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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RSA Nos.92/2013 & 345/2014

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4th August, 2016

1. RSA No.92/2013

SHRI PEAREY LAL (DECEASED) NOW REPRESENTED BY HIS L.Rs

..... Appellants

Through: Mr. Ravi Gupta, Senior Advocate with
Mr. Gourav Sharma, Advocate and Ms.
Bhoomija Verma, Advocate.

versus

MAHANT RAM NATH (SINCE DECEASED NOW REPRESENTED BY
LRS) AND ORS.

..... Respondents

Through: Mr. Dhiraj Bhardwaj, Advocate for
respondent No.10(b) with respondent
no.10(b) in person.

2. RSA No.345/2014

MAHANT RAM NATH (SINCE DECEASED NOW REPRESENTED BY
LRS) AND ORS.

..... Appellants

Through: Mr. Dheeraj Bhardwaj, Advocate.

versus

SHRI PEAREY LAL (DECEASED) NOW REPRESENTED BY HIS L.Rs

..... Respondents

Through: Mr. Ravi Gupta, Senior Advocate with
Mr. Gourav Sharma, Advocate and Ms.
Bhoomija Verma, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

RSA No.345/2014

1. This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) is in fact only in the nature of cross objections by the respondents/defendants in RSA No.92/2013 for sustaining the judgments of the courts below dismissing the suit for declaration and injunction filed by the plaintiff, and whose legal heirs are now the appellants in RSA No.92/2013. Accordingly, this second appeal is disposed of by considering the present appeal as arguments for sustaining the judgments of the trial court and first appellate court which are challenged in RSA No. 92/2013.

This RSA is therefore disposed of as not pressed subject to the aforesaid observations.

RSA No.92/2013

2. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiffs in the suit challenging the concurrent Judgments of the courts below; of the Trial Court dated 31.1.2012 and the First Appellate Court dated 1.4.2013; by which the courts below have dismissed the suit filed by the plaintiffs seeking declaration and injunction with respect to claim of the plaintiffs of tenancy in premises being

shop no.1, Kalkaji Mandir, Delhi comprising of two rooms and two varandas.

I note that original plaintiff died *pendente lite* and he was substituted by his legal heirs and who hence became the plaintiffs. Reference to appellants/plaintiffs will include reference to the original plaintiff wherever the context so requires. Plaintiffs had also claimed the relief of injunction to restrain the defendants/landlords/respondents from allowing any person other than the plaintiff from opening another halwai shop in the entire premises of the Kalkaji Mandir.

3. While admitting this second appeal on 21.8.2013, the following substantial question of law was framed:

“Whether the judgments of the two courts below returning the concurrent finding are suffering from any perversity with regard to the issue as to whether the appellant was a tenant or a licensee in respect of the suit premises?”

4. The facts of the case are that the appellants/plaintiffs claimed tenancy of the suit premises. In para 21 of the plaint where the assertion of existence of the tenancy was first made, there is no date month or year given when the tenancy commenced. In paras 27 and 28 of the plaint plaintiff claims that he has paid rent of Rs.1,125/- per month and therefore he cannot be evicted without the due process of law as plaintiff's tenancy is protected under the Delhi Rent Control Act, 1958. In para 32 of the plaint plaintiff pleads that he is in continuous possession for more than 12 years of the tenanted premises.

In para 40 of the plaint plaintiff pleads an alternative case that in case the plaintiff is not found to be a tenant and only a licensee, even then he cannot be dispossessed without the due process of law. Paras 21, 27, 28 and 32 of the plaint and the relief para 44 of the plaint read as under:-

“21. That the plaintiff is a tenant of the Mandir Shri Kalkaji in respect of one shop bearing No.1 belonging to Mandir Shri Kalkaji for the last more than 12 years at a monthly rent of Rs.1125/-. The plaintiff carries on his business as a Halwai and prepared sweets for “Parshad” purposes and the premises in his tenancy consists of one big room, one small room and 2 verandahs. The plaintiff carries on business under the name and style of “Kalka Mai Ke Parshad Ki Kadimi Dukan. Yahan Parshad Acha Milta Hai” as sole proprietor of Pearey Lal Fateh Chand.

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XXXXX

27. That the plaintiff accordingly has paid rent of the said premises at the rate of Rs.1125/- per month to the Baridar of Thok Jogian, as well as to Baridars of Thulla Tansukh, Thulla Jas Ram, Thulla Bahadur and Thulla Ram Baksh against proper rent receipts.

28. That the plaintiff submits that he is a tenant with respect of the shop of Mandir Kalkaji and is paying Rs.1125/- per mensem as rent and cannot be evicted therefrom otherwise than in due course of law and has the rights of privileges of a tenant as guaranteed under the provisions of the Delhi Rent Control Act 59 of 1958 and cannot forcibly be dispossessed from the said shop by any Baridar.

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XXXXX

32. That the plaintiff further submits that for the last more than 12 years the plaintiff is in continuous actual and physical possession of the tenancy premises as a tenant and at no point of time delivered possession of the tenancy premises or any portion thereof to any Baridar. The Baridar is only entitled to the rent for his Bari from the plaintiff.

Relief para 44 of the plaint

44. That the plaintiff, therefore, most respectfully prays:-

(a) That a decree for declaration declaring the plaintiff to be the tenant in the premises mentioned in para No.21 of the plaint as Rs.1125/- per month be passed in favour of the plaintiff against the defendants themselves and as representing their respective Thok/Thulla.

(b) That a decree for perpetual injunction restraining the defendants and all other members of their respective Thok/Thulla from dispossessing the plaintiff from the premises mentioned in para No.21 of the plaint otherwise than in due course of law, be passed in favour of the plaintiff against the defendants themselves and as representing their respective Thok-Thulla.

(c) That a decree for perpetual injunction restraining the defendants and all other members of their respective Thok/Thulla from allowing any other Halwai shop to be opened in the precincts of Mandir Shri Kalkaji except on Sashmahi mala be also passed in favour of the plaintiff against the defendants themselves and as representing their respective Thok/Thullas.

(d) Costs of the suit be awarded against the defendants.

(e) Any other and further relief which the court deems fit and proper may also be given and granted to the plaintiff.”

5. Defendants/respondents are some of the baridars or trustees/pujaris of the Kalkaji Mandir. The English translation of the Hindi word ‘Baari’ means ‘turn’. Every pujari of the Kalkaji temple is called a baridar because, turn by turn i.e bari by bari, different pujaris have been given right to collect the offerings made to the temple. Though not much relevant for deciding the issues at hand, it is stated that the pujaris are divided into two classes; Thok Jogians and Thok Brahmins with Brahmins having a right to collect $\frac{3}{4}^{\text{th}}$ of the offerings on the normal days and also the festival days and the Jogians have a right to collect $\frac{1}{4}^{\text{th}}$ of the similar offerings. This inter se distribution between the pujaris has been fixed by various judgments of the courts of law and there is no dispute inter se the pujaris with respect to their entitlement turn by turn to take offerings given in the temple. I am informed that there are over 250 pujaris i.e pujaris with respect to the Kalkaji Mandir

and turn by turn each branch gets the right and has entitlement to take the offerings in the temple and such pujaris do the puja in the temple.

6. The case of the respondents/defendants was that the plaintiff was never a tenant in the suit property and was only a licensee. It is pleaded in the written statement that one baridar i.e just one or more co-sharer(s)/baridars cannot on their own create tenancy rights in favour of an individual person and that it is only the entire body of the trustees/pujaris/baridars/managers who can create a tenancy. Accordingly, it was contended that the plaintiff cannot claim any declaration of tenancy rights in his favour and the suit should be dismissed. In the written statement it was additionally pleaded that in between the pujaris a civil suit was filed being civil suit no.630/1963, and in this civil suit the civil court vide its Order dated 16.05.1964 had directed that the possession of the temple shall be deemed to be of the court from 16.05.1964, and therefore, there does not arise any issue of creation of any tenancy in favour of the plaintiff post 16.5.1964 because by the Order of the civil court dated 16.05.1964 there remained no legal rights in any baridar to transfer possession in the nature of tenancy to any person. Finally, it is pleaded by the respondents/defendants that a baridar can at best create licensee or tehbazari rights to the extent of his turn but cannot create tenancy rights for all times to come so as to bind all the other baridars.

7. Trial Court on 29.01.1985 framed the following issues:-

- “i) Whether the plaintiff is a tenant at the suit premises? OPP
- ii) Whether the plaintiff is a trespasser in the suit premises as alleged in para 27-32 of the written statement? OPD
- iii) Whether the suit is barred by Principle of Resjudicata? OPD
- iv) Whether the suit is barred under order 23 rule 1 clause 3 CPC? OPD
- v) Whether the suit is barred under order 2 rule 2 CPC? OPD
- vi) Whether the plaintiff is entitled for the injunction as prayed for? OPP
- vii) Relief.”

8. The main issue was issue no.1 as to whether the plaintiff was a tenant in the suit property and the trial court held that the appellants/plaintiffs had failed to prove their case of tenancy. Before I turn to the relevant discussion of the trial court, let me at this stage, refer to the documents which have been filed and proved by the parties and also the depositions of the witnesses of the parties, and which aspects are referred to in paras 18 to 28 of the judgment of the trial court. These paras read as under:-

“18. To prove his case, plaintiff has examined Sh. Satpal as PW1. In his examination in chief PW1 has deposed that plaintiff is in Halwai business in Shri Kalkaji Mandir since lat 19-20 years and used to pay rent to respective Baridar. He further stated that he belongs to Thulla Jas Ram and used to realise the rent from the plaintiff and issued the rent receipt Ex. PW1/1 signed by him at Point “ A”. He also identified various rent receipt issued by the various other Baridars Ex. PW1/2 to Ex. PW1/61.

19. PW1 Sh. Satpal Singh was crossexamined as PW3 on 06-09-1985.

20. Sh. Ram Kumar was examined as PW2 on 02-02-1984 and he was cross-examined as PW1 on 24-04-1985 who has denied to identify the signature of Sh. Radhey Sham on Ex. PW1/3.

21. Sh. Parey lal was also examined as PW3. he was crossexamined on 24-04-1985 and further examined on 16-09-1985. Thereafter, the said witness had died therefore he was not cross-examined.

22. The plaintiff has also examined Sh. Rohtas Singh Clerk MCD, Water Department As PW4 who has deposed that water connection bearing No. 724 has been installed in the name of Sh. Parey Lal in the shop No. 1 of Shri Kalkaji Mandir and submitted that Ex. PW1/4 had been issued by his office.

23. The plaintiff has also examined Sh. Jugal Kishore Clerk Shop and Establishment, Department on 09-09-1985 who has deposed that certificate bearing No. 9/3789/1 dt. 12-04-1976 has been issued by their officer whose photocopy is Mark "A".

24. The plaintiff has also examined Sh. V.R. Sharma Clerk from DESU as PW5, who has deposed that the elecrical meter bearing No. 126122 Zone No. 311 is installed in the name of Sh. Parey Lal in shop No. 1 of Shri Kalka Ji Mandir on 26-10-1981 vide Ex. PW5/1.

25. On the other hand , the defendant has examined Sh. Satish Bhardawaj as Dw1 has has produced his evidence by way of affidavit as DW1/A and who has proved the following documents:

i) Certified copy of plaint in suit No. 413/1974 titled as Parey lal Vs. Harsaroop is Ex. DW1/1.

ii) Certified copy of written statement filed on 13-05-1977 in suit No. 413/1974 titled as Parey lal Vs. Harsaroop is Ex. DW1/2.

iii) Certified copy of written statement filed on 13-05-1975 in suit No. 413/1974 titled as Parey lal Vs. Harsaroop is Ex. DW1/3.

iv) Certified copy of order dt. 15-10-1974 passed by Sh. Brijesh Kumar, SJIC, Delhi in suit No. 413/1974 titled as Parey lal Vs. Harsaroop is Ex. DW1/4.

v) Certified copy of order dt. 19-03-1976 passed by Sh. Brijesh Kumar, SJIC, Delhi in suit No. 413/1974 titled as Parey lal Vs. Harsaroop is Ex. DW1/5.

vi) Certified copy of statement of Sh. Panna Lal in suit No. 413/1974 titled as Parey lal Vs. Harsaroop is Ex. DW1/6.

vii) Certified copy of order dt. 16-05-1964 passed by Sh. G.C. Saini in suit No. 413/1974 titled as Parey lal Vs. Harsaroop is Ex. DW1/7.

ix) Certified copy of order passed by Sh. Shiv Dass Tyagi , SJIC , Delhi in suit No. 94/64 titled as Mahant Prithi Nath Vs. Shri Tula Ram is Ex. DW1/8.

x) Certified copy of plaint dt. 05-08-1974 filed in the court of Sh. J.K. Pali in suit titled as Parey Lal Vs. Ram Swaroop is Ex. DW1/9.

xi) Certified copy of written statement dt. 09-08-1974 filed in the court of Sh. J.K. Pali, Ld. Sub Judge, Delhi in suit titled as Parey Lal Vs. Ram Swaroop is Ex. DW1/10.

xii) Certified copy of order dt. 26-08-1974 passed by the court of Sh. J.K. Pali, Ld. Sub Judge, Delhi in suit No. 426/74 & 403/1974 is Ex. DW1/11.

xiii) Certified copy of order dt. 28-05-1975 passed by the court of Sh. J.K. Pali, Ld. Sub Judge, Delhi is Ex. DW1/12.

xiv) Certified copy of order dt. 31/12/1957 passed in CA No. 86/57 passed by Sh. Ramesh Dayal II, ADJ, Delhi is Ex. DW1/13.

xv) Certified copy of order dt. 28-12-1955 passed by Sh. Gian Chand, the then SjiC in suit No. 266/52 is Ex. DW1/14.

xvi) Certified copy of judgment and decree dt. 01-02-1974 passed by Sh. N.K. Kappoor , the then Ld. SJIC, Delhi is Ex. DW1/15.

xvii) The Theknama dt. 23-06-1976 executed in favour of Sh. Jai Lal starting from 07-07-1976 to 08-06-1976 is Ex. DW1/6.

26. The defendant has also examined Sh. Sham Bihari as DW2 who was examined on 26-10-1987.

27. Sh. Lakshmi Chand Dw3 who has filed his evidence by way of affidavit which is Ex. DW3/A.

28. The defendant has also examined Sh. Durga Parsad as Dw4 who has filed his evidence by way of affidavit which is Ex. DW4/A and proved the following documents;

i) Original Thekanama executed by Sh. Jai Lal is Ex. Dx.”
(underlining added)

9. Issue no.1 framed was as to whether the plaintiff was a tenant in the suit premises. For holding that plaintiff is not a tenant, trial court has given the following discussions, reasoning and conclusions in paras 52 to 74 of the judgment and which paras read as under:-

“52. During the arguments Ld. counsel for the plaintiff has submitted that the plaintiff was inducted as tenant in the suit property through oral agreement and the plaintiff is paying the rent to the respective Baridar who used to issue rent receipt Ex. PW1/1 to Ex. PW1/61. Therefore, plaintiff be declared as tenant in the suit property.

53. On the other hand Ld. counsel for the defendant had argued that plaintiff had not examined himself as the witness to prove his case. Therefore, the adverse inference be drawn against the plaintiff and relied upon the following judgment.

i) AIR 199 HC 989, 1141

ii) 1957 Ahlabad 346

54. In the above mentioned judgment it is held that deliberate avoidance of witness box by the party raises the presumption against the contention of such party. But in the present case the plaintiff Sh. Pare Lal himself had appeared in the witness box who was examined on 29-04-1985 and 16-09--1985. But during the examination in chief he died therefore, he was not cross-examined. Therefore, it can not be said that the plaintiff deliberately avoid the appearance in the witness box. Hence no adverse presumption can be drawn against the plaintiff because the plaintiff had died during his examination in chief.

55. During the arguments , Ld. counsel for the defendant further argued that the rent receipts Ex. PW1/1 to Ex. Pw1/61 could not be read in evidence as the plaintiff had not examined the Baridar who had signed the rent receipt Ex. Pw1/1 to Ex. PW1/61.

56. PW1 Sh. Satpal had identified his signature on the rent receipt Ex. PW1/1 at point "A" and deposed that Ex. PW1/2 & 3 is signed by Sh. Radhe Sham , Ex. PW1/4 is signed by Kishan Chand, Ex. PW1/5 is signed by Harsawroop, Ex. PW1/6 & Ex. PW1/7 is signed by Lakhpat and further deposed that Ex. PW1/8 is signed by Deen Dayal, Ex. PW1/9 is signed by Kishan Chand . He further deposed that he identified the signature on Ex. PW1/1 to Ex. Pw1/61 of the person who signed them as he had seen all of them signing and writing.

57. But during the crossexamination PW1 Sh. Satpal has stated that he can not identified the signature of Har Sawroop on Ex. PW1/5 and further deposed that "plaintiff's sister has got marriage to him. It is wrong to suggest that I have come to depose for this reason".

58. The contradiction in respect of identification of signature of Sh. Har Sawroop on Ex, PW1/5 & relationship of plaintiff witness Sh. Satpal raises the doubts qua the creditability of the witness.

59. Sh. Ram Kumar during his examination in chief has stated that Baridar issued a rent receipt to the plaintiff after realizing the rent which are Ex. PW1/1 to Ex. Pw1/61 and he can identify the signature on the rent receipts. But the witness has not specifically named the persons who have signed the Ex. PW1/1 to Ex. PW1/61.

60. Moreover, in his crossexamination dt. 24-04-1985 plaintiff witness Sh. Ram Kumar has stated that he can not identity the signature of Sh. Radhey Sham on Ex. PW1/3 . He further stated that he had not seen Sh. Gobind Chand

signing and writing and Sh. Gobind Chand has not issued any rent receipt in his presence. Therefore, PW3 Sh. Ram Kumar has also failed to prove that the rent receipt Ex. PW1/1 to Ex. PW1/61 were issued by the Baridar.

61. Even for the sake of argument, if it is presumed that the plaintiff has proved the rent receipt . The next question arises that whether the person issuing the rent receipt have authority to issues the same and mere issuance of the rent receipts is enough to prove the fact that the plaintiff is the tenant in the suit premises.

62. During the arguments, Ld. counsel for the plaintiff had argued that mere payment of rent is enough to prove the fact that the tenancy was created in favour of the plaintiff and relied upon the judgment i.e.

i) AIR (30) 1943 Lahore 127 ii) AIR 1955 PB 37

iii) AIR 1997 Ahlabad 439 iv) (2004) 3 SCC 595

63. The Ld, counsel for the plaintiff also relied upon the judgment i.e. AIR 1966 SC 629 titled as Atyam Veeraju Vs. Pechetti Venkanna , where it is held that:

“Manager of the temple has not authority to to grant perpetual lease of temple land at a fixed rate without any legal necessity. But he has ample power in the course of the management to grant the lease from year to years. The lease from year to year granted by him is binding on the temple . Such a lease does not terminate with the expiry of the officer of the particular manager or the succeeding managers. It continue of its own force until it is terminated by notice.”

64. The plaintiff neither in his plaint nor in his evidence has stated the name of the person who has created the tenancy in his favour . The plaintiff have neither disclosed the date , month and year when he was inducted in the suit property.

65. Pw1 Sh. Ram Kumar in his cross-examination has stated that he do not know that who created the tenancy in favour of the plaintiff.

66. Pw2 Sh. Satpal in his cross-examination dt. 06-09-1985 has also stated that “ The land lord of the shop is Mandir Shri Kalkaji. The co-shares whose turn falls they have created tenancy in favour of the plaintiff. He further deposed that It is correct to suggest that no single co-share has got any right to create tenancy in favour of the plaintiffs. He is only entitled to realize rent.

67. It is admitted fact that there is numerous Baridar who were entitled to collect the offering and Tehbazari etc. But the plaintiff had failed to name of any of the Baridar who have created tenancy in his favour.

68. Therefore, the judgment in the case AIR 1966 SC 629 relied upon by the plaintiff is not beneficial to him because the plaintiff has failed to specify the name of person who created the tenancy in his favour and also failed to specify the day , month and year , when the alleged tenancy was created.

69. During the arguments, Id . counsel for the defendant have submitted that when the alleged tenancy of the plaintiff was created , the possession of the Mandir Shree Kalkaji was with the court as mentioned in the order dt. 16--05-1964 Ex. DW1/7 and order dt 3110-1968 Ex. DW1/8 . Therefore, tenancy cannot be created in favour of the plaintiff.

70. **Perusal of Ex. DW1/7 & Ex. DW1/8 reveals that in the case titled as Mahant Prithi Nath Vs. Tula Ram & others , the possession of the Mandir Sh. Kalkaji was with the court since 16-05-1964 till 01-02-1974 when the final judgment was passed and the baries of the Barridar were regularized vide judgment dt. 01-02-1974 by the court of Sh. S.N. Kapoor, the then Sub-Judge. During this period the court used to hand over the possession of the Mandir Shree Kalkaji to the different person(Highest bidder) every month after the auction conducted by the receiver appointed by the court.**

71. Plaintiff has not specified the date when the tenancy was created, but in his evidence the plaintiff has produced the recent receipt Ex. PW1/1 to Ex. Pw1/61 for the period starting from 27-07-1966 to 10-04-1976. (Though the plaintiff has not filed the rent receipt for every month for this period). Therefore, it is presumed that tenancy, if any was created in favour of the plaintiff somewhere around in June or July 1966.

72. **But in the month of July 1966, the possession of the Mandir Shree Kalkaji was with the court , therefore, no person can create the tenancy in favour of the plaintiff during this period. Because for creating the tenancy , the transfer of possession of the tenanted premises is essential, which is in the present case was with the court.**

73. In view of the judgment of Sh. Bhaskar Rao of 1877 and of Sh. S.N. Kapoor the then Ld. Sub Judge of 01-02-1974 , it can be said that the baridar used to realise the offerings and Tehbazari from the occupant and Chabutra which was given on license to people by each baridar as on their turn . Thus the position of the plaintiff was just like a vendor who was allowed to carry on business of Halwai in the portion of Mandir Sh. Kalkaji on license basis.

74. In view of the above discussion, the court is of the considered opinion that plaintiff is not tenant in the suit premises as the plaintiff has failed to prove the rent receipts Ex. PW1/1 to Ex. PW1/61, failed to specify the name of the person who create tenancy in his favour, failed to specify the date when the tenancy was created and the possession of the suit premises was with the court , when the tenancy was alleged to be created. Hence this issue is decided in favour of defendant against the plaintiff.” (emphasis is mine)

10. A reference to the aforesaid paras of the judgment of the trial court shows that the trial court arrived at the following conclusions:-

(i) Plaintiff had failed to specify the date, month and year when the alleged tenancy was created.

(ii) If tenancy is proved by the plaintiff to have been created after 1964, and which is so because plaintiff filed no documents prior to 1964 with respect to the creation of the tenancy, such a tenancy could not be created after 1964 in view of the possession of the Kalkaji Mandir having been vested in the court as per the Order of the Senior Sub Judge dated 16.05.1964, Ex.DW1/7 and which merged in the final Judgment of the Sub Judge Ist Class dated 1.2.1974 as Ex. DW1/15.

(iii) The trial court in para 66 of its judgment observes that witness of the plaintiff PW-3 Sh. Satpal in his cross examination on 06.09.1985 admitted that the landlord of the shop is the Kalkaji Mandir and no single co-sharer has got a legal right to create tenancy in favour of the plaintiff.

Though the trial court has arrived at various other conclusions including that the rent receipts are not proved, however, those conclusions in my opinion are not correct, but those conclusions in the opinion of this Court will not in any manner change the result of the judgments of the courts below as also the present judgment by which the second appeal has to be dismissed.

11. I may note that the object of allowing entertaining of a second appeal under Section 100 CPC is only for seeing if a substantial question of law arises. The expression is not 'question of law' but 'substantial question of law'. The object of law is to restrict filing of a second appeal, the effect of which is to treat the High Court hearing the second appeal under Section 100 CPC as if the High Court is the trial court or the first appellate court. Putting it in other words, appreciation of evidence and conclusions are to be drawn by the trial court and the first appellate court, and in the second appeal under Section 100 CPC it is not permissible for an unsuccessful litigant, more so having concurrent judgments against him, to seek to re-argue the entire matter by only contending that the courts below have wrongly arrived at the conclusions by appreciation of evidence. Appreciation of evidence and arriving at conclusions fall within the jurisdiction of the courts below and this Court cannot interfere with the findings and conclusions of the courts below unless the same are shown to be clearly perverse and totally illegal. I am making these observations because the present second appeal was argued before this Court on the same facts, issues, grounds, evidence and reasoning which were urged before the courts below and which have been decided appropriately by the courts below. Really therefore, this second appeal does not lie as no substantial question of law arises and hence the second appeal is liable to be and is accordingly dismissed though I would hereafter refer to the

arguments urged on behalf of the appellants/plaintiffs to show not only the complete lack of substance in the arguments, but also that such arguments at best are alternative possible views, but, this Court cannot interfere with the concurrent judgments of the courts below merely because the courts below have taken one possible and plausible view and that there can be another possible alternative view which this Court must accept as per the arguments of the appellants.

12. On behalf of the appellants, the following arguments have been urged:-

(i) Appellants/plaintiffs have proved tenancy in their favour by means of the rent receipts Ex.PW1/1 to Ex.PW1/61 and consequently, tenancy in favour of the erstwhile plaintiff stands proved.

(ii) In the facts of the present case, once from the evidence led including the documentary evidence, it is shown that plaintiff and now the appellants are in continuous possession since even before 1960, therefore, mere not mentioning of the month and year of commencement of tenancy is immaterial as per the facts of the case, and therefore this Court must held that the courts below have committed illegality and perversity in not holding the plaintiff, and now the appellants, to be tenants in the suit property. Reliance in support of this argument is placed upon para 10 of the judgment of a learned

Single Judge of the Rajasthan High Court in the case of *Uda Ram Vs. Tej Karan and Others AIR 1975 Rajasthan 147* that merely not stating the details in the plaint of tenancy cannot be taken as against the erstwhile plaintiff and now the appellants.

(iii) The fact that the tenancy receipts are only from the year 1966 makes no difference because witnesses of the plaintiff have deposed with respect to the suit premises being in possession of the plaintiff, and now the appellants for between 20 to 25 years prior to filing of the suit, and which period in fact will extend to before 1964 and thereby no prejudice can be caused to the appellants/plaintiffs on account of the Order of the civil court dated 16.05.1964 Ex. DW1/7 by which the possession of the Kalkaji Mandir came to be vested in the civil court.

(iv) Legally even one baridar can create a tenancy and for which purpose reliance is placed upon the judgment of the Supreme Court in the case of *Atyam Veerraju and Ors. Vs. Pechetti Venkanna and Ors. AIR 1966 SC 629*.

(v) On the basis of certain findings contained in the Judgment of the civil court dated 1.2.1974, Ex.DW1/15, and which is the final judgment in the 1964 suit as between the pujaris, it is argued that since that judgment shows that the Kalkaji temple could create a tenancy, therefore, there is no reason

why tenancy should not exist in favour of the erstwhile plaintiff and now the appellants of the suit premises.

13. In my opinion, all the arguments urged on behalf of the appellants lack substance and are accordingly rejected. The reasons are given hereinafter.

14. The first aspect is as to whether the appellants have proved existence of tenancy in their favour. Evidence in this regard is in two parts; one part with respect to the rent receipts from 1966 and second part of oral evidence with respect to plaintiff being in possession of the suit property even before 1960 and which is argued to be a good enough ground for taking as proved the existence of tenancy of the suit property in favour of the appellants/plaintiffs. Reliance in support of this argument is placed by the appellants upon the admissions made in the cross-examination of the respondents' witness DW-1 Sh. Satish Bhardawaj dated 23.4.2005 wherein this witness admits as correct that plaintiff is in possession of the suit property since 1963-64. Reliance is also placed upon the cross-examination of DW-4 Sh. Durga Prashad conducted on 2.7.2005 wherein this witness has admitted that plaintiff was carrying on business of selling parsad in the Kalkaji Mandir premises since before 1960. On the basis of the deposing statements of the plaintiff's witnesses as also statements/admissions made by the defendants' witnesses, it is argued that there are two types of premises; one of tehbazari i.e

license and another of tenancy, and that as per the facts and evidence of the present case, appellants/plaintiffs should be held to have proved the existence of tenancy and not merely the tehbazari or license in favour of the appellants/plaintiffs.

15(i) In my opinion, the courts below have rightly held that the appellants/plaintiffs have failed to prove existence of any tenancy of the suit premises in favour of the appellants/plaintiffs.

(ii) Firstly, it is required to be noted that valuable rights in an immovable property in the nature of tenancy having protection under the Delhi Rent Control Act, that too of a temple/trust having over 250 pujaris/trustees, should not be a matter of inference from indirect evidence, but should be a matter of such credible evidence, more so in the form of documentary evidence, before a court should conclude existence of tenancy. Therefore, admissions of plaintiff being in possession of the suit property prior to 1960 will not automatically mean that such possession was as a tenant inasmuch as the case of the plaintiff himself is that there were two types of occupations of portions in the Kalkaji temple, one of tehbazari or license and other of a tenancy. Therefore possession prior to 1960 of the plaintiff has necessarily to be proved to be only of a tenant, and thus mere statements of plaintiff being in possession prior to 1960 would not mean that this Court should consider it as

such an acceptable evidence for arriving at an unshakable conclusion of tenancy, more so in this second appeal under Section 100 CPC because this issue is an issue of appreciation of evidence, and which has already been done against the appellants by the courts below by concluding that the tenancy cannot be said to exist in favour of the erstwhile plaintiff of the suit property.

(iii) Secondly, it is seen that the rent receipts Ex.PW1/1 to Ex.PW1/61 are only of the period from 1966 onwards and in this period no tenancy could be created because of the fact that the legal possession of the entire Kalkaji temple premises vested with the court in view of the Order of the Senior Sub Judge dated 16.5.1964, Ex.DW1/7 in the litigation inter se the pujaris. This Order dated 16.5.1964 (Ex.DW1/7) reads as under:-

“Present: Counsel for the parties with parties as before

As agreed to by the parties to the suit the right to receive offerings made at the temple known as ‘Shri Mandir Kalkaji, Delhi, during the month of Jeth commencing on 21.5.64. has been given to Lakhpat, son of Niader of Thulla Bahadur, for Rs. 5500/-/- he being the highest bidder in the auction now held by this court in the presence of the parties and their counsel. As undertaken by Lakhpat he is now required to deposit the aforesaid amount in this court on 21.5.64 failing which Sultan Singh shall have the right to deposit Rs. 5,000/- on this account on 22.5.64. The possession of this temple shall be deemed to be that of this court from today onwards till further orders of this court and the person who is given the right to receive the offerings in this auction shall be deemed to be in possession of the temple on behalf of this court and shall enjoy all the rights and be subject to all the liabilities of a Pujari of this temple. Thus, it shall be his duty to maintain the temple in question in proper condition and also to cater to all the needs of those who visit the temple on pilgrimage. The right to receive the offerings during the next month shall be auctioned now on 8th June, 1964, on which date all the remaining parties may also file their written statements. The application for the appointment of receiver shall be disposed of accordingly.”

(iv) Thirdly, there does not arise creation of tenancy in favour of the plaintiff inasmuch as one or more baridars/pujaris/trustees/managers cannot create tenancy in favour of a person because tenancy can be created only by the entire body of the co-owners or trustees or managers. There is a salutary purpose to this because otherwise it would be impossible to manage properties of trust or temple and that otherwise one or more of the trustees who do not form the entire body of the trustees or pujaris will while away or alienate the properties of the temple/trust. Even under the ordinary civil law, one co-owner does not have a right to create tenancy of the entire property because one co-owner only has a limited right of the existence of his co-ownership interest, and thus having only a limited co-ownership interest, such a person alone cannot alienate the co-owned property or an interest therein, including by creation of tenancy of the entire property. Reliance placed on behalf of the plaintiffs/appellants to the judgment of the Supreme Court in the case of *Atyam Veerraju and Ors. (supra)* is misconceived inasmuch as nowhere in the said judgment it is held that one co-owner or one co-trustee or one or more pujaris can alienate the property of the temple/trust although there exists a large number of managers constituting the entire body of the pujaris/managers/trustees. All that has been held in paras 10 and 11 of the judgment of the Supreme Court in the case of *Atyam Veerraju and Ors. (supra)* is that a manager in the ordinary course of management has authority

to grant leases, and to which legal proposition there is no dispute because a sole manager can always in the ordinary management of a temple or trust create leases and which leases will continue even beyond the term of manager, however, there is a difference between there being only one manager of a temple/trust and there being a body of the innumerable managers/trustees/pujaris of a temple as in the present case, noting that and as stated above there are over 250 pujaris who are co-baridars/co-trustees/co-managers of the Kalkaji temple.

16. The next argument urged on behalf of the appellants/plaintiffs that admissions in the cross-examination of the witnesses of the defendants of the possession of plaintiff should result in creation of tenancy has no basis inasmuch as mere possession is not necessarily relatable only to a tenancy and since in the temple as per the case of the appellants/plaintiffs there are premises both of a tehbazari/license and a tenancy such as that of the plaintiff. Also, I would be extremely reluctant and hesitant on the ground of some oral admissions in cross-examination to result in creation of tenancy in favour of the appellants/plaintiffs especially where the rent receipts do exist as pleaded and proved on behalf of the appellants/plaintiffs, with the fact that such rent receipts are only after 1966 when the possession of the temple properties vested in the court. In any case, as already held above, even if rent receipts exist, and which are executed by one or the other baridar, the same will not result in creation of tenancy because tenancy

can be created only by the entire body of co-owners/co-trustees/co-pujaris and not by any one or more pujaris/co-trustees/co-managers who do not form the entire body of the co-sharers/co-managers/co-pujaris and only who can alienate or let out the property of the temple/trust. Reliance placed on behalf of the appellants to the judgment of the Rajasthan High Court in the case of *Uda Ram (supra)* is misconceived because whether or not tenancy exists will depend upon the facts of each case, and in the facts of the present case, it is a fact that the plaintiff not only did not plead the month and year of creation of tenancy prior to 1960 but this case is also not supported by any documentary evidence in the form of rent receipts etc prior to 1960. Hence it cannot be held that tenancy existed in favour of the appellants/plaintiffs of the suit property prior to 1960, and much less a legal tenancy which could only be created by the entire body of the trustees/pujaris/baridars.

17. In view of the aforesaid discussion it is held that the courts below have rightly held that no tenancy was created of the suit premises in favour of the plaintiff, and now the present appellants.

18. The next/remaining arguments urged on behalf of the appellants that in the Judgment of the Sub Judge Ist Class dated 1.2.1974, Ex. DW-1/15 which decided the civil suit no. 61/69, since there is a finding with respect to tenancy existing and therefore being capable of being created by the Kalkaji Mandir, and consequently that tenancy can be created of the suit property in favour of the

appellants/plaintiffs, is an argument which is completely superficial and lacking substance for various reasons. Firstly, it is seen that the tenancy which is talked of in the Judgment of the Sub Judge Ist Class dated 1.2.1974 is not of a tenancy within the Kalkaji Mandir but of a tenancy of a premises many miles away in Khari Baoli, Delhi. Further, it is seen that the tenancy which is created in favour of the tenant of Khari Baoli property is even prior to 1911, and surely we do not know what was the position of the baridars before 1911 and thus who could have therefore validly created a tenancy of the Khari Baoli property in favour of the tenant and so held in the Judgment Ex. DW1/15 dated 1.2.1974. The argument thus urged on behalf of the appellants/plaintiffs for creation of tenancy of the suit property in favour of the appellants/plaintiffs on account of certain tenancy being created at another place in the Khari Baoli property by the Kalkaji Mandir, and that too around 1911, is an argument which is really neither here nor there and is therefore rejected.

19. I may note that the documentary evidence of the appellants with respect to the electricity connection, water connection and certificate under the Delhi Shops and Establishments Act, 1954 are of periods much after filing of the present suit and therefore such evidence cannot be a basis for holding that tenancy exists of the suit premises in favour of the plaintiffs/appellants. These aspects with respect to electricity connection, water connection and certificate

under the Delhi Shops and Establishments Act are referred to in paras 22 to 24 of the judgment of the trial court which have been reproduced above.

20(i) Once the erstwhile plaintiff, and now the appellants, are not tenants and are only licensee/licensees, no suit for possession is required to be filed as the right of a licensee is only to enter and exit from the premises. A licensee in fact can be thrown out by use of reasonable force as held by the Full Bench judgment of this Court in the case of ***Chandu Lal Vs. Municipal Corporation of Delhi AIR 1978 Delhi 174***. The relevant paras of this judgment are paras 26 and 27, and these paras read as under:-

“26. There is a catene, of authorities in support of the proposition that in the case of a license there is something less than a right to enjoy the property in the licensee; it cannot be exercised by servants and agents and is terminable while on the other hand, in the case of a lease, there is a transfer to a right to enjoy the property or in other words the lessee is entitled to enjoy the property. A bare licensee having no interest in the property cannot maintain an action for its possession. A mere licensee has only a right to use the property. Such a right does not amount to an easement or an Interest in the property but is only a personal privilege to the licensee. After the termination of the license, the licensor is entitled to deal with the property as he likes. This right he gets as an owner in possession of his property. He need not secure a decree of the Court to obtain this right. He is entitled to resist in defense of his property the attempts of a trespasser to come upon his property by exerting the necessary and reasonable force to expel a trespasser. If, however, the licensor uses excessive force, he may make himself liable to be punished under a prosecution, but he will Infringe no right of the licensee, No doubt a person in exclusive possession of the property is prima facie to be considered to be a tenant, nevertheless he would not be held to be so if the circumstances negative any intention to create a tenancy.

27. In the instant cases the petitioners' possession of the premises (Kiosk) on the facts and circumstances of the case, cannot be held to be conclusive evidence of their being a lessee as the grant was not coupled with an interest in the property. The principle once a licensee always a licensee applies proprio vigore in these cases. The petitioners are not entitled to retain possession against the Corporation, which can take possession of the Kiosk and would not

be driven to a Court of law as the mere physical possession of the petitioners confers no right on them. The petitioners, therefore, in law are not entitled to retain possession against the Corporation, having only the personal privilege to carry on their business which otherwise without the permission granted by the Corporation would be an unlawful act. These well-settled principles - find support from Satwant Singh v. Assistant Passport Officer, New Delhi; Associated Hotel's case ; B. M. Lall v. M/s. Dunlop Rubber Co. (India) Ltd., Air 18 Sc 175; Miss Aninha D'Costa v. Mrs. Parvatibai M. Thakur,; Beant Singh v. Cantonment Executive Officer, Jammu Air 1960 J&K 83, Chinna Pillai v. N. Govindaswami Naidu; Milka Singh v. Diane Air 1964 J&K 99 and Raj Singh v. Union of India (A Bench decision of this Court)."

(underlining added)

(ii) Therefore, appellants are not entitled to relief that they cannot be dispossessed without the due process of law.

21. At the cost of repetition, and for finally concluding, I would like to note that the only documentary evidence of the tenancy of the plaintiff of the suit premises is after 1966, and that there is no documentary evidence in the form of rent receipts in favour of the plaintiff prior to 1964, and as on 16.5.1964 an Order was passed by the civil court vesting the possession of the temple in the court. On mere oral evidence therefore it cannot be held on preponderance of probabilities that tenancy was created and did exist in favour of the plaintiff of the suit premises prior to 1960 merely because of certain admissions of plaintiff being in possession of the suit property from around 1960. This position emerges all the more so because if there can be rent receipts for creation of tenancy after 1966 there is no reason why if tenancy exists prior to 1960 or before 1964 then the rent receipts would not have existed in favour of the plaintiff showing existence of tenancy

of the suit premises in the name of the plaintiff. Also, as already stated above, if one or more of the co-pujaris/co-trustees/co-managers are allowed to alienate properties of a temple/trust, then, there will be a chaos and run upon the properties of the temple/trust with the free for all whereby every baridar in his turn will keep on alienating the properties of the temple/trust and to the prejudice of the other co-pujaris/co-managers/co-trustees. Therefore, looking it in any manner with respect to tenancy not being factually proved or tenancy could not be created legally by only some baridars, the courts below have rightly held that the plaintiff was not a tenant in the suit premises.

22. In view of the above discussion, it is held that the concurrent findings of the courts below do not suffer with any perversity and the courts below have rightly held that original plaintiff, now the appellants, are not the tenants in the suit property but were only licensee/licensees. This second appeal is hence dismissed, leaving the parties to bear their own costs.

AUGUST 04, 2016
godara/ib/Ne

VALMIKI J. MEHTA, J