

(1972) 01 DEL CK 0008

In the Delhi High Court

Case No : Regular First Appeal No. 50D of 1961

Kanhya Lal and Others

APPELLANT

Vs

Birdhi Chand Girdhari Lal and Others

RESPONDENT

Date of Decision : 07-01-1972

Acts Referred:

Citation : (1972) ILR Delhi 820

Hon'ble Judges : Narain Andley, J; Jagjit Singh, J

Bench : Division Bench

Advocate : S.N. Chopra, Roshan Lal, D.L. Sondhi, H.R. Sawhney and R.K. Mehta, for the Appellant;

Judgement

Jagjit Singh, J.

(1) These cross-appeals (Nos. 50-D and 103-D) were filed against the judgment and decree in a suit instituted on October 1, 1955 on behalf of Messrs Birdhi Chand Girdhari Lal Jain and six others. The suit was against Messrs Kanhya Lal Sham Lal and five others. On April 15, 1961 it was partly decreed by Shri R. L. Lamba, Subordinate Judge First Class, Delhi. The decree passed in favor of the plaintiffs was for ejection of the defendants from the portions shown red and yellow in the plan (Exhibit P/I) attached to the plaint and for recovering Rs. 20,836/10/8. The amount decreed comprised of Rs. 14,400.00 on account of arrears of rent, Rs. 4,836/10/8 as damages and Rs. 1,600.00 as electric charges. The plaintiffs were as well allowed proportionate cost of the suit.

(2) In this appeal the defendants claimed that no decree should have been passed against them either for eviction or recovering any amount on account of arrears of rent, damages or electric charges. The judgment and decree of the trial court were alleged to be against facts and law. In the other appeal the plaintiffs desired the decretal amount to be enhanced by a sum of Rs. 8,000.00. It was alleged that the court below had erred in awarding damages at Rs. 100.00 per month for a portion of the premises in dispute and that the plaintiffs were

entitled to damages at Rs, 300.00 per month. It was also stated in the grounds of appeal that the arrears of rent should have been computed for a period of thirty seven months and not only thirty six months.

(3) In order that the contentions raised from the opposing sides may be properly appreciated it is necessary to state certain facts. There is a building known as Birdhi Chand Girdhari Lal Building (hereinafter referred to as "the premises") which is situated at Naya Bazar (Burn Baston Road), Delhi. The Naya Bazar (Burn Baston Road) is towards its east. On the northern side of the premises adjoins the house of Ram Gopal Prash Ram, who are not parties to this case. Towards its south there is a public road and on the west is a public lane. The premises were owned by Messrs Birdhi Chand Girdhari Lal Jain and Nanag Ram, Bal Chand, Girdhari Lal, Sumair Chand, Prem Chand and Shiv Bai, who were plaintiffs in the suit. During pendency of the suit Nanag Ram died and in his place names of his legal representatives were substituted. Another thing, which happened was that the premises were given by the plaintiffs to a Trust, but in spite of that they continued with "the suit. Their right to proceed with the suit was not disputed by the other side.

(4) Messrs Kanhya Lal Sham Lal (called hereinafter as "the defendant firm") had some accommodation with it on the first floor of the premises. The partners of the defendant firm are Kanhya Lal, Jagdish Chander, Rishi Ram, Chela Ram and Sham Lal. Chela Ram was, however, admitted as a partner in the year 1949.

(5) On February 27, 1948 Shri Girdhari Lal, on behalf of the plaintiff-firm Messrs Birdhi Chand Girdhari Lal Jain) wrote the following letter (Exhibit D/16) to the defendant firm:-

"WE agree to give you the possession of the two halls and one portion of Gaddi at the ground floor of our building situated in Burn Baston Road on a rent of Rs. 150.00 per month for a period of 2 years only. Your tenancy rights come into effect from 1st March 48 and terminate on 28th February 1950 in accordance with our mutual agreement. On expiry of the specified period you are bound to give us vacant possession of the said premises. It is further consented that you will be at liberty to sublet any portion of the said Halls and Gaddi on the strict condition that you will be solely responsible to get the premises vacated by the specified period. Please note that we have already vacated one hall for your possession and we are further trying to remove our goods from the other one, which hope will be completed in the near future."

Pursuant to the above-mentioned letter possession of two halls and one portion of Gaddi on the ground floor of the premises was given to the defendants with effect from March 1, 1948. No registered lease deed was, however, executed. The portion of the premises on the first floor which was with the defendants was simultaneously vacated by them.

(6) From the same date that possession of two halls and portion of a Gaddi was given by the plaintiffs to the defendants the latter sub-let one of the halls to the

Punjab National Bank Limited at a rent of Rs. 250.00 per month and realised from the Bank two years rent in advance, amounting to Rs. 6,000.00. In that connection a letter (Exhibit Public Witness .12/1) was written by Shri Jagdish Chander on behalf of the defendant firm acknowledging receipt of two years rent in advance. With that letter a copy of the letter of Girdhari Lal (Exhibit D/16) was also sent to the Bank authorities to show that sub-letting had specifically been permitted by the landlords. The Bank did not vacate the hall on expiry of two years, but retained its possession till March 4, 1963. On the record of the case there is the letter Chela Ram (Exhibit Public Witness .12/3) about his taking back vacant possession of the hall.

(7) On March 13, 1955 Shri Hans Raj Sawhney, Advocate sent a notice (Exhibit DW.35/4) to the defendant firm demanding Rs. 19,150.00 "as arrears of rent due from 1-5-50 to 28-2-55" and in addition to that a sum of Rs. 1,600.00 as electric charges. The defendant firm was also required to vacate the portion of the premises in its occupation.

(8) In the notice (Exhibit DW35./4) the defendant firm was described as "a tenant" under the plaintiff firm in respect of two halls and a portion of Gaddi. It was, however, stated that the rent payable by the tenant was at the rate of Rs. 400.00 a month. Further the tenant was alleged to have made a default in paying the rent from May 1, 1950 to the end of February 1955 and not to have paid for its share of electric energy consumed in the premises. The notice also mentioned that the tenant had forcibly turned out the occupiers of another portion of the premises from the common passage and thereby caused annoyance to the said occupiers. The portion of the premises with the defendant firm was as well stated to be required bona fide by the owners for purposes of rebuilding.

(9) The reference in the notice to occupiers of another portion in the premises was to Raj Kumar and Vishwa Mittar who took on lease for purposes of transport business a portion in the premises from the plaintiff firm at a rent of Rs. 50.00 per month. In the lease deed dated July 25, 1952 (Exhibit P/5) the portion thus taken on lease by them was described to be "two rooms in the main front hall facing Burn Baston Road opposite the Gaddi one portion of which is in possession of Messrs. Kanhya Lal Sham Lal and the other in possession of the Lesser/owner himself". It was also mentioned that passage from the central gate was to remain common.

(10) As the defendant firm did not vacate the portion of the premises in its occupation and also did not pay the amount demanded from it a suit was instituted by the plaintiffs on October 1, 1955. It was stated in the plaint that the plaintiff firm was a partnership firm registered under the Indian Partnership Act and was carrying on business at Chawri Bazar, Delhi. It was then averred that though originally it was intended that the defendants would occupy two halls and one Gaddi by way of lease with effect from March 1, 1948 on certain terms but the relationship of landlord and tenant never came into existence. It was further

alleged that on March 7, 1953 the defendants took forcible and illegal possession of a second Gaddi and also put themselves in exclusive possession of the common passage. The possession of the defendants was urged to be against the wishes of the plaintiffs and it was claimed that the plaintiffs were entitled to possession and mesne profits amounting to Rs. 24,000.00 as per details given below :-

(a) Amount of mesne profits from September 1, 1952 to September 30, 1955 at Rs. 400.00 per month in respect of two halls and a Gaddi Rs. 14,800.00 (b) Mesne profits in respect of the second Goddi and the common passage from March 7, 1953 to September 30, 1955 Rs. 9,200.00 Total: ..Rs. 24,000.00

So far as the mesne profits up to the end of August 1952 were concerned it was stated that the total amount at the rate of Rs. 400.00 per month came to Rs. 21,600.00 out of which the defendants had paid Rs. 6,000.00 on or about February 28, 1948 and a further sum of Rs. 7,050.00 between April 1, 1948 and September 9, 1952. The balance amount of Rs. 8,550.00 due up to August 31, 1952 was said to have been given up as being time barred. Rs. 1,600.00 were mentioned to be due from the defendants as their share of the electric energy consumed through the common meter for the premises.

(11) In the alternative it was pleaded that even if the defendants were proved to be tenants of the property in suit. in part or whole, still the plaintiffs were entitled to the relief of ejectment and to recover Rs. 24,950.00 comprising of Rs. 23,350.00 on account of arrears of rent and Rs, 1,600.00 in respect of electric charges.

(12) The stand taken by the defendants in their written-statement was that the portion in their occupation was taken on rent from the plaintiff firm and that they have been paying rent for it. The portion of the Gaddi to the south of the iron fencing; was stated to have been rented out to them along with the two back halls. It was mentioned the other portion of the Gaddi to the north of the iron fencing remained in possession of the plaintiffs. It was not denied that the landlords had the right of entrance through the main door for going to their portion of the Gaddi. The allegation that they had taken forcible possession of any portion was denied. The rent payable by .them was stated to be only Rs. 150".00 per month and not Rs. 400.00 per month. Payment of Rs. 6,(X)0.00 to the plaintiffs on or about February 28, 1948 was not admitted. A plea was as well taken that even the rent of Rs. 150.00 a month was excessive as the standard rent of the portion of the premises with them could under no circumstances be more than Rs. 50.00 a month and, Therefore, the plaintiffs were not entitled to charge rent at a rate higher than the standard rent. A request for fixation of the standard rent was accordingly made. The grounds urged in the plaint in support of the prayer for eviction were all contraverted. It was also mentioned that besides payments already made towards rent an amount of Rs. 7,600.00 had been deposited in the trial court, by way of abundant caution, in order to comply with the provisions of section 13(2) of the Rent Control Act. Regarding arrears of

electric charges it was admitted that these had remained unpaid from August 1, 1951. The reason given Was that the plaintiffs had neither got a sub-meter fixed nor had they been able to show for what amount the defendants were liable.

(13) After trying the suit the learned Subordinate Judge held that the plaintiff firm was a registered firm and Girdhari Lal was one of its partners. The plaintiffs were also held to be owners of the premises. It was found that in respect of two halls and the Gaddi (including the portion shown in yellow in the plan attached to the plaint) the defendants held a tenancy from month to month and that their possession of those portions, was in no way unlawful. The agreed rent was, however, considered to be Rs. 400.00 per month and on that basis the plaintiffs were held entitled to Rs. 14,400.00 as arrears of rent for a period of three years. It was further found that the defendants had remained in illegal occupation of the common passage from March 7, 1953 to March 18, 1957 and were Therefore, held liable to pay damages at the rate of Rs. 100.00 per month for use and occupation of that passage. The amount of damages for the above-mentioned period was computed at Rs. 4,836/10/8. The claim of the plaintiffs for eviction was as well found tenable on the ground of non-payment of rent. In the result, as already stated above, a decree for ejectment besides money decree for amounts aggregating to Rs. 20,836/10/8, on account of arrears of rent, damages and electric charges, was passed in favor of the plaintiffs and against the defendants.

(14) Before dealing with the contentions raised from the opposing sides it would be helpful to refer to the plan (Exhibit P/I) which was attached to the plaint. That plan shows the main or the central entrance to the premises from the Naya Bazar (Burn Baston Road). A corridor like covered passage leads from the entrance to a hall. called godown No. 2. Behind godown No. 2 there is another godown (No. 1) almost of the same dimensions. There is a door which connects both the godowns. Godown No. 1 has also a separate entrance from the public lane which is towards the west of the premises. On the northern side of the passage is a portion having iron bars and a door. That portion has as well a direct entrance from the Naya Bazar, but admittedly the said entrance was provided by the owners after the portion was given on lease to Sarvshri Raj Kumar and Vishwa Mittar. There is also a portion on the southern side of the passage, a part of which was shown in the plan in red colour while the remaining part towards the Naya Bazar side was indicated by yellow colour. Between the red and yellow part there is no dividing wall or a wall towards the passage side. In the plan (Exhibit P/I) godown Nos, I and 2 and a part of the portion towards the southern side of the passage were shown in red.

(15) According to the plaintiffs only possession of the portions shown in red in the plan (Exhibit P/I) was given to the defendants on March 1, , The part of the portion towards the south of the passage, shown in yellow, was alleged to have been taken unlawful possession of by the defendants on March 7, 1953. From that date, as mentioned earlier, the defendants were as well alleged to have put

themselves in exclusive possession of the common passage. Both the red "and yellow parts of the portion of the premises towards the southern side of the passage were held by the trial court to be the Gaddi which formed part of the tenancy. The allegation about the defendants having taken unlawful possession of the yellow part of the Gaddi was. Therefore, not believed. As, however, the defendants did take exclusive possession of the passage from March 7, 1953 and started proceedings u/s 145 of the Code of Criminal Procedure against the persons in occupation as tenants of the portion towards the northern side of the passage, means profits at the rate of Rs. 100.00 per month were allowed to the plaintiffs for the period the passage remained in the exclusive possession of the defendants.

(16) On behalf of the defendant-appellants it was contended by their learned counsel that the finding of the trial Judge about the plaintiff firm being a registered one was not justified from the facts of the case and the suit was not competent as it had arisen from a contract with an un-registered firm, as provided by section 69(2) of the Indian Partnership Act, 1932.

(17) A certificate of registration (Exhibit P/84) was produced which shows that the firm of Messrs Birdhi Chand Girdhari Lal, Naya Bazar, was registered, on September 4, 1948, under the Indian Partnership Act. The particulars given further show that Girdhari Lal and his son Sumair Chand were indicated as partners of the firm and their principal place of business as mentioned to be Naya Bazar, Delhi.

(18) It was urged that on the letter-head on which the agreement (Exhibit D/16) was written the name of the firm was given as Birdhi Chand Girdhari Lal Jain, Chawri Bazar, Delhi and further the year of establishment of the firm was mentioned to be 1924. From this it was tried to be inferred that the firm whose registration certificate was produced has no connection with the plaintiff-firm.

(19) From the evidence of Shri Muni Lal (P. W. 15A), who had been a Munim with the plaintiffs for twenty years, it appears that the plaintiff-firm is the same one which was previously carrying on business under the name of Messrs Birdhi Chand Girdhari Lal at Naya Bazar at the time of its registration in September, 1948, u/s 51(1) of the Indian Partnership Act. It was deposed by the Munim that when he was employed the name of the firm was Birdhi Chand Jain and Sons and it used to work in Chawri Bazar. The name of the firm was then stated to have been changed to Nanak Chand Girdhari Lal and later on it came to be known as Birdhi Chand Girdhari Lal and has been working under the name in Chawri Bazar from the year 1950. As the firm had premises in Naya Bazar the mention of Naya Bazar as the principal place of business does not indicate that the firm could not have been previously and when the suit was instituted carrying on business in Chawri Bazar. Use of the surname "Jain" earlier and dropping it in the registration certificate was hardly of any consequence. The finding of the trial Judge about the plaintiff firm being a registered one has, Therefore, to be regarded as correct.

(20) The findings of the trial Judge that the portion on the southern side of the common passage shown as Gaddi and marked red and yellow in the plan (Exhibit P/I) was part of the tenancy of the defendants is also, in our opinion, correct. The contention of the plaintiffs was that possession of only a portion of Gaddi was given to the defendants and as the only portion of the premises which could be regarded as Gaddi was towards the southern side of the common passage, Therefore, possibly only one of the parts of the said Gaddi could be part of the tenancy. The portion shown in yellow colour in the plan (Exhibit P/I) was alleged to have remained in possession of the plaintiffs till March 7, 1953 when unlawful possession of it was said to have been taken by the defendants. The finding of the trial Judge that portion of the Gaddi meant both the parts shown in red and yellow colours in the plan (Exhibit P/I) was stated to be contradictory in nature.

(21) Normally a Gaddi means the seat used for doing business as distinguished from godown or portion of a premises used for other purposes and it is generally on the front side of a building. The portions on the northern side and the southern side of the common passage are similarly situated and equally suitable for Gaddi. The only difference was that in the portion on the southern side there was no wall towards the passage side.

(22) Merely because in the plan attached to the plaint only the portion on the southern side of the passage was shown as Gaddi it did not mean that the portion on the northern side did not have the characteristics of a Gaddi. If anything it was more suitable for that purpose, having a wall to separate it from the common passage, with iron bars and a door in that wall, and also having been provided with a safe.

(23) It is difficult to believe that in a portion about 10'-3" X 20'-6" which had no dividing wall, only a portion, 10'-3" X 10'-6" in area, was given on lease and the other portion was retained by the owners. Such an arrangement was hardly practicable.

(24) The evidence produced on behalf of the plaintiffs to show that the yellow part of the Gaddi on the southern side of the passage had remained in their possession till March 7, 1953 is unreliable and somewhat contradictory. The statement made by Muni Lal (P. W. 15-A) was that he had been working on the yellow Gaddi, on behalf of the plaintiffs, "since 1950" and that this part of the Gaddi remained "vacant and unused" between the years 1951 to 1953. He, however, did not stick to that position and stated that there was no business of their shop carried on at the yellow Gaddi but that part of the Gaddi was used by a Sabha as its office up to the end of the year 1951. Ram Pat (P. W. 5) came out with the story that the yellow part of the Gaddi was used by Sadhus and some function of Sadhus were held there. Kundan Lal (P. W. 10) mentioned that the yellow part of the Gaddi remained with the plaintiffs and there a Jain Sadhu came in the year 1950. He added that when "the Jain Sadhu came every body used to sit in the yellow Gaddi." Girdhari Lal, one of the plaintiffs, at first took the stand that he often used to go to the yellow Gaddi when a Jain Sadhu (Shri

Tuisi Maharajji) stayed there and that even after Maharaj Ji went away that part of the Gaddi remained in his possession. In a later portion of his statement he completely changed his version by saying that Maharaj Ji or any other Sadhu never came to the yellow part of the Gaddi. The testimony of Mangat Ram (P. W. 13) was that after 1950 the plaintiffs did not carry on any business in the yellow part of the Gaddi but with the plaintiffs' permission it was used by Guru Ji Maharaj. That witness, however, admitted that he had been using the telephone in the yellow part of the Gaddi.

(25) The plaintiffs had no telephone in the premises. The telephone which Mangat Ram (P. W. 13) had been using was of the defendants. Som Datt Chhabra (D. W. 28), a Supervisor of the Punjab National Bank, stated that as the Bank had no telephone so he used to go to the "defendants shop for using their telephone". The evidence of Chowdhary (D. W. 22), an Income Tax Officer, was also to the effect that the yellow Gaddi was used by the employees of the defendants and on a Takhtposh a telephone used to lie.

(26) If the plaintiffs had not given possession of the yellow part of the Gaddi to the defendants then they would not have allowed the latter to place a Takhtposh there to be used by the defendants' employees and to install a telephone in that part of the Gaddi. Significantly in the notice given on behalf of the plaintiffs, in March 1955, though a specific averment had been made about the defendants forcibly turning out the occupiers of the adjacent portion from the common passage, there was not even a whisper about the yellow portion of the Gaddi having been encroached upon.

(27) The evidence on the record leaves no doubt that both the parts shown as red and yellow and marked Gaddi in the plan (Exhibit P/I) have been in possession of the defendants from 1st March 1948 and the allegations about the yellow part having been subsequently encroached upon are without any basis. The portions on opposite sides of the passage both being Gaddi the portion on the southern side, including the red and yellow parts, could be regarded as portion of the entire Gaddi and it was in that sense that a portion of the Gaddi was given possession of to the defendants. In that view of the matter there is no contradiction in the finding of the learned Subordinate Judge and the claim of the plaintiffs for damages in respect of the yellow part of the Gaddi was rightly disallowed.

(28) Before coming to the main controversy in the case it may be pointed out that the case of the defendants as put before the trial Court was that the Gaddi whose possession was given to them included the so called common passage. It was, however, conceded that from that portion the plaintiffs and later on the tenants in the other portion of the Gaddi towards the north had the right of passage. When a separate entrance was provided for the portion given on lease to Raj Kumar and Viswa Mittar, the defendants did not allow those persons to have access through the portion behind the central entrance. A complaint filed by them under provisions of section 145 of the Code of Criminal Procedure was,

however, dismissed but on account of those proceedings the occupiers of the Gaddi towards the north could not make use of the common passage.

(29) There is no evidence on the record to show that possession of the passage was given to the defendants along with the two godowns and the Gaddi on the southern side of the passage. They were only allowed right of passage and, Therefore, the finding of the trial Judge about the common passage having been put to their exclusive use by the defendants from March 7, 1953 to March 18, 1957 was in no way incorrect. Even during arguments the learned counsel for the defendant-appellants did not seriously contest that finding of fact.

(30) In allowing damages at the rate of Rs. 100.00 per month for the period the plaintiffs and the occupants of the Gaddi towards the north of the common passage were deprived of its use the court below took into consideration the fact that by sub-letting one of the godowns the defendants could realise Rs. 250.00 per month. The contention of the plaintiffs that the common passage could fetch Rs. 200.00 per month was considered to be an exaggerated estimate. It seems to us that allowing damages at Rs. 100.00 per month was fair and in the circumstances of the case in no way unreasonable. There is no justification for enhancing the rate of damages beyond Rs. 100.00 per month, as desired by the plaintiffs,

(31) So far as the nature of possession of the defendants of the two godowns and the Gaddi was concerned it was not disputed before us by Shri H. R. Sawhney, learned counsel for the plaintiffs, that the defendants could be regarded to be in possession as tenants from month to month. It was only urged that the portion of the Gaddi of which possession had been given to the defendants merely comprises the red part as shown in the plan (Exhibit P/I). We have already held above that the red and yellow parts together formed the portion of the Gaddi of which possession was given to the defendants along with the godowns.

(32) For purposes of the Indian Registration Act, 1908 a lease includes "an agreement to lease". The agreement dated February 27, 1948 (Exhibit D/16) being for a period of two years required registration, as provided by section 17(I) (d) of the Registration Act. Section 107 of the Transfer of Property Act. which had already been made applicable, as well required lease of immovable property for any term exceeding one year to be made only by a registered instrument. The said agreement to lease being unregistered could not be received in evidence of the transaction of the lease. As provided by the proviso to section 49 of the Registration Act it could, of course, be received in evidence of any collateral transaction not required to be affected by registered instruments. It was, Therefore, of help in showing the nature of possession of the defendants of the two godowns and portion of the Gaddi.

(33) In the case of Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another, their Lordships of the Supreme Court referred to section 106 of the

Transfer of Property Act which, inter alia, provides that in the absence of a contract or local law or usage to the contrary, a lease of immovable property for any purpose other than agricultural or manufacturing purposes is to be deemed a lease from month to month. It was observed that the rule of construction embodied in the section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and acceptance of rent and other circumstances. On the basis of this authority the tenancy in favor of the defendants was rightly considered by the trial Judge to be from month to month.

(34) The question, however, arose as to what was the agreed rate of rent. Shri Chopra urged that the rent had been agreed to be paid at Rs. 150.00 per month. From the other side Shri Sawhney ivied to support the finding of the learned Subordinate Judge that the rent was payable at Rs. 400.00 per month.

(35) It may be mentioned that the unregistered agreement of lease (Exhibit D/16) could not be relied upon to prove the agreed rate of rent. The agreed rate of rent being one of the terms of the lease the document was not admissible for proving that term of the lease.

(36) Shri Chopra relied upon some cases, including *Jawahri Mal v. Jagan Nath and others* AIR 1930 Lah 915 and *Kidar Nalh v. Dungar Mal and Sons* AIR 1931 Lah 501 in support of the proposition that if rent is claimed but only damages by way of rent are permissible then although the figure as to rent mentioned in a lease deed which required registration cannot be looked at in order to establish the rent fixed it may be looked at to establish what damages the landlord suing for arrears of rent is entitled to. Obviously where the rent payable and not damages by way of rent is to be determined the recital about rent in a lease deed or an agreement to lease which required registration but was not registered cannot be looked at.

(37) It was also urged by the learned counsel for the defendants that u/s 53A of the Transfer of Property Act the transferor is debarred from enforcing against the transferees any right in respect, of the property of which the transferee had taken possession and continued in possession, other than a right expressly provided by the terms of the contract, notwithstanding that the contract, though required to be registered, had not been registered.

(38) It appears to us that the defendants cannot take any benefit from the provisions of section 53A of the Transfer of Property Act, embodying the principle of part performance. No such plea was taken in the written-statement of the defendants. Moreover the defendants had not shown their unqualified willingness to perform their part of the contract, which is one of the requirements of section 53A. In their written-statement it was stated that though they were tenants in respect of two halls and a portion of the Gaddi on a monthly rent of Rs. 160.00 yet the plaintiffs under no circumstances were entitled to charge rent at a rate higher than the standard rent which should not be more than Rs. 50.00 a month.

A request for fixation of standard rent was as well made. It is also worth noting that section 53A. had not been made applicable to Delhi when the suit was instituted.

(39) As to what was the agreed rate of rent will, Therefore, have to be determined independently of the unregistered agreement of lease (Exhibit D/16). That document is not admissible in evidence for ascertaining the rate of rent.

(40) Girdhari Lal plaintiff mentioned in his statement that in lieu of the portion which had been occupied by the defendants on the first floor of the premises the latter were given two godowns and a portion of Gaddi on the ground floor at Rs. 400.00 per month. He further stated that as the defendants were not able to pay for the whole portion given to them, they, Therefore, wanted to sub-let the back godown to the Punjab National Bank and "obtained a letter of consent from him to be shown to the Punjab National Bank". He also deposed that Rs. 6,000.00 were paid to him in advance and it was further agreed that Rs. 150.00 will be paid every month by the defendants.

(41) The amount of Rs, 6,000.00 obtained by the defendants from the Punjab National Bank by sub-letting a godown was alleged by the plaintiffs to have been passed on to them as partial advance payment of rent. On behalf of the defendants Shri Chela Ram, who was previously manager of the defendant-firm and became a partner of it in the year 1949, denied that the amount of Rs. 6,000.00 received from the Bank was paid to the plaintiffs. Regarding the books of account of the defendant-firm for the year 1948 it was, however, mentioned by him that these had to be taken to Pakistan by Jagdish Chandra as Rishi Ram, brother of Jagdish Chandra had been detained by Pakistan authorities in Dera Ismail Khan till such time as that person could obtain Income Tax clearance certificate. It was further stated that those books of account were not allowed to be brought back to India.

(42) The plaintiffs as well did not produce their books of account to show any entry regarding receipt of Rs. 6,000.00. The reason given by Girdhari Lal was that their books of account for the year 1948 had been destroyed. This plea of the plaintiffs was considered by the trial Judge to be incorrect. He also did not believe the defendants' version that the books of account in which payment of Rs. 6,000.00 to the plaintiffs may have been recorded were in fact taken to Pakistan as neither Jagdish Chandra nor Rishi Ram was examined as a witness. Curiously, however, the learned Subordinate Judge drew an inference that though the "plaintiffs did not make any entry of Rs. 6,000.00 in their books of account, probably with a view to save the Income Tax on that amount" but that an entry about the payment of Rs. 6,000.00 by the defendants to the plaintiffs "must have been mentioned in the defendants books of account and to conceal that evidence from being taken into consideration (which is definitely against the defendants) the defendants have not produced their books of account and have falsely stated that the same have been taken to Dera Ismail Khan and left there".

(43) It is well settled that when the question for an appellate court is undoubtedly one of fact, the decision of which depends upon the appreciation of oral evidence adduced in a case, the appellate court has to keep in mind that it did not have the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. As laid down by their Lordships of the Supreme Court in *Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others*, this certainly does not mean that when an appeal lies on facts the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge; the rule of practice being that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of an eye-witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial judge on a question of fact.

(44) In the present case the evidence of witnesses had been recorded by subordinate Judges other than Shri Lamba who delivered judgment in the suit. Shri Lamba, Therefore, did not have the advantage of observing the manner in which the witnesses deposed in court. Moreover any finding given by a trial judge can be reversed by an appellate Court if some special feature about the evidence of any witness escaped the trial Judge's notice or there is sufficient balance of improbability to displace his opinion.

(45) It was for the plaintiffs to support their contentions that a sum of Rs. 6,000.00 had been paid to them towards advance rent. If the defendants did not produce their books of account it did not necessarily follow that there must have been an entry showing payment of the amount to the plaintiffs. When the non-production of the books of account by the plaintiffs was attributed to their desire to save Income Tax why the same inference was not drawn from the non production of the account books of the other side ? In any event it was for the plaintiffs to prove the fact of payment of Rs. 6,000.00 to them by the defendants. In the absence of reliable evidence in support of that assertion the only logical conclusion to be drawn can be that the averment about Rs. 6,000.00 having been paid to the plaintiffs is without basis.

(46) The circumstances of the case also show that in all probability Rs. 6,000.00 received by the defendants from the Punjab National Bank by sub-letting a godown could not have been passed on to the plaintiffs. Admittedly the defendants were given the right of subletting the godown. If so the benefit of the rent paid by the Bank was to be retained by the defendants. If the defendants were not to retain the rent to be paid by the Bank then there could be no fun in their obtaining permission of the plaintiffs for sub-letting, the plaintiffs gave the right of sub-letting to the defendants as inducement for them to vacate the portion on the first floor of the premises for which admittedly they were paying very low rent. We have no hesitation in holding that the plaintiffs altogether

failed to prove payment of Rs. 6,000.00 to them about the end of February for beginning of March 1948 as an advance towards rent.

(47) From the notice given by the plaintiffs in March 1955 it appears that their own case was that rent was only due from May 1, 1950 to February 28, 1955. Thus it amounted to an admission that at the agreed rate rent up till the end of April 1950 had been paid. If the rent was payable at the rate of Rs. 400.00 per month then the plaintiffs should have been able" to show that a sum of Rs. 10,400.00 had been received by them from the defendants before the issue of the notice. In paragraph 14 of the plaint filed on October 1, 1955 the amount of arrears of rent was stated to be Rs. 23,350.00. That amount was computed on the basis that rent from March 1, 1948 to September 30, 1955 at the rate of Rs. 400.00 amounted to Rs. 36,400.00 and that Rs. 13,050.00 had already been received, leaving a balance of Rs. 23,350.00.

(48) The amount of Rs, 13,050.00 mentioned in the plaint to have been received from the defendants was stated to include Rs. 6,000.00 said to have been paid in advance. Payment of Rs. 6,000.00 by the defendants to the plaintiffs not having been established and the facts being consistent with no such payment having been made to them obviously the payments received by the plaintiffs according to their own avermeiits amounted to Rs. 7,050.00 only. If the agreed rate of rent had been Rs. 400.00 per month even for the period up to April 1950 the amounts received towards rent should have aggregated to Rs. 10,400.00 These facts, Therefore, belie the correctness of the plaintiffs version about the agreed rent having been Rs. 400.00 per month.

(49) Evidence was produced on behalf of the defendants to show that rent was being paid at the rate of Rs. 150.00 per month. The following payments were stated to have been made by cheques prior to the institution of the suit towards the rent:-

(1) Cheque No. Bd 674877 dated April 1, 1948 (Exhibit D. 6) payable to Messrs Birdhi Chand Girdhari Lal Jain or bearer for Rs. 150.00 (2) Cheque No. 502552 dated June 30, 1948 (Exhibit D. 5) payable to Messrs Birdhi Chand Girdhari Lal or bearer for Rs. 450.00 (3) Cheque No. DL/B 031275 dated September 13, 1948 (Exhibit D. 10) payable to Messrs. Birdhi Chand Jain & Sons or bearer for Rs. 450.00 (4) Cheque No. DL/D 024360 dated November 4, 1949 (Exhibit D. II) payable to Messrs Birdhi Chand Jain & Sons or bearer for Rs. 750.00 (5) Cheque No. DL/B 034085 dated February 19, 1949 (Exhibit D. 4) payable to Messrs Birdhi Chand Girdhari Lal or bearer for Rs.1,050.00 (6) Cheque No. B271967 dated June 10, 1950 (Exhibit D. 2) payable to Messrs Birdhi Chand Girdhari Lal for Rs. 931/2/9 (7) Cheque No. DL/H 145619 dated Sepicniher 9. 1952 (Exhibit K) payable to Messrs Birdhi Chand Girdhari Lal or bearer for Rs. 4.050.00 Total Rs. 7,831/2/9

(50) According to the evidence given by Chela Ram by the cheques marked Exhibit D/6, D/5, D/IO, D/II and D/4 rent had been paid up to the end of

September 1949. The cheque dated June 10, 1950 (Exhibit D/2) for Rs. 931/2/9 was stated to square up the rent up to June 1950. In that connection it was mentioned that rent from October 1949 to June 1950 amounted to Rs. 1.350.00. Rs. 162/13/3 were stated to have been deducted as the amount-spent on wiring etc. Credit for Rs. 44.00 was, however, given to the plaintiffs for floor repairing charges. It was added that Rs. 300.00 were deducted for white-washing etc. for a period of two years. The balance of rent payable up-till June 1950 was, Therefore, stated to be Rs. 931/2/9. As there was no evidence to show that one month's rent was deductible for white-washing each year the rent paid by cheque dated June 10, 1950 could only be treated for a period of seven months at the rate of Rs. 150.00 per month, i.e. up to end of April, 1950. This tallies with the averment in the plaintiff's notice that rent up to April 1950 was not in arrears. The next cheque (Exhibit K) for Rs. 4,050.00 was even credited by the plaintiffs towards rent for the period from May 1, 1950. Thus with the payment of Rs. 4,050.00 rent at the rate of Rs. 150.00 per month was paid till July 1952.

(51) It seems to us the defendants succeeded in establishing that for the period rent was paid it was being paid and accepted at the rate of Rs. 150.00 per month and not Rs. 400.00 per month. On behalf of the plaintiff-appellants it was contended that cheques dated September 13, 1948 and November 4, 1949 (Exhibits D/10 and D/11) were not paid to the plaintiffs as these were in the name of Birdhi Chand Jain & Sons or bearer. Firstly there was no specific denial in the statement of Girdhari Lal that these cheques were not received by him and even if these were not towards rent of the portion of the premises on lease with the defendants the stand taken on behalf of the plaintiffs that the rent was Rs. 400.00 per month will become still more unsupportable.

(52) In his deposition Girdhari Lal stated that possession of godown No. 2 which had been sub-let by the defendants with his permission to the Punjab National Bank should have been delivered back to him when the bank vacated it. The godown was vacated on March 4, 1953 and thereafter the possession of it has remained with the defendants. If the agreed rate of rent had been Rs. 400.00 per month the plaintiffs normally would not have accepted rent after February 1950 at the rate of Rs. 150.00 per month. Even after the bank vacated the godown they did not ask the defendants any time before giving notice in March 1955 to deliver its possession to them or to make up the deficiency in the rent beyond April 1950. The conclusion is inescapable that the agreed rate of rent was only Rs. 150.00 and not Rs. 400.00

(53) On behalf of the plaintiffs it was also contended that the court below had fixed the standard rent at Rs. 400.00 per month. The judgment of the learned Subordinate Judge, however, shows that standard rent was not fixed as in his opinion he could have jurisdiction to fix standard rent only if the agreed rent was unreasonable. The learned counsel for the defendants did not press for fixation of standard rent. No advantage can, Therefore, be gained by the plaintiffs from the fact that though an issue regarding, the standard rent was raised in view of the

plea raised by the defendants but the issue was left undecided.

(54) Though many grounds for eviction of the defendants were taken (the court below only allowed eviction on the ground of non-payment of rent under the provisions of clause (a) of the proviso to sub-section (1) of section 13 of the Delhi and Ajmer Rent Control Act, 1952 which was applicable when the suit was instituted. Under clause (a) of the proviso to sub-section (1) decree for possession could be passed if the tenant had neither paid nor tendered the whole of the arrears of rent due within one month of the date on which a notice of demand for the arrears of rent had been served on him by the landlord in the manner provided in section 106 of the Transfer of Property Act. Sub-section (2), however, provided that no decree or order for recovery of possession shall be passed on the ground specified in clause (a) of the proviso to sub-section (1) if on the first day of the hearing of the suit or within such further time as may be allowed by the Court the tenant pays in court the arrears of rent then due together with the costs of the suit.

(55) As mentioned above rent up to July 1952 was paid by cheque dated September 9, 1952 (Exhibit K). On the date of the institution of the suit rent from August 1952 to the end of September 1955 had fallen into arrears. The rent for that period at the rate of Rs 150.00 per month, which we have held to be the agreed rate of rent, came to Rs. 5,700.00. On the first date of the hearing the defendants deposited a sum of Rs. 7,600.00 which was in excess of the arrears of rent then due together with the costs of the suit. No decree for eviction or possession could, therefore, be passed against the defendants on the ground of non-payment of rent. It was not disputed by the learned that rate of rent is held to be Rs. 150.00 the defendants will have to be regarded to have complied with the requirements of sub-section (2) of section 13 of the Delhi and Ajmer Rent Control Act.

(56) A contention was, however, raised by Shri Sawhney that the decree for eviction can be maintained as the conduct of the tenants in taking exclusive possession of the common passage amounted to nuisance or it caused annoyance to the other occupiers of the premises and also because the premises were bona fide required by the landlords for purposes of rebuilding and that such re-building could not be carried out without the premises being vacated. These were stated to be permissible grounds for eviction of tenants under clauses (g) and (j) of the proviso to sub-section (1) of section 13 of the Delhi and Ajmer Rent Control Act. It was also submitted that though under the Delhi Rent Control Act, 1958, by which the Delhi and Ajmer Rent Control Act was repealed, nuisance is no longer a ground for eviction but in view of the provisions of section 54 and 57 of the new Act and because the premises are situated in an area subjected to the Slum Areas (Improvement and Clearance) Act, 1956 the new Act did not apply. Reliance was placed, 1969 S.C 1165

(57) The section 57(1) of Delhi Rent control Act, 1958 provided that the Delhi

and Ajmer Rent Control Act in so far as it was applicable to the Union territory of Delhi was being repealed. While repealing it, by sub-section (2) of the same section, a special saving was made in favor of suits and other proceedings then pending under the repealed Act and it was provided that those suits and other proceedings should be continued and disposed of in accordance with the provisions of the repealed Act as if that Act had continued to be in force and the new Act had never been passed. Further one of the provisos to the Section made the following provision:-

"PROVIDED that in any such suit or proceedings for the fixation of standard rent or for the eviction of a tenant from any premises to which section 54 does not apply, the court or other authority shall have regard to the provisions of this Act,"

Section 54, referred to in the above quoted proviso, is as under:-

"NOTHING in this Act shall effect the provisions of the Administration of Evacuee Property Act, 1950, or the Slum Areas (Improvement and Clearance) Act, 1956, or the Delhi Tenants (Temporary Protection) Act, 1956."

In the case of Jai Narain, referred to above, their Lordships of the Supreme Court held that in a suit pending when the Delhi Rent Control Act, 1958 came into force the provisions of that Act were to be taken into consideration only in respect of premises not governed by the Acts mentioned in Section 54.

(58) In the present case there was no averment that the premises were situated in an area subjected to slum Areas (Improvement and Clearance) Act, 1956. In the plan attached to the plaint the premises were, however, shown to be in ward No. Iii and Shri Sawhney urged that ward No. Iii was notified to be slum area in the year 1957.

(59) It is difficult to proceed on the assumption that the premises were situated in area subjected to Slum Areas (Improvement and Clearance) Act. That was a question of fact. If the matter had been: raised at the proper stage the defendants may have been able to show that the premises were not in slum area.

(60) In any event even if the ground of nuisance or annoyance was available to the plaintiffs after coming into force of the Delhi Rent Control Act, 1958 still they failed to prove that the conduct of the defendants was such that it was a nuisance or that it caused annoyance to the other occupiers of the premises.

(61) Due to the complaint filed by the defendants, u/s 145 of the Code of Criminal Procedure, against the occupiers of the portion of Gaddi towards the northern side of the common passage those persons could not use the passage from March 7, 1953 to March 18, 1957. During that period the iron door from the common passage towards that portion remained sealed under orders of the Magistrate concerned. The defendants may have, Therefore, been guilty of trespass but their conduct cannot be regarded to amount to nuisance or annoyance. In Halsbury's Laws of England (Third Edition-Volume 28 page 127) the distinction between nuisance and trespass was. pointed out in the following

words :-

"THE distinction between the two is that in trespass the immediate act itself which constitutes the offence occasions a prejudice or an injury to the sufferer's person or property or amounts to dispossession, whereas in the case of nuisance that act itself often does not directly affect the person or property of another, but the consequences of such act become or are prejudicial to his person or property."

(62) The ground that the premises were bona fide required for rebuilding was as well not established. Apart from mentioning that the building was four storeyed and had become very old and required rebuilding not a word was said by Girdhari Lal plaintiff or any other witness that the re-building could not be carried out without the premises, being, vacated. It is also difficult to believe that the plaintiffs bona fide required the premises for re-building. Even after the institution of the suit the premises were given to a Trust and there is no evidence on the record to show that any steps had been taken to get the upper storeys of the premises vacated.

(63) The plaintiffs, Therefore, failed to make out any case for eviction on the basis of clauses (a) (g) and (j) of the proviso to sub-section (1) of section 13 of the Delhi and Ajmer Rent Control Act.

(64) During, arguments it was not pressed that the plaintiffs were entitled to recover arrears of thirty-seven months rent and not thirty-six months rents. On behalf of the defendants the claim for arrears of electric charges amounting to Rs. 1,600.00 was not disputed.

(65) In the result the appeal of the defendants is partly accepted and the decree of the Subordinate Judge First Class, Delhi, dated April 15, 1961 is modified to the extent that the order for eviction of the defendants is set aside and that amount on account of three years arrears of rent is reduced from Rs. 14,400.00 to Rs. 5,400.00 at the rate of Rs. 150.00 per month. The amount of damages for exclusive use of the common passage by the defendants from March 7, 1953 to March 18, 1957 is maintained at Rs. 4,83/10/8 and also the amount of Rs. 1,600.00 for electric charges. Thus the modified decree shall only be for recovering Rs. 11,836.68 p. in favor of the plaintiffs and against the defendants with proportionate costs throughout. The appeal of the plaintiff-appellant is dismissed.