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

Reserved on : 30th May, 2018

Date of decision : 13th July, 2018

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RFA 744/2016

PUNEET PRAKASH

..... Appellant

Through: Mr. Thakur Sumit, Advocate.
(M:9968454481)

versus

SURESH KUMAR SINGHAL & ANR

..... Respondents

Through: Mr. Sanjeev Sindhvani, Senior
Advocate with Mr. Siddharth
Aggarwal, Advocate for R-1.
(M:9871588350)

Mr. K. K. Aggarwal, Mr. Sushil K.
Pandey and Mr. Aayush Agrawal,
Advocates for R-2. (M:9810006579)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present appeal has been filed by the Appellant/Plaintiff No.1 challenging the impugned judgment dated 18th August, 2015 by which the suit filed by the Plaintiffs (*hereinafter*, 'Plaintiffs') was dismissed.
2. Shri Puneet Prakash and Shri Varun Prakash sons of Shri J.P. Sharma claimed to be owners of property bearing No.HS-19, Kailash Colony, New Delhi-110048 which consists of a house along with two tenanted shops located on the ground floor facing market road.
3. It is the Plaintiffs' case that their grandmother Smt. Sona Devi purchased the property on 2nd June, 1994 from Smt. Parmodini Saxena wife

of Shri V.K. Saxena; Shri Sharad Kant Saxena and Sh. Shri Kant Saxena, both sons of late Shri V.K. Saxena, as described in paragraph 2 of the plaint. The Plaintiffs pleaded that they have inherited the property from their grandmother by Will dated 25th October, 1996. According to the plaint, the Defendant was the tenant of shop No.1 of the suit property, consisting of two portions, admeasuring 14 x 15 feet and store/office admeasuring 14 x 13 feet on a monthly rent of Rs.300/- by virtue of rent deed dated 27th November, 1975 entered into between the Defendant and Shri V.K. Saxena, the erstwhile owner. According to the Plaintiffs, after their grandmother purchased the property, a meeting was held with the Defendant wherein he agreed to pay the rent of Rs.3,000/- per month, excluding water and electricity charges and accordingly the rent for the month of July, 1994 was paid by the Defendant. The property was mutated in the name of the grandmother of the Plaintiffs on 8th August, 1994. However, thereafter the Defendant reverted back to paying Rs.300/- as rent and vide letter dated 17th September, 1996 sent Rs.8,100/- as the rent for the period 1st July, 1994 to 30th September, 1994 which was returned by Smt. Sona Devi. The Will was thereafter executed by her on 25th October, 1996 and she passed away on 4th December, 1998.

4. It is the case of the Plaintiffs that on 3rd January, 2005, they came to know that the Defendant had illegally trespassed into a storeroom at the back of the shop by breaking the wall. The same was sought to be proved by means of a site plan in which the store was marked in yellow colour. The Defendant also failed to pay the rent as per the agreement at Rs.3,000/- per month. Accordingly, the Plaintiffs filed an eviction petition against the Defendant before the Assistant Rent Controller (ARC), Delhi which is stated

to be pending. The Plaintiffs also got issued notice dated 8th January, 2008 demanding vacant possession of the store and the same was not handed over. Since the store was not part of the tenanted property, the subject suit was filed seeking the following reliefs: -

- “a) pass a decree of possession in favour of the plaintiffs and against the defendant in respect of small store ad-measuring 8’x10’, more specifically shown in yellow colour in the site plan annexed with plaint forming residential part of house property No.HS-19, Kailash Colony, New Delhi;*
- b) pass an order as per order XX rule 12 CPC for payment of damages @ Rs.2500/- p.m. for use and occupation of the suit premises by the defendant for the period 24.1.2005 to 23.1.2008 amounting to Rs.90,000/- and also pendent-lite and future damages/mense-profit from the date of institution of the suit till actual delivery of possession of the suit premises alongwith interest @ 18% per annum thereon;*
- c) award cost of the suit in favour of the plaintiffs and against the defendant;*
- d) any other or further relief which this Hon’ble Court may deem fit and proper in the facts and circumstances of the case be also granted in favour of the plaintiffs and against the defendant.”*

5. The Defendant filed his written statement and claimed that he is in possession of the store since the inception of his tenancy i.e. 33 years and hence claimed that the suit is barred by limitation. The Defendant also pleaded that considering that the eviction petition under Section 14(a), (b) and (j) of the Delhi Rent Control Act, 1958 (*hereinafter*, ‘DRCA’) is

pending, the present suit is liable to be stayed under Section 10 of the Code of Civil Procedure, 1908 (*hereinafter*, 'CPC').

6. In response to paragraph 3 of the plaint which specifically pleaded the rent agreement dated 27th November, 1975, the Defendant did not claim that he had not signed the said agreement. Apart from a bare denial of paragraph 3 of the Plaint, he only pleaded that the rent deed is not sufficiently stamped. It was also claimed that the site plan filed by the Plaintiffs is not correct. The Defendant further claimed that he is the tenant in the portion of the shop shown in green i.e., the shop and the portion in yellow colour i.e., the store. He denied the right of Plaintiffs to the suit property. He further denied that he ever sent an amount of Rs.3,000/- for July, 1994. However, he admits that he attorned to Smt. Sona Devi's purchase of the property and sent a cheque of Rs.8,100/- @ Rs.300/- per month. However, Smt. Sona Devi did not accept the said amount. So according to him, no rent was ever paid by him to Smt. Sona Devi. He also denied the execution of the Will dated 25th October, 1996 as also the mutation of the suit property in the name of the Plaintiffs. There is a categorical denial that the Plaintiffs are not the landlords of the suit property. Insofar as the yellow portion is concerned, the Defendant submitted that the store was always part of the shop and there was no gate or wall between the shop and the store. Thus he claimed that the site plan is incorrect.

7. The following issues were framed in the suit: -

- “1. Whether the suit has not been properly valued for the purpose of court fees and jurisdiction or requisite court fees have not been paid? OPD.*
- 2. Whether the suit of the Plaintiff is barred by*

- limitation? OPD.*
3. *Whether this court has no jurisdiction in view of Section 50 of Delhi Rent Control Act, 1958? OPD.*
 4. *Whether the proceedings of this suit have to be stayed under Section 10 of CPC? OPD.*
 5. *Whether the plaint is bad due to non-filing of supporting affidavit as prescribed in Order 6 of CPC? If so, its effects. OPD.*
 6. *Whether the plaint is not properly verified as per the provisions of CPC? If so, effects. OPD.*
 7. *Whether the plaintiff is entitled for decree of possession for the suit property? OPP.*
 8. *Whether the plaintiff is entitled for decree for the payment of damages? If so, at what rate and for what period. OPP.*
 9. *Relief.”*

8. The Plaintiffs led the evidence of Shri Varun Prakash as PW-1. PW-1 reiterated the contents of the plaint, and exhibited the following documents:

- **Exhibit PW1/1** – Site plan of the shop in question;
- **Exhibit PW1/2** – Rent deed dated 27th November, 1975;
- **Exhibit PW1/3** - Letter dated 17th September, 1996, sent by the Defendant to Smt. Sona Devi along with cheque of Rs.8,100/- @Rs.300 p.m. towards arrears of rent for the period from 1st July, 1994 to 30th September, 1994;
- **Exhibit PW1/4** – Will of Smt. Sona Devi dated 25th October, 1996;
- **Exhibit PW1/5** – Copy of death certificate of Smt. Sona Devi;
- **Exhibit PW1/6** – Mutation letter in the name of the PW-1, dated 13th February, 2003;

- **Exhibit PW1/7** – Notice dated 24th May, 2005;
- **Exhibit PW1/8** – Notice dated 8th January, 2008;
- **Exhibit PW1/9 (colly)** – Photographs taken by PW-1 on digital camera showing small gate in the back wall of the small store.

9. In his cross-examination, PW-1 reiterated that the meeting with the Defendant and his grandmother i.e., Smt. Sona Devi took place in June, 1994. He further reiterated that the amount of Rs.3,000/- was paid in cash to his grandmother but no receipt was issued. He admitted that **Exhibit PW-1/D-1** which was the site plan annexed with the eviction petition, is correct according to the spot. He denied that the gate shown at Point A was ever in existence. He also denied that the store was always in the possession of the Defendant since inception. The Defendant had also filed photographs - **Exhibit PW-1/9 (colly)**. He stated that he had taken the photographs and got them developed.

10. Mr. Jai Prakash, PW-2 has filed his affidavit on 23rd May, 2010 and his cross-examination had been deferred and on 13th September, 2012, it was submitted that he had expired. Accordingly, his evidence is not led in the present suit.

11. PW-3, Smt. Uma Sharma, is the wife of late Shri J.P. Sharma, and mother of the Plaintiffs. She confirmed the meeting of June, 1994. She also confirmed the execution of the registered Will dated 25th October, 1996. In her cross-examination she reiterated the meeting of June, 1994.

12. The Defendant appeared as DW-1. In his affidavit in chief, he claimed that the rent agreement is a forged and fabricated document. He also stated that the site plan is not according to the construction existing on spot. He denied the gate existing at the rear of the store. He claimed that there was a

wall between the store and the rear of the property at Point A. The eviction petition was still claimed to be pending. He exhibited the site plan filed in the eviction petition. He also claimed that no wall existed between the shop No.1 and the store at the back. He also claimed that the photographs are manipulated. In his cross-examination, he claimed that he had informed his counsel that the agreement is forged and fabricated. He denied his signatures at Point X, Y, Z and Z-1. He also claimed that when he took the shop on tenancy, he was never told about the measurement of the shop. He denied that a wall existed between the shop and the store and that a gate existed at the rear of the store. He also claimed that he had not filed any criminal complaint in respect of the rent agreement i.e., Exhibit PW-1/2, alleging that the same was forged or fabricated.

13. The Trial Court's findings on the issues are as under: -

- Issue No.1 – decided against the Defendant and in favour of the Plaintiffs that the suit was properly valued.
- Issue No.4 – the Trial Court held that the onus of proving this issue is on the Defendant. The Defendant has failed to prove the pleadings in the eviction petition and accordingly, the suit is not liable to be stayed.
- Issues Nos. 5 & 6 – The Trial Court held that the verification of the Plaint is proper and decided them against the Defendant.
- Issues No. 2, 3 and 7 – On an analysis of the rent deed, the Trial Court held that the rent deed has not been established as it is a photocopy, and the Plaintiffs has not discharged the burden of establishing the rent deed. The Trial Court further held that execution of the rent deed had been denied in the written

statement. The Trial Court thereafter held that it is the Plaintiffs' own case that the Defendant is an unauthorised occupant, and since the Will was not proved by the Plaintiffs, judicial notice could not be taken of the same. So the Trial Court holds that the Plaintiffs have failed to prove their title. Insofar as the site plan is concerned, the Trial Court went by Exhibit PW-1/D-1 which was the site plan filed with the eviction petition, and thus held that there was no gate at the rear of the store, and the only access was through the shop. The Trial Court refused to consider the photographs, in view of the judgment of the Supreme Court in **Anvar P.V. v. P.K. Basheer (2014) 10 SCC 473** (hereinafter, '*Anvar v. Basheer*').

- The Court also held that the suit is barred by limitation, since it was preferred later to 12 years after dispossession.

Accordingly, the suit was dismissed by the Trial Court.

14. The Plaintiffs had moved an application, seeking to place on record sale deeds, Will etc. by which Smt. Sona Devi and thereafter the Plaintiffs, acquired title to the suit property. Vide order dated 26th November, 2014 the Trial Court refused to take them on record. However, CM (M) 79/2015, vide order dated 30th April, 2015, a learned Single Judge of this Court directed as under:

"1. Vide the impugned order dated 26th November, 2014 four applications of the Petitioner/Plaintiff No. 2 were dismissed. The applications were one under Order 16 Rule 1 (3) / (1) CPC, two applications under Order 18 Rule 17 read with Section 151 CPC and one application under Order 7 Rule 14 (3) CPC.

2. At the outset learned counsel for the Petitioner, on

instructions states that he is not pressing the present petition to the extent of dismissal of the two applications under Order 18 Rule 17 read with Section 151 CPC. However, he presses the petition qua the other two applications.

3. The four documents which are sought to be produced by the Petitioner/Plaintiff No. 2 before the learned Trial Court are as under:

(i) Certified copy of Will dated 25th October, 1996

(ii) Original Death Certificate of Mrs. Sona.

(iii) Certified copy of Lease Deed of Mrs. Pista Gupta Measne [sics] Profits/Market Rent.

(vi) Copy of Sale Deed dated 2nd June, 1994 in favour of Smt. Sona Devi.

4. Learned counsel for the Respondent on instructions states that he has no objection if the documents at Serial No.2, that is, the Original Death Certificate of Mrs. Sona is placed on record as the said document is per se admissible in evidence. Moreover he does not dispute the factum of death of Mrs. Sona. The bone of contention between the parties relates to the documents at Serial No.(i), (iii) and (iv).

5. Learned counsel for the Petitioner states that he be permitted to place on record the documents at Serial Nos. 1, 3 and 4 without exhibiting the same by entering the witness box.

6. If it is legally permissible to take judicial notice of these documents then the same may be looked into by the learned Trial Court. To this extent even learned counsel for the Respondent has no objection if the documents at Serial Nos. 1 3 and 4 are kept on record and it will be left for the learned Trial Court to take judicial notice of the same if permissible by law.

7. Consequently, on consent of the learned counsel for the parties, on instructions, the impugned order in relation to the two applications, that is, under Order 16 Rule 1 (3) /(1) CPC and under Order 7 Rule 14 (3) CPC is modified to the extent that the Petitioner will

file the four documents mentioned in para-3 above and if legally permissible the Trial Court may take judicial notice of these documents.

8. Petition and application are disposed of.”

15. Thus, for the purposes of this appeal and the final hearing of the suit, the said documents i.e. the Will, the death certificate, certified copy of the rent deed and copy of sale deed can be taken notice of, if legally permissible.

16. The Defendant is not a person who is setting up his own title. He claims that he is a tenant through Shri V.K. Saxena. His exact plea in the written statement is: -

“2. That the defendant is in possession of the property in dispute since the inception of the tenancy i.e. since about 33 years. The suit is thus barred by limitation.”

17. Thereafter, in his written statement, he pleads as under:

“Para 3 of the plaint is wrong and denied. It is denied that the defendant was inducted as a tenant In shop No.1, HS-19, Ground Floor, Kailash Colony Market, New Delhi admeasuring showroom 14’x15’ feet and store/office 14’x13’ on a monthly rent of Rs. 300/- excluding electricity and water charges under the landlordship of Sh. V.K. Saxena vide rent deed dated 27.11.75 setting out the terms and conditions mentioned therein, more specifically shown in green colour in the site plan annexed. It is submitted that the alleged rent deed is not sufficiently stamped and is unregistered and thus is inadmissible in evidence. The site plan filed by plaintiffs is not correct according to the spot. It is denied that after the death of Sh. V.K. Saxena, the defendant continued to be a tenant of

his LR's as alleged. The defendant is the tenant in respect of the portion shown in green and yellow in the site plan annexed with the plaint. The defendant was inducted in the said premises by Sh. Virender Kumar somewhere in 1975 and the defendant is in possession of the same since then."

18. From a perusal of the above paragraphs in the written statement, the Defendant admits that he was a tenant, though he completely denies that he was inducted as a tenant under the landlordship of Shri V.K. Saxena vide rent deed dated 27th November, 1975. He also states that the rent deed is not sufficiently stamped and is unregistered, and therefore, is inadmissible in evidence. What is conspicuously missing in this paragraph is the allegation that the rent deed is forged and fabricated. The Defendant also does not plead adverse possession. In his affidavit, by way of evidence, he admits that he was inducted as a tenant by Shri Virender Kumar "*somewhere in 1975*". Thus, the Defendant does not dispute that he was tenant under Shri V.K. Saxena. He disputes the Rent deed.

19. When Smt. Sona Devi purchased the property, in the sale deed executed in her favour, there is a specific clause in which it is recorded that:-

"That the vendor has delivered the original documents and papers in respect of the said property to the Vendee"

Thus, Smt. Sona Devi was handed over all the original documents by the sellers.

20. In the written statement, the Defendant admits that he had atorned to the land lordship of Smt. Sona Devi in paragraph 4. The relevant part of paragraph 4 reads as under:

"4..... The defendant paid rent to Sh. Virender

Kumar upto June, 1994. Thereafter Smt. Sona Devi represented to the defendant that she had purchased the property. The defendant therefore atorned to her and sent a cheque for Rs. 8100/- towards rent @ Rs.300/- per month for the priod 1.7.94 to 30.7.96. Smt. Sona Devi did not accept the rent from the defendant. No rent as such was ever paid to Smt. Sona Devi.”

Thus the defendant did not dispute the title of Smt. Sona Devi. He does, however, dispute the title of the current Plaintiffs. Since the Defendant disputes the title of the current Plaintiffs, the question of treating him as a tenant, at least insofar as the store at the back of the shop is concerned, does not arise. He would have to be treated as a trespasser, as he disputes the contents of the Rent Deed as also the title of the present Plaintiffs. He merely claims, without any basis that the store is part of the tenanted property.

21. The Defendant’s plea in respect of his tenancy is contradictory i.e. on the one hand, he denies that he was inducted as a tenant under the land lordship of Shri V.K. Saxena vide rent deed dated 27th November, 1975 and on the other hand states that he is a tenant in the portion shown in the green (two portions of Shop no.1) and yellow colour (store) in the site plan annexed with the plaint of Shri V.K. Saxena. Either way the Defendant does not claim ownership rights in the property. Admittedly, the Defendant has also not paid any rent to even Smt. Sona Devi or to her heirs and thus the Defendant is enjoying the property without having any rights therein, that too without paying any rent.

22. A perusal of the site plan filed on record reveals that there is no doubt

that there is a separate store at the back of the shop. The question is whether there was a separate entrance to the said store or was the only entrance through the shop. In the site plan annexed with the DRC eviction petition (**Exhibit PW1/D1**), there is no opening shown from the residential portion to the store whereas in **Exhibit PW-1/1** there is a proper gap/opening shown at Point A. The Plaintiffs did admit in the cross-examination that the site plan **Exhibit PW-1/D-1** filed in the DRC petition, was correct according to the spot. This evidence was given in 2010. Thus, the fact that this constitutes an admission on the part of Plaintiffs, as to the non-existence of the entrance to the store from the residential portion, is not inaccurate. The Defendant had, in 2010 already trespassed into the store and had closed the opening by the brick wall. Thus **Exhibit PW-1/D1** was correct on the day when the PW-1 gave evidence.

23. The brick wall between the residential portion and the store is clearly evident from **Exhibit PW-1/9 (colly)**. These photographs show the existence of a metal grilled gate at Point A, from the side of the residence and a brick wall ahead on the same. But these photographs are disputed by the Defendant on the ground that these photographs are digital photographs and were not proved in accordance with law. The Trial Court has held that the photographs having not been proved as per the dictum of the Supreme Court in *Anvar v. Basheer (supra)*, cannot be taken in evidence. The said objection is not tenable inasmuch as the objection raised is that the negatives in respect of these photographs have not been placed on record. It is a matter of which judicial notice ought to be taken that digital photographs no longer have negatives, as in olden times. PW-1 has clearly stated in his affidavit that the photographs were taken on a digital camera. The relevant portion of

his affidavit is set out below: -

“The photographs taken on digital camera showing small gate in the back wall of the small store are Ex.PW-1/9 (colly).”

24. In his cross-examination, this evidence is not impeached. He asserts in his cross-examination is as under: -

“The photographs Ex.PW/9 (colly) were taken by me and got the said photographs developed from one shop at Kalka Ji but I do not remember the name of the said shop. I do not remember as to how many photographs are developed by me from the said shop at that time. I might have obtained cash memo for developing of the photographs from the said shop. I do not remember the amount paid by me for developing charges. It is wrong to suggest that Ex.PW/9 (colly) are manipulated and are not of the property in dispute.”

25. He asserted that the photographs were taken by him personally and he got them developed. The Defendant has tried to confuse the issue by relying upon PW-1's cross-examination in respect of Shop No.2 for which PW-1 stated that there was no gate between the store shown in black colour and Shop No.2. This is not to be confused with the shop in issue which is Shop No.1 and the store behind it, which is the suit property. The Defendant did not produce any photographs to show that the position on the spot is different than what is shown in **Exhibit PW-1/9 (colly)**. In his cross-examination, DW-1 merely denies the existence of the door/gate as shown in **Exhibit PW-1/9 (colly)**.

26. An overall look at the two site plans and the evidence on record including the photographs **Exhibit PW-1/9 (colly)** makes it clear that the

store did have a separate grilled gate from the residential house of the Plaintiffs which has been closed by a brick wall from the inside of Shop no.1. The photographs also show that the brick wall is visible from the Plaintiffs' portion of the property in an unfinished form and is not even painted. This points to the fact that the brick wall was erected from inside Shop No.1. If there was no gate at that point, a wall would have been there, in place of the grilled gate whereas, as is evident from a look at the photographs, the wall is inside the grilled gate.

27. The Defendant claims to be a tenant but does not state as to what was the term of the tenancy and the conditions of tenancy. He has merely denied the rent deed (**Exhibit PW-1/2**) which was placed by the Plaintiffs on record. The rent deed was exhibited after the original was seen and returned by the Court. The remark '**OSR**' appears with the signature of the Trial Judge, on the document. In his written statement, the Defendant does not state that the rent deed is forged and fabricated. Thus the allegation of forgery and the denial of the signatures is a clear afterthought. The schedule to the rent deed reads as under: -

"THE SCHEDULE"
(Vide clause 1 of the Rent Deed)

Shop No.1 in the building known as 'JAI MANSION' HS 19, Kailash Colony Market, New Delhi-48, comprising of two rooms as per dimensions given below, and use of the portion of the front verandha or corridor in front of that shop in common with the public.

- 1. Main shop or show room, size 14' x 15' fitted with the steel rolling shutter and front glazing.*

2. *One Store or Office room at the back of the showroom, size 14' x 13'.*

Access to or exit from the shop will be from the front Verandha and there shall be no passage from the back door into rear verandha or any other part of the building.

Lessor Sd/-

Lessee Sd/-

Witnesses:

Witnesses:

1. *Sd/-*
Address:

1. *Sd/-*
Address:

2. *Sd/-*
Address:

2. *Sd/-*
Address:

28. Going by the rent deed, the store was not part of the tenanted property and thus the objection under Section 50 of the DRCA does not apply qua the store. The schedule clearly states that Shop No.1 which has been given on rent comprises of two rooms i.e. the main shop and one store, of 14x15 feet and 14x13 feet respectively. This does not include the store behind the shop. The Defendant should be held to be bound by this rent deed, as the only objection in the written statement to the same is that it is not sufficiently stamped and is unregistered. Since all the documents were handed over to Smt. Sona Devi by the owner Shri V.K. Saxena and the same is recorded in the sale deed, there is no reason to disbelieve the said rent deed. In fact, the rent deed gets further corroborated from the fact that the same fixes Rs. 300/- per month as the rent which is exactly the same amount which was offered by the Defendant to Smt. Sona Devi when he attorned to her ownership. The Defendant also does not claim that the tenancy was an

oral tenancy. Thus, the challenge to the Rent deed is a farce, especially since no other document has been put forward by the Defendant.

29. Insofar as proving of the photographs under Section 65B of the Indian Evidence Act (*hereinafter*, 'Evidence Act') is concerned, when photographs are taken digitally and the person taking the photographs himself has deposed in the Court, his statement that he got the photographs developed himself is sufficient and satisfy the requirements of Section 65B of the Evidence Act. Section 65B of the Evidence Act is not to be applied mechanically. A digital photograph which is proved constitutes electronic evidence, which is admissible. The Defendant has not filed any other photographs to show or establish that the position on spot is different from what is depicted. Recently in ***Shafhi Mohammad v. State of Himachal Pradesh (2018) 2 SCC 801*** the Supreme Court held as under:

“29. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate is not always mandatory. 30. Accordingly, we clarify the legal position on the

subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies.”

The Plaintiffs having deposed that he took the photographs himself, got them developed and filed them in the Court, the non-filing of negatives cannot be a ground to reject them, especially since they are digital photographs. Thus, in the facts of the present case, the photographs are taken to be proved in accordance with law.

30. The Defendant having taken possession of the store by trespassing into it, and having admitted tenancy in respect of the shop appurtenant to the store, absolute title of the Plaintiffs need not be established. In ***Boorugu Mahadevm & Sons v. Sirigiri Narasing Rao (2016) 3 SCC 343***, wherein it was held as under:

“18. It is also now a settled principle of law that the concept of ownership in a landlord-tenant litigation governed by Rent control laws has to be distinguished from the one in a title suit. Indeed, ownership is a relative term, the import whereof depends on the context in which it is used. In rent control legislation, the landlord can be said to be the owner if he is entitled in his own legal right, as distinguished from for and on behalf of someone else to evict the tenant and then to retain control, hold and use the premises for himself. What may suffice and hold good as proof of ownership in landlord-tenant litigation probably may or may not be enough to successfully sustain a claim for ownership in a title suit. (vide Sheela and

Ors. v. Firm Prahlad Rai Prem Prakash (2002) 3 SCC 375).”

In ***Anathula Sudhakar v. P. Buchi Reddy (2008) 4 SCC 594***, the Supreme Court held as under:

“We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be sufficient. Where the plaintiff, believing that defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.”

As per the dictum above, if there is no cloud on the title of the Plaintiff then

suit for possession is sufficient.

31. The Plaintiffs herein are the grandchildren of Smt. Sona Devi. The Defendant has admitted that Smt. Sona Devi became the owner of the suit property in his letter dated 17th September, 1996. The relevant portion of the said letter is set out below: -

“REGISTERED A.D. DATED:17.9.1996

*Smt. Sona Devi,
wife of Late Shri Ganga Parshad,
HS-19 Kailash Colony Market, First Floor,
New Delhi.*

Madam,

Under instructions of my client Shri Suresh Kumar son of Shri Bhikam Sain Singhal, resident of K-12-A, Kailash Colony, New Delhi, I serve you with the following notice:

1. That my abovesaid client is a tenant in the shop bearing no. HS-19/1, ground floor, Kailash Colony Market, New Delhi, on a monthly rental of Rs. 300/=. The said tenancy was under the owner / landlord Shri V.K. Saxena and after his death under his wife Smt Parmodini Saxena.

2. That the said Smt Pamodini Saxena intentionally avoided the receipt of the rent from my abovesaid client on one pretext or the other, ever since 1.7.1994. However, it has now come to the knowledge of my abovesaid client that you have purchased the property bearing the no. HS-19 Kailash Colony Market, New Delhi, from the previous owner in or around June 1994, but no intimation whatsoever either by the previous owners or by you have been received by my client with regard to the change in ownership/title of the property.

3. That my client has tried to tender the rent for the period 1.7.1994 till date, to you, but you

have avoided to accept the same on one pretext or the other and have also asked my client to increase the rent exorbitantly to Rs. 3000/ per month which my client has refused to do so.

I hereby on behalf of my abovesaid client am enclosing a cheque bearing no. 230711 dated 16.09.1996 drawn on the Bank of Rajasthan Ltd., Greater Kailash, New Delhi, for a sum of Rs. 8,100/= towards rent @Rs. 300/= per month for the period 1.7.1994 to 30.9.1996 of the tenancy premises HS-19/1 Kailash Colony Market, New Delhi. I hereby call upon you to acknowledge and confirm the receipt of the same and also issue the receipt of the said cheque for Rs. 8,100/=-, within 15 days hereof which my client shall have to legally recourse and you shall be responsible for all risks, costs and consequences.

*So please take notice.
Copy Kept.*

*Enclosure: As above (Arun Vohra)
Advocate”*

32. The Defendant having admitted the ownership of Smt. Sona Devi and the fact that Smt. Sona Devi executed a registered Will which is placed on record as Exhibit PW1/4 is sufficient for the purposes of this suit to hold that the Plaintiffs have adequate title against the Defendant. This is not a case where there are two competent claimants of a property where the Will needs to be proved by producing an attesting witness. The Defendant has no title and also does not claim any title. Under these circumstances, the production of a certified copy of the Will executed by Smt. Sona Devi is sufficient to recognise the Plaintiffs' rights in the present suit.

33. The Plaintiffs have placed on record a copy of the Will along with the document issued by Municipal Corporation of Delhi to show that they are being assessed to property tax in respect of the property. Since the Defendant does not claim any title to the suit property this is sufficient to hold that the Plaintiffs can maintain the present suit. Moreover, this Court vide order dated 30th April, 2015 held that notice can be taken of the Will and the death certificate and the lease deed, if legally permissible. As the Defendant has not set up a competing title, this Court holds that notice can be taken of these documents.

34. The Trial Court has held in favour of the Plaintiffs on Issues No.1, 2, 5 and 6.

35. On Issues No.2, 3 and 7, the Defendant admits the tenancy from Mr. V. K. Saxena. He has admitted to the tenancy of Smt. Sona Devi, both in the pleadings and correspondence. He only challenges that the Plaintiffs herein, the grandsons of Smt. Sona Devi have not established their title. The original rent deed was produced as is clear from the notation on the document, in the trial court record, which reads **`OSR (Original seen and returned)`**. The allegation of the same being forged is an afterthought and is not contained in the written statement. In view of the discussion above the Trial Court finding is set aside. It is held that the rent deed has been duly proved and the store is not part of the tenanted property.

36. Insofar as PW-1/D-1 is concerned, the admission by PW-1 is that it reflects the correct position as on spot, was made in 2010, after the Defendant had trespassed into the store. Thus, the said admission cannot be held against the Plaintiffs. The photographs clearly show that a wall has in

fact been constructed and there is nothing shown by the Defendant to the contrary. Thus, the Trial Court finding in this regard is also set aside.

37. Insofar as limitation is concerned, it is the Plaintiffs case that they came to know of the trespass by the Defendant sometime in 2005 and the suit was filed in 2008. The Defendant, on the other hand, claims that he was always in possession of the property since 33 years. Since the rent deed has been taken to be proved, the plea of the Defendant that he was in possession of the suit property since 1975 is held to be incorrect.

38. Even a perusal of the photographs (Exhibit PW-1/9) clearly shows that a *kachcha* wall was erected from the inside of the shop. Thus, the suit is not barred by limitation. In fact the Defendant himself has not claimed adverse possession, since it is the Defendant's case that he is a tenant in the suit property. Under such circumstances, the Trial Court could not have been gone beyond the pleadings of the Defendant.

39. The Counsel for the Defendant has relied on ***Manmohan Service Station v. Mohd. Haroon Japanwala and Others AIR 1994 Delhi 337*** to argue that if a tenant encroaches into portion of the landlord property it would be deemed to be part of the tenanted accommodation. The said judgment is authority to the proposition that a tenant cannot claim adverse possession. The Court in the said case, while deciding the application under Order 39 Rule 1 and 2, held that the Plaintiff No.1 is entitled to an injunction in the suit.

40. On the other hand, the Appellant has relied upon the Division Bench judgment of this Court in ***Naeem Ahmed v. Yash Pal Malhotra (deceased) Through Lr's & Anr. 2012 (129) DRJ 546 (DB)*** to argue that if the Defendant challenges the title of the Plaintiff, only a civil suit would be the

remedy. In the present case, on the one hand, the Defendant argues that the suit property i.e. the store is part of the tenancy but on the other hand also argues that the Plaintiffs herein have no title. These two are contradictory pleas and are self defeating. The Defendant cannot have it both ways. Since the Defendant challenges the title of the Plaintiffs to the suit property and only admitted ownership of Smt. Sona Devi i.e. the grandmother of the Plaintiffs and has admittedly not paid any rent for any portion of the property, the Civil Court would have jurisdiction to direct the Defendant to handover possession.

41. Counsel for the Defendant has also relied upon ***Parsa Singh v. Smt. Parkash Kaur and Ors. AIR 1976 P&H 235*** to argue that certified copy of the Will is not admissible without proving the loss of the original. Mr. Sindhvani submits that a registered Will is not a public document. There can be no quarrel to the proposition that a registered Will is not a public document but there can be also no quarrel to the proposition that, against a trespasser absolute title need not be proved, and it is only relative title that has to be established. The Defendant having not claimed any title to the suit property, the non-production of the original Will would not defeat the Plaintiffs claim as against the Defendant, the Plaintiffs have better title as the Defendant has admitted that their grandmother had bought the property from Sh. V.K.Saxena.

42. The Defendant thereafter relies upon ***National Radio & Electronic Co. Ltd. v. Motion Pictures Association 122 (2005) DLT 629 (DB)*** to argue that mesne profits have to be proved in accordance with law. Again there can be no question to that proposition. In the present case, Smt. Usha Sharma wife of late Shri J.P. Sharma i.e. the mother of the Plaintiffs

appeared and confirmed that the meeting dated 2nd June, 1994 had taken place. However, the Defendant did not abide by what was agreed in the said meeting. The Plaintiffs has claimed damages at Rs.2,500/- per month for occupation of the store w.e.f. 3rd January, 2005. In his affidavit, PW-1 stated as under: -

“That the deponent is entitled to damages @ Rs. 2500/- p.m. for the use and occupation of the premises by the defendant which is prevalent of the similar property in the locality. Therefore, the deponent has claimed Rs.90,000/- for the last three years i.e. 24.1.2005 to 23.1.2008.”

43. This evidence is not seriously impeached as there is only a suggestion put by the Defendant that the same is not the prevalent rent. DW-1 merely states that the portion in dispute cannot fetch a rent of Rs.2,500/- per month. Considering that the suit property is located in the posh Kailash Colony market, the claim of Rs.2,500/- for the store is not unreasonable inasmuch as in 1994, the Defendant himself appears to have agreed to Rs.3,000/- for the shop in question. This is clear from the evidence of PW-3. Under these circumstances, Rs.2,500/- per month is a reasonable amount of mesne profits liable to be granted. The registration or otherwise of the rent deed is an issue to be considered and decided in the eviction petition which is pending between the parties in respect of the main shop, as the adjudication in the present appeal is in respect of the non-tenanted portion. The rent deed was produced in the Court at the time of exhibit marking and if the same is not registered, then the effect of the same would be considered in the eviction petition. For the purposes of the present case, the Rent Deed has been considered only in order to establish the extent of the tenanted portion and

nothing more. The non-registration of the rent deed does not give any benefit to the Defendant in the present case as the portion in dispute in the present case is not the tenanted portion. The consequence of non-registration would have to be dealt with in the eviction proceedings and not in the present suit.

44. In view of the findings above, the Trial Court judgment is set aside insofar as it relates to Issues No.2, 3 and 7. The Plaintiffs are held entitled to a decree for possession in respect of suit property being a store admeasuring 8x10 feet as shown in yellow colour in Exhibit PW-1/1 forming part of Property No.HS-19, Kailash Colony, New Delhi-110048. The Defendant is directed to handover vacant and peaceful possession of the said store, within a period of eight weeks.

45. The Plaintiffs are also entitled for damages @ Rs.2,500/- per month for use and occupation of the suit property for a period commencing from 24th January, 2005 till the actual delivery of possession. The Plaintiff is also entitled to interest on a sum of Rs.90,000/- which was claimed in the suit, @ 8% per annum. On the remaining amount, no interest is liable to be granted, if the property is handed over. However, if the Defendant does not handover the suit property within eight weeks, 8% simple interest on the decretal amount would be liable to be paid, upon the expiry of eight weeks, till handing over of possession.

46. The appeal is allowed in the above terms with no order as to costs.

PRATHIBA M. SINGH, J.
Judge

JULY 13, 2018/Rekha