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

+ **Date of Decision: 31.08.2015**

% **RSA 55/2014 and C.M. Nos.3272/2014, 3538/2014 & 6012/2014**

AMIT KATYAL Appellant

Through: Mr. Anunaya Mehta, Advocate.

versus

HARSH GUPTA Respondent

Through: Mr. Dhanesh Relan & Mr. Arush
Bhandari, Advocates.

% **RSA 56/2014 and C.M. Nos.3274/2014, 3539/2014 & 6010/2014**

OM PRAKASH Appellant

Through: Mr. Anunaya Mehta, Advocate.

versus

HARSH GUPTA Respondent

Through: Mr. Dhanesh Relan & Mr. Arush
Bhandari, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. These two second appeals arise out of the two identical judgments rendered by the learned First Appellate Court, namely the Additional District Judge – 12, Central District, Tis Hazari Courts, Delhi in RCA No.30/2013 titled *Amit Katyal Vs. Harsh Gupta* and RCA No.31/2013 titled *Om Prakash Vs. Harsh Gupta*. By the impugned judgments, the said two appeals have been dismissed and the judgments and decrees passed by the

learned Civil Judge in Suit No. 243/2010 titled *Harsh Gupta Vs. Amit Katyal & Others* and Suit No.233/2010 titled *Harsh Gupta Vs. Om Prakash & Others*, have been affirmed.

2. The respondent/ plaintiff Sh. Harsh Gupta had preferred the said two suits against the two appellants herein to seek reliefs of declaration, mandatory injunction and permanent injunction, thereby seeking a declaration to the effect that the subject matter of the tenancy between the plaintiff and the respective defendant/ appellant had ceased to exist subsequent to the demolition drive, which has been carried out subsequent to and in compliance with the directions of the MCD, and to seek further directions/ injunction against the respective appellant/ defendant not to use, occupy or squat on the area admeasuring 6 inches - between the wall of the property of the plaintiff, and the shutter illegally and wrongfully affixed by the appellant/ defendant, which was alleged by the appellant/ defendant to be shop bearing No.1142, Pahar Ganj, New Delhi (in Suit No.234/2010 titled *Harsh Gupta Vs. Amit Katyal & Others*) and No.1141, Pahar Ganj, New Delhi (in Suit No.233/2010 titled *Harsh Gupta Vs. Om Prakash & Others*). The plaintiff also sought a further direction that the defendants/ appellants should remove the shutters from the front of the wall of the plaintiff.

3. The case of the respondent/ plaintiff was that he is the owner of the property bearing Nos.1141-42, Pahar Ganj, New Delhi. The plaintiff claimed that Shop No.1141 was in possession of the defendant Om Prakash, and similarly, Shop No.1142 was in possession of the defendant Amit Katyal, as tenants on a monthly rent of Rs.440/- each. The plaintiff claimed

that the MCD had issued directions to all the shop-owners in the area that space was required from the shops/ house of each of the persons staying on/ in the land, and land was required by MCD for road widening purpose. The MCD had directed the owners to remove the encroachment of the area, and the space was required up to the back of the wall. The plaintiff claimed that he had carried out the demolition as was required of the owners in compliance of directions of the MCD around 25.06.2010, and that the entire area of the shop belonging to the plaintiff, and in possession of the respective respondent/ defendant, was demolished. Consequently, the sole basis/ subject matter of the relationship between the plaintiff and each of the defendants, i.e. shops itself were demolished, and ceased to exist. The plaintiffs stated that after the said demolition on 26.06.2010, the respondent/ defendants had illegally put up the shutter outside the raised/ demolished shop, which gave cause of action to the plaintiff to file the suits to claim the reliefs, as aforesaid.

4. At this stage, I may take note of some of the relevant averments made in paragraphs 3, 4 & 5 by the respondent/ plaintiff in the case of Sh. Amit Katyal. Identical averments were made in the case of Sh. Om Prakash. The same read as follows:

“3. That it was further directed by the MCD that in case the MCD was forced to take action with respect to forcibly pushing back/forcibly taking area from each house, the same shall be done by the MCD with the police aid and at the cost of the person who shall not take back/release area from their house/shop as the case may be. That subsequent to the aforesaid, it was decided by all the shop owners/existence of the land that they will push back the shop in furtherance thereof

and suo moto demolition work was carried out by each and every owner of the flat in the area, upto the back wall.

4. *That as the plaintiff also was/is a resident of the same area the plaintiff also carried out the demolition as was required by the owners to comply with the direction of the MCD, on/around 25th June, 2010. That when the aforesaid demolitions were carried out qua the property of the petitioner and in occupation of the defendant no.1, the entire shop which was in the possession and occupation of the defendant no.1, the entire shop was totally wiped out/demolished in the drive which was carried out by pursuing to the directions of the MCD, to demolish the existing structure upto the back wall.*

5. *That the aforesaid action was taken by the plaintiff, wherein the entire shop which was in existence and under the tenancy of the defendant no.1 prior to the demolition drive was completely raised/demolished. That the aforesaid demolition as was carried out by the plaintiff to save himself from any civil and/or criminal action being taken by the MCD and in compliance of the directions issued by the MCD, who had the right to order/direct for the removal of the existing construction, for the purposes of road widening of the lane in public interest, where the property of the plaintiff is situated and located. In the present case, the portion/area asked for by the MCD for the purposes of road widening and making area commutable, took into its ambit the entire area of the shop”.*

5. Both the suits were contested by the respective respondent/ defendant. Both the defendants claimed that the MCD, for the purpose of road widening, had taken/ acquired four feet in front of the shop in question of the respective defendants, and that the shop in question now measures only 5 feet in width, and 8 inches in depth.

6. The respective defendants, inter alia, stated:

“The MCD for road widening purposes had taken/acquired the

4'' portion in front of the shop in question of the defendant no.1 and Smt. Veena Katyal and Shri Rohit Katyal and the shop in question now measures only 7'' in width and 8' in length''.

7. Thus, the case of the defendant/appellants was that some part of the shop leased to each one of them had remained even after demolition and, consequently, the tenancy in favour of the respective defendants continued in respect of the remaining portions. The defendants claimed that the surviving tenancy was governed by the Delhi Rent Control Act.

8. On the basis of the pleading, the Trial Court framed the following identical issues in both the suits:

1. Whether this Court has no jurisdiction to try and entertain the present suit? OPD
2. Whether suit of the plaintiff is barred u/s 477/478 MCD Act? OPD
3. Where the defendant no. 1 is still in possession of the suit property as a tenant? OPD1
4. Whether plaintiff is entitled for the relief of declaration? OPP
5. Whether plaintiff is entitled for the relief of mandatory injunction? OPP
6. Whether plaintiff is entitled for the relief of permanent injunction? OPP
7. Relief

9. The plaintiff examined himself as PW-1 in both the suits and exhibited several documents. He deposed in terms of the averments made in his plaint. The defendants examined themselves in their respective suits as

DW-1. In the case of Amit Katyal, he also examined the Assistant Engineer (B), Sadar Paharganj Zone, Delhi as Nutan Gupta DW-2.

10. The defendant Amit Katyal as DW-1, inter alia, stated in his cross examination:

“It is correct that the distance between the wall and shutter of my shop and shop of Mr. Om Prakash are equal. It is correct that the marking as was done by the MCD for the purposes of road widening was same for all shops including the shop of Om Prakash and my shop”.

“I had put the shutter after demolition of my shop. The shutter was put on the remaining shop, the distance between the wall and the shutter is my shop. The distance between the back wall and the shutter is 8 inches. It is wrong to suggest that there is no roof on the shutter.

Question : Can you please tell as to whether there exists a roof on the shutter and if so, what is it of made of?

Answer : Yes, there exists a roof but I cannot tell the material of which it is made up of”.

11. DW-2, Nutan Gupta, Assistant Engineer in the case of Amit Katyal stated in his cross examination in chief that he visited the property/shop bearing No.1141, Main Bazar, Paharganj, Delhi and upon physical inspection, it was found that:

“.... there exists a wooden Almirah of approximately 6” in depth, having one shutter over it. It is submitted that earlier on account of encroachment, an action was taken by the M.C.D., in the area.

3. I also state that as of now, there does not exist any shop except the above mentioned block with the shutter.

4. *I also state that width of the road abutting the shop in question was earlier 60' whereas, at the first instance the Municipal Corporation of Delhi has removed the encroachment thereby making the width of the road to 45' approximately".*

12. In his cross examination on behalf of the defendant Amit Katyal, DW-2 had stated:

"It is incorrect to state that there is a proper shop admeasuring 4 feet in width and 8 inch in length and not a wooden almira as stated by me in my affidavit. There is no roof on top of the shutter. It is incorrect to state that there is roof on top of the shutter".

13. Om Prakash, the defendant in the other suit (CS No.233/2010) as DW-1, inter alia, stated during his cross examination:

"It is correct that the shop which was let out to me and the shop which was taken by me on rent was 4 ½ feet x 5 ½ feet.

Q- Is it correct that the shutter of the shop as it existed prior to demolition was 4 ½ feet approximately away from the wall of the building?

A- The shutter was at a distance of 4 ½ feet from the wall of the shop. The wall of the shop is different from the wall of the building"

"Vol. The MCD had put a mark in front of our shop and till that mark the demolition done".

"Around a month before the demolition the mark was put by the MCD. The mark was put by the MCD behind our shop to the extent of the building of the plaintiff".

14. The Trial Court considered and decided issue no.3, 4, 5 and 6 together.

15. On the basis of and upon appreciation of evidence led before the Trial Court, the Trial Court returned the finding that the lease stood determined under section 111(c) of the Transfer of Property Act (the Act), as the interest of the lessor in the suit property had been terminated on the demolition of the suit shop for road widening. The relevant discussion in the judgment of the Trial Court reads as follows:

“16. In the light of cross examination of defendant no. 1, it is admitted by the defendant no. 1 that MCD has directed the defendant no.1 to demolish the suit shop for the purpose of road widening and for this purpose, MCD has also put a mark on the shop for demolition. It is admitted case of the defendant that he himself had demolished the suit shop. It is also admitted by the defendant no. 1 that marking as was done by the MCD for the purpose of road widening was same for all shops including the shop of Omprakash and his shop. It is also admitted by the defendant no. 1 that the MCD has directed the widening of road in symmetry. But, the defendant has not demolished a portion of 8 inches at the back side of shop and put a shutter thereon apparently with an intention to show the tenancy in respect of that portion of the shop is subsisting. When the MCD has directed the defendant no. 1 to demolish the suit shop in symmetry and there after there would have been no existence of the suit shop.

17. During his cross-examination, the defendant no. 1 was unable to tell the material of which the roof is made of. DW2 Shri Nutan Gupta, Assistant Engineer, MCD has also deposed in his evidence there is no roof on the shutter. In these circumstances, therefore, I am of the considered opinion that the shop in question is not in existence”.

16. Since the lease stood determined under section 111(c) of the Act, the Trial Court returned the finding on issue no.1 in favour of the plaintiff. Consequently, the two suits of the plaintiff against the respective defendants were decreed.

17. The First Appellate Court while passing the impugned judgments, which are identical, sustained the finding of the Trial Court that the lease stood determined under section 111(c) of the Act as the interest of the lessor for the suit property had been terminated on the demolition of the suit property for road widening.

18. The submission of Mr. Mehta, learned counsel for the appellant in both the appeals is that the First Appellate Court relied on the admission of DW-1 made during his cross examination that he had himself demolished the suit property for purposes of road widening as directed by the MCD. The submission is that it was the case of the respective appellants that they had not fully demolished the said shops, and that to the extent of about six inches, shops remained intact even after demolition. In this regard, he has referred to the following extracts from para 10 of the impugned judgment:

“10. nor it is disputed that the shop in question was demolished as per directions of MCD for road widening purpose. DW-1 i.e. appellant during his cross examination himself admitted that MCD had directed him to demolish the suit shop for the purpose of road widening and for this purpose MCD had also put a mark on the shop for demolition. When defendant no. 1/appellant himself admitted that he himself demolished the suit shop then it was rightly observed by the Ld. Trial Court that defendant no. 1 had not demolished a portion of 8 inches at the back side of shop and put a shutter thereon apparently with an intention to show that the tenancy in respect of that portion of the shop is subsisting. No explanation has been put forward by the defendant as to why the suit shop was not demolished to the extent which was marked by the MCD. It is apparent that despite directions of MCD and mark put by it to the extent of the building of plaintiff, the defendant no. 1/appellant deliberately did not demolished it to

the said extent and rather had put a shutter to show suit shop is still in existence but for a smaller portion”.

19. The submission of Mr. Mehta is that if the respective appellants had not fully demolished their shops and some part of it remained, it could not be said that the lease of the two appellants stood determined under section 111 (c) of the Act. He submits that the failure to demolish the shops, to the extent marked by the MCD, is a matter between the appellants and the MCD, and the respondent/plaintiff cannot take advantage of the fact that the mark had been put behind the wall in the area of the plaintiff, and that the appellants had not carried out demolition uptill the point where the mark had been put. Mr. Mehta has placed reliance on the judgment of the Supreme Court in ***T. Lakshmpathi v. P. Nithyananda Reddy***, (2003) 5 SCC 150 in support of his aforesaid submissions.

20. On the other hand, the submission of learned counsel for the respondent is that the Trial Court as well as the First Appellate Court, on appreciation of evidence, have held that the lease stood determined under section 111(c) of the Act, since the suit property ceased to exist on demolition being undertaken and the interest of the plaintiff/lessor itself stood terminated. Learned counsel submits that in fact, no part of the shops of the respective appellants remained in existence post the demolition and the so-called remaining shop were nothing but wooden almirahs of 6 inches depth put along the wall of the plaintiff with a shutter.

21. In view of the aforesaid, the following substantial question of law is framed for consideration in each of the appeals:

- i) Whether the present suits of the respondent/plaintiff were barred under Section 50 of the Delhi Rent Control Act?

22. The decision on the aforesaid issue depends on the finding as to whether, or not, any portion of the tenanted shops of the two respective appellants remained in existence, post the demolition activity undertaken in pursuance of the directions of the MCD. In case the answer to the aforesaid question is in the affirmative, i.e. that some portion of the pre-existing shop tenanted to the respective appellants survived the demolition drive, the remaining portion of the shop would constitute tenanted premises and, since, the rent of each of the shops was only Rs.400/- per month, the suit would be barred under Section 50 of the Delhi Rent Control Act. On the other hand, if no portion of the two tenanted shops survived the demolition drive, by operation of Section 111(c) of the Transfer of Property Act, the tenancy of the respective appellants stood determined as the interest of the lessor in the respective tenanted premises stood terminated on demolition of the tenanted premises, and the suits could not be said to be barred under Section 50 of the Delhi Rent Control Act.

23. It is wholly immaterial as to who carried out the demolition. Both the parties have claimed that demolition had been carried out by them. The courts below have relied on the admission of the respective appellant/defendants, that they had carried out the demolition of the shops in question as per the directions of the MCD.

24. The contention of the respective appellant/defendants that they did not carry out the demolition of their respective shops upto the wall - behind

which the property of the respondent/plaintiff exists, and they left in existence - the pre-existing tenanted shop to the extent of 8 inches is, in fact, not supported by the evidence led by the two appellants in their respective cases. The evidence led by the parties establishes that the respective shops tenanted to the two appellants stood completely demolished, and with a view to cling on to their rights as tenants, the two appellants, post demolition, put two wooden almirahs with shutter along the wall of the plaintiff upto the depth of about 6 inches.

25. Firstly, it was admitted by the defendant Amit Katyal (DW-1) in his suit that the distance between the wall and the shutter of his shop, and the shop of Om Prakash are equal. He also admitted that the marking, as was done by the MCD for the purpose of road widening, was the same for all the shops including the shop of Om Prakash and his shop.

26. Om Prakash as DW-1 in his suit had admitted that the mark upto which demolition had to be carried out had been put by the MCD, and the same was *“behind our shop to the extent of the building of the plaintiff”*. Thus, the MCD had marked for demolition the extent of the encroached land, which engulfed not only the shops in question, but also the wall of the plaintiff and some portion on the other side of the wall extending right upto the area in occupation of the plaintiff. However, it is not disputed that the wall itself was not demolished by either of the parties, or the MCD. The question is whether any portion of the two shops in question leased to the respective appellants survived the action of demolition.

27. Amit Katyal, DW-1 in his cross examination in his suit, inter alia,

stated *“I had put the shutter after the demolition of my shop”* (emphasis supplied). While he denied the suggestion that there is no roof on the shutter, he could not tell the material of which the so-called roof was made up. DW-2, Nutan Gupta, produced by the defendant Amit Katyal did not stand by the case of the defendant. He stated that there existed a wooden almirah of approximately 6 inches in depth having one shutter over it. He stated that on account of encroachment, action was taken by the MCD in the area. He categorically stated *“I also state that as of now, there does not exist any shop except the above mentioned block with the shutter”*. DW-2 Nutan Gupta was cross examined by the defendant Amit Katyal, and he denied the suggestion that *“there is a proper shop admeasuring 4 feet in width and 8 inch in length and not a wooden almira as stated by me in my affidavit”*. He also stated that there is no roof on the top of the shutter and he denied the suggestion that there is a roof on the top of the shutter.

28. DW-2 was produced by the appellant/defendant Amit Katyal. He was the witness of the appellant/defendant Amit Katyal, and there is no reason to disbelieve his testimony. As noticed above, even the defendant/appellant Amit Katyal did not disclose as to what material the roof over the wooden almirah is made up of. If the submission of the appellants that only partial demolition of their respective shops had been carried out were to be accepted, it would mean that a cross section of the entire shop of the respective appellant/defendant would have existed post demolition, with not only the roof but also with walls in masonry - extending upto a depth of 6-8 inches. However, no evidence in this regard has been led by either of the appellant/defendants. On the contrary, the evidence which has come on

record is that there is no roof, and all that exists is a wooden almirah placed along with the wall, which is now claimed to be the tenanted premises. Pertinently, it was not sought to be established by the appellants that the side walls survived the demolition upto a depth of 6” - 8”.

29. Thus, this Court concludes that no part of the respective tenanted premises of the two appellants remained in existence post the demolition undertaken for road widening on the directions of the MCD. By merely putting up wooden almirah alongwith exterior wall of the plaintiff/respondent, the respective appellants cannot revive their rights under the lease which stood determined under Section 111(c) of the Transfer of Property Act, since the interest of the lessor/respondent/plaintiff stood terminated in respect of the two shops in question with the demolition of the shops for road widening.

30. Reliance placed on ***T. Lakshmipathi*** (supra) is of no avail. I may particularly refer to paras 22 to 24 of the said decision, which are relied upon by Mr. Mehta and the same read as follows:

“22. A lease of a house or of a shop is a lease (sic) only of the superstructure but also of its site. It would be (sic) not only the site but also the land beneath ceases to exist by an act of nature. In the (sic) case the appellants who are the successor of the tenancy right have demolished the superstructure but the land beneath continues to exist. The entire tenancy premises have not been lost. Moreover, the appellants cannot be permitted to take shelter behind their own act prejudicial to the interest of the respondent No. 1 under whom the respondents No. 2 and 3 were holding as tenants and then inducted the appellants.

23. In *D.G. Gouse & Co. (Agents) Pvt. Ltd. v. State of Kerala and Anr.*, [1980]1SCR804, while dealing with Entry 49 of List II of the Seventh Schedule of the Constitution, making a reference to Oxford English Dictionary, this Court has held that the site of the building is a component part of the building and therefore inheres in the concept or ordinary meaning of the expression 'building'. Referring to *Corporation of the City of Victoria v. Bishop of Vancouver Island*, AIR 1921 PC 240, it was held that the word 'building' must receive its natural and ordinary meaning as 'including the fabric of which it is composed, the ground upon which its walls stand and the ground embraced within those walls'.

24. We are, therefore, of the opinion that in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of subject matter of demise and the destruction of the building alone does not determine the tenancy when the land which was site of the building continues to exist; more so when the building has been destroyed or demolished neither by the landlord nor by an act of nature but solely by the act of the tenant or the person claiming under him. Ample judicial authority is available in support of this proposition and illustratively we refer to *George J. Ovungal v. Peter*, AIR1991Ker55, *Rahim Bux and Ors. v. Mohammad Shafi*, AIR1971All16, *Hind Rubber Industries Pvt. Ltd. v. Tayebhai Mohammedbhai Bagasarwalla and Ors.*, AIR1996Bom389 and *Jiwanlal & Co. and Ors. v. Manot & Co., Ltd.*, . The Division Bench decision of Kerala High Court in *Dr. V. Sidharthan v. Pattiori Ramadasan*, AIR1984Ker181, appears to take a view to the contrary. But that was a case where the building was totally destroyed by fire by negligence of the tenant. It is a case which proceeds on very peculiar facts of its own and was rightly dissented from by Bombay High Court in *Hind Rubber Industries Pvt. Ltd. v. Tayebhai Mohammedbhai Bagasarwalla and Ors.*”.

31. The facts of the present case are materially different from the case decided by the Supreme Court in *T. Lakshmipathi* (supra). In the said case, it appears that the demolition had been carried out by the tenant himself. In that situation, the Supreme Court held that since the land underneath the building/super structure continued to exist, the tenancy could not be said to be determined. However, in the present case, not only the super structure which was leased out to the respective appellants, but also the land beneath the super structure ceased to exist – inasmuch, as, the said land was encroached land, and the MCD took over the land for road widening. Thus, the said decision has no application in the facts of the present case.

32. In view of the above, the substantial question of law is answered in favour of the respondent/plaintiff and against the appellants. The appeal stands dismissed. The parties shall bear their respective costs.

VIPIN SANGHI, J

AUGUST 31, 2015

B.S. Rohella /ST