

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

+ **RSA No.147/2013**

% **12th February, 2014**

M/S. JIWAN INDUSTRIES (P) LTD. Appellant
Through: Mr. Naresh Thanai, Advocate.

VERSUS

SMT. KAMLESH RANI BUDHIRAJA Respondent
Through: Mr. Vinay Kumar Garg, Advocate

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This regular second appeal is filed by the plaintiff/landlord against the impugned judgment of the first Appellate Court dated 13.5.2013. The first Appellate Court by the impugned judgment allowed the appeal of the defendant/respondent and set aside the judgment dated 30.11.2012 of the trial court by which the trial court had decreed the suit for possession and recovery of damages filed by the appellant/plaintiff against the respondent/defendant.

2. The facts as pleaded by the appellant/plaintiff in the plaint were that vide a rent deed, Ex. PW 1/3, the suit property comprising of open land measuring 341 sq. yards forming part of 69, Najafgarh Road, New Delhi-110015 was let out to the respondent/defendant. The lease was created for a period of two years commencing from 1.6.1980 i.e ending on 31.5.1982. The premises were outside the Delhi Rent Control Act, 1958 inasmuch as what was let out was the land and not a built up premises. The tenancy was a monthly tenancy which was terminated by the notice dated 10.9.1997, and since the respondent/defendant failed to comply with the same by vacating the suit property the subject suit for possession and mesne profit was filed.

3. The respondent/defendant contended that what was let out was not land but a covered area/structure and, therefore, the suit premises fell within the protection of the Delhi Rent Control Act, 1958.

4. The relevant issues framed in this regard by the trial court were issue nos. 1 and 4 which read as under :

“1. Whether the plaintiff is entitled for the decree of possession of the suit property, as claimed? OPP

4. Whether suit of the plaintiff is barred by Section 50 of DRC ACT? OPD”

5. These issues were decided in favour of the appellant/plaintiff and it was held that what was let out was only land and not a constructed premises, and therefore, the respondent/defendant did not have protection of the Delhi Rent Control Act. Both the parties relied on their respective copies of the rent note. In the rent note filed by the appellant/plaintiff, Ex. PW-1/3, the expression “covered” was cut out whereas in the rent note filed by the respondent/defendant as Ex. PW-1/D1 the expression “covered” was not struck off. Trial court has firstly relied upon the rent receipts which referred to the tenanted area as land/open space to hold that premises which were let out were not constructed premises. The counterfoils of the rent receipts in this regard are Ex. PW-1/5 to PW-1/22. Secondly, the trial court has relied upon the documents Ex. PW-2/3 to Ex. PW-2/5 which were filed with the Municipal Corporation of Delhi for property tax purposes by the respondent/defendant and which showed that what was taken on lease was not a constructed premises but only land at rent of Rs. 343/- per month. The relevant observations of the trial court are contained in paras 21 to 24 and which read as under :

“21. In order to discharge the initial onus, Sh. Harish Virmani entered in the witness box as PW1 and he relied on Ex. PW1/3 which is rent note, but in the rent note the term of lease was mentioned as 2 years, but the rent note was not registered and

as per the provision of section 17(1)(d) r/w section 49 of Registration Act, 1908 such a document is required to be compulsorily registrable and if the same not registered, it cannot be looked into, in proof of any term evidenced by such document, but it may be taken into consideration for collateral purposes.

22. In the present case, the relationship of landlord and tenant is not in dispute, neither there is any dispute as to rate of rent, the only dispute is whether built up property or open space was let out as it was the contention of the plaintiff that open space was let out and the contention of the plaintiff that open space was let out and the contention of the defendant was that built up property was let out and in the opinion of this court to determine the same, Ex. PW1/3 can be looked into since the said is merely collateral purpose and in the first para of Ex. PW1/3, it is written that it is agreed between the parties to let out open space, but the defendant had placed emphasis on para 10 of Ex. PW1/3 where the word covered was written and same was cut, it was contention of the defendant that as word “covered” was cut and same was not initialed by either party, therefore it was covered or built up property that was let out, further it was averred that, in para 7 also, the word, covered is there, but same is not cut, thus the built up property was let out. Further the defendant had relied on Mark E which was brought on record by summoned witness from MCD i.e PW2, and in para 10 of Mark E, the word covered was not cut, therefore it was contention of the defendant that in Ex. PW1/3 the word “Covered” was deliberately cut by plaintiff himself, but Mark E is merely photocopy and original of the same was not brought by PW2, therefore Mark E is not proved and therefore reliance cannot be placed on the same. But PW1 had admitted the signatures of his father on Ex. PW1/D1 which is original of Mark E with defendant, therefore Ex. PW1/D1 is duly proved and in para 10 of Ex. PW1/D1, word covered was not cut, now the implication of the same has to be seen, in the opinion of this court this clause cannot be read in isolation and it has to be read in consonance with other clauses as well as other documents proved on record. As per para 10 of Ex. PW1/D1 it is settled

between the parties that the second party shall maintain the covered space in neat and clean condition and in para 1 of same document, it is specifically stated that open space was let out to the defendant and it has to be interpreted in consonance with other documents which are proved on record and all the documents have to be seen to find out whether open space or premises was let out to the defendant.

23. The plaintiff had placed on record number of counterfoils of rent receipts i.e Ex PW1/5 to Ex. PW1/22 wherein the plaintiff had received rent from defendant, in which it was written that received Rs. 343/- on account of rent for open space, the exhibition of these documents were not objected to by the defendant and the witness of the plaintiff was not cross examined on these documents, thus these documents were duly proved. Further in rent receipts Mark A, Mark B, and Mark C and Mark D, it was written that received Rs 343/- on account of rent for open space, and these photocopies were brought by summoned witness i.e PW2 and when these documents were confronted to DW1 during his cross examination, he had admitted his signatures at point B1 on Mark B and at D1 on Mark D, and in earlier part of his deposition, he deposed that we signed on the counterfoil of rent receipt without observing the contents thereof, thus DW1 had plead ignorance of the contents of the documents, but once he had admitted his signatures on some documents and when there is no contention that his signatures were procured on blank paper or by force or fraud, DW1 is not allowed to plead ignorance of the contents of the same, and further these rent receipts were admitted by DW1 to have placed before M.C.D. by the defendant only, and in the rent receipts, the rent was paid for open space. Further, the summoned witness, PW2 had brought documents, Ex. PW2/3 to Ex. PW2/5 which were filed by the defendant with MCD, and DW1 deposed in his cross examination dated 28.10.2009, that these affidavits do not appear to be signed by my wife, but in his cross examination dated 12.07.2010 when he was put question pertaining to affidavit dated 06.02.1990 i.e Ex.

PW2/4 and 07.01.195 i.e Ex PW2/4 and 07.01.1995 i.e Ex. PW2/3, DW1 deposed that it is correct that they are signed by the defendant, but they have got it signed by the plaintiff in good faith and they have kept it with them, and as per deposition of summoned witness i.e PW2, the said affidavits were filed by the defendant herself for house tax assessment purpose, and in cross examination of DW1 dated 12.07.2010, DW1 had even admitted signatures of defendant on Ex. PW2/5, DW1 had even admitted signatures of defendant on Ex. PW2/5, DW1 had even admitted signatures of defendant on Ex. PW2/5, DW1 further deposed that all the documents were filed by me on 19.01.1991, on adking of late Sh. Jiwan Lal Virmani, but admittedly late Sh. Jiwan Lal Virmani died on 03.11.1989, therefore documents filed after his death, cannot be said to be filed at the instance of late Sh. Jiwan Lal Virmani, and in Ex. PW2/3 the defendant had stated that she had taken land on rent of Rs. 343/- p.m. and that she had not signed any new rent deed agreement and in Ex. PW2/4 in para 3, it was stated that I have constructed the building over it, thus by these documents, the plaintiff had duly proved that open space was let out to the defendant and all these documents were of later date of execution of rent note Ex. PW1/D1, **therefore plaintiff had averred that all these documents duly prove that tenancy was for open space and not for premises so as to attract bar of section 50 DRCA.**

24. Now it is on the defendant to disprove the same and to disprove the same, the defendant had examined only one witness i.e DW1 and as already discussed above, that there are contradictions in the testimony of sole witness who appeared on behalf of the defendant, as at one point of time he deposed that Ex. PW2/3 to Ex. PW2/5 were not signed by the defendant, and later he admit the signatures of defendant on Ex. PW2/3 to Ex. PW2/5, and further admit to have filed these documents before M.C.C. by himself on behalf of the defendant, therefore, his testimony is not reliable. But the defendant had proved documents Ex. PW1/DA through admission of PW1, as he had admitted the signatures of his father on the same and in Ex.

PW1/DA, it was written that received on account of security for “area covered by them”, and on the basis of this document the defendant had contended that it was covered space that was being let out, however in the opinion of this court, this document though proved, but the expression “area covered by them”, cannot be construed to mean that built up property was let out, and furthermore in Ex. PW2/4 which was affidavit furnished by the defendant herself before M.C.D. The defendant had admitted that I have constructed building over it, thus it is duly proved that tenancy was for open space and not for built up property, therefore bar of section 50 DRCA is not attracted.”

6. The aforesaid conclusions of the trial court was set aside by the first Appellate Court by giving the following reasons:

“12. Issue No. 1. Whether the plaintiff is entitled for the decree of possession of the suit property, as claimed? OPP and Issue No. 4. Whether suit of the plaintiff is bared by Section 50 of the DRC Act?OPD:- Both these issues are interconnected and are taken up together. Even otherwise the Ld. Trial court has also dealt with these issues simultaneously. The main controversy is with respect to question whether suit is hit by DRC Act for which definition of “Open Space” is to be seen viz-a-viz rent note executed between parties. The Ld. Trial Court has opined that as land was for open space hence DRC Act is not applicable and suit for possession was maintainable. Relationship in the present matter is not disputed. Rate of rent is not disputed and only question is whether in fact open land was given. Though initially rent deed was not admitted by defendant and some objection was taken regarding the actual rent not but same has been clarified by defendant by producing the copy of rent note by showing discrepancy between rent not produced by plaintiff and defendant. In the rent note produced by plaintiff Ex. PW-1/3, there is cutting on word “Covered” in clause No. 10 Later on same rent note was produced by defendant as Ex.

PW-1/D1 wherein word “Covered” is mentioned which has also been admitted by one of the witness produced by plaintiff as PW-2. There is no explanation as to why word “covered” was deleted from rent note which was still available in the copy of rent note. The counsel for plaintiff has tried to say that term “covered” does not include construction but herein same has to be read keeping in view all surrounding circumstances. Particular line of agreement cannot be read in isolation and whole of the terms are to be read. Though counsel for plaintiff has relied upon certain receipts wherein word “open” is mentioned but simultaneously one or two receipts have been relied upon by defendant also wherein so not recorded. But crux is that can parties on their own violate the provisions of law and even if theoretically lease deed is held to be of open land still can it term actual lease for open piece of land if at all it was not so. Strange enough, the plaintiff has never approached police authorities if construction was carried out unauthorizedly and without consent of plaintiff by defendant after the start of lease. Consent can be seen from lease deed itself when it has been mentioned that electricity charges are to be paid by plaintiff. If it was of open land where was the reason of using the electricity and if it was open piece of land then there was no need to write word “covered” meaning thereby the plaintiff was conscious of the fact that land has been constructed upon and thereafter premises is to be used. The position would have been different if defendant had constructed the area without permission then it could not have been stated that land has been converted from open land to premises and lease be deemed of premises covered under the definition of Rent Act, hence landlord was conscious of the fact that lease is to be used for constructed area/covered area so suit property comes under purview of DRC Act. Moreover, photographs show that area was thickly constructed and plaintiff itself has admitted in evidence that premises was constructed in the year 1956. It is not made out as to which area was constructed and which area was open and it was upon plaintiff to prove that in fact at the time of filing of suit and at the time of entering into lease, the area was open land. No evidence has come to that effect. Document itself talks about covered land and construction cannot be exonerated and it will

be deemed to be covering constructed area. Even PW-1 in his cross-examination has stated that they made the property tax for built up property let by them meaning thereby there was existence of construction. In Ex. PW-1/D1 (which is rent deed) in clause 6 it has been mentioned that second party would have the right to make repairs of alteration in the present condition with the permission of corporation or any concerned department of the municipal corporation meaning thereby if it was not constructed then there is no question of alteration and repairs in the vacant condition of property. The permission is required only for the construction purpose or repairs or alteration. In clause 7 it has been mentioned that tenant will be liable for any action taken by factory inspector under any act with respect to covered space, meaning thereby there was some constructed area. Again clause 12 says that 'if any portion of area or structure thereon is acquired by govt. which is in possession of second party'..... so it means that structure was there otherwise there was no need to use word structure. So even if there is cutting in clause No. 10 on the word 'covered' still in the other portion of rent deed 'covered' word remains as such. Reading of whole deed is that is clause 1 open space is mentioned and rest of lease talks about constructed area and Id. Trial Court failed to appreciate this fact. So, it is clear that lease was of constructed area so it brings the case under purview of DRC Act. Accordingly, findings on this issue are hereby reversed and this issue is decided in favour of defendant and against the plaintiff and it is held that plaintiff is not entitled to decree of possession of suit property and suit is barred U/s 50 of DRC Act. Another question was raised whether tenancy was legally terminated or not and 6 months notice was required as per Transfer of Property Act because lease was for manufacturing/industrial purpose but this question has lost its significance in the light of finding on maintainability of suit itself which is against the plaintiff."

7. Since for the purpose of deciding a second appeal it is necessary to frame substantial questions of law, the following substantial questions of law are framed:

(i) Whether the first Appellate Court committed a clear cut gross error of law in relying upon the terms of tenancy as stated in the rent note Ex. PW1/3 or Ex. PW1/D1 inasmuch as the terms of relationship of a landlord and tenant in an unregistered lease deed cannot be looked into by virtue of Section 17(1)(b) and (d) read with Section 49 of the Registration Act?

(ii) Whether first Appellate Court has committed a perversity in not considering and avoiding reference to the rent receipts and the documents filed with the Municipal Authorities by the respondent/defendant herself and which showed that what was let out was open space and not constructed premises?

8. In my opinion, both the questions of law are to be answered in favour of the appellant/plaintiff and against the respondent/defendant and it is held that the first Appellate Court committed a gross illegality and perversity in referring to the terms of an unregistered lease deed of two years although reference to the terms of such a lease deed is barred by virtue of Section 49 of the Registration Act. Even the trial court could not have referred to/

relied upon the terms contained in an unregistered lease deed. Also, there is perversity in the impugned judgment of the first Appellate Court inasmuch as where the trial court in paras 22 to 24 exhaustively considered all facts and documents including the counterfoils of the rent receipts and the documents filed with the Municipal Authorities by the respondent/defendant herself, the Appellate Court's impugned judgment; the relevant para 12 of which has been reproduced above; shows that for unexplainable reasons no reference is made of the findings and conclusions of the trial court by reference to the counterfoils of the rent receipts and the documents filed by the respondents/defendants itself before the Municipal Authorities.

9. It is settled law that an unregistered lease deed can be looked into only for collateral purpose and collateral purpose cannot be interpreted to include therein the terms and conditions by which parties are related to each other as landlord and tenant. Collateral purpose basically is to show the nature of possession i.e tenant has not illegally entered into possession but has legally entered into possession. All other terms and conditions between the landlord and tenant as stated in the registered lease deed whether it be for the period of lease, or the rate of rent or area of tenancy or other terms and conditions, the same cannot be looked into in view of the specific bar of

Section 49 of the Registration Act. The first Appellate Court was, therefore, wholly unjustified in looking at the terms of the lease/rent note.

10. It is also relevant to note that at best the terms of the lease deed are capable of two interpretations taken with the fact that in the rent note filed by the appellant/plaintiff the expression “covered” was struck off and in the rent note filed by the defendant the expression “covered” was not struck off. To resolve this ambiguity, trial court rightly relied upon the counterfoils of the rent receipts showing that the open space was let out. Besides the rent receipts mentioning letting out of open space, the fact that the respondent/defendant in the documents filed by her before the Municipal Authorities admitted that letting out was not with respect to the constructed building but only for land/open space, clearly rightly entitled the trial court to hold that only open space was let out and not a building with land. .

11. Learned counsel for the respondent/defendant sought to sustain the judgment of the first Appellate Court by reference to para 12, but, the arguments raised in this regard are misconceived and have already been rejected by me in view of the bar to look into the terms of the rent note as per Section 49 of the Registration Act.

12. Another argument which was urged on behalf of the respondent/defendant was that there were two rent receipts which were filed in the trial court in which it was not mentioned that letting out was of open space/land, however, even this argument held by the respondent/defendant has no weight inasmuch as merely because two rent receipts are silent on what is let out, it cannot mean that the same should be interpreted as that they are issued to tenancy of a constructed property, more so because the various other rent receipts filed and proved on record as Ex. PW1/5 to PW1/22 showed that the rent receipts pertain to open space i.e not a constructed building. This argument of the respondent/defendant is also, therefore, rejected.

13. In view of the above, the appeal is allowed and the impugned judgment of the first Appellate Court dated 13.5.2013 is set aside and the judgment of the trial court dated 30.11.2012 is accordingly revived. Appeal is allowed with costs of Rs. 50,000/-. I am empowered to impose costs by exercising my powers under *Volume V* of the *Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15* which entitles this Court to impose actual costs. The Supreme Court in the judgment in the case of the *Ram Rameshwari Devi & Ors. Vs. Nirmala*

Devi & Ors. (2011) 8 SCC 249 has held that it is high time in certain litigations that actual costs must be imposed, and because this is a commercial litigation and which is not between poor sections of society, I impose the costs as stated above.

FEBRUARY 12, 2014
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VALMIKI J. MEHTA, J.