IN THE COURT OF MS. VANDANA JAIN,
LD. ADDITIONAL DISTRICT JUDGE-07,
SOUTH EAST DISTRICT/ SAKET COURTS, NEW DELHI

RCA No. 20167/2016
Asif Parvez Vs Majid Deo Bandi

In the matter of :-

Asif Parvez S/o Sh. Nazeer Ahmad
R/o U-175, Beta -2, Greater Noida
Gautam Budh Nagar, Uttar Pradesh
Through Saghir Alam S/o Sh. Addul Gani
R/o B-159, Sangam Vihar, New Delhi

.....Appellant

Versus

1. Majid Deo Bandi
R/o R-116, Rameez Building
1st floor, Nafees Road, near Hari Masjid
Jogabai Extension, Batla House, Jamia Nagar, New Delhi

2. Shama Parveeen
R/o R-116, Rameez Building
1st Floor, Nafees Road, near Hari Masjid
Batla House, Jamia Nagar, New Delhi

3. Station House Office
PS-Jamia Nagar, New Delhi

.....Respondents

Date of institution	:	23.05.2015
Date of Reserving	:	04.03.2020
Date of pronouncement of order	:	15.05.2020

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Order on Appeal

1. This judgment is being pronounced on 15.05.2020 after preponing the file, in compliance of Order no. Admn./2020/SED/4904-4909 dated 02.05.2020 passed by Ld. District and Session Judge, South East, Saket, New Delhi during COVID 19 Lockdown, after intimating the date of pronouncement of judgment through whatsapp by issuing court notice to the Parties/their counsels as per record available in the judicial file.

2. Vide this order, I shall dispose off an appeal filed by appellant/plaintiff against the judgment and decree dated 28.04.2015 passed by Sh. Pranjal Aneja, Civil Judge-6, Central District, Tis Hazari Courts in suit no. 755/11 titled as Asif Parvez through Attorney Sagir Alam Vs Majid Deobandi & Ors whereby suit of the plaintiff was dismissed.

3. Brief facts of the case before Ld. Trial Court are that appellant/plaintiff Asif Parvez was the owner of land measuring 200 sq. yds with built up structure i.e. a temporary tin sheds/jhuggi, land

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measuring 200 sq yards situated in Khasra no. 308, Batla House, Jaima Nagar, Okhla, New Delhi (*hereinafter referred to as suit land).* It is further stated that plaintiff/owner executed the documents like GPA, agreement to sell etc in favour of his attorney Sh. Sagir Alam, vide said document on 05.03.2008 in respect of the aforesaid property.

4. It is further stated that Asif Parvez is the actual owner of the land mentioned above, the same was mutated in his name in the records of Revenue Authority, Defence Colony and property has been mutated in the name of its previous owner in Tehsil, Defence Colony, South District.

5. It is further stated that plaintiff duly executed the abovesaid documents in favour of his attorney in respect of the said property and the said attorney took the possession of the said suit land on 05.03.2008. It is further stated that the Asif Parvez had filed a suit for permanent injunction against one Shanay Hasan interrupting in peaceful possession of the previous owner and the suit was decreed exparte as the said Shanay Hasan after filing the suit did not come to the court.

6. It is further stated that at the time when the aforesaid documents were

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executed by the plaintiff in favour of his attorney, the attorney Sagir Alam put some fence boundary wall over the suit land and covered it to avoid any encroachment or trespass. It is further stated that plaintiff was in exclusive possession of the suit land till 18.03.2008 and on 18.03.2008 at about 10.45pm, the plaintiff came to know that defendant no. 1 accompanied with 4-5 other persons visited the suit land and shouted that the property belonged to him. Again on 20.03.2000, the defendant no. 1 alongwith 2-3 persons visiting the suit land and he tried to dispossess the plaintiff and further uprooted some of the bamboos planted by the plaintiff and plaintiff gave information to the local police about the same.

7. It is further stated the plaintiff filed the suit for permanent injunction against the defendant no. 1 on 24.03.2000. It is further stated that defendant no. 1 and 2 placed documents of the plot which were falling in Khasra no. 306, Batla House, Jamia Nagar, New Delhi. The said khasra and land falling in the khasra bearing no. 306 had been acquired by govt. vide due publication in National Gazette. It is further stated that defendant no. 1 and 2 in collusion with defendant no. 3 have illegally and unauthorizedly dispossessed the plaintiff from the suit land, which had been purchased by the plaintiff from its registered owner after paying the

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lawful consideration. It is further stated that defendants are having no interest, title and right over the suit land .

8. Written Statement was filed by the defendants wherein it was stated that plaintiff Sagir Alam had no locus standi to file the suit as he is not the owner of the suit property. Sagir Alam, plaintiff is claiming himself to be the attorney of Asif Parvez, both of them are not having any sale deed in their favour. He did not file any chain of document in favour of Asif Parvez. The plaintiff did not file any document to satisfy the court that he is the owner of the suit land and is entitled for possession.

9. It is further stated that the suit land being an agricultural land, is the subject matter of revenue court therefore, the jurisdiction of this court to entertain suit is barred in view of section 185 of Delhi Land Reforms Act. It is further stated that the plaintiff is not the bhumidar of the suit land.

10. It is further stated that present plaintiff filed a suit for permanent injunction in the civil court and the matter was listed on 06.05.2008 for settlement of issues. The maintainability of the suit was argued on behalf of defendants on various issues, the locus of the plaintiff, jurisdiction of

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the court and proof of possession of the plaintiff were questioned and consequently he withdrew the suit. It is submitted by the defendants that property in question is a plot of 225 sq. yards forming part of khasra no. 306, Batla House, Okhla, New Delhi. The defendants are in joint possession of the plot. The defendant no. 1 has purchased a piece of 100 sq yards whereas defendant no. 2 has purchased a piece of 125 sq. yards. The defendants have jointly raised a boundary wall and a shed made of bamboos and wild phoosh. The plaintiff neither in past nor in present is in the possession of the suit property therefore, is not entitled for the relief of injunction. It is further stated that from the record, it seems that the plaintiff procured a exparte collusive judgment against one Shanay Hasan to create the documents and misuse the same to grab the land. Rest of the averments were denied by the defendants.

11. No replication was filed by the plaintiff to the written statement of defendants.

12. After completion of the pleadings, Ld. Trial court framed following issues were framed vide order dated 11.11.2011.

1. Whether the plaintiff has no locus standi to file the present suit?

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OPD.

2. Whether the suit property is an agricultural land and suit is barred in view of section 185 of Delhi Land Reforms Act? OPD.

3. Whether the plaintiff is entitled for a decree of possession as prayed? OPP.

4. Whether the plaintiff is entitled for decree of declaration as prayed? OPP.

5. Relief.

13. After conducting trial, Ld. Trial Court dismissed the suit of the plaintiff with cost.

14. I have heard the arguments of the parties and perused the record carefully.

15. It is argued by Ld. Counsel for appellant/plaintiff that Ld Trial Court failed to appreciate that there are two types of onus i.e. burden of proof and onus to prove. Burden of proof is that which has to be proved by one party only. Onus to prove shifts from one party to another. In the present case, issues were framed and the onus to prove was OPP not OPD (burden

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of proof). In the present case the onus to prove was upon both the parties. The Ld . Trial court by keeping in mind " the burden of proof" gave the whole judgment as if burden was put on the appellant.

16. It is further argued that Ld Trial Court below slipped away from the basic law as stated above, that in civil court the evidence of parties is to be weighed and the judgment was delivered on the basis of evidence led by the parties which is missing in the present case. The Ld Trial Court has only discussed about the evidence led by the plaintiff and not considered even a single word of the respondent's evidence. So Ld. Trial court failed to weigh the evidence of both the parties.

17. It is further argued that Ld. Trial Court below failed to appreciate that at the time of deciding the present case, the Ld Trial Court below must have kept in mind as to who has the better title amongst the parties. It is further argued that Ld Trial Court failed to appreciate that plaintiff proved that the suit land was owned by Abdul Qadar whose name was duly recorded in revenue record. After the sale of suit land by virtue of documents executed by him, as stated above, the property was mutated in the name of the plaintiff. The plaintiff Asif Parvez has been shown as owner of the suit land.

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18. It is further argued that Ld Trial Court failed to appreciate that Sh Ram Tirath Patwari PW-3 appeared and proved that the Khasra girdawari and mutation so made are correct documents. The mutation has not been challenged by the defendant. It is further argued that Ld Trial Court also failed to prove that Asif Parvez through attorney appeared and deposed and proved himself to be the owner. It is further argued that Ld Trial Court has not appreciated the evidence led by the parties properly. It is further argued that Ld Trial Court failed to appreciate that the respondent no. 2 has not appeared in the court to give evidence and further the evidence led by respondent no. 1 is not reliable.

19. It is further argued that Ld Trial Court failed to appreciate that the appellant has got the judgment in suit titled as Asif Parvez Vs Shanay Hasan bearing suit no. 186/04. In the said judgment, the patwari, Devi Ram of area had appeared and deposed that the property in suit falls under Khasra no. 308 of village Okhla, New Delhi and he specifically stated that the appellant is in physical and actual possession of the property in question. The said judgment is also binding upon the parties.

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20. It is argued that judgment and decree passed by Ld. Trial Court is based on mere surmises and conjectures and is therefore, liable to be set aside.

21. On the other hand, Ld. Counsel for respondents was argued that the judgments/decree passed by Ld. Trial court is well reasoned and does not suffer from any illegality as alleged by the appellant/plaintiff. It is argued that grounds of appeal are baseless and it is liable to be dismissed.

22. I have heard the arguments of the parties and perused the record carefully.

23. I shall decide the appeal issue wise.

24. Issue no. 1:-

1. Whether the plaintiff has no locus standi to file the present suit? OPD.

The basic case of the appellant/plaintiff is that he has purchased the land measuring 200 sq. yards in khasra no.308, Jamia Nagar, New Delhi. It is pertinent to mention here that originally the suit was filed by

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one Sagir Alam to which the defendant has taken an objection that in the revenue records, the name of Asif Parvez was mentioned. The revenue records did not show the name of the Sagir Alam anywhere. Sagir Alam moved an application for amendment of plaint Under Order VI Rule 17 CPC which was allowed by Ld. Trial court and the name of recorded owner, Sh. Asif Parvez through Attorney Sagir Alam was allowed to be taken on record. Indeed, Sagir Alam has claimed that he had purchased the property from Asif Parvez and therefore, he has interest in the suit land. The order passed Under order VI Rule 17 CPC was never challenged. There is no cross appeal from the side of respondent/defendant even now challenging the order of Ld. Trial court under order VI Rule 17 CPC. In a nutshell, the plaint was allowed to be presented through Sagir Alam, being attorney of Asif Parvez. Though, Asif Parvez did not enter the witness box, but the consistent stand of Sagir Alam is that he had purchased the property from Asif Parvez. This fact has been fortified by PW2 Arif Parvez, brother of Asif. In Mankaur (dead) by LR's Vs Hartar Singh Sangha 2010 (10) SCC 512, it has been held that the attorneys who have personal knowledge of facts can depose in place of plaintiff. Here, Sagir Alam is on an upper footing since he claims to have purchased the suit land.

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Therefore, the finding of Ld. Trial Court that Sagir Alam had no locus to file or contest the suit, can not be sustained. The issue no. 1 is accordingly decided in favour of appellant/plaintiff.

25. Issue no. 2:-

2. Whether the suit property is an agricultural land and suit is barred in view of section 185 of Delhi Land Reforms Act? OPD.

There is no challenge to issue no. 2 by the appellant as it was decided in favour of appellant. There is no cross appeal against the findings on this issue. Therefore, there is no need to dwell upon this issue again as respondents have failed to discharge the onus put on them to prove this issue.

26. Issue no 3 and 4 **being interrelated are dealt with together:-**

3. Whether the plaintiff is entitled for a decree of possession as prayed? OPP.

4. Whether the plaintiff is entitled for decree of declaration as prayed? OPP.

The recorded owner of land in question (suit property) in Khasra no. 308 is shown to be Asif Parvez in Khasra girdawari Ex. PW1/3

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which was filed by appellant /plaintiff alongwith his documents. The said khasra girdawari was proved to be genuine by Ram Tirath Patwari from SDM Office, Defence Colony, who deposed as PW3 on 06.11.2012 before Ld. Trial Court. His examination was deferred for production of some documents. He again appeared on 16.05.2013 and was examined as PW4 and he brought the certified copy of khasra girdawari and exhibited it as PW4/1. It is relevant to mention here that Ex. PW1/3 and Ex. PW4/1 are same. He was cross examined by Ld. Counsel for defendant/respondent herein. He stated during his cross examination that "mutation is carried out on the basis of Sale deed".

PW2 Arif Parvez, brother of Asif Parvez, during his cross examination stated that his brother Asif has purchased the suit land from Abdul Qadar son of Niyadar. Abdul Qadar entered the witness box as PW3 and endorsed this fact. He also exhibited the chain of documents Ex PW3/2 which were executed by him in favour of Asif Parvez in respect of suit land. But there is no document on record to show from whom Abdul Qadar had purchased. Previous chain of documents is missing. The only document relied upon by Appellant/plaintiff is Khasra girdawari which is Ex PW1/3 or Ex. PW4/1. The careful examination of Ex. PW1/3 show that name of Asif Parvez is mentioned. Name of one Abdul Qadar is also

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mentioned who is shown to be one of the co-sharer but his parentage is not given in Ex. PW1/3. Abdul Qadar, PW3 in this case has been shown to be son of one Niyadar which is missing in Ex. PW1/3. As per patwari (PW4), the mutation would have been carried out on the basis of Sale deeds, however, no such Sale deed in favour of Abdul Qadar is on record showing his ownership in respect of suit land at any point of time. Thus, the appellant has failed to establish his clear title in the suit land. Though, the respondent had taken an objection that suit land falls in kharsa no. 306 and not in 308. But that question /objection does not assume any significance in view of the fact that appellant /plaintiff had to prove his case independent of the defence taken by defendant/respondent. Though, it is alleged by plaintiff/appellant before Ld Trial court that Khasra no. 306 was acquired by government but there is no need of going into that aspect. Even if it is presumed that the suit land fall under Khasra no. 308, Appellant/plaintiff had not been able to prove that his predecessor in interest had the good title to pass it on to him (Asif Parvez). The appellant had taken a specific objection that the evidence of respondents was not discussed. In my considered view, when the appellant has failed to discharge his onus to prove his title or that of his predecessor in interest, it would be a futile exercise to discuss the testimony of DW-1 specifically in

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view of the fact that there are no admissions on the part of respondents.

Further, the appellant had not shown any document to prove his possession in the suit land before the date of alleged dispossession. Even the factum of dispossession is not proved. Appellant has alleged that on 30.04.2008, respondent had forcibly taken the possession of the suit land from the servant of appellant /plaintiff in his absence. Even the name of the servant was not mentioned in the plaint. No such witness was called in the witness box to prove the factum of dispossession. Therefore, plaintiff /appellant failed to prove the title in the said land, his possession over the suit land at any point of time and even the dispossession of the plaintiff from the suit land on a given date.

Appellant has mentioned in his plaint that he had got an exparte decree in his favour against one Shanay Hasan in respect of this land and that judgment can be read under section 13 of Indian Evidence Act, 1872 to see that plaintiff is the owner of suit land. Ld counsel for appellant has relied upon "Tirumala Tirupati Devasthanams Vs K.M.. Krishnaiah(1998) 3.SCC 331. The perusal of the aforesaid judgment reveals that the facts of the case are different from the facts in appeal herein. In the suit filed by plaintiff against one Shanay Hassan, there was no appearance from defendant's side and Exparte decree was passed. Even in the testimony of

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PW2 (brother of Asif Parvez), it has come that she is the sister in law of plaintiff, whereas in the case of 'Tirumala' both the sides have made their submissions and everything on merits was considered. Therefore, that exparte judgment cannot be said to have any bearing on this case and therefore is not relevant under section 13 of Indian Evidence Act.

The issue no. 3 is decided against the appellant, but for the reasons mentioned above which are not given in judgment passed by Ld. Trial court. In view of findings on issue no 3, issue no. 4 is also decided against the appellant.

27. Accordingly, appeal is dismissed. Appeal file be consigned to the Record Room. Trial Court be sent back alongwith copy of this order. Decree sheet be prepared.

28. Copy of this order be sent to parties/their counsels as per record available.

(VANDANA JAIN)
ADDITIONAL DISTRICT JUDGE-07/
SOUTH EAST DISTRICT/SAKET COURTS
NEW DELHI/15.05.2020

IN THE COURT OF MS VANDANA JAIN,
ADDITIONAL DISTRICT JUDGE-07 (SE),
SAKET COURTS NEW DELHI

CS No. 10706/16
M/s Revie Vs. M/s Sunrise Hospitality & Anr.

In the matter of:

M/s Revie (Registered Partnership Firm)
Flat No. 1, 11 Aurangzeb Road,
New Delhi-110011
(Through its Partner Mr Jaiwant Daulat Singh)

.....**Plaintiff**

VERSUS

1. M/s Sunrise Hospitality
A-53, New Friends Colony,
New Delhi-110065

2. Mr Lakesh Sarna @ Bobby Sarna
S/o Mr. J.K. Sarna, Partner
M/s Sunrise Hospitality,
A-55, Defence Colony, New Delhi-110024

3. Mr. Sugreev Ahuja S/o Mr Sandeep Ahuja
Partner, M/s Sunrise Hospitality, A-53,
New Friends Colony, New Dellhi-110065.

4. Mrs. Shalini Ahuja W/o Mr. Sandeep Ahuja
Partner, M/s Sunrise Hospitality, A-53,
New Friends Colony, New Delhi-110065,

5. Mr. Sandeep Ahuja
Authorized Signatory
M/s Sunrise Hospitality,
A-55, Defence Colony,
New Delhi-110024

6. M/s City Square Mall Management
City Square Mall (Basement)
Plot No. 7 & 8 Shivaji Place,
District Centre, Main Ring Road, Raja Garden,
New Delhi-110027

.....Defendants

Date of Institution	**:**	**19.05.2015**
Date of reserving of judgment	**:**	**11.02.2020**
Date of Judgment	**:**	**15.05.2020**

JUDGMENT

1. This judgment is being pronounced on 15.05.2020 after

preponing the file, in compliance of Order no. Admn./2020/SED/4904-4909 dated 02.05.2020 passed by Ld. District and Session Judge, South East, Saket, New Delhi during COVID 19 Lockdown, after intimating the date of pronouncement of judgment through whatsapp by issuing court notice to the Parties/their counsels as per record available in the judicial file.

2. This is a suit for recovery, damages and mesne profits.

3. Brief facts of the case are that defendant no. 1 is a partnership firm which is in the business of running "Yo-China" restaurants on franchisee basis and defendant no. 2 to 4 are the partners and defendant no. 5 is the signatory authorized of the defendant no. 1 firm. It is averred in the plaint that shop no. T5-05, situated on the third floor of the City Square Mall located at commercial plot no. 8, Shivaji Place District Centre, Ring Road, Raja Garden, New Delhi *(hereinafter referred to as suit property)* is owned by the plaintiff and on 01.01.2006, the suit

property was let out to defendant no. 1 firm vide registered lease deed dated 27.10.2005 and in the said lease deed, M/s Moods Hospitality Pvt Ltd who were originally the franchisors of the "Yo China" restaurant brand to defendant no. 1, were made the confirming party and this situation continued till 31.12.2012.

4. It is further averred that sometime in January, 2012, defendant no. 2 to 5 approached the partner of the plaintiff firm for renewing the lease of the suit property and represented that they shall timely pay the rent and secured the timely payment of rent by handing over monthly post dated cheques to, discharge their obligations towards electricity, water and maintenance charges in a timely manner. It is further averred that relying on the aforesaid representations, plaintiff executed a fresh lease deed dated 12.01.2012 with respect to suit property with the defendant no. 1 on such terms and conditions as contained therein and for the first time, the said M/s Mood Hospitality Pvt. Ltd was not added as a confirming party to the said lease deed.

5. It is further averred that in terms of said lease deed, defendant no. 2 to 5 issued post dated cheques bearing no. 110526, 971933, 971935 and 971937, all drawn on Central Bank of India in the name of the plaintiff. However, defendant no. 2 to 5 failed to discharge their obligations in a timely manner and defendant no. 1 did not pay monthly rent on time and also failed to pay the electricity, water and maintenance charges.

6. It is further averred that from April 2012 onwards, the cheques issued by defendant no. 1 through its partners towards monthly rent, bounced on several occasions and plaintiff served various breach/default notices dated 04.10.2012, 30.10.2012 and 21.11.2012. Thereafter, defendant no. 2 to 5 apologized for the dishonor of those cheques and subsequently paid the rent. In October, 2013, defendant no. 1 through defendant no. 2 to 5 sought an adjustment of advance rent and also requested for a discount on the agreed rent under the said lease deed. It is further averred that since the defendant no. 1 never paid the rent timely and the cheques issued towards rent also usually bounced

and were cleared only upon being represented, plaintiff reluctantly agreed to adjust the entire advance rent for the remaining fourteen months of the lease period in the month of October, 2013 bill and gave a further discount of 13% from 01.10.2013 to 28.02.2014. Thereafter, vide e-mail dated 09.04.2014, plaintiff increased the discount to 26% from 01.03.2014 to 30.11.2014, on the rent but only on the condition that defendant no. 1 shall timely pay the rent and also timely pay electricity, water and maintenance charges on due date and further clarified that this arrangement shall be withdrawn if rental and other payments are delayed. However, in spite of the above undertaking, defendant no. 1 never paid the rent and electricity, water and maintenance charges in a timely manner and continued its default.

7. On 22.09.2014, plaintiff wrote an e-mail to defendant no. 1 calling upon the defendant no. 1 to clear the amount of Rs.1,00,785/- which were pending for the month of July, 2014 as only a sum of Rs. 75,000/- had been paid towards rent for the month of July, 2014. On 25.09.2014 and 27.09.2014, reminder

of earlier e-mail dated 22.09.2014 was sent by plaintiff to defendant no. 1. On 29.09.2014 another e-mail was sent by plaintiff to defendant no. 1 seeking immediate payment of aforesaid sum of Rs. 1,00,785/-. Defendant no. 1 sent an e-mail dated 29.09.2014 promising to transfer the aforesaid sum of Rs. 1,00,785/- by RTGS very soon and also confirming that plaintiff may deposit one full rent cheque of Rs.1,00,785/-. As no payments were made, on 30.09.2014, plaintiff requested the defendant no. 1 to RTGS at least Rs. 43,000/- to enable plaintiff to pay service tax for two months.

8. It is further averred that as the rent for July, 2014 was still not fully paid and a sum of Rs. 57,785/- was still outstanding towards the same and the rent for the months of August to November, 2014 @ Rs.1,75,785/- per month were also outstanding, another e-mail dated 27.10.2014 was sent by plaintiff to defendant no. 1. On 28.10.2014, defendant no. 1 sent an e-mail to plaintiff confirming that it will remit Rs. 57,785/- by RTGS in a couple of days and Rs. 1,75,785/- by next week. It is further averred that due to non-payment of the electricity,

water and maintenance charges by the defendant no. 1 to defendant no. 6, on 09.11.2014, they discontinued the supply of electricity and water to the suit property and refused to provide the same till their dues were cleared. Defendant no. 1 failed to pay the rent and thereafter plaintiff presented post dated cheques no. 110526, 971933, 971935, and 971937 and the aforesaid cheques were dishonoured with remarks "funds insufficient". Thereafter, plaintiff terminated the said lease deed w.e.f. 01.12.2014 and this was confirmed to the defendant no. 1 vide notice dated 05.12.2014. Thereafter, plaintiff served a legal notice dated 09.12.2014 under Section 138 NI Act to defendant no. 2 to 5. Another e-mail dated 09.12.2014 was sent by plaintiff to the defendant no. 1 forwarding the scanned copy of notice of termination dated 05.12.2014 and legal notice dated 09.12.2014. On 30.12.2014, plaintiff sent another notice referring to its earlier e-mail dated 09.12.2014 and informing the defendant no. 1 to 5 that they had to handover full vacant and physical possession of the suit property. Thereafter, defendant no. 1 sent an e-mail dated 08.01.2015 stating that defendant no. 1 had called Jaiwant Daulat Singh of plaintiff firm and expressed that

the outstanding rent can be cleared in a couple of installments. It is further averred that legal notice dated 09.12.2014 was duly acknowledged by defendant no. 1 to 5 and a reply dated 19.12.2014 was received from the defendant no. 1. On 04.02.2015, defendant no. 1 sent another e-mail referring to its earlier e-mail dated 08.01.2015 and 11.01.2015 and seeking an early meeting to sort out things.

9. It is further averred that on 16/17.02.2015, defendant no. 1 filed a false and frivolous suit against plaintiff and defendant no. 6. On 20.02.2015, plaintiff gave a final warning to defendant no. 1 to immediately clear all its furniture and other belongings lying in the suit property on 28.02.2015. On 10.03.2015, plaintiff sent another e-mail to defendant no. 1 to clear outstanding amount. On 06.04.2015, defendant no. 6 had sent an e-mail to defendant no. 1 informing it that it had not cleared the dues and was still occupying the suit property. On 08.04.2015, plaintiff sent another e-mail to defendant no. 1 to pay outstanding dues. On 13.04.2015, defendant no. 1 replied to the e-mail dated 08.04.2015 stating that possession of the suit

property is not with them as the mall management had sealed and locked the suit property a week after disconnecting power, water and other maintenance services. On 16.04.2015, defendant no. 1 wrote an e-mail confirming that it would be clearing the dues of defendant no. 6 and shall take about 6-7 days after that to lift all its equipments and furniture from the suit property. It is further averred that on 01.05.2015, plaintiff was informed by defendant no. 6 that defendant no. 1 had vacated the suit property and handed over the key to Mr. Arvind Kapoor of defendant no. 6. Thereafter, plaintiff wrote an e-mail dated 01.05.2015 to defendant no. 1 for recording the fact of vacation of suit property and defendant no. 1 to 6 to execute a formal handover of possession letter and pay the outstanding amount, but of no avail. Thereafter, the present suit was filed for recovery.

10. Written statement was filed by defendant no. 1 to 5. Defendant no. 1 being partnership firm through its partners entered into lease agreement with the plaintiff in respect of suit property, firstly in the year 2006 and then it was renewed in the

year 2012 vide registered lease dated 19.03.2012 for a monthly rent of Rs. 2,31,732/- for the purposes of running the restaurant by the name of "Yo-China" by defendant no. 1 to 5. It is further stated that defendant no. 1 through defendant no. 2 had also entered into a tripartite operation and maintenance agreement with the plaintiff and defendant no. 6. Defendant no. 6 is Mall Management Agency appointed by the Mall is responsible for the maintenance of the Mall. Defendant no,1 being the user of the premises was paying the charges as per the terms of the agreement.

11. It is further stated that defendant no. 1 thereafter informed the plaintiff for reducing the rent as the footfall in the mall had significantly gone down as a result of certain multi-brand retail outlets which affected the business of the defendants and the overheads had become very difficult to manage.

12. It is further stated that plaintiff thereafter agreed to reduce the rentals by giving special discounts from October, 2013

amounting to Rs.30,000/- and the rentals were thereby significantly decreased in the said manner. The rentals were again decreased by the tune of Rs. 30,000/-. The plaintiff had asked the defendant no. 1 not to terminate the lease deed as the lock in period was still in subsistence.

13. It is further stated that plaintiff thereafter from the month of March, 2014 started issuing the fresh invoices for effecting the reduced amount of rent which in terms of the said invoices amounted to Rs. 1,71,732/- plus service tax. The plaintiff had in fact acknowledged the said fact vide an e-mail dated 09.04.2014 whereby it has been categorically admitted the rental payments will be decreased by a sum of Rs. 60,000/-.

14. It is further stated that as per the said understanding the defendant no. 1 had agreed to pay the amounts as per the discount rate thereby making the plaintiff liable to return the post dated cheques issued initially at the time of execution of the lease deed as the lease rentals had been decreased. Moreover,

the said cheques had been invalidated as the lease rentals had been revised by the plaintiff and defendant no. 1. However, the plaintiff did not return the said cheques and got them dishonored. Plaintiff also kept on raising invoices at the reduced rates and still went on to present the cheques. Defendant no. 1 in fact wrote e-mails to the plaintiff to return the said cheque and thereby not to present the said cheques. Plaintiff also threatened the defendant to initiate legal proceedings on the dishonour of those cheques. In fact, plaintiff instructed defendant no. 6 to cut the electricity and water supply to the property occupied by defendants by virtue of registered lease deed and in this regard plaintiff wrote an e-mail dated 10.11.2014 to defendant no. 6. Defendant no. 6 acting on the instructions of the plaintiff and in connivance with the plaintiff, cut the supply of electricity and water on 10.11.2014 which resulted in the closure of the operation of restaurant of defendant no. 1. Plaintiff and defendant no. 6 (wrongly mentioned as defendant no. 1) in furtherance of their mala fides had gone to the extent of closing/locking the premises without giving any written notice to the defendants which is clear breach of terms and conditions

of the maintenance agreement. Thereafter, plaintiff terminated the registered lease agreement vide its letter dated 05.12.2014. It is stated that disconnection of water and electricity supply by defendant no. 6 upon the instructions of the plaintiff without any prior notice is the breach of the contract. Defendant no. 3 through e-mail dated 08.05.2015 clearly explained that the possession of the suit premises alongwith his goods were with defendant no. 6 since 19.11.2014 and, therefore, defendant no. 1 to 5 are not liable to pay any damages as claimed by plaintiff. It is denied that defendant no. 1 to 5 are liable to pay liquidated damages of Rs.20,000/- per day. It is stated that goods were handed over to defendant no. 1 by defendant no. 6 only after receipt of summons in the suit filed by defendant no. 1 again plaintiff and defendant no. 6 in Tis Hazari Courts. It is further stated that suit premises was vacated and possession of the suit premises was handed over to the plaintiff and keys were handed over to Arvind Kumar and same was duly intimated to the plaintiff. It is denied that arrears of rent, electricity, water, maintenance charges, sinking fund charges were not paid by the defendant no. 1. It is stated that possession of the suit premises

alongwith goods of defendant no. 1 was with the defendant no. 6 and, therefore, defendant no. 1 is not liable to pay any liquidated damages. It is stated that suit of the plaintiff is false and is liable to be dismissed.

15. Defendant no. 6 did not file any written statement.

16. Replication to the written statement of defendant no. 1 to 5 was filed by plaintiff wherein averments made in the written statement were denied and contents of the plaint were reiterated.

17. After completion of the pleadings, following issues were framed vide order dated 17.12.2018.

1. Whether the plaintiff is entitled for recovery as prayed for?

2. Whether the plaintiff is entitled to interest, if so, at what rate and from what period? OPP

3. Relief.

18. Thereafter, matter was listed for plaintiff's evidence.

19. During evidence, plaintiff examined Sh Jaiwant Daulat Singh, partner of the plaintiff partnership firm. Plaintiff also examined Sh. Gajendra Kumar, accounts manager of City Square Mall as PW-2. Thereafter, PE was closed.

20. Defendants have examined Sh. Lakesh Sarna as DW-1 on behalf of defendant no. 1 to 5. Thereafter, DE was closed.

21. I have heard the arguments on behalf of both the parties and have perused the record carefully.

22. Ld counsel for plaintiff has argued that suit premises was rented to the defendant no. 1 initially in the year 2005 which continued till 2012 whereas present suit is with respect to registered lease deed executed between the plaintiff and defendant no. 1 in January, 2012, four PDCs were issued by defendant at that time. It is argued that monthly rent was

Rs.2,31,732/-, however, defendant no. 1 to 5 usually defaulted in the payment of rents. It is further argued that plaintiff served various breach notices upon the defendants for non-payment of the timely rents for which defendant no. 2 to 5 made apology and paid rent in the year 2013.

23. Defendant no. 1 through defendant no. 2 to 5 sought an adjustment of advance rent and also requested for a discount on the rent and plaintiff agreed to the same and issued discount of Rs. 30,000/- from 01.10.2013 till 28.02.2014. Vide e-mail dated 09.04.2014, Plaintiff increased the discount further to the amount of Rs. 30,000/- with effect from 01.03.2014 and on the condition that defendant no. 1 shall make timely payment of rent and maintenance charges.

24. It is further argued that it was declared at the same time that said arrangement of discount of total Rs. 60,000/- shall be withdrawn if the rentals and other payments are delayed.

25. Ld counsel for plaintiff has argued that despite issuing the discount to the defendant, the defendants failed to pay the part payment of Rs.5,70,785/- for the month of July 2014 and for the month of August to November 2014 at the rate of rent mentioned in the lease deed. Ld counsel for plaintiff further argued that since the defendants have failed to pay the rent at the discounted rate within the time frame, therefore, they are liable to pay at the normal rate of rent as given in the lease deed alongwith interest @ 20%.

26. Ld counsel for plaintiff has further argued that vide letter dated 05.12.2014, the plaintiff terminated the tenancy of the defendant w.e.f. 01.12.2014. It is stated that in the lease deed itself, there is a covenant with respect to liquidated damages @ Rs. 20,000/- per day and, therefore, defendants are liable to pay damages @ Rs. 20,000/- per day from 01.12.2014 till 01.05.2015. It is also argued that maintenance charges have not been paid since June 2011 and, therefore, defendants are liable to pay said maintenance charges. It is further argued that apart from e-mail regarding the withdrawal of the discount, in case of

irregular payments, there is non-waiver clause in the lease deed itself, as per which plaintiff is entitled to recover arrears of rent at the rate stipulated in the lease deed.

27. On the other hand, Ld counsel for defendants has argued that plaintiff had demanded the reduction of rent by giving discount twice and since there was alteration of rent for the period of 14 months w.e.f. October 2013 till December 2014, therefore, there had been alteration in the condition of the lease agreement and, therefore, condition given in the existing lease deed did not remain valid. Ld counsel for defendants further argued that since the plaintiff had raised demand of the arrears of rent at the rate of discounted rates in e-mail dated 27.10.2014, therefore, now the plaintiff cannot revert back and seek the rentals as per the original lease deed. Ld counsel for defendants has further argued that earlier lease deed goes and in view thereof, defendants are also not liable to pay any damages as given in the registered lease deed originally executed between the parties.

28. Ld counsel for defendants have further argued that defendants are not liable to pay any maintenance charges to the plaintiff as there is no such agreement between them. It is further argued that defendants are not liable to pay anything after 10.11.2014 as the defendant no. 6 at the asking/instruction of the plaintiff had disconnected the electricity and water supply to the suit premises due to which plaintiff was unable to work and then a week or 10 days thereafter, premises was sealed by defendant no. 6 and defendants were not allowed to enter the suit premises and all their articles and equipments lying therein for a huge amount could not be taken out resulting in huge losses to the defendants. It is further argued that effectively the possession was not with the defendant no. 1 to 5 w.e.f. 10.11.2014 and therefore, they are not liable to pay any amount towards the same. It is further argued that suit of the plaintiff is false and is liable to be dismissed.

29. Ld counsel for defendant has relied upon *(i)* ***Sethi Construction Company Vs. Chairman & Managing Director,***

NTPC 2003 (4) R.A.J. 116 (Del). (ii) Nexgen Edusolutions Pvt Ltd Vs. Aspire Investments Pvt Ltd FAO (OS) 297/2015 DOD 30.09.2015.

30. In rebuttal, Ld counsel for plaintiff has argued that e-mail dated 27.10.2014 cannot be read in isolation and all the e-mails prior to the same and subsequently written have to be read as a whole, in order to see the intention of the parties. It is submitted that plaintiff had time and again notified to the defendants that in case rentals and other payments are delayed, defendants shall be liable to pay arrears of rent at the rate of original rate of rent and discounts will be withdrawn. As regards sealing, it is stated that though a letter was written to the mall management agency with respect to cutting of the electricity and water supply and defendants were neither making payments towards rentals nor making any payments towards maintenance charges, however, mall maintenance agency i.e. defendant no. 6 was not bound by the request of the plaintiff in any manner and plaintiff had no role to play in disconnection of electricity.

31. It is further argued that possession was all through with the defendants as their goods were lying therein which is writ large from the correspondences between the parties filed by the plaintiff. It is further argued that defendants in these correspondences have demanded that they will be lifting their goods/equipments after settling their accounts with defendant no. 6 and will be intimating about the lifting of the goods to the mall management agency. Ld counsel for plaintiff has further argued that on 01.05.2015, it was informed to the plaintiffs by the defendant no. 6 that the defendants have vacated the property and have removed their equipments on which plaintiff write an e-mail to the defendants asking them to execute a formal handover possession letter but the same was never issued. It is further argued that e-mail exchanges between the parties would clearly show that plaintiff was nowhere responsible for sealing of the suit premises of the defendant, if any. It is further argued that photographs have been placed on record which shows that defendants had put its own seal upon the suit premises and which shows that premises was in the possession of the defendants. Ld counsel for plaintiff has further

argued that defendants have tried to set a plea of novation of lease agreement for the first time in the cross examination of the plaintiff's witness though no such defence was set up in their written statement. He has further argued that argument with respect to novation, in any case, is not made out in view of ***(i) Juggilal Kamlapat Vs. N.V. Internationale Crediet-En-handels Vereeninging Rotterdam (alias Rotterdam Trading Co. Ltd.) 1952 SCC OnLine Cal 250. (ii) R.S. Amarnath Mehra & Co. Vs. Union of India & Ors (1993) 27 DRJ 1 (DB), (iii) Lata Construction & Ors Vs. Dr. Rameshchandra Ramniklal Shah & Anr (2000) 1 SCC 586. (iv) Savita Dey Vs. Nageswar Majumdar & Anr (1995) 6 SCC 274, (v) Goppulal Vs. Thakurji Shriji Shriji Dwarkadheeshji & Anr (1969) 1 SCC 792. (vi) Bengal Nagpur Ry. Co. Ltd Vs. Rattanji Ramji & Ors AIR 1935 Cal 347, (vii) Shivjiram Dhannalal Marwari & Anr AIR 1941 Nag 100, (viii) H.S. Bedi vs. National Highways Authority of India 220 (2015) DLT 179.***

32. He has also argued that after the plaintiff had terminated the tenancy of the defendant by way of termination letter dated

05.12.2014, defendant had filed a suit against the plaintiff herein and defendant no. 6 for permanent injunction seeking the removal of the articles inside the suit premises, however, defendants nowhere sought declaration that the alleged sealing by defendant no. 6 was illegal or disconnection of electricity and water supply was also illegal. He has submitted that at the time of receiving summons of the suit, plaintiff herein filed a detailed written statement alongwith application under Order VII Rule 11 CPC which was listed for a later date for disposal and on the date fixed defendant appeared and withdrew the suit unconditionally. It is further argued that plaintiff is entitled to recover arrears of rent, damages and maintenance charges as sought in the plaint.

33. Findings on issues:-

34. **Issue no. 1:-**

1. Whether the plaintiff is entitled for recovery as prayed for?

35. Certain admitted facts between the parties are herein as under:-

(i) Registered lease agreement dated 12.01.2012 Ex PW1/3 was executed between the plaintiff and defendant no. 1.

(ii) Monthly rent was Rs. 2,31,732/-.

(iii) Interest free security of Rs. 1,84,736/- was deposited by the defendant no. 1 to 5 with the plaintiff.

(iv) In the eventuality of defendants making a default in the payment of rent, plaintiff was well within its rights to terminate the tenancy as per clause 8(c) and 10(b) of the lease deed.

(v) Vide e-mail dated 17.10.2013 Ex PW1/9A a special discount of Rs. 30,000/- on the monthly rent was given by the plaintiff to the defendant no. 1 to 5.

(vi) E-mail dated 09.04.2014 Ex PW1/10 was written by plaintiff to the defendant no. 1 to 5 and discount was increased from Rs. 30,000/- to Rs. 60,000/- and it was specifically written that the proposal shall be withdrawn if the rentals are delayed.

(vii) Service of termination notice dated 05.12.2014 Ex PW1/28 is also admitted.

(viii) Service of legal notice dated 09.12.2014 Ex PW1/29 is also admitted.

(ix) Reply to legal notice dated 09.12.2014 was sent on 19.12.2014 by defendant no.1 to 5 which is Ex PW1/34.

(x) Rejoinder to said reply was also sent by plaintiff which is Ex PW1/35.

(xi) DW-1 during his cross examination has admitted that outstanding rents from monthly of July, 2014 (part rent) and August, 2014 till November 2014 have not been paid by defendant no. 1 to 5 either at the discounted rates or at the contractual rate of rent as mentioned in the lease deed Ex PW1/3.

36. With this background of admitted facts, let us proceed to decide whether plaintiff is entitled to the relief sought which is segregated under three heads:-

(i) Unpaid rent for the month of July, 2014 (part rent), August, 2014 till November 2014.

(ii) Maintenance charges including electricity, water and sinking

fund charges.

(iii) Damages to the tune of Rs.20,000/- per day from 01.12.2014 till 01.05.2015.

37. Since it is already on record that the outstanding rate of rent has not been paid, therefore, arguments of counsel for the defendants are taken up one by one.

38. First argument is with respect to the liability of the defendant to pay as per discounted rates and not as per contractual rate of rent.

39. Ld counsel for plaintiff during course of his arguments has brought the attention of this court towards the e-mail dated 09.04.2014 which is Ex PW1/10 wherein special discount was increased from Rs. 30,000/- to Rs. 60,000/-. In the said e-mail, it is categorically mentioned that:-

"Dear Bobby and Sandeep,

Assuming that I will be receiving the cheque for the invoiced value of rental for the month of February, 2014 latest by this Friday 11th April 2014, enclosed herewith is the received combined invoice for March 2014 and April, 2014 which also needs to be paid. Please tear the old March, 2014 invoice as it is no longer valid.

After having heard Sandeep carefully vis-a-vis the current environment of the mall, I have decided to increase the discount each month from Rs. 30 K to Rs. 60 K till the anchor tenant opens I am making this special discount only provided you make payments on the due date. This proposal will be withdrawn if your rental payments are delayed.

This is the best I will offer and I will not negotiate on this subject any further.

Kind Regards"

40. Thereafter, when the payments were not made towards the rent for the month of July, August and September, an e-mail dated 27.09.2014 was written which is Ex PW1/17 wherein the plaintiff again reiterated that:-

> *"We had an understanding that discounted rentals (after adjusting your advance rent fully) was only being given to Sunrise provided you make prompt rental payments."*

41. Even after this e-mail, the payments were not made. Again it was made clear by e-mail dated 28.10.2014 sent by plaintiff to the defendant that:-

> *"Please be advised that any sealing liability for non-payment of ground rent for our shop will be solely attributable to Sunrise Hospitality for nonpayment of monthly rent especially keeping in mind that I have already given you a Rs. 60,000/- reduction in monthly rent provided you make payments on time.*
>
> *Please be advised that no reduction in rent will be*

applicable if payments are not made on time. I am repeating myself on this issue so that you understand this clearly. I will apply the same retrospectively for the months the payment is still outstanding."

42. Despite reminding and making it clear that in case the payment of rentals at the discounted rates is not made, the contractual rate of rent shall be paid by defendant no. 1 to 5, no payment was made and ultimately notice of termination was sent on 05.12.2014 wherein the demand was made as per the contractual rate of rent alongwith service tax.

43. Ld counsel for defendants during the course of his arguments have raised the plea of novation stating that there was a deduction in the lease rent from October 2013 till December 2014 (till the expiry of the lease by efflux of time) and, therefore, the change in the rent for the period of 14 months had changed the terms of earlier lease deed and resulted into operation of a fresh lease deed with less amount of rentals and

no provision for payment of any damages in the event of non-payment of rent was made in fresh lease deed.

44. In this regard, the defence taken by the defendant no. 1 to 5 in their written statement has been carefully perused. Nowhere in the entire written statement, defendants no. 1 to 5 have taken a defence that novation of the earlier registered lease deed had come into effect and for that reason, they are not liable to pay rent of the aforesaid period at the contractual rate of rent as mentioned in the original lease deed. The entire file has been perused. This plea of novation has been set up for the first time in the cross examination of PW-1. Since there was no defence of novation in the pleadings of the defendants no. 1 to 5, it is a settled law that new pleadings/defence could not have been introduced by the defendants no. 1 to 5 during the cross examination of the plaintiff witness and, therefore, this defence is not tenable.

45. Even otherwise looking at the e-mail dated 17.10.2013, Ex

PW1/9A and by which a special discount of Rs. 30,000/- was given for the first time by plaintiff to the defendant no. 1 to 5 and after perusal of Ex PW1/10, e-mail dated 09.04.2014 when the discount was increased to Rs. 60,000/-, it is clear that none of the e-mails even remotely indicated that parties had the intention to substitute a new contract (lease deed) in place of the earlier one. Though, both e-mails clearly talks about the discount being given on the monthly rate of rent and there is not even a whisper about change of any other covenant of the said lease deed. In the e-mail dated 09.04.2014, the plaintiff has reiterated its non-waiver clause as given in clause 11 of the registered lease deed by stating that this proposal of discount shall not be applicable if the rental payments were delayed. By no stretch of imagination, any alteration in the amount of rent can amount to a substitution of a new lease agreement in place of earlier one which is a registered lease agreement. It is pertinent to mention here that its term can be altered via written registered agreement only which should be duly admitted and signed by both the parties.

46. As far as judgment ***Sethi Construction Company (Supra) & Nexgen Edusolutions Pvt Ltd (Supra)*** relied upon by Ld counsel for defendant no. 1 to 5 are concerned, same is not applicable to the case in hand as it says that no clause of lease including the clause stipulating the period of lease can be enforced if a lease is not registered. This judgment is not applicable till to the case in hand as in this case registered lease deed was executed between the parties and thereafter due to the market situation, discount in the amount of rent was given twice. Same cannot be taken as an alteration of the registered lease deed executed between the parties. Therefore, this plea of defendant no. 1 to 5 is not maintainable at all.

47. As far as applicability of amount to be recovered is concerned, since it is clear in all the e-mails as detailed above that plaintiff had time and again clarified it to the defendants that if rentals are not paid, defendant no. 1 to 5 shall be liable to pay the rent as given in the registered lease deed. There is no doubt that defendant no. 1 to 5 are liable to pay unpaid rent of Rs. 57,785/- for the month of July, 2014 and rent at the rate of

Rs. 2,31,732/- per month from August till October 2014.

48. As far as rent for the period of November 2014 is concerned, defendants have objected to the same stating that electricity and water connection in the suit premises was disconnected by mall management agency in connivance with the plaintiff on 09.11.2014 and premises was thereafter sealed on 19.11.2014 and they were not able to use the suit premises since the possession was not with them and were not able to lift the goods/equipments from the premises and, therefore, they are not liable to pay any amount.

49. Ld counsel for defendant during the course of arguments has brought the attention of this court towards e-mail dated 10.11.2014 Ex DW1/1 sent by plaintiff to the mall management agency. The said e-mail is reproduced herein as under:-

"Dear Arwind,

Ref emails attached below, since monthly rent is

outstanding from July, 2014 with Sunrise Hospitality and since they have not bothered to clear the same, please immediately terminate all services (i.e. electricity and water) to Sunrise Hospitality for their Yo China restaurant until all dues are cleared with Revie (owner of the restaurant) and the maintenance company.

As mentioned before in various e-mails, please make sure all dues payable to the maintenance company are recovered directly from Sunrise Hospitality. Revie will not bear responsibility for clearance of the same.

Sunrise have been defaulting on all their lease obligations and therefore please ensure immediate compliance to the same. Enough notice period has been given to Sunrise to rectify their defaults.

Kind Regards"

50. Ld counsel for defendants has argued that since the electricity and water connection has been disconnected at the instructions of plaintiff by mall management agency, therefore,

plaintiff is not entitled to any kind of rent after this date.

51. In order to consider this argument of Ld counsel for defendant, it is important to refer to the operations and maintenance agreement executed between the plaintiff, defendant and City Square Mall (Mall Management Agency) on 22.11.2005 which is Ex PW1/4. As per clause 4.5 of the agreement, mall management agency had a right to disconnect the electricity after giving 15 days notice in writing. It was also argued that no such notice was given. Apart from this clause there is another clause 25 which is under heading principal to principal basis. The said clause is reproduced herein as under:-

> *"Principal to Principal Basis:- This Agreement is on a principal-to-principal basis. Neither party is the agent of the other. This Agreement does not constitute any association or partnership or joint venture between the two parties. It is further confirmed by both parties that neither party has any financial or pecuniary interest in the ownership and profits or losses of the other party*

at any time before, during or after the term of this Agreement."

52. From the perusal of this clause, it is clear that none of the party was the agent of the other. Meaning thereby that even if plaintiff had requested or recommended the mall management agency to disconnect the electricity and water connection in the suit premises, mall management agency was not bound to accept the said request or recommendation in view of clause 25. Mall management agency had an independent right to recover dues from the defendants. It has already come on record that defendants have also not paid mall management charges for a long period of time though the agency has not taken any action independently against defendants for the recovery of the same. Therefore, it cannot be said that electricity and water connection in the suit premises was disconnected at the instruction of the plaintiff. It was purely disconnected by mall management agency out of its own discretion, without being swayed by the email dated 10.11.2014 of the plaintiff written to Mall Management Agency.

53. As far as argument for not serving of 15 days notice before disconnection of amenities is concerned, it is pertinent to mention here that defendant no. 1 to 5 herein had filed a suit against the plaintiff and mall management agency for relief of mandatory injunction for return of the equipments lying inside the suit premises which was allegedly sealed by mall management agency, however, in that suit neither disconnection of electricity and water being illegal was challenged nor the declaration was sought with respect to sealing being illegal. The statutory period of availing those remedies have already expired in November, 2017 and, therefore, it would be improper to say at this stage that notice of disconnection of electricity and water connection was illegal.

54. It is a matter of record that even after sealing of the suit premises in November, 2014, as per the version of the defendant no. 1 to 5, though it is not admitted by plaintiff, defendant no. 1 to 5 did not make any effort to pay mall maintenance charges to them and finally lifted the goods without paying the said charges

on 01.05.2015. Plaintiff being lawful owner of the property and having served termination notice on 05.12.2014 was entitled to receive back the vacant and peaceful possession of the property from the defendant no. 1 to 5 immediately on the service of said termination notice. Plaintiff had no concern whatsoever with any arrangement between the defendant no. 1 to 5 and mall management agency. It was the duty of the defendant no. 1 to 5 to handover the possession to the plaintiff which was not done during this period. Therefore, defendant no. 1 to 5 are liable to pay the unpaid rent for the month of November, 2014 also.

55. Plaintiff has sought damages from 01.12.2014 on the ground that termination notice dated 05.12.2014 terminating the tenancy from 01.12.2014 was served upon defendants no. 1 to 5. Though, service of said legal notice was acknowledged, however, the tenancy cannot be terminated from a retrospective date. In view of the Section 106 of the Transfer Property Act, the tenancy can be said to be terminated w.e.f. 20.12.2014 and not from 01.12.2014, therefore, plaintiff is also entitled to the

outstanding rent from 01.12.2014 till 20.12.2014 at the same rate of contractual rent as applicable till November, 2014.

56. Now coming to the damages. The plea of the defendant no. 1 to 5 that in view of the novation, damages as given in the registered lease deed Ex PW1/3 are not applicable, has already been turned down in the previous paragraphs. Defendants no. 1 to 5 became unauthorized occupants w.e.f. 20.12.2014 and, therefore, they are liable to pay mesne profits from 21.12.2014 till 30.04.2015. Plaintiff has demanded damages at the rate of Rs. 20,000/- per day as mentioned in the registered lease deed. It is argued by plaintiff that defendant no. 1 to 5 have agreed and voluntarily signed the registered lease agreement after careful reading and understanding the same and, therefore, they are liable to pay damages at this very amount.

57. As far as damages at the rate of Rs. 20,000/- per day is concerned, total amount of damages comes to Rs. 6,00,000/- per month. The rate of rent just before the termination was

Rs.2,31,732/- and the amount of damages to the tune of Rs.6,00,000/- per month is almost three times of the monthly rate of rent. It is settled proposition of law that in view of Section 73 & 74 of the Indian Contract Act, damages can never be in the form of penalty. This clause of charging Rs.20,000/- per day as damages is clearly in the nature of penalty and by no stretch of imagination, can be said to be reasonable amount of compensation.

58. In ***Herbicides (India) Ltd Vs. M/s Shashank Pesticides Pvt Ltd & Ors (2011) 180 DLT 243*** Hon'ble High Court of Delhi had relied upon ***Fateh Chand Vs. Balkishan Dass AIR 1963 SC 1405*** wherein Hon'ble Supreme Court referring to Section 74 of the Indian Contract Act observed as under:-

> *"The measures of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated,*

jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

59. In the same judgment, Hon'ble High Court of Delhi has further placed reliance upon ***ONGC Vs. Saw Pipes Ltd AIR 2003 SC 2629*** wherein it was observed that:-

> *"(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;*
>
> *(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.*
>
> *(3) Section 74 is to be read alongwith Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim*

a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

60. In view of the aforesaid proposition of law, it is very much clear that amount of Rs. 6,00,000/- per month (Rs. 20,000/- per day) towards damages is unreasonable and is in the form of penalty. There is no other document on record to show the market rate of rent at the time when the defendants were unauthorized occupants of the suit premises. Therefore, damages are ascertained by giving 10% increase in the rate of rent as mentioned in the lease deed Ex PW1/3. Therefore,

defendants are liable to pay damages @ Rs. 2,31,732/- per month + 10% increase from 21.12.2014 till 30.04.2015.

61. Now coming to the maintenance charges. On the perusal of the entire record, it has nowhere come on record that plaintiff had paid the outstanding maintenance charges to the mall management agency on behalf of defendant no. 1 to 5. In the absence of any such proof or any other covenant in Operation and maintenance agreement with respect to rights of the plaintiff to recover such charges from the defendant no. 1 to 5, they are not liable to pay anything towards the same to the plaintiff. It is the prerogative of the mall management agency to recover the same from the defendants. It would not be out of place to say that charges were sought from June, 2011, though suit was filed on 19.05.2015 and, therefore, maintenance charges from June 2011 till April 2012 could not have been otherwise sought being barred by limitation. Therefore, relief of seeking maintenance charges is declined. Before concluding this issue, it is pertinent to point that defendant no. 5 is alleged to be only an authorized signatory and not the partner of defendant no. 1. Therefore,

defendant no. 5 is not liable to pay anything to the plaintiff. Only defendant no. 1 to 4 are liable to make payment towards arrears of rent, damages etc. Issue no . 1 is decided accordingly.

62. ***Issue No. 2.***

Whether the plaintiff is entitled to interest, if so, at what rate and from what period? OPP

Keeping in view the facts and circumstances of the case, plaintiff is entitled to interest @ 9% per annum on the amount of arrears of rent from 21.12.2014 till realization from defendant no. 1 to 4. Defendant no. 1 to 4 are further liable to pay interest @ 6% per annum on the mesne profits as directed above from 01.05.2015 till realization.

63. **Issue no. 3 :-**

Relief.-

(a) Defendant no. 1 to 4 are directed to pay arrears of rent at Rs. 1,00,785/- for month of July 2014 and @ Rs.2,31,732

p.m. for the month of August 2014 till 20.12.2014 alongwith simple interest @ 9 % p.a. on the amount of arrears w.e.f. 21.12.2014 till realization, to the plaintiff.

(b) Defendants no. 1 to 4 are further directed to pay damages @ Rs.2,31,732/- per month + 10% increase from 21.12.2014 till 30.04.2015 alongwith simple interest @ 9% per annum on the mesne profits as directed above from 01.05.2015 till realization.

64. **Suit of the plaintiff is decreed in view of reliefs granted above alongwith cost of the suit.** Decree sheet be prepared accordingly. File be consigned to Record Room after due compliance.

65. Copy of judgment be sent to the parties/counsels through emails by Ahlmad.

(VANDANA JAIN)
ADJ-07/SE/SAKET COURTS/
NEW DELHI/15.05.2020