

\* HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: October 30<sup>th</sup> , 2009

+ RSA 116A/1996

Hari Chand Appellant  
Through : Mr.Y.K.Jain, Sr.Adv with Mr.Abhinav  
Jain, Adv.

versus

Fateh Singh & Ors ..... Respondents  
Through : Mr.Keshav Dayal, Sr.Adv with  
Mr.Prahlad Dayal, Adv.

**CORAM:**

**\* HON'BLE MS. JUSTICE VEENA BIRBAL**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest?

**Veena Birbal, J.**

1. Appellant herein i.e. plaintiff before the Ld. trial court, has filed the Second Appeal against the judgment and decree dated 14<sup>th</sup> August, 1996 passed by the first appellate court i.e Ld. Addl. District Judge, Delhi whereby judgment and decree dated 2<sup>nd</sup> June, 1995 passed by the learned trial court granting a decree of possession in respect of suit property bearing No. 14/47-50, 2255, Sarai Topkhana, Kauria pul, H.C. Sen Road, Delhi as shown in site-plan Ex. PW4/1 and further a decree for Rs. 800/- in favour of appellant was set aside.

2. Brief facts necessary that gave rise to present appeal are as under:-

The case of appellant herein i.e. plaintiff-Hari Chand before the Ld. trial court was that he was a tenant in respect of two "Dars" with open court yard of property bearing No. 14/47-50, 2255, Sarai Topkhana, Kauria pul, H.C. Sen Road, Delhi at a monthly rent of Rs. 200/- i.e., Rs. 100/- for each "Dar" under respondent no-2 herein i.e. defendant No. 1 before the Ld. trial court. The tenanted premises of appellant/plaintiff are shown in the site plan (Ex. P-4/1 and Ex. P-4/2). As per the case of the appellant/plaintiff, he took the same for doing business. Prior to appellant/plaintiff, respondent no.3/defendant No. 2 (who died during the pendency of proceedings before Ld. trial court) was a tenant in respect of the above mentioned property at a monthly rent of Rs. 16/- under respondent no. 2/defendant no. 1. It is alleged that father of respondent no.3/defendant no.2 was doing the work of plying tonga and was living as a tenant prior to appellant/plaintiff. While living there, he had employed respondent no.1/defendant no.3 as a servant and had allowed respondent no.1/defendant No. 3 to occupy one 'Dar' out of the above mentioned tenanted premises as a servant, for the convenience of his work. After the death of his father, respondent no. 3/defendant no.2 inherited the tenancy who also kept respondent no.1/defendant no.3 as his servant on same terms and conditions as he was working under his father.

3. It is alleged that respondent no.1/defendant no. 3 was never a tenant in the portion occupied by him which is now the subject matter of dispute between appellant/plaintiff and respondent no.1/defendant no. 3 and the

status of defendant No. 3 was that of a 'Licencee'. Respondent no.3/defendant no. 2 under a settlement had vacated the above mentioned tenanted premises on 25.2.82 and had delivered the vacant and peaceful possession of the same to the appellant/plaintiff at the instance of respondent no.2/ defendant No.1 (landlord). Respondent no. 3/defendant no. 2 had further assured respondent no. 2/defendant no.1 that the portion in dispute which was given by his father to respondent no.1/defendant no.3, would be vacated by him on 7.3.1982. On 7.3.1982, respondent no.1/defendant No. 3 vacated the portion in dispute and after delivering the possession had gone to some other place with his family and belongings. In the first week of April, 1982, respondent no.1/defendant No 3 came to appellant/plaintiff and requested him for possession of one dar i.e. room in dispute for purposes of marriage of his daughter with the assurance that he would vacate the same after the marriage of his daughter. On his assurance, appellant/plaintiff gave the possession of dispute property to defendant no. 3 for the said purpose but respondent no.1/defendant no.3 failed to vacate the same.

4. Since respondent no.1/defendant No. 3 failed to deliver vacant possession of the suit property, appellant/plaintiff had filed a suit for possession of room in dispute i.e. one 'dar' as shown in red in Plan Ex. PW4/1 and recovery of Rs. 800/- as license fee @ Rs.100/- per month for the period from 3.4.82 to 30.11.82.

Respondents herein/defendants 1 to 3 had filed their respective written statements.

5. Respondent no.2/Defendant no.1 is the landlord of the property. In the written statement dated 14<sup>th</sup> February, 1983 he has supported the case of appellant/plaintiff. He further stated that respondent no.1/defendant no.3 was never his tenant. He has alleged that initially father of respondent no. 3/defendant no. 2 was the tenant of the premises in dispute. After his death, respondent no.3/defendant no.2 became the tenant and thereafter premises were let out to appellant/plaintiff. Respondent no. 1/defendant no. 3 was licensee previously under respondent no. 3/defendant no. 2 and subsequently under appellant/plaintiff.

6. Respondent no.3/defendant no.2 had also filed written statement before Ld. trial court wherein it is alleged that appellant/plaintiff had taken the abovementioned premises on rent. Respondent no.3/defendant no.2 (Gopi Ram) never charged any amount from respondent no.1/defendant no.3 (Fateh Singh). He has also stated that after delivering the possession to appellant/plaintiff, he had also written 'superdginama' in token of delivering the possession and assured that respondent no.1/defendant no.3 would vacate the portion under dispute on 7<sup>th</sup> March, 1982 and on said date, respondent no.1/defendant no.3 had also vacated the portion under dispute and delivered the possession of the same to the appellant/plaintiff. Respondent no.1/defendant no.3 gave writing to that effect to the appellant/plaintiff. It is further alleged that prior to appellant/plaintiff,

respondent no. 3/defendant no.2 was a tenant in respect of property bearing no. 14/47-50 2255, Sarai Topkhana, Kauria Pul, Delhi at a monthly rent of Rs.16/- under respondent no.2/defendant no.1. His father used to do the work of plying tonga and respondent no.1/ defendant no.3 was his employee for the said work and for the convenience of duty, his father had allowed respondent no.1/defendant no.3 to use one dar i.e disputed property. Nothing was charged from respondent no.1/defendant no.3 in respect of premises in dispute by them.

7. Respondent no.1/defendant No. 3-Fateh Singh had also filed written statement before the learned trial court. His case is that he is in occupation of one room with open space in the premises No. 2255, Sarai Topkhana, Kauria Pul, H.C. Sen Road, Delhi Since 1956-57 as a tenant. The entire property consists of various portions and different persons are in occupation of their respective portions. The property belongs to M/s Chuna Mal & ors and he was living as a tenant in his portion. Father of defendant no.2 was also inducted as a tenant in a different portion whereas appellant/plaintiff is a tenant in another portion. It is alleged that he is a tenant in respect of property number 2255/46(old) and the new number is 2255/22. He has no connection with the premises bearing No. 14/47-50. He has denied that he was a licensee. According to him, father of defendant no.2 was in possession of portion bearing number 2255/48-49 and was not in possession of 2255/47 and 2255/50. He has denied having approached appellant/plaintiff for one room on the occasion of the marriage of his daughter.

8. On the basis of pleadings of the parties, the learned trial court framed the following issues on 7<sup>th</sup> December, 1983:-

1. Whether the plaintiff has Locus-Standi to file the present suit? OPP
2. Whether in the first week of April, 1982 the defendant No. 3 was inducted in the suit premises or the defendant No. 3 is a tenant in his own independent rights? (onus on parties)
3. If issues No. 2 is proved in affirmative, whether defendant is liable to pay any license fee? If so, at what rate and to what amount? OPD
4. If issue No. 2 is proved in favour of plaintiff, whether plaintiff is entitled to the relief of possession against defendant No. 3? OPP
5. Whether the suit is barred under section 10 CPC?
6. Relief.

Following additional issue was framed on 6<sup>th</sup> November, 1986:-

“Whether the defendant is in occupation of premises comprised of one room, one kitchen and open space bearing No. 2255/46 (old) 2255/22(now) Sarau Topkhana, Kauria Pul, Delhi and not in occupation of premises No. 14/47-50 2255, Sarai Topkhana, Kauria Pul, Delhi? OPD

9. The Plaintiff in support of his case examined Sh. Sham Sunder (PW 1); Sh.Raja Ram (PW 2); Sh. Kachera Ram (PW 3); Sh. Hari Chand (PW 4) (appellant/plaintiff), Sh. Risal Singh (PW 5) and Sh. Gopal Mehra (PW 6). Defendant No. 1 examined himself as DW. 1. Defendant No 2 examined himself as DW. 2. Defendant No. 3 has examined himself as DW. 3/1. He has also produced two more witnesses in support of his case i.e Sh.Tara Chand (D3W1) and Sh. Kanta Parshad from the Office of the Election Commission, Delhi.

10. After hearing arguments, learned lower court came to the conclusion that respondent no.1/defendant no.3 was in possession of disputed property bearing no. 2255/47 and was a 'Licencee' in respect of the same and decreed the suit of the appellant/plaintiff vide judgment and decree dated 4<sup>th</sup> June, 1995.

11. On an appeal by respondent no.1/defendant no.3, the first Appellate Court vide judgment dated 14<sup>th</sup> August, 1996 reversed the findings of learned lower court by holding that respondent no.1/defendant no.3 was not a licensee of appellant/plaintiff but was in possession of premises bearing number 2255/46 (old) and 2255/22(new). Appellant/plaintiff has no right in respect of the same. Learned first Appellate Court also held that respondent no.3/defendant no.2 had expired during the pendency of suit before the learned lower court and legal heirs of defendant no.2 were not brought on record and held that suit abated as a whole and as such, judgment and decree passed by the learned lower court was bad in law and set aside the judgment and decree passed by the learned lower court.

12. Aggrieved with the same, present regular second appeal is filed. The same was admitted on 19<sup>th</sup> September, 1996 and following substantial questions of law were framed:-

- (i) Whether the finding of the learned lower Appellate Court reversing judgment of the Trial court on issue numbers 1,2,4 & 6 is perverse?
- (ii) Whether the finding regarding abatement of the suit because of death of defendant no.2 is perverse.

13. The counsel for both the parties have been heard and record has been perused.

14. The Ld. Sr. counsel for the appellant has contended that Ld. lower court by the judgment and decree dated 2<sup>nd</sup> June, 1985 decreed the suit of appellant/plaintiff against respondent by well reasoned judgment and Ld. lower appellate court by its judgment dated 14<sup>th</sup> August, 1996 reversed the well reasoned judgment by perverse finding and wrong interpretation of documents by observing that respondent no.1 used to sign, as such disbelieved the document Ex PW1/1 i.e. writing dated 07.03.1982 by which vacant possession of disputed property was given to appellant/plaintiff. It is contended that said document is disbelieved without any evidence to the effect that respondent no. 1/defendant no. 3 used to sign and not thumb mark. It is contended that testimony of attesting witnesses of Ex PW 1/1 i.e. Sham Sunder (PW 1), Raja Ram (PW2) was found to be unbelievable because they did not know where respondent No.1 had gone to live after vacating the premises on 07.03.1982 is no ground to reject the same, considering the overall evidence on record. It is contended that evidence on record clearly proves that status of respondent no. 1/defendant no. 3 in the disputed property was that of a licensee and the appellant/plaintiff was entitled for the relief of possession. It is contended that finding of first appellate court that respondent No.1 is not in occupation of property in dispute and is in possession of property bearing No.2245/46 (old) 2255(22) is perverse as the evidence led by respondent no. 1/defendant no. 3 does not substantiate

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the same. It is contended that finding of first appellate court in this regard are not sustainable. It is contended that Ld. lower appellate court has ignored the weight of evidence on record altogether, as such High Court will be justified in re-appreciating the evidence and giving its own conclusion. In support of his contention learned counsel has relied upon judgment of Supreme Court reported in **Hira Lal & anr Vs. Gajan & Ors AIR 1990 SC 723.**

It is contended that if finding of the court on facts are vitiated by non consideration of relevant evidence or by erroneous approach to the matter by High Court is not precluded from interfering while exercising the power of Section 100 CPC as has been held in Jagdish Chand v. Natthu Singh 1992(1) SCJ 36.

It is further contended that finding of lower appellate court that suit had abated is also perverse as respondent no. 3/defendant no. 2 (deceased through LRs) i.e. erstwhile deceased tenant was a proforma party to the suit and no relief was claimed against him.

15. Learned counsel for respondent has contended that finding of fact recorded by First appellate Court cannot be reopened in second appeal. In the instant case, lower appellate court has recorded a finding of fact after appreciating evidence that respondent no. 1/defendant no. 3 was not a licensee of appellant/plaintiff but was in possession of 2255/46 (new) 2255/22 (old) as such the same cannot be re-agitated before this court. It is contended that findings given by the lower Appellate Court are supported by

evidence on record and are not perverse. It is further contended that appellant/plaintiff has failed to put forward any infirmity, perversity and illegality in the impugned order requiring interference by this court.

16. As regards scope of power of High Court under Section 100 CPC, the Supreme Court in **Bondar Singh & ors Vs. Nihal Singh & ors AIR 2003 SC 1905** has held as under:-

“xxxxxxxxxxxxxxxxxxxxxxxxxxxx. The scope of powers of High Court under Section 100 CPC is a matter of settled law. The learned counsel for the appellant cited several judgments in support of his contention. We do not consider it necessary to discuss these decisions because so far as the question of powers of High Courts under Section 100 CPC is concerned, it needs no discussion. If the findings of the subordinate courts on facts are contrary to evidence on record and are perverse, such finding can be set aside by the High Court in appeal under Section 100 CPC. A High Court cannot shut its eyes to perverse findings of the courts below. In the present case the findings of fact arrived at by the lower appellate court were contrary to evidence on record and, therefore, perverse and the High Court was fully justified in setting aside the same resulting in the appeal allowed and suit being decreed.”

In **Hira Lal and another Vs. Gajan and Others (supra)**, the Supreme Court has held that where a court below ignored the weight of evidence and allowed the judgment to be influenced by consequential matter, the High Court would be justified while exercising power of Section 100 CPC in re-appreciating the evidence and coming to its own independent decision.

In **A.Munuswami vs R. Sethuraman and others, AIR 1995 Madras, 375**, it is held that:-

“.....I am of the opinion that if the courts below, who are the final authorities on the question of appreciation of

evidence and findings of fact, fail in their duty and do not advert to such vital evidence, be it oral or documentary, the same would lead to the conclusion that they have committed errors on substantial questions of law.”

17. Keeping in mind the above background the evidence led by the parties is seen in order to answer the substantial question of law formulated above. Appellant/plaintiff in evidence as PW-4 has deposed that he took property no.14/47-50 on a rent of Rs.200/- per month for business purposes. Prior to him, Gopi Ram/respondent no.2 was tenant of the aforesaid property at a monthly rent of Rs.16/- per month who had surrendered the tenancy of aforesaid two dars in his favour with the consent of landlord Ravinder Mohan, i.e. respondent no.2/defendant no.1, on 25<sup>th</sup> February, 1982. He has proved on record site plan of the property as Ex. 4/1 (disputed property) and 4/2. He was a tenant of respondent no.2/defendant no.1 in respect of aforesaid premises. He had known father of respondent no.3/ defendant no.2 who was doing the work of plying tonga. Father of defendant no.2/respondent no. 3 had kept respondent no.1/defendant no.3 for his help. Father of defendant no.2 had given dar no.14/47 to respondent no.1/defendant no.3 for the convenience of his duty and was living there as a licensee in the life time of father of respondent no.3/defendant no.2. After the death of father of respondent no.3/ defendant no.2, the tenancy of above two dars of 14/47-50 was inherited by respondent no. 3/defendant no.2 who also continued the work of plying tonga and respondent no. 1/defendant no. 3 continued living there as a licensee with him. Respondent no.1/defendant no.3 was never

his tenant. On 25<sup>th</sup> February, 1982, there was some settlement between respondent no.2/defendant no.1 and respondent no.3/defendant no.2 whereby respondent no.3/defendant no.2 vacated and tenancy of property was changed in his name and document Ex. PW 4/3 was executed in this regard. While delivering the possession, respondent no.3/defendant no.2 had assured vide Ex. PW 4/3 that respondent no.1/defendant no.3 would vacate the disputed property on 7<sup>th</sup> March, 1982. While delivering the possession, respondent no.3/defendant no.2 also executed one superdignama Ex. PW 4/4 wherein he had stated that he had given the possession of the premises to appellant/plaintiff with the consent of landlord Ravinder Mohan i.e respondent no.2/defendant no.1. After delivering the possession on 7<sup>th</sup> March, 1982, respondent no.1/defendant no.3 also gave in writing vide Ex. PW 1/1 that he had vacated the disputed property wherein he affixed thumb mark and other witnesses also signed. Respondent no.1/defendant no.3 had got written Ex. PW 1/1 from Raja Ram PW 2 and thereafter he had left the property. After few days, respondent no.1/defendant no.3 again came to him with Sham Sunder, PW-1 and Sh. Kachera Ram, PW-3 and requested that he wanted property in dispute for the marriage of his daughter. Appellant/plaintiff took pity on him and agreed to give him the disputed property for the marriage of his daughter. He never gave the property on rent but gave him on licence basis for the limited purpose. Thereafter, respondent no.1/defendant no.3 did not give back the disputed property despite repeated requests made by him. Respondent no.1/defendant no.3 is in unauthorized possession of the same.

18. Evidence of appellant/plaintiff (PW 4) is supported by Sh. Sham Sunder (PW 1) who is a resident of same area by deposing that on 7<sup>th</sup> March, 1982, respondent no.1/defendant no.3 had vacated the property in dispute and also gave in writing Ex PW 1/1 whereupon respondent no.1/defendant no.3 had affixed his thumb impression. Sham Sunder (PW 1) also proved his signature as an attesting witness on the said document i.e Ex.PW 1/1. Sham Sunder (PW 1) also deposed that in April, 1982, he along with Sh. Kachera Ram (PW 3) accompanied respondent no.1/defendant no.3 and met appellant/plaintiff and requested him to give the disputed property for the purpose of marriage of respondent no.1/defendant no.3's daughter. Appellant/plaintiff agreed to give the said property and same was never given on rent. Thereafter, respondent no.1/defendant no.3 did not vacate the same. No suggestion is given to Sham Sunder (PW 1) that respondent no.1/defendant no.3 did not ask for providing space for the marriage of his daughter. In cross-examination to Sham Sunder (PW 1) has denied that respondent no.1/defendant no.3 did not vacate the disputed property on 7<sup>th</sup> March, 1982 or that he did not affix thumb impression on Ex. PW 1/1.

19. Raja Ram (PW 2) had also deposed that he had known the parties. He wrote Ex.PW 1/1 at the instance of respondent no.1/defendant no.3 who also affixed his thumb impression at point 'A' on it. He also proved his signature on the aforesaid document. Thereafter, respondent no.1/defendant no.3 vacated the premises in dispute.

20. Sh. Kachera Ram (PW 3) also stated on oath that he has known the parties to the present case and respondent no.1/defendant no.3 was never the tenant in respect of premises in dispute. He deposed that respondent no.1/defendant no.3 had come to him along with Sh.Sham Sunder (PW 1) and asked him to request appellant/plaintiff Hari Chand to give the premises in dispute to respondent no.1/defendant no.3 for the purpose of solemnization of marriage of his daughter. At their instance, appellant/plaintiff gave the premises in dispute to respondent no.1/defendant no.3 for the purpose of solemnization of marriage of his daughter. Appellant/plaintiff never let out the premises in dispute to respondent no.1/defendant no.3. In cross-examination of PW-3, no suggestion was given that respondent no.1/defendant no.3 had not gone to PW-3 for persuading appellant/plaintiff Hari Chand for providing space.

21. Sh. Gopal Mehra (PW 6) has also appeared as a witness of the appellant/plaintiff who has stated that he is the manager of landlord Ravinder Mohan, i.e., respondent no.2/defendant no.1 and his main work is to collect rent. As per his deposition, one Gordhan s/o Gopi Ram is a tenant of 14/46, 2255, Sarai Topkhana, H.C. Sen Road, Delhi. One Ram Chand s/o Shri Umrao is the tenant in premises no. 14/22, Municipal No. 2255 at the aforesaid address. He has deposed that appellant/plaintiff is a tenant of disputed property. He has also deposed that Ravinder Mohan, respondent no.2/defendant no.1 had filed a suit no.239/1980 titled Ravinder Mohan Vs. Banwari Lal and ors. against his tenants. He has produced on record

certified copy of the plaint which is Ex. PW 6/1/A. PW-6 Gopal Mehra deposed that he used to issue receipts and used to preserve the counter foils of those receipts. He has produced counter foils of rent receipt i.e Ex. PW 6/3A in respect of property municipal no.2255, private number 14/47. He has deposed that Bhagwan is a tenant residing in municipal number 2255, private number 14/45 and rent receipt Ex. PW 6/4A is a counter foil of rent receipt which is in his hand writing. As per him, appellant/plaintiff is a tenant of aforesaid property bearing no.14/47 and original counter foil of rent receipt is Ex. PW 6/3A. Ram Chander Kancera is a tenant in respect of property number 14/22, 2255 and original counter foil of rent receipt is Ex. 6/5A. He has deposed that only persons mentioned as defendants in Ex. 6/A are the tenants at the time of filing of the suit. He has never collected rent without issuing receipts.

In cross examination, he has stated that tenants referred above are the tenants of Ravinder Mohan, respondent no.2/defendant no.1. He has stated that Goverdhan Das is a tenant in respect of property no.2255, 14/46 and is still a tenant. Ram Chander is a tenant in respect of property no.2255/14/22. In cross examination, he has also stated that Gopi Ram, i.e. respondent no.3/defendant no. 2 was living in property bearing number 47 and 50. Later the paid portions were sold to appellant/plaintiff-Hari Chand.

22. Sh. Risal Singh (PW 5), Moharer, Hakni Carriage Department, MCD has deposed that a tonga number 1416 was registered on 21<sup>st</sup> January, 1959

in the name of Madan Lal s/o Ganga Ram r/o 2255, Sarai Topkhana. The licence number is 1539.

23. Ravinder Mohan (DW-1) has deposed that he is the owner of property bearing number 14/47-50 2255, Sarai Topkhana, Kauria Pul, H.C.Sen, Delhi. He inherited the said property after the death of his father. He has fully supported the case of appellant/plaintiff by deposing that earlier to appellant/plaintiff, father of Gopi Ram i.e Madan Lal was tenant at a monthly rent of Rs.16/-. After the death of Madan Lal, Gopi Ram, i.e. respondent no. 3/defendant no. 2 inherited the tenancy. Sh.Madan Lal was doing the work of plying tonga and had employed respondent no.1/defendant no.3 Fateh Singh and had allowed respondent no.1/defendant no.3 Fateh Singh to use the aforesaid property in the course of his employment. Even after the death of Madan Lal, respondent no.1/defendant no.3 continued to live in the said premises. He never charged any rent from respondent no.1/defendant no.3 nor rent out any premises to respondent no.1/defendant no.3. A settlement was arrived at between him and respondent no.3/ defendant no.2 - Gopi Ram to the effect that Gopi Ram would vacate the premises under his tenancy on 25<sup>th</sup> February, 1982 and accordingly respondent no. 3/defendant no. 2 vacated the same on the said date and delivered the possession to appellant/plaintiff at his instance. Possession of one dar was given to appellant/plaintiff and possession of another dar was to be delivered on 7<sup>th</sup> March, 1982 on the vacation of the same by respondent no.1/defendant no.3. Possession of said dar was given to appellant/plaintiff on 7<sup>th</sup> March,

1982 at his instance. He had let out the premises at a monthly rent of Rs.200/- to the appellant/plaintiff and appellant/plaintiff is paying rent against receipt. He has also deposed that appellant/plaintiff was inducted on 25<sup>th</sup> February, 1982 at a monthly rent of Rs.200/-.

The above witness has not been cross examination by respondent no.1/defendant no.3 despite opportunity given in this regard.

Appellant/plaintiff in cross examination of aforesaid witness has got proved rent receipts issued to him which are Ex. PW 1/PX 1 to PX 6.

24. Gopi Ram DW-2, also supported the case of the appellant/plaintiff by deposing that respondent no.1/defendant no.3 was earlier assisting him and his father in the work of plying tonga and his father had given him space to live in the disputed property. After the death of his father, he has inherited the tenancy right of property bearing no.14/47-50, 2255, Sarai Topkhana, Delhi. On 25<sup>th</sup> February, 1982, he surrendered the possession of one dar, i.e. 14/50 in favour of appellant/plaintiff and he has deposed that documents Ex. PW 4/4 and 4/3 are executed by him and bears his signatures. He further deposed that respondent no.1/defendant no.3 did not vacate the premises on 25<sup>th</sup> February, 1982 but vacated the same on 7<sup>th</sup> March, 1982 and delivered the possession to appellant/plaintiff.

25. Respondent no. 1/defendant no.3 in his evidence has deposed his case on oath. He has produced extract from electoral roll Ex.D 3 W 2/D10 showing address 2255/46. Slips of voters showing number of property.

Ration card Ex. D3 W2/1 and several letters received on 2255/46 and 2255/22 address. Admission card of his daughter Ex.D3W1/93 and 94 for the year 1984-85 at address of 2255/22. One Kanta Prasad is also examined as DW 3 who brought electoral roll but could not state the particular portion 2255. D3 W 2 Shri Tara Chand has proved D3 W2/1, the copy of ration card.

26. The evidence of respondent no.2/defendant-Ravinder Mohan (DW1) and respondent no.3/defendant no.2-Gopi Ram erstwhile tenant (DW2), clearly proves that premises let out were 14/47-50 and earlier respondent no.1/defendant no.3-Fateh Singh was living there by virtue of his employment and was assisting the father of respondent no.3/defendant no.2 in plying tonga and after his death, respondent no. 3/defendant no. 2 had also allowed him to live him in the disputed property as a licensee for the convenience of discharge of his duty. Respondent no. 3/defendant no. 2 vacated the said premises on 25<sup>th</sup> February, 1982. Documents Ex. PW4/3 and Ex. PW4/4 were executed by him. As per the aforesaid witnesses as well as PWs 1 to 3, respondent no.1/defendant no.3, Fateh Singh had also vacated on 7<sup>th</sup> March, 1982 and a writing was executed which is Ex. PW 1/1. Ld. First Appellate Court has not considered Ex. PW1/1 on the ground that it is not a genuine document. Even if this document is not read in evidence, the other evidence on record discussed above clearly shows that respondent no. 1/defendant no. 3 was a licensee in the disputed property.

27. Further certified copy Ex. PW 6/1 clearly shows that in dar no.14/46,

the name of tenant mentioned is Shri Goverdhan s/o Sh.Gulzari Lal, in respect of dar no.14/22, the name of tenant is Shri Ram Chander @ Kachera Ram s/o Umrao Singh. There are about 68 defendants in the said suit filed by landlord Ravinder Mohan and the same is dated 8<sup>th</sup> April, 1980 i.e two years prior to filing of present suit. Name of respondent no.1/defendant no.3 does not exist in the list of tenants in different rooms in Sarai topkhana. The details of tenants with rate of rent are mentioned in the list attached with the plaint. The name of Gopi Ram, erstwhile tenant i.e. respondent no. 3/defendant no. 2 is there as a tenant in respect of dar nos.14/47 and 14/50 and the rate of rent is mentioned as Rs.16/- per month. The said suit was filed by landlord, i.e. respondent no. 2/defendant no. 1 for restraining the defendants from making any structural additions or alterations in any part of property nos.2255, 2256 and 2257 known as Sarai Topkhana situated at Korla Pul near fountain, Delhi. As per Ex. PW6/A one Gordhan S/o Gopi Ram is a tenant of 14/46, 2255 Sarai Topkhana, Delhi. Name of respondent no. 1/defendant no. 3 does not figure therein.

No justified reasons are given by the lower appellate court is not considering the evidence discussed above.

28. The case of respondent no.1/defendant no.3 is that he was a tenant in respect of 14/46 in his independent right. He has stated so on oath also. However, he admits that Ravinder Mohan, respondent no.2/defendant no.1 was landlord of aforesaid property. As per evidence of Ravinder Mohan (D1W1), respondent no. 3/defendant no. 1 had never let out any premises to

respondent no.1/defendant no.3. The evidence of above witness had gone un rebutted and unchallenged. No rent receipt is produced to show that he was a tenant in respect of aforesaid dar. There is no material on record to show that he has made any efforts to pay rent to landlord Ravinder Mohan, respondent no.3/defendant no.1. In cross examination, he has stated that Ravinder Mohan, respondent no.3/defendant no.1 is the owner of the suit premises since 1977 and prior to him, Channa Mal was the owner. He has categorically stated in the cross examination that he never paid any rent personally to Ravinder Mohan DW-1. He further deposed that since 1982, he had not paid any rent as no one approached him for collection of rent. No material evidence has come on record to show that even till today he has ever paid rent of the premises, of which he is allegedly a tenant.

The First Appellate Court has relied upon application form for renewal of ration card Ex.D3 W2/1, admission card Ex.D3 W1/93-94 for the years 1984, 1985 of daughter of respondent no.1/defendant no.3, Electoral roll Ex.D3 W 2/D10, slips of voters Ex. D3 W1/D2 to Ex D 3 W1/D9 to give the finding that respondent no.1/defendant no.3 is in possession of 2255/46 and later on renumbered as 2255/22. These documents have been perused. Ex.D3 W 2/1 is a declaration form for renewal of ration card which is of the year 1983 i.e after the case had already been filed wherein address given there is 2255/22, Sarai Topkhana, Delhi. Admission card (for private candidate) of his daughter Ex.DW3/93 which is of 1984, and other is of 1985. Both bear address as 2255/22, Sarai Topkhana, Delhi which is is hand written where the particulars of address etc are given by candidate herself.

They are also for the period after the case had already been filed against him. The First appellate Court has relied upon voters slips Ex.D3W1/D2 to D3W1/09 to come for arriving at conclusion that respondent no.1/defendant no.3 was living at 2255/46 when these slips are issued on behalf of a contesting party and are not Government documents. The learned First appellate Court has also relied upon electoral roll Ex.D3W1 for giving the finding that respondent no.1/defendant no.3 was residing at 2255/46, Sarai Topkhana, Delhi when witness Kanta Prasad D3W1 from Election Office, Kashmiri Gate deposed that as per record brought by him, address of Fateh Singh given is 2255. No "Dar" number/room number is stated therein. In cross examination, he has also stated that he cannot state in which portion of House No.2255 who lives. Under these circumstances, the Ld.First Appellate Court ought not have given weightage to aforesaid documents when there is no substantive evidence to prove his alleged tenancy. Considering the over all evidence on record, Ld. First Appellate Court is not justified in giving the finding that respondent no 3/defendant no 1 was in possession of room no. 2255/46 (old) and 2255/22 (new).

29. Learned counsel for respondent has contended that respondent no.3/defendant no.2-Gopi Ram died during the pendency of the suit before the before trial court and application for substituting his legal heirs was not filed within 90 days, as such suit/proceedings stood abated and decree passed is a nullity in the eyes of law and First Appellate Court has rightly held so. In support of above contention, learned counsel for respondent has

relied upon **Madan Naik (Dead) by Legal Representatives and Ors. V. Hansubala Devi and Ors.** AIR 1983 SC 676. On the other hand, learned counsel for appellant has contended that respondent no.3/defendant no.2- Gopi Ram had died during the pendency of suit before the trial court. He was only a perfunctory party, as such, suit could not have been abated on the death of Gopi Ram, respondent no.3/defendant no.2 inasmuch as right to sue survives against the surviving defendants. In support of his contention, learned counsel for the appellant has relied upon:-

1. **Kanhaiyalal v. Rameshwar and Ors.** AIR 1983 SC 503
2. **Gangadhar Dhal & Ors Vs. Bata Krushna Dhal & Ors** AIR 1995 Orissa 66

30. In the present case, deceased respondent no.3/defendant no.2 Gopi Ram died on 18<sup>th</sup> December, 1989 i.e., during the pendency of suit before the Ld. trial court, appellant/plaintiff had moved an application under Order 22 Rule 4 read with section 151 CPC on 30<sup>th</sup> January, 1991 for bringing on record his legal heirs on the ground that appellant has come to know about the death of said defendant only on 16<sup>th</sup> January, 1991. Perusal of record shows that notice of the application was sent to the L.Rs of defendant no.2 who did not turn up and were proceeded ex parte. There was another application moved by respondent no.1/defendant no.3-Fateh Singh before the learned trial court wherein a prayer was made that the entire suit be abated as respondent no.3/defendant no.2 had died and steps have not been taken to bring on record his L.Rs. The said application was disposed of by

the learned trial court vide orders dated 24<sup>th</sup> July, 1992 wherein it has been noted that respondent no.1/defendant no.3 had failed to intimate the court the factum of death of defendant no.2 which he was obliged to do as per provisions of Order 22 Rule 10A CPC. Even after the expiry of statutory period of 90 days, counsel for respondent no.1/defendant no.3 did not make any request for abatement of suit. The application mentioning the death of respondent no.3/defendant no.2 and praying for abatement of suit was moved on 16<sup>th</sup> January, 1991. Thereafter the said application was never pressed before the court and when the case was at the stage of final arguments, counsel for defendant no.3 insisted for disposal of the said application. The learned trial court observing that defendant no.2 was only a performa party and no relief was claimed against him, dismissed the said application holding that suit does not abate on the failure to implead L.Rs. of performa defendant.

31. It may be noted that the above order was passed on 24<sup>th</sup> July, 1992. The main suit was disposed of on 2<sup>nd</sup> June, 1995. The order dated 24<sup>th</sup> July, 1992 was never challenged by respondent no.1/defendant no.3. The said finding had become final. Ld. first appellate court had not considered this aspect of the matter. Further in the case **Kanhaiyalal v. Rameshwar and Ors.** AIR 1983 SC 503, Supreme Court held that failure to bring on record L.Rs in time of performa respondent does not result in abatement of appeal. Suit does not abate if the deceased defendant was only one of the defendants and a performa party with no relief is claimed against him. In

the present case also, no relief is claimed against respondent no.3/defendant no.2, as such finding regarding abatement of suit given by the first appellate court because of death of defendant no.2 is contrary to law. Judgment relied up by Counsel for respondent has no applicability to the facts of the present case.

32. In view of above discussion, I answer both substantial questions of law formulated at the time of admission, in the affirmative in favour of appellant/plaintiff and against respondent no. 1/defendant no. 3.

33. Appeal is allowed. The judgment/decreed dated 14.08.1996 passed by Ld. ADJ, Delhi is set aside and the judgment and decree dated 2<sup>nd</sup> June, 1995 passed in Suit No.R-194/1993 by learned Sub Judge, Delhi are restored. There shall be no order as to costs.

34. Respondent no.1/defendant no.3 is given one month time from today to vacate the suit property.

**Veena Birbal, J.**

October 30<sup>th</sup> , 2009  
ssb