord for the purpose of financing the construction of the whole or part of any premises on the land belonging to, or taken on lease by, the landlord, if one of the conditions of the agreement is that the landlord is to let to that person the whole or part of the premises when completed for the use of that person or any member of his family:

Provided that such payment does not exceed the amount of agreed rent for a period of five years of the whole or part of the premises to be let to such person.

Explanation.-For the purposes of clause (h) of this sub-section, a –member of the family" of a person means, in the case of an undivided Hindu family, any member of the family of that person and in the case of any other family, the husband, wife, son, daughter, father, mother, brother, sister or any other relative dependent on that person.” (emphasis supplied)

39. In fact in ***Lachoo Mal*** (supra) itself, the Court observed that a party can waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. The public policy contained in Section 5 of the Act could not have been breached by agreement of parties. To permit the same, would tilt the balance unduly in favour of the tenants, who would be able to exploit the protection afforded by the Act by entering into such like arrangements. In ***D.C. Bhatia*** (supra), the Court took note of the various representations received by the Government about the hardship and injustice caused by the provisions of the prevailing Act. The Court observed that the Economic Administration Reforms Commission set up by the Government to look into the aforesaid aspect, pointed out that freezing of rentals at old historic levels, the excessive protection of tenancy rights and the extreme difficulty of recovering possession of the accommodation even for the owner's own use had, amongst other issues, encouraged various malpractices and abuses such as on-money (pugree), partial receipts for rent, capital consideration (in black money) for tenancy transfers, etc. It is such like abuse of position by a tenant that led the Legislature in its wisdom to amend the Act in 1988 as

observed by the Court in *D.C. Bhatia* (supra). The amended section 3(c) of the Act cannot be considered as merely an exemption in favour of the landlord and as a mere conferment of a benefit on the landlord, which they could waive. The Act ceases to apply to premises whose monthly rent exceeds Rupees three thousand five hundred.

40. There is yet another aspect that needs consideration. The purport of the leases Exh PW 1/3 and 1/4 is that by agreement of parties, the Act is sought to be made applicable, by continuing the protection afforded by the Act to defendant no.1, even though on its own terms (under section 3(c)), the Act cease to apply to the suit property in respect of the tenancy in question, since the monthly rent of the suit property exceeded Rs.3500/- per month upon creation of the sub tenancy in favour of defendant no.2. The parties could not have contracted into the Act, when the Act itself says that it does not apply to premises whose monthly rent exceeds Rs.3,500/-. It is like saying that a marriage between two individuals – one or both of whom are not Hindus, or one or both of whom are Muslim, Christian, Parsi or Jew, is agreed by the parties to be governed by the Hindu Marriage Act. By contract, the parties cannot agree that a particular legislative enactment would become applicable to them, when that enactment itself stipulates that the same would not apply to persons, or objects, or things who do not meet the requisite qualifications.

41. In *Mohar Singh* (supra), the Division Bench while dealing with the issue whether subletting was opposed to public policy, observed that the Act does not forbid subletting but imposes a rider that prior permission of a landlord is necessary to sub let a premises under Section 14(1)(b). It was

observed that sub letting is not opposed to public policy and in the event that the provisions of Section 14(1)(b) are contravened, the landlord may file eviction proceedings against a tenant. Furthermore, Section 48 (2) of the Act renders a tenant sub-letting premises in contravention of Section 14(1)(b) punishable with fine which may extend to Rs. 1000. The Court observed that the prohibition on subletting did not emanate in law but from the refusal of the landlord which is a private right. It is in this context that the Court relied upon *Lachoo Mal* (supra) observing that the protection given to tenants under the Act could not be waived as tenants were the weaker section of society whereas the protection given to landlords was not based on public policy and could be waived. The present case is not concerned with whether there is an underlying aspect of public policy in the provisions of subletting. In the present case we are concerned with: what is the intent of the legislature behind enacting Section 3(c) of the Act. As already discussed aforesaid and as laid down in *D.C. Bhatia* (supra), clause (c) of Section 3 was not enacted for the benefit of a particular class, i.e. the landlords or the tenants alone, but reflected public policy. The decision in *Mohar Singh* (supra) therefore has no application to the facts of the present case.

42. Accordingly, issue no.(viii) is decided in favour of the plaintiffs and against the defendants. The present suit is maintainable and is not barred under the provisions of the Act. The tenancy of defendant no.1 is not protected under the Act, and would be governed by the Transfer of Property Act.

43. I now proceed to consider issue nos.(iii) and (iv), which pertain to the discharge of its liability by defendant no.1 to pay property tax to the extent of 66.70% in respect of the suit property.

44. Learned counsel for the plaintiff submits that clause 8 of the lease Exh PW 1/4 puts the liability for payment of property/house tax to the extent of 66.70% on defendant no.1, whereas the owners i.e. the plaintiffs were liable to pay the same to the extent of 33.30%. Clause 8 of the Exh PW 1/4 reads as follows:

“8. The liability to pay property/house tax shall be shared in the ratio of 2:1, that is, SPRAYLAC shall pay 66.7% and the OWNERS 33.3%. SPRAYLAC shall forward a cheque drawn in favour of the New Delhi Municipal Committee or any other authority that may be then authorised to collect the property tax to the owners within the time allowed for payment of the said tax, as per bills raised by the NDMC in favour of the OWNERS.”

45. The submission of learned counsel for the plaintiff is that for the period 01.06.1996 to 01.04.2009, defendant no.1 did not pay any property/house tax in terms of the aforesaid lease agreement. He submits that the plaintiffs issued a legal notice Exh PW 1/43 dated 18.11.2008 (wrongly typed as 2007) to the defendants counsel. Along with this notice, the plaintiffs sent a detailed revised calculation chart showing the property tax dues for the period 01.06.1996 to 31.03.2009, which came to Rs.35,58,605/-. The plaintiff claimed that the liability of defendant no.1 was already overdue. The plaintiff required the defendant no.1 to positively pay the said amount on or before 28.11.2008, else the same would be treated as a

default on the part of defendant no.1, and consequences of the same shall follow.

46. The defendant vide their communication dated 24.12.2008 (Exh PW 1/49) enclosed two pay orders for Rs.4,40,000/- and Rs.8,60,726/- i.e. Rs.13,00,726/- favouring Secretary, NDMC and claimed that the said payment fully settles the defendants share of property tax upto the year 2008-09 i.e. for the period 01.04.2001 to 31.03.2008. Defendant no.1 also claimed that the balance 50% i.e. Rs.8,60,726/- will be payable in the financial year 2009-10. Vide Exh PW 1/51 dated 07.01.2009, defendant no.1 sent fresh pay orders for the aforesaid amounts, as the earlier sent pay orders were not received by the plaintiffs.

47. Counsel for the plaintiff relies on Exh PW 1/52, the legal notice sent on 26.03.2009 to defendant no.1 and its partners, wherein the plaintiff again detailed the breaches of the terms of the lease deed Exh PW 1/4, inter alia, on account of:

- i) Non payment of property tax arrears for the period of 1996 to 31.03.2001 amounting to Rs.9,96,375/- (Rupees Nine Lacs Ninety Six Thousand Three Hundred Seventy Five only)
- ii) Non payment of arrears of property tax from 2001 to 2009 out of which only Rs.13,00,726/- (Rupees Thirteen Lacs Seven Hundred Twenty Six only) is paid and the remaining Rs.12,61,504/- (Rupees Twelve Lacs Sixty One Thousand Five Hundred and Four only) of arrears of property tax are still unpaid.

48. Counsel for the plaintiff submits that the defendant no.1 sent a reply to this legal notice vide Exh PW 1/108 dated 22.04.2009. The defendant no.1 did not deny its liability to pay the outstanding amounts as aforesaid and merely stated that:

“6. It is further submitted that as per the understanding arrived at between my clients and yours client, my clients were required to pay the balance amount by April, 2009 and my clients are ready and willing to pay the arrears of tax liability on or before 30th April, 2009. It is further submitted that my clients issued two pay orders for Rs.4,40,000/- and Rs.8,60,726/- respectively for the abovesaid purpose”.

49. Vide Exh PW 1/109 dated 01.05.2009, the defendant forwarded the NDMC property tax receipt no.22041 dated 28.04.2009 for Rs.8,60,726/- (Exh PW 1/113). Defendant no.1 claimed that with this payment of dues of property tax for the suit property, their account had been cleared upto the year ending 31.03.2009, and that the property tax dues for the current year ending 31.03.2010 will be paid in due course. On the aforesaid basis, the plaintiff claims that large amounts of property tax dues have not been paid by defendant no.1 in terms of clause 8 of Exh PW 1/4.

50. On the other hand, learned senior counsel for defendant no.1 has relied upon the cross examination of PW-1, to submit that in his cross examination conducted on 13.08.2010 and thereafter, the said witness has admitted that defendant no.1 has paid its entire share of property tax dues and nothing was outstanding in this regard. In his cross examination PW-1 admits that *“It is correct that NDMC has not assessed the rateable value of the suit property for the period 1996 to March 2001”*. He further states that

“After 1996, we received the property tax bill of the suit property for the first time in September or October 2008.” Mr. Batra submits that since the rateable value itself has not been assessed for the said period, there was no question of any demand being raised, or there being any outstanding towards property tax payable to the NDMC by defendant No.1.

51. PW-1 further admits that there is no separate assessment order for assessment of rateable value with respect to the suit property for the period 1996 till the date of his deposition, i.e. 13.08.2010. He further admits that *“It is correct that the assessment order passed by NDMC on 04.09.2008 for assessment of rateable value has been comprehensively passed for the following properties: M-42; M-43; M-91 and M-132, Connaught Place, New Delhi”*. He further admits that *“It is correct that we have challenged this order in the competent courts in Patiala House. It is correct that the R.V assessed by the NDMC with regard to the suit property is in dispute. To the best of my knowledge, we i.e. myself and plaintiff no.2 have not informed defendant no.1 or defendant no.2 with regard to the challenge made by us to the assessment order dated 04.09.2008 passed by the NDMC”*.

52. In his cross examination conducted on 17.08.2010, PW-1 admits that the Exhibit PW 1/11 containing “Proportionate property tax liability” for the period 01.06.1996 to 31.03.2009 has been done by the plaintiff, and not by the NDMC. He volunteered to state that the calculation had been done by the plaintiff based on the assessment order dated 04.09.2008 (Exh PW 1/6) issued by the NDMC. He admits that the assessment order Exh PW 1/6 does not mention assessment of rateable value from 01.06.1996 to 31.03.2001.

He does not deny that NDMC has not raised any demand for the period 01.06.1996 to 31.03.2001, nor assessed the rateable value till date.

53. From the cross examination of PW-1, it becomes evident that the plaintiffs have also not paid any amount towards property tax dues for the period 01.06.1996 to 31.03.2001. In response to a question *“Is it correct that defendant no.1 has paid Rs.21,61,452/- being its share of the property tax for the period 01.04.2001 to 31.03.2009?”*, the answer given by PW-1 is *“It is roughly the correct figure, but I do not remember the exact amount”*.

54. On the basis of the aforesaid cross examination, the submission of Mr. Batra is that, admittedly, for the period 01.06.1996 to 31.03.2001, the rateable value has not been assessed by the NDMC till date. He submits that such assessment, in any case, would be barred by limitation. He submits that since no assessment of the rateable value took place for the said period, no demand was raised by the NDMC pertaining to the said period. Even the plaintiff has not paid any amount towards property tax for the said period. Had any demand been raised by the NDMC for the said period, the plaintiff would have paid its 1/3rd share. However, in this respect, PW-1 has avoided to give a clear answer to the pointed query raised by defendant no.1. He further submits that even though the plaintiffs have themselves challenged the assessment order dated 04.09.2008 (Exh PW 1/6), the plaintiffs did not inform defendant no.1 of the same, and defendant no.1 has already paid the entire amount due under the said assessment order for the period 01.04.2001 to 31.03.2009 amounting to Rs.21,61,452/-, which has been admitted by PW-1 to be the correct figure roughly. He submits that the present suit was

filed by the plaintiff in May 2009, when the property tax dues already stood paid upto 31.03.2009, and the next payment was due only in 2010.

55. From the evidence led by the plaintiff, it appears that though the plaintiff repeatedly called upon defendant no.1 to pay the arrears of property tax dues, and the plaintiff also gave its own calculation of the said property dues, there was no basis for the computation made by the plaintiff as communicated in Exh PW 1/43 dated 18.11.2008. As noticed above, the plaintiff claimed an amount of Rs.35,58,608/- towards outstanding property tax dues. This calculation is done by the plaintiff for the period 01.06.1996 onwards, even though the NDMC has not assessed the rateable value for the period 01.04.1996 to 31.03.2001. The defendants have been able to establish that they have paid the arrears of property tax as communicated by them vide Exhs PW 1/49, 1/51 and 1/109. The plaintiffs have failed to establish that the defendant No.1 was in breach of its obligation to pay 66.70% of the property tax in respect of the suit property. Therefore, issues nos.(iii) & (iv) are decided in favour of defendant no.1 and against the plaintiffs.

56. I now turn to consider issue no.(v) i.e. whether the plaintiff is entitled to interest free refundable security deposit received by defendant no.1 from defendant no.2 by way of mandatory injunction or otherwise. The issue, as framed, does not really arise for the reason that there is no dispute between the parties that the plaintiff was entitled to receive 1/3rd of the interest free refundable security deposit from defendant no.1 which was received by defendant no.1 from defendant no.2. While the plaintiffs claim breach of the terms of the lease Ex. PW-1/4 by defendant No.1, on account of the failure

of defendant No.1 to transfer the plaintiffs share of the interest free security deposit to the plaintiffs, when the rent was upwardly revised and the security deposit was also upwardly revised, the case of defendant no.1 is that the said interest free refundable security deposit was not transmitted to the plaintiff on account of the fact that the plaintiff refused to give “no objection” when demanded, and the plaintiff instructed the defendant no.1 to continue to retain the said interest free refundable security deposit.

57. What, therefore, needs consideration is whether defendant no.1 was justified in not making over the plaintiff share of the interest free refundable security deposit to the plaintiff and, if not, whether the said conduct of defendant no.1 constituted breach of the terms of the lease Exh PW-1/4 leading to forfeiture of the lease. It also needs examination whether the defendant has been able to establish its defence that the plaintiff was tendered the security deposit, but the plaintiff asked the defendant no.1 to retain the same. Clause 5 of Exh PW 1/4 , inter alia provides that:

“5. If any deposit, refundable or non refundable, advance rent or any other amount, one third of such amount shall also be paid to OWNERS by SPRAYLAC within seven days of receipt of this amount by SPRAYLAC from sub-tenants/licensee. It is clarified that in case of any refundable amount, the OWNERS shall simultaneously refund their share when SPRAYLAC refunds such amount to the sub-tenant/licensee”.

58. The aforesaid clause 5 of Exhibit PW-1/4 obligates the defendants Spraylac to transmit 1/3rd of the amount received from the sub tenant towards refundable deposit to the plaintiff.

59. The averments of the defendant Spraylac, found in paragraph 19 onwards in the written statement under the heading **“Factual Position”** are as under:

“19. That thereafter the answering defendants and the defendant no.2 again entered into a fresh license deed the same terms and conditions of the License Deed dated 24.09.1996 for a rent of Rs.1,30,000/- per month on 20.9.2005.

*20. That thereafter in the year 2008, the answering defendants approached the defendant no.2 for the enhancement of the rent and the defendant no.2 agreed to enhance the amount from Rs.1,30,000/- to Rs.2,50,000/- per month w.e.f. 01.04.2008, to the said effect, **the plaintiffs issued a letter dated 29.03.2008 whereby giving no objection to the answering defendants to amend the license deed dated 20.09.2005.***

21. That thereafter when the answering defendants approached the plaintiffs for getting the requisite no objection as a routine in 2005 and for handing over the 1/3rd share of the refundable security deposit given by the defendant no.2, the plaintiffs, for the reasons best known to the plaintiffs, refused to issue no objection letter in favour of the answering defendants and clearly stated that the refundable security meant to be given to the plaintiffs, may be kept with the answering defendants, as the plaintiffs showed their unwillingness to accept the said refundable security deposit.

22. That the answering defendants received a refundable security deposit from the defendant no.2 to the tune of Rs.6,50,000/- and the one third of the said amount of Rs.2,16,667/- which is still lying with the answering defendants and the answering defendants are ready and willing to hand over the said cheque subject to the plaintiffs giving no objection letter in favour of the answering defendants as were being given by the plaintiffs to the answering defendants in the routine manner. It is submitted that this Hon'ble Court

directed the plaintiffs to accept the refundable security and the answering defendants reserve their right to move an appropriate application before this Hon'ble Court and deposit the said amount before this Hon'ble Court.” (emphasis supplied)

60. The plaintiffs have dealt with the aforesaid averments of the defendant No.1 in their replication in reply to paragraph 16 by stating as follows:

“.... the answering defendant no.1 further failed to pay refundable security deposit of Rs.6,50,000/- received by them on 02.04.2008 in terms of clause no.5 of the agreement from defendant no.2. Defendant no.1 has unilaterally received the security deposit in terms of agreement dated 2nd April 2008 without sharing the said security deposit with the plaintiffs. This act of answering defendants, is the breach of covenant of the lease deed. The answering defendants should have taken “No Objection Certificate” before accepting security deposit amount. In any case, there is no legitimate basis for withholding of the said refundable security by the answering defendants as well as the outstanding dues of the property tax as mentioned above”.

61. PW-1 in his examination-in-chief states that defendant No.1 had failed to pay refundable security deposit to him, or to plaintiff No.2 in terms of clause 5 of the lease Exhibit PW-1/4 and in terms of the agreement dated 02.04.2008. He states that the said amount was paid by defendant No.1 after filing of the suit upon the directions of the Court contained in the order dated 06.01.2010. PW-1 claims that the said default is also made out against defendant No.1, in addition to, default in payment of property tax.

62. In his cross-examination on the aforesaid aspect, PW-1 states that *“I am not aware that on the enhancement to Rs.2,50,000/- by defendant No.2 w.e.f. April 2008, defendant No.2 had given a sum of Rs.6,50,000/- as enhanced security deposit to defendant No.1. It is incorrect that Mr. Rajiv Maira and Mr. Rahul Bhasin both partners of defendant No.1 offered to pay 1/3rd of the said enhanced security deposit to him in terms of the agreement at Embassy Restaurant”*.

63. The evidence led by the defendants' witness Sh. Rajiv Maira, DW-1, on this aspect on his examination-in-chief is as follows:

“21. That thereafter in the year 2008, the deponent approached the defendant no.2 for the enhancement of the rent and the defendant no.2 agreed to enhance the amount from Rs.1,30,000/- to Rs.2,50,000/- p.m. w.e.f. 01.04.2008, to the said effect, the plaintiffs issued a letter dated 29.03.2008 whereby giving no objection to the deponent to amend the license deed dated 20.09.2005. The letter dated 29.3.2008 is Exb. DW-1/5 issued by plaintiff no.1 and plaintiff no.2 duly signed on the place on G/F Exb. DW1/4”.

22. That thereafter when the deponent approached the plaintiffs for getting the requisite no objection as a routine in 2005 and for handing over the 1/3rd share of the refundable security deposit given by the defendant no.2, the plaintiffs, for the reasons best known to the plaintiffs, refused to issue no objection letter in favour of the deponent with malafide design and clearly stated that the refundable security meant to be given to the plaintiffs, may be kept with the deponent, as the plaintiffs showed their unwillingness to accept the said refundable security deposit. The letter dated 2008. Exb. DW1/6.

23. That the deponent received a refundable security deposit from the defendant no.2 to the tune of Rs.6,50,000/- and the one

third of the said amount of Rs.2,16,667/-. The deponent submits that plaintiff through his legal notice dated 26.3.2009 demand for refundable security deposits from the deponent and deponent duly replied vide letter dated 22.4.2009 Exb. PW1/108 and offer to pay the said amount subject to the plaintiff giving no objection letter in favour of the deponent. The deponent submits that the deponent filed I.A 12437/2009 under order 38 rule 10 allowed by this Hon'ble Court on 6.1.2010 and the deponent has paid the said refundable security alongwith the arrear of rent to the plaintiffs."

(emphasis supplied)

64. At this stage itself, I may observe that in the cross-examination of PW-1 Exhibit DW-1/5 had been put to the said witness and he had admitted his signatures at point 'F' and signatures of plaintiff No.2 at point 'G'. At that stage, the said document was marked 'D'. Exhibit DW-1/5 reads as follows:

"Dated 29.3.2008

TO WHOM IT MAY CONCERN

We have 'No Objection' to the Amendment to Deed of Licence Dt. 20th Day of Sept. 2005 whereby Licence Fee is being enhanced to Rs. 2,50,000/- per month with effect from 1st April, 2008 by Domino's Pizza India Ltd. Subject to further enhancement as agreed.

This is however agreed that there would be no change of structure, addition, alteration etc. compliance of L & DO, NDMC Guidelines/byelaws of Public Authorities etc to be assured to.

Yours sincerely,

Sd/-

(Shashi Ranjan Gupta) (Sunil Kumar Gupta)
S/o Late Sh. Sohan Lal Gupta S/o Late Sh. Kishore Lal Gupta”

65. On this aspect, in his cross-examination DW-1 states as follows:

“As regard security deposit is concerned, defendant no.2 paid the security deposit in 1996 thereafter the same is increased in 2008 only. It is correct that the security deposit received by us was shared between us and the plaintiff in the ratio of two third and one third respectively as per the lease deed exhibit P1. It is wrong to suggest that we did not pay the share of the plaintiff of the enhanced security received by us from defendant no.2. Vol. We offered to pay one third of the enhanced security received from defendant no.2 to the plaintiffs but the plaintiffs refused to accept the same. We submitted a letter to the plaintiffs alongwith the offer of the payment of their share of the enhanced security deposit, however the plaintiff refuse to accept the amount or sign the letter in token of their acceptance. I did not tender the said enhanced security amount by way of a cheque or bank draft. Vol. as they were unwilling to give NOC to defendant no.1 on the same lines as they were given in 1996. I do not remember when did I pay the said amount of enhanced security deposit to the plaintiffs. Vol. I paid the amount in court.”

(emphasis supplied)

66. The plaintiffs in their legal notice dated 26.03.2009 Exhibit PW-1/52 set out in paragraph 7 the details of the breaches of the lease dated PW-1/4 attributed to the defendant No.1. The third breach attributed to defendant No.1 reads as follows:

“(iii) In terms of clause No.5, you have failed to pay refundable security deposit of our clients in terms of Agreement dated 02.04.2008.”

67. In paragraph 10 of this legal notice Exhibit PW-1/52, the plaintiff called upon defendant No.1 to deposit the refundable security deposit of Rs.11,38,000/- with the plaintiffs. In paragraph 16 of this notice, the plaintiffs determined the lease of defendant No.1 by stating as follows:

“16. In the backdrop of the prevailing facts and circumstances, you are hereby notified by way of the present notice that your rights stood determined under the lease deed dated 20.09.2005 and you do not have any right, interest left in the demised premises i.e. No.M-42, Connaught Place, New Delhi comprises of approx. area of 1000 sq. feet on the ground floor and a portion of Mezzanine together with unrestricted use of Mezzanine and joint toilets and back door entrance.”

68. This notice was responded to by the defendant No.1 on 22.04.2009 vide Exhibit PW-1/108. In paragraphs 23 to 25, the defendant No.1 stated as follows:

“23. That thereafter in the year 2008, my clients approached M/s Dominos for the enhancement of the rent and M/s Dominos agreed to enhance the amount from Rs.1,30,000/- to Rs.2,50,000/- per month w.e.f. 01.04.2008, to the said effect, your clients issued a letter dated 29.03.2008 whereby giving no objection to my clients to amend the license deed dated 20.09.2005.

24. That thereafter when my clients approached your clients for getting the requisite no objection as a routine and further for handing over the balance amount of refundable security deposit given by M/s Dominos, your clients, for the reasons best known to your clients, refused to issue no objection letter in favour of my clients and clearly stated that the refundable security meant to be given to your clients, may be kept with my clients, as your clients showed its unwillingness to accept the said refundable security deposit.

25. *That my clients received a refundable security deposit from M/s Dominos to the tune of Rs.6,50,000/- and the one third of the said amount of Rs.2,16,667/- which is still lying with my clients and my client is ready and willing to handover the said cheque subject to your client giving no objection letter in favour of my clients as were being given by your clients to my clients in the routine manner.”*

69. It was again stated in paragraph 7(iii) of this reply as follows:

“As regards reply to the present sub para, it is submitted that when my clients approached your clients for getting the requisite no objection as a routine and further for handing over the balance amount of refundable security deposit of Rs.2,16,667/- out of Rs.6,50,000/- given by M/s Dominos, your clients, for the reasons best known to your clients, refused to issue no objection letter in favour of my clients and clearly stated that the refundable security meant to be given to your clients, may be kept with my clients, as your clients showed its unwillingness to accept the said refundable security deposit. My clients through the present notice, call upon you to inform the date, time and venue, when and where your clients are interested in taking the abovesaid refundable security deposit of Rs.2,16,667/- and thereby handing over the no objection letter to my clients.”

70. From the above pleadings, testimonies and evidence brought on record, it emerges that the rent payable by the sub tenant defendant No.2 was revised several times. It was revised from Rs.1,30,000/- to Rs.2,50,000/- per month w.e.f. 01.04.2008. Before its aforesaid revision, the plaintiffs issued a no objection to the amendment of the deed of license dated 20.09.2005 for enhancement of the license fee to Rs.2,50,000/- w.e.f. 01.04.2008 by defendant No.2 vide Exhibit DW-1/5 on 29.03.2008. Admittedly, the enhanced refundable security deposit on account of upward

revision of rent from Rs.1,30,000/- per month to Rs.2,50,000/- per month was received by defendant No.1 to the tune of Rs.6,50,000/- from defendant No.2. There is also no dispute that the plaintiff was entitled to 1/3rd of the said amount, i.e. Rs.2,16,667/-.

71. It is also not in dispute that the plaintiffs, as a matter of fact, were not paid the said amount of Rs.2,16,667/-. It is also not in dispute that the plaintiffs complained about the non-payment of their share of the enhanced security deposit, and that claimed the same constitutes a breach of the lease Exhibit PW-1/4 while issuing the legal notice Exhibit PW-1/52. The defence of the defendant No.1, as found in its reply to the legal notice vide Exhibit PW-1/108 dated 22.04.2009; in its written statement and; in the evidence of DW-1 is, firstly, that the plaintiff refused to issue a no objection letter in favour of defendant No.1 and, secondly, that the plaintiffs stated that the refundable security amount to be given to the plaintiffs, may be kept by defendant No.1 as the plaintiffs showed their unwillingness to accept the said refundable security deposit.

72. These defences of the defendant No.1 are not only false and frivolous on the face of it, but defendant No.1 has completely failed to establish the same. Firstly, there was no justification for defendant No.1 to insist on the plaintiffs issuing no further “no objection” to the enhancement of the rent from Rs.1,30,000/- to Rs.2,50,000/- per month by the sub tenant defendant No.2. The plaintiffs had already given their no objection vide Exhibit DW-1/5. It is not that such a ‘no objection’ is required in any prescribed statutory format which the plaintiffs refused to execute, thereby giving

justification to defendant No.1 to withhold the plaintiffs share to the refundable security deposit of Rs.2,16,667/-.

73. Even otherwise, the plea that the plaintiffs refused to execute a so-called “no objection” appears to be a figment of the defendants imagination and an excuse concocted by defendant No.1 to cover up its lapse in transmitting the plaintiffs share of refundable security deposit, and its continued refusal to do so. Had there been any truth in the pleas set up by defendant No.1, as aforesaid, defendant No.1 would have recorded the same in some communication contemporaneously sent to the plaintiffs. The dealing between the parties, right from 1996 onwards, shows that the same was strictly formal and, invariably, was always reduced to writing. The defendant No.1 being a tenant, evidently, was seeking to defend its valuable rights in a prime commercial property. It was for this reason that the parties, at every stage, recorded their transactions in writing so as not to provide any opportunity to the plaintiffs to catch the defendant on the wrong foot. However, the defendant Spraylac did not issue any such communication. The defendant Spraylac only responded to the plaintiffs notice Exh. PW1/52 dated 26.03.2009 vide reply dated 22.04.2009 Exh. PW1/108, wherein it communicated its stand for the first time i.e. after nearly a year of the enhanced refundable security deposit being collected from defendant no.2.

74. The plea of defendant No.1 that the plaintiffs verbally refused to issue the no objection to defendant No.1, or that the plaintiffs asked defendant No.1 to retain the plaintiffs share of the refundable security deposit can simply not be accepted. The plaintiffs witness has categorically denied having been tendered the plaintiffs’ share of the refundable security deposit

during the course of his cross-examination. The defendants witness has not been able to make good its defence that the plaintiffs share of the refundable security deposit was ever tendered to them to the plaintiff.

75. The conduct of defendant No.1 is also not consistent with its projected readiness and willingness to part with the plaintiffs' share of the refundable security deposit. Firstly, defendant no.1 did not choose to send the plaintiffs share of the refundable security deposit through recorded delivery. Secondly, even when the plaintiff issued the legal notice Exh. PW-1/52 dated 26.03.2009, the defendant merely sent a reply dated 22.04.2009 vide Exh. PW-1/108, and did not tender the amount of Rs.2,16,667/- to the plaintiffs even at that stage. The defendant no.1 filed a caveat in this court. When the suit came up before the court on 27.05.2009, the defendant no.1, even at that stage, did not tender the refundable security deposit share of the plaintiff to the plaintiff. The matter was adjourned thereafter from time to time. It was only in the third week of September 2009, that the defendant no.1 moved I.A. No.12437/2009 before this court to seek leave to deposit the amount of Rs.2,16,667/- being the 1/3rd share of the plaintiffs interest free refundable security.

76. From the above discussion, it emerges that:

- i) The plaintiff had already given its 'no objection' to the enhancement of the rent from Rs.1,30,000/- to Rs.2,50,000/- per month by the sub tenant-defendant no.2 with effect from 01.04.2008 vide Exh. DW-1/5 dated 29.03.2008;

- ii) There was no other or further 'no objection' that the plaintiff was obliged to give as demanded by defendant no.1;
- iii) There was no justification for defendant no.1 not to transmit, or to deny the amount of Rs.2,16,667/- as the plaintiffs share of the interest free refundable security deposit to the plaintiffs, and to withhold the same on the ground that the plaintiff had not given or had refused to give the 'no objection';
- iv) There is no material evidence brought on record by the defendant no.1 to establish that the plaintiff was tendered the refundable security deposit of Rs.2,16,667/- and that the plaintiff ever refused to accept the same, much less to show that the plaintiff asked defendant no.1 to continue to retain the plaintiffs share of the refundable security deposit;
- v) The defendant no.1, even post the issuance of the legal notice Exh. PW-1/52 dated 26.03.2009, specifically detailing that the non-payment of the interest free refundable security deposit in terms of clause 5 of Exh. PW-1/4 is a material breach of the lease Exh. PW-1/4, did not tender the same to the plaintiffs. Defendant no.1 continued to hold the plaintiffs share of the interest free refundable security deposit till well after the filing of the present suit, and only in September 2009 moved an application before this court being I.A. No.12437/2009 to seek leave to deposit the same in this court.

The aforesaid shows that the defendant no.1 did not intend to part with the plaintiffs share of the interest free refundable deposit and probably, on legal advice, as an afterthought, sought to make the deposit of the said amount in this court by moving I.A. No.12437/2009.

77. The obligation of defendant no.1 to share the interest free refundable security deposit to the plaintiff is contained in clause 5 of Exh. PW-1/4. This obligation, as aforesaid, is not in dispute. The amount of Rs.2,16,667/- was a substantial amount considering that it was to remain with the plaintiffs as an interest free security deposit. When viewed in the context of the so-called rent of the suit property of Rs.159.46 per month - claimed to be the rent by defendant no.1, the said amount assumes great significance. Even the interest earned on the said amount (if it were to be placed in a fixed deposit in a nationalized bank) would translate to many times over the said so called monthly rent. The breach of clause 5 of the lease Exh. PW-1/4 cannot even be termed as accidental or unintentional. It is a conscious and deliberate breach of clause 5 of Exh. PW-1/4 by defendant no.1. Defendant no.1 did not even seek to remedy the said breach upon being put to notice vide Exh. PW-1/52 and, instead, defendant no.1 compounded the breach of clause 5 of Exh. PW-1/4 by again insisting – though unjustifiably, on the issuance of a ‘no objection’ by the plaintiff and by requiring the plaintiffs to state as to when, where and at what time the amount would be accepted by the plaintiffs, subject to their executing a ‘no objection’ vide their legal reply Exh. PW-1/108. If the defendant no.1 intended to part with the said amount, it could have sent the payment alongwith its reply Exh. PW1/108.

78. Consequently, issue no.(v) is decided in favour of the plaintiff, and it is held that defendant no.1 breached the lease Exh. PW-1/4 by failing to transmit the plaintiffs 1/3rd share of the enhanced security deposit i.e. Rs.2,16,667/- to the plaintiffs despite notice. The lease of defendant no.1, consequently, stands duly terminated by the issuance of Exh. PW-1/52 which, admittedly, has been received by defendant no.1, who has already sent a reply thereto.

79. The lease Exh. PW-1/4 does not stipulate any particular manner of its termination. The notice Exh. PW-1/52 issued by the plaintiffs has, therefore, taken effect and the lease of defendant no.1 stands duly terminated upon expiry of fifteen days of the service of the notice Exh. PW-1/52. The acknowledgment due cards received back upon service of the notice Exh. PW-1/52 have been proved on record as Exh. PW-1/94 to 1/107, which shows the receipt of notice Exh. PW-1/52 by defendant no.1 by several partners of defendant no.1 on 09.04.2009. Therefore, in any event, the lease stood terminated on the expiry of the tenancy month of April 2009.

80. In the light of the aforesaid findings, I proceed to consider issue nos.(i), (ii) & (vi). The consequence of the legal and valid termination of lease of defendant no.1 would be that the plaintiff is entitled to a declaration that defendant no.1 has surrendered the lease in respect of the suit property and is liable to be ejected from the suit property. The plaintiff is entitled to recover possession from the defendants in respect of the suit property. Since the lease of defendant no.1 stands duly terminated, the claim of the plaintiff for Rs.2.50 lacs per month from 01.05.2009 onwards is also justified, since that was the amount being paid by defendant no.2 as rent for the suit

property. The plaintiff is, therefore, held entitled to recover from defendant no.1 the use and occupation charges @ Rs.2.50 lacs per month from 01.05.2009 onwards. Since defendant no.2 has made payment of the said amounts, the right of the plaintiff to recover the said amount enures only against defendant no.1. From the amount of Rs.2.50 lacs per month, deductions would, obviously, have to be made on account of the amounts received as the 1/3rd share of the plaintiffs, or which may have been deposited by defendant no.1. Defendant no.1 would also be entitled to adjust the amount of property tax paid in respect of the suit property for the period 01.05.2009 onwards. The defendant no.2 shall henceforth make payment of use and occupation charges of Rs.2.50 lacs directly to the plaintiff and upon doing so, the liability of defendant no.2 shall stand discharged for the period for which such payment is made, subject, of course, to any further agreements that may be entered into between plaintiff and defendant no.2 directly. The plaintiff is also entitled to recover the entire interest free refundable security deposit held by defendant no.1. Issue nos. (i), (ii) and (vi) are decided accordingly.

81. I now proceed to consider issue no.(vii) i.e. with regard to the plaintiffs claim for interest @ 18% p.a. on the use and occupation charges of Rs.2.50 lacs per month realized by defendant no.1 with effect from 01.05.2009. As I have already noticed herein above, the defendant no.1 is entitled to adjustment of the amounts paid/deposited towards the plaintiffs 1/3rd share. Defendant no.1 is also entitled to adjust the amount of property tax paid by it to the extent of 2/3rd of the total property tax liability for the period 01.05.2009 onwards. The transaction between the parties being a

commercial transaction, the plaintiffs are entitled to claim interest, particularly when the said claim for interest was raised by the plaintiff in Exh PW1/52 in para 17. Accordingly, the plaintiff is held entitled to receive interest on the outstanding amounts as aforesaid from defendant no.1 @ 12% p.a. The said interest is awarded from the date of filing of the present suit till realization, on the increasing outstanding balance.

82. The suit is decreed accordingly. The plaintiffs shall be entitled to costs quantified at Rs.25,000/-. Costs be paid within four weeks.

(VIPIN SANGHI)
JUDGE

DECEMBER 17, 2013