

(2009) 01 DEL CK 0269

In the Delhi High Court

Case No : C.S. (OS) No. 1560 of 2001

Parsons Brinckerhoff International Inc.

APPELLANT

Vs

Manoj Gulshan and Others

RESPONDENT

Date of Decision : 09-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6
Contract Act, 1872 — Section 73, 74
Registration Act, 1908 — Section 17, 49
Transfer of Property Act, 1882 — Section 105, 107

Citation : (2009) 01 DEL CK 0269

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Sandip Sethi and Chetan Chopra, for the Appellant; Raman Kapur, for the Respondent

Judgement

Sanjiv Khanna, J.—M/s. Parsons Brinckerhoff International Inc., the plaintiff has filed the present Suit for recovery of Rs. 7,04,628/- with interest and recovery of specific movable properties consisting of 15 kva diesel generator set, one split 3.0 ton air conditioner and 2 split air conditioners of 1.5 ton capacity or in the alternative recovery of Rs. 5,04,690/-.

2. There are five defendants to the suit. Mr. Manoj Gulshan, Defendant No. 1 is owner of a portion of the property No. A-9/20, Ground Floor, Vasant Vihar, New Delhi (hereinafter referred to as the Property, for short). By an unregistered lease deed dated 27th November, 1998, Exh. No. PW1/1 and D-1, defendant No. 1 rented out the Property to the plaintiff on a monthly rent of Rs. 18,000/-. In addition, four other agreements were executed between the plaintiff and defendant Nos. 2 to 4 as per details given below:

(i) Hire Agreement dated 27th November, 1998 between the plaintiff and defendant No. 2, Mona International, through defendant No. 1 for payment of hire charges in respect of bath room fittings, geysers, light fittings, exhaust fans,

grills etc. @ Rs. 30000/- p.m. (Exh. No. PW1/3 and PW1/D1).

(ii) Hire Agreement dated 27th November, 1998 between the plaintiff and defendant No. 3, Manoj Gulshan and Sons (HUF) through defendant No. 1 for payment of hire charges for wooden wardrobes, showcases, fancy crockery racks etc. @ Rs. 30,000/- p.m. (Exh. No. PW1/2 and PW1/D2)

(iii) Hire Agreement dated 30th November, 1998 between the plaintiff and defendant No. 2 Mona International through attorney Ms. Kamayani Suri, defendant No. 4 for payment of hire charges in respect of tables, chairs, sofa set beds, microwave, cooking range etc. @ Rs. 18,000/- p.m. (Exh. No. PW1/4)

(iv) Licence contract dated 27th November, 1998 Exh. No. Pw1/D3 between plaintiff and defendant No. 4 for use of car parking space on payment of Rs. 12,000/- per month. (Exh. No. PW1/5 and PW1/D3) Thus under the five agreements the total monthly amount payable by the plaintiff was Rs. 1,08,000/-.

3. It is an admitted case of the parties that the plaintiff had paid security deposit of Rs. 12,96,000/- in respect of the five Agreements to the defendants in the following manner:

(i) Rs. 2,16,000/- in respect of Lease deed Exh. No. PW1/1 between plaintiff and defendant No. 1.

(ii) Rs. 3,60,000/- in respect of Hire Agreement Exh. No. PW1/3 between plaintiff and defendant No. 2 through defendant No. 1.

(iii) Rs. 3,60,000/- in respect of Hire Agreement Exh. No. PW1/2 between plaintiff and defendant No. 3.

(iv) Rs. 2,16,000/- in respect of Hire Agreement dated 30th November, 1998 Exh. No. PW1/4 between plaintiff and defendant No. 2 through Ms. Kamayani Suri.

(v) Rs. 1,44,000/- in respect of Licence Contract Exh. No. PW1/5 between plaintiff and defendant No. 4.

4. It is an admitted case of the parties that the plaintiffs have paid Rs. 1,08,000/- p.m. upto 22nd November, 2000. Thereafter, no amount has been paid.

5. The first dispute between the parties is as to what amount is due and payable by the plaintiff to the defendants for the period from 23rd November, 2000 onwards upto 7th/22nd May, 2001. The plaintiff admits liability to Rs. 1,08,000/- per month upto 7th/22nd May, 2001 and seeks refund of balance security deposit of Rs. 6,85,998/- and return of three air-conditioners and generator set or in alternative recovery of Rs. 5,04,690/-. The defendants have filed their counter claim which has been registered as C.C. No. 1650/2002 claiming adjustment/set off of the entire security deposit and recovery of an additional amount of Rs. 30,30,501/-. The Counter Claim/adjustment is based upon clauses in the five

Agreements that on expiry of the said Agreements on 22nd November, 2000 and overstay the plaintiff was liable to pay the following amounts, upto 22nd May, 2001 when the premises were vacated:

(i) Rs. 6560/- per day as per Clause 19 of Lease Deed Exh. PW1/1 plus other charges under Clause 9, 12 and 14 in all amounting to Rs. 15,89,427/-.

(ii) Rs. 5429/- per day as per Clause 10 of Hire Agreement Exh. PW1/3 with Mona International through defendant No. 1 plus other amounts amounting to Rs. 10,00,688/-.

(iii) Rs. 5429/- per day as per Clause 11 of hire Agreement Exh. No. PW1/2 with Manoj Gulshan amd Sons (HUF) plus other amounts in all Rs. 10,40,206/-.

(iv) Rs. 10,933/- per month as per Clause 9 of Hire Agreement Exh. PW1/4 with Mona International dated 30th November, 1998 and other amounts, in all Rs. 2,46,334/-.

(v) Rs. 96,000/- per month under the Licence Contract Exh. PW1/5 with Kamayani Suri and other amounts equal to Rs. 1,46,823/-.

Some other amounts are also claimed by the defendants towards damage, missing fixtures/fittings/gadgets etc.

6. The second dispute between the parties is as to what happened on 7th May, 2001. It is the contention of the plaintiff that the defendants illegally trespassed into the Property and occupied the same, whereas it is the case of the defendants that the plaintiff had permitted and allowed them to occupy the Property and thereupon the unauthorized occupation of the plaintiff came to an end. It is also the claim of the defendants that one Mr. J.P. Bovis for whose benefit the property was taken on rent and their authorized signatory had executed documents on behalf of the plaintiff confirming and admitting that Rs. 23,91,801/- was due and payable as arrears and as damages etc. for the period between 23rd Nov., 2000 and 7th/22nd May, 2001. These documents and authority of Mr. J.P. Bovis are disputed by the plaintiff.

7. On the basis of the pleadings between the parties, by Order dated 23rd July, 2004, the following 14 issues were framed:

(1) Whether the plaintiff Company is entitled to seek refund of balance security deposits and specific movable properties as prayed for in the Plaint? OPP.

(2) Whether the Lease in respect of the demised premises stood extended as alleged in para 17 to 20 of the Plaint? OPP.

(3) Whether the plaintiff has defaulted in making payment of utility charges like water, electricity and telephone bills? OPD.

(4) Whether the plaintiff Company is liable to pay damages as per Clause 19 of the Lease Deed and Clauses 9 to 11 of the three Hire Purchase Agreements and Licence Contract? OPD.

(5) Whether the parties arrived at a final settlement as alleged in para 6 of the Written Statement? OPD.

(6) Whether the Plaint has been instituted, signed and verified by a duly authorized person? OPP.

(7) Whether the plaintiff is entitled to any interest, if so at what rate and for what period? OPP.

(8) Whether the plaintiff is in default as alleged in para 43 of the Counter Claim making payments as per Clauses 2 and 3 of the Lease Deed and Clause 3 & 4 of the Hire Purchase Agreement? OPD.

(9) Whether the Counter Claim has been instituted signed and verified by a duly authorized person? OPD.

(10) Whether the Counter Claimant is entitled to any interest, if so at what rate and for what period? OPD.

(11) Whether the plaintiff is guilty of violating the terms of the five agreements between them? OPD.

(12) Whether the plaintiff company was ever granted extension of time? OPP.

(13) Whether the plaintiff is liable to make good the expenses, bills, loss and damages resulting out of misuse, misappropriation of goods given on hire and other damages arising out of breach of agreements? OPD.

(14) Relief.

ISSUE No. 6 and 9

8. Learned Counsel for the defendants during the oral submissions did not challenge the authority of Mr. Bishan Basu, to file the present Suit on behalf of the plaintiff Company. In fact, during the course of arguments, it was admitted that Mr. Bishan Basu was working with the plaintiff at the relevant time and was their Principal Officer. Handwritten note of Mr. Bishan Basu (Exhibit DW.1/18) was relied upon by the defendants. Issue No. 6 is therefore decided in favour of the plaintiff.

9. Counter claim by the defendants has been filed by Mr. Manoj Gulshan. He has admitted his signatures. It is not disputed that the plaintiff was corresponding Mr. Manoj Gulshan in respect of the property. Mr. Manoj Gulshan is Karta of Mr. Manoj Gulshan and Sons, HUF and authorized signatory of M/s. Mona International. In the plaint itself he is described as authorized signatory of Mona International (India). Authorization of Mr. Manoj Gulshan to file the present suit on behalf of himself, Mona International (India) and the HUF is accepted. Issue No. 9 is accordingly decided in favour of the defendants.

ISSUE Nos. 1, 2, 3, 4, 8, 11 AND 13

10. These issues are interconnected and are based upon the five agreements mentioned above, whether there was any breach of the said agreements and whether upon breach thereof, the plaintiff is liable to pay the amounts specified in the agreements for the period w.e.f. 23rd November, 2000 till 7/22nd May, 2001 i.e. (i) Rs. 6560/- per day as per Clause 19 of Lease Deed Exh.PW1/1 plus other amounts under Clauses 9, 12 and 14. (ii) Rs. 5429/- per day as per Clause 11 of Hire Agreement with Mona International dated 27th November, 1998 Exh.PW1/3. (iii) Rs. 10,933/- p.m. as per Clause 9 of Hire Agreement with Mona International dated 30th November, 1998 Exh.PW1/4 (iv) Rs. 5429/- per day as per Clause 11 of hire Agreement with Manoj Gulshan and Sons (HUF) Exh.PW1/2 and (v) Rs. 96,000/- per month under Licence Contract with Kamayani Suri Exh.PW1/5.

11. The four agreements dated 27th November, 1998 Exh. Nos. PW1/1 to 1/3 and 1/5 are unregistered and in view of Section 107 of the Transfer of Property Act, 1882 and Sections 17 and 49 of the Registration Act, 1908 cannot be relied upon and referred to except for collateral purposes. Only month to month tenancy rights were created. There was no expiry date or a lease for a fixed period. The defendants cannot rely upon the clauses in the said agreements and claim damages for firstly, as the lease period was not fixed but monthly and thus there is no question of payment of damages due to expiry of the lease period and secondly, clauses fixing damages cannot be read and relied upon. It was not urged that the clauses for payment of damages, are collateral clauses and therefore can be relied upon for the purpose of the present Suit.

12. Learned Counsel for defendants had urged that the hire purchase agreements and the Licence agreement Exh. Nos. PW1/2 to 5, are not lease deeds and therefore were not required to be registered. The said contention has no merit. Four agreements Exh. Nos. PW1/1 to 3 and 5 were executed simultaneously on 27th November, 1998 and it is a case in which rent was bifurcated by the defendants for tax purposes. The primary and main purpose and object of the agreements was to rent out the Property to the plaintiff-Company. While examining the documents, the intention and purport of the documents has to be also taken into consideration and not the heading or nomenclature given to the document. Lease rent fixed was only Rs. 18,000/-, whereas alleged hire amount/license fee fixed in the other three agreements Exh Nos. PW1/2, PW1/3 and PW1/5, were much higher i.e. Rs. 30,000/- each in Exh. PW1/2 and PW1/3 and Rs. 12,000/- for parking of car in the drive way in PW1/5. Nature of items/mentioned in the two hire agreements dated 27th Nov., 1998 Exh. PW1/2 and PW1/3 indicates that the fixture and fittings mentioned in the annexure were fixed and connected with enjoyment and use of the immovable property. It is not the case of the defendants that the agreements could be enforced and continued separately and were not interrelated. Four agreements including lease deed were executed on the same date and cannot be read in isolation. Termination was coterminous the term "rent" as defined in Section 105 of the Transfer of Property Act, 1882 means all payments which have to be paid

by the tenant to the landlord. After referring to several judgments it has been observed in *Annick Chaymotty v. Prem Mohini Mehra* ILR (2001) delhi 277 that the term "rent" will include payments which are to be made towards fixtures, fittings and hire charges.

13. The fifth agreement dated 30th Nov., 1998 between the plaintiff and Mona Intl. through attorney holder Ms. Kamayani Suri Exh. No. PW1/4 is in respect of specific electrical and electronic gadgets, furniture items like tables, chairs etc.. This agreement may not have required registration but Clause 8 of the said agreement stipulates that the agreement was for a minimum period of 2 years and therefore impliedly extendable. Further Clause 9 reduces the monthly hire charge to 145 Pounds (or about Rs. 10,000/- per month) after 2 years from 782 Pounds per quarter (or Rs. 18,000/- per month) for the period after Nov., 2000. Reduction in hire charges after expiry of the agreement Exh.PW1/4 goes in favour of the plaintiff and is against the defendants.

14. Even otherwise damages specified in the Clauses in the lease agreement, hire purchase and licence agreement all dated 27th Nov., 1998 Exh. PW1/1 to 1/3 and 1/5 are not liquidated damages but penalty amounts u/s 73/74 of the Contract Act, 1872. There is a huge difference between the total monthly amount of Rs. 1,08,000/- which was payable by the plaintiff to the defendants upto 22nd November, 2000 and the amount payable under the five agreements w.e.f. 23rd November, 2000 at the rate Rs. 5,45,000/- p.m. The amount being claimed as liquidated damages is nearly five times the amount payable before the date of the alleged breach i.e. 22nd November, 2000. The amount stipulated in the Agreements is a penalty amount and not liquidated damages. Rs. 5,45,000/- per month cannot be regarded as a genuine pre-estimate of loss that the defendants would have suffered on the breach of the agreements due to over stay. It is an amount payable in terrorem. It is not an estimate of actual damages anticipated from breach due to over stay beyond the period of the lease. Mere description in the agreements that the amounts fixed is liquidated damages, does not bar and prevent courts from examining the true nature and purport of the clause and the intention of the parties. Use of expression "liquidated damages" etc. is a relevant consideration but not decisive and conclusive. Literal language can be disregarded if it does not represent the real nature of the transaction. The amounts specified are clearly extravagant and unconscionable. They are penalty amounts. The amounts stipulated in the four agreements are not liquidated damages or a pre- ascertained amount of damage which the defendants would have incurred in case the plaintiff had overstayed beyond and utilized the property beyond 23rd November, 2000. Mr. Manoj Gulshan in affidavit has not tried to justify the amounts fixed. The defendants claims on the basis of the agreements and damages stipulated therein are therefore liable to be rejected.

15. The defendants in view of Sections 73/74 of the Contract Act are entitled to actual damage/mesne profit subject to the maximum penalty amount stipulated in the relevant clauses. The defendants to succeed are required to prove and

establish the actual loss, due to increase in rent or hire charges between the period when the premises was taken on rent and the hire purchase agreements/ Licence agreement were executed and on and after 23rd November, 2000 till 7th May, 2001. No evidence and material has been placed on record to show increase in rents or hire charges between Nov., 1998 and May, 2001.

16. On termination of tenancy a landlord/owner is entitled to mesne profit i.e. the actual market rent as damages and nothing more. The defendant has not proved that the actual market rent of the property during the period 23rd November, 2000 to 7th May, 2001. In fact the defendant has not placed on record the subsequent lease deed under which the property was rented out. In these circumstances, when there is no indication or evidence to show increase in market rent, the defendants are entitled to the existing rent being paid as damages (refer Hari Singh, deceased through LR's v. S.S. Jogi and Ors. 2002 VI AD (Delhi) 725). It may be also noticed here that period involved is only six months and during period 2000-2001, when the real estate market was facing stagnation, if not a slump.

17. Defendants have not placed on record water and electricity bills issued by Jal Board or the electricity supplying company. In the letters written and the notices issued also no such claim towards water, electricity charges has been raised. Defendants has not placed on record bank statement to show any payment to the Jal board or electricity distribution company. Long after issue have been framed, along with list of documents dated 17.05.2005 on undated receipt executed by Shayam Prabha Anand has been filed for payment of common water and electricity charges. Shayam Prabha Anand has not been produced as a witness. Mode and manner of payment of the said amount is not stated. The claim is therefore disallowed.

18. These issues are therefore decided against the defendants and in favour of the plaintiff.

ISSUE NO.12

19. In view of the above findings, holding that the hire purchase agreements and licence agreement being an unregistered document cannot be looked into except for collateral purposes, the question whether there was any agreement to extend the lease becomes entirely irrelevant. The lease between the parties was month to month and not lease for a fixed period or lease which could be extended after the fixed period.

20. The plaintiff has relied upon Fax dated 25th September, 2000, Ex.PW1/20 and reply dated 27th September, 2000, Ex.PW1/21, by Mona International signed by Mona Gulshan. The defendants have denied the two documents and Ms. Mona Gulshan has also filed an affidavit that she had not sent any such letter dated 27th September, 2000. These letters are inconsequential and not relevant as the original lease deed is an unregistered document and no fixed period of tenancy was created and only month to month tenancy was created. These two

documents do not matter. The issue is accordingly answered.

ISSUE Nos. 5, 9 and 10

21. It is an admitted case of the parties that the plaintiff Company had taken the property on rent for residence of Mr. J.P. Bovis and he was residing there. It is also an admitted case that Mr. J.P. Bovis left India on or about 10/11th May, 2001 and has not returned back. He has not been examined by the plaintiff. PW-1, Mr. Virendra Dwivedi is the only witness examined by the plaintiff and he had joined the plaintiff Company in 2004. He has no personal knowledge about the facts in the present case. He has deposed only on the basis of official records. PW-1 therefore has not deposed and has not been able to state what exactly happened on or about 7th May, 2001 except on facts which were documented in records of the plaintiff. This is also subject to the condition that the facts recorded are accepted or in case of dispute, the court is otherwise satisfied about their truthfulness.

22. The defendants have produced Mr. Manoj Gulshan, DW-1, his wife Ms. Mona Gulshan DW-2, Mr. Rakesh Kumar Aggarwal, property broker DW-3 and Mr. Hatinder Singh DW-4. Mrs. Mona Gulshan, DW-2 was not present in the Property and has no personal knowledge of what transpired on 7th May, 2001. Her evidence is therefore irrelevant.

23. Mr. Manoj Gulshan, DW-1 in his affidavit by way of evidence has stated that he had written letter dated 5th May, 2001 to the plaintiff company with copy to Mr. J.P. Bovis which is marked Exhibit DW.1/16. The original of the said letter was filed with list of documents dated 18th October, 2002 has also been given Exhibit PW.1/D5. Exhibit DW.1/16 is a photocopy of the said letter dated 5th May, 2001 filed along with affidavit by way of examination in chief. There is one difference between the original letter PW.1/D5 and DW.1/16. The words "original receipt" mentioned after "Copy to Mr. J.P. Bovis: with a request to kindly get this issue resolved/settled on priority" in Exhibit PW.1/D5, are missing in Exhibit DW.1/16. It was admitted during the course of arguments that the words "original receipt" are in the handwriting of Mr. Manoj Gulshan DW.1. These words have been added after words by Mr. Manoj Gulshan. There is no evidence or material on record to show that this letter was received by the plaintiffs on 5th May, 2001 or before 7th May, 2001. On the top left corner of the letter there is an endorsement "received for information only" with alleged signatures of Mr. J.P. Bovis and the date 7th May, 2001. This letter it can be safely held was received by Mr. J.P. Bovis on 7th May, 2001 and as recorded by him "received for information only". In this letter, the defendant No. 1 had raised various claims and had claimed an amount of Rs. 24,17,951.88 on various accounts on the basis of the penalty clauses under the five agreements. This document is only a claim and not an admission.

24. In para 40 of the affidavit filed by Mr. Manoj Gulshan, DW-1 it is mentioned that on 7th May, 2001 in the morning he had visited the Property for taking over

possession, assessment of damage to hired items and recording shortages. At that time, he noticed that various hired items were missing, misappropriated or damaged and he assessed the damage at Rs. 1,95,850/- in the presence of "common witnesses". Who are these "common witnesses" is not stated.

25. In paragraphs 41 and 42 it is stated that diesel generator set and three air conditioners were available in the property and their value/consolidated price was quantified at Rs. 2,22,000/- and these were sold to the defendants by Mr. J.P. Bovis/authorized representative of the plaintiff.

26. In paragraph 43, it is stated that a final settlement/document was prepared and signed by Mr. J.P. Bovis on 7th May, 2001 agreeing to pay Rs. 23,91,801/- after accounting for the sale price towards generator set, air conditioners, security deposit as well as damage to equipments and missing items of Rs. 1,95,850/-. These documents have been collectively marked Exhibits DW.1/19 to DW.1/21 in the affidavit by way of evidence. The defendants dispute and deny signatures of Mr. J.P. Bovis on the said documents. Exhibit DW.1/19 is a photocopy with the heading "Final Settlement of Account". Photocopy of similar document being Exhibit PW.1/D6 with attestation by notary public was filed along with list of documents dated 18th October, 2002. Exhibit DW.1/20 is another notary attested photocopy of the document-Exhibit DW.1/19. Original of this document has not been placed on record.

27. Exhibit DW.1/21 is again identical photocopy of the "Final Settlement of Accounts" i.e., Exhibit Nos. DW.1/19 and DW.1/20 but with two differences. Firstly, it is not notarized and secondly on the top right handside of the said document, the word "received" with alleged signatures of Mr. J.P. Bovis in blue ink with date 7th May, 2001 are present. It may be noted that Exhibit DW.1/21 with the word "received" and alleged signatures of Mr. J.P. Bovis with date 7th May, 2001 was not filed by the defendants at or before settlement of issues or even thereafter. The said document saw light of the day for the first time only with the affidavit by way of evidence of Mr. Manoj Gulshan, DW-1. There is no explanation or reason given by Mr. Manoj Gulshan why this document was not filed earlier and that only notarized photocopy or plain photocopy was filed. Moreover it is not understandable why Mr. J.P. Bovis would have signed this document on the top right hand corner on 7th May, 2001 and written the word "received", if he had signed and executed the said document in original with signatures at the bottom left hand corner.

28. The mystery and suspicion gets further confounded by the document Exhibit DW.1/23, the original of another letter dated 7th May, 2001. Notarized photocopy of same letter was filed alongwith list of documents dated 18th October, 2002 and has been marked Exhibit PW.1/D7. Defendant No. 1 Mr. Manoj Gulshan has added the words "Encl: Handing over due 7/5/final settled Amount" in Exhibit DW.1/23 in his handwriting and the said words are missing in the notarized photocopy of the same document Exhibit PW.1/D7. Exhibit DW.1/23 or Exhibit PW.1/D7 dated 7th May, 2001 are signed by Mr. Manoj Gulshan and Mrs.

Kamayani Suri. The said document is not signed by Mr. J.P. Bovis. In fact the letter is addressed to him and begins with "Subsequent to the Final Handing over today by Mr. and Mrs. J.P. Bovis to...." It again contains a detailed statement of accounts and claim and the total amount payable by the plaintiff is mentioned as Rs. 23,91,801/- and not Rs. 24,17,951.88 mentioned in Exh. DW 1/16, served on Mr. Bovis on 7/5/2001. This document Exhibit DW.1/23 or PW.1/D7 does not refer to any earlier documents or final settlement of account signed and accepted by Mr. J.P. Bovis on behalf of the plaintiff. A reading of this letter shows that defendant No. 6 is making a claim for settlement of dues and it is not the case that the parties had already arrived at a settlement which has been accepted and the only issue left was when payment of Rs. 23,91,801/- would be made. Noting purportedly in the hand writing of Mr. J.P.Bovis and signed by him with date 7th May, 2001 at Exhibit DW.1/23 or DW.1/D7 is interesting and is an indicator that there had been no settlement or agreement on the amount payable. It reads "Deputy Project Director-Mr. John Triplett (PB representative) arriving-28th May, 2001". The manner in which the words are written is a clear pointer that Mr.J.P.Bovis did not accept the said claim otherwise he would have written "accepted". On the other hand, it looks that the defendants were asked to contact Mr. John Triplett, Deputy Project Director who was arriving on 28th May, 2001. As per the affidavit by way of evidence of DW.1, Exhibit DW.1/23 was executed after the settlement documents-Exhibits DW.1/19 to DW.1/21 had already been executed. If this was correct, then there was no reason and cause to draft the document in this manner as if there had been no settlement and finalization of accounts. Document exhibit DW.1/23 uses the words "subsequent to the final handing over today...may kindly be settled before Mr. Bovis leaves India on 12.5.2001....", "request kindly advise M/s. PBI/Manager-Mr. Bishan Basu to kindly pay the above overdue amount immediately before your departure...." The words "Encl: Handing over doc 7/5/final settled amount" have been deliberately and malafidely added and interpolated by the defendant No. 1, Mr. Manoj Gulshan.

29. There is one difference between Exhibit DW.1/19 and DW.1/21 and DW.1/23. DW.1/19 to DW.1/21 are photocopies signed by Mr. Manoj Gulshan and allegedly by Mr. J.P. Bovis. DW.1/23 is signed by Mr. Manoj Gulshan, DW-1 and Ms. Kamayani Suri, sister in law of Mr. Manoj Gulshan. Ms. Kamayani Suri did not enter the witness box. It is not stated by any witness that Ms. Kamayani Suri had at any time come to the property on 7th May, 2001, if Ms. Kamyani suri had not come to the property, she could not have signed this document.

30. Admittedly, the letter dated 5th May, 2001 Exhibit DW.1/16 was typed before defendant No. 1 had visited the property on 7th May, 2001. It is difficult to perceive that on 7th May, 2001 when Mr. J.P. Bovis was moving out and shifting from the property, there was necessary paraphernalia/equipment in the form of computers, printers etc. to type out and take prints of Exhibits PW1/19 to PW1/21 and PW1/23. Evidence of DW-1, Mr. Manoj Gulshan about how and when these letters were typed and print outs were taken is completely silent.

31. As noted above, original of DW.1/19 or DW.1/20 (final settlement of account) has not been filed. It is the case of the defendant No. 1 that these documents were burgled from the suit property itself. Police report in this regard has not been proved. It is also difficult to believe that somebody would have burgled and stolen this document, which was of value and importance to the defendants but otherwise only a worthless piece of paper for any third person. The allegation that a thief or burglar had selectively taken some documents is highly unbelievable and does not satisfy the test of preponderance of possibility. More so when some other documents with alleged original signatures of Mr. J.P. Bovis of even date have been produced. It is difficult to belief that the defendant No. 1 who admittedly was residing in a different premises would have kept the original document, Exhibits DW.1/19 or DW.1/20 in the suit property itself which was lying locked and had not taken the said document with him. This is especially so as Mr. Manoj Gulshan DW-1 has stated that he had filed a police complaint, on 7th May, 2001 at 2.30 p.m., Exh. DW 1/24, making allegations against Mr. J.P. Bovis and the plaintiff. It was alleged that the plaintiff had surrendered possession of the property without paying dues and after damaging the same. It was further alleged that Mr. Bishan Basu was trying to break into the property and claim that the property was a company property. Relevant para of this complaint, DW1/24 reads as under:

....they shall be liable to pay penalty and liquidated damages wef 23/11/2000 as per various agreement clauses. Mr. Bovis and Mr.Bishan Basu had been all along assuring to clear all our dues as per agreement clauses but today Mr. Bovis took again all details of due payments; assured they will be paid by Mr. Basu, but Mr.Basu is denying to pay up now and have abandoned our damaged property by handing over keys and giving peaceful possession but without giving our dues.

Today when I gave Mr. Bovis's acknowledgement of our dues to Mr. Basu, Mr. Basu threatened to use physical force and manpower to get the DG Set which Mrs. Bovis settled against our dues alongwith some other items in lieu of our Hire items disposed off from the house by her.

32. Reading of the above paragraphs of the complaint, Exhibit DW1/24 (photocopy) made on 7th May, 2001 at 2.30 p.m. shows that till that time there was no final settlement on payment of dues with documents DW.1/19 or any other document. For if there was any settlement it would have been specifically pleaded and mentioned. No document was enclosed. If the amount payable by the plaintiff had been settled and document "summary of final settlement" dated 7th May, 2001 Exh. DW1/19 or 20 signed and executed, then the only question was of payment of the dues and not any claim. Reference to the agreement clauses for claiming damages was irrelevant as the amount had been ascertained and finalized as payable and did not require any determination.

33. The complaint states that defendant No. 1 had given Mr. Bovis.s acknowledgment of dues to Mr. Basu, which was not accepted and Mrs. Bovis had settled DG set against dues. This claim of settlement with Mrs. Bovis has not

been alleged in the written statement/counter claim. As per Exh. DW 1/24 acknowledgement of Mr. Bovis was not in respect of GD set but by Mrs. Bovis. DW1/19 to DW1/21 do not bear signatures of Mrs. Bovis but do refer to adjustments in respect of DG Set and air conditioners for Rs. 2,22,000/-. Acknowledgement of Mr. Bovis referred to in Ex. DW1/24 cannot therefore be "summary of final settlement. Exh. Dw1/19 to 21. It may be some other document, which has not been brought on record by the defendants.

34. The complaint Exh. Dw1/24 makes it clear that there were disputes on the amount due and payable and there was no settlement between the plaintiff company, the tenant, and the landlords the defendants. The above view gets confirmed from Exhibit DW1/18 filed by defendant No. 1 himself. The said document consists of calculations made by Mr. Bishan Basu in his handwriting with the heading "following refund rejected due to agreement terms". It refers to security deposit of Rs. 12,96,000/- which was available with the defendants. From this amount Rs. 6.48 lacs has been deducted towards rent @ Rs. 1,08,000/- p.m. from 23rd November, 2000 till 7th May, 2001 i.e. for a period of six months. To this amount, Rs. 3 lacs has been added towards increase @ 20%. Further amount of Rs. 2,40,000/- towards painting, polishing, TDS is also deducted from the security deposit leaving balance payable by the defendants at Rs. 1,08,000/-. To this Rs. 37,900/- is added towards TDS adjustment making Rs. 1,45,900/- as the total amount payable by the defendants to the plaintiff. Thereafter Rs. 2,22,000/- has been added as sale consideration for the generator set and three air conditioners making a sum total of Rs. 3,60,000/- as refund due or payable by the defendants to the plaintiff. From this amount, an amount of Rs. 3,58,900/- has been deducted leaving a balance of Rs. 1100/-. In his cross examination, DW-1, Mr. Manoj Gulshan has stated that Rs. 3,58,900/- was deducted towards shortages and other dues of the defendants. (See, cross examination dated 18th May, 2005). But this figure and statement is not correct and is contrary Rs. 1,95,000/- mentioned in DW1/19 to 21. Even as per DW 1/16 the entire value of the furniture etc. subject matter of agreement PW1/4 was Rs. 4,38,600/- as agreed and Rs. 4,95,800/- as claimed by the defendants. Below these figures, it is mentioned: "proposal of Mr. Manoj Gulshan accepted for final settlement of dues of Rs. 23.91 lacs". Thereafter, signature of Mr. Bishan Basu appears. The above document shows that Mr. Bishan Basu did not accept the claim of Rs. 23.91 lacs made by the defendant. In fact he had suggested that amount of Rs. 3.60 lacs was payable/refundable by the defendants to the plaintiffs. From this, amount of Rs. 3,58,900/- was deducted as per the statement of DW-1, Mr. Manoj Gulshan towards repairs/damage and other charges. If this is so, there was no reason or cause for the plaintiffs to admit payment of Rs. 23,91,800/- to the defendants by documents, Exhibits DW.1/19 to DW.1/23. Moreover, if the defendants could have saved and kept with him Exhibit DW1/18 it is not understood why the original of DW.1/19-20 has not been filed and produced. The claim, therefore, made by the defendants that there was a final settlement and agreement to pay Rs. 23,91,801/- cannot be accepted for

variety of reasons including failure to produce the original of document Exhibit DW1/19-20. There is no justification and good reason to allow the defendants to lead secondary evidence. Genuineness of the document Exhibit DW.1/19-20 is also not established.

35. The above reasoning will equally apply to the letter dated 7th May, 2001 Exhibit DW.1/22 which is claimed to be original but was filed for the first time with the affidavit by way of evidence and had not been filed with the documents filed by the defendants before framing of issues. No application has been for taking the said document on record and explaining why this document was not filed earlier. It cannot be accepted that this important document was by mistake not filed. Exhibit DW.1/22 is signed in original by Mr. Manoj Gulshan, DW-1 and Ms. Kamayani Suri as well as by Managing Director, Brokers & Brokers Pvt. Ltd. Letter is addressed to Mr. J.P. Bovis. However, words "for Parsons Brinkerhoff International Inc." are printed below the alleged signatures of Mr. Bovis. This creates doubt whether the alleged signatures of Mr. Bovis were only for receipt of the said letter or in acceptance of the claim. A person cannot be an executant of a letter, as well addressee.

36. The contents of this document dated 7th May, 2001 Exhibit DW.1/22 are identical with the contents of document dated 7th May, 2001 Exhibit DW.1/23, except that in the bottom the words "for Parsons Brinckerhoff International Inc" and signature of Mr. J.P. Bovis as also the signature with stamp of Managing Director, for Brokers & Brokers Pvt. Ltd. are not written/missing in Exhibit DW.1/23. However on top of letter dated 7th May, 2001 Exh. Dw1/23 Mr. Bovis has written "Deputy Project director Mr. John Triplett (PB representative) arriving 28th May, 2001". Here it may be interesting to refer to the evidence of Mr. Rakesh Aggarwal, DW-3 of Brokers & Brokers Pvt. Ltd. He has stated that when he reached the property at 9.30 a.m. on 7th May, 2001, Mr. Manoj Gulshan, Mr. J.P. Bovis and Mr. Bishan Basu were present. He has not mentioned about the presence of Mrs. Kamayani Suri, a signatory to both documents Exh. DW1/22 and 23. He has stated that he watched the proceedings as a witness and he had seen some persons not known to him were packing goods. He has further stated that Mr. J.P. Bovis left the property at 10.30 p.m. along with his family and belongings. He has stated that Mr. J.P. Bovis did not give any acknowledgement. He has also stated that he does not remember whether he had signed any document during the visit to the premises. Cross examination of Mr. Rakesh Aggarwal dents the story propounded by the defendants as well as document Exh. Dw1/23, the so called acknowledgement.

37. The so called written acknowledgements or agreements for payment of Rs. 23,91,801/- do not find specific mention in the legal notice dated 11th May, 2001 Exh. No. Dw1/28 which was issued by the defendants to the plaintiff. The notice makes reference to the five agreements and the amounts payable due thereunder. But does not state and refer to any settlement of accounts duly signed by the plaintiff. Notice dated 11.5.2001 Exh.Dw1/28 states "as per the

various agreements mentioned above, you are directed to pay up within 15 (fifteen) days the amount calculated as per our final settlement account dated 5/5/2001.(duly received by your authorized signatory Mr. J.P. Bovis)." The agreements referred to in this notice are obviously agreements PW1/1 to 5.

38. Statement of Hatinder Singh, DW-3 does not inspire confidence. Mr. Hatinder Singh is partner of Surjit Gas and Fuel Depot. He was not summoned as a witness by the defendants but had filed his affidavit in support of their case. He claims that he was present at the property on 7th May, 2001 from about 9.30 a.m. till 10.30 am in response to a complaint made by Mr. J.P. Bovis of Gas leakage. He further claims that at that time, he had heard Mr. Manoj Gulshan and Mr. J.P. Bovis discuss the matter of payment/outstanding amounts, shortage of items given on hire and sale of personal items of Mr. J.P. Bovis i.e three air conditioners and one DG set. In his affidavit by way of examination in chief Mr. Hatinder Singh has stated that Mr. Manoj Gulshan had agreed to joint proposal of Mr. J.P. Bovis and Mr. Basu to purchase the said items for Rs. 2,22,000/- and this amount was mentioned in the final settlement documents made by them. He has also stated that Mr. J.P. Bovis had handed over one set of keys of the premises and some electricity bills etc. in his presence to Mr. Manoj Gulshan, the landlord, before noon of 7.5.2001. The alleged presence of Mr. Hatinder Singh at the property on 7th May, 2001 and the reason given is peculiar and unusual. Owners/partners of Gas agencies do not themselves visit houses, when complaints are received. Complaints are attended to by staff and not usually by owners. Mr. Hatinder Singh has not produced any bill or receipt of payment for gas leakage repair. In his cross examination, he has admitted that he had never personally visited Mr. J.P. Bovis during his stay for supply of gas cylinder. It is also unusual and strange for Mr. Hatinder Singh to remain there for one hour between 9.30 a.m. to 10.30 a.m. and to be allowed privy to the alleged discussion and conversation between Mr. Manoj Gulshan, Mr. J.P. Bovis and Mr. Bishan Basu. In his cross examination Mr. Hatinder Singh, DW-3, tried to improve upon his statement by stating that he wanted to purchase two air conditioners but was asked to wait. In the cross examination Mr. Hatinder Singh, DW-3 has stated that he had seen a stout Bengali gentleman with a moustache but he did not remember his name. In his affidavit by way of chief, he has given the name of Bengali gentleman as Mr. Basu. He has further stated that he had not seen written contents of the letter handed over by Mr. Manoj Gulshan to Mr. Basu and when he had left the premises, Mr. Manoj Gulshan, Mr. J.P. Bovis and Mr. Basu were still present along with some packers and labour. Thus he does not prove settlement or documents Exh. DW. 1/19 to 23. Mr. Hatinder Singh in his cross examination has admitted that his affidavit had already been prepared/drafted and after going through the same he had signed, the affidavit in one of the Lawyers. Chambers in the High Court. There was no prior meeting between the Advocate and Mr. Hatinder Singh before the affidavit was prepared.

39. In his examination in chief Mr. Hatinder Singh has stated that Mr. J.V. Bovis.s personal staff had been relieved and none was available on 7.5.2001 and

handing over and taking over of the possession had taken place in his presence. In reply to paragraph 25 of the plaint, the defendants in the written statement have stated that the Bovis couple had left the demise premises after their complete belongings were shift by the Star Worldwide Packers and Movers and had moved to Hotel Taj Maan Singh, Room No. 522 with effect from 5th May, 2001. There is contradiction in the stand of the defendants in the written statement and statement of Mr. Hatinder Singh, DW-3 and even DW 1 mr. Manoj Gulshan. There was no need and requirement for Mr. J.P. Bovis to call Mr. Hatinder Singh's Gas agency for gas leakage complaint if they had already shifted out.

40. For a period of two years till November, 2000, the plaintiff had paid rent of Rs. 1,08,000/- per month to the defendant, which was accepted and admitted as the correct amount payable. It is difficult to conceive and accept that the plaintiff would have agreed and acknowledged payment of rent @ Rs. 5,45,000/- per month for the period with effect from 23rd November, 2000 till 7th May, 2001. The amount is nearly five times more than the rent, which was being paid for two years. It is difficult to accept and believe that any person would have agreed to make payment of @ Rs. 5,45,000/- per month towards arrears on the date when the property was being vacated. Preponderance and normal human conduct defies the claim of acknowledgment and admission propounded by the defendants. It is difficult to accept the claim of the defendants with regard to acknowledgment as it is contrary to normal human conduct.

41. Reading of letters and police complaints (Exh. Nos. DW1/24 to 27) made by Mr. Manoj Gulshan discloses a concerted effort and desire to prevent the Bovis couple from leaving India, though admittedly Mr. J.P. Bovis was not the tenant but an occupant. In the complaint dated 11th May, 2001. Ex.DW-1/27, written to the S.H.O. Police Station Vasant Vihar, it is stated that the Bovis couple are guilty of cheating and had left Hotel Taj Man Singh on 10.5.2001 and the police should investigate as they would be leaving the country on 13th May, 2001, without clearing the dues. In the letter written to the Managing Director, DMRC, dated 8th May, 2001, Ex.DW1/25, it is alleged that Bovis couple had procured various items including Diamond Jewellery but were to pay the final balance before the departure. In this letter it is alleged as under:

That upon handing over of possession on 7/5/2001 we noticed in the presence of Mr. Bovis certain missing expensive electronic gadgets and items, which were held in trust by the Couple on account of Hire Agreements. Upon the request of Mr. Bovis, another Final statement was prepared on 7/5/2001 including these damages. But when the applicant met him later in the hotel with this letter, he tried to wriggle out of his commitment not only on account of misappropriated/missing items/damages to our items and other payment due to us, as he then directed us to contact Mr. John Tirplet for the same, inspite of the fact that he was the Authorized signatory of the agreements and Mr. Basu had started giving us tough time in setting the same.-Enclosed as Annex. C-2.

42. The above statement is contrary to the averments and allegations that Mr. J.P. Bovis had acknowledged and accepted payment of arrears of rent @ Rs. 5,45,000/- per month instead of Rs. 1,08,000/- per month for the period between 23rd November, 2000 to 7th May, 2001 and had agreed to pay Rs. 1,95,850/- towards missing and damaged items/gadgets before leaving the premises.

43. In the Affidavit of Mr. Manoj Gulshan, it is stated that he had written letter dated 2nd January, 2001, Ex.DW1/12, which was addressed to Mr. R.L. Allman as Deputy Project Director of the plaintiff company with copy to Mr. Bovis. Similarly, letter dated 5th May, 2001, Ex.DW1/16 was written to the plaintiff company with copy to Mr. Bovis. In the written statement, the defendants have on one hand claimed that Mr. J.P. Bovis was the authorized signatory of the plaintiff company, yet at the same time they have pleaded that the adjustment was made by the authorized representative with the concurrence of the plaintiff's head office. (See preliminary objection No. 3). It, therefore, appears that Mr. J.P. Bovis was not regarded as an officer competent and authorized to settle the matter on behalf of the plaintiff company. It is also clear from the writing made by Mr. J.P. Bovis on top of Ex.DW1/23, dated 7th May, 2001. It is stand of the plaintiff that Mr. J.V. Bovis could and was not authorized to enter into any settlement or acknowledgement on behalf of the plaintiff company.

44. In view of the findings given above it is held that the defendant is entitled to rent/mesne profit @ Rs. 1,08,000/- for the period between 23rd November, 2000 till 7/22nd May, 2001, i.e. Rs 6,48,000/-. The alleged settlement or admission is not proved and established. The defendants have claimed that the property was damaged and in this regard have produced bills of M/S. S.S. Pahwa, HUF Contractors etc. of Rs. 1,67,731/- towards painting and Rs. 70,088/- for replacing electrical fittings etc. and Rs. 34,475/- towards replacement of Kota Stone in the parking (total Rs. 2,72,294/-). However, contractor was not produced and examined as a witness. I may also notice that the bills of M/s. S.S. Pahwa HUF Contractors were filed for the first time along with affidavit by way of evidence. The bills do not indicate the manner in which payments were made i.e. whether the payments were made by cheque or in cash. Nevertheless, the statement of Mr. Manoj Gulshan that the property was damaged and required repair/rectification remains unchallenged. In these circumstances claim of Rs. 1,04,555/- towards repair/replacement of electrical fittings and kota stone/damage to the flooring in the driveway is allowed. Damage to drive way including replacement cost of Rs. 35,000/- is mentioned in the letter dated 5th May, 2001, Ex.D1/16. Other claims including whitewash and polishing etc. are dis-allowed. PW1/1 the lease deed being un- registered cannot be relied upon for claim for plaintiff white wash. DW-1/18, the handwritten note of Mr. Bishan Basu at best was an offer to settle the matter. The defendants did not accept the said offer.DW1/18 cannot therefore form basis for payment of enhanced rent, claim for painting etc. It may noted that the bill of S.S. Pahwa, HUF, relating to waterproofing of external and internal walls and installing two wooden wardrobes

or for polishing of parking floors has to be ignored as these are new items and are not relatable to any lapse or negligence on the part of the tenant. Polishing of parking floors and painting is required periodically and cannot be attributed to any lapse or negligence on the part of the plaintiff.

45. The defendant has made allegations that gadgets and other gadgets/items subject matter of hire agreement with Mona International were found to be missing. The defendant has not placed on record the specific details of the gadgets/items or their market value, though an amount of Rs. 1,95,850/- has been claimed towards the same. Purchase invoices have not been filed. Moreover, letter dated 5th May, 2001. Ex.DW-1/16, shows that the total value of the items given on hire-purchase as was originally agreed was Rs. 4,38,600/- and the plaintiff had given refundable security deposit of Rs. 2,16,000/- towards the said items and had paid Rs.1,08,000/- in advance towards six months hire charges, and another amount of Rs. 40,500/- was also paid. The claim towards missing of gadgets and items is rejected.

46. The defendants claim that they had purchased three air conditions and a generator set. It is a case of the defendants that the generator set was purchased by the plaintiff company but three air conditioners were personal property of Mr. Bovis. In this regard my attention is drawn to bills/invoices Corporate Systems Consultant dated 15.4.1999, in the name of both the plaintiff company and Mr. J.P. Bovis. The defendants have also filed an application Criminal Miscellaneous Application No. 93/2004 claiming that the plaintiff has forged and fabricated invoices of Corporate System Consultants in favour of the plaintiff. The stand taken by the plaintiff in their written statement/replication to the counter claim is that the plaintiff company had made payment for the three air conditioners and the generator set but invoices were drawn in the name of Mr. J.P. Bovis as these were installed in the property occupied by Mr. J.P. Bovis. The plaintiff has produced statement of their account maintained with HSBC Bank Ex.PW3/1 to establish payments made by them for purchase of air conditioners and the generator set. Statement of Mr. C.M. Mathur, PW-3, was also recorded in this regard. The statement of account shows that plaintiff had paid Rs. 2,48,840/- to Carrier Aircon Limited and had made payments to Corporate Systems and Consultants/Corporate Services and Consultants for the DG Set.

47. At this stage and after lapse of 8 years, I do not think a decree of specific performance of movable assets should be passed. Moreover, the value of the said movable asset is ascertainable and the plaintiff in alternative has prayed for decree of money equal to the value of the moveable assets. The plaintiff has not lead any evidence to show the market value of the property as on 7th may, 2001. The defendants, however, admit that the market value of the said movable assets was Rs. 2,22,000/-. In view of the admission by the defendants, the market value of the movable asset is take as Rs. 2,22,000/- and accordingly the plaintiff is entitled to said amount.

48. In facts of the circumstances of the case and in view of the factual findings

give above, I do not think it will be appropriate to initiate any criminal proceeding against the plaintiff. I have noted above the stand taken by the plaintiff in reply to the counter claim that payments for purchase of air conditions and DG set were made by the plaintiff company but invoices were raised in the name of Mr. J.P. Bovis. They have been able to prove their stand. It is difficult for this Court to reach any final conclusion on the invoices produced in the name of the plaintiff. Perhaps the party issuing the invoice was required to be examined. Moreover, I also find that the defendants have also added words to the documents produced by them and these aspects have been highlighted above. In view of the facts of the present case Criminal Miscellaneous Application No. 93/2004 is dismissed with no order as to costs.

49. The defendants along with their written submissions have relied upon several judgments. Judgments relating to admissions and decree on admission under Order XII, Rule 6 of the Code are not relevant. It has been held above that the plaintiff company had not accepted and admitted that it was liable to pay mesne profits/damages @ Rs. 5,45,000/- per month. The judgments relating to liquidated damages/penalty do not support the plaintiff. It has been held above that the lease deed/agreements being unregistered documents cannot be looked into except for collateral purposes and only month to month tenancy was created. It has also been held that the amount specified in the agreements was a penalty amount and not genuine pre estimate of loss likely to result in case of a breach by overstay. The defendants are entitled to actual damages i.e. Market rent. The defendants have not lead evidence and proved that the actual market rent was higher than the Rs. 1,08,000/- per month. Judgments on promissory estoppel are not relevant to the facts of the present case. Similarly, judgments relating to expiry of the lease period by efflux of time are not relevant as only month to month tenancy was created.

50. In view of the findings given above, it is held as under:

I. plaintiff is entitled to refund of security deposit Rs. 12,96,000/- less rent of six months from 23rd November 1999 to 22nd May, 2001, i.e. refund of Rs. 6,48,000/-.

II. plaintiff is entitled to Rs. 2,22,000/- towards cost of the air conditioners and DG Set.

III. Defendants are entitled to set of Rs. 1,04,000/- on account of repairs/replacements Counter claims of the defendants except to the extent of Rs. 1,04,000/- are rejected.

The defendant Nos. 1 to 3 are, therefore, jointly and severally liable to pay Rs. 7,66,000/- to the plaintiff.

Issue No. 10

51. It is held that the defendant No. 1 to 3 are jointly and severally liable to pay Rs. 7,66,000/- to the plaintiff. The plaintiff will be also entitled to interest on the

aforesaid amount @ 10 % per annum from the date of the filing of the suit till payment. Relief

52. After adjustment/set off of Rs. 1,04,000/- a decree of Rs. 7,66,000/- along with the interest @ 10 % per annum from the date of the filing of the suit till payment with cost is passed in favour of the plaintiff and against the defendants Nos.1 to 3. Decree sheet will be accordingly drawn.