(2013) 07 DEL CK 0635

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 118 of 2009

Sh. Manoj Gulshan and Others APPELLANT

Vs

M/s. Parsons Brinckerhoff International Inc. RESPONDENT

Date of Decision : 01-07-2013

Acts Referred:
Contract Act, 1872 — Section 73, 74

Citation : (2013) 8 AD 53

Hon'ble Judges : Pradeep Nandrajog, J;Manmohan Singh, J

Bench : Division Bench

Advocate : Puneet Taneja, for the Appellant; Dhirendra Negi and Mr. Mohit Bakshi, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The respondent herein filed a suit for recovery of Rs. 7,04,628/- with interest and recovery of specific movable properties consisting of 15 KVA diesel generator, one split 3.0 ton Air conditioner and 2 split Air conditioners of 1.5 ton capacity each or in the alternative recovery of Rs. 5,04,690/- against the appellants. (For convenience the respondent would be referred as plaintiff and appellants as defendants). The facts leading to the matter are that the plaintiff through a property broker approached the defendants for taking the property bearing No. 9/20 ground floor, Vasant Vihar, New Delhi (hereinafter referred to as ''the said premises'') on rent and asked that the said premises be fully furnished with complete furniture and house-hold equipment etc.

2. Thereafter, four agreements, including one lease deed dated November 27, 1998 commencing from November 23, 1998 to November 27, 2000, two hire agreements (dated November 27, 1998 commencing from November 23, 1998 to November 22, 2000 and November 30, 1998 commencing from November 23, 1998 to November 22, 2000) and one license agreement for parking dated November 27, 1998 commencing from November 23, 1998 to November 22,

2000 were executed between the plaintiff and the defendants. The period of contracts was fixed for a term of 2 years.

3. The agreement also provided clause for liquidated damages predetermined between the parties to be paid by the plaintiff in case the plaintiff failed to vacate the premises and hand over the hired articles.

4. By an unregistered lease deed dated November 27, 1998, Ex.PW-1/1 and D-1, defendant No. 1 rented out the property to the plaintiff on a monthly rent of Rs. 18,000/-. In addition the details of other four agreements executed between the defendant Nos. 2 to 4 are given as under :-

(i) Hire Agreement dated November 27, 1998 between the defendant No. 2, Mona International through defendant No. 1 and the plaintiff for payment of hire charges in respect of bathroom fittings, geysers, light fittings, exhaust fans, grills etc. @ Rs. 30,000/- per month (Ex.PW-1/3 and PW-1/D1).

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

(iii) Hire Agreement dated November 30, 1998 between the defendant No. 2 Mona International through Attorney Ms. Kamayani Suri, defendant No. 4 and the plaintiff for payment of hire charges in respect of tables, chairs, sofa set beds, microwave, cooking range etc. @ Rs. 18,000/- per month (Ex.PW-1/4).

(iv) Licence Contract dated November 27, 1998 (Ex.PW-1/D3) between defendant No. 4 and the plaintiff for use of car parking space on payment of Rs. 12,000/- per month. (Ex.PW-1/5 and PW1/D3).

So, under the five agreements, the total monthly amount payable by the plaintiff was Rs. 1,08,000/- to the defendants.

5. 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 Ex.PW-1/1 between appellant No. 1 and the respondent.

(ii) Rs. 3,60,000/- in respect of Hire Agreement Ex.PW-1/3 between appellant No. 2 through appellant No. 1 and the respondent.

(iii) Rs. 3,60,000/- in respect of Hire Agreement Ex.PW-1/2 between appellant No. 3 and the respondent.

(iv) Rs. 2,16,000/- in respect of Hire Agreement dated 30th November, 1998 Ex.PW-1/4 between appellant No. 2 through Ms. Kamayani Suri and the respondent.

(v) Rs. 1,44,000/- in respect of Licence Contract Ex.PW-1/5 between appellant

No. 4 and the respondent.

6. In detail, the case of the defendants before the learned Single Judge was that when the expiry date of agreements was coming close, the defendants had no inclination to extend the said agreements therefore they sent notices dated the September 9, 2000 and October 22, 2000 requesting the plaintiff to vacate the said premises. But, there was no response from the plaintiff. On January 2, 2001 another notice was sent to the plaintiff who still did not show any intention of getting the contracts extended and illegally retained the unauthorized possession and neither vacated the said premises nor handed over the goods. Therefore, the plaintiff became liable to pay to the defendants the pre-settled liquidated charges in terms of independent contracts and lease.

7. It was alleged by the defendants that after a gap of almost five months and after repeated requests, the plaintiff, on April 24, 2001 sent a letter to the defendants requesting them to meet Mr. J.P. Bovis, the Principal Officer of the plaintiff who along with his family was occupying the said premises, so as to resolve the issue.

8. Accordingly, on May 4, 2001 a meeting was held and it was decided that the plaintiff would hand over the possession on May 7, 2001 and also settle all the pending dues between the parties. On May 7, 2001, the defendants were handed over the possession and at that time, it was also noticed by the parties that the premises had been damaged and various hired items were either damaged or were missing. Therefore, the amounts for the said damaged and missing articles was decided between the parties and was incorporated in the document of "Final Settlement of Account" dated May 7, 2001. However, as no payment was made on the said date, the defendants on May 8, 2001 visited the local office of the plaintiff and issued a letter to the Managing Director, DMRC to ask the plaintiff to settle the dues, even a reminder dated May 12, 2001 was also sent. The defendants lodged police complaints on May 7, 2001, May 10, 2001 and May 11, 2001 and also issued a legal notice dated May 11, 2001. However, no payment was received and instead of making the payment, the plaintiff filed a suit seeking refund of the security and goods (D.G. set and air conditioners) owned by Mr. J.P. Bovis.

9. Alongwith written-statement, the defendants also filed their counter claim which was 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/- in terms of the settlement arrived at between the parties.

10. The Counter Claim/adjustment is based upon clauses in the five agreements that on expiry of the said Agreements on November 22, 2000 and overstay the plaintiff was liable to pay the following amounts upto May 22, 2001 when the premises were vacated:

(i) Rs. 6560/- per day as per Clause 19 of Lease Deed Ex.PW-1/1 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 Ex.PW-1/3 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 Ex.PW-1/2 with Manoj Gulshan and Sons (HUF) plus other amounts in all Rs. 10,40,206/-.

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

11. On the basis of the pleadings, following 14 issues were settled on April 23, 2004:-

(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.

12. After recording the evidence of the parties, learned Single Judge on January 9, 2009 decreed the suit by passing the judgment and decree in favour of the plaintiff and against the defendants.

13. All issues were decided by the learned Single Judge in the following manner :

i) Issue No. 6 was decided in favour of the defendants as Bishan Basu was working with the plaintiff-company at the relevant time and he was the Principal Officer of the plaintiff. The handwritten note of Bishan Basu (Ex.DW-1/18) was relied upon by the defendants. As regards issue No. 9, the same was also decided in favour of the defendants.

ii) Issues No. 1, 2, 3, 4, 8, 11 and 13 were taken up together and were decided against the defendants and in favour of the plaintiff, holding that the defendants have not proved the actual market rent of the property during the period November 23, 2000 till May 7/22, 2001. In fact, the defendants have not placed on record the subsequent lease deed, under which the property was rented out. There was no indication or evidence to show any increase in the market rent during this period for which the defendants were entitled to the existed rent being paid as damages.

iii) As far as issue No. 12 was concerned, the plaintiff had relied upon fax dated September 25, 2000 (Ex.PW-1/20) and reply dated September 27, 2000 (Ex.PW-1/21), by Mona International signed by Mona Gulshan. The defendants denied the two documents and in the affidavit of Mona Gulshan, she deposed that she had not sent any such letter dated September 27, 2000. The Court held that these documents are not relevant as the original lease deed was an unregistered document and no fixed period of tenancy was created and only month to month tenancy was created. Therefore, these documents are irrelevant and the said issue No. 12 was accordingly decided.

iv) Issue No. 5 was decided against the defendants by holding that the claim of the defendants that there was a final settlement and agreement to pay Rs. 23,91,801/- cannot be accepted for many reasons including failure to produce the original documents Ex.DW-1/19 & 1/20. There was no justification and good reason to allow the defendants to lead secondary evidence. The genuineness of the documents Ex.DW-1/19 & 1/20 was also not established.

v) Issues No. 7 & 10 i.e. about entitlement of plaintiff to any interest and entitlement of the counter-claimant to any interest, the suit of the plaintiff was decreed and it was held that defendants No. 1 to 3 were jointly and severally liable to pay Rs. 7,66,000/- to the plaintiff and further, the plaintiff would also be entitled to interest on the aforesaid amount @ 10% per annum from the date of filing of the suit till payment, after adjustment/set off of Rs. 1,04,000/- on account of repairs/replacements as claimed by the defendants in their counter-claim.

14. The defendants filed the abovementioned Regular First Appeal against the judgment and decree dated January 9, 2009 passed by the learned Single Judge in CS(OS) No. 1560/2001 and C.C. No. 16050/2002.

15. We have heard the learned counsel for the parties. We are in agreement with learned Single Judge that the entire dispute between the parties revolves around two issues which are:

(i) The first issue is with regard to the dispute between the parties as to what amount is due and payable by the plaintiff, if any, to the defendants from the period 23rd November, 2000 to 7th/22nd May, 2001 and as to whether the defendants are entitled for liquidated damages claimed by them, the details of which are mentioned in their counter-claim being C.C. No. 1650/2002 claiming adjustment/set off of the entire security amount and recovery of additional amount of Rs. 23,91,801/- on the basis of clauses in the five agreements and on expiry of the said agreements on 22nd November, 2000 and overstay by the plaintiff.

(ii) The second issue between the parties is as to what happened on 7th May, 2001, as according to the plaintiff the defendants illegally trespassed into the suit property and occupied the same, and on the other hand, the case of the defendants is that the plaintiff had permitted and allowed them to occupy the property and Mr. J.P. Bovis for whose benefit the property was taken on rent had executed the documents on behalf of the plaintiff confirming and admitting that sum of Rs. 23,91,801/- was due and payable as arrears and damages etc. for the period between 23rd November, 2000 to 7th/22nd May, 2001. The said document dated 7th May, 2001 was disputed by the plaintiff.

16. It is not in dispute that the lease deeds/agreements dated November 27, 1998 (Ex.PW-1/1 to PW-1/3 and 1/5) are unregistered documents and the same cannot be looked into except for collateral purposes. Thus, as per law, the tenancy was from month to month.

17. The defendants in their counter claim stated that after the expiry of lease period by efflux of time the plaintiff continued overstaying for about six months w.e.f. November 23, 2000 to May 7, 2001 without making any payment with regard to admitted liquidate damages as per Clause 19 of lease deed and Clauses 9, 10 and 11 of the Hire Contract between the parties. Therefore, they are entitled to actual damage i.e. market rent.

18. The learned Single Judge after having considered the interpretation of the various clauses of these documents held that the amount stipulated in the agreements was a penalty amount and not the genuine pre-estimated of loss of likely to result in case of a breach due to overstay and the defendants failed to lead evidence to prove that the actual market rent was higher than Rs. 1,08,000/- per month. Though, according to the defendants, the amount payable

under the five agreements with effect from November 23, 2000 @ Rs. 5,45,000/- per month and the said amount claimed as liquidated damages which is approximately 5 times the amount payable before the date of alleged breach i.e. November 22, 2000 but no evidence was produced by them.

19. Actual damages/mesne profits, undisputedly the defendants were entitled for in view of Sections 73 & 74 of the Contract Act subject to proof and establishing the actual loss due to increase in rent or hire between the period when the premises was taken on rent and vacated. Admittedly, Ex. PW-1/1 to PW-1/3 and PW-1/5 i.e. lease deeds and hire agreements are unregistered documents. The same can only look into for collateral purpose. The defendants have based their counter claim of liquidated damages as per clauses of same very document. No evidence has even been adduced by the defendant in the present matter.

20. Thus, from the above, it is clear that even if there is a clause of liquidated damages, in a given case, it is for the Court to determine as to whether it represents genuine pre-estimate of damages with the proof of "actual loss or damage". But, the person claiming the liquidated damages is still to prove that the legal injury resulted because of breach and he suffered some loss. Party has to show that he took all reasonable steps to mitigate the loss. It is only after proper enquiry the Court in a given case would rule as to whether liquidated damages as prescribed in the contract are to be awarded or not. The position in the present case is more worse as all the documents on the basis of which the defendant are claiming liquidated damage under clauses are unregistered documents.

21. In the present case no evidence or material was placed on record to show increase in rent or hire between November, 1998 and May, 2001. No documentary evidence was produced by the defendants in this regard. The defendants have not proved the actual market rent of the property during the period from November 23, 2000 to May 7, 2001.

22. Therefore, we have no option but to agree with the findings of the learned Single Judge that mere description in the agreements that the amounts fixed were liquidated damages, does not bar and prevent Courts from examining the true nature and purport of the clause and the intention of the parties. The amounts stipulated in the four agreements are not liquidated damages or a pre-ascertained amount of damages which the defendants would have incurred in case the plaintiff had overstayed beyond and utilized the property beyond November 23, 2000 and DW-1 in his affidavit had not tried to justify the amount fixed.

23. With regard to second issue, Mr. Virendra Dwivedi, PW-1 in his evidence has given the plaintiffs'' explanation about overstaying the period in terms of the clause 19 of the lease deed. PW-1 deposed that much prior to the expiry of the aforesaid lease deed, the plaintiff company by their fax dated September 25, 2000 (PW-1/20) addressed to the defendant No. 1, expressed their desire to

extend the period of the lease till such time as deemed appropriate. Thereafter, by fax dated September 27, 2000 (PW-1/21) the defendant No. 5 for and on behalf of the defendant No. 1 categorically consented, accepted and extended the period of lease, till such time as the plaintiff company required. The defendants in extending the period of lease informed the plaintiff company that, the defendant No. 1 i.e., Mr. Manoj Gulshan had discussed the above referred subject with the representative of the client i.e. Mr. J.P. Bovis in the first week of September, 2000, the defendant was glad to convey that Mr. Bovis could continue to retain w.e.f. November 23, 2000, the above leased premises till such time he was posted in his present job in Delhi. A copy of fax of the defendant No. 2 on behalf of defendant No. 1 dated September 27, 2000 was received by the plaintiff company. The plaintiff company by their fax dated February 5, 2001 (PW-1/22) addressed to the defendants expressed their desire to vacate the premises of the defendants on or before May 22, 2001. It was informed to the defendants that the rent/agreed charges for the agreed extended period, as agreed would be provided/adjusted from the aforesaid "Security Deposit" of Rs. 12,96,000/-, that was to be refunded by the defendant herein. Thereafter, by fax dated March 21, 2001 and April 3, 2001 sent to the defendants, the plaintiff company while again reaffirming that Mr. J.P. Bovis would be vacating the premises on or before May 22, 2001, requested that the defendants after deducting the rent and/or charges for the agreed extended period of lease, should refund the remaining amount of Rs. 6,85,998/- to the plaintiff company. Copy of the fax of the plaintiff company to the defendant No. 1 dated March 21, 2001/April 3, 2001 is marked as Ex.PW-1/23. Ex. PW-1/20, PW-1/22 to PW-1/23 are communications sent by the plaintiff company to the defendants. Similar fax/ letter dated April 3, 2001 (PW-1/24) in the form of reminders were also sent by the plaintiff company to the defendant No. 1 which is marked as Ex.PW-1/24. In the meanwhile the plaintiff company vide its letters dated March 30, 2001 addressed to the Defendant No. 1 enclosed all applicable TDS certificates of the Defendants for the period May 23, 2000 to March 31, 2001. A copy of the fax dated March 30, 2001 from the Plaintiff Company to the Defendants is annexed hereto and marked as Ex.PW-1/25.

The Plaintiff company vide its letters dated April 23, 2001 enclosed all applicable TDS Certificates of the Defendant for the period May 23, 2000 to March 31, 2001. A copy of the letter dated April 23, 2001 from the Plaintiff Company to the Defendants enclosing the TDS Certificates for the period May 23, 2000 to March 31, 2001 marked as Ex.PW-1/26. The TDS Certificates regarding the deductions and deposits by the plaintiff company on account of the payments made to the defendants marked as Ex.PW-1/27 A to 27 H. No disputes whatsoever arose with regard to any payments or otherwise till May 9, 2001 between the Plaintiff Company and the defendants, when the Defendants inspite of consistent reminders for the Plaintiff Company seeking the due refund for the "Security Deposit(s)", which the Defendants had all along consented to and in any event duty bound under the terms of the aforesaid Agreements refused to do so. The defendants on May 9, 2001 in choosing to forcibly enter and occupy the said premises, the defendants forcibly evicted the various household staff employed at the said premises by Mr. J.P. Bovis of the Plaintiff Company.

The defendants thereby illegally retained three sets of Air Conditioners and a Diesel Generator Set, that had been installed by the plaintiff company at the said premises for the usage by Mr. J.P. Bovis. The aforesaid illegal and forcible entry into the tenanted premises, by the defendants constrained the plaintiff company to immediately informed the concerned police station, Vasant Vihar. The representative of the plaintiff company, Mr. Bishan Basu immediately filed a complaint with the police station Vasant Vihar on May 9, 2001 itself setting out the relevant facts. A copy of the complaint dated May 9, 2001 filed by the plaintiff company through Mr. Bishan Basu is marked as Ex. PW-1/28. The plaintiff company sent a detailed legal notice dated May 12, 2001 to the defendants through its legal counsel setting out all the correct facts and circumstances as well as demanding that the defendants forthwith refund the illegally retained security deposit as well as the various articles of the plaintiff company at the said premises. A copy of the said legal notice dated May 12, 2001 issued by the counsel of the plaintiff company to the defendants is annexed and marked as Ex.PW-1/29A to PW-1/29-C.

24. DW-1 Mr. Manoj Gulshan in his affidavit has denied having received any communication sent by the plaintiff. He stated in his affidavit that no letters were ever received. With regard to security deposit, the same was adjusted in the agreements and lease and as per final settlement terms agreed upon and documents between the parties on March 7, 2001. He stated in his evidence that on May 7, 2001 the peaceful possession of the said premises and balance items were handed over and promising to pay admitted amount of Rs. 23,91,801 to the defendants by May 9, 2001. In his evidence he had also filed a police complaint on May 7, 2001 at 2.30 p.m. (Ex.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 also alleged that Bishan Basu was trying to break into the property and claimed that the property was a company property. The relevant para of the complaint Ex.DW-1/24 reads as, under:-

...they shall be liable to pay penalty and addressed to the liquidated damages w.e.f. 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 along with some other items in lieu of our Hire items disposed off from the house by her.

25. The learned Single Judge after having considered the rival submissions of the parties, evidence placed on record decided issue No. 5 against the defendants holding that the claim of final settlement to Rs. 23,91,901/- cannot be accepted due to failure of production of original document DW-1/19 and DW-1/20. No secondary evidence was led by the defendants who also failed to establish the genuineness of documents DW-1/19 and DW-1/20. The details of discussion and finding arrived are mentioned in para 33 to 37 of the impugned judgment. The extracts of the same are reproduced bellow:-

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 Ex. 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" Ex. Dw1/19 to 21. It may be some other document, which has not been brought on record by the defendants.

34. The complaint Ex. 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 Ex. 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 Ex. 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 Ex. 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 Ex.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.

26. For the abovesaid reasons, on both issues the defendants have not proved their case. On issue No. 1 the defendants have not proved the actual market rent of the property during the period November 23, 2000 till May 7th/22nd, 2001 and on issue No. 2, they failed to establish the genuineness of document Ex.DW-1/19 and DW-1/20 i.e. final settlement. In view of above discussion, no infirmity is found in the impugned judgment and decree and the same is upheld. The appeal is dismissed but with no order as to costs.

