

**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH.**

**R.S.A No.2600 of 2016(O&M)  
Date of decision :17.11.2016**

**International Institute of Neuro Sciences & Oncology Ltd.,  
Chandigarh and another**

**..... Appellants**

**Versus**

**Sahibjit Singh Sandhu and others**

**..... Respondents**

**CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH**

Present: Mr.Vikas Bahl, Sr. Advocate  
with Mr. Parwinder Singh, Advocate and  
Ms.Japneet Kaur, Advocate  
for the appellants.

Mr.Arun Jain, Sr. Advocate  
with Mr. Divanshu Jain, Advocate  
and Mr. R.V.S.Chugh, Advocate  
for the respondents.

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**DARSHAN SINGH,J**

The present appeal has been preferred against the judgment and decree dated 19.03.2016 passed by the learned Additional District Judge, Chandigarh, whereby the appeal filed by the appellants-defendants against the judgment and decree dated 28.01.2014 passed by the learned Civil Judge (Sr. Division), Chandigarh, has been dismissed.

2. Respondents-plaintiffs filed the suit for ejectment of defendants from the demised premises i.e. S.C.O No. 18-19, Sector-

34, City Sub-centre, Chandigarh comprised of basement portion, ground floor, first floor, second floor, third floor and fourth floor, which was let out to them by the plaintiffs vide lease deed dated 20.09.1996 and also for the recovery of Rs. 13,02,090/- as arrears of rent w.e.f. 01.11.2000 to 31.03.2001 at the rate of Rs. 2,60,418/- per month along with interest at the rate of 12% per annum amounting to Rs. 40,000/- and for future damages w.e.f. 01.04.2001 onwards at the rate of Rs.2,60,418/- along with interest at the aforesaid rate.

3. Plaintiffs are the owners/landlord of the demised premises. The same was let out by them to the appellants-defendants vide lease deed dated 20.09.1996. According to terms and conditions, the tenancy was the monthly tenancy starting from 1<sup>st</sup> of each month and expiring at the end of the month according to the British Calender. The water and electricity charges were to be borne by the appellants-defendants besides the rent. The rent of the demised premises was settled as below as per clause 3 of the lease deed:-

|     |                         |                |
|-----|-------------------------|----------------|
| i.  | 1.08.1996 to 31.07.1997 | Rs. 1,95,000/- |
| ii  | 1.08.1997 to 31.07.1998 | Rs. 2,09,000/- |
| iii | 1.08.1998 to 31.07.1999 | Rs.2,25,347/-  |
| iv  | 1.08.1999 to 31.07.2000 | Rs.2,42,249/-  |
| v   | 1.08.2000 to 31.07.2001 | Rs.2,60,418/-  |

That as the premises in question was newly constructed and period of 5 years has not yet expired, so the building was exempted from the operation of provisions of East Punjab Urban Rent Restriction Act, 1949 (for short 'Rent Act') 2. In part performance of the lease deed dated

20.09.1996, defendants started paying the rent to the plaintiffs-respondents including the increase of the rent. The clause of the lease deed regarding increase of the rent was duly acted upon by the defendants. The rent of the demised premises w.e.f. 01.08.1999 was Rs. 2,42,249/-. The same was being paid by the defendants after deducting the Tax Deduct at Source (for short TDS). That w.e.f. 01.08.2000 the appellants were tenants in the demised premises on payment of the rent at the rate of Rs. 2,60,418/- per month. Plaintiffs had already instituted the suit for recovery of the arrears of rent due against the appellants up to 30.10.2000 which is pending in the Court of learned Civil Judge (Jr. Division), Chandigarh.

4. Condition No. 13 (III) 1 of the lease deed read as under:-

“ In the event the lessee fails to pay the rent as required under this Deed or makes a breach of any of the terms and conditions or covenants hereby agreed, the lessors shall have the right to terminate this Deed and take over possession of the said premises.”

That the appellants committed the breach of aforesaid condition, so the tenancy of the appellants were terminated vide notice dated 17.11.2000, which was dispatched to the defendants on 30.12.2000 through registered A.D as well as U.P.C. In spite of the service of notice and termination of tenancy, the appellants have not delivered the vacant possession of the demised premises. Hence the suit.

5. Appellants-defendants contested the suit on the grounds *inter alia* that initially the terms and conditions were reduced into writing vide alleged lease deed dated 20.09.1996. But, the terms and conditions incorporated therein were never acted upon by the parties. Defendants

were never inducted as tenants under the plaintiffs in the demised premises on the terms and conditions mentioned in the alleged lease deed dated 20.09.1996. The possession of the demised premises was handed over to the defendants on 01.09.1996 when the terms and conditions of tenancy were settled orally by the parties and rate of rent were settled at Rs. 1,95,000/- without any enhancement. Appellants-defendants are not defaulter towards any term and conditions settled between the parties orally. At the time of creation of tenancy, it was agreed that appellants-defendants would not be evicted from the demised premises and accordingly they made huge investment to the tune of Rs. 3.5 crores after raising the loan from the banks for setting up a hospital in the demised premises. More than Rs.50 lacs have been spent on interior and incorporators in the demised premises, which cannot be removed. It is further pleaded that the alleged lease deed is an unregistered document and the conditions incorporated therein were never acted upon by the parties. As the impugned lease deed was an unregistered document, as such the same cannot be relied upon. Appellants also denied that the tenancy commenced from 01.09.1996. They also denied that the building in dispute was exempted from the operation of the provisions of the Rent Act as applicable to Union Territory, Chandigarh and it was pleaded that the sewerage connection was given much to 20.08.1996. It was further pleaded that condition no. 13 (III) 1 of the lease deed is not enforceable. They had already paid the rent up to 31.03.2001 and the rent w.e.f. 01.04.2001 to 31.07.2001 has been tendered in the Court along with interest at the rate of 9% per annum. They further pleaded that the

appellants-defendants have not committed any breach of condition of the tenancy. They have also not received any notice regarding termination of tenancy. Appellants-defendants have also raised various legal and preliminary objections and pleaded for dismissal of the suit.

6. From the pleadings of the parties, the following issues were framed by the learned trial Court vide order dated 05.11.2001:-

1. Whether the plaintiffs are entitled to eject the defendants from the suit premises as alleged?OPP
2. Whether the plaintiffs are entitled to recover Rs. 13,02,090/- on account of arrears of rent etc. alleged from the defendants?OPP
3. What is the rate of rent?OP parties
4. Whether the plaintiff is entitled to get interest, if so at what rate?OPP
5. Whether the suit has not been filed by competent person?OPP
6. Whether no legal and valid notice was served upon the defendant terminating the tenancy?OPD
7. Relief..

7. The following additional issues were also framed by the learned trial Court vide order dated 01.09.2011 and 03.09.2012:-

- 6(a) Whether this Court has jurisdiction to entertain and try the present suit or not?OPD
- 6(a-1) (wrongly numbered as 6a) Whether the plaintiffs are estopped by their act and conduct in terminating the lease by issuing notice under Transfer of Property Act after having allowed the defendant to incur huge amount of Rs. 9.5 crore by having a loan amount from the bank and they cannot change the stand to the detriment of the defendant?OPD
- 6(b) Whether the suit is liable to be dismissed on account of concealment of facts and over reaching the Hon'ble Court?OPD

8. On appreciating the material on record and contentions raised by learned counsel for the parties, the learned trial Court held that the plaintiffs-respondents have not been able to prove that the defendants-appellants were in arrears of the rent. However, the suit of the plaintiffs-respondents for ejectment was decreed as the tenancy was

terminated. Thus, the suit filed by the plaintiffs-respondents was partly decreed with costs and decree for ejectment qua the demised premises was passed in favour of plaintiffs-respondents. However, the suit of the plaintiffs-respondents with regard to the recovery of arrears of rent was dismissed vide impugned judgment and decree dated 28.01.2014.

9. Aggrieved with the aforesaid judgment and decree, appellants-defendants preferred the appeal. The same has also been dismissed by the learned Additional District Judge, Chandigarh vide impugned judgment and decree dated 19.03.2016. Hence this Regular Second Appeal.

10. I have heard Mr.Vikas Bahl, Sr. Advocate with Mr. Parwinder Singh, Advocate and Ms.Japneet Kaur, Advocate learned counsel for the appellants, Mr.Arun Jain, Sr. Advocate with Mr. Divanshu Jain, Advocate and Mr. R.V.S.Chugh, Advocate learned counsel for the respondents and have carefully gone through the record of the case.

11. Initiating the arguments, learned counsel for the appellants contended that the suit for ejectment has been filed by the plaintiffs-respondents on a particular ground i.e. the arrears of rent. But, as per the findings of learned Courts below and even in the previous suit filed by the plaintiffs-respondents for recovery of arrears of rent, it was found that the appellants-defendants were not in arrears of rent and the entire rent was already paid. So, there was no ground for termination of the tenancy. Learned Courts below had ordered the eviction entirely on different grounds i.e. due to afflux of time of tenancy, which was never the ground

set out by the plaintiffs-respondents in the plaint. Learned Courts below were not justified to grant the decree on the ground which was never the part of pleadings. He relied upon cases **Prataprai N. Kothari Vs. John Braganza 1999(3) R.C.R (Civil) 119, Ikrar Mohammad Vs. Isub Khan 2010(2) JabLJ 351, Darbara Singh and another Vs. State of Punjab and others CWP No.11559 of 2012, d/d 24.12.2015 and Harsh Vardhan Vs. Union of India 2006(2) R.C.R (Civil) 447.**

12. He further contended that the suit of the plaintiffs-respondents was also barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure, 1908 (for short 'CPC'). It is the admitted case of the plaintiffs-respondents that earlier they had filed the suit for recovery of the arrears of rent in November 2000 on the plea that the appellants-defendants were in arrears of rent w.e.f. 01.08.2000. In the present suit also, the plaintiffs have sought the recovery of arrears of rent from November 2000, thus he pleaded that the alleged violation of condition No. 13(III) 1 had already taken place when the first suit was filed. So, the present suit is barred by the provisions of Order 2 Rule 2 CPC. He further contended that the pure question of law can be raised for the first time even in the second appeal. To support his contentions, he relied upon case **Punjab Urban Development Authority and others Vs. Dashmesh Educational Society (Regd.) and others 2005(3) R.C.R (Civil) 245, Mohd. Liaquiddin and Anr. Vs. Kamala Devi Misra (dead) by L.Rs and others 2010(1)R.C.R (Civil) 687, Arjan Singh Vs. Babu Ram 2001(4) R.C.R (Civil) 409 and Mehtab Singh Advocate Vs. Shri Tilak Raj Arora and anr. 1988(1) P.L.R 269.**

13. He further contended that in fact the period of tenancy was extended by the plaintiffs-respondents vide letter dated 04.09.1998. The period of tenancy was extendable as per clause 6 of the lease deed. He contended that intention of the parties was to create the perpetual lease and that is why the appellants-defendants have spent huge amount to establish the hospital. They have to take the loan from the bank, so the appellants-defendants were estopped by their own act and conduct to seek the eviction of the appellants.

14. He further contended that a specific issue no. 6(a-1) was framed by the learned trial Court vide order dated 03.09.2012 with respect to estoppel, but the learned First Appellate Court has not given any finding on this issue. The learned First Appellate Court has also not given the issue wise findings, which is required under law and has resulted in a serious prejudice to the appellants. Thus, he contended that the findings recorded by the learned First Appellate Court are erroneous. He relied upon cases **B.V.Nagesh and another Vs. H.V.Sreenivasa Murthy 2011(1) R.C.R (Civil) 802**, **H.Siddiqui (D) by Lrs. Vs. A.Ramalingam 2011(2) R.C.R (Civil) 385** and **Smt. Harjit Grewal and others Vs. Dr. Vinod Kumar Batra and others 2010(5) R.C.R (Civil) 340**.

15. He further contended that the appellants-defendants were also protected under Section 53-A of Transfer of Property Act, 1882( for short T.P.Act). The said ground was also taken by the appellants before the learned First Appellate Court. He contended that as the protection of Section 53-A of T.P.Act emanates from the record, so this plea can be

taken even before this Court in the second appeal. He contended that as the terms of the lease was extended vide letter dated 04.09.1998 up to 01.08.2006, thus by virtue of the protection under Section 53-A of T.P.Act available to the appellants, the plaintiffs-respondents were not entitled to seek the possession. He relied upon cases **Maneklal Mansukhbhai Vs. Hormutsji Jamshedji Ginwalla and Sons 1950 AIR (SC)1** and **State Bank of Bikaner & Jaipur Vs. Vijay Kumar 1999(2) R.C.R (Civil) 679**.

16. He further contended that the plaintiffs-respondents have waived the notice regarding termination of tenancy. As per notice, the last date of the lease was 31.01.2001. But, in the suit the plaintiffs-respondents have claimed the rent up to 31.03.2001. Meaning thereby, they have accepted the tenancy up to 31.03.2001. So, they have waived the notice of termination of tenancy. To support his contentions, he relied upon cases **Kantilal Kachhi Vs. Smt. Ashokalata Devi and others 1977 AIR (Patna) 118** and **Tyabali Jaffarbai Vs. Messrs Asha and Co. 1970(1) SCC 46**.

17. He further contended that there was no clause regarding forfeiture of tenancy due to non-payment of the rent. So, the tenancy on that account cannot be terminated. Moreover, it is also not established that there was any agreement between the parties with respect to the increase of the rent and that appellants were in arrears of rent. Thus, he finally contended that due to aforesaid reasons the findings recorded by learned Courts below are erroneous.

18. Per contra, learned senior counsel for the respondents-

plaintiffs contended that this fact is not disputed that provisions of the Rent Act are not applicable to the demised premises. He contended that the demises premises were leased out only for a period of four years and six months vide lease deed dated 20.09.1996. The said lease deed was unregistered document. It was a month to month lease and plaintiffs-respondents were entitled to terminate the lease. Plaintiffs-respondents have issued the notice Ex.PW6/33 dated 17.11.2000 as the appellants-defendants did not proved to be good tenants and did not pay the rent as per terms and conditions of lease deed. He contended that even the service of notice was not required and filing of the suit was itself a notice of termination of tenancy. He relied upon cases **Neelam Vs. Sanjay Pahwa 2016(1) R.C.R (Rent) 696**, **M/s Nopany Investments (P) Ltd. Vs. Santokh Singh (HUF) 2008(1) R.C.R (Civil) 270**, **Hazari Vs. Vinod Kumar (now deceased) through Lrs. And others 2015(4) R.C.R (Civil) 688**, **Harikesh Vs. Smt. Narain Devi (widow) and others 2010 (1) R.C.R(Rent) 99** and **M/s Mandap International Pvt. Ltd. Vs. M/s Ahuja Kashyap Pvt. Ltd. 2014(5) R.C.R (Civil) 797**.

19. He further contended that in the plaint, plaintiffs-respondents have mentioned both the grounds that appellants are in arrears of rent and also that their tenancy has been terminated by service of notice. Thus, he contended that it cannot be stated that the learned Courts below have traveled beyond the scope of the suit.

20. He further contended that mere this fact that plaintiffs-respondents have claimed the rent up to 31.03.2001 cannot be construed to be the waiver of the notice of termination of tenancy. He contended

that the filing of the suit shows the intention of the plaintiffs-respondents not to retain the appellants as their tenants. He contended that the payment of rent after termination will represent the damages for use and occupation. He relied upon cases **Mangal Dass Vs. Bahadur Singh Chauhan 2006(4) R.C.R (Civil) 310, Saraswati Vs. Dr. Suresh Jhawar 1992(2) R.C.R (Rent) 227, Harbhajan Singh Vs. Munshi Ram 1956 PLR 328, Punjab State Electricity Board Vs. State of Punjab 2003(1) R.C.R (Civil) 48, M/s Jeevan Diesels and Electricals Ltd. Vs. M/s Jasbir Singh Chadha (Huf) and another 2011(4) R.C.R(Civil) 824).**

21. He further contended that there is no proof regarding extension of tenancy. The letter dated 04.09.1998 is not proved in accordance with law. The tenancy also cannot be extended with unregistered document. Thus, he contended that even by efflux of time, the tenancy of appellants had come to an end even before filing of the suit.

22. He further contended that no plea of applicability of Order 2 Rule 2 CPC and Section 53 of T.P.Act was raised in the written statement. Both, these questions are the mixed questions of law and facts and cannot be allowed to be raised for the first time in the Second Appeal. To support his contentions, he relied upon cases **Malkiat Singh and another Vs. Karnail Singh and others R.S.A No. 4744 of 2010, d/d 27.09.2016, Smt. V. Rajeshwari Vs. T.C. Saravanabava 2004(1) R.C.R (Civil) 498 and Ram Chander and others Vs. Kali Ram 2010(33) R.C.R (Civil) 857.**

23. He further contended that the present suit has been filed on

the basis of the subsequent cause of action i.e. the termination of tenancy. So, the earlier suit filed by plaintiffs for recovery of arrears of rent is no ground to attract the principle of *res judicata* or estoppel. He relied upon case **State of Punjab through the Manager, Govt. Seed Farm Aspal, Tehsil Muktsar, District Faridkot Vs. Commissioner, Ferozepur Division, Ferozepur and others 2012 (3) R.C.R (Civil) 401.**

24. He further contended that Section 53-A of T.P. Act is also not applicable as defendants-appellants are not claiming to have come in the possession of the demised premises in pursuance of the written lease dated 20.09.1996. Rather, they have taken the plea that the terms and conditions of the lease were orally settled. There has to be written agreement in order to attract Section 53-A of T.P.Act. To support his contentions, he relied upon cases **Joginder Kaur Vs. Hindu undivided family of Kidar Nath & Sons and others 2000(2) R.C.R .(Civil) 452 and Shrimant Shamrao Suryavanshi Vs. Pralhad Bhairoba Suryavanshi 2002(1) R.C.R (Rent) 302.** Thus, he contended that as the tenancy of appellants was validly terminated, so their eviction has been rightly ordered by the learned Courts below.

25. I have duly considered the aforesaid contentions.

26. As per provisions of Section 100 CPC, in the second appeal, it is not permissible for the High Court to interfere with the concurrent findings of fact recorded by the learned Court below except in two situations. The first is that when material or relevant evidence is not considered which if considered would have led to an opposite conclusion. The second situation is where a findings has been arrived at by the

learned Lower Appellate Court by placing reliance on inadmissible evidence which if it was omitted, would have led to the opposite conclusion. The second appeal is also maintainable where the findings recorded by the learned Courts below are perverse or that the factual findings are based on no evidence. Keeping in view the aforesaid principles of law, we have to examine the case in hand.

27. As per the case of the plaintiffs-respondents, the demised premises were let out to the appellants-defendants vide lease deed dated 20.09.1996 for a period of four and half years commencing from 01.08.1996 to 31.01.2001. It was also the case of the plaintiffs-respondents that the initial rate of rent was Rs. 1,95,000/- per month w.e.f. 01.08.1996 to 31.07.1997 and thereafter, the rate of rent was to be enhanced every year on 1<sup>st</sup> August by 7 ½ % of the monthly rent payable during the immediate proceeding year. The plaintiffs-respondents have alleged that the tenancy of the appellants was terminated vide notice dated 17.11.2000 Ex.PW6/33.

28. However, in the written statement, appellants-defendants have pleaded that they were never inducted as tenants on the terms and conditions mentioned in the alleged lease deed dated 20.09.1996. The possession of the demised premises was handed over to them on 01.09.1996 when the terms and conditions of tenancy were settled orally by the parties and the rate of rent was settled to be Rs. 1,95,000/- without any enhancement.

29. There is absolutely no dispute with the proposition of law that as per Section 107 of the T.P. Act, a lease of immovable property

from year to year or for any term exceeding one year can be made only by a registered instrument. Same is the requirement of Section 17 (1)d) of the Indian Registration Act. Admittedly, in the present case, the lease deed dated 20.09.1996 is unregistered document. So, the said unregistered lease deed cannot be taken into consideration with respect to the terms and conditions of the lease. It can only be used for the collateral purposes. The terms and conditions of the lease are the main purpose of the contract of lease. Thus, as the lease deed dated 20.09.1996 is unregistered document, which cannot be taken into consideration so, the lease of the demised premises shall be the lease from month to month.

30. Appellants-defendants have projected that the period of lease was extended voluntarily by the appellants-defendants vide letter dated 04.09.1998 (copy Ex.DW2/3). As per the contents of the said letter, the period of lease was extended up to 01.08.2006. As already mentioned, as per the provisions of Section 107 of the T.P. Act, the lease of immovable property from year to year or for any term exceeding one year can only be by a registered instrument. If the lease deed dated 20.09.1996 is inadmissible in evidence except for collateral purposes being unregistered, the same principle of law will apply to the letter Ex.DW2/3 and will not be admissible in evidence to show the extension of the period of tenancy, which cannot be stated to be a collateral purpose by any stretch of imagination.

31. Moreover, the letter Ex.DW2/3 is not legally proved. This document has been brought on record in the statement of DW-2-Rajesh Sharma, Assistant Manager, Indian Overseas Bank, Sector-32,

Chandigarh, marking of exhibit on this letter, in the examination in chief of DW-2 Rajesh Sharma, was objected to. In the cross-examination, this witness stated that he joined this branch of the bank for the first time in January 2011 and he never remained posted in the said branch earlier. He further deposed that he does not know Sahibjit Singh Sandhu personally. He has never seen him signing any document. So, DW-2 Rajesh Sharma, is not conversant with the handwriting/signatures of Sahibjit Singh Sandhu. He was not even posted in this branch of Indian Overseas Bank when the loan case of the appellants was processed. Thus, mere production of the letter Ex.DW2/3 from the record by this witness will not prove its due execution particularly when the marking of this document as exhibit was already objected to by the plaintiffs-respondents when the same was tendered in evidence. This letter has also not been put in the cross-examination of PW-6 Sahibjit Singh Sandhu, the alleged executant of the letter. So, the letter Ex.DW2/3 dated 04.09.1998 is inadmissible in evidence to establish any extension of the lease period.

32. Learned counsel for the plaintiffs-respondents faced with the situation that the lease deed dated 20.09.1996 being an unregistered document, which could not show the agreement between the parties with respect to the yearly increase in the rent has not been able to challenge the concurrent findings of fact recorded by the learned Courts below on appreciation of the evidence that the appellants-defendants were not proved to be in arrears of rent.

33. In order to ascertain the reasons for termination of tenancy, we have to take into consideration the notice of termination of tenancy

Ex.PW6/33 in addition to the averments of the plaint. It has been repeatedly mentioned in the plaint that the tenancy of the appellants has been terminated vide notice dated 17.11.2000 (copy Ex.PW6/33). The perusal of the notice dated 17.11.2000 depicts that the tenancy has been terminated not only on the ground that the appellants were in arrears of rent, but it is also mentioned that the appellants have not proved to be good tenants. If, the tenants do not prove to be good tenants that can also be a valid ground for termination of tenancy. As per the direction given in the notice dated 17.11.2000, tenancy of the appellants stood terminated after the expiry of period of three months. The period of three months will complete on 17.02.2001. As per the case of the plaintiffs, the period of tenancy was w.e.f. 01.08.1996 to 31.01.2001. The present suit has been filed on 09.04.2001 when the period of tenancy had already expired. As already discussed in detail in the upper portion of the judgment, the appellants have not been able to establish the extension of the period of tenancy. So, when the present suit was filed the tenancy of the appellants had already come to an end. In that situation, even the filing of the suit itself is a notice regarding the termination of tenancy. The Hon'ble Apex Court in case **M/s Nopany Investments (P) Ltd. Santokh Singh (HUF) (supra)** has laid down as under:-

“In any view of the matter, it is well settled that filing of an eviction suit under the general law itself is a notice to quit on the tenant. Therefore, we have no hesitation to hold that no notice to quit was necessary under Section 106 of the Transfer of Property Act in order to enable the respondent to get a decree of eviction against the appellant. This view has also been expressed in the decision of this Court in **V. Dhanappal Chettiar V. Yesodai Ammal, 1979(2) RCR (Rent) 352;**

[AIR 1979 SC 1745]”

The same proposition of law has been laid down by this Court in cases **Neelam Vs. Sanjay Pahwa (supra)**, **Hazari Vs. Vinod Kumar (now deceased) through Lrs. and others (supra)** and **Harikesh Vs. Smt. Narain Devi (widow) and others (supra)**. Thus, there is no escape from the conclusion that the tenancy of the appellants was validly terminated by the plaintiffs-respondents.

34. There is no dispute with the proposition of law that the pleadings is the foundation in the civil litigation. All the grounds of attack and defence have to be pleaded and then to prove the same by leading cogent and convincing evidence. At the same time, it is settled legal position that a pure question of law can be even raised for the first time in the second appeal. But, where the plea is a mixed question of law and facts, the same cannot be raised for the first time in the second appeal. In the instant case, learned counsel for the appellants has raised the plea that the suit of the plaintiffs-respondents were barred under the provisions of Order 2 Rule 2 CPC due to the filing of the previous recovery suit and that the appellants-defendants were entitled for protection of provisions of Section 53-A of T.P. Act. Both these grounds were not pleaded by the appellants-defendants in their written statement.

35. Learned counsel for the appellants-defendants has referred the impugned judgment of the learned First Appellate Court wherein it is mentioned that in the grounds of appeal the appellants has taken the plea of the protection of Section 53-A of T.P.Act. The grounds of appeal cannot be a substitute of plaint/written statement and does not fall within

the ambit of pleadings. Order 6 Rule 1 CPC defines the pleadings, which reads as under:-

“Pleading” shall mean plaint or written statement.”

In view of the aforesaid provision of law, the grounds of appeal cannot be considered to be the pleadings. So, if the plea of Section 53-A of T.P.Act has been raised in the grounds of appeal, that will not cure the defect and cannot be the part of the pleadings of the appellants. Thus, virtually both these pleas were not raised by the appellants-defendants in the pleadings and have been raised for the first time in the second appeal. This Court in case **Balwant Singh Vs. Mehar Singh 1973 PLJ 668** has laid down that plea of part performance under Section 53-A of T.P.Act embraces questions both of law and fact and cannot be raised for the first time in the second appeal. The same principle of law has been laid down in case **Karam Chand and others Vs. Banwari Lal 1964 P.L.R 1201**.

36. The plea of protection of Section 53-A of T.P. Act is not available to the appellants on other grounds also. The Hon'ble Apex Court in **Shrimant Shamrao Suryavanshi's case (supra)** has laid down as under:-

“16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are-

- 1) there must be a contract to transfer for consideration any immovable property;
- 2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- 3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

- 4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- 5) the transferee must have done some act in furtherance of the contract; and
- 6) the transferee must have performed or be willing to perform his part of the contract.”

Thus, as per the aforesaid conditions, the contract must be in writing signed by the transferor or by someone on his behalf and the transferee must in part performance of the said written contract take the possession of the property or any part thereof. In the instant case, it is the categoric stand of the appellants-defendants in the written statement that they were never inducted as tenants in the premises in question on the terms and conditions mentioned in the alleged deed dated 20.09.1996. In fact, the possession of the demised premises was handed over to them on 01.09.1996 when the terms and conditions of tenancy were settled orally by the parties. So, as per the case of appellants-defendants, the terms and conditions of the tenancy were settled orally and they came in possession of the demised premises as a result of the oral settlement and not in pursuance of the terms and conditions of the lease deed dated 20.09.1996. So, they do not satisfy conditions no. 2 and 4 as laid down by the Hon'ble Apex Court in **Shrimant Shamrao Suryavanshi's case (supra)** reproduced above.

37. Moreover, it is further the settled principle of law that a party cannot be allowed to approbate and reprobate at the same time. Reference can be made to cases **Karam Kapahi & others Vs. M/s Lal Chand Public Charitable & Anr. 2010 AIR (SC) 2077** and **Rajni Sanghi Vs. Western Indian State Motors Ltd. & Ors. 2016(1) R.C.R (Civil) 941.**

Thus, in the written statement, appellants-defendants have taken the stand that it was the oral tenancy and now they want to take the protection of Section 53-A of T.P. Act by making the reference to the lease deed dated 20.09.1996.

38. There is no denial to the fact that the period of tenancy, by taking from any angle, has already expired before the filing of the suit. The protection under Section 53-A of T.P. Act shall only be available during the subsistence of the contract. Reference can be made to case **Bharat Bijlee Limited vs. P.S. Prasad and Family (HUF) 2011(122) DRJ 66**. Thus, in view of the aforesaid legal position, the appellants cannot claim the protection of Section 53-A of T.P. Act.

39. Similarly, the provisions of Order 2 Rule 2 CPC are not applicable to the facts of the present case. The previous suit for recovery was filed by the plaintiffs-respondents on 22.11.2000. In that suit, the plaintiffs-respondents have sought the recovery of rent for the previous period. By that time, appellants had no cause of action to file the suit for ejectment as by that date, the period of tenancy had not expired. As per the notice dated 17.11.2000 (copy Ex.PW6/33), the tenancy was to be terminated after the expiry of three months from the date of the notice. So, the cause of action to file the suit for ejectment had accrued to the plaintiffs-respondents only during the pendency of the previous suit and the said cause of action was not available on the date of institution of the previous suit.

40. No doubt, as per the terms of the lease deed, the tenancy was to expire on 31.01.2001 and as per the notice of termination of tenancy

dated 17.11.2000, the period of notice comes to an end on 17.02.2001. But, in the present suit, the plaintiffs-respondents have claimed the arrears of rent w.e.f. 01.11.2000 to 31.03.2001. But, it is the settled principle of law that the acceptance or demand of rent will not amount to waiver of the notice of termination of tenancy. In case **Saraswati Vs. Dr. Suresh Jhavar (supra)**, this Court has laid down that the acceptance of rent from tenant after the service of notice for termination of tenancy will not afford the ground for holding that landlord had assented to a new contractual tenancy. The Division Bench of this Court in case **Harbhajan Singh Vs. Munshi Ram (supra)** has laid down that acceptance of rent by the landlord after the expiration of a notice to quit is not in itself a waiver on his part of the notice so given. The same principle of law has been reiterated by this Court in case **Mangal Dass Vs. Bahadur Singh Chauhan (supra)**. Another Division Bench of this Court in case **Punjab State Electricity Board Vs. State of Punjab (supra)** has gone to this extent that acceptance of rent or demand of rent would not confer right on the tenant to continue in possession. It was further laid down that the rent so paid by the tenant will represent the damages for use and occupation. The Hon'ble Delhi High Court in case **M/s Jeevan Diesels and Electricals Ltd. Vs. M/s Jasbir Singh Chadha (Huf) and another (supra)** has also laid down that receipt of rent by the landlord after termination of tenancy can be taken as damages towards use and occupation because a tenant is bound to pay charges till he vacates the tenanted premises. Thus, mere demand of the rent in the present suit up to 31.03.2010 cannot be stated to be a waiver on the part

of the plaintiffs-respondents to the notice of termination of tenancy because the filing of the suit shows the clear intention of the plaintiffs-respondents to terminate the tenancy and to seek the eviction of the appellants from the demised premises.

41. There is no dispute with the proposition of law that the learned trial Court as well as learned First Appellate Court are required to record the findings covering all the issues. In the instant case, the learned trial Court has framed the following additional issues:-

6(a) Whether this Court has jurisdiction to entertain and try the present suit or not?OPD

6(a-1) (wrongly numbered as 6a) Whether the plaintiffs are estopped by their act and conduct in terminating the lease by issuing notice under Transfer of Property Act after having allowed the defendant to incur huge amount of Rs. 9.5 crore by having a loan amount from the bank and they cannot change the stand to the detriment of the defendant?OPD

6(b) Whether the suit is liable to be dismissed on account of concealment of facts and over reaching the Hon'ble Court?OPD

It is evident from the judgment of the learned First Appellate Court that the learned First Appellate Court has only reproduced the main issues and no reference of the additional issues have been given. The additional issues no. 6-a relates to the jurisdiction of the Civil Court, additional issue no. 6 (a-1) relates to the applicability of the principle of estoppel on the ground that the defendants-appellants have spent huge amount by incurring the loan from the bank and additional issue no. 6(b) relates to concealment of facts by the plaintiffs/respondents.

42. The learned First Appellate Court in Para no. 13 of the judgment has mentioned that the suit has been filed within five years

from the initial inception of tenancy/lease deed and the law is settled that provisions of Rent Act as applicable to Chandigarh are not applicable to the present case as the building was new. The possession certificate and sewerage connection was issued on 20.08.1996 and the filing of the suit was competent within five years. So, the learned First Appellate Court has dealt with the issue regarding jurisdiction i.e. additional issue no. 6-a.

43. The learned First Appellate Court has not recorded any finding on issue no.6(b) as no such plea was raised before the learned First Appellate Court that the plaintiffs-respondents have concealed any fact and have tried to over reached the Court. It is a common practice that various pleas are raised in the pleadings, but some of them are not raised at the time of arguments and such pleas are deemed to have been given up. Exactly, this has happened in the present case. Moreover, learned counsel for the appellant has not been able to show to this Court as to what material facts have been concealed by the plaintiffs-respondents and in what manner they have tried to overreach the Court. Consequently, the omission of any finding on issue no.6(b) by the learned First Appellate Court has not resulted in any prejudice to the appellants as the appellants-respondents have not been able to establish this issue, though the onus to prove the same was upon them.

44. No doubt, learned First Appellate Court has not specifically dealt with issue no.6 (a-1) with respect to estoppel. The Hon'ble Supreme Court in case **P. Purushottam Reddy Vs. M/s Pratap Steels Ltd. 2002(2) R.C.R.(Civil) 70** has laid down that where the material is available on record, the Appellate Court should take up the matter itself

and proceed to record its finding instead of remand for fresh findings on the issue which has been left out. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided. So, this Court can itself deal with this issue on the basis of material available on record.

45. Issue no.6 (a-1) is with respect to operation of the principle of estoppel against the plaintiffs on account of their act and conduct in terminating the lease by issuing a notice after having allowed the appellants-defendants to incur huge amount by securing the loan from the bank. The appellants-defendants have taken the demised premises on lease to set up the hospital. There is no material on record to show that it was a perpetual lease. As already discussed, the extension of the period of tenancy as alleged by the appellants is not established. If the appellants have spent the money for establishment of hospital in the demised premises that cannot be a ground to estopp the plaintiffs-respondents to terminate the tenancy and seek the ejectment. Learned counsel for the appellants has again referred to clause 6 of the lease deed to contend that the intention of the parties was to create the perpetual lease. But, as already mentioned, the appellants-defendants cannot blow hot and cold in the same breath. On the one hand, they are contending that the tenancy was oral and on the other hand by referring to clause/condition no. 6 of the lease deed, they want to contend that the lease was extendable. So, there can be no question of applicability of the principle of estoppel against the plaintiffs-respondents.

46. This Court will be failing in its duty if the judgments relied

upon by learned counsel for the appellants are not discussed. In **Prataprai N. Kothari's case (supra)**, it was laid down by the Hon'ble Apex Court that the evidence beyond pleadings cannot be taken into consideration, which is not the controversy in the present suit. In **Ikrar Mohammad's case (supra)**, the Hon'ble Madhya Pradesh High Court has held that the decision of a case cannot be based on grounds outside pleadings of the parties. But, in the instant case, as already discussed the notice of termination of tenancy is very much referred in the plaint and in the notice in addition to the ground of arrears of rent, the plaintiffs-respondents have categorically mentioned that appellants-defendants did not proved to be good tenants. The decree for ejectment has been sought on the basis of termination of tenancy which is clearly pleaded. In **Darbara Singh's case (supra)**, the parties were not conscious of the plea of collusion and were taken by surprise, whereas in the instant case, there is no such plea that the appellants-defendant were not aware about the reasons for the termination of tenancy. In **Harsh Vardhan's case (supra)**, this Court has laid down that the plaintiff has to prove his own case and would have to stand on his own legs. I fail to understand as to how this authority is applicable to the controversy.

47. Counsel for the appellants-defendants has also relied upon case **M/s Prince Rubber and Plastics Vs. M/s Remington Rand of India Ltd. 1998(3) R.C.R (Civil) 579**. In that case, it as laid down that the landlord was not entitled to evict the tenant because there was no forfeiture clause in the lease deed. But, in the instant case, as already mentioned, the arrears of rent was not the sole reason for termination of

tenancy. So, this authority will have no application to the facts of the case. In **Arjan Singh Vs. Babu Ram's case (supra)**, the facts were not in dispute with respect to the applicability of Order 2 Rule 2 CPC. But, in the instant case, as discussed above, the present suit has been filed on the subsequent cause of action. So, this authority is of no help to the appellants. Similar, is the position with respect to case **Mehtab Singh Advocate Vs. Shri Tilak Raj Arora and anr. (supra)**.

48. As discussed above, appellants are not entitled to the protection under Section 53-A of T.P. Act on various grounds, so cases **Maneklal Mansukhbhai Vs. Hormutsji Jamshedji Ginwalla (supra)** and **Sons and State Bank of Bikaner & Jaipur Vs. Vijay Kumar (supra)** are also of no help to appellants.

49. In view of the consistent rule of law laid down by the Division Bench of this Court in the cases referred above, case **Kantilal Kachhi Vs. Smt. Ashokalata Devi and others (supra)** cannot render any help to the appellants. Case **Tyabali Jaffarbhai Vs. Messrs Asha and Co. (supra)** is quite distinguishable on facts, because in that case the land lord has served the second notice on tenant adding a ground of *bona fide* requirement. But, the suit was filed on the basis of the first notice with respect to the non-payment of the rent. The Hon'ble Apex Court held that the service of the second notice will amount to the waiver of the first notice. But, in the instant case, the suit has been filed on the basis of second notice and not on the basis of the first notice dated 09.11.2000.

50. So, keeping in view my aforesaid discussion, there was valid termination of tenancy of appellants by plaintiffs-respondents and they

were entitled to seek the ejectment of the appellants-defendants from the demised premises.

51. Thus, keeping in view of my aforesaid discussion, there is no perversity or illegality in the concurrent findings recorded by the learned Courts below calling for any interference by this Court while exercising the limited jurisdiction under Section 100 CPC.

52. Consequently, no question of law, much less, the substantial question of law arises in the present appeal.

53. Therefore, the present appeal being devoid of merits, is hereby dismissed with no orders as to costs.

**November 17, 2016**

s.khan

**(DARSHAN SINGH)  
JUDGE**

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No