(2016) 09 DEL CK 0146

DELHI HIGH COURT

Case No: RFA No. 60 of 2016 and CM No. 3975 of 2016 (for filing additional documents)

Bhupinder Kalra - Appellant
@HASH Paramjit Kaur and Others — APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 29, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2, Section 96
- Constitution of India, 1950 - Article 227
- Transfer of Property Act, 1882 - Section 108

Citation: (2016) 8 ADDelhi 693

Hon'ble Judges: Rajiv Sahai Endlaw, J.

Bench: Single Bench

Advocate: Mr. K.C. Mittal and Ms. Ruchika Mittal, Advocates, for the Appellant; Mr. Anil Gera, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Mr. Rajiv Sahai Endlaw, J. - This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 8th October, 2015 [of the Court of the Additional District Judge (ADJ)-05 (West), Tis Hazari Court, Delhi in CS No.1439/2011 (Unique ID No.02401C0338702011)] of ejectment of the appellant from the shops on first and second floors above the shop bearing no. 4, WZ-296, G-Block, Jail Road, Hari Nagar, New Delhi and for recovery of Rs.4,30,000/- towards arrears of rent and of Rs.30,000/- per month towards damages/use and occupation charges w.e.f. June, 2011 till the delivery of possession.

2. The appeal came up first before this Court on 3rd February, 2016 when on being told that CM(M) No.872/2015 preferred by the appellant against the order in the suit from which this appeal arises closing the right of the appellant to cross examine the

witnesses of the respondents/plaintiffs was also pending consideration, the appeal was ordered to be listed along with the said CM(M) No.872/2015. However it appears that CM(M) No.872/2015 was disposed of on 11th February, 2016 i.e. before this appeal could be listed therewith. Accordingly, notice of this appeal was issued and Trial Court record requisitioned. The appeal, on 3rd March, 2016 was admitted for hearing and considering the nature of the controversy, was posted for hearing on actual date and subject to the appellant/depositing the entire decretal amount due towards mesne profits i.e. Rs.4,30,000/- plus Rs.30,000/- per month w.e.f. June, 2011 till March, 2016 execution was stayed. Vide subsequent order dated 28th March, 2016 the appellant was permitted to deposit Fixed Deposit Receipt (FDR) in the name of the Registrar General of this Court on the condition that the interest on the FDR shall accrue to the benefit of the final order and will not be credited to the account of the appellant.

3. The counsels were heard on 2nd May, 2016, 9th May, 2016 and 11th May, 2016 and judgment reserved.

4. The respondents no.1, 3 & 4 namely Smt. Paramjit Kaur, Sh. Darpreet Singh and Smt. Simran Kaur (respondent no.2 Sh. Hardev Singh is the husband of the respondent no.1 Smt. Paramjit Kaur and was not a party to the suit and appears to have been erroneously impleaded) instituted the suit from which this appeal arises, pleading (i) that the respondents/plaintiffs had earlier let out the ground floor shop no.4, WZ-296, G-Block, Jail Road, Hari Nagar, New Delhi to the appellant/defendant on 15th February, 2003 and which tenancy was renewed from time to time and the last registered Tenancy Agreement was dated 20th March, 2009 and the last paid rent of the said shop was Rs.35,000/- per month; (ii) that the respondents/plaintiffs had separately sued the appellant/defendant for ejectment from the said ground floor shop; (iii) that the appellant/defendant, after taking the ground floor shop on rent, requested the respondents/plaintiffs to construct two new additional shops on the first floor and second floor of the said ground floor shop and to which the respondents/plaintiffs agreed; (iv) that the respondents/plaintiffs let out the two new additional shops on the first and second floors to the appellant/defendant from 1st July, 2009 on a rent of Rs.30,000/- per month; (v) that the appellant/defendant paid the rent of the said first and second floor shops up to 31st March, 2010 and stopped paying rent w.e.f. 1st April, 2010; and, (vi) that the respondents/plaintiffs vide notice dated 3rd May, 2011 determined the tenancy of the appellant/defendant of the said first floor and second floor shops but the appellant/defendant had failed to vacate the same. Accordingly, the suit for the reliefs of ejectment of the appellant/defendant from the said first and second floor shops, recovery of arrears of rent/mesne profits and future mesne profits was filed.

5. The appellant/defendant contested the suit by filing a written statement pleading (i) that there was no relationship of landlord and tenant between the parties with respect to the first and second floor shops; (ii) that the appellant/defendant was the

owner of the first and second floor shops; that though the appellant/defendant was the tenant under the respondents/plaintiffs with respect to the ground floor shop but the appellant/defendant was the owner of the first floor and second floor shops; (iii) that in the Rent Agreement dated 15th February, 2003 between the parties with respect to the ground floor shop the appellant/defendant had been permitted to install the tin shed on the terrace of the ground floor shop and to use the said terrace as a godown; (iv) similar clauses existed in the subsequent Rent Agreements dated 22nd March, 2006 and 20th March, 2009 between the parties with respect to the ground floor shop; (v) that the appellant/defendant at his own expense, in the year 2004 built the first floor and the second floor above the ground floor shop and staircase for going thereto; (vi) this construction was got done with the consent and knowledge of the respondents/plaintiffs and with the understanding that the structure of the first and second floors would vest with the appellant/defendant while the ground floor shop would continue to be in the tenancy of the appellant/defendant under the respondents/plaintiffs; (vii) that the appellant/defendant while carrying out construction of the first floor and second floor shops in early part of the year 2004 paid in cash a sum of Rs.5,00,000/- to the respondents/plaintiffs for obtaining their consent and acquiescence for securing absolute rights with respect to the first floor and second floor shops; (viii) that the appellant/defendant spent a sum of Rs.6,00,000/- towards construction; (ix) however in the Rent Agreements of the years 2006 and 2009 the factum of the first and second floors was not mentioned on the request of the respondents/plaintiffs; (x) that the respondents/plaintiffs had requested the appellant/defendant to increase the monthly rent of the ground floor shop to Rs.70,000/- and upon the appellant/defendant not agreeing thereto, they first sent legal notice dated 30th August, 2010 and thereafter notice dated 25th September, 2010 of termination of tenancy; (xi) that the respondents/plaintiffs prior to instituting the subject suit had instituted the suit for ejectment with respect to the ground floor shop and the subject suit was barred by Order 2, Rule 2 of the CPC; (xii) that the respondents/plaintiffs have no right to interfere with the possession of the appellant/defendant of the first and second floor shops; and, (xiii) that the appellant/defendant had never paid rent at a rate of Rs.30,000/- per month or at any other rate with respect to the first and second floor shops to the respondents/plaintiffs.

6. No replication is found to have been filed by the respondents/plaintiffs.

7. On the pleadings aforesaid, the following issues were framed in the suit on 18th September, 2012:-

"1. Whether the suit is barred under Order 2, Rule 2 CPC as pleaded in WS? (OPD)

2. Whether the defendant is the owner with regard to the first floor and second floor above shop no.4 of property bearing no. WZ-296, G-Block, Jail Road, Hari Nagar, New Delhi? (OPD)

3. Whether the plaintiffs let out the suit property to the defendant on 01.07.2009 on a monthly rent of Rs.30,000/- excluding other charges? (OPP)

4. Whether the tenancy of the defendant qua the suit property has been terminated vide legal notice dated 03.05.2011 w.e.f. 31.05.2011. If so, whether the plaintiffs are entitled to a decree of possession? (OPP)

5. Whether the plaintiffs are entitled to arrears of rent and damages as claim in the plaint? (OPP)

6. Relief."

8. Though on framing of the issues aforesaid the suit was posted for evidence of the respondents/plaintiffs but vide order dated 26th April, 2013 on an application of the respondents/plaintiffs, the appellant/defendant was directed to lead evidence first and the suit adjourned to 24th July, 2013 and 26th July, 2013 for entire evidence of the appellant/defendant.

9. The appellant/defendant did not file affidavits by way of examination-in-chief of his witnesses and on 24th July, 2013 sought adjournment and without noticing that the suit was also posted on 26th July, 2013, the same was adjourned for evidence of the appellant/defendant to 4th September, 2013.

10. On 4th September, 2013, the Advocates were abstaining from work and the suit adjourned to 17th October, 2013.

11. No affidavits by way of evidence were filed by the appellant/defendant till 17th October, 2013 also and on that date also adjournment was sought; though the counsel for the respondents/plaintiffs opposed but adjournment was granted and the suit adjourned to 29th November, 2013 for evidence of the appellant/defendant with a direction to the appellant/defendant to supply advance copies of the affidavits by way of examination-in-chief.

12. On 29th November, 2013 also neither the witnesses of the appellant/defendant appeared nor any affidavit by way of examination-in-chief had been filed and adjournment was sought and granted with the condition that "no further adjournment shall be granted". The suit was adjourned to 10th January, 2014.

13. It appears that a transfer petition for transfer of the suit to some other Judge was filed and accordingly adjournments were granted on 10th January, 2014 and 13th February, 2014. Finally on 14th February, 2014 the matter again posted for evidence of the appellant/defendant to 19th March, 2014.

14. The appellant/defendant still did not file any affidavits by way of examination-in-chief and no witness was present on 19th March, 2014. Accordingly the evidence of the appellant/defendant was closed and the suit posted to 27th May, 2014 for the evidence of the respondents/plaintiffs.

15. The respondents/plaintiffs filed affidavit by way of examination-in-chief of their witness on 20th November, 2014; however none appeared for the appellant/defendant despite repeated calls on that date and "in the interest of justice" suit adjourned to 2nd February, 2015.

16. On 2nd February, 2015 also the counsel for the appellant/defendant sought adjournment for cross examination of the witness of the respondents/plaintiffs whose affidavit by way of examination-in-chief had been tendered in evidence and the suit adjourned to 25th February, 2015.

17. On 25th February, 2015 again the counsel for the appellant/defendant sought adjournment and though the same was opposed by the counsel for the respondents/plaintiffs but granted and the suit adjourned to 25th March, 2015.

18. The appellant/defendant failed to cross examine the witness of the respondents/plaintiffs on 25th March, 2015 also and instead filed an application and sought reference to the Mediation cell.

19. Mediation remained unsuccessful and the suit was posted to 27th August, 2015 for cross examination by the appellant/defendant of the witness of the respondents/plaintiffs.

20. On 27th August, 2015 also the appellant/defendant did not cross examine the witness of the respondents/plaintiffs and sought adjournment which was refused and the right of the appellant/defendant to cross examine the witness of the respondents/plaintiffs was closed.

21. The respondents/plaintiffs on 27th August, 2015 itself closed their evidence and the suit was posted for final arguments to 18th September, 2015.

22. CM(M) No.872/2015 supra was preferred by the appellant/defendant impugning the order dated 27th August, 2015 aforesaid closing the right of the appellant/defendant to cross examine the witness of the respondents/plaintiffs. The said petition came up first before this Court on 18th September, 2015 when notice thereof was issued though no stay of proceedings before the Trial Court as sought granted.

23. The appellant/defendant accordingly, on 18th September, 2015 when the suit was listed before the Trial Court for final hearing, sought adjournment and which was granted and the suit adjourned to 8th October, 2015 for arguments.

24. On 8th October, 2015 again the counsel for the appellant/defendant sought adjournment and which was refused and the learned ADJ after hearing the counsel for the respondents/plaintiffs decreed the suit as aforesaid.

25. The CM(M) No.872/2015 supra was disposed of vide order dated 11th February, 2016 observing that in view of the judgment and decree dated 8th October, 2015 the same had become infructuous.

26. The learned ADJ, in the impugned judgment (i) has decided issues no.1&2 aforesaid against the appellant/defendant reasoning that the onus thereof was on the appellant/defendant and the appellant/defendant by failing to lead evidence had not discharged the onus; and, (ii) has on the basis of unrebutted evidence of the witness of the respondents/plaintiffs whom the appellant/defendant failed to cross examine despite opportunity, decided issues no.3,4,&5 in favour of the respondents/plaintiffs and against the appellant/defendant and accordingly decreed the suit.

27. The counsel for the appellant/defendant at the outset contended that the learned ADJ erred in proceeding to decide the suit notwithstanding the notice of the CM(M) petition aforesaid having been issued by this Court.

28. The question which arises is, whether a mere pendency of an appeal, revision or a petition under Article 227 of the Constitution of India amounts to a stay of further proceedings in the suit or other proceeding from an order wherein such appeal, revision or petition under Article 227 has been preferred.

29. The answer is obviously "no". Neither is there any provision in CPC or in any other law to the said effect nor has any such jurisprudential principle evolved over the years. Rather, Order 41, Rule 5 of the CPC expressly provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate court may order.

30. It is quite obvious that the appellant/defendant also was fully conscious of the same and for this reason only, along with the CM(M) petition aforesaid, filed an application for stay of proceedings in the suit.

31. However this Court though issued notice of the CM(M) petition as well as of the application for stay but did not grant any stay of proceedings in the suit. Unequivocal indication from the refusal to grant stay of proceedings in the suit was that the suit proceedings were intended to go on and this Court while issuing notice of the CM(M) petition did not find the facts to be such as to warrant stay of proceedings in the suit.

32. The question which further arises for consideration is, whether notwithstanding this Court having not deemed the facts of the case fit enough to grant stay of proceedings in the suit, the learned ADJ should have nevertheless not proceeded with the matter.

33. The answer again obviously has to be in the negative. Once this Court having supervisory jurisdiction had refused to grant stay of proceedings, to hold that the learned ADJ should have not proceeded with the matter would amount to the learned ADJ granting stay of proceedings which this Court had not deemed appropriate to grant.

34. I must however record that in yesteryears, when all litigation was bona fide and not used as a tool of oppression and coercion and the dockets of the courts not bulging at the seams as they now are and it was possible to grant short adjournments, the subordinate courts generally used to await the outcome of an appeal or a revision or a petition under Article 227 of the Constitution of India preferred against an order in the proceedings so as not to compel the litigants to indulge in repeated rounds of litigation in the event of the higher court reversing the decision/order. The counsel for the appellant/defendant also in this regard has relied on **Maya Singh v. Jawant Rai, 1975 Rajdhani Law Reporter (Note) 40** to contend that even if High Court does not grant stay of proceedings in the Trial Court while admitting petition against an interim order, Trial Court should not hastily proceed but consider whether next date in the High Court was short or near and accordingly adjourn the matter.

35. However the said indulgence granted by the courts is found to have been abused by the litigants by, on the one hand taking adjournments in the higher court and on the other hand stalling the proceedings in the subordinate courts on the ground of pendency of proceedings in the High Court. It is also not possible today to grant short adjournments as the cause list of each court is blocked months in advance. Time has thus come for such deference which was earlier shown by the subordinate courts to come to an end and subordinate courts not treating the mere pendency of a proceeding in a higher court as an automatic stay of the proceedings pending before them. Of course, if in the facts of any case this Court feels a need for grant of stay of proceedings before the subordinate court, certainly this Court in exercise of its discretion would do so.

36. The appellant/defendant here is also similar found to be abusing the process of the Court. I have herein above set-out in detail the repeated adjournments taken by the appellant/defendant at each and every stage of proceedings. The appellant/defendant on 18th September, 2015 was fully aware of the next date of 8th October, 2015 for hearing final arguments fixed by the learned ADJ and had an opportunity to approach this Court before that for stay of proceedings but did not do so. The same is the demonstrative of the appellant/defendant using the process of the Court to compel and coerce the respondents/plaintiffs to settle with him.

37. Supreme Court, in **Collector of Customs, Bombay v. M/s. Krishna Sales (P) Ltd. 1994 Supp. (3) SCC 73** held, "As is well known, mere filing of an appeal does not operate as a stay or suspension of the order appealed against. Again, in **Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd. (2005) 1 SCC 705**, after observing that landlord-tenant litigation goes on for an unreasonable length of time and tenants in possession of premises do not miss any opportunity of filing appeals and revisions so long as they can thereby afford to perpetuate the life of litigation and continue in occupation of the premises, it was held "It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the

proceedings in the court below". Yet against, in **Madan Kumar Singh (D) thr. LR. v. Distt. Magistrate, Sultanpur (2009) 9 SCC 79** it was held "It is trite to say that mere filing of a petition, appeal or suit, would by itself not operate as stay until specific prayer in this regard is made and orders thereon are passed."

38. Thus, no credence can be given to the observations made more than 40 years ago in the judgment cited by the counsel for the appellant/defendant and no error can be found in the impugned judgment for the reason of the same having been pronounced during the pendency of CM(M) petition aforesaid.

39. Though the appellant/defendant in this appeal has not impugned the order dated 19th March, 2014 of the learned ADJ of closure of his evidence or the order dated 27th August, 2015 of closure of his right to cross examine the witness of the respondents/plaintiffs, as the appellant/defendant could have done under Order 43, Rule 1A of the CPC but I have nevertheless considered the said aspect. The appellant/defendant in the Memorandum of Appeal has however pleaded that the appellant/defendant was wrongly called upon to lead evidence.

40. In my opinion neither can any error be found in the learned ADJ requiring the appellant/defendant to lead evidence first nor can any error be found in the order dated 19th March, 2014 closing the right of the appellant/defendant to lead evidence or the order dated 27th August, 2015 closing the right of the appellant/defendant to cross examine the witness of the respondents/plaintiffs.

41. The appellant/defendant was admittedly a tenant under the respondents/plaintiffs with respect to the ground floor shop. It is the case of the appellant/defendant that on the open terrace above the said shop he was permitted to put up a tin shed and to use the same as a godown. The use by the appellant/defendant of the said open terrace was thus, according to the appellant/defendant, permitted by the respondents/plaintiffs. In this state of pleadings, when the respondents/plaintiffs sued the appellant/defendant for ejectment from the first and second floors shops pleading that the appellant/defendant had been let out the first and second floors also and that his tenancy had been terminated and in the face of the defence of the appellant/defendant of having become the owner thereof, no error can be found in the order of the learned ADJ of calling upon the appellant/defendant to lead evidence first as the outcome of the case was dependent upon the appellant/defendant proving his ownership. If the appellant/defendant failed to prove his ownership, in the light of his admissions as noted herein, his possession which was claimed to be peaceful and lawful over the property admittedly belonging to the respondents/plaintiffs had to be believed to be as a tenant. It was not the case of the appellant/defendant that his possession of the said first floor and second floor shops was adverse or hostile to the respondents/plaintiffs.

42. I say so because per Section 108 of the Transfer of Property Act, 1882 prescribing the rights and liabilities of lessor and lessee in the absence of a contract to the contrary, if during the continuance of the lease any accession is made to the property, such accession shall be deemed to be comprised in the lease [see Section 108(B)(d)]. Reference may also be made to Section 108 (B) (h) of the Transfer of Property Act conferring right on a lessee/tenant to (subject to contract to contrary), after determination of lease, remove, at any time whilst he is in possession of the property leased, all things which he has attached to the earth. Thus, a tenant is not entitled to claim such accessions as his own property.

43. Merely because the appellant/defendant here claimed to have raised the construction of the first and second floor shops himself and at his own expense would not in law raise a presumption of the appellant/defendant becoming owner thereof, even if he were to establish/prove so, without further proving a contract to the contrary. The appellant/defendant pleaded such contract to the contrary by averring that the respondents/plaintiffs had for consideration of Rs.5 lacs, paid and received in cash and of which payment/receipt no document was produced, sold the terrace above the ground floor shop in his tenancy to the appellant/defendant. If the appellant/defendant failed to prove so, as per Section 108(B)(d) supra, there was legal presumption of the said first and second floor shops being in his possession as a tenant under the respondents/plaintiffs, and with which case the respondents/plaintiffs had instituted the suit. In these facts, no error can be found with the direction to appellant/defendant to lead evidence first. Only if the appellant/defendant by leading evidence first proved that the respondents/plaintiffs had so sold the terrace above the ground floor shop to the appellant/defendant, would the onus to disprove so and prove that the appellant/defendant was tenant under the respondents/plaintiffs therein would have shifted to the respondents/plaintiffs.

44. Though vide Order 18, Rule 1 CPC, the plaintiff has the right to begin but only unless the defendant admits the facts alleged by the plaintiff and contends either in point of law or on some additional facts that the plaintiff is not entitled to the relief. Here, the appellant/defendant, by admitting tenancy of ground shop and permitted use of terrace and by claiming to have purchased the same from respondents/plaintiffs admitted ownership of respondents/plaintiffs of terrace. Law, as aforesaid, raises presumption that even if construction on such terrace is made by appellant/defendant, as claimed by him, the status of appellant/defendant in the said premises would be as a tenant only and not as owner. It was thus for the appellant/defendant to prove to the contrary. Supreme Court in **Anil Rishi v. Gurbaksh Singh (2006) 5 SCC 558** held that right to begin follows onus probandi. Moreover, now that the suit has been finally decided, all these issues pale into insignificance.

45. No error is also found in the order dated 19th March, 2014 of the learned ADJ closing the evidence of the appellant/defendant. The appellant/defendant had availed of as many as eight opportunities for leading evidence and was clearly dragging his feet. I have recently in judgment dated 7th September, 2016 in CS(OS) No.1602/2006 titled Samsung Electronics Company Ltd. v. Gyanji Choudhary, for reason set-out in detail there held that a litigant cannot choose to proceed with a litigation at his own pace and the courts would be lacking in their duty to dispense justice if allow such abuse of the process of Court.

46. Though the appellant/defendant has been unsuccessful in CM(M) No. 872/2015 preferred against the order dated 27th August, 2015 of closure of his right to cross examine the witness of the respondents/plaintiffs but since the CM(M) petition was not considered for the reason of the final judgment and decree having been passed and since the appellant/defendant in this appeal against the final judgment and decree, as aforesaid is entitled to challenge the said order, I have also considered the said aspect. For the reasons which have been stated above it has to be held that there is no error in the said order. The appellant/defendant had been afforded five opportunities to cross examine the witness of the respondents/plaintiffs and witnesses cannot be compelled to come to the Court repeatedly for their cross examination.

47. The counsel for the appellant/defendant, faced with aforesaid, argued (i) that the respondents/plaintiffs had sued for ejectment of the appellant/defendant as a tenant under them and the relationship of landlord and tenant had not been established; (ii) that even though the appellant/defendant has been unable to prove his claim of title as owner to the first and second floors but if the respondents/plaintiffs are unable to establish a landlord tenant relationship, they will have to sue the appellant/defendant for possession on the basis of title as owner and after paying court fees as per the market value of the property; (iii) that in the suit for ejectment from the ground floor shop filed by the respondents/plaintiffs against the appellant/defendant, no mention was made of the upper floors; (iv) that while the respondents/plaintiffs claim having let out the first floor and second floor shops to the appellant/defendant in the year 2009, according to the appellant/defendant he was in possession thereof since the year 2004; (v) that if the appellant/defendant succeeded in proving that the superstructure of the first and second floors had been raised by him, the respondents/plaintiffs would be entitled to decree for possession only after the appellant/defendant had removed the superstructure; and, (vi) that the respondents/plaintiffs had failed to prove that the superstructure of the first and second floors was constructed by them;

48. During the hearing on 2nd May, 2016 and as recorded in the order of that date I had enquired from the counsel for the appellant/defendant as to what is the right of the appellant/defendant with respect to the first and second floors de hors the

legalese and technical objections and observed that the appellant/defendant without any registered document and which he does not have cannot possibly become the owner of the first and second floors. It was further observed that even if the appellant/defendant claimed an agreement by the respondents/plaintiffs of sale of the terrace rights above the ground floor to the appellant/defendant, the appellant/defendant had to still sue for specific performance of the Agreement to Sell and which the appellant/defendant had not done. It was further enquired as to why this Court should allow its process to be used when ultimately no right in law with respect to the first and second floors emerged in favour of the appellant/defendant. The counsel for the appellant/defendant on that date had sought time to search for law on the said aspect.

49. The counsel for the appellant/defendant on the next date of hearing referred to and relied on:-

(i) **Laxmipat Singhania v. Larsen and Toubro Ltd. AIR 1951 Bombay 205** laying down that the effect of Section 108 (h) of the Transfer of Property Act, 1882 is that the lessee is the owner of the building put up by him although it is put up on the land belonging to the lessor and may after the determination of the lease remove all things which he has attached to the earth including structure or buildings put up by him and that there can be two distinct ownerships, one of the land and the other of the structure.

(ii) **Basant Lal v. State of Uttar Pradesh (1980) 4 SCC 430** - also on Section 108 (h) supra.

(iii) **Atmakur Venkatasubbiah Chetty v. Thirupurasundari Ammal AIR 1965 Madras 185 (DB)** - Referring to **Dr. K. A. Dhairyawan v. J. R. Thakur AIR 1958 SC 789** laying down that the lessee would continue to be the owner of the superstructure put up by him and superstructure would not vest in the lessor.

(iv) **Bishan Das v. State of Punjab AIR 1961 SC 1570** - laying down that a person who bona fide puts up constructions on land belonging to others, with their permission, is the owner of the superstructure by the application of the maxim quicquid plantatur solo, solo cedit.

50. The counsel for the appellant/defendant thus argued that the decree for ejectment should be modified by permitting the appellant/defendant to remove the superstructure put up by him of the first floor and second floor.

51. The counsel for the appellant/defendant during the hearing on 11th May, 2016 also handed over photocopy of a document obtained under Right to Information Act, 2005 purporting to show the existence of the first and second floors of the property as on 28th December, 2006 and argued that it is not as if the appellant/defendant has no defence whatsoever to the suit and if granted an opportunity to lead evidence and/or to cross examine, would prove that the first

floor and the second floor have been in existence since prior to 2009, thereby nullifying the claim of the respondents/plaintiffs of creation of tenancy thereof in the year 2009. It was argued that the appellant/defendant on proving the same would be able to at least get a right to remove the superstructure and salvage the cost thereof.

52. I have considered the aforesaid submissions.

53. Though the appellant/defendant in the written statement and even during the arguments earlier made was denying relationship of landlord and tenant with the respondents/plaintiffs, subsequently, by invoking clause (h) of Section 108 (B) of the Transfer of Property Act is admitting existence of such relationship. No provision of law entitling the appellant/defendant, if not a tenant, to remove the superstructure has been shown. Thus, the argument of the appellant/defendant of there being no relationship of landlord and tenant and the decree for ejectment of the appellant/defendant as a tenant being bad does not survive. Even otherwise, the same stands proved from the evidence of respondents/plaintiffs and which has not been rebutted by the appellant/defendant. Also, no ground for granting any fresh opportunity to the appellant/defendant to lead evidence is made out.

54. Once it is not in dispute that the appellant/defendant was a tenant in the premises, in the absence of a plea of a registered lease deed or of the tenancy being covered by the provisions of the Delhi Rent Control Act, 1958 (as indeed it could not be as the rent of the ground floor was admittedly Rs.35,000/- per month, much above the threshold of Rs.3,500/- per month for the applicability of the said Act), no error as pleaded in the Memorandum of Appeal or as earlier argued can be found with the decree for ejectment.

55. The only question which remains is whether the appellant/defendant is entitled to take away the superstructure of the first and second floors and/or entitled to any compensation therefor.

56. The appellant/defendant, to be entitled to such relief, ought to have pleaded and proved the same and which it has not pleaded and proved. Supreme Court, in Dr. K.A. Dhairyawan supra held that if the lessee does not exercise the right to superstructure, the superstructure becomes part of the demised premises and thereafter if the lessee continues in possession as a tenant, he will be a tenant of the land as well as of the superstructure and the superstructure becomes the property of the landlord without any further conveyance or formal transfer of the superstructure from the lessee to the lessor. I have also perused the Trial Court file. The appellant/defendant has not filed a single document lest documents to show that the construction of the first floor and second floor was undertaken by him or that monies thereon were spent by him thereon. No claim also to this effect was made in the written statement. In this state of affairs, the argument, of being allowed to take away the superstructure, is nothing but an argument of

desperation.

57. There is another aspect. I enquired from the counsel for the appellant/defendant what permissions, as are required under the Municipal Laws, were obtained for making the construction. No such permissions were disclosed. Thus the construction even if any by the appellant/defendant is illegal and no credence or benefit thereof can be given.

58. I may record that during the course of hearing it was also informed that the appellant/defendant has already, as far back as in April, 2015 been evicted from the ground floor shop and that the first floor and second floor shops are now merely lying locked.

59. No merit is thus found in the appeal.

60. Dismissed.

61. Decree sheet be drawn up.

62. The FDR deposited by the appellant/defendant in this Court be encashed forthwith and the amount thereof together with interest accrued thereon be released in favour of the respondents/plaintiffs.