
(2015) 07 DEL CK 0229
In the Delhi High Court
Case No : CS(OS) 119 of 1980

Anil Kumar Khanna and Others APPELLANT
Vs
The Indian Tourism Development Corporation Ltd. RESPONDENT

Date of Decision : 17-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 12(1)(c), Order 20 Rule 12(1)(c)(iii), Order 20 Rule 12(iii), Order 47 Rule 1
Constitution of India, 1950 — Article 136, 141
Land Acquisition Act, 1894 — Section 4

Citation : (2015) 8 AD 145 : (2015) 222 DLT 119

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Sacchin Puri, Kaadambari Puri and Vinay Dubey, for the Appellant;
Y.P. Narula and Sanjay Gupta, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Jayant Nath, J—By the present order I shall dispose of the objections to the report of the Local Commissioner filed by plaintiff No. 1, plaintiff No. 2, plaintiff No. 3 and the defendant respectively. The plaintiffs filed the present suit for recovery of possession of property commonly known as Jiwan Roop Mansion "L" Block, Radial Road, Connaught Circus, New Delhi. This Court vide judgment dated 5.2.2001 passed a decree for possession of the suit property. The Court also directed that the plaintiff shall be entitled to a preliminary decree for mesne profits of Rs. 30,000/- for the period from 1.1.1980 till 31.1.1980. Plaintiff was also held entitled to interest @12% per annum on the mesne profits determined from the date of its accruing till date. Pendente lite interest of 6% per annum from the date of decree till the date of payment was awarded. The court also held that w.e.f. 1.2.1980 an inquiry is required to be conducted as to the amount of mesne profits that the plaintiffs are entitled to. Mr. Bhawani Shanker Bannerjee, Advocate was appointed as Local Commissioner to determine the amount of mesne profits payable to the plaintiffs by the defendant from 1.2.1980

till date of delivery of possession.

2. Against the above judgment, the defendant filed an appeal RFA(OS)18/2001. The appeal was dismissed on 20.10.2005. An SLP was also filed by the defendant which was dismissed on 13.2.2006. However, the defendant was given time by the Supreme Court to vacate the premises upto 28.2.2007 on the defendant filing usual undertaking. The defendant vacated the premises on 28.2.2007.

3. The Local Commissioner has now filed his final report dated 31.8.2013 determining the mesne profits w.e.f. 1.2.1980 till 28.2.2007. Plaintiffs and defendant have filed their objections to the report which are being disposed of by the present order.

4. Coming to the report, in paragraph 6 of his report the Local Commissioner has framed questions that arose for determination of mesne profits/damages. The questions framed are as follows:--

"(a) What was the total area of the suit premises occupied by the defendant during the period 01.02.1980 to 28.02.2007?

(b) Whether it is necessary for the Local Commissioner to go into the question of carpet area or super area for correct quantification of the mesne profits?

(c) Whether in view of the order dated 13.2.2006 passed by the Supreme Court of India granting time upto 28.2.2007 to vacate the premises the defendant was not in wrongful and illegal possession as the orders of this Court merged with the orders of the Supreme Court and the present enquiry of determining mesne profits by the Local Commissioner is without jurisdiction?

(d) Whether the plaintiffs can claim mesne profits only for the period of three years in view of Order 20 Rule 12 CPC?

(e) What amount are the plaintiffs entitled to claim as mesne profits?"

5. As far as question No. (c) and (d) are concerned the Local Commissioner has not answered these issues holding that these are issues to be determined by the Court.

6. As far as question No. (a) is concerned i.e. area of the premises, the Local Commissioner noted that the admitted position in the pleadings including the written statement filed by the defendant, is that the defendant is in legal possession of property measuring 297.3 sq. meters. Keeping into account the pleadings and the fact that the defendant has belatedly sought to challenge the area in question, the Local Commissioner concluded that the area under occupation of the defendant was 297.3 sq. meters.

7. On question (b), namely, super area and carpet area, the Local Commissioner has noted that the property was let out by the Custodian of Enemy Property from 1.1.1966 to the defendant on a monthly rent of Rs. 345/- for the whole premises without separately specifying covered area or carpet area or super area. The

plaintiffs have also claimed mesne profit for the period 1.1.1980 to 31.1.1980 at Rs. 30,000/- per month for the unit of 297.3 sq. meters as a whole and not separately on the basis of carpet area, covered area or super area. It is further pointed out that no such question was raised during the course of trial or before the Division Bench or the Supreme Court. It is only during the course of the present enquiry that such a plea has been raised. This plea was raised for the first time on 22.2.2007 when the defendant filed IA No. 2063/2007 for appointment of a Local Commissioner or an Architect for conducting an enquiry into the actual area occupied by the defendant and how much was carpet area. This Court passed an order dated 23.2.2007 accepting that the Local Commissioner can go into the said issue. The Local Commissioner appointed an Architect who gave his report. The Local Commissioner noted that even if the report of the Architect is taken into account the covered area as per report comes to 292.71 sq. meters i.e. 4.59 sq. mts. less than the admitted overall area under the occupancy of the defendant. The Local Commissioner, however, held that it is proper to deal with the property as a whole unit and hence took the area as 297.39 meters as a whole for claiming and computing the mesne profits of the unit.

8. As far as question (e) is concerned i.e. the determination of the amount of mesne profits payable by the defendant, the Local Commissioner noted that the Single Judge has passed a preliminary decree dated 5.2.2001 and granted Rs. 30,000/- to the plaintiffs as mesne profits for the month 1.1.1980 to 31.1.1980. The Local Commissioner noted that no substantial clinching and conclusive evidence had been led either by the plaintiffs or the defendant for enabling him to have a comparative study of the market rate of the rent in or around the premises of the suit for a particular year except some isolated evidence of registered lease deeds for the year 1997 and 2005 (Ex. DW1/P2 and Ex. DW1/P1). The Local Commissioner took the amount of Rs. 30,000/- to be correct and fair amount of mesne profits for the period 1.1.1980 to 31.1.1980 in as much as it was the determined rate granted by the Single Judge and not a subject matter of challenge in the appeals filed before the Division Bench or Supreme Court. The Local Commissioner noted various judgments of this Court and concluded that this Court in various cases has granted 15% cumulative increase every year on the contractual rate of rent. The Local Commissioner awarded 15% increase of rent every year from the rate of rent of last year. The Local Commissioner also awarded Simple Interest @12% per annum on the arrears of mesne profits payable from the end of each month of illegal occupation. According to learned counsel for the plaintiffs complete calculations have not been filed alongwith the report, but based on the report the plaintiff should be entitled to about Rs. 72.4 crores as mesne profits.

9. As noted above, the plaintiffs No. 1, 2, 3 and defendant have respectively filed objections. Plaintiffs No. 1, 2 and 3 seek enhancement of mesne profits while defendant seeks to strike down the report of the Local Commissioner/reduction of awarded mesne profits.

OBJECTIONS OF DEFENDANT

10. Learned senior counsel appearing for the defendant has raised the following objections with regard to the findings recorded by the Local Commissioner regarding the report/answers stated by the Local Commissioner to the questions framed. :

"(i) Learned senior counsel has submitted that the order of the Supreme Court dated 13.2.2006 granting time to vacate the suit premises upto 28.2.2007 got merged with the orders dated 5.2.2001 and 20.10.2005 passed by the Single Judge and the Division Bench of this Court. Hence, it is urged that in view of the extension of time granted by the Supreme Court the defendant became a lawful occupant of the suit premises and not a trespasser. Hence there was no occasion for grant of mesne profits and the report of the Local Commissioner to that effect is misconceived. Reliance is placed on Gangadhara Palo Vs. The Revenue Divisional Officer and Another, (2011) 2 CTC 451 : (2011) 3 JT 518 : (2011) 164 PLR 516 : (2011) 3 RCR(Civil) 343 : (2011) 3 SCALE 498 : (2011) 4 SCC 602 : (2011) 3 SCR 746 : (2012) 25 STR 273 : (2012) 35 STT 463 : (2011) AIRSCW 1811 and Union of India (UOI) and Others Vs. Banwari Lal and Sons (P) Ltd., AIR 2004 SC 1983 : (2004) 2 ARBLR 81 : (2004) 4 JT 519 : (2004) 4 SCALE 443 : (2004) 5 SCC 304 : (2004) 1 SCR 1194 : (2004) AIRSCW 2172 : (2004) 4 Supreme 495 .

(ii) It is further submitted by learned senior counsel for the defendant that there was no material with the Local Commissioner to conclude that market rent had increased @15% per annum every year. In the absence of any material to the said effect the conclusions of the report are entirely erroneous. It is averred that from 1980 to 1997 there is no material with the Local Commissioner. The first lease deed filed by the plaintiffs is of 1997 and the second lease deed is of 2005. It is further alleged that all the plaintiffs have sold their share and that one of the plaintiffs has sold his 1/3rd share for Rs. 22 lacs. Now, the plaintiffs, it is urged, are claiming Rs. 100 crores as mesne profits which shows the absurdity of the claim of the plaintiff. Hence it is stated that the calculations of mesne profit are erroneous.

(iii) It is further stated that the area in question which was leased to the defendant is 175.62 sq. meters not 297.39 sq. meters as has been wrongly concluded by the Local Commissioner. To support this contention, reliance is placed on the order of this Court dated 23.2.2007 in IA No. 2063/2007 where this Court had noted that since the Local Commissioner is conducting the enquiry it is appropriate to grant liberty to the defendant to move the Local Commissioner with the request to either himself measure or get the area measured through a qualified Architect. Against the said order dated 23.2.2007 the plaintiffs had filed an appeal FAO (OS)103/2007. The said appeal was dismissed.

(iv) Reliance is also placed on Order 20 Rule 12(iii) CPC to contend that mesne

profits can only be computed for upto 3 years from the date of the preliminary decree and any computation beyond that would be barred under the said provisions. Reliance is placed on Chitturi Subbanna Vs. Kudapa Subbanna and Others, AIR 1965 SC 1325 : (1965) 2 SCR 661 to support the said plea.

(v) It is further averred that the grant of interest @ 12% per annum as granted by the Local Commissioner is illegal and misconceived. Reliance is placed on Sri Ramnik Vallabhdas Madhvani and Others Vs. Taraben Pravinlal Madhvani, (2004) 6 JT 144 : (2004) 1 SCC 497 : (2003) 5 SCR 230 Supp to contend that interest should have been on yearly basis and not on monthly rest as has been done by the Local Commissioner. The interest as per Section 37 CPC should have been @6% per annum and not @ 12% per annum as awarded by the Local Commissioner.

(vi) It is also urged that the defendant had filed documents to show the rent being paid by M/s. Nirulas regarding area in the same premises as occupied by the defendant where a rent of only Rs. 10,000/- per month for 3000 sq. ft. was being paid. It is averred that this vital piece of evidence has been completely ignored by the Local Commissioner while determining the rate of mesne profits."

OBJECTIONS OF PLAINTIFF

11. The learned counsel appearing for the plaintiffs have submitted regarding question (e), namely, the determination of mesne profits that the Local Commissioner has wrongly assessed the mesne profits. It is urged that plaintiffs had filed three documents on record, namely, Ex. PW1/1, DW1/P2 and DW1/P1. It is urged that the Local Commissioner has wrongly not taken these documents into account for determination of mesne profits and has erroneously for wrong reasons rejected the same. Hence, the plaintiff submitted that the profits determined by the Local Commissioner needs substantial enhancement.

FINDINGS

12. I will deal with the submissions/objections of the learned counsels for the parties as per the questions framed by the Local Commissioner.

13. I will first deal with questions (a) and (b) as framed by the Local Commissioner i.e. the area of the suit premises including carpet/super area. It is the stand of the defendant that the area under occupation of the defendant was only 175.62 sq. metres. It is urged that the Local Commissioner has concluded the area to be 297.3 sq. metres erroneously.

14. Learned senior counsel for the defendant has vehemently argued that the area has been incorrectly determined and cannot be the basis for the Local Commissioner to compute mesne profits.

15. Learned counsel for the plaintiffs has reiterated that the assessment of area of the premises by the Local Commissioner is in order. Reliance is placed on para 5 of the plaint and the prayer clause of the plaint where the area of the property

in question is clearly stated as 297.3 sq. metres. In para 3 of the written statement, the defendant admits the area to be 297.3 sq. metres. Hence, it is strenuously urged that in view of the clear admission in the pleadings, the defendant cannot be permitted to resile.

16. Some relevant facts on this issue are that this court had allowed IA No. 2063/2007 on 23.02.2007 which was filed by defendant. In the said application, the defendant had sought appointment of a Local Commissioner/Architect to determine the actual area occupied by the defendant before handing over possession of the suit property. This court noted that as an enquiry is being conducted by the Local Commissioner, the enquiry would entail the determination of the relevant factors such as carpet area/super area. The court directed that since the Local Commissioner is conducting the enquiry, it is appropriate to grant liberty to the defendant to move the Local Commissioner with a request to him to get the area measured through a qualified Architect. The defendant moved the Local Commissioner who vide order dated 01.03.2007 appointed M/s. Arvind Kumar & Associates i.e. one of the architects suggested by the defendant, to visit the aforesaid premises on 05.03.2007 at 2.00 p.m. to do the needful measurements. On 05.03.2007 when the architect visited the premises, the same were found locked. Plaintiff No. 3 vide letter dated 07.03.2007 informed the Local Commissioner that due to short notice of the Architect's visit, the keys of the premises could not be organized. Thereafter the matter was pending before the Division Bench. Against the said order dated 23.2.2007 of this court the plaintiffs filed an appeal before the Division Bench being FAO(OS)103/2007. The Division Bench dismissed the appeal on 07.12.2007. The defendant however took no steps in the meantime to approach the Local Commissioner to direct a re-inspection of the premises. A fresh application was filed before the Local Commissioner only on 12.02.2008. Vide order dated 08.04.2008, the Architect appointed earlier was again directed by the Local Commissioner to carry out the inspection. The Architect however visited the premises only on 09.07.2008 and he filed his report dated 10.07.2008/27.08.2008. The suit premises had by then (about 16 months after possession was received by the defendant) been renovated and re-modelled completely and converted into a showroom for motorcycles. Hence the report of the architect is of limited use.

17. A perusal of the Local Commissioner's report shows that he was persuaded to accept the area as 297.3 sq. metres of the premises for the following reasons:

"(a) The admission of the defendant in the written statement in paragraph 3. The relevant portion of the written statement filed by the defendant reads as follows:--

"3. The allegations in para 5 is wrong and the defendants are perfectly in legal possession of the property measuring 297.3 sq. mts. on the southern side of the building which abuts on the Radial Road and the Middle Circle of Connaught Place, New Delhi. The plaintiffs have purposely given wrong facts of the case to mislead this Hon"ble Court....."

(b) The admission of DW-1 Sh. I. Majumdar in his cross-examination dated 08.02.2007 where he admits that in the written statement the defendant has admitted the said area i.e. 297.3 sq. mtrs. to be in its possession.

(c) A preliminary decree for possession was passed for the suit property. The suit property was clearly defined in the plaint as the showroom measuring 297.3 sq. metres. The Local Commissioner noted that this position was not challenged before the Division Bench or in the Special Leave Petition filed by the defendant before the Supreme Court.

(d) The Local Commissioner also noted that the suit premises was in possession of Pakistan International Airways Cooperation in the year 1958 and it was let out as a whole on a monthly rent of Rs. 345/- without specifying any rate separately for the covered area or carpet area or super area. At no stage prior to vacation of the suit property i.e. in 2007 the defendant had raised the issue or dispute about the covered area or carpet area or super area. The Local Commissioner noted that the area of the suit property was hence always dealt as a single unit i.e. as a whole and not on the basis of carpet area or super area or covered area.

(e) It is only at the final stage inasmuch as the defendant was obliged to vacate the suit property by 28.02.2007, the defendant approached this court seeking a direction for the Local Commissioner to measure the area of the suit property. The said application of the defendant filed in 2007 was allowed on 23.02.2007.

(f) The Architect who was appointed by the Local Commissioner has pointed that the covered area of the premises was 292.71 sq. metres i.e. a variation of only 4.59 sq. metres. This variation could be ignored as the property was inspected only after it had been renovated extensively.

(g) The Local Commissioner also noted that neither of the parties had filed any objections before the Local Commissioner to the report of the Architect despite opportunities being given."

On the basis of the above reasons, the Local Commissioner concluded that the area of the premises in fact was 297.3 sq. metres.

18. In my opinion, there are no reasons to differ with the reasons given by the Local Commissioner in concluding that the area of the premises is 297.3 sq. metres and that the parties have always accepted the area of the premises as 297.3 sq. mtrs and that no difference/distinction between the super or carpet area or covered area was ever envisaged.

19. Given the above facts, namely, the clear admissions in the pleadings of the defendant, the failure of the defendant to file any objections to the report of the Architect appointed on the request of the defendant and the belated stage at which the defendant had moved this Court for appointment of the Local Commissioner much after passing of the preliminary decree which decree had been upheld right upto the Supreme Court, it was for the defendant to prove that the area of the suit premises was 175.62 sq. meters as claimed. In my opinion,

no cogent or proper evidence has been led by the defendant.

20. The defendant had led the evidence of DW-1 I. Majumdar, DW-2 Ravinder Kumar and DW-3 Shri Sanjiv Poswal. DW-1 Shri I. Majumdar states that the defendant is in occupation of 175.62 sq. meters. Reliance is placed by him on a communication dated 1.3.1966 by which tenancy was transferred to the defendant (Ex. DW1/1), on a lay out plan (Ex. DW1/2) and on a valuation report (Ex. DW1/3).

DW1/1 i.e. a letter written by Deputy Custodian of family property dated 1.3.1966 does not stipulate the area of the premises.

DW1/2 the site plan produced by the defendant is only a photocopy of a site plan. There is some jotting on the side of the area without any explanation. The jotting on the first page of the site plan indicates an area of 29.26 sq. meters. The second page indicates 146.41 sq. meters. The total would come to 175.67 sq. meters. The basis of the calculation is not explained or known. There is no explanation who prepared this document and under whose instructions it was prepared. The said document Ex. DW1/2 has no evidentiary value and cannot be accepted.

Coming to the third document, namely, the un-dated valuation report Ex. DW1/3. This is again a photocopy. The author seems to be Pankaj Goel and Associates. It notes the area as 175.67 sq. meters of the suit premises. Valuation report does not indicate the basis of having accepted the covered area as 175.6 sq. meters. This document in no way or in any manner helps the defendant to prove the area in occupation of the defendant.

21. DW3 in his affidavit makes a bald statement about the plaintiffs having materially altered the structure and changed the area and have added an additional area of 117.91 sq. meters. This calculation is being allegedly culled out from the report of the Architect Arvind and Associates. The basis for arriving at this conclusion is not known or explained.

22. Given the nature of evidence led by the defendant, there are no reasons to differ with the conclusions recorded by the Local Commissioner. The defendant have failed to prove that the area of the suit premises was 175.62 sq. meters. There is no merit in the submission of the defendant. The area of the suit premises is taken to be correctly assessed as 297.3 sq. meters by the Local Commissioner.

23. I will now deal with question (c) framed by the Local Commissioner i.e. the issue of merger of the order of this court with that of the order passed by the Supreme Court in the SLP. Learned senior counsel for the defendant has contended that the order of the Single Judge merged into the order of the Division Bench and the order of the Division Bench further merged into the order of the Hon"ble Supreme Court while dismissing the SLP by granting time to the defendant to vacate up to 28.02.2007. It is urged that keeping in view the

judgment of the Supreme Court in the said SLP and the judgment of the Supreme Court in *Gangadhara Palo v. Revenue Divisional Officer and Anr.*, (supra) and *Union of India v. Banwari Lal & Sons (P) Ltd.*, (supra), the plaintiffs cannot claim mesne profits. It is urged that time was granted by the Supreme Court to vacate and hence the plaintiffs/landlords would not be entitled to mesne profits. It is urged that the very concept of mesne profits pre-supposes wrongful possession and the profit received by a person in wrongful possession. It is urged that the occupation of the defendant in the suit property was permissive in view of the directions of the Supreme Court granting time to the defendant. Hence it is argued that the defendant is not liable to pay mesne profits.

24. Learned counsel for the plaintiffs have strenuously denied the said submission. Learned counsel have relied on the judgment of the Supreme Court in the case of *Kunhayammed and Others Vs. State of Kerala and Another*, AIR 2000 SC 2587 : (2000) 162 CTR 97 : (2000) 72 ECC 681 : (2001) 129 ELT 11 : (2000) 245 ITR 360 : (2000) 9 JT 110 : (2000) 5 SCALE 167 : (2000) 6 SCC 359 : (2000) 1 SCR 538 Supp : (2000) 119 STC 505 : (2000) 113 TAXMAN 470 : (2000) 2 UJ 1158 : (2000) AIRSCW 4641 : (2000) AIRSCW 4557 : (2000) AIRSCW 2608 : (2000) 8 Supreme 202 : (2000) 5 Supreme 181 : (2000) 7 Supreme 70 to contend that no such merger takes place as is sought to be argued. It is stated that the SLP was actually dismissed and the judgment of the Single Judge or the Division Bench is not overruled. The contentions of the defendant, it is urged, are misplaced.

25. I may first see the judgment of the Supreme Court relied upon by the plaintiffs in *Kunhayammed & Ors. v. State of Kerala & Anr.* (supra). The Supreme Court summed up the doctrine of merger as follows:--

"42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See *Corpus Juris Secundum*, Vol. LVII, pp. 1067-1068)

44. To sum up our conclusions are:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an

appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties,

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by Sub-rule (1) of Rule 1 of Order 47 of the C.P.C."

26. Similarly in *State of Madras Vs. Madurai Mills Co., Ltd.*, AIR 1967 SC 681 : (1967) 1 SCR 732 : (1967) 19 STC 144 , the Supreme Court in para 6 held as follows:--

"6.... But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the

inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion of merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction...."

27. In view of the above stated legal position, we may now look at the order of the Supreme Court passed in the present case dismissing the SLP of the defendant on 13.02.2006 being SLP No. 1569/2006. The relevant portion of the order reads as follows:--

"Heard. Mr. G.E. Vahanvati, learned Solicitor General for the petitioner and learned Senior Counsel for the respondent

"We see no substance in this Special Leave Petition which is liable to be dismissed.

"However, at the request of the learned Solicitor General time to vacate the premises is granted upto 28th February 2007 on the petitioner's filing the usual undertaking by the competent officer within four weeks.

The special leave petition is dismissed."

28. The aforesaid order dismissed the SLP. It merely gave time to the defendant to vacate the premises up to 28.02.2007. There is nothing in this order to substantiate the contention of the defendant that it in any way modified the directions passed by the Single Judge. The Single Judge had held vide order dated 05.02.2001 held that for the period 01.02.1980 onwards till possession is received by the plaintiff, an enquiry is required to be conducted into the amount of mesne profits that the plaintiffs are entitled to. The Local Commissioner was appointed to determine the amount of mesne profits payable by the defendant. This direction is nowhere altered or modified

29. In view of the judgment of the Supreme Court noted above in Kunhayammed & Ors. v. State of Kerala & Anr. (supra), it is clear that the dismissal of the SLP in this case being a non-speaking order, does not attract the doctrine of merger.

30. The reliance of learned senior counsel for the defendant on the judgment of the Supreme Court in the case of Gangadhara Palo v. Revenue Divisional Officer and Another (supra) is misplaced. That was a case in which the High Court had after dismissal of the SLP, dismissed the review petition as well as the application for condonation of delay in filing the review petition. The Supreme Court took the view that when the Supreme Court dismisses a Special Leave Petition by giving same reasons, however, meager (it can be even just one sentence) there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the Special Leave Petition. In that eventuality, the Court held that no review of a judgment can take place. However, where the Special Leave Petition

is dismissed without giving any reasons whatsoever, the situation would be different.

Relevant portion of the judgment reads as follows:--

"6. When this Court dismisses a special leave petition by giving some reasons, however meagre (it can be even of just one sentence), there will be a merger of the judgment of the High Court into the order of the Supreme Court dismissing the special leave petition. According to the doctrine of merger, the judgment of the lower court merges in to the judgment of the higher court. Hence, if some reasons, however meager, are given by this Court while dismissing the special leave petition, then by the doctrine of merger, the judgment of the High Court merges into the judgment of this Court and after merger there is no judgment of the High Court. Hence, obviously, there can be no review of a judgment which does not even exist.

7. The situation is totally different where a special leave petition is dismissed without giving any reasons whatsoever. It is well settled that special leave under Article 136 of the Constitution of India is a discretionary remedy, and hence a special leave petition can be dismissed for a variety of reasons and not necessarily on merits. We cannot say what was in the mind of the Court while dismissing the special leave petition without giving any reasons. Hence, when a special leave petition is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of this Court. Hence, the judgment of the High Court can be reviewed since it continues to exist, though the scope of the review petition is limited to errors apparent on the face of the record. If, on the other hand, a special leave petition is dismissed with reasons, however meagre (it can be even of just one sentence), there is a merger of the judgment of the High Court in the order of the Supreme Court."

31. The judgment of the Supreme Court in the present case has given no reasons whatsoever. It in fact says the SLP has no substance and is liable to be dismissed. Hence, the judgment of the Supreme Court in the case of *Gangadhara Palo v. Revenue Divisional Officer and Another* (supra) would have no application to the facts and circumstances of the present case.

32. Similar is the situation regarding the judgment cited by the learned senior counsel for the defendant being *Union of India & Ors. v. Banwari Lal & Sons (P) Ltd.* (supra). That was a case in which the property was requisitioned by the Delhi Administration under Requisition and Acquisition of Immovable Property Act, 1952. Before the said Act lapsed, a notification under Section 4 of the Land Acquisition Act was issued for acquisition of the entire property. The High Court quashed the acquisition and appointed an arbitrator to determine the damages with effect from the date the requisition of the Delhi Administration lapsed. The SLP filed was dismissed but the party allegedly in wrongful possession were given time to vacate the property. That was not a case of landlord and tenant. In the facts of the case, the Supreme Court had held that permission was granted

by the Supreme Court to the appellant to use and occupy the property up to an extended date and it cannot be said that the possession was illegal or wrongful or in the nature of trespass. In the present case the Single Judge of this Court while passing preliminary decree has clearly stipulated that from 1.2.1980 onwards an enquiry is required to be conducted into the amount of mesne profits that the plaintiffs are entitled to till possession. This Court accordingly appointed an Advocate as a Local Commissioner to determine the amount of mesne profit payable to the plaintiff by the defendant from the said date till date of delivery of possession i.e. from 1.2.1980 till date of delivery of possession. The above order of the Single Judge was upheld by the Division Bench vide judgment dated 20.10.2005 in RFA(OS)18/2001. The above directions for assessment of mesne profits were not disturbed by the Division Bench.

Against the said judgment of the Division Bench dated 20.10.2005 the defendants had filed a Special Leave Petition which was dismissed on 13.02.2006. The order in the Special Leave Petition does not in any manner disturb the directions of the Single Judge for payment of mesne profits w.e.f. 1.2.1980 till delivery of possession. In fact the special leave petition was dismissed. Hence, in these facts, the judgment of the Supreme Court in *Union of India & Ors. v. Banwari Lal & Sons (P) Ltd.*(supra) would have no application.

33. It would also be appropriate to mention that after the Special Leave Petition was dismissed on 13.2.2006, the defendant had filed an affidavit before the Supreme Court in the form of an undertaking. In the said affidavit which was filed by Mr. I. Majumdar on behalf of the defendant, a categorical averment was made that the defendant shall pay mesne profits from 1.2.1980 till the delivery of vacant possession in terms of the judgment and decree dated 5.2.2001 as under the provision of Order 20 Rule 12 CPC it notes that a Local Commissioner was appointed to determine the mesne profits. It is clear from this undertaking that the defendant did not interpret the order passed by the Supreme Court in the SLP dated 13.2.2006 to imply that the possession of the defendant of the suit premises till 28.2.2007 is legal and valid and that there is no obligation on the part of the defendant to now pay mesne profits. The submissions of the defendants are totally contrary to the undertaking given to the Supreme Court. The defendant cannot be permitted to resile from the undertaking given to the Supreme Court.

34. There is hence no merit in the contention of the defendant that in view of the judgment of the Supreme Court dated 13.02.2006, the defendant has no liability to pay mesne profits.

35. I will now deal with question (d) noted by the Local Commissioner i.e. the issue regarding Order 20 Rule 12 CPC. It is the contention of learned senior counsel for the defendant that under Order 20 Rule 12(1)(c) CPC the maximum period for which mesne profits can be granted is (i) till the date of delivery of possession to the Decree Holder (ii) relinquishment of possession by the Judgment Debtor, or (iii) the expiration of three years from the date of decree,

whichever event first occurs. Hence, it is urged that in the present case decree was passed on 5.2.2001. Hence, mesne profits are payable by the defendant at best only upto 4.2.2004 i.e. 3 years. Reliance is placed on the judgment of the Supreme Court in the case of Chitturi Subbanna vs. Kudapa Subbanna and Ors. (supra).

36. Learned counsel appearing for the plaintiff has strongly refuted the submission. It is urged that the Order XX Rule 12(1)(c)(iii) stipulates only the period upto the final decree. The phrase decree used in the said provision inherently applies to a final decree. Hence, it is stated that in the present case the final decree is yet to be drawn up and the submissions of the defendant are misplaced. It is urged that no such plea was taken in the written statement or in the appeal. Similarly, it is urged that an undertaking was filed before the Supreme Court subsequent to orders of the Supreme Court dated 13.2.2006 in the SLP filed by the defendant being SLP No. 1569/2006 where a categorical undertaking was given by the defendant to pay the mesne profits from 1.2.1980 till delivery of vacant possession of the concerned premises in terms of the judgment dated 5.2.2001 of the learned Single Judge. The undertaking also states that subject to determination of mesne profits by the Local Commissioner the defendant is willing to pay mesne profits @ Rs. 30,000/- in case the plaintiff accepts the same. Reliance is also placed on Bans Raj Singh and Others Vs. Krishna Chandra and Others, AIR 1981 All 280 and Shibdas Gopalji Patel Vs. Ram Chandra Mookerjee, AIR 1977 Cal 319 .

37. I may first have a look at Order 20 Rule 12(1)(c) CPC which reads as follows:--

"(c) directing an inquiry as to rent or mesne profits from the institution of the suit until,-

(i) the delivery of possession to the decree holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs."

38. The Supreme Court in Chitturi Subbanna v. Kudapa Subbanna and Ors. (supra) held as follows:--

"We therefore hold that a decree under r. 12, O. 20 C.P.C. directing enquiry into the mesne profits, however expressed, must be construed to be a decree directing the enquiry into the mesne profits in conformity with the requirements of r. 12(1)(c) of O. 20 and that the decree-holder in this case cannot get mesne profits for the period subsequent to March 7, 1941 when the three year period from the date of the High Court decree expired."

39. However, if we look carefully at the facts of the case, it is obvious that the

said judgment does not help the defendant inasmuch as the factual scenario here is different. In that case the decree for possession was passed on 7.3.1938 and the defendants were directed to deliver the possession to the decree holder. Possession of the property was delivered in February 1943. No appeal was filed against the preliminary decree by the defendant. Hence, there was no impediment for the plaintiffs therein to execute the decree and take possession. For some reason the plaintiffs had delayed and received possession only in February 1943 i.e. five years after the decree. It is only after mesne profits were determined and a decree was passed that in 1949 the defendants appealed to the High Court. It was in those facts that the Supreme Court stated that the period of mesne profits can be calculated only for a period of three years from the date of the preliminary decree. The Court noted that there is a possibility of the decree holder gaining by his own default if he did not take possession for a period longer than three years from the date of the decree and hence the mesne profits would keep running. The Court held that the law does not contemplate such a case and therefore provided a maximum period for which mesne profit could be passed. The relevant portion (at pages 673 & 675) of the said judgment reads as follows:--

"This power was given to the Court in order to avoid multiplicity of suits between the decree-holder and the judgment-debtor for mesne profits which the decree holder could rightly claim. The period was, however, restricted to three years in order to discourage decree-holders from making delays in taking possession. If a decree-holder be not diligent in executing the decree, he would have to forego mesne profits for the period in excess of three years or would have to institute separate suits to recover them."

"Lastly, we may draw attention to a possibility of the decree-holder gaining by his own default, if he did not take possession for a period longer than 3 years after the date of the decree, when the decree did not specify the period for which mesne profits would be allowed or nearly stated that mesne profits would be paid until delivery of possession. The law did not contemplate such a case and therefore clearly provided the maximum period for which mesne profits would be allowed to the decree-holder after the passing of decree. Such a case was *Kumar Jagdish Chandra Vs. Bulaqi Das and Another*, AIR 1959 All 242 ."

40. Reference may also be had to the judgment of the Allahabad High Court in *Bans Raj Singh & Others v. Krishna Chandra & Ors.*(supra). The Court held as follows:--

"18....It is the final decree regarding the mesne profits which is executable and the final decree can be passed for the recovery of the mesne profits for the maximum period of three years from the date of the passing of the final decree which is a decree of the High Court in this case as the decree of the trial Court has merged with the decree of the appellate Court i.e. the High Court."

41. The present plea about mesne profits being payable only till 4.2.2004 i.e.

upto three years after the preliminary decree, does not seem to have been raised before the Division Bench or the Supreme Court. Both courts have passed their orders after 4.2.2004. The defendant cannot now raise this plea.

42. Further, in the present case it is not the case of the defendant that after the preliminary decree was passed on 5.2.2001 the plaintiff was in a position to execute the decree but delayed needlessly. In fact, it is the defendant who has been agitating in higher courts by filing appeals before the Division Bench and thereafter before the Supreme Court. On 16.04.2001 an undertaking was given by the plaintiffs before the Division Bench that they will not execute the decree till the next date. It appears that the said order was not modified at any stage. In fact order dated 08.11.2001 of the Division Bench notes "Interim order to continue". The Supreme Court had also granted time to the defendant to vacate. Hence the plaintiffs were not in a position to take physical possession of the suit property on account of the litigation filed by the defendant and the interim orders continuing.

43. We may look at two maxims of equity i.e. "Actus curiae neminem gravabit" and "Lex non cogit ad impossibilia". The Supreme Court in Raj Kumar Dey and Others Vs. Tarapada Dey and Others, AIR 1987 SC 2195 : (1988) 2 ARBLR 151 : (1987) 3 JT 555 : (1987) 2 SCALE 551 : (1987) 4 SCC 398 : (1988) 1 SCR 118 explained the above maxims as follows:

"6. We have to bear in mind two maxims of equity which are well settled, namely, "ACTUS CURIAE NEMINEM GRAVABIT" - An act of the Court shall prejudice no man. In Broom's Legal Maxims, 10th edition, 1939 at page 73 this maxim is explained that this maxim was founded upon justice and good sense; and afforded a safe and certain guide for the administration of the law. The above maxim should, however, be applied with caution. The other maxim is "LEX NON COGIT AD IMPOSSIBILIA" (Broom's Legal Maxim-P. 162) - The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exceptions in the consideration of all particular cases."

44. Hence, the defendant cannot now turn around and take advantage of its own deeds. Keeping in view the above facts, in my opinion, the period of three years would get extended for the period the stay continued to operate in favour of the defendant. Mesne profits have to be fixed as directed in the preliminary decree passed by this Court, namely, w.e.f. 1.2.1980 till date of delivery of possession in the facts of this case.

45. There is yet another reason why, the defendant is liable to pay mesne profit w.e.f. 1.2.1980 till date of delivery of possession. In my opinion, the defendant

cannot be permitted to approbate and reprobate. The defendants have given a categorical undertaking to the Supreme Court that they would pay the mesne profits till the date possession was handed over. This undertaking is given in compliance to the order of the Supreme Court dated 13.2.2006 i.e. much after the period of three years had lapsed after the decree of the learned Single Judge of this Court. The relevant portion of the undertaking given by Mr. I. Majumdar on behalf of the defendant reads as follows:--

"3. The petitioner herein undertakes to pay amount of Rs. 30,000/- towards mesne profits for the period 01.01.1980 till 31.01.1980 as determined by the Ld.Single Judge vide judgment and decree dated 5.2.2001. The petitioner further undertakes to pay mesne profits from 01.02.1980 till the delivery of the vacant possession of the concerned premises in terms of the judgment and decree dated 05.02.2001 whereby the Ld.Single Judge has, pursuant to request made by the Respondent herein (Plaintiffs in the suit) under the provisions of Order XX Rule 12 of Code of Civil Procedure, has appointed a Local Commissioner to determine the amount of mesne profits for the said period. Subject to the determination of mesne profits as aforesaid by the Local Commissioner, the Petitioner is willing to pay mesne profits @ Rs. 30,000/- in case respondent accepts the same."

46. In the light of the above clear and unequivocal undertaking the defendant cannot now turn around and say or claim that it would be liable to pay mesne profits only for a period of three years from the date of preliminary decree. A clear undertaking was given, on an affidavit filed before the Supreme Court, that the defendant shall pay mesne profits from 01.02.1980 till delivery of the vacant possession of the concerned premises in terms of the judgment and decree dated 05.02.2001 as determined by the Local Commissioner. The defendant cannot be permitted to approbate and reprobate in this manner.

47. Reference may be had to the judgment of this court in the case of Rajneesh Kumar Singhal Vs. The State (National Capital Territory of Delhi), (2001) 2 AD 37 : (2001) CriLJ 1192 : (2001) 89 DLT 511 : (2001) 57 DRJ 411 where the court held as follows:--

"6. The submission of the learned senior counsel overlooks the fact that a party cannot normally be allowed to approbate and reprobate. If a party has taken up a specific stand at a particular stage of the court proceedings it should not be open for him to take a contrary position at a subsequent stage of litigation or in different proceedings. The principle serves well as it does not allow a litigant to blow hot and cold at successive stages of the same litigation, or another litigation. The doctrine is well illustrated in Dwijendra Narain Roy Vs. Joges Chandra De and Others, AIR 1924 Cal 600 : 79 Ind. Cas. 520 where it was held as follows:

"It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent. This wholesome

doctrine applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided that the second suit grows out of the judgment in the first."

48. Hence, it is not possible to permit the defendant to resile from the undertaking given to the Supreme Court.

49. There is no merit in the present submissions of the defendant. The defendant is liable to pay mesne profits w.e.f. 01.02.1980 till delivery of vacant possession to the plaintiffs i.e. 28.2.2007.

50. I will now deal with the question No. (e), namely, on the issue of mesne profits determined by the Local Commissioner. The plaintiffs and defendant have filed objections on the finding of the Local Commissioner on this question. The plaintiff seeks enhancement of the computation of mesne profits as done by the Local Commissioner. In contrast the defendant submits that the Local Commissioner having rejected the evidence placed on record by the plaintiffs had no option but to fix the mesne profits based on the agreed rent that was being paid by the defendant, namely, Rs. 345 per month.

51. The plaintiffs have before the Local Commissioner led the evidence of four witnesses, namely, plaintiff No. 1 who was PW-1, Plaintiff No. 3 Shri Rajeev Khanna who was PW-2, plaintiff No. 2 Pradeep Khanna who was PW-3 and Shri Ved Prakash PW-4. Similarly, the defendant led the evidence of Mr. I. Majumdar, Manager, Ashoka Travels as DW-1, DW-2 Mr. Ravinder Kumar and of Mr. Sanjeev Oswal as DW-3.

52. We may look at the evidence of the plaintiff first. The plaintiffs have filed three photocopies of rent agreements Ex. PW1/1, DW1/P-2 and DW1/P-1.

53. Ex. PW1/1 is a photocopy of letter dated 2.6.1979 from one Empire Stores 15-B, Connaught Place, New Delhi to M/s. Bata India Limited offering to lease out to them a portion of the property where they are located on certain terms and conditions. Alongwith the said letter is a copy of a telegram from Bata India Limited informing M/s. Empire Stores that the contents of the aforesaid letter dated 2.6.1979 were acceptable to them and their representative would reach Delhi for execution of necessary documents. Photocopy of a letter dated 11.2.1994 from Bata India Limited is also placed on record. On the basis of this document the plaintiff claimed mesne profits @ Rs. 41.97 per sq. ft. per month for the year 1979 and also for the year 1980 w.e.f. 1.2.1980.

54. Ex. DW-1/P-2 is a photocopy of a lease deed dated 5.6.1997 entered into between Atma Ram Builders (P) Limited as Lessors and M/s. Lombard Street (Estates) Private Limited as Lessees in respect of property bearing No. D-10, Connaught Circus, New Delhi (Ex. DW1/P2). This is in respect of premises measuring in all 3756 sq. ft. on the ground floor and mezzanine floor on the monthly rent of Rs. 8 lacs per month with 20% increase every three year alongwith interest free security deposit of Rs. 1,50,00,000/-. On the basis of the

said lease, taking into account the agreed rent and interest @18% per annum on interest free security deposit the plaintiffs claimed mesne profits @ 272.90 sq. ft. per month for the year 1997 for the suit property.

55. Ex. DW1/P-1 is a copy of Lease agreement dated 24.10.2005 entered into between Mr. Chander Mohan and Others as lessors and M/s. Indian Rayon Industries Limited as Lessees in respect of property bearing No. 13/14-C, C-Block, Connaught Place, New Delhi for a period of nine years in respect of premises measuring 1837.03 sq. ft. in super area and 1413.10 sq. ft. in carpet area on the ground floor and mezzanine floor on a monthly rent of Rs. 6 lacs for the period 28.7.2005 to 27.7.2006 and for the next two years @ Rs. 6,40,000/- per month and for the next three years @ Rs. 7,36,000/- per month and so on. The tenant was also required to pay advance rent of Rs. 36 lacs which was to be adjusted @ Rs. 1,50,000/- from the rent payable by the lessee to the lessor during initial 24 months of the lease. The lease contains a stipulation that the lessee has paid Rs. 90,00,000/- after deduction of TDS as interest free security deposit. The lease also provides that the lessees have agreed to make substantial capital investments by incurring various costs and expenses including installment and commissioning of immovable and moveable fixtures, furniture, fittings etc. The plaintiffs claimed that based on this document the mesne profits for 2005 should be Rs. 454.32 per sq. ft. per month.

56. The defendant filed certified copy of a lease deed dated 30.4.1974 executed by Smt. Bhagwati Devi & Ors. as lessors and Shri L.C. Nirula and Shri M. Nirula as lessees. The same was exhibited as Ex. DW2/1. The said lease is for a period of 30 years for carrying on hotel and other businesses on the ground, mezzanine, first, second and partial third floor and terrace with right to the lessee given for altering, changing, renovation, modifying and carrying out constructional changes etc. at their own costs. Rent was fixed at Rs. 4500 per month.

57. The Local Commissioner did not accept these three documents filed by the plaintiff or defendant. Regarding PW-1/1 letter dated 02.06.1974 from Empire Store, the Local Commissioner noted that PW-4 admitted his father and Uncle's signatures on photocopy of the said letter Ex. PW-1/1. He further noted that in his cross-examination PW-4 could not show whether apart from the said letter (Ex. PW1/1) any lease deed was executed as reflected in the said letters and telegram. He also did not give a definite area of the shop which was let out to Bata India Limited. He also did not produce such record despite being given an opportunity. As the said document Ex. PW1/1 was were without any material details the Local Commissioner did not accept the said documents as determinative of the market rent as on 1979 or 1.2.1980.

58. Regarding DW-1/1 the Local Commissioner noted that the lease Ex. DW1/P1 dated 24.10.2005 is not a usual lease. It requires the lessee to make substantial capital investments by incurring various costs and expenses for modification and renovation. Hence, the Local Commissioner concluded that the said lease agreement cannot help the plaintiffs for fixation of quantum of mesne profits.

59. As far as the other lease dated 5.6.1997 is concerned (Ex. DW1/P-2), the Local Commissioner also did not take this into consideration for the reason that no oral evidence or document has been produced or filed on record to enable the Local Commissioner to have a comparative study of the market rate for that year and determine the mesne profits exactly or near about that year. Hence, the Local Commissioner did not accept this document filed by the plaintiffs as determinative of the mesne profits.

60. Regarding Ex. DW-1/2 i.e. the lease deed dated 30.04.1974 filed by the defendant, given the peculiar nature of lease and the sweeping powers given to the lessee in the lease, the Local Commissioner concluded that such a lease cannot be of any help for determination of mesne profits.

61. The Local Commissioner further noted that no substantial evidence has been led by the plaintiffs in respect of gradual increase of rent for period in question, namely, from 1.2.1980 to 28.2.2007 in the properties like that of the suit property. The Local Commissioner also noted that the defendant has also not shown any document to show the market rent except coming out with suggestions to the plaintiffs in their cross-examination that the rent of the premises in the suit was Rs. 350 per month i.e. the original rent which they were paying. Based on the above, the Local Commissioner concluded that neither of the parties have placed on record certified copies of lease deeds in respect of commercial properties in the vicinity of the premises in the suit to enable a comparative study of the market rates of rent. Hence, the Local Commissioner attempted to find out the prevalent market rates of rent on the basis of lease agreements placed before this Court which have been noted in various judicial pronouncements of this Court. On the basis of these judicial pronouncements of this Court the Local Commissioner found record for the year 1980-86 and prepared a chart of rentals on the basis of the lease deed in respect of commercial properties in or around Connaught Place. The various lease deeds placed on record in the case of Ballabh Das Aggarwal (Decd.) Vs. Union of India (UOI) and Others, (2011) 178 DLT 166 : (2011) 122 DRJ 657 : (2011) 3 ILR Delhi 606 ; Anant Raj Agencies Properties Vs. State Bank of Patiala, (2010) 167 DLT 138 ; RFA 154/1998 Rail India Tech, & Eco. SVCS Ltd. v. I.M. Puri & Ors (DB) (RFA 154/1998) and P.S. Bedi Vs. The Project and Equipment Corporation of India Ltd., (1994) 2 AD 937 : AIR 1994 Delhi 255 : (1994) 28 DRJ 680 were taken into account.

62. The Local Commissioner also noted that the Single Judge of this Court while passing preliminary decree on 5.2.2001 had granted a sum of Rs. 30,000/- per month as claimed by the plaintiffs for the period 1.1.1980 to 31.1.1980 as the reasonable mesne profits on the basis of fair market rent. Based on this calculation, the rate for the period for 297.3 sq. meters (i.e. 3200.11sq. ft.) comes to Rs. 9.37 per sq. ft. per month for the said period. It was noted that the determination of mesne profits by the Single Judge was not challenged by the defendant or the plaintiffs in the appeal before the Division Bench or in the

Special Leave Petition and hence the rate of mesne profits for the said period i.e. 01.01.1980 to 31.01.1980 attained finality.

63. The Local Commissioner also concluded based on the various judicial decisions of this Court as noted above that the rate of Rs. 9.37 per sq. ft. per month for ground floor three side open premises, appears to be a fair market rent for the premises in Connaught Place for the period in question. Hence, the Local Commissioner took this as the basic market rent i.e., Rs. 9.37 per sq. ft. for 1980.

64. Having determined the base rate at the said figure of Rs. 9.37 per sq. ft. per month the Local Commissioner noted that various judicial pronouncements have thereafter granted 15% hike in the rate payable for mesne profits for each year. This has been the norm, the Local Commissioner noted for commercial areas in Delhi including Greater Kailash-I, Daryaganj, Kashmiri Gate, Janak Puri and Connaught Place. Hence, the Local Commissioner having assessed the rate at Rs. 9.37 per sq. ft. per month for the year 1.1.1980 to 31.1.1980 has granted 15% increase thereafter for each year till 28.2.2007. In paragraph 35 of the report a chart has been prepared whereby the Local Commissioner has noted the rate per sq. ft. as shown in various judicial pronouncements and rate per sq. ft. as finally determined by the Local Commissioner. On the basis of 15% increase each year the rate starts at Rs. 10.780/- per sq. ft. per month for the period 1.2.1980 to 31.12.1980 rent being Rs. 34,500/-per month. For the period 1.1.2007 to 28.2.2007 the rate has gone upto 469.348 per sq. ft. per month with a monthly rent of Rs. 15,01,967.70.

65. The plaintiff do not find this rate to be proper. Learned counsel appearing for the plaintiffs have stressed that there was no reason or justification for the Local Commissioner to reject the documents placed on record by the plaintiffs, namely, the two lease deeds dated 5.6.1997, 24.10.2005 (Ex. DW1/P-2 and Ex. DW1/P-1) and the correspondence exchanged between Empire Stores and Bata India Ltd. for the purpose of determination of the market mesne profits (Ex. PW1/1). It is their contention that this evidence was the only evidence on record and there were no grounds to reject them.

66. Learned counsel have also refuted the submissions regarding sale of the suit property. It is pointed out that it is only plaintiff No. 1 who has prior to receipt of possession sold his share which was also by means of a distress of sale. As the plaintiff No. 2 was not in a position to hand over physical possession of the properties, he got an extremely poor price which he sold on account of certain personal circumstances. Plaintiffs No. 1 and 3 it is urged have, after receipt of possession from the defendant sold their share of the property for Rs. 11 crores and Rs. 10 crores respectively. Hence, it is pointed out that the submissions of the defendant in this regard are erroneous. Counsel for plaintiffs have also stressed that the Local Commissioner was doing an inquiry. He submits that an inquiry would be less officious than Court proceedings. If for some reason the Local Commissioner was not satisfied, the Local Commissioner himself could

have collected evidence.

67. Learned senior counsel appearing for the defendant has stressed that as the Local Commissioner has not accepted the evidence filed by the plaintiff he had no option but to fix mesne profits at Rs. 345 per month which was the rent which the defendants were paying to the landlords.

68. We may look at the legal position regarding determination of mesne profits. Section 2(12) CPC defines mesne profit as follows:--

"2(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;"

The Supreme Court in the case of Lucy Kochuvareed Vs. P. Mariappa Gounder and Others, AIR 1979 SC 1214 : (1979) 3 SCC 150 : (1979) 3 SCR 58 held as follows:--

"25. Mesne profits being in the nature of damages, no invariable rule governing their award and assessment in every case, can be laid down and "the Court may mould it according to the justice of the case". Even so, one broad basic principle governing the liability for mesne profits is discernible from Section 2(12) of the CPC which defines "mesne profits" to mean "those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession". From a plain reading of this definition, it is clear that wrongful possession of the defendant is the very essence of a claim for mesne profits and the very foundation of the defendant's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits."

A Division Bench of this Court in Phiraya Lal alias Piara Lal and Another Vs. Jia Rani and Another, AIR 1973 Delhi 186 : (1972) 2 ILR Delhi 206 held as follows:--

"14. The claim in the suit by Jia Rani against the appellants was firstly for possession and secondly for damage's for use and occupation of the site in suit wrongfully by the defendants appellants. When damages are claimed in respect of wrongful occupation of immovable property on the basis of the loss caused by the wrongful possession of the trespasser to the person entitled to the possession of the immovable property, these damages are called "mesne profits". The measure of mesne profits according to the definition in section 2(12) of the Code of Civil Procedure is "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received there from, together with interest on such profits". It is to be noted that though

mesne profits are awarded because the rightful claimant is excluded from possession of immovable property by a trespasser, it is not what the original claimant loses by such exclusion but what the person in wrongful possession gets or ought to have got out of the property which is the measure of calculation of the mesne profits. (Rattan Lal v. Girdhari Lal, Air 1972 Delhi 11). This basis of damages for use and occupation of immovable property which are equivalent to mesne profits is different from that of damages for tort or breach of contract unconnected with possession of immovable property. Section 2(12) and order XX rule 12 of the Code of Civil Procedure apply only to the claims in respect of mesne profits but not to claims for damages not connected with wrongful occupation of immovable property."

Similarly, the Andhra Pradesh High Court in Dr. J. Bhakthavasala Rao and Others Vs. Industrial Engineers and Others, AIR 2005 AP 438 : (2005) 4 ALD 19 : (2005) 2 APLJ 287 held as follows:--

"8. The controversy in this appeal is limited to the one of fixing the damages for use and occupation of the suit building. By its very nature, it involves adjudication of a pure question of fact and there exists hardly any uniform and standard pattern of assessment in this regard. The Court has to undertake a comparative assessment of the nature, location, age, condition etc., of the suit schedule premises, on the one hand, and the similar characteristics of the premises in the surrounding area, on the other. It is very difficult to find the premises of similar nature, size and quality at the same location. Even if there exists any broad similarity on these aspects, the rent in respect of such premises would depend, mostly, upon the need of the lessee and the circumstances under which the leases are granted. Prevalence of amity or enmity, as the case may be, between the landlords and the tenants or the duration of lease, are also certain factors, which would have a bearing on this."

69. In my opinion, in the light of the above position there is no merit in the contentions of the defendant. The question of fixing the mesne profits @ Rs. 345/- per month as sought to be argued is a completely misplaced argument and has to be rejected outright. The suit property is three side open premises on the ground floor abutting on the common corridor in Connaught Place, New Delhi i.e. a prime and prestigious commercial hub of Delhi. The submission of the learned senior counsel for the defendant cannot be accepted.

Reference may be had to the judgment of this Court in the case of Roshan Lal Vegetable Products Pvt. Ltd. Vs. Param International and Another, (2011) 2 ILR Delhi 350 this Court in paragraphs 11 and 12 held as follows:--

"11. From these decisions, it is clear that for assessing mesne profits, judicial notice can be taken of the prevailing rents and that an element of guess work is always involved.

12. Once some evidence has been adduced by the Plaintiff as to the prevailing rate and judicial notice taken as supplementing that, the burden shifts to the

Defendant to establish his version as to the prevailing rents, or the rent at which similar premises were being leased out during the relevant period. He has also to prove the prevailing rate as being not what the lessor seeks to prove, but the rate which he contends it to be. It is on weighing the two that the Court determines the correct figure. The Defendant's failure to adduce evidence to rebut leaves the Court free to draw an appropriate inference, and pass orders."

It is clear that the defendant had failed to submit any credible evidence. The defendant's submissions are clearly without merits.

70. As far as the contention of the plaintiffs is concerned, in my opinion, there are no reasons to differ with the findings recorded by the Local Commissioner. The Local Commissioner has for sound reasoning noted that the correspondence of Empire Store and Bata India Ltd. cannot be taken into account for the purpose of determining the market rent. In my opinion, the conclusions are correct. PW4, the partner of Empire Store in his cross-examination states that he is not aware of the area with Bata India Ltd. He is also not aware of whether a lease deed was executed in favour of Bata India Ltd. No lease deed has been produced. There is nothing to show what were the terms and conditions agreed upon. Hence, the conclusion of the Local Commissioner in not accepting the said documents are in order. The claim of the plaintiff on these documents i.e. Rs. 41.97 per sq. ft. per month for 1979 cannot be accepted.

71. Coming to the other two lease deeds relied upon by the plaintiffs, namely, lease dated 05.6.1997 Ex. DW1/P-2 and lease dated 24.10.2005 Ex. DW1/P1. The Local Commissioner has given reasons why the two leases have not been accepted. The Local Commissioner concluded that the lease dated 24.10.2005 Ex. DW1/P1 is not a usual lease deed and it has entirely different terms and conditions. It contains stipulation of the lessee having paid Rs. 90,00,000/- as interest free security deposit. The lessee have also undertaken the obligation of incurring various costs and expenses including installation and commissioning of various movable and immovable fixtures. There were two other adjoining properties which were also given on rent to the lessee and the same was renovated as an integral unit. Clearly this lessee cannot be a precedent as claimed.

72. I may also note that the plaintiff witness have simply tendered the two lease deeds and the documents of Empire Store. There is no attempt to prove the nature of location of the premises in question or that they have features akin to that of the suit property. Hence, there was enough justification not to accept the lease deeds.

73. It is also clear that determining the mesne profit/market rent for a period of nearly 27 years i.e. 1.2.1980 to 28.2.2007 cannot be done on the basis of two sporadic leases of two separate properties filed by the plaintiffs dated 5.6.1997 and 24.10.2005. There is also no evidence to show that the leases pertained to properties that had identical features as the suit properties. The evidence placed

on record by the plaintiffs is sketchy and based on these sporadic leases for a huge area like Connaught Place it would not have been appropriate or proper to conclude the market rent for a long period of 27 years.

74. The approach of the Local Commissioner in fixing the base rate based on the rent of Rs. 30,000/- per month for the period 01.01.1980 to 31.01.1980 is in order. It cannot be forgotten that as per the preliminary decree passed by this Court the initial rent had been agreed to be Rs. 30,000/- per month for the period 1st January, 1980 to 31st January, 1980 i.e. one month. This rate was never challenged by the defendant before the Division Bench or the Supreme Court. In fact in an undertaking filed before the Supreme Court the defendant had agreed to pay the plaintiff at this rate till determination of the mesne profits by the Local Commissioner. The Local Commissioner rightly took this figure, namely, 9.37 per sq. feet to be the base rate for 1980. The Local Commissioner also relied on leases produced before this court in various judicial pronouncement to conclude that the base rate of Rs. 9.37 per sq. ft. is in order. The enhancement of the said rate by 15% every year is also as per various judgments of this court i.e. *Sneh Vaish and Another Vs. State Bank of Patiala and Others*, (2012) 8 AD 188 : (2012) 189 DLT 153 ; *Chander Kirti Rani Tandon Vs. M/s. VXL Lodging N. Boarding Services Pvt. Ltd.*, (2013) 197 DLT 266 and; *M.C. Agrawal Huf Vs. Sahara India and Others*, (2011) 183 DLT 105 . These judgments have held that in residential and commercial areas in prime and centrally located locations like Connaught Place an increase of 15% every year would be in order.

75. I also cannot help noticing that in 1997 based on the lease dated 5.6.1997 the plaintiffs claimed mesne profits at Rs. 272.90 sq. ft. per month. The Local Commissioner has awarded Rs. 116.015 per sq. ft. per month. Similarly, for the period 2005 based on the lease deed dated 24.10.2005 the plaintiffs claimed a rent of Rs. 454.32 per sq. ft. per month. The Local Commissioner has awarded Rs. 354.895 per sq. ft. per month. Keeping in view the findings of the Local Commissioner and the nature of evidence placed on record by the plaintiffs I see no reason to differ with the findings of the Local Commissioner and accept the rates on which mesne profits have been determined. The rate of mesne profits adopted by the Local Commissioner in the facts and circumstances is in order.

76. Coming to the interest part, the Local Commissioner has awarded based on judicial pronouncements 12% per annum from the end of each month of illegal occupation till 28.2.2007. Keeping in view the market rate I reduce the interest awarded to 8% per annum Simple Interest from the date the mesne profit fell due i.e. end of each month of illegal occupation and payable till payment is received by the plaintiff. A final decree is passed in favour of the plaintiffs and against the defendant for mesne profit as per chart below fixed by the Local Commissioner based on the rates fixed by the Local Commissioner as follow for the area of 3200.11 sq ft:--

"(The Local Commissioner has noted the area of the premises as 3200.11 sq. ft.

(equivalent of 297.3 sq. meter) to which neither party has objected.)

77. The plaintiff shall also be entitled for costs. The plaintiffs would be entitled to equal share in the decretal amount.

78. There is a dispute regarding the entitlement of the mesne profits between defendants No. 2 and 2A. This Court on 6.10.2006 allowed an application of one Karmyogi. Hotels Private Limited to be substituted in place of plaintiff No. 2 on the ground that plaintiff No. 2 had assigned his right, title and interest in the suit property in favour of the said Karmyogi Hotels Private Limited. Plaintiff No. 2 on 16.12.2008 moved an application stating that it never received a notice on the substitution. This Court noted that the dispute between original plaintiff No. 2 and the new plaintiff No. 2 are not to be adjudicated in the present Suit. This Court also noted that it would be considered at the stage of final arguments whether inter se dispute between the said plaintiff and defendants can be resolved in the present proceedings. Hence, mesne profits being the share of plaintiff No. 2 shall be deposited in this Court subject to realization of inter se dispute between the said parties. There is no dispute between the said two plaintiff No. 2 regarding the share of mesne profits for the period after 9.12.2008 inasmuch as the substituted plaintiff No. 2 had become the rightful owner of the suit property. The dispute pertains to the share of plaintiff No. 2 to the mesne profits prior to the period 9.12.1998. The substituted plaintiff No. 2 shall be entitled to the share of mesne profits for the period after 9.12.1998. The mesne profits before the said period shall be deposited in Court which shall be subject to any decision in appropriate proceedings to be initiated by any of the said parties. However, the said plaintiffs No. 2 and new plaintiff No. 2 have agreed to attempt mediation. Let the new plaintiff No. 2 and the original plaintiff No. 2 appear before the Mediator on 30.07.2015 at 3.00 p.m. to try and resolve their disputes. In case in the course of mediation their disputes are resolved, the report may be put up before this Court for appropriate directions regarding the deposit made in Court. If the mediation does not succeed the matter need not be listed in Court inasmuch as the issue would have to be resolved by means of appropriate legal proceedings by the said parties.

79. All pending applications, if any, also stand disposed of.