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**(1990) 09 RAJ CK 0031**

**In the Rajasthan High Court**

**Case No :** Civil Revision Petition No"s. 38, 39, 40 of 1990 and Civil Review Petition No"s. 132 and 315 of 1990

Kistur Chand Jawari Lal and Others

APPELLANT

Vs

Mangilal

RESPONDENT

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**Date of Decision :** 13-09-1990

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 115, 151  
Transfer of Property Act, 1882 — Section 108, 3

**Citation :** (1990) 2 RLW 132 : (1991) 2 WLN 231

**Hon'ble Judges :** Milap Chandra, J

**Bench :** Single Bench

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**Judgement**

Milap Chandra, J.—These revision petitions have been filed by the plaintiff-petitioners-tenants (hereinafter to be called the petitioners) against the similar orders of the learned District Judge, Pali dated December 16, 1989, dismissing the appeals of the plaintiff-petitioners and affirming the orders of the learned Munsif, Pali dated May 27, 1987 by which he had dismissed the applications of the petitioners moved under Order 39 Rules 1 and 2, C.P.C. praying that the defendant-non-petitioner-landlord(hereinafter to be called "the non-petitioner") be restrained from obstructing them to carry out repairs in the demised shops.

2. The review petitions have been filed against my common order dated October 20, 1989 by which the revision petitions No. 540,541 and 790 of the year 1989 have been dismissed. These revisions were filed against the similar orders of the learned Additional Civil Judge No. 1, Pali (where these suits were then pending) dated September, 21st, 1989, directing the tenants to remove their articles from the demised shops.

3. As these revisions and review petitions arise out of three similar cases, they are being disposed of by this order. The facts of the cases may be summarised thus. The petitioners are in possession and occupation of three shops situated at Ruyee Katla, Pali as tenants of the non-petitioner. On March 18, 1987, communal

riots broke out in Pali. Shutters were removed from the shops, articles were taken away therefrom and fire was set up in them. As a result thereof, their roofs fell down and walls got damaged. The non-petitioner served notice upon the petitioners on April 3, 1987 that he would remove the "malwa" and also the articles lying hidden thereunder. The petitioners filed suits for injunction against the non-petitioner restraining him from dispossessing them and also from obstructing them in repairing the demised shops to restore their position as existed prior to the communal riots. Alongwith the suits, applications were moved under Order 39 Rules 1 and 2, C.P.C. After hearing the parties, the learned trial court directed the parties to maintain the status quo of the suit shops and also directed the non-petitioner to remove the "malwa" from the suit shops within a month failing which the petitioners would be entitled to remove the same by its orders dated May 27, 1987. It was also observed that the petitioners were free to obtain any order from competent authority u/s 12, Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter to be called "the Act,). Against these orders, appeals were filed. The learned District Judge dismissed these appeals by his similar order dated December 16, 1989 against which present revision petitions have been filed. On September 21, 1989, on the applications of the non-petitioner the trial court directed the petitioners to demolish the constructions effected by them in the demised shops and to restored the condition which existed just prior to the institution of the suits. Against these orders, the said revision petitions No. 540,541 and 790 of 1989 were filed and they were dismissed by me on October 20, 1989.

4. It has been contended by the learned Counsel for the petitioners that the learned lower courts have acted with material irregularity in the exercise of their jurisdiction in dismissing the applications of the petitioners moved under Order 39, Rules 1 and 2, C.P.C. as u/s 20 of the Act and under Clause (f) of Section 108, Transfer of Property Act, the non-petitioner was bound to keep the demised shops in good repairs, service of notice upon the non-petitioner was not at all necessary as the latter, by serving notice upon petitioners for removing "malwa", by not repairing the demised shops and by filing suits for ejectment on the ground of the demised shops becoming unfit and unsafe for human habitation, made his intention clear. He also contended that no notice in writing is necessary under these provisions. He lastly contended that the provisions of Clause (p) of Section 108, Transfer of Property Act are applicable for agricultural leases. He relied upon Eashwar Vs. B. Sudershan and Another, and Nayak Kalidas Motiram Vs. Menaben and Another,

5. In reply, it has been contended by the learned Counsel for the non-petitioner that neither the revision petitions nor the review petitions are maintainable as the scope of the provisions of Section 115 and Order 47 Rule 1, C.P.C. is very limited, no illegality or irregularity in the exercise of jurisdiction has been committed by the lower courts while passing the impugned orders, the provision of Section 20 of the Act and Section 108(f) of the Transfer of Property Act simple require a landlord to keep the demised premises in good and tenantable

condition and they do not require their reconstruction, in the said fire all the three demised shops were gutted, their roof and walls fell down, electric fittings and wooden doors were burnt away, as such they became unfit and unsafe for human habitation, on this ground suits for ejectment have been filed and grant of injunction would adversely affect the ejectment suits. He relied upon The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway, , Sita Ram v. R.M. Muni 1965 All LJ 689 and Kurian and Another Vs. Job and Others,

6. Admittedly, the relationship of landlord and tenant is still existing in between the parties. It is well proved from the report of the Commissioner that the roof of the suit shops fell down, walls were damaged and doors were burnt away in the said fire and the petitioners had put tin sheets on the roofs and fitted new doors in the suit shops.

7. This first question for consideration is whether the petitioners have a right to carry out repairs in the suit shops after the said fire and had taken place in them. Section 20 of the Act runs as under:

20. Landlord's duty to keep premises in good repair:

(1) The landlord shall be bound to keep in good and tenantable repair any premises to which this Act applies except in cases where the tenant has undertaken by agreement to keep premises in repair.

(2) If the landlord neglects to make within a reasonable time after notice, any repairs which he is bound to make under Sub-section (1), the tenant may make the same himself, and deduct the expenses of such repairs from the rent, or otherwise recover it from the landlord:

Provided that the amount so deducted or recoverable in any year shall not exceed one twelfth of the rent payable by the tenant for that year.

Sub-section (2) does not require service of a notice in writing by a tenant upon his landlord. If the landlord has notice from any source about the condition of the demised premises, he is bound to carry out necessary repairs as required under Sub-section (1) clause(f) of Section 108, Transfer of Property Act runs as under:

(f) If the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover if from the lessor.

This clause also does not require that a lessee is to serve a notice in writing upon his lessor. Section 3 of the Transfer of Property Act enshrines that a person is said to have notice of a fact which he actually knows that fact or when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Section 28 of the Act says that the provisions of the Act shall be in addition to and not derogatory of, any other law

on the subject for the time being in force. Thus the learned lower courts have acted with material irregularity in exercising their jurisdiction to hold that the petitioners have no right to carry out the repairs in the suit shops as they did not serve any notice upon the non-petitioner prior to filing of the suits. These provisions leave no doubt that the non-petitioner had a duty to carry out necessary repairs in the suit shops. He not only failed in his duty but obtained an order from the courts restraining the petitioners in carrying them out. Clause (m) of Section 108, Transfer of Property Act requires that the lessee is bound to keep the demised property in as good condition as it was in at the time when he was put in possession.

8. The contention of the learned Counsel for the non-petitioner that the provisions of Section 13(1)(c) of the Act impliedly prohibits a tenant to carry out any construction in the demised shops in devoid of force for more than one reasons. Clause(c) of Sub-section (1) of Section 13 of the Act runs as under:

13. Eviction of tenants.-(1)Notwithstanding anything contained in any law or contract, no Court shall pass any decree; or make any order, in favour of a landlord whether in execution of a decree or otherwise, evicting the tenant so long as he is ready and willing to pay rent therefore to the full extent allowable by this Act, unless it is satisfied:

(a)X X X

(b)X X X

(c) that the tenant has without the permission of the landlord made or permitted to be made any such construction as, in the opinion of the court has materially altered the premises or is likely to diminish the value thereof;

Firstly, this clause does not speak of repairs. It is concerned with constructions. Secondly, all types of constructions do not attract this clause. Only those constructions will attract this clause which go to materially alter the premises or is likely to diminish its value. Thirdly, comparison is required to be made with the condition of the demised shops as it was at the time of the commencement of the tenancy (not as it was after the said fire had taken place) with the condition after construction.

9. Reliance was also placed on Clause (k) of Sub-section (1) of Section 13 of the Act in support of the contention that the petitioner cannot be permitted to carry out construction/repairs as it would impair the right of the non-petitioner which has accrued to him and would adversely effect his suits for ejectment based on this ground. This clause is attracted in a case in which the demised premises becomes unfit and unsafe on account of the failure of the landlord to carry out the repairs which he is bound to carry out under law. Be that as it may, the subject matter in the present revision petitions is the petitioner's suits for injunction and not the suits of the non-petitioner for ejectment. In view of these facts, circumstances and law, the petitioners are entitled to carry out repairs in

the suit shops as their own expenses.

10. During the arguments before the learned District Judge, the learned Counsel for the non-petitioner contended:

izR;k"kh us vihykFkhZ ds fo:) vf/kfu"dklu dk okn Hkh izLrqr fd;k vkSj ml okn ds v/khu ,d izkFkZuk i= vUrZxr vkns"k 39 fu;e 1 o 2 flfoy izfdz;k lafgrk ds v/khu izLrqr fd;k x;k ftles fnukad 8&9&86 dks vihykFkhZ ds fo:) ;g vkns"k ikfjr fd;k x;k fd okn ds yfEcr jgus ds ckn izLr nqdku es dksbZ ifjorZu ugh djs fdUrq vihykFkhZ us dkuwu dks vius gkFk es ysrs gq, nqdku ds ckgj yksgs dk njoktk ,oa Nr ij irjs yxok fn;s gS vkSj vihykFkhZ Loa; us vihy es ekaxk x;k vuqrks"k nqdku dk iqufuekZ.k dj izkIr dj fy;k gSA

The next question for consideration is whether this work fell within repairs or re-construction. There is a fundamental difference between repair and re-construction. The test for determining whether a thing is a repair or not is to see whether the act actually done is replacement of a defective part or the replacement of the entire or substantial part of the demised premises.

11. Law Lexicons define "Repair" as under:

Webster's International Dictionary of the English Language (2 vols).

Repair Act of repairing: restoration, or state of being restored, to a sound or good state after decay, waste, injury, etc; supply of loss; reparation; mending. Also, an instance or result of such restoration-often in plural, as, the repairs to the house are extensive. Condition with respect to soundness need of repairing etc. as, a house in good, or bad, repair, or out of repair.

(2) Murray: New English Dictionary (10 Vols.)

Repair: The act of restoring to a sound or unimpaired condition; the process by which this is accomplished; the result attained.

Relative state or condition of some thing admitting or susceptible of restoration in event of actual or possible damage or decay.; chiefly of buildings or other composite structures and in phrase, in good (or bad) repair.

(3) Funk and Wagnalls: New Standard Dictionary of English Language (1953)

Repairs: To mend, add to, or make over, add, to repair a building.

The process of repairing; restoration after decay, waste, injury, or partial destruction, supply of loss; reparation; as, the repair of a building; often in plural; as to make repairs of a roof;

Condition after use, especially, good condition, condition after repairing as, in what repair is the house?

(4) Ballantine: Law Dictionary (1954)(O.S.A.)

Repair: Under statutes authorizing special assessments for the reconstruction of

street, improvements, but not for the repair thereof, the work "repair" contemplates an existing structure or thing which has become imperfect by reason of the action of the element, or otherwise. Work done on a structure which has not been demolished, but which has been damaged. The word is to be distinguished from reconstruction which properly applies only to work done upon a structure which had been demolished in whole or in part.

(5) Stroud's Judicial Dictionary.

(Third edition) (1952).

Repair: To repair means to make good defects, including renewal where that is necessary, i.e., patching, where patching is reasonably practicable and, where it is not, you must put in a new piece.

...But "repair" does not connote a total reconstruction. (*Inglis v. Buttery* (1978) 3 A.C. 552; *Creg v. Plannque* (1936) 1 K.B. 669; *R. v. Epsom* (1863) 8 LT 383." (Reproduced from AIR 1960 Madras 24 at page 26)

Restoration of the fallen roof would not amount to reconstruction. It has been held in *S.B. Chatterjee v. Munsif, Allahabad*, 1959 Allahabad Law Journal 227, that construction of a fallen wall is a repair. The facts of *Sita Ram v. R.M. Muni*, 1965 ALJ 689 and *Kurian and Another Vs. Job and Others*, relied upon by the learned Counsel for the non-petitioner are quite different and distinguishable. They do not go to help the non-petitioner. Thus the petitioners had a strong prima facie case in their favour for getting the non-petitioner restrained from obstructing them in carrying out the said repairs.

12. The trial court has rightly held that the balance of convenience is in favour of the petitioners and they would suffer an irreparable loss if the desired injunction is not granted. The learned District Judge has not discussed these points in his orders. As such all the three revision petitions deserve to be accepted.

13. In view of the order which is being passed in the aforesaid revision petitions, it is expedient and necessary in the interest of justice that the common order dated October 20, 1989 passed by me in Civil Revision Nos. 540 and 541 of 1989 and 790 of 1988 is reviewed and recalled u/s 151 C.P.C. and also the order of the trial court dated September 21, 1989 (against which the said revisions were filed) directing the petitioners to restore the suit shops in the condition in which they were immediately after the fire had taken place, is set aside. At the risk of repetition, it is necessary to mention here that alongwith their complaints, the petitioners moved application under Order 39 Rules 1 and 2, C.P.C. praying that the non-petitioner be directed not to obstruct them in carrying out repairs in their shops. Instead of granting the desired temporary injunction, the trial court directed them to maintain status quo by its order dated May 27, 1987 against which appeals were filed and which were dismissed by the learned District Judge, Pali by his orders dated December 16, 1989, challenged in these revision petitions. The petitioners carried out the said repairs in order to run their

business. On the applications of the non-petitioner, the trial court directed the petitioners to restore the suit shops in the same position as existed immediately after the fire had taken place by its order dated August 21, 1989. The said revision petitions No. 540 and 541 and 790 of 1989, were dismissed on the ground that they were not maintainable as the impugned orders dated September 21, 1989 were passed in pursuance of the orders dated May 27, 1987. If the orders dated May 27, 1987 had been set aside earlier, the orders dated September 21, 1989 would not have been passed by the trial Court.

14. Before parting with the case it may be observed that if there would have provisions similar to the provisions of Section 29, U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 in the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, there would not have been any necessity for the tenant-petitioners to file the suits for injunction. Collective disturbances have started occurring frequently in Rajasthan as occurred in Pali in March, 1987. For giving relief to such grief stricken tenants, it is necessary that provisions similar to Section 29 of the said U.P. Act are incorporated in the Rajasthan Act. Section 29 of the said U.P. Act runs as under:

29. Special protection to tenants of buildings destroyed by collective disturbances etc.-(1)Where in consequence of the commission of mischief or any other offence in the course of collective disturbances, any building under tenancy is wholly or partly destroyed, the tenant shall have the right to re-erect it wholly or partly, as the case may be, at his own expenses within a period of six months from such injury:

Provided that if such injury was occasioned by the wrongful act or default of the tenant he shall not be entitled to avail himself of the benefit of this provision.

(2) Where in consequence of fire, tempest, flood or excessive rainfall, any building under tenancy is wholly or partly destroyed the tenant shall have the right to re-erect or repair it wholly or partly, as the case may be, at his own expense after giving a notice in writing to the landlord within a period of one month from such injury; provided that the tenant shall not be entitled to avail himself of the benefit of this provision.

(a) if such injury was occasioned by his own wrongful act or default; or

(b) in respect of any re-erection or repair made before he was given a notice as aforesaid to the landlord or before the expiration of a period of fifteen days after such notice, or if the landlord in the meantime makes an application u/s 21, before the disposal of such application; or

(c) in respect of any re-erection or repair made after the expiration of a period of six months from such injury or, if the landlord has made any application as aforesaid, from the disposal thereof.

(3) Where the tenant, before the commencement of this Act, has made any re-erection or repair in exercise of his right u/s 19 of the old Act, or after the

commencement of this Act makes any re-erection in the exercise of his right under sub-section (1) or Sub-section (2).

(a) the property so re-erected or repaired shall be comprised in the tenancy;

(b) the tenant shall not be entitled, whether during the tenancy or after its determination, to demolish the property or parts so erected or repaired or to remove any material used therein other than any fixtures of a movable nature;

(c) Notwithstanding, anything contained in Sub-section (2) of Section 2, the provisions of this Act shall apply to the building so re-erected:

Provided that no application shall be maintainable u/s 21 in respect of any such building on the ground mentioned in Clause (b) of Sub-section (1) thereof within a period of three years from the completion of such re-erection.

15. Consequently, the revision petitions No. 38, 39 and 40 of 1990 are allowed with costs. The orders of the Munsif, Pali dated May 27, 1987 and of the learned District Judge, Pali dated December 16, 1989 are set aside. The petitioners' applications moved under Order 39, Rules 1 and 2, C.P.C. are allowed and the defendant-non-petitioner is restrained till the disposal of the suits from obstructing the petitioners from repairing the suit shops in their tenancy and occupation.

16. The review petitions No. 315/90 (defect) and 132/90(defect) are also allowed with costs. The order of this Court dated October 20, 1989 dismissing the earlier revisions No. 540 and 541 of 1989 and 790/90 (defect) is recalled and the orders of the learned Additional Civil Judge No. 1 Pali dated September 21, 1989 passed in Civil Misc. Cases No. 20, 21 and 22 of 1989 in between the parties are set aside.