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

Date of decision: 31.10.2023

+ **RSA 60/2020 & CM APPLs. 16497/2020, 18601/2020, 23083/2020, 37739/2022, 31183/2023**

SALEEM AHMAD

..... Appellant

Through: Mr. Dinesh Kumar, Advocate.

versus

SMT. KAUSHALYA DEVI(DECEASED) THR. LR SHRI SUDERSHAN KUMAR JOSHI & ANR.

..... Respondents

Through: Mr. Munish Chhoker and Ms. Jyoti Verma, Advocates.

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. This regular second appeal filed under Section 100 of the Code of Civil Procedure, 1908 ('CPC') impugns the judgment dated 15.07.2020 passed by ADJ-02, East, Karkardooma Court, Delhi ('First Appellate Court' or 'Appellate Court') in RCA No. 05/2018, whereby the First Appellate Court dismissed the RCA No. 05/2018, titled as **Saleem Ahmad v. Smt. Kaushalya Devi**, and further disposed of the Misc. No. 91/2019 which was filed under Section 151 of CPC by the Respondent i.e., plaintiff seeking clarification of the order dated 15.01.2019. Vide the order dated 15.01.2019 the RCA No. 05/2018 was adjourned *sine-die*.



1.1. The regular civil appeal no.05/2018 was filed by the Appellant i.e., defendant under Section 96 of CPC against the judgment and decree dated 21.12.2017 passed by ACJ-CCJ-ARC, East, Karkardooma Court, Delhi ('Trial Court' or 'Civil Court') in CS No. 8902/2016, titled as **Smt. Kaushalya Devi v. Saleem Ahmad**, whereby the Trial Court decreed the suit for recovery of possession and recovery of Rs. 98,000/- in favour of the Respondent herein.

2. For the sake of convenience, the parties are being referred to in this judgment as per their rank and status before the Trial Court. The Appellant is being referred to as the defendant. The Respondents are the legal heirs of the deceased plaintiff and are hereinafter being referred to as the plaintiff.

Facts

3. The plaintiff filed the suit for possession and recovery of Rs. 98,000/- on 30.05.2008. The plaintiff asserted herself to be the owner/landlady of the immovable property identified as property bearing municipal number 90/1, Gali No.1, Shakarpur, Delhi ('tenanted premises'). The plaintiff further contended that defendant is tenant in occupation of ground floor and first floor of the said property at an agreed rate of rent of Rs. 13,000/- per month, effected by an instrument of lease ('rent agreement') dated 17.07.2007. As per the rent agreement the currency of the tenancy was for 24 months. It was stated that since the defendant defaulted in payment of monthly rent, the plaintiff exercising the powers reserved under clause 5 of the rent agreement terminated the tenancy by giving a notice in writing dated 26.03.2008 to the defendant.

3.1. It was stated in the suit that since the defendant failed to pay the arrears of rent and hand over the possession of the tenanted premises to the



plaintiff pursuant to the legal notice, it was in these circumstances the plaintiff filed the suit no. 8902/2016.

4. The defendant resisted the prayers in the suit by filing a written statement dated 06.09.2008, principally on the ground that there was no default in payment of monthly rent.

4.1. It was stated in the written statement that the suit of the plaintiff was not maintainable as tenancy of the defendant still subsisted and had not been terminated lawfully because basis of the termination notice dated 26.03.2008 was the rent agreement dated 17.07.2007, which was forged and fabricated.

4.2. It was the contention of the defendant that there were two (2) separate/distinct tenancies created in his favour by the plaintiff in the tenanted premises; one for the ground floor (commercial use) and other for the first floor (residential purposes). It was the case of the defendant that rent of the ground floor was reserved as Rs. 6000/- and for the first floor was reserved as Rs. 4000/-.

4.3. In the written statement the defendant admitted that he is tenant in respect of the tenanted premises, which comprised of the entire ground floor and first floor; and that the plaintiff is the landlady.

4.4. While replying to paragraphs 3-6 of the plaint, the defendant adverted to a distinct set of facts, with respect to a distinct property, which was unrelated to the tenanted premises and the averments made by the plaintiff in the plaint.

4.4.1. As per the defendant, husband of plaintiff i.e., late Sh. ML Joshi inducted the defendant to the ground floor of a distinct two storied building numbered as 88/15, Gali No.1, Shakarpur, Delhi ('88/15, Shakarpur') in July, 1997 at orally agreed rent of Rs. 4000/- per month. Later a contract



dated 30.08.1999 ('ATS') was entered into between late Sh. ML Joshi and the defendant for the sale of 88/15, Shakarpur.

4.4.2. It was averred by the defendant that by July, 2007 all the amount as per the ATS was paid and defendant had performed his part of the contract. Thereafter, defendant requested the plaintiff and her son to transfer 88/15, Shakarpur as per the ATS dated 30.08.1999 by effecting a sale deed in his favour.

4.4.3. It was stated that, Ms. Kashi Kashyap (daughter of plaintiff and late Sh. ML Joshi) was instructed by the plaintiff and her son to prepare the draft of the sale deed, who requested the defendant to handover ATS dated 30.08.1999 for the said purpose and acceding to her request the defendant delivered the same. It was also averred that Ms. Kashi Kashyap also obtained signatures of the defendant on blank papers which were later fraudulently used by the plaintiff to prepare the purported rent agreement dated 17.07.2007 to wrongfully evict the defendant from the tenanted premises.

5. The Trial Court vide order dated 11.09.2009 framed the issues in the suit. By the order dated 29.01.2015 the defence of the defendant was struck off.

6. The defendant after the commencement of the trial sought to amend the written statement by filing an application under Order 6 Rule 17 CPC to materially change his stand to contend that the municipal address of the suit property is 88/15, Shakarpur, Delhi and it is not 90/1, Gali No. 1, Shakarpur, Delhi. Further the defendant stated that he is not a tenant in the tenanted premises. The defendant sought to dispute the site plan filed with the plaint. The defendant contended that he has no concern with property no. 90/1, Gali



No.1, Shakarpur, Delhi which is located at a distance away from the suit property. In this manner, the defendant sought to create a dispute with respect to identity of the tenanted premises.

6.1 This application filed under Order 6 Rule 17 CPC was dismissed by the Trial Court on 03.10.2012 and the order of dismissal was upheld by the High Court vide order dated 27.11.2012. The suit has therefore been decided as per the pleadings in the original written statement.

7. The key findings of the Trial Court in the impugned judgement dated 21.12.2017 reads as under:

- (i) That the defendant has admitted in the pleadings that he is the tenant in the tenanted premises and the plaintiff is the landlady.
- (ii) That the defendant admitted the receipt of the legal notice terminating the tenancy and had replied to the same.
- (iii) That the place of residence of the defendant as per the government issued identification documents produced before the Trial Court recorded his address as 90/1, Shakarpur, Delhi i.e., tenanted premises. The Trial Court held that on a comparison of the site plan filed by the plaintiff and the defendant, the location of the tenanted premises is identical and therefore there is no ambiguity regarding the identity of the premises.
- (iv) That the defendant had admitted the rate of rent to be Rs. 10,000/- per month but the plaintiff has pleaded the rent to be Rs. 13,000/- per month. Since, the rent agreement produced stipulates the lease to be for 24 months but the said agreement is not a registered document and, therefore, cannot be read in evidence because to affect a lease of immovable property for a period exceeding one (1) year or



reserving yearly rent, a registered instrument of lease is the only mode. Therefore, the rate of rent was held to be Rs. 10,000/-

(v) That, the plaintiff is entitled to possession of the tenanted premises, mesne profit at Rs. 10,000/- per month from the date of termination of tenancy dated 21.04.2008 (upon expiry of 30 days from the receipt of notice dated 18.03.2008) and the arrears of rent of Rs. 90,000/- for the period w.e.f., 17.07.2007 to April, 2008.

8. The defendant filed Regular First Appeal against the said judgment and order dated 21.12.2017 being RCA No. 05/2018.

8.1. In the meanwhile, the First Appellate Court, vide order dated 13.02.2018 stayed the operation of the impugned judgment and decree dated 21.12.2017, however, vide order dated 28.03.2018 stay was continued only qua the handing over of the possession and consequently the Appellate Court directed the defendant to pay arrears of rent of Rs. 90,000/- and mesne profit at 10,000/- per month with effect from 21.04.2008 to 17.03.2009.

8.2. On 15.01.2019 the appeal was adjourned *sine die* on the statement of the defendant that he had already vacated the tenanted premises i.e., 90/1, Gali No.1, Shakarpur, Delhi in October, 2010. However, as is evident from the record this submission was factually incorrect as in October, 2010, the Petitioner has vacated a distinct property i.e., 88/15, Shakarpur and he continued to remain in possession of the tenanted premises until 17.04.2023. These properties are referenced by this Court as per the site plan filed by the plaintiff with the plaint.

9. Thereafter, the plaintiff filed Misc. No. 91/2019 seeking clarification of the order dated 15.01.2019 and requesting the First Appellate Court that



the plaintiff might be permitted to press the execution qua the possession of the suit property before the Executing Court.

10. The First Appellate Court vide the impugned judgment dated 15.07.2020 upheld the Trial Court's judgment dated 21.12.2017. Further the Court observed that the arguments raised by the defendant were not borne out from the pleadings in the trial or the memorandum of appeal.

11. It is admitted on record that the possession of the tenanted premises has been recovered by the plaintiff in the execution proceedings on 17.04.2023.

Arguments of the parties

12. Mr. Dinesh Kumar, learned counsel for the defendant states that the tenanted premises has been wrongly identified in the plaint and the site plan annexed thereto as property bearing no. 90/1, Gali No. 1, Shakarpur, Delhi. He states on the contrary, the correct municipal no. of the suit property is 88/15, Gali No.1, Shakarpur, Delhi. He states that this is a material fact as the defendant has a valid ATS with the husband of plaintiff i.e., late Sh. M.L. Joshi for property bearing no. 88/15, Shakarpur.

12.1 He states that the defendant has paid the entire sale consideration agreed as per the ATS and was therefore in possession of the suit property in his capacity of a buyer and not in his capacity as a tenant.

12.2 He refers to a site plan and states that the defendant herein was a tenant under the plaintiff in the (distinct) adjoining property which is numbered as 88/15-A, Gali No.1, Shakarpur, Delhi. He states that however, the Petitioner herein vacated the said distinct property in October, 2010. He states it is a matter of record that the plaintiff has sold the distinct property



no. 88/15-A, Gali No. 1, Shakarpur, New Delhi to Smt. Manisha Jain vide a sale deed dated 17.03.2009.

12.3 He states that since the defendant was a purchaser who was in possession of the suit property under the ATS and not occupying the same as a tenant, no decree for possession and mesne profits could have been passed against the defendant by the Courts below.

12.4 He states that a suit for specific performance of the ATS with respect to property no. 88/15, Shakarpur, Delhi has been filed by the defendant which is pending consideration before the concerned Civil Court.

12.5 He states that the Appellant was wrongfully dispossessed in the execution proceedings on 17.04.2023 during the pendency of this appeal and therefore, he should be put back in possession.

13. In reply, Mr. Vivek Sharma, learned counsel for the plaintiff states that the primary contention of the defendant that the municipal number of the tenanted premises is 88/15, Gali No. 1, Shakarpur, Delhi is false and incorrect.

13.1 He states that a bare perusal of the pleadings of the defendant in its written statement would evidence that the defendant duly admitted that the municipal number of the tenanted premises is 90/1, Gali No. 1, Shakarpur, Delhi.

13.2 He refers to the site plan filed with the plaint and states that property no. 88/15, Shakarpur, Delhi is the adjoining property in respect whereof a separate civil suit no. 302/2008 ('former suit') for recovery of possession was filed by the landlady on 09.05.2008 and which civil suit was withdrawn on 23.03.2009 as the said property was sold to a third party in the year, 2009. He states that the defendant admits that he has surrendered the



possession of the adjoining property in favour of the third party i.e., Smt. Manisha Jain.

13.3 He states that the defendant had filed a counter claim on 02.08.2008 in the former suit (which subsequently stood withdrawn) claiming his rights as purported purchaser under the ATS. He states that the filing of the said counter claim in the former suit evidences that the assertion of ATS was raised with respect to the said distinct adjoining property i.e., 88/15 Gali No. 1, Shakarpur, Delhi (shown in the site plan filed in this plaint) and not the tenanted premises.

13.4 He states in any event the said counter claim also stands dismissed by the Trial Court vide order dated 20.09.2008 for want of pecuniary jurisdiction.

13.5 He states that the defendant is wrongly contending that the municipal number of the tenanted premises is 88/15. He states that the correct municipal number of the tenanted premises which is the subject matter of the suit is 90/1.

13.6 He states that the only argument raised by the defendant in the present second appeal is with respect to the municipal number of the suit property. He states, however, the Trial Court has returned a categorical finding that there is no dispute of the 'identity' of the suit property as in the site plan filed by the plaintiff as well as the defendant the physical location of the property and its boundaries are identical.

13.7 He states that the defendant has sought to raise the dispute of the municipal number contrary to its own pleading and the government issued identification documents placed by defendant himself on record.



13.8 He states that the identity of the property is pure question of fact and does not constitute a substantial question of law.

Analysis and findings

14. This Court has considered the submissions of the counsel for the parties and perused the record.

15. The sole contention raised by the defendant in his arguments is with respect to the municipal number of the suit property. While, the plaintiff has contended that the municipal number of the suit property is 90/1, Gali no. 1, Shakarpur, Delhi, whereas, the defendant has contended that the municipal number of the suit property is 88/15, Gali No. 1, Shakarpur, Delhi. However, a perusal of the site plan filed by both the defendant and the plaintiff makes its amply evident that there is no dispute of the physical location of the suit property and its boundaries. The finding of the Trial Court with respect to the said fact reads as under:

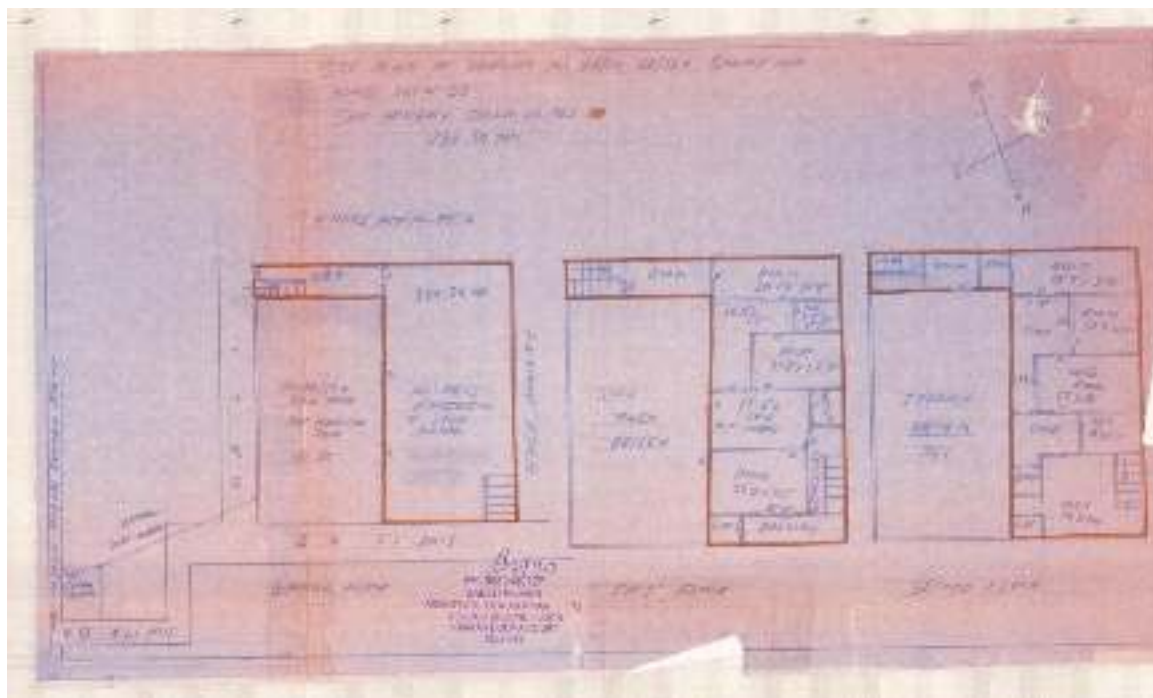
8. From the pleadings of the defendant as shown in Figure 1 and the site plan produced by the plaintiff as shown in Figure 2 and the site plan produced by the defendant as shown in Figure 3, it is proved that the defendant had been defending the suit in respect of premises identified as 90/1, Gali No. 1, Sharkarpur, Delhi and from the figures 2 & 3, it is also proved that the identity at site of the property is also the same except the region/area ABCDA in figure 3 which the defendant claims(not in pleading but in the site plan) to be the part of the suit property. Since the plaintiff does not claim the area ABCDA, therefore, the said is excluded from the claim of the plaintiff.

(Emphasis supplied)

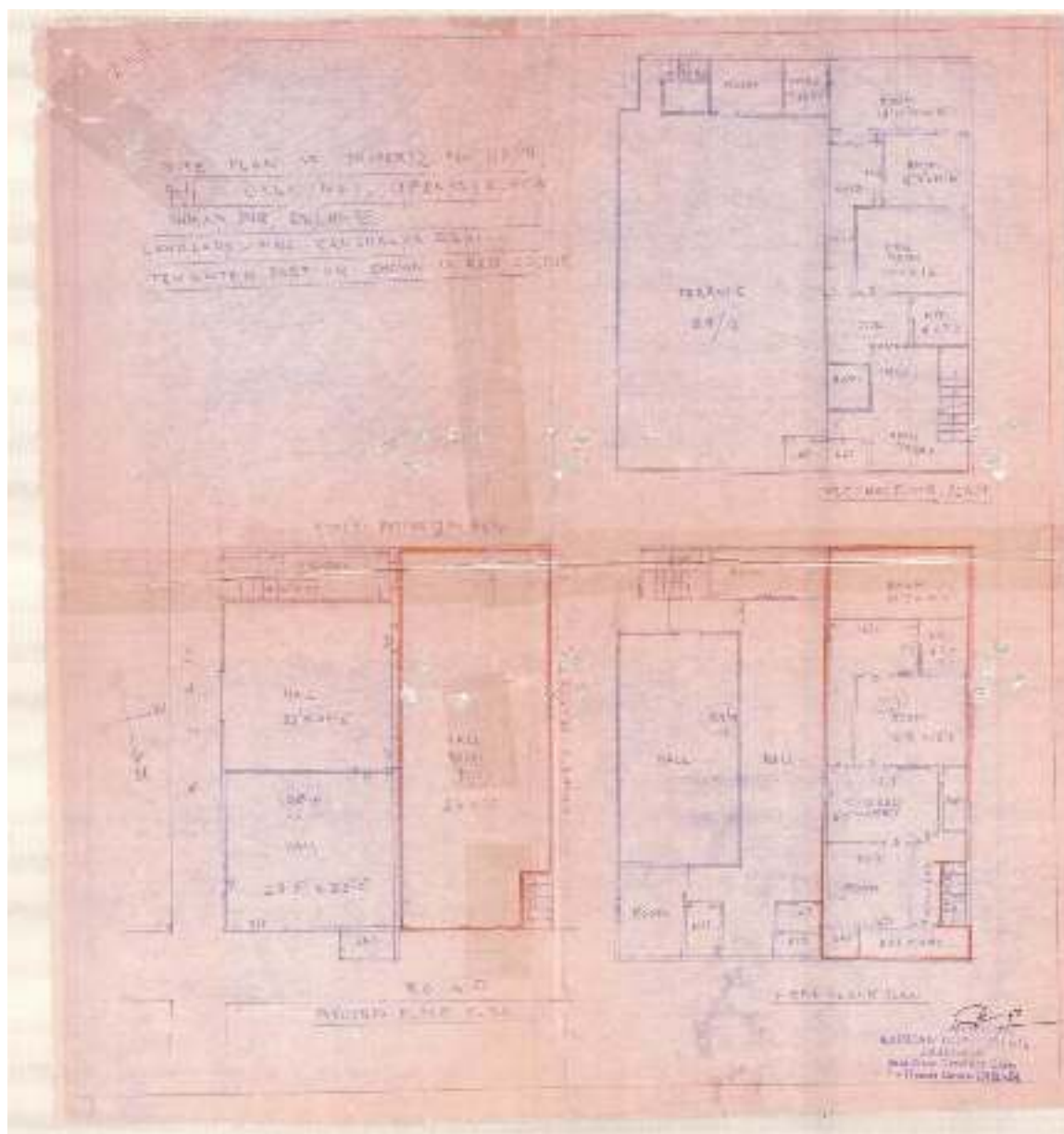
15.1. In the opinion of this Court, the Trial Court has correctly held that there is no dispute about the 'identity' of the property. The site plan of defendant and the plaintiff is shown below and the tenanted premises are delineated in red colour in these plans. As is evident, the boundaries of the suit property in both the plans are identical and the location is also identical.



The only distinction is in the municipal number written for the property in the two (2) site plans.



(Figure 1: Site Plan filed by the defendant in the Trial Court)



(Figure 2: Site Plan filed by the plaintiff with the plaint)

16. A perusal of the record shows that initially (from 2008-2012) the defendant did not raise any dispute with respect to the municipal number of the tenanted premises being 90/1, Gali No.1, Shakarpur, Delhi. This is evident from the pleadings in the written statement and the reply issued by



the defendant to the statutory legal notice dated 26.03.2008 issued under Section 106 of the Transfer of Property Act, 1882.

16.1. It is admitted by the defendant in the written statement that he was served with the statutory legal notice dated 26.03.2008 terminating the tenancy and that he replied to the said notice vide reply dated 21.04.2008. It is further a matter of record that the defendant was served with another notice dated 18.03.2008 for payment of arrears of rent, which was duly replied by the defendant vide reply dated 16.04.2008.

16.2. It is pertinent to note that in the said replies, the defendant has himself stated/admitted that the tenanted premises is property bearing municipal number 90/1, Gali No.1, Shakarpur, Delhi and that the plaintiff is the landlady of the said premises. In addition to the said admission the defendant also admitted that he was earlier inducted as a tenant in the ground floor of property bearing no. 88/15, Shakarpur being adjacent to the tenanted premises, which inarguably evidences that the suit property bears municipal no. 90/1, Shakarpur, Delhi and not 88/15, Shakarpur. The relevant para of replies dated 16.04.2008 and 21.04.2008 reads as under:

Averments in notice dated 26.03.2008 issued by plaintiff/landlady	Averments in reply dated 21.04.2008 issued by defendant/tenant to the notice dated 26.03.2008
1. That you are tenant under my aforesaid clientess in respect ground floor and first floor forming part of the <u>premises bearing No. 90/1, Gali No.1, Shakarpur, Delhi</u> at a monthly rent of Rs. 13,000/- (excluding water and electricity charges). A rent	1. Para No. 1 of your notice is admitted to the extent that <u>my client is a tenant in respect of ground floor and first floor forming part of premises bearing No. 90/1, Gali No.1, Shakarpur, Delhi under your clientess the landlady of premises in question.</u>



agreement dated 17.7.2007 was executed by you in favour of my aforesaid clientess.	
4. That my aforesaid clientess does not wish to keep you her tenant anymore and hereby terminates your tenancy with immediate effect.	4. That para no.4 of your notice is wrong, illegal and denied. <u>My client is a lawful tenant in the tenanted premises no. 90/1 as detailed in the above paras.</u>

(Emphasis Supplied)

Averments in the Notice dated 18.03.2008 issued by the plaintiff/landlady	Averments in reply dated 16.04.2008 issued by the defendant/tenant to the notice dated 18.03.2008
1. That my clientess is the owner of <u>property bearing No. 90/1, Gali No. 1, Shakarpur, Delhi-92</u> , consisting of first floor and ground floor of the above said building.	1. Para No. 1 of your notice is denied for want of knowledge, it is however <u>admitted that she is the, landlady of premises, in question.</u>
2. That you were inducted as a tenant on July, 17, 2007, in respect of Ground Floor and First Floor un the aforesaid property and legally possession of the same was retained by said clientess. The rent of the premises at the rime of letting out the same was agreed to be Rs.13,000/- per month for a period of 24 months with the stipulation that rent shall be enhanced by 10% after the expiry of one year, beside; electricity	2-3. My client was inducted as, a <u>tenant in the ground floor of the three storeyed premises bearing No. 90/1, situated in Gali No.1, Shakarpur, Delhi</u> , the premises in question for commercial purposes at a monthly rent of Rs ,6000/- and the 1st floor of the same for residential purposes at a monthly rent of Rs,4000/- besides electricity and water charges payable by my client to the concerned authorities in



and water charges have to be paid by you, directly to the concerned authority. 3. That the rent in the area has increased substantially but still you are you are also in arrears of rent for the last three months amounting to Rs. 39,000/- only with the interest @ 18% per month.	November 2004 by Shri Sudarshan Kumar, who is managing the properties of his mother Smt. Kaushalya Devi. It is pertinent to submit that <u>my client was first inducted as a tenant in the ground floor of 2 storeyed house bearing Ho.88/15, Gali No. 1 Shakarpur Delhi which is contiguous of premises No.90/1</u> in dispute for commercial purposes in July 1997 at a monthly rent of Rs.4000/- besides electricity and water charges.
4. It is stated that the matter is sub-judice before the Hon'ble Senior Civil Judge, Karkardooma Courts, Delhi, regarding Ground Floor and is fixed for 13th May, 2008 for argument. <u>The 1st Floor is used by your family for residential purposes and my clientess does not wish to keep you as tenant anymore</u> and as such your tenancy shall stand terminated with the expiry of 30 days period from the receipt of this Notice.	4. <u>My client is a lawful tenant in the tenanted premises no. 90/1.</u>

(Emphasis Supplied)

16.3. The aforesaid replies to the statutory legal notices were issued by a lawyer on behalf of the defendant. In these replies, the defendant categorically admitted that he occupies the suit property as a tenant and the



municipal number of the suit property is 90/1, Gali No.1, Shakarpur, Delhi. There was no claim or defence raised alleging that the defendant has an ATS for the said tenanted premises.

17. Similarly, in the written statement filed by the defendant he duly admitted that the municipal number of the suit property is 90/1, Gali No.1, Shakarpur, Delhi. In this regard, the following averments in the pleadings are relevant:

Averments of Plaintiff in the Plaint	Averments of Defendant in Written Statement
1. <u>That the plaintiff is the Senior Citizen and the owner/ landlord of the premises bearing no. 90/1, GaH No. 1, Shakarpur, Delhi</u> and the defendant is the tenant in the said premises under the plaintiff at a monthly rent of Rs.13000/ (excluding water and electricity charges) in respect of ground floor and first floor forming part of the <u>premises No. 90/1, Gall No. 1, Shakarpur, Delhi</u> . The tenanted portion is shown red in the site plan annexed therewith.	1. In reply to para no. 1 of the plaint only <u>it is not disputed that plaintiff is a senior citizen and defendant is a tenant in respect of premises bearing no. 90/1, Gali no.1, Shakarpur, Delhi</u> . The tenancy premises is comprised of entire ground floor, and first floor. <u>The ground floor portion of the suit property is a shop and first floor portion is being used as his residence by the defendant.</u>

(Emphasis supplied)

17.1. Thus, in the written statement, the defendant categorically admitted the identity of the tenanted premises and the existence of the relationship of landlord and tenant.

18. This Court also concurs with the findings of the Trial Court that in the government issued identification documents produced by the defendant on



record, his place of residence was duly recorded as 90/1, Gali No.1, Shakarpur, Delhi. The relevant portion of the findings of the Trial Court read as under:

*“6.1 In the documents produced by the defendant i.e. Ex.DW1/9, Ex.DW1/10, Ex.DW1/11, Ex.DW1/12, Ex.DW1/6 and in the voter ID card bearing no. BQF1644624 issued by the Election Commission of India to the defendant, **his place of residence is recorded to be 90/1, Upadhyay Block, Shakarpur, Delhi tells the suit property.**”*

(Emphasis supplied)

18.1. The learned counsel for the defendant has not disputed the aforesaid finding of the Trial Court, further the defendant has not been able to explain the existence of municipal number 90/1 Gali No.1, Shakarpur, Delhi in his identification documents. The defendant admittedly resided at the first floor of the tenanted premises and defendant's identification documents therefore falsify the stand of the defendant that the tenanted premises bears municipal no. 88/15, Shakarpur.

19. In the opinion of this Court, a perusal of the pleadings of the written statement, replies filed by the defendant to the legal notices and his personal government issued identification documents sufficiently proved that the tenanted premises bear municipal number 90/1 Gali No.1, Shakarpur, Delhi. Therefore, both the Trial Court and the first Appellate Court have rightly concluded on the basis of the record that there is no disputed about the identity of the tenanted premises.

20. Further, the relationship of landlord/tenant also stands proves and the termination of the said relationship by service of the legal notice dated 26.03.2008 also stands established. In these facts, the decree of possession has been rightly passed by the Trial Court.



21. No arguments were addressed by the defendant on the rate of mesne profits determined by the Trial Court. The Trial Court has in any event awarded the mesne profits on the admitted rate of Rs. 10,000/- per month. There is therefore no infirmity in the said decree of mesne profits.

22. In the aforesaid facts, the finding of the Trial Court that the defendant was a tenant in the tenanted premises whose tenancy has been validly terminated vide the legal notice, is based on correct appreciation of facts.

23. It appears from the record that the defendant on or about in 2012 sought to change his stand in the present suit to claim that the municipal number of the suit property is 88/15 and not 90/1. To substantiate this defence, the entire argument and controversy around the municipal number was sought to be raised during the trial.

23.1. In the site plan filed by the plaintiff, property bearing no. 88/15 is shown as an adjacent property to the tenanted premises which bears municipal number 90/1. As per the site plan, property bearing no. 88/15 is distinct from property bearing no. 90/1.

23.2. The defendant was also a tenant in property bearing no. 88/15 in the ground floor of the said premises as depicted in the site plan filed with the plaint. A separate and distinct civil suit 302/2008 was filed by the landlady for recovery of possession of premises bearing no. 88/15. It was in the said civil suit that the defendant herein set up a counter claim of the ATS. The counsel for the defendant during the course of arguments has been unable to explain defendant's action of filing the counter claim in pursuance to its purported ATS dated 30.08.1999 in the former suit and not in the present suit for the tenanted premises bearing no. 90/1, Gali No. 1, Shakarpur, Delhi. The said former suit filed for property bearing no. 88/15 was withdrawn by



the landlady on 23.03.2009 as she sold the said distinct property in 2009 to a third party.

23.3. The defendant admits surrendering possession of the said ground floor in favour of the third party who bought the said distinct property. However, the defendant seeks to raise a plea that the said distinct property which was surrendered by him to the third party bears municipal number 88/15-A.

23.4. The defendant has also filed a separate civil suit bearing no. 2500/2016 for specific performance of the ATS which is pending before the concerned Civil Court. Thus, rights if any, of the defendant under the ATS will be decided in the said suit on its own merits and in accordance with law.

23.5. However, in the facts of this case on the basis of the pleadings and documents on record, this Court finds no error in the concurrent findings of the first Appellate Court and the Trial Court in passing a decree of possession and mesne profits against the defendant. In the facts of this case, the tenanted premises bears the municipal number 90/1, Gali No.1, Shakarpur, Delhi.

24. Therefore, defendant herein has failed to raise any question of law much less a substantial question of law for consideration of this Court and further the grounds merely challenge the finding of the fact.

24.1. In this regard, it would be appropriate to refer to the case of **Nazir Mohamed v. J. Kamal and others (2020) 19 SCC 57** wherein the Supreme Court observed that second appeal only lies on a substantial question of law and the party cannot agitate facts or call upon the High Court to reappraise the evidence in a second appeal. The operative portion to this aspect reads as under:



*“22. A second appeal, or for that matter, any appeal is not a matter of right. the right of appeal is conferred by statute. A second appeal only lies on a substantial question of law. If statute confers a limited right of appeal, the court cannot expand the scope of the appeal. **It was not open to the respondent-plaintiff to reagitate facts or to call upon the High Court to reanalyse or reappreciate evidence in a second appeal.**”*

23. Section 100 CPC, as amended, restricts the right of second appeal, to Only those cases, where a substantial question of law is involved. The existence of a "substantial question of law" is the sine qua non for the exercise of jurisdiction under Section 100 CPC.

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28. To be “substantial”, a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.

*29. **To be a question of law "involved in the case, there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case."***

(Emphasis supplied)

25. The defendant before the First Appellate Court made an incorrect statement on 15.01.2019 that he has surrendered the possession of the tenanted premises which forms the subject matter of the Trial Court judgment and decree dated 21.12.2017. In fact, it is evident from the record that the defendant continued to remain in possession of the suit property until 17.04.2023.

25.1. The defendant by raising an untenable controversy over the municipal number of the suit property has successfully avoided handing over the possession from 21.12.2017 until 17.04.2023.

25.2. This Court therefore, finds no merit in the prayers of the defendant seeking restitution of possession of the tenanted premises recovered in the execution proceedings.



26. The learned counsel for the defendant contended that for the recovery of the mesne profits, the defendant be given benefit of the amounts which already stands paid to the plaintiff. This Court is of the opinion that it is the matter of law that defendant will be entitled to adjustment of all payment made to the plaintiff after the passing of the judgment and decree dated 21.12.2017, subject to the defendant proving the said payment to the satisfaction of the Executing Court.

27. This second appeal is accordingly dismissed and the order of the First Appellate Court and the Trial Court is upheld. Pending applications, if any stand disposed of.

MANMEET PRITAM SINGH ARORA, J

OCTOBER 31, 2023/hp/sk

[Click here to check corrigendum, if any](#)