



2025:DHC:2056



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RSA 200/2015

JAI PRAKASH AGGARWAL

.....Appellant

Through: Mr. Alok Kumar, Sr. Adv. with Ms. Manisha A. Narain, Mr. Amit Kumar Singh, Mr. Varun Maheshwari, Mr. Manan Soni, Mr. Sandeep Singh Somaria, Advs.

versus

KIRAN CHAWLA & ANR

.....Respondents

Through: Mr. Siddhant Nath, Standing counsel with Mr. Bhavishya Makhija, Mr. Amaan Khan, Advs. for MCD.

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*Date of Decision: 18.03.2025.***CORAM:****HON'BLE MR. JUSTICE DINESH KUMAR SHARMA****J U D G M E N T****DINESH KUMAR SHARMA, J. (Oral)**

1. The present regular second appeal filed under Section 100 CPC read with order XLII CPC challenging the judgment and decree dated 28.02.2015 passed by learned ADJ-13 (Central), Tis Hazari Courts, Delhi in RCA No. 3/2011 titled *Shri Jai Prakash Aggarwal vs. Ms. Kiran Chawla & Ors.* filed by appellant against the judgment dated 29.01.2011 passed by learned Civil Judge, Delhi in Suit No. 795/08/02.
2. The learned First Appellate Court while hearing the civil appeal challenging the judgment and decree dated 29.01.2011 passed by



learned Civil Judge, Delhi in Civil Suit No. 795/08/02 dismissed the appeal and upheld the order of the learned Trial Court. Aggrieved of this the appellant filed the present appeal challenging the impugned order on the ground that the same is against the facts of the case and law applicable on it whereby the learned First Appellate Court failed to appreciate that the lease of the building includes the land on which the building stands and the doctrine of frustration cannot be invoked on destruction or demolition of a building under lease where privity of contract and estate is created. The appellant has also challenged the impugned judgment on the ground that learned First Appellate Court failed to appreciate that there was no termination of tenancy by the Respondent and that the rent was regularly being paid to the Respondent which was duly acknowledged by receipts. Lastly, the Appellant raised the ground that the impugned judgment was not in sync with the judgment of the Apex Court passed in **T. Lakshmipathi vs. R. Nithyananda Reddy**, (2003) 5 SCC 150, relied by the learned First Appellate Court.

3. In the Memorandum of Appeal the appellant raised the following substantial question of law:
*(i) Whether the judgments of the Courts below is per incuriam and is in ignorance of the Law settled by the Hon'ble Supreme Court in **Shaha Ratansi Khimji & Sons Vs. Proposed Kumbhar Sons Hotel P. Ltd. & Ors.** in Civil Appeal No. 127 of 2007 decided on 10.07.2014.*
4. Notice was issued to the respondents. The respondent No.1 was proceeded ex-parte as recorded in order dated 02.09.2015. On



02.09.2015 the Court formed the following question of law:

Whether the judgments of the Courts below are per incuriam and are in ignorance of the law settled by the Hon'ble Supreme Court in Shaha Ratansi Khimji & Sons Vs. Proposed Kumbhar Sons Hotel P. Ltd. & Ors. in Civil Appeal No. 127 of 2007 decided on 10.07.2014.

5. Sh. Alok Kumar, learned senior counsel for the appellant states that the impugned order is liable to be set aside as the same is erroneous as having been passed on the basis of judgment in **Vannattankandy Ibrayi** (*Supra*). Learned senior counsel submits that in **Shaha Ratansi Khimji & Sons** (*Supra*) the Apex Court relied upon **T. Lakshmi pati** (*Supra*) and *inter alia* held that the decision rendered in **Vannattankandy Ibrayi** (*Supra*) case does not correctly lay down the law.
6. Brief factual matrix of the case is that the appellant is the tenant of Shop No. 27 in Property No. 5863, Swadeshi Market, Sadar Bazar, Delhi 110008, under Smt. Kiran Chawla and Smt. Sumitra Devi. Learned senior counsel submits that Smt. Kiran Chawla had filed a suit against the appellant for permanent and mandatory injunction bearing CS No. 407/2002 alleging therein that the appellant being the tenant in respect of Shop No. 27 in Property No. 5863, Swadeshi Market, Sadar Bazar, Delhi 110008 along with tenant of Shop No.28 are raising unauthorized constructions. It is an admitted fact that on 31.12.2001 fire occurred in the Sadar Bazar area in which Shop No.27 and 28 bearing Property No. 5863, Swadeshi Market, Sadar Bazar, Delhi 110008 were gutted/damaged in fire along with the adjoining shops. The Deputy Commissioner, North issued an order vide no.



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SDM/SB/Fire/2002/242-249 dated 14.02.2002 directing all the owners to observe certain precautions and rules in reconstruction of the gutted shops. In the suit Smt. Kiran Chawla stated that Shop No. 28 had already been constructed. However, it was alleged that on 03.09.2002 when the plaintiff visited her shop she found that the present appellant and the tenant in Shop No.28 in collusion with other defendants are digging the basement without any knowledge, consent or permission of the landlady. The Landlady also found the construction material on 04.09.2002.

7. The present appellant besides filing the written statement also filed the counter claim stating therein that the landlords are bound to reconstruct the shop as it originally existed. It was stated that landlord promised to reconstruct the subject property. It was further stated that Smt. Kiran Chawla, plaintiff in her affidavit dated 03.04.2002 admitted that she will reconstruct the property. It was further stated that another landlady Smt. Sumitra Devi also filed an affidavit dated 15.02.2002 before the SDM concerned stating therein that she will rebuild the premises. In the counter claim it was stated that defendant No.1/landlords are bound to reconstruct the shop bearing No. 27 bearing Property No. 5863, Swadeshi Market, Sadar Bazar, Delhi 110008.
8. Learned senior counsel submits that the suit filed by the plaintiff was dismissed on 07.08.2003 and in the counter claim plaintiff was proceeded ex-parte on 07.08.2003. Initially MCD was deleted from the array of the parties on 27.08.2003 but was again added on 14.10.2003.
9. The counterclaim filed by the appellant was dismissed on twin grounds.



Firstly, the appellant should have made Smt. Sumitra Devi as a party and secondly, since the shop had completely been destroyed the tenancy gets extinguished and no direction can be issued for the construction of the shop. Learned Trial Court had also noted that the tenant Sh. Rajesh Aggarwal did not file any counter claim. Aggrieved of this the appellant herein filed the first appeal. Learned First Appellate Court *inter alia* held that dismissal of counter claim on the ground of non-joining of Smt. Sumitra Devi as party was not justified. However, in respect of the direction as to whether the tenant can compel the landlord to construct the demised shop learned First Appellate Court relied upon *Mahadeo Prosad Shaw vs. Calcutta Dyeing and Cleaning Co.*, AIR D1961 Cal 70 as well as *Vannattankandy Ibrayi* (*Supra*) and *inter alia* held that since by natural calamity the subject matter of the tenancy stands destroyed the rent agreement becomes void and hence the tenant even cannot ask for a mandatory injunction from the Court directing the landlady to construct the shop.

10. In regard to the affidavit of the landlady, learned First Appellate Court *inter alia* held that even if the shop is reconstructed, the appellant tenant has no right to put himself back in the newly constructed shop because the shop under tenancy had been destroyed by fire rendering the rent agreement void on account of the reason that the subject matter of the tenancy ceased to exist.
11. Sh. Alok Kumar, learned senior counsel for the appellant states that the finding of the learned Trial Court and learned First Appellate Court is



liable to be rejected out rightly in view of the judgment of the Supreme Court in **Shaha Ratansi Khimji** (*Supra*). Learned senior counsel has also submitted that the appellant did not get the opportunity before the learned First Appellate Court to assist the Court regarding reliance upon the judgment of **Vannattankandy Ibrayi** (*Supra*). Learned senior counsel also submits that the learned Appellate Court has fallen into error by *inter alia* holding that since the tenanted structure has been destroyed or demolished, the right transferred under the lease has come to an end and the relationship of lessor and lessee ceases.

12. This Court did not have the privilege to hear the submissions on behalf of respondent No.1. Learned counsel for respondent No.2 states that the MCD is a performa party. However, learned counsel submits that if the permission is granted to reconstruct the shop, the same may be granted subject to the present norms, rules and regulations. The order of the learned First Appellate Court indicates that the learned First Appellate Court has relied upon the judgment of the Supreme Court in **Vannattankandy Ibrayi** (*Supra*). The Apex Court in **Shaha Ratansi Khimji & Sons** (*Supra*) was hearing an appeal against the concurrent finding of the lower Courts that the appellant's tenancy right had lapsed. The Apex Court in view of the conflicting judgment of **Vannattankandy Ibrayi** (*Supra*) and **T. Lakshnipati** (*Supra*) referred the matter to the bench of three judges vide order dated 05.01.2007.
13. The Apex Court noted that in the case of **Vannattankandy Ibrayi** (*Supra*) the Court had formulated two questions for consideration.
 - (a) *Whether the tenancy in respect of the premises governed by the*



Kerala Buildings (Lease and Rent Control) Act (hereinafter referred to as [pin]” the State Rent Act”) is extinguished by destruction of the subject-matter of tenancy i.e. the premises by natural calamities, and

(b) On the destruction of property whether the civil court has jurisdiction to entertain and try the suit for recovery of possession of land brought by the landlord.

14. It was also noted that in ***T. Lakshmi pati*** (*Supra*) it was *inter alia* held that the lease of a building includes the land on which the building stands. So even if the building is destroyed or demolished, the lease is not determined so long as the land beneath it continues to exist. It was further *inter alia* held that the doctrine of frustration cannot be invoked on destruction or demolition of a building under lease where not only privity of contract, but privity of estate is also created.
15. The Apex Court in **Shaha Ratansi Khimji & Sons** (*Supra*) after taking into account Section 105, 108, 106 and 111 of the Transfer of Property Act *inter alia* held as under:

“[22] Immovable property means landed property and may include structures embedded in the earth such as walls or buildings for the permanent beneficial enjoyment. A lease of immovable property is a transfer of right to enjoy such property in consideration of price paid as per Section 105 of the T.P. Act. By way of lease, a right and interest is created which stands transferred in favour of the lessee. The immovable property, thereafter, only can be reverted back on determination of such right and interest in accordance with the provisions of the T.P. Act. Therefore, once the right of lease is transferred in favour of the lessee, the destruction of a house/building constructed on the lease property does not determine the tenancy rights of occupant which is incidental to the contract of the lease which continues to



exist between the parties.

[23] The Kerala High Court in V. Kalpakam Amma vs. Muthurama Iyer Muthurkrishna Iyer, 1995 AIR(Ker) 99, held that there cannot be a building without a site and once a structure is put up in the land the site becomes the part of the structure and, thereafter the site becomes part of the building. The Court further held:

"14. The Supreme Court had also occasion to consider the meaning of the word 'building' in D.G. Gouse and Co, v. State of Kerala, 1980 2 SCC 410. It was a case challenging the constitutionality of the Kerala Building Tax Act, 1975. Paragraph 21 of the judgment deals with the definition of the word 'building' It read thus:- "The word "building" has been defined in the oxford Dictionary as follows:

That which is built; a structure, edifice; now a structure of the nature of a house built where it is to stand.

Entry 49 of Schedule VII of the Constitution of India therefore includes the site of the building as its component part. That, if we may say so, inheres in the concept or the ordinary meaning of the expression "building".

15. A somewhat similar point arose for consideration in Corporation of the City of Victoria v. Bishop of Vancouver Island, 1921 AIR(PC) 240 with reference to the meaning of the word "building" occurring in Section 197 (1) of the Statutes of British Columbia 1914. It was held that the word must receive its natural and ordinary meaning as "including the fabric or which it is composed, the ground upon which its walls stand and the ground embraced within those walls". That appears to us to be the correct meaning of the word 'building'.



15A. In Stroud's Judicial Dictionary (Vol.I. 5th Edn.), the word 'building' is defined thus: "What is a building must always be a question of degree and circumstances". In Black's Law Dictionary (5th Edn.), the meaning of the word building is given as follows: "A structure or edifice enclosing a space within its walls, and usually, but not necessarily, covered with a roof. In Bourvier's Law Dictionary (A Concise Encyclopedia of the Law Vol.I. 3rd Revision) the meaning of building is given as "an edifice, erected by art, and fixed upon or over the soil, composed of brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed."

16. The above are some of the natural meanings that are given to the word 'building'. Adopting the above meaning, the word 'building' must take in the site also, as part of it. If that is so, without site, there cannot be a structure and the site becomes an integral part of the building. Without a site, the super structure of the building on the land cannot normally exist. Thus, when there is a lease of a building, such lease would normally take in the site unless it specifically excluded from the land."

*[24] Similar issue was considered by the Bombay High Court in **Hind Rubber Industries (P) Ltd. vs. Tayebhai Mohammedbhai Bagasarwalla**, 1996 AIR (Bom) 389. In the said case, the High Court observed as under:*

"16. In my view, the correct legal position in this country appears to be that the destruction of the tenanted structure does not extinguish the tenancy and the right of occupation of the tenant under the contract of tenancy continues to exist between the parties. Merely because the tenanted structure has been destroyed or demolished, the right transferred under the lease cannot be said to have come to an end, and



the relationship of lessor and lessee continues to exist. The destruction of the tenanted premises does not destroy the tenancy rights nor does it bring to an end the relationship of lessor and lessee or for that matter landlord and tenant.

The lessee continues to be lessee in the property leased even after its destruction by fire or such like event unless the lessee exercises his option of treating such lease as void. It may be observed that Section 108 of the T.P. Act deals with the rights and liabilities of lessor and lessee and Part-B and clause (e) of Section 108 provides that if the property leased in wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was leased by fire, tempest or flood or violence of any army or of a mob or other irresistible force, such lease may be rendered void at the option of the lessee provided of course that such injury to the lease property has not been occasioned by the wrongful act or default of the lessee. That means that right of the lessee in the leased property subsists even if the leased property has been destroyed by fire, tempest or flood or violence of an army or of a mob or other irresistible force unless the lessee exercises his option that on happening of such events the lease has been rendered void.

By necessary corollary, therefore, if the leased property is destroyed wholly by fire, the lease cannot be said to be extinguished, nor can it be said that lessee's right in the leased property has come to an end unless the lessee exercises such option. The express provision in clause (e) of Section 108 leaves no manner of doubt that on destruction of leased property by fire, the lease cannot be said to be extinguished, automatically and in this view of the matter the statement of law made in Article 592 of American Jurisprudence and para 2066 of Woodfall on landlord



and tenant and relied upon by the learned counsel for the Plaintiff/Respondent cannot be applicable in our country. The view of the Kerala High Court in Dr. V. Siddharthan's case: is also not acceptable because of no proper construction given to Section 108(e) of the T.P. Act."

[25] Adverting to one of the situations similar to that, now before us, the two Judge-Bench of this Court in Vannattankandy Ibrayi observed as under.

"20. From the aforesaid decisions there is no doubt that if a building is governed by the State Rent Act the tenant cannot claim benefit of the provisions of Sections 106, 108 and 114 of the Act. Let us test the arguments of learned counsel for the appellant that on the destruction of the shop the tenant can resist his dispossession on the strength of Section 108(B)(e). In this case what was let out to the tenant was a shop for occupation to carry on business. On the destruction of the shop the tenant has ceased to occupy the shop and he was no longer carrying on business therein. A perusal of Section 108(B)(e) shows that where a premises has fallen down under the circumstances mentioned therein, the destruction of the shop itself does not amount to determination of tenancy under Section 111 of the Act. In other words there is no automatic determination of tenancy and it continues to exist. If the tenancy continues, the tenant can only squat on the vacant land but cannot use the shop for carrying on business as it is destroyed and further he cannot construct any shop on the vacant land. Under such circumstances it is the tenant who is to suffer as he is unable to enjoy the fruits of the tenancy but he is saddled with the liability to pay monthly rent to the landlord. It is for such a situation the tenant has been given an option under Section 108(B)(e) of the Transfer of Property Act to render the lease of the



premises as void and avoid the liability to pay monthly rent to the landlord. Section 108(B) (e) cannot be interpreted to mean that the tenant is entitled to squat on the open land in the hope that in future if any shop is constructed on the site where the old shop existed he would have right to occupy the newly-constructed premises on the strength of original contract of tenancy. The lease of a shop is the transfer of the property for its enjoyment. On destruction of the shop the tenancy cannot be said to be continuing since the tenancy of a shop presupposes a property in existence and there cannot be subsisting tenancy where the property is not in existence. Thus when the tenanted shop has been completely destroyed, the tenancy right stands extinguished as the demise must have a subject-matter and if the same is no longer in existence, there is an end of the tenancy and therefore Section 108(B)(e) of the Act has no application in case of premises governed by the State Rent Act when it is completely destroyed by natural calamities."

23. In V. Kalpakam Amma the Kerala High Court relying upon the definition of "building" in the State Rent Act held that there cannot be a building without a site and once a structure is put up in the land the site becomes part of the structure and thereafter the site becomes part of the building and on that basis the High Court held that once the premises covered by the State Rent Act is raised to the ground the tenancy continues to survive in respect of the vacant land. In our view this is not the correct interpretation of Section 2(1) of the State Rent Act. Section 2(1) uses the words "part of a building or hut". The words "part of the building" do not refer to the land on which the building is constructed but refer to any other superstructure which is part of that main building e.g. in addition to the main building if there is any other superstructure in the said premises i.e. motor garage or servant quarters



then the same would be part of the building and not the land on which the building has been so constructed. So far the appurtenant land which is beneficial for the purpose of use of the building is also a part of the building. Thus according to the definition of "building" in the State Rent Act the building would include any other additional superstructure in the same premises and appurtenant land. We are, therefore, of the view that the interpretation put by the Kerala High Court on Section 2(1) for holding that the words "part of a building" mean the land on which the building has been constructed is not correct. The provisions of the State Rent Act clearly show that the State Rent Act is a self-contained Act and the rights and liabilities of landlord and tenant are determined by the provisions contained therein and not by the provisions of the Transfer of Property Act or any other law. The rights of a landlord under the general law are substantially curtailed by the provisions of the State Rent Act as the Act is designed to confer benefit on tenants by providing accommodation and to protect them from unreasonable eviction. In the present case what we find is that the subject-matter of tenancy was the shop room which was completely destroyed on account of accidental fire and it was not possible for the tenant to use the shop for which he took the shop on rent. After the shop was destroyed the tenant, without consent or permission of the landlord, cannot [pic] put up a new construction on the site where the old structure stood. If it is held that despite the destruction of the shop, tenancy over the vacant land continued unless the tenant exercises his option under Section 108(B) (e) of the Act the situation that emerges is that the tenant would continue as a tenant of a non-existing building and liable to pay rent to the landlord when he is unable to use the shop. The tenancy of the shop, which was let out, was a superstructure and what is protected by the State Rent Act is the occupation of the tenant in the



superstructure. If the argument of the appellant's counsel is accepted then it would mean that although the tenant on the destruction of the shop cannot put up a new structure on the old site still he would continue to squat on the vacant land. Under such situation it is difficult to hold that the tenancy is not extinguished on the total destruction of the premises governed by the State Rent Act. Under English law, in a contractual tenancy in respect of building and land the liability to pay the rent by the tenant to the landlord continues even on the destruction of the building whereas there is no liability of the tenant to pay rent to the landlord on the destruction of the premises governed by the State Rent Act. Therefore, the view taken by the Bombay High Court in Hind Rubber Industries (P) Ltd. does not lay down the correct view of law. This Court a number of times has held that any special leave petition dismissed by this Court without giving a reason has no binding force on its subsequent decisions. Therefore, the two aforesaid cases relied on by counsel for the appellant are of no assistance to the argument advanced by him.

24. However, the situation would be different where a landlord himself pulls down a building governed by the State Rent Act. In such a situation the provisions contained in Section 11 of the State Rent Act would be immediately attracted and the Rent Control Court would be free to pass an appropriate order.

25. Coming to the next question whether the civil court was competent to entertain and try the suit filed by the respondent for recovery of possession of the vacant land. As already stated above, the tenancy in the present case was of a shop room which was let out to the tenant. What is protected by the State Rent Act is the occupation of the tenant in the superstructure. The subject-matter of tenancy having been completely



destroyed the tenant can no longer use the said shop and in fact he has ceased to occupy the said shop. Section 11 of the State Rent Act does not provide for eviction of the tenant on the ground of destruction of the building or the superstructure. Thus when there is no superstructure in existence the landlord cannot claim recovery of possession of vacant site under the State Rent Act. The only remedy available to him is to file a suit in a civil court for recovery of possession of land. In view of the matter the civil court was competent to entertain and try the suit filed by the respondent landlord."

[26] Subsequently, another two-Judge Bench of this Court considered the same question in T. Laxmipathi, In the said case this Court noticed the decision of Bombay High Court in Hind Rubber Industries and other High Courts and observed as under.

"20. The tenancy cannot be said to have been determined by attracting applicability of the doctrine of frustration consequent upon demolishing of the tenancy premises. Doctrine of frustration belongs to the realm of law of contracts; it does not apply to a transaction where not only a privity of contract but a privity of estate has also been created inasmuch as lease is the transfer of an interest in immovable property within the meaning of Section 5 of the Transfer of Property Act (wherein the phrase "the transfer of property" has been defined), read with Section 105, which defines a lease of immovable property as a transfer of a right to enjoy such property. (See observations of this Court in this regard in Raja Dhruv Dev Chand v. Raja Harmohinder [pic]Singh6.) It is neither the case of the appellants nor of Respondents 2 and 3 that the subject-matter of lease was the building and the building alone, excluding land whereon the building forming the subject-matter



of tenancy stood at the time of creation of lease.

22. A lease of a house or of a shop is a lease not only of the superstructure but also of its site. It would be different if not only the site but also the land beneath ceases to exist by an act of nature. In the present case the appellants who are the successors of the tenancy right have demolished the superstructure but the land beneath continues to exist.

The entire tenancy premises have not been lost. Moreover, the appellants cannot be permitted to take shelter behind their own act prejudicial to the interest of Respondent 1 under whom Respondents 2 and 3 were holding as tenants and then inducted the appellants.

*24. We are, therefore, of the opinion that in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist; more so when the building has been destroyed or demolished neither by the landlord nor by an act of nature but solely by the act of the tenant or the person claiming under him. Ample judicial authority is available in support of this proposition and illustratively we refer to **George J. Ovungal v. Peter**, 1991 AIR(Ker) 55, **Rahim Bux v. Mohd. Shafi**, 1971 AIR(All) 16, **Hind Rubber Industries (P) Ltd. and Jiwanlal & Co. v. Manot & Co. Ltd**, 1960 64 CalWN 932. The Division Bench decision of the Kerala High Court in **V. Sidharthan (Dr) v. Pattiori Ramadasan** appears to take a view to the contrary. But that was a case where the building was totally destroyed by fire by negligence of the tenant. It is a case which proceeds on very peculiar facts of its own and was rightly dissented from by the*



Bombay High Court in Hind Rubber Industries (P) Ltd. v. Tayebhai Mohammedbhai Bagasarwalla."

[27] After referring to the aforesaid two authorities, we are required to scrutinize which view is in consonance with the statutory provisions enshrined under the Transfer of Property Act. We have already referred to the statutory provisions that control the relationship between the lessor and the lessee, the definition of lease as engrafted under Section 105, the rights and liabilities of lessor and lessee enshrined under Section 108 and the conceptual circumstances and the procedure which find mention for determination of lease under Section 111 of the Act.

[28] In Vannattankandy Ibrayi the learned Judges referred to the decision on common law, the principles in American jurisprudence, and various decisions of the High Courts and adverted to two categories of tenants, namely, a tenant under the Transfer of Property Act and the other under the State Rent Laws and proceeded to interpret Section 108 (B) (e) to hold that where a premises has fallen down under the circumstances mentioned therein, the destruction of the shop itself does not amount to determination of tenancy under Section 111 of the Act and there is no automatic determination of tenancy and it continues to exist. If the tenancy continues, the tenant can only squat on the vacant land but cannot use the shop for carrying on business as it is destroyed and further he cannot construct any shop on the vacant land. Under such circumstances it is the tenant who is to suffer as he is unable to enjoy the fruits of the tenancy but he is saddled with the liability to pay monthly rent to the landlord. It is for such a situation the tenant has been given an option under Section 108(B)(e) of the Transfer of Property Act to render the lease of the premises as void and avoid the liability to pay monthly rent to the landlord. Taking note of this facet, the Court proceeded to rule that Section 108(B)(e) cannot be interpreted to mean that the tenant is entitled to squat on the open land in the hope that



in future if any shop is constructed on the site where the old shop existed he would have right to occupy the newly-constructed premises on the strength of original contract of tenancy because lease of a shop is the transfer of the property for its enjoyment and on destruction of the shop the tenancy cannot be said to be continuing since the tenancy of a shop presupposes a property in existence and there cannot be subsisting tenancy where the property is not in existence. It was further laid down that when the tenanted shop has been completely destroyed, the tenancy right stands extinguished as the demise must have a subject-matter and if the same is no longer in existence, there is an end of the tenancy.

[29] As we notice from the aforesaid analysis it is founded on an interpretation of Section 108 (B) (e) by assuming when a building or structure is leased out, it is the superstructure that is leased out in exclusivity. As we perceive, the language employed in Section 108 (B) (e) does not allow such a construction. The singular exception that has been carved out is the wrongful act or default on the part of the lessee which results in the injury to the property that denies the benefit. In all other circumstances which find mention under Section 111 of the Act, are the grounds for determination of the lease. This is the plainest construction of the provision and there is no other room for adding to or subtracting anything from it. Be it stated, Section 108 postulates the rights and liabilities of lessor and lessee. If a right is not conferred by the Statute on the lessor for determination, except one exception which is clearly stipulated there in Section 108 (B) (e) by the Legislature, it would not be permissible for the Court to add another ground of the base or fulcrum of ethicality, difficulty or assumed supposition.

*[30] In T. Lakshmipathi's case, the Court referred to the observations made by a three-Judge Bench in **Raja Dhruv Dev Chand v. Harmohinder Singh and another**, 1968*



AIR(SC) 1024 wherein it has been held that doctrine of frustration belongs to the realm of law of contracts; it does not apply to a transaction where not only a privity of contract but a privity of estate has also been created inasmuch as lease is the transfer of an interest in immovable property within the meaning of Section 5 of the Transfer of Property Act. In the said case, it has been further opined that under a lease of land there is a transfer of right to enjoy that land. If any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let out, because of fire, tempest, flood, violence of an army or a mob, or other irresistible force, the lease may at the option of the lessee, be avoided and that is the rule incorporated in Section 108 (e) of the Transfer of Property Act and applies to leases of land, to which the Transfer of Property Act applies.

[31] It is apt to note here that when there is a lease of a house or a shop it cannot be treated as a lease of structure but also a lease of site. The Court referred to the decision in **D.G. Gose & Co. (Agents) (P) Ltd. v. State of Kerala, 1980 2 SCC 410** wherein this Court held that the site of the building is a component part of the building and, therefore, inheres in it the concept or ordinary meaning of the expression "building". The Court also placed reliance on *Corpn. of the city of Victoria v. Bishop of Vancouver Island, 1921 AIR(PC) 240.*

[32] It has been further opined that once a tenancy is created in respect of a building standing on the land it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which is the site of the building continues to exist. This interpretation, as we find, is in accord with Section 108 of the Act. It is reflectible that in *Vannattankandy Ibrayi's case, the two-Judge Bench observed that the rights stand extinguished as on the distinction of the demise, for there is*



destruction of the superstructure and in its non-existence there is no subject matter. Thus, the land has been kept out of the concept of subject matter. In our considered opinion, the Court in the said case failed to appreciate that there are two categories of subject-matters, combined in a singular capsule, which is the essence of provision under the Transfer of Property Act and not restricted to a singular one, that is, the superstructure. In T. Lakshmi pathi the Court took note of the fact that the land and superstructure standing on it as a singular component for the purpose of tenancy. It is in tune with the statutory provision.

Therefore, we agree with the proposition stated therein to the effect that "in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist". On the touchstone of this analysis, we respectfully opine that the decision rendered in Vannattankandy Ibrayi does not correctly lay down the law and it is, accordingly, overruled."

16. Thus, the Apex Court after considering the entire law on the issue categorically held that if the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject-matter of demise. It was specifically held that the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist. In view of the categorical finding, the Court considers that there is nothing further which could detain this Court to say further. Hence in view of the discussion made hereinabove, the Court is of the considered view that the lease of building includes that land on which the building



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stands or even if the building is destroyed or demolished, the lease is not extinguished as long as the land beneath it continues to exist. The Doctrine of frustration also cannot be invoked on destruction or demolition of a building under lease.

17. In view of the above, the order of the learned Trial Court and learned First Appellate Court is set aside. The appeal is allowed. The appellant is permitted to construct Shop No. 27 in Property No. 5863, Swadeshi Market, Sadar Bazar, Delhi-110008 at his own expenses. The construction shall be carried out in accordance with the present norms, rules and regulations of the MCD. The present appeal along with pending application(s), if any, stands disposed of.

DINESH KUMAR SHARMA, J

MARCH 18, 2025

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