

(2013) 02 DEL CK 0243

In the Delhi High Court

Case No : Regular First Appeal (OS) 96 of 2010

Lord Chloro Alkali Ltd.

APPELLANT

Vs

Mohinder Pal Singh Khurana and Others

RESPONDENT

Date of Decision : 28-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Transfer of Property (Amendment) Act, 2002 — Section 3
Transfer of Property Act, 1882 — Section 106, 107, 108(B)(h), 2

Citation : (2013) 5 AD 631 : (2013) 200 DLT 206

Hon'ble Judges : Sanjiv Khanna, J;S.P. Garg, J

Bench : Division Bench

Advocate : Ravinder Sethi, with Mr. Rahul Gupta, Mr. Shekhar Gupta, Mr. Rajeev Ghawana and Mr. Nitesh, for the Appellant; Arun Kumar Varma, Advocate with Ms. Mansi Wadhera and Mr. Ashish Bansal, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Garg, J.—The appellant-Lord Chloro Alkali Limited, formerly known as Modi Alkalies and Chemicals Limited, has filed the present intra-Court appeal against the judgment and decree dated 30th July, 2010 in CS(OS) No. 131/2005 (original suit No. CS(OS) 344/1998) for possession of property bearing No. 18, Community Centre, New Friends Colony, New Delhi in favour of the respondents, the original plaintiffs, namely, Mohinder Pal Singh Khurana and Khushbir Singh Baweja, now represented by his legal heirs-Harcharan Kaur, Harshbir Kaur Rana, Gulbir Singh Baweja and Darshbir Kaur Uppal. The same judgment/decreed dismisses two other suits; CS(OS) No. 594/1998 for recovery of mesne profits etc. and Suit No. 206/2002 for mandatory injunction etc., which were preferred by Mohinder Pal Singh Khurana and Khushbir Singh Baweja. The respondents have accepted the judgment and decree of the Single Judge dismissing their suits Nos. 594/1998 and 206/2002. We are, therefore, not concerned and not examining the said aspects. The undisputed facts are that Mohinder Pal Singh Khurana, respondent No. 1 and Khushbir Singh Baweja, now represented by his

legal heirs (hereinafter referred to as the respondent Nos. 2 to 5) acquired leasehold rights from Delhi Development Authority on a plot of land and constructed a commercial building thereon. The said property is given municipal No. 18, Community Centre, New Friends Colony, Delhi. By a registered lease deed dated 14th December, 1981 (Exhibit PW-1/2) an area of 7647.12 square feet was rented out to three companies, namely, the appellant (5000 square feet), Modi Industries Limited (2000 square feet) and Modi Carpets Limited (647 square feet). The demarcation of the area, i.e., 5000 square feet apportioned to the appellant, 2000 square feet apportioned to Modi Industries Limited and 647 square feet apportioned to Modi Carpets Limited was not specifically made in the site plan or in the lease deed. The rent specified in the lease was Rs. 3/- per square feet payable by 7th day of each calendar month. The relevant clauses of the lease deed about which there are disputes and interpretation is required are reproduced and discussed below. It is, however, not disputed that the respondents had constructed the commercial building, on the land, consisting of 7647.12 square feet from their own resources.

2. It is also an undisputed position that the respondents constructed a mezzanine floor of 1845 square feet sometimes after the lease deed dated 14th December, 1981 was executed. By the supplementary lease deed (Exhibit PW-1/4) dated 19th September, 1985, the mezzanine floor was rented out to the appellant at Rs. 6/- per square feet per month. Modi Industries Limited and Modi Carpets Limited were not parties or tenants under the supplementary lease deed.

3. The respondents through their advocate, before filing the suit, had sent two legal notices dated 29th November, 1997 (Ex. PW1/5) and 21st January, 1998 (Ex. PW-1/11) determining the lease. The notices were sent by registered post. No reply to the said notices was received.

4. The suit for possession was filed on 18th February, 1998. At that time, the total rent being paid for the entire premises to the respondents was Rs. 49,570/- per month. The break-up of this is not available, but probably it represents rent at the rate of Rs. 3.70 per square feet for 7647.12 square feet, which was originally let out by the respondents to the three companies, including the appellant vide lease deed dated 14th December, 1981 (Exhibit PW-1/2) and Rs. 6/- per square feet for 1845 square feet of the mezzanine area, which was rented out to the appellant herein vide supplementary lease deed (Exhibit PW-1/4). Modi Industries Ltd. and Modi Carpets Ltd. were defendants to the said suit but they did not enter appearance despite service and were proceeded ex-parte vide order dated 6th April, 2000.

5. The suit has been decreed after protracted trial and adjudication vide impugned judgment dated 30th July, 2010 i.e. after nearly more than 12 years.

6. Challenge to the impugned judgment and decree by the appellant is primarily on two grounds. Firstly, the two notices of termination dated 29th November, 1997 (Ex. PW1/5) and 21st January, 1998 (Ex. PW-1/11) are invalid and did not

validly terminate the tenancy u/s 106 of the Transfer of Properties Act, 1882 (TPA, for short). Secondly and the main plea was that the tenancy of the appellant was perpetual and, therefore, the respondents cannot ask for and pray for a decree of possession. A supplementary plea raised was that the respondents had not approached the Court with clean hands.

7. The plea of the appellant that the tenancy rights given to them in respect of the property by the respondents are perpetual is based upon three assertions. Firstly, the appellant placed reliance on the terms and conditions of the registered lease deed (Exhibit PW-1/2) and submitted that terms and the clauses indicate that the tenancy is perpetual. Secondly, the respondents did not file any suit for ejectment or possession though the Delhi Rent Control Act, 1958 ceased to be applicable with effect from October, 1988. The suit for ejectment was filed on 18th February, 1998, nearly ten years after the amendment. Thirdly and lastly the appellant and the other two companies had made payment of lease premium of Rs. 25/- lacs to the respondents at the time of creation of tenancy, which fact was concealed, but is now accepted and admitted by the respondents. This contention will be dealt with and examined in detail separately, but at this stage, it is suffice to notice that the appellants had filed an application CM No. 5453/2011 for additional evidence under Order XLI Rule 27, CPC, which was disposed of vide order dated 2nd May, 2011 recording, inter alia, that the respondents had not only admitted receipt of Rs. 16,61,070/- but receipt of total amount of Rs. 25 lacs. The order records that the appellant had pleaded that the payment was towards "lease premium", whereas the stand of the respondents was that it was non interest bearing "security deposit" refundable at the time of vacation. Thereafter, the appellant was permitted and allowed to amend the written statement in terms of order dated 3rd November, 2011. Parties were permitted to file additional documents by the same order and lead oral evidence. Consequent thereto some additional evidence was recorded in the form of affidavits and cross-examination of Mr. S.K. Nair on behalf of the appellant and Ms. Harcharan Kaur on behalf of the respondents.

8. In *Bejoy Gopal Mukherji Vs. Pratul Chandra Ghose*, it was observed that permanency of tenancy does not necessarily imply both fixity of rent and fixity of occupation. At the same time, it was observed that mere possession for generations at a uniform rent and construction of permanent structure by itself is not conclusive proof of permanent right but cumulative effect of such facts coupled with several other facts may lead to an inference of permanent tenancy. The Supreme Court observed that question of permanency of tenancy was not directly and substantially in issue in the said case. In fact, it was not known how the earliest known tenant in occupation had acquired the property and what was the nature of the tenancy, but the tenancy had passed from one person to another by inheritance, will or by transfer inter vivos. There were deeds of transfer under which the transferee was given the right to enjoy the property from generation to generation forever. At no time, the landlord sought eviction/ejectment. Though several judgments have been cited at the Bar, we deem it

appropriate and necessary to only refer to another decision of the Supreme Court in *State of U.P. and Others Vs. Lalji Tandon (Dead)*, and some judgments of the High Court referred to with approval in the said case.

9. At the outset, it would be appropriate to refer to the law as enunciated in *Secretary of State for India in Council Vs. A.H. Forbes*, wherein it has been observed:

(1) A lease, which creates a tenancy for a term of years, may yet confer on the lessee an option of renewal.

(2) If the lease does not state by whom the option is exercisable, it is exercisable (as between the lessor and lessee) by the lessee only, that is to say, a covenant for renewal, if informally expressed, is enforced only in favour of the lessee.

(3) The option is exercisable not merely by the lessee personally but also by his representative-in-interest.

(4) If the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, in respect of all the essential conditions thereof, except as to the covenant for renewal itself.

(5) There is no sort of legal presumption against a right of perpetual renewal. The burden of strict proof is imposed upon a person claiming such a right. It should not be inferred from any equivocal expressions which may fairly be capable of being otherwise interpreted. The intention in that behalf should be clearly shown; otherwise, the agreement is satisfied and exhausted by a single renewal.

(6) A covenant for renewal runs with the land.

(7) The position of a lessee, who has been always ready and willing to accept a renewal on proper terms, is the same in equity as if a proper lease had been granted. Where the covenant for renewal was still specifically enforceable at the commencement of a suit for ejectment against the lessee, the position of the lessee in equity is the same as if it had been specifically enforced.

10. The following observations of a Division Bench of Andhra Pradesh High Court in *Syed Jaleel Zane Vs. P. Venkata Murlidhar and Others*, are apposite:-

(i) In India, the law does not prohibit a perpetual lease; clear and unambiguous language would be required to infer such a lease. If the language is ambiguous the court would opt for an interpretation negating the plea of the perpetual lease;

(ii) To find an answer to the question whether a covenant for renewal contained in the lease deed construed properly and in its real context, entitles the tenant to continue as long as he chooses by exercising the option of renewal at the end of each successive period of 5 years subject to the same terms and condition depends on the deed of lease being read as a whole and an effort made to ascertain the intention of the parties while entering into the contract. No single

clause or term should be read in isolation so as to defeat other clauses. The interpretation must be reasonable, harmonious and be deduced from the language of the document;

(iii) The court always leans against a perpetual renewal and hence where there is a clause for renewal subject to the same terms and conditions, it would be construed as giving a right to renewal for the same period as the period of the original lease, but not a right to second or third renewal and so on unless, of course, the language is clear and unambiguous.

11. The facts in Lalji Tandon's case (*supra*) may be noticed. Land was given on 50 years lease with the option clause for renewal for another 50 years before expiry of the term to the existing lessee, "subject to the same covenants, conditions and provisions as contained in the original lease". The original lease, however, was not placed on record by the parties and it was noticed that the High Court had drawn adverse inference against the State of U.P. because they were in possession of the same. The High Court had accordingly rejected the contention that the lease was renewable only once. After expiry of the first 50 years, the lease was not initially renewed. The State Government agreed to renew the lease for the term of 50 years but after a period of 42 years and some months had already passed in the second term. The lease executed was placed on record. The Supreme Court opined that clause (2) of the said lease was crucial and stipulated that the lessee and the lessor would be bound by the obligations and would perform and observe the covenants, provisos and stipulations in the original/first deed as if the same covenants, provisos, stipulations had been repeated in full. The Supreme Court thereafter observed that the short question was whether the clause of renewal as mentioned in the original lease was got incorporated in view of the covenant 2 in the second lease executed in 1945 after expiry of more than 42 years in the second term. We note that the second term expired in 1991 and the grievance of Lalji Tandon, the lessee, was that he was entitled to another renewal of 50 years. The stand of the State of U.P. was that there could be only one renewal for the second term of 50 years and that had exhausted itself. In these circumstances, the Supreme Court observed as under:

13. In India, a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. (Mulla on the Transfer of Property Act, 9th Edn., 1999, p. 1011) Where a covenant for renewal exists, its exercise is, of course, a unilateral act of the lessee, and the consent of the lessor is unnecessary. (*Baker v. Merkel*, also Mulla, *ibid.*, p. 1204) Where the principal lease executed between the parties containing a covenant for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case, regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances. There is a difference between an extension of lease in accordance with the covenant in that

regard contained in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed, as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be.

12. Reference was made to English decision in *Green versus Parmer*, (1944) 1 AER 670, wherein the relevant covenant read as under:-

The tenant is hereby granted the option of continuing the tenancy for a further period of six months on the same terms and conditions including this clause, provided the tenant gives to the landlord in writing four weeks" notice of his intention to exercise his option.

and the Chancery Division had held:

The first thing one observes is that, in terms, there is granted to the tenant a single option exercisable only once upon the named event, and the subject-matter of that option is an option of continuing the tenancy for a further period of six months on the same terms and conditions including this clause. To my mind, what that means is this: the tenant is to be allowed once, and once only, the opportunity of continuing the tenancy--continuing it for a further six months. Then we come to the critical words "on the same terms and conditions including this clause". As I read it, that means there is included in the new tenancy agreement a right in the tenant, if he thinks fit, to go on, for one further six months, and when you have got to that stage you have finished with the whole matter. In other words, it comes to this: "Here is your present lease. You may continue that, but I tell you, if you continue it, you continue it on the same terms as you were granted the original lease. You may continue it for a further 6 months with the right to go on for another 6 months.

Upon that footing, in the events which have happened, all the landlord was bound to do under this arrangement was to permit the tenant to occupy for a period not exceeding 18 months in the whole from the time when the original lease was granted.

13. It was accordingly held as under:

18. We find ourselves in full agreement with the view of the law taken in the decisions cited hereinabove. It is pertinent to note that the respondent is not claiming a lease in perpetuity or right to successive renewals under the covenant for renewal contained in the 1887 lease. The term of 50 years under the 1887

lease came to an end in the year 1937 and the option for renewal was exercised by the respondent as assignee of the original lessee which exercise was honoured by the lessor State executing a fresh deed of lease belatedly on 20-2-1945. This lease deed does not set out any fresh covenants, mutually agreed upon between the parties for the purpose of renewal. Rather it incorporates, without any reservation, all the covenants, provisos and stipulations as contained in the principal lease as if they had been herein repeated in full. Not only was a fresh deed of lease executed but the conduct of the parties also shows that at the end of the term appointed by the 1945 lease i.e.. in or around the year 1987, the lessor did not exercise its right of re-entry. On the other hand, the respondent exercised his option for renewal. The officials of the appellant State i.e. the Collector and the Board of Revenue, all recommended renewal and advised the State Government to expedite the renewal. The State Government was generally renewing such like leases by issuing general orders/instructions to its officers. At no point of time prior to the filing of the counter-affidavit, on the present litigation having been initiated, the State or any of its officers took a stand that the right of renewal, as contained in the principal deed of lease, having been exhausted by exercise of one option for renewal, was not available to be exercised again.

19. Now that the covenant for renewal has been referentially incorporated without any reservation in the lease deed of 1945, the exercise of option for renewal cannot be denied to the respondent. However, in the lease deed to be executed for a period of 50 years commencing 20-5-1987, the covenant for renewal need not be incorporated and therefore the term of the lease would come to an end on expiry of 50 years calculated from 20-5-1987. This view also accords with the view of the law taken in *Green v. Palmer*.

14. Now we turn to the relevant clauses of the present lease dated 14th December, 1981 (Ex. PW1/2), which are as under:

2. The tenancy will commence by the 16th of December 1981 and after the expiry of first four years the rent would be revised to Rs. 3.70 paise per sq ft, per month and would be revised by 10% on the first of the expiry of every four years.

In case permanent electricity connection is not provided by 16/12/1981 then the rent will be charged from the date the permanent connection is given.

3. The tenants shall be entitled to make alterations in the tenanted premises in accordance with the plan to be approved by the Municipal and/or other authorities but shall restore the same in the same conditions if the tenants vacate the premises on their own. In case of any illegal construction or alterations violating the laws of DDA or municipal corporation, the penalty, if any levied would be paid by the Tenants/

4. The tenants shall be entitled to use the said tenanted premises for commercial purposes and/or for the purpose of running their offices and/or carrying on

business therein.

5. The Tenants, if they of their own decided to vacate the premises, will be entitled to remove all fixtures, fittings or additional equipment brought in by them by way of air-conditioning or for any other purposes in the tenanted premises. The Landlords will not in any manner claim any ownership for retaining all those fixtures and fittings and additional materials brought in by the Tenants in the tenanted premises and will not in any manner cause any difficulty in their removal by the Tenants.

6. (iii) The Tenants will have the right to use the whole or any part of the tenanted premises during the tenancy for companies, firms, trusts, associates of the Tenants. However, the responsibility of paying the rent will be of the Tenants under this Deed.

7. The Landlords do hereby covenant with the Tenants in the manner followings:

(a) the tenants paying the rent and other charges and outgoings hereby reserved on the days and in the manner hereinbefore mentioned and observing and performing all covenants and conditions herein contained and on their part to be observed and performed shall peacefully and quietly held, occupy and enjoy the tenanted premises and the said fittings and fixtures free from all disturbances by the Landlords or any person or persons rightfully claiming from, under on in trust for the Landlords.

(b) To bear and pay the Municipal rates and taxes, house-taxes any imposition by DDA or other authority or authorities in respect of the tenanted premises during the said term of tenancy.

15. It is not possible to accept the contention of the appellant that the lease Exhibit PW-1/2 is for infinite or perpetual duration. Covenant 2 of the lease agreement reproduced above is to the contrary. It states that the tenancy would commence on 16th December, 1981 and after expiry of first four years the rent would be revised to Rs. 3.70 paise per sq. foot per month. It would be revised by 10% on expiry of every four years.

16. Covenant 2 merely states that after the expiry of first four years, the rent would be revised to Rs. 3.70 paise per sq. ft. per month and would be revisable by 10% on the first of the expiry of every four years. It merely talks that whenever there is renewal of the lease, it would be on enhanced/revised rate. It does not say that the renewal would be automatic and the lessee as a matter of right would have the option of renewal for an indefinite period after the expiry of every four years block. After the expiry of first four years, no such option of renewal in writing was exercised by the lessee. No such fresh lease deed incorporating all the terms and conditions in the original lease deed including renewal clause was executed between the parties.

17. Clause (3) of the lease deed authorizes the appellants to make alterations in the tenanted premises in accordance with the plan to be approved by the

Municipal and/or other authorities. They were to restore the premises in the same condition when they vacated it on their own. Admittedly, the premises in question were let out to the appellant for commercial purpose and/or for the purpose of running their offices and/or carrying their own business therein. Some amount was purportedly incurred by the appellant in carrying out the renovation to make the premises useable for that purpose. This authorization to make alteration in the tenanted premises, as per the law cannot be interpreted to mean that the appellant was authorized to make structural changes or to raise independent structure or cause substantial changes in the tenanted premises. They could carry out the alterations as per the building bylaws of the Municipal Corporation and/or other authorities. It was specifically mentioned that in case of any illegal construction or alteration violating the laws of DDA or Municipal Corporation, the penalty, if any, would be payable by the tenants.

18. In clause (5), it was agreed that when the tenants decided to vacate the premises on their own, they would be entitled to remove all fixtures, fittings or additional equipment brought in by them by way of air conditioning or for any other purposes in the tenanted premises. The landlords would not claim any ownership for retaining all those fixtures and fittings and would not in any manner cause any difficulty in their removal by the tenants. Again, the tenants were permitted to remove the additions or fittings carried out by them with their own funds at the time of vacating the premises. Apparently, the landlords had no right over the improvements made by the tenants in the tenanted premises as per law.

19. Section 108(B)(h) of the TPA is to the same effect and permits the lessee even after on determination of the lease to remove all things that he had attached to earth at any time, but while he was in possession but not afterwards, provided he leaves the property in the state in which he had received it. The covenant is not unusual and even in the absence of any provision/covenant in the lease deed Exhibit PW-1/2, the implied term in Section 108(B)(h) of TPA would have been applicable. u/s 108(B)(p) a lessee without the lessor's consent cannot erect on the property any permanent structure except for agricultural purposes. This does not mean that internal changes or modification are not made by tenants unless they are perpetual tenant. Erection of structures or modification of property by a lessee is not something unusual and this does not show and establish that the tenancy was permanent.

20. Clause (6) (iii) gives rights to the tenants to use the whole or any part of the tenanted premises for companies, firms, Trusts and associates. It stipulates that the responsibility to pay the rent would be that of the tenants. In our view, no inference can be drawn from this covenant that the tenancy was perpetual in nature. The landlords had given permission of use the premises in question by the associate companies, firms and trusts. It does not say that the tenants were free to sublet or part with the possession of the premises in question to any stranger without the written consent of the landlords. It prescribed that the

responsibility of payment would remain with the appellant and the two other companies meaning thereby that the relationship of landlord and tenant would continue only between the signatories to the agreement.

21. u/s 108(B)(j) a lessee has right, subject to contract to the contrary, to transfer absolutely by way of mortgage or sub-lease the whole or in part his interest in the property and the transferee of such interest or part may again transfer it. The clause, therefore, permitting the group companies, firms etc. to use the property is not peculiar and in fact restricts the right of the appellant u/s 108(B)(j). It is not an indication that the lease was perpetual.

22. The words in clause 5 that the tenants, i.e., "the appellant on their own decide to vacate the premises" or that the respondents, i.e., the landlords would permit the tenants, i.e., the appellant, to peacefully and quietly occupy and enjoy tenanted premises/fittings/fixture is a normal clause, which is invariably incorporated in most written leases. Clause is in consonance with the general understanding about the rights and obligations of a tenant and a landlord.

23. Clause 8 of the lease Ex. PW1/2 reads as under:-

It is agreed by and between the Landlords and the tenants that if and when the landlords intended to construct another floor or floors to the said premises the tenants will have no objection to the same provided, however, that as and when the said floor would be constructed and completed, the Landlords shall offer the tenancy of the said floor to the tenant at the first instance and the tenants would have the first right of refusal.

The said clause is a clear pointer that the respondents, i.e., the landlord had the right to carry out further construction in the property in spite of the tenancy right granted under lease. By permitting construction in the property, the respondents could add to the constructed area and make new construction. The respondents also had the right to rent it out but the tenants were given right of first choice to take the new constructed portion on rent. The appellant and other tenants had the first right of refusal. The respondents in fact had constructed the mezzanine floor and increased the covered area by 1845 square feet. The new construction was leased out to the appellant under supplementary agreement Exhibit PW-1/4 executed on 19th September, 1985. Monthly rent for the new portion was Rs. 6/- per square feet. The supplementary lease agreement (Exhibit PW-1/4) is not registered. Therefore, it created month to month tenancy and not a tenancy for four years or a perpetual tenancy as claimed. The contention of the appellant that supplementary agreement Exhibit PW-1/4 though an unregistered document creates perpetual tenancy in respect of 1845 square feet is fallacious and flawed. It is contrary to Sections 106 and 107 of the TPA.

24. A long and undisturbed possession by itself is not sufficient to establish a claim for permanent tenancy. There has to be other co-existing substantive evidence and material to justify the said claim as observed by the Supreme Court in Bejoy Gopal Mukherji (supra). We in this case do not find any such co-existing

factors to justify the said claim. The fact that the respondent did not initiate litigation and asked for ejectment or possession does not justify the claim that there was permanent tenancy. Litigation is not easy and is normally a matter of last resort for most. In the present case, it took nearly 12 years for suit for ejectment to be decided and thereafter it has taken another three years in the first appeal. There is no mention in the lease deed that the appellant or the tenants would enjoy property infinitive or a word to the effect that the tenancy right was permanent. On the contrary, the clauses negate that the nature of tenancy as permanent. Various restrictions were put on how the appellant-tenant would use the property. In case they violate the municipal bye-laws, penalties had to be paid by the appellant. As noticed, right to further constructions continued and was specifically granted to the respondents. Importantly clause 2 of the lease specifically stated that it was for four years. It is on the basis of this clause that the lease deed was registered. Under the Stamp Act, stamp duty is payable depending on the tenure or the term of the lease. A lease for long terms of 12 years and beyond are virtually treated and regarded as "transfers" and higher stamp duty is paid. Clause 2 of the lease is clear and categorical that the tenancy was for four years. Language employed does not show that the lease was permanent, in fact contra to the claim that the lease is permanent or perpetual, it gave an option to renew at enhanced rent.

25. It is admitted position that no fresh or further lease was executed after the period of four years came to an end as stipulated in clause 2 of Exhibit PW-1/2. The rent may have been increased to Rs. 3.70 per square feet after the end of four years but this only resulted in creation of month to month tenancy and not a tenancy for infinite or indefinite period. In Samir Mukherjee Vs. Davinder K. Bajaj and Others, Sections 106 and 107 of the TPA were examined and it was observed that the two Sections have to be read harmoniously. Section 106 classifies leases into two categories; leases for immovable property for agricultural or manufacturing purposes and leases for other purposes. But where the parties to the contract have indicated a duration of lease, Section 106 is not applicable. Leases other than leases for agriculture or manufacturing purposes are month to month leases unless there is a valid contract to the contrary, i.e., contract as prescribed meets the mandate of Section 107 of TPA and the Registration Act. Section 107 TPA prescribes the procedure for execution of a lease between the parties from year to year or for any term exceeding one year. Section 107 stipulates that such leases can be only by way of an registered instrument. Other leases are treated as oral agreements with delivery of possession and are accordingly month to month leases. Unless there is a valid lease within the meaning of the opening words of Section 106, the same would not be attracted. It was accordingly opined as under:

9. In a recent decision of this Court in Janki Devi Bhagat Trust this Court held that u/s 107 of the Transfer of Property Act a lease of immovable property from year to year or for a term exceeding one year can be made only by a registered instrument and any lease of this kind would be void unless it is so created.

10. In the present case though the appellant has claimed that it was a lease for manufacturing purpose, admittedly there was no registered written lease. Therefore, the rule of construction as envisaged in Section 106 would not be applicable as the statutory requirement of Section 107 of the Act has not been satisfied. The plea of the appellant that 15 days" notice terminating the present tenancy is bad in law would not be sustainable.

11. XXX

12. In Krishna Das v. Bidhan Chandra and Balwant Singh v. L. Murari Lal the Courts have taken the view that Section 106 was not intended to be controlled by Section 107. Similar view has been expressed by the High Court of Assam and Nagaland. The contrary view has been expressed by the Calcutta High Court in Sati Prasanna Mukherjee v. Mohd. Fazel and the Allahabad High Court in Kishan Lal v. Lal Ram Chander. It is not necessary to refer to all the decisions of other High Courts.

13. On a perusal of these decisions we find the view that fiction in Section 106 was not intended to be controlled by Section 107 was due to a misunderstanding of the decision of this Court in Ram Kumar Das as we have already indicated that in Ram Kumar Das this Court did not apply the rule of construction of Section 106 as there was no registered instrument. The High Courts taking that view have not laid down the law correctly.

14. In Jagat Taran Berry v. Sardar Sant Singh the Delhi High Court considered the views expressed by different High Courts and correctly took the view that there is no conflict between Sections 106 and 107 of the Act and for application of Section 106 a valid year-to-year lease shall be deemed to exist only when it is created by a registered instrument; non-existence of a registered instrument to create such a lease will by itself exclude Section 106.

26. Applying the aforesaid decision once it is held that there was no further registered lease after the term stipulated in the lease dated 14th December, 1980 (Exhibit PW-1/2) came to an end; it means and implies that thereupon there was only month to month lease and nothing more.

27. Order dated 3rd November, 2011 allowing the written statement to be amended and permitting the appellant to take the plea that they had made payment of lease premium records in the first paragraph as under:

1. Too much money. Neither the one who gave, nor the one who received remember giving and receiving the money. And when they recollect, the one who gave recollects having paid Rs. 16,61,070/- but the one who received acknowledges having received much more i.e. Rs. 25,00,000/-. A fairly funny situation.

28. As noticed above, the appellant had filed CM No. 5453/2011, which was allowed vide order dated 2nd May, 2011. The respondents have accepted that they had received total payment of Rs. 25 lacs at the time of initial letting out.

The appellant, however, claims that this was lease premium as the tenancy was perpetual and without any authority to the respondents to terminate the same. The respondents contend that this was interest free security deposit refundable on vacation of the premises under tenancy.

29. The payment of Rs. 25 lacs is not mentioned in the original lease deed dated 14th December, 1981 Exhibit PW-1/2, which was the registered document. The appellant claims this was because the respondents were sub-leases of the Delhi Development Authority and transfers were not permitted. It was submitted that the respondents had paid premium of Rs. 2,44,000/- to Delhi Development Authority to acquire rights on the land as per perpetual lease dated 7th April, 1980 Exhibit PW-1/1. The contention has to be rejected for various reasons. Firstly, the onus that this payment was towards lease premium is on the appellant. It is surprising that this claim was not made by the appellant till 2011, i.e., the claim was made after 13 years of litigation. It is difficult to accept and believe that the appellant and Modi Industries Limited and Modi Carpets Limited would have paid "lease premium", but were not aware and forgot about the same. "Lease premium" would be a capital account payment and, therefore, reflected in the books of accounts. The appellant has not placed on record their books of account and the treatment given to payment of Rs. 25 lacs in their books. They have not filed their annual returns, balance sheet etc. More importantly there is no written instrument for this payment. As already noticed above, this payment is not mentioned in the registered lease (Exhibit PW-1/2) which form the binding contract. S.K. Nair, who has filed the affidavit and appeared as DW-1 is not a signatory to the two lease agreement (Exhibit PW-1/2) and (Exhibit PW-1/4). He is not even a witness to them. S.K. Nair, DW-1 had also appeared before the single Judge and at that time he did not make any averment or statement that "lease premium" was paid. In the affidavit mark "A" dated 16th January, 2012 S.K. Nair came up with the plea that recently they had come to know that payment of Rs. 16.35 lacs was made by two demand drafts but how he came to know that this was "lease premium" is not indicated or stated. There is no document or even internal notings of the appellant company to show that this was "lease premium". On the other hand, it has come on record that Rs. 26,070/- out of this amount of Rs. 16,61,070/- was on account of rent. In his cross-examination, DW-1 S.K. Nair admitted that he had joined Modi Carpets on 19th January, 1979 as a sales coordinator but claimed that he came to know about the terms and conditions of the lease agreement as they were discussed in the meetings. This statement is unreliable and unbelievable as he was not certainly involved in the deliberations with the landlords and claims that information came to him from third parties, i.e., persons who were negotiating with the landlords. Dr. D.K. Modi did not appear as a witness and testify. S.K. Nair, DW-1 has given evasive replies in the cross-examination. We may at this stage also record that the plea and contention that there was a perpetual tenancy was not taken in the original statement filed by the appellant dated 16th April, 1999. The said plea was taken for the first time in the amended written

statement dated 25th October, 2005, i.e., after gap of 6 1/2 years. We hold that the appellant has not been able to substantiate and prove that they had made payment of lease premium.

30. The respondents have relied upon the affidavit of Harcharan Kaur, who was also cross-examined. She is a co-owner of the property but it is apparent that she was not directly dealing with the appellant and other tenants. In fact to the credit of the respondents, they came forward and stated in reply to CM No. 5453/2011 that they had received payment of Rs. 25 lacs and not Rs. 16,61,070/-, a fact which was obviously not in the knowledge of Mr. S.K. Nair. This also shows that S.K. Nair had no personal knowledge as to what was agreed and on what account payment of Rs. 25 lacs was made. The said averment was made by Harcharan Kaur on the basis of documents she came across including copy of the bank account Exhibit RX-2 and details of security deposit as mentioned in the relevant page of the account books Exhibit RX-3. The respondents have only produced a copy of the said page of their books. Even if we disregard the statement, it is difficult to accept that Rs. 25 lacs was "lease premium" for perpetual tenancy. Anyone familiar with the property tax provisions as they were then applicable would be aware that property tax was calculated and computed on the basis of rent received by the landlord during first five years after construction and on first letting. Huge and disproportionate security deposits were taken by the landlords to avoid payment of higher property tax. However, we would not like to give any firm opinion on the said aspect but observe that there is insufficient evidence to hold that the payment of Rs. 25 lacs is towards lease premium. Supplementary lease deed (Exhibit PW-1/4) was executed on 19th September, 1985. By this agreement extended area of 1845 square feet of mezzanine floor was rented out at Rs. 6/- per square feet, i.e., Rs. 11,070/- per month. There is no mention of any "lease premium" in this document also. Separate "security deposit" was paid for the mezzanine floor. There is no plausible explanation why the appellant paid and the respondents received the "security deposit" for the mezzanine floor after they had received "lease premium". Terms of the lease (Exhibit PW-1/2) do not support the contention that "lease premium" for permanent/perpetual lease was paid.

31. The aforesaid discussion negates the contention of the appellant that the appeal should be allowed and the decree be set aside because the respondents have deliberately concealed facts. It is a case where both the appellant and the respondents have forgotten true and correct facts, viz. payment of Rs. 25 lacs. Perhaps it was not convenient to remember the said facts because the respondents wanted to avoid incidence of taxation. Both parties were *pari delicto*. The respondents as noted, have come forward and admitted that they had received Rs. 25 lacs at the time of creation of tenancy in 1981 and not mere Rs. 16,61,070/- as claimed by the appellant. We do not think that the appeal should be allowed and the suit of the respondents should be dismissed on this ground. Of course, the respondents are bound to refund Rs. 25 lacs to the appellant and Modi Carpets Limited and Modi Industries Limited.

32. The contention of the appellant is that the respondents did not serve valid fifteen days" notice ending with the tenancy month as mandated and required u/s 106 of the TPA. It is stated that as per document letter dated 16th March, 2003 (Exhibit PW-1/3) the tenancy commenced from 1st February, 1982 and not from 16th December, 1981. Clause 2 of the lease deed is highlighted and stated that the tenancy would not commence from 16th December, 1981 as permanent electricity connection was not provided and commenced from the date the permanent connection was granted. It is submitted that the second notice dated 21st January, 1998 Exhibit PW-1/11 terminated the lease but without waiting for the end of the tenancy month, i.e., February, 1998 the suit was filed prematurely on 18th February, 1998.

33. Section 106 of the TPA was amended by Transfer of Property (Amendment) Act, 2002 (Act No. 3 of 2003) and the substituted Section 106 reads as under:

For section 106 of the Transfer of Property Act, 1882 (4 of 1882) (hereinafter referred to as the principal Act), the following section shall be substituted, namely:-

106. Duration of certain leases in absence of written contract or local usage.--(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months" notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days" notice.

(2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.

(3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

(4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

34. The aforesaid amendment has been given retrospective effect by the transitory provisions incorporated in Section 3 of the Transfer of Property (Amendment) Act, 2002, which for the sake of convenience is reproduced below:-

The provisions of section 106 of the principal Act, as amended by section 2, shall apply to-

(a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act; and

(b) all notices which have been issued before the commencement of this Act but where no suit or proceeding has been filed before such commencement.

35. As per amended Section 106 of the TPA, 15 days' notice for termination is required in case of month to month tenancy. The earlier requirement that the notice period must end with the month of tenancy has been deleted. The new amendment is retrospective and is applicable to all notices on which suit or proceedings were pending at the commencement of the Act, i.e., on 31st December, 2002. Thus, Section 3 of the Transfer of Property (Amendment) Act, 2002 is applicable.

36. We have also examined the two notices dated 29th November, 1997 Exhibit PW-1/5 and 21st January, 1998 Exhibit PW-1/11. The two notices were sent under registered cover. The notice Exhibit PW-1/5 dated 29th November, 1997 was correctly addressed to the appellant at his registered office SP-460, Matyasa Industrial Area, Alwar, Rajasthan. Notice was also sent to the appellant at the tenanted premises. The relevant postal receipts were Exhibited as PW-1/6, PW-1/7, PW-1/8 and PW-1/8A

37. The second notice Exhibit PW-1/11 was also sent under registered cover and the postal receipts and A.D. cards have been marked Exhibit PW-1/12, Exhibit PW-1/14, Exhibit PW-1/14A, Exhibit PW-1/15 and Exhibit PW-1/16A. DW-1 S.K. Nair in his affidavit had stated that no notices were received but accepted that the address of the appellant on the AD card Exhibit PW-1/15 was correct. The notice dated 29th November, 1997 Exhibit PW-1/5B in paragraph 12 had stated as under:

12. The lessors hereby terminate your tenancy of the aforesaid demised premises, and call upon you to hand over vacant possession on the expiry of 15th day of January, 1998 for which you are hereby given fifteen days notice expiring with the end of the month of tenancy. Alternatively you may hand over possession on such date that you may consider to be the date on which the notice of fifteen days expires with the end of the month of the tenancy and, if according to you, your tenancy commences and ends on any other day of the English calendar month, then please treat this notice by having fifteen days notice and your tenancy would be deemed to have been terminated on the expiry of such tenancy month according to you.

38. Notice dated 21st January, 1998 in paragraph 12 again had stated as under:

12. The Lessors hereby terminate your tenancy of the aforesaid demised premises, and call upon you to hand over vacant possession on the expiry of 15th day of February, 1998 for which you are hereby given fifteen days notice expiring with the end of the month of tenancy. Alternatively you may hand over possession on such date that you may consider to be the date on which the

notice of by having fifteen days notice and your tenancy would be deemed to have been terminated on the expiry of such tenancy month according to you.

39. In view of the aforesaid position, the contention of the appellant on validity of the notice has to be rejected.

40. In the light of above discussion, we find no merit in the appeal and it is dismissed. The appellant shall handover the vacant possession of the premises in question to the respondents within two months. The respondents shall deposit Rs. 25 lacs with the Registrar General of this Court within fifteen days after the premises are vacated by the appellant. The amount of Rs. 25 lacs shall be released to the appellant, Modi Industries Limited and Modi Carpets Limited thereafter. The appeal stands disposed of in the above terms.