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

+ **RFA 722/2005**

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Date of Judgment: 17th May, 2017

SURINDER KRISHAN BAKSHI

..... Appellant

Through: Mr.P.S. Bindra, Adv. with Ms.Rishika
Aorra, Advocate.

versus

M/S S.K. MEDICOS P. LTD. & ANR.

..... Respondents

Through: Mr. S.P. Mishra, Adv. with Mr.Ramji
Pandey, Advocate.

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J. (ORAL)

1. The appellant/plaintiff has challenged the impugned judgment and decree dated 15th July, 2005 passed by the learned Additional District Judge, Delhi, to the extent of not allowing his claim for damages to furniture, fixtures & fittings and not granting pendent lite and future interest till the date of actual payment of the decretal amount.
2. Appellant/plaintiff had leased out the ground floor of premises No.A-271, Shivalik, New Delhi, to respondent/defendant No.1 through respondent/defendant No.2, who is Director of defendant No.1, vide registered lease deed dated 4th October, 2002 for a period of one year w.e.f. 01.10.2002 at a monthly rent of Rs.17,500/-.
3. It was, *inter-alia*, alleged in his plaint by the appellant/plaintiff that the defendants/respondents had damaged the furniture, fixture and fittings provided by him. The defendants had also caused damage to the tenanted premises. The appellant claimed damages for Rs.70,000/-.

The averments made by the appellant were vehemently denied by the defendants/respondents in their written statement.

4. After hearing the parties, the learned Trial Court framed the issues on 27th February, 2004 and the relevant issue No.1 reads as under:

“1. Whether the defendant has caused any damage to the suit property, if yes, to what extent? OPP”

5. In support of his allegations, the appellant examined himself as PW-1 and his Architect Sh.Suresh Kumar as PW-2.
6. Since the defendants/respondents did not make the payment of the admitted rent in terms of order of the learned Trial Court, the defence of the defendants/respondents was struck off on 14th October, 2004. For this reason, the respondents were not given opportunity by the learned Trial Court to lead the evidence.
7. Admittedly, the respondents had vacated and handed over the vacant possession of the suit property to the appellant/plaintiff during the pendency of the suit on 24th January, 2004.
8. The learned counsel for the appellant/plaintiff, on instructions, states that he does not press the claim with regard to non-awarding of pendent lite and future interest till the actual payment of decretal amount.
9. It is submitted by the learned counsel for the appellant that the learned ADJ has erred in not granting the damages to furniture, fixture and fittings in the house. He submits that the appellant had mentioned the details of damages in para 7 of the Replication and hence even if the plaint was not amended to incorporate the details, the learned Trial Court should have considered the same as Replication is part of pleading. In para 7 of the Replication it is pleaded that the defendants

have taken out the water pipes due to which the kitchen in the suit premises was flooded with water. There was seepage in the roof of the basement which caused substantial damages to the property situated at the basement. The defendants have taken out the water pipes and sanitary fittings of the toilets of the suit premises and there was seepage in the roof of the garage which caused inconvenience to the other tenants residing there.

10. Learned counsel for appellant further submits that after inspection of the property, the damages were found more than Rs.1 lac and he has adduced the evidence by placing photographs on record. He refers Clauses (b), (d) and (e) of the registered Lease Deed dated 4th October, 2002, Ex.PW-1/1, wherein it is provided that the respondents/defendants shall keep the said premises in clean and hygienic condition and shall not do or cause to be done any act which may be a nuisance to others. It is further provided that the respondents shall carry out day-to-day minor repairs on their own cost and vacate and hand over the peaceful and vacant physical possession to the appellant on expiry of the lease period or at its earlier determination in the same good condition as now being taken over by the respondents subject to normal wear and tear.
11. Mr.Bindra, learned counsel for the appellant, further argued that the learned Trial Court erred in recording that the plaint does not state the nature of damages and estimates of damages or that there was no specific averment regarding the damage to the furniture. He further argued that the possession of the premises in question was received by the appellant on 25th January, 2004 and prior to that the appellant was not in a position to ascertain the extent of damages in the property in

question. He further argued that the learned Trial Court has erred in recording that the inspection report Ex.PW-2/2 was not the subject matter of the suit. He submits that as per inspection carried out by the Architect Sh.Suresh kumar (PW-2) damage caused to the property was estimated at Rs.74,415/-.

12. On the other hand, it is submitted by the learned counsel for the respondents/defendants that the suit was instituted by the appellant in the Trial Court on 28th October, 2003 and without inspecting the premises in question, the appellant has falsely pleaded that the damages were caused to the furniture, fixtures and to the property in question. He further argued that the respondent company had voluntarily surrendered the possession of the suit property to the plaintiff/ appellant on 24th January, 2004 and at the time of taking over the possession the appellant had not pointed out to the respondent company about the alleged damages. He submits that the Architect had allegedly inspected the premises in question on 27th January, 2004 and therefore his report Ex.PW-2/2 is not a document worth relying upon. He submits that no notice was given to them prior to inspection of the property in question. He further argued that even after the alleged inspection of the suit premises in question by PW-2 the appellant did not amend the plaint to plead the factum of inspection and details of damage assessed by the architect. He further argued that it is settled proposition of law that the Replication is not a part of the pleadings and therefore, the appellant cannot take benefit of alleging something therein.
13. I have heard the learned counsel for the parties and very carefully perused the material available on record.

14. Issues were framed on 27th February, 2004. Inspection report was placed on record on 4th May, 2004. Admittedly, the appellant and the Architect PW-2 Sh.Suresh Kumar have not given any notice to the respondents of their intention to visit and inspect the property. The appellant has not disclosed as to when he had taken the photographs Ex.PW-1/6 to Ex.PW1/12. As per inspection report and deposition of PW-2, it is not reflected that photographs were taken at the spot.

15. Relevant extract of Para 7 of Replication reads as under:

“...It is submitted that the Defendants have taken out the water pipes as a result kitchen of the Suit premises is flooded with the water and there is water seepage in the roof of the basement which have caused substantial damages to the property situated at basement. The Defendants have also taken out the water pipes and the sanitary fittings of the toilets of the Suit premises and there is water seepage in the roof of the garage which had caused great inconvenience to the tenants residing there.”

16. PW-1/appellant tendered his affidavit in evidence and relevant Para 19 reads under: -

”19. I say that Defendants have also damaged the furniture, fixture and fittings provided by me to the Defendants. The Defendants have also caused damages to the tenanted Property. There has been cracks in the floor of the drawing room dinning room of the Suit Premises. The Defendants have intentionally broken the granite in the kitchen. The tiles of 3 (three) bathrooms and of Kitchen of the Suit Premises have also been broken by the Defendants. The Defendants have also broken the wooden work of the Suit Premises especially of the almirahs of bedrooms and the windows of the drawing room. The same has been done in order to cause monetary loss to me. There is water seepage in the wall of the Suit Premises especially in the kitchen and the toilet of the elevated rooms. The roof of the basement situated under the Suit Premises is also badly damaged. The same has been done by the Defendants with malafide intentions. I have taken few photographs of the Suit Premises and also of the

Property which is situated in basement i.e. exactly under the Suit Premises on 25.01.2004. The photographs of the Suit Property marked as A to D are Exhibits PW-1/6 to P-1/9 and the photographs marked as E to G are of the basement which is situated exactly below the Suit Property. The photographs thereof marked as E to G and Exhibits PW-1/10 to PW-1/12. The negatives in respect of the said photographs are Exhibit PW-1/13 Colly. I have assessed the damages at the time of the filing of the Suit at Rs.70,000/- (Rupees Seventy Thousand Only). However, when the Defendants vacated the Suit Premises I found that there are more damages than that I had estimated at the time of the filing of the Suit. I say that the Defendants are liable to pay damages to the tune of Rs.1,00,000/- (Rupees One Lac Only) as the Defendant had caused damage to the Suit Property including fixtures and fittings after filing of the Suit.”

17. Even in Replication, it is not mentioned that there were cracks on the floor of the drawing room and dining room. It is also not pleaded in report that tiles of 3 bathrooms and of the kitchen were broken by the defendant. It is also not pleaded that wooden work of almirahs of bedroom and windows of the Drawing room were broken. Architect's report further exaggerates damages even on flooring of bedroom and kitchen and damages to all walls and electricity which were not mentioned by appellant in his replication and affidavit tendered in evidence. The Architect has mentioned damages to tiles, wooden work and electricity fittings. But he has not reported specifically as to whether those tiles were in kitchen or in bathroom or drawing room. He has not specified the wooden work damages. As per Replication, there was water seepage in the roof of basement but does not mention damages on the floor of the basement which is reported by the Architect (PW-2).
18. If there were any damages in the furniture, fixtures and fittings in the premises in question, the appellant should have immediately brought it

to the notice of the respondents on that day itself or on the very next day. The Architect (PW-2) and the appellant have not given any notice to the respondent prior to inspect the site. The plaint does not specify the damages. It is not explained as to how he assumed the damages and estimated for Rs.70,000/- when he had not inspected the premises before filing the suit. Even the details of damages as mentioned in Para 7 of the Replication and Para 19 of the Affidavit tendered in evidence are on variance and report of PW-2 Sh.Suresh Kumar even exaggerates what has been pleaded in replication and testified in Para 19 of the affidavit. Para 7 of Replication, Para 19 of Affidavit of Appellant tendered in Evidence and Report Ex.PW-2/2 of PW-2 are on variance and contradictory to each other.

19. In view of the above, I do not intend to take different view than taken by the learned ADJ and find no merit in the appeal and the same is dismissed with no orders as to cost.
20. Decree sheet be prepared accordingly.
21. Trial Court record be sent back.

VINOD GOEL, J.

MAY 17, 2017/jitender