

(2024) 01 BOM CK 0053

In the Bombay High Court

Case No : Civil Revision Application No. 549 Of 2022

Bata India Limited

APPELLANT

Vs

Bindiya Co-Operative Housing

RESPONDENT

Date of Decision : 19-01-2024

Acts Referred:

Limitation Act, 1963 — Article 113
Code Of Civil Procedure, 1908 — Section 2(12), 115, Order 2 Rule 4, Order 20 Rule 12, Order 20 Rule 12(1(c)(iii)), Order 20 Rule 20, Order 22 Rule 12, Order 41 Rule 5
Limitation Act, 1963 — Section 15
Transfer Of Property Act, 1882 — Section 111
Maharashtra Rent Control Act, 1999 — Section 3(1)(b)

Citation : (2024) 01 BOM CK 0053

Hon'ble Judges : Sharmila U. Deshmukh, J

Bench : Single Bench

Advocate : Shyam Dewani, Chirag Chanani, M. Tahai, S. C. Naidu, Sudesh Kumar Naidu, Pradeep Kumar, Abhishek Ingale

Final Decision : Partly Allowed

Judgement

Sharmila U. Deshmukh, J

1. Rule. Rule made returnable forthwith and heard finally with the consent of the parties.

2. The revisional jurisdiction of this Court has been invoked challenging the common judgment and order dated 5th September 2022 passed by the Appellate Court in appeals filed by both the parties against the Judgment dated 22nd August 2015 passed by the Small Causes Court in Mesne Profits Application No.6 of 2010. Vide the impugned judgment, the Applicant is directed to pay mesne profits at the rate of Rs.1,24,099/- per month for the period from 22nd January 2002 to 31st March 2012 along with interest at the rate of 6% p.a.

3. The facts of the case are that the Applicant is a company registered under the Companies Act and was the tenant of Respondent since the year 1958 at

monthly rent of Rs. 200/- in respect of Shop no. 8 situated on the ground floor of Respondent-Co-operative Housing Society. At the time of filing of eviction suit, the monthly rent of the suit premises was Rs 313/-. Vide legal notice dated 11th September 2001, the tenancy agreement of Applicant was terminated. T. E. Suit No.21/23 of 2002 was instituted by the Respondent before the Small Causes Court seeking eviction of the Applicant and an inquiry for mesne profits under Order XX Rule 12 of CPC which came to be decreed vide judgment and order dated 2nd August 2005. As against the said judgment and order, Appeal No. 229 of 2005 was filed by the Applicant which came to be dismissed by the Appellate Court by judgment and order dated 28th July 2010.

4. Civil Revision Application No. 912 of 2010 was preferred before this Court, which was dismissed on 27th April 2011. SLP Civil 14753 of 2011 filed before the Apex Court came to be dismissed by order dated 16th September 2011 and the applicant was granted time to hand over possession of the suit premises on or before 31st March 2012.

5. Mesne Profits Application No. 6 of 2010 was filed in T. E. Suit no. 21/23 of 2002 seeking an inquiry into the mesne profits under Order XX Rule 12 of CPC. The Respondent appointed Mr. Roshan H Namavati, an Architect and registered estate valuer who submitted valuation report dated 18th May, 2010 on the basis of which the Respondent claimed Rs.2,08,49,018/-as arrears of mesne profits upto 31st July, 2010 and Rs.2,82,318/- per month as mesne profits from 1st August, 2010 till handing over possession alongwith interest @ 6% p.a. The application was resisted by the Applicant contending that the suit building is more than 70 years old and is dilapidated. It was contended that considering the present day position, locality and amenities, rate claimed by the Applicant was highly disproportionate and the instances of the valuer are not comparable.

6. The Small Causes Court by judgment dated 22nd August 2015 allowed the mesne profits application and directed the applicant to pay Rs. 1,07,040/- per month for the period from 22nd January 2002 to 31st March 2012 alongwith interest @ 6% p.a. Both parties challenged the judgment of the Trial Court and vide common judgment dated 5th September 2022 the appeal filed by the applicant was dismissed and the appeal filed by the respondent was partly allowed increasing the amount of mesne profits to Rs. 1,24,099/- per month from 22nd January, 2002 to 31st March, 2012.

7. Heard Mr. Shyam Dewani, learned counsel appearing for the Applicant and Mr. S. C. Naidu, learned counsel appearing for the Respondent.

8. Mr. Dewani, learned counsel for the Applicant submits that the mesne profits application being filed after period of five years from the date of decree of eviction was barred by limitation as also the period for which mesne profits can be granted is three years preceding the application for mesne profits whereas in the instant case the mesne profits is granted for period of eight years preceding the application. Pointing out to the averments in mesne profits application, he

would contend that it is the case of Respondent that there is no specific order staying the inquiry into mesne profits. As regards the quantum of mesne profits granted, he contends that the relevant criteria has not been applied by the Respondent's valuer as the age of the building has not been taken into consideration and comparable instances shown are of new constructions. He would further submit that mesne profits has been granted in respect of the area admeasuring 669 square feet whereas the suit shop is admeasuring 569 square feet and the area of loft could not be taken into consideration for the purpose of grant of mesne profits. He would further submit that the Secretary of the Respondent Society has admitted in the cross examination that he does not have any personal knowledge about the mesne profits fixed by its valuer and as such there is no evidence about the loss caused to landlord. He submits that the exact amount of compensation cannot be determined only on the basis of valuation report. He would further point out that in the eviction suit, the damages which were claimed were Rs. 20,000/- which could not be enhanced by the Trial Court and Appellate Court. He would further point out the observation of the appellate Court that there is not a single sentence by the respondent seeking enhancement of mesne profits. He would further submit that the decree of eviction was passed on 2nd August 2005 and the Applicant is not liable to pay mesne profits for the period prior to the said date. In support of submissions he tenders the following decisions:

- (I) A. Noorjehan v. Kabir [2012 SCC Online Mad 3824];
- (ii) Wasudeo Ramaji Atkare v. Kushabilal Wazirchand Bahel [Decision of this Court- Nagpur Bench in W.P. No. 3994 of 2022 dtd. 9th Feb. 2023];
- (iii) Chittoori Subhanna v. Kudappa Subhanna [AIR 1965 SC 1325];
- (iv) Ram Sarup Gupta v. Bishun Narain Inter College [(1987) 2 SCC 555];
- (v) M.S.E. Board v. M/s. Mahusudandass [AIR 1966 Bom 160];
- (vi) Pandurang Dhondi Chougule v. Maruti Hari Jadhav [AIR 1966 sc 153];
- (vii) Central Bank of India v. Anil Puranmani Bansal [2016(3) Mh.L.J. 774];
- (viii) Urmi Developers Pvt. Ltd v. Kanorai Brothers [(2016) 5 Bom CR 650];
- (ix) Fateh Chand v. Balkishan Dass [(1964) 1 SCR 515];
- (x) Purificaco Fernandes v. Dr. Hugo Vicentre [(1985) Mh.L.J. 224];
- (xi) Vidyaben Mafatlal Parish v. Nirat Krishnadeo Gupta [2016 SCC Online Bom 16010];
- (xii) Dr. J. Bhakthavatsala Rao v. Industrial Engineers, Nellor [2005(2) APLJ 287];
- (xiii) Atma Ram Properties (P) Ltd v. Federal Motors (P) Ltd [(2005) 1 SCC 705];

(xiv) Osmanabad Janata Sahakari Bank Ltd v. Pandharinath Gyanba Gunale [2014 SCC Online Bom 1174];

(xv) Vijay Anant Gangan v. Zenabibi Gulam Rasool [2021(2) Mh.L.J. 756];

(xvi) Martin & Harris (P) Ltd v. Rajendra A. Mehta [(2022) 8 SCC 527];

9. Per Contra Mr. Naidu, learned counsel for the respondent submits that there is no limitation prescribed for filing of an application for mesne profits as it is a continuing cause of action. He submits that decree of the trial Court is in the nature of preliminary decree and the decree itself provided for the payment of mesne profits for the period from the date of suit till receipt of possession. He would further submit that limitation being mixed question of fact and law could not be raised for the first time before this Court. He would submit that although in the memo of appeal, ground of limitation has been taken by the Applicant the same was not pressed. He would further submit that there was a stay on the entire decree by the appellate Court and the provisions of section 15 of the Limitation Act excludes the period during which the stay was operating. Drawing attention to the averments in the plaint, Mr. Naidu contends that damages of Rs.20,000/- was sought on ad-hoc basis till the filing of suit, and by the decree trial Court has granted mesne profits from the date of suit till the possession is received, upon a proper determination under Order XX rule 12 of CPC. He further submits that the appellate Court has rightly computed the quantum of mesne profits by relying on the valuation report. He submits that the revisional jurisdiction of this Court under Section 115 of CPC ought not to be exercised as the impugned order does not suffer from jurisdictional error. He tenders the following decisions:

(i) State of Maharashtra v. Super Max International (P) Ltd [(2009) 9 SCC 776];

(ii) Sumer Corporation v. Vijay Anant Gangan [Decision of SC in Civil Appeal No. 7774 of 2022, dtd. 9th November 2022.

(iii) Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai [(2005) 4 SCC 1];

(iv) Bhogvati Sahakari Sakhar Karkhana v. M/s. Chaugule [2003(2) Mh.L.J. 562];
and

(v) Kanpur Jal Sansthan v. Bapu Constructions [(2015) 5 SCC 267];

(vi) Shankar Patil v. Gangaram Nagude [1928 Indian Law Reports Vol LII 360];

(vii) Karaka Varaghallamma v. Velagala Simhachalam [2010 SCC Online AP 225];

(viii) Deepak Tandon v. Rajesh Kumar Gupta [(2019) 5 SCC 537];

(ix) Sarla Ahuja v. United India Insurance Co. Ltd [(1998) 8 SCC 119];

(x) Hindustan Petroleum Corp. Ltd v. Dilbahar Singh [(2014) 9 SCC 78]

(xi) State of A.P. v. Vatsavayi Kumara Venkata Krishna Verma [(1999) 2 SCC

297]; and

(xii) *Hindustan Aeronautics Ltd v. Ajit Prasad Tarway* [(1972) 3 SCC 195];

10. In rejoinder Mr. Dewani would submit that specific ground was raised with regard to the limitation and the same was not given up which is demonstrable from the Applicant's written notes of arguments. He would further submit that the burden of proof was upon the Respondent and on the basis of report of valuer the quantum could not have been decided. He submits that by grant of excessive amount of mesne profits the appellate Court has committed a jurisdictional error which can be corrected in exercise of powers under Section 115 of the CPC.

11. In sur-rejoinder, Mr Naidu would contend that by the decree, relief of mesne profits from the date of suit till the date of handing over possession was granted, which relief has been confirmed right up to the Supreme Court. He would further submit that in the plaint, in paragraph 11 it was specifically pleaded that the plaintiffs are entitled to mesne profits from the date of filing of suit till delivery of possession at the rate of Rs. 20,000/- or at such other rate as may be decided by the Court in an enquiry under Order XX rule 12 of CPC. Distinguishing the decision of the learned Single Judge of this Court in *Wasudeo Ramaji Atkare v. Kushabilal Wazirchand Bahelasudev* (supra) he would submit that in the facts of that case, the only relief was regarding the modification as the date of decree was of the year 2016 and the enquiry was directed to be conducted from the institution of suit. He submits that in the present case there was a specific prayer as regards the mesne profits from the date of institution of suit which has been confirmed up to the Apex Court.

12. Considered the submissions and perused the record.

13. Firstly it will be necessary to address the objection of limitation raised by learned counsel for the Applicant. According to Mr. Naidu, learned Counsel for the Respondent the question of limitation being mixed question of fact and law cannot be raised for first time before this Court. The submission is without merit as in the present case the the question of limitation is not a mixed question of fact and law but a pure question of law and does not involve any adjudication of facts. If the question of law does not involve any adjudication of facts, the same can be raised at any stage of the proceedings. In any event, from the memo of appeal and well as the written arguments tendered before the Appellate Court, it appears that the ground of limitation was raised before the Appellate Court. I am therefore inclined to consider the submission as regards bar of limitation.

14. The objection on the ground of limitation has been raised qua the application for mesne profits as well as qua the period for which mesne profits has been granted. According to Mr. Dewani, the application for mesne profits was required to be filed within three years from the date of decree of eviction and the mesne profits, if granted, can be only for a period of three years preceding the application. It will be therefore necessary to take a look at the undisputed

sequence of dates and events which is as under :

Date.

Particulars.

11-09-2001

Notice was issued by the respondent terminating the tenancy of applicant with effect from 31st October 2001.

22-01-2002

TE Suit No.21/23 of 2002 was filed by the respondent, inter-alia seeking eviction of applicant.

02-08-2005

Decree of eviction and inquiry into mesne profits passed.

16-11-2005

Appeal No.229 of 2005 preferred assailing the judgment and decree of Trial Court.

28-07-2010

Appeal dismissed confirming the decree of trial Court.

04-08-2010

Application for Mesne Profits filed by the Respondent.

19-10-2010

CRA No. 912 of 2010 filed by the Applicant in this Court assailing the concurrent judgment of Trial Court and Appellate Court in eviction suit.

22-10-2010

Stay granted by the appellate Court continued by this Court in CRA.

27-04-2011

CRA came to be dismissed.

16-09-2011

SLP (Civil) No. 14753 of 2011 filed by the applicant came to be dismissed by the Apex Court. Time granted upto 31st March, 2012 to hand over possession.

2012

Applicant vacated and handed over possession of suit premises to the Respondent.

22-08-2015

Small Causes Court passed order in Mesne Profit Application granting Mesne Profit @ Rs. 1,07,040/- per month for the period 22nd January 2002 to 31st March 2012.

5-9-2022

By common judgment and order the Appellate Court partly allowed the appeal filed by the Respondent, being Misc. Appeal No.3 of 2016 enhancing the quantum of mesne profits and dismissed the appeal being Misc. Appeal No.86 of 2016 filed by Applicant impugning the quantum of mesne profit.

15. The above list of dates indicates that tenancy was terminated with effect from October 2001 and T.E Suit No.21/223 was filed on 22nd January, 2002 seeking the following reliefs:

“(a) that the Defendants be directed by an order and decree of this Hon’ble Court to quit vacate and handover to the plaintiffs the quiet, vacant and peaceful possession of the suit premises viz. Shop No.8 on the Ground floor, of Bindiya Co-operative Housing Society Ltd., situated at 51, Pali Hill Road, Bandra (West), Mumbai 400051.

(b) An inquiry into the amount of mesne profit be ordered as contemplated U/O 22 R.12 of C.P.C.”

16. The specific provision of Limitation Act, 1963 was not pointed out by Mr. Dewani, however as reliance is placed on decision of Central Bank of India vs Anil Puranmal Bansal (supra), the relevant Article held therein was Article 113 of the Schedule to Limitation Act, 1963. Article 113 of Limitation Act, 1963 which is a residuary provision prescribes a period of three years when the right to sue accrues.

17. The cause of action for claiming mesne profits would arise upon the possession being determined as wrongful. As held in the case of Atmaram Properties (P) Ltd vs Federal Motors (P) Ltd (supra), under the general law and in cases where the tenancy is governed only by the provisions of Transfer of Property Act, 1882 once the tenancy comes to an end by determination of lease under Section 111 of Transfer of Property Act, 1882 the right of tenant to continue in possession comes to an end and for any period thereafter, for which he continues to occupy the premises, he becomes liable to pay damages for use and occupation, and in case of premises governed by rent control legislation the tenancy would stand terminated with effect from the date of decree of eviction. In the present case, the Applicant is admittedly exempt under the provisions of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 and, as such, the tenancy stands determined from the date of termination of tenancy and not from the date of passing of decree of eviction.

18. By reason of Order II Rule 4 of Code of Civil Procedure, 1908 (CPC), the cause of action in respect of claim for mesne profits is permitted to be joined with the cause of action for recovery of immovable property despite the dates of

cause of action not necessarily being identical. Now, coming to the decree which may be passed by the Trial Court in the suit seeking eviction and mesne profits, the provisions of Order XX Rule 12 of CPC (Bombay Amendment) provides that where a suit is for recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree directing an inquiry as to the rent or mesne profits from the date of institution of suit until the delivery of possession to the decree holder. Where an inquiry is directed as above, a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of inquiry. It is therefore evident that the decree passed by the trial Court directing an inquiry into mesne profits from the date of institution of suit until delivery of possession partakes the character of a preliminary decree and the proceedings culminate upon a final decree being passed for mesne profits after an inquiry under Order XX Rule 20 CPC. The enabling provisions of Order XX Rule 12 would indicate that the purpose is that Plaintiff having granted decree for possession should thereafter not be driven to file a separate suit for relief of future mesne profits from date of suit till delivery of possession. The provisions does not contemplate filing of an application for purpose of initiation of an inquiry as the decree itself directs an inquiry. The Final decree proceedings being in continuation of the suit, there is no question of starting point of limitation where the claim for mesne profits is already decreed and all that remains is the determination thereof.

19. The decision relied upon by the learned counsel appearing for the Respondent in the case of Shankar Appaji Patil vs Gangaram Bapuji Nagude (supra) is squarely applicable to the facts of present case. In the facts of that case, an objection of limitation was raised that an application for ascertainment of mesne profits is required to be filed within three years. The Division Bench held that as a result of inquiry, the final decree is required to be passed for mesne profits and Order XX rule 12 of CPC does not provide for any application to be made for ascertainment of mesne profits. The Division Bench further held that ascertainment of mesne profits is a proceeding in the suit and it is the duty of the Court to pass a final decree in accordance with the inquiry as laid down by Order XX rule 12 of CPC and it is not within the power of lower Court to decline to exercise the jurisdiction and to dismiss the application on the ground of limitation.

20. In view of the above enunciation of law, in the facts of the present case where the claim for future mesne profits is decreed by the Trial Court, the contention that the application for Mesne Profits is barred by limitation being beyond three years is liable to be rejected.

21. Even otherwise in the instant case, after the decree was passed by the trial Court in the year 2005, the decree was stayed by the Appellate Court which stay was continued by this Court in the Revision proceedings which was dismissed on 27th April, 2011. It appears that after the dismissal of the appeal by the Appellate Court on 28th July, 2010, on 4th August 2010 mesne profits application

was filed by the Respondent. The reliance upon the pleadings in the application as well as the evidence of respondent that the stay was initially granted and extended from time to time and there was no specific order staying the enquiry of mesne profits will not assist the case of Applicant as it is not demonstrated, at least before this Court, that the order of stay was confined only to the decree of eviction and not to the enquiry into the mesne profits. It is also unfathomable that the entire decree would not be stayed in as much as if the inquiry into mesne profits would be permitted to continue, if the decree of eviction is quashed and set aside by the appellate forum, the exercise of inquiry under Order XX Rule 12 would be rendered futile.

22. Coming to the second submission that mesne profits can be granted only for the period of three years immediately preceding the date of application, it is settled that the landlord is entitled to claim past as well as future mesne profits. The provisions of Order XX Rule 12 of CPC empower the Court to pass decree for possession and for mesne profits which have accrued upon the property during the period prior to the institution of the suit as well as to direct an inquiry into mesne profits from the institution of the suit till delivery of possession. The statutory provisions permit the claim for mesne profits from date of institution of suit till delivery of possession i.e. future mesne profits.

23. In the facts of present case, in the suit itself there was a prayer made for inquiry into mesne profits under Order XX Rule 12 of CPC which prayer was granted by the trial Court by directing an inquiry into the mesne profits from the date of institution of suit till handing over of possession. All challenges to the decree of trial Court right up to the Apex Court came to be negated and all that it required subsequently was computation of mesne profits for the said period.

24. In support of his submission that mesne profits can be granted only for a period of three years, much emphasis has been laid upon the decision of this Court in *Central Bank of India v. Anil Puranmal Bansal* (supra). It will be necessary to consider the decision in some detail. In that case, tenancy was terminated on 19th June 1982 and thereafter R.A.E & R Suit No 1486/4851 of 1983 was filed which came to be decreed on 12th July, 1991. The Appeal of the tenant came to be allowed as against which Writ Petition was filed in this Court which was allowed by judgment and order dated 3rd September, 2002. The possession was handed over on 31st March, 2003. In the interregnum TE& R Suit No 229/274 of 2000 was filed claiming mesne profits for period post 2000. In the year 2004, Miscellaneous Notice No 4705 of 2004 was taken out in the eviction suit of 1983 claiming mesne profits for the period from the date of termination till the year 2000 i.e past mesne profits. The facts of that case were that in the eviction suit of 1983, there was no claim for past or future mesne profits and as such there was no decree in respect of the past mesne profits or an inquiry into the future mesne profits. The learned Single Judge was considering the issue of limitation qua the Misc. Notice of the year 2004 claiming past mesne profits from the date of termination of tenancy till the year 2000 as there was no decree for

past or future mesne profits passed in the R.A.E. & R. Suit No.1486/4851 of 1983 and in the year 2004, the claim was made for past mesne profits. The facts of that case are clearly distinguishable and does not assist the case of the applicant.

25. As discussed above, in the instant case as the claim for future mesne profits was already decreed, which decree was upheld by the Apex Court and the provisions of Order XX Rule 12 does not contemplate filing of an application for commencement of inquiry into future mesne profits, there is no question of mesne profits being limited to a period of three years preceding the application for inquiry into mesne profits.

26. Having negated the contention as regards the bar of limitation qua the application and period for grant of mesne profits in the factual scenario, it will be now necessary to refer to the computation of mesne profits by the trial Court as well as the appellate Court. In the Mesne Profit application, the Respondent examined its Secretary and the Valuer. The valuation report dated 18th May, 2010 was produced by the valuer and marked Exhibit-37. The Defendant examined its authorised officer. There is no submission advanced on the evidence of valuer. The submission of Mr. Dewani was that the Respondent's witness i.e. Secretary of the Society has admitted that he has no personal knowledge about the mesne profits of any specific shop or premises of the suit premises or about the mesne profits fixed by the Valuer. In my opinion, nothing much turns on the said admission as the Secretary is not an expert real estate valuer. The expert i.e. the valuer who had prepared the valuation report was duly examined by the Respondent and nothing has been demonstrated from valuer's evidence to doubt the valuation report submitted by him. Pertinently, there is no competitive valuation report produced by the Applicant. Reliance on the decision of *Urmi Developers Private Limited & Ors vs Kanoria Brothers & Ors* (supra) to contend that the exact compensation cannot be only on the basis of valuation report submitted by both the parties is misplaced as the observation has been read out of context. In that case, the learned Single Judge was considering the quantum of interim compensation as condition of stay under Order XLI Rule 5 of CPC. The learned Single Judge in that context held that at that stage the Court cannot determine the exact amount of compensation only on the basis of valuation report submitted by both the parties and the Court can consider whether all the principles/factors required to be considered are considered or not in the valuation report.

27. The suit premises is situated in a building located at Hill Road Junction, ICE Factory Lane, Bandra (West) facing Hill Road. The locality of Bandra West is a bustling commercial locality and is well known shopping centre. The area is approachable by all means of public transportation and is a landmark locality. The suit premises was used as a commercial premises for retail sales as such the location can be said to be advantageous for the purpose of business. As far as the age of building is concerned, admittedly the building has been constructed

somewhere in the year 1930 and this is one of the factors which will have to be taken into consideration for the purpose of determining mesne profits.

28. Section 2(12) of CPC defines the mesne profits as those profits which a person in wrongful possession of such property actually receives or might with ordinary diligence have received therefrom together with interest on such profits. It is settled that while ascertaining mesne profits the test to be applied is not what the landlord has lost or would have earned by letting out or using the property himself but what the wrongful occupant had actually received or might have with due diligence received. (See *Humayan Dhanrajgir vs Esra Aboody*, *Fatehchand vs Balkishan Dass* and *Smt. Purificacao Fernandes vs Dr. Hugo Vicentre*.)

29. PW-2 i.e. the valuer has produced the valuation report dated 18th May 2010. While computing the monthly compensation, the valuer has divided the period between 2002 to 2010 into 4 groups, as under :

Group No.1 : 22-1-2002 to 31-12-2002.

Group No.2 : 1-1-2003 to 31-12-2005.

Group No.3 : 1-1-2006 to 31-12-2008.

Group No.4 : 1-1-2009 to end of May 2010.

30. As per valuation report, the building has been constructed in the year 1930. The valuer has calculated the applicable depreciation value @ Rs 5.60 per square feet which is then applied by the valuer to the instances of leave and license rentals quoted in the valuation report. Group No.1 considers two instances. The 1st instance shows computation of Rs.148.44/- per square feet per month computed by the Small Causes Court in the year 2001 in respect of a property in the vicinity of suit property. The valuer has added rise of 1.25% for the year 2002 and has deducted the depreciation value of Rs. 5.60/ per square feet arriving at Rs.185.50 per square feet per month. In Instance No.2 the premises are admeasuring 720 square feet and the license fees is Rs 90,000/- per month with service charges of Rs 45,000/- per month and interest free deposit of Rs.40,00,000/-. The property is not located in the vicinity of suit premises and cannot be taken as a comparable instance.

31. As regards Group No.2, two instances were considered. As far as instance no.3 is concerned, the same was in respect of a premises which is not in the vicinity of suit premises and is in respect of an admittedly larger area. The valuer has considered the areas on the ground floor as well as the first floor and has adopted de-loading of the first floor by 30% as compared to the rate on the ground floor and has thereafter deducted the estimated rentals of car parking as well as the terrace for dish antenna and outdoor condenser unit. Apart from the fact that the said premises was not in the vicinity of suit premises as also the premises were of a larger area, the instance was obviously not comparable as there were certain amenities included in the rentals and the valuer has deducted

an estimated amount. The monthly rental has been arrived at by the valuer by complicated method and cannot be considered as a comparable indicator. As regards instance no.4, the area considered was a smaller area and situated at a location which was far away from the suit premises and therefore cannot be considered as a comparable instance.

32. As regards Group No. 3, Instance no.5 was in respect of a shop admeasuring 330 square feet located at a distance of about 1 km from the suit premises. The monthly compensation was Rs.1,12,000/- per month with interest free deposit of Rs.16 lakh. The valuer has considered 7.58% interest on the deposit and after deducting the depreciation value, computed the monthly compensation @ Rs.364.51/-. The premises not being located in the vicinity of suit premises cannot be considered. Instance No.6 is in respect of premises of smaller area, however is situated in the vicinity of suit premises.

33. As regards Group No.4, instance no. 7 was in respect of shop of a larger area which also included mezzanine as well as basement of larger areas and cannot be considered as comparable indicator. The valuer has calculated the effective area, however, there is no basis for the calculation.

34. The trial Court considered the instances quoted in the valuation report and held that only instance no.6 can be considered as a comparable instance as the same is situated near Hill Road, Bandra West. However, as the premises were of a smaller area of 120 square feet and there was no evidence about the age of building, the trial Court has reduced the rate from Rs.313.53 per square feet to Rs 160 per square feet per month and computed the monthly compensation @ Rs 160/ per square feet.

35. The appellate Court disagreed with the finding of trial Court and held that there is no basis for reducing the area of 50% and as such has taken into consideration the lowest rate of instance no. 1 which was pursuant to a judgment of the Small Causes Court in respect of a premises in the vicinity of the present suit premises at Rs185.50 per square feet.

36. The Trial Court has considered Instance No.6 as a comparable instance whereas the Appellate Court has upheld Instance No.1. As far as instance no.1 is concerned, the valuer has taken into consideration the computation of mesne profits as per the judgment of Small Causes Court and has thereafter added a rise of 1.25% and has deducted the depreciation value of Rs.5.60 per square feet and arrived at figure of Rs.185.50 per square feet per month. Although in that case, age of the building does not find mention in the valuation report there has been a deduction on account of depreciation which has been calculated at 70% of cost of construction by the valuer and as such Instance No.1 can be stated to be comparable indicator. It needs to be noted that Instance no. 6 is in respect of much lesser area of 120 sq. ft. carpet area. It is well known that the smaller premises command a higher monthly rental than a larger area premises. The monthly rental for premises of smaller area cannot be taken as an indicator of

the monthly rental that the premises of larger area would command.

37. The Appellate Court has rightly rejected the deduction of 50% made by the trial Court while accepting Instance No 6. The Trial Court reduced the rate by 50% by presuming that the building in Instance No 6 is situated in a recently constructed building. There was no warrant for considering Instance No 6 which was in respect of smaller area and no basis for reducing the rate by 50%.

38. In my opinion, the computation of mesne profits cannot be conjecture of the Court. There has to be some evidence to sustain the computation and if some evidence has been led to justify the quantum of mesne profits, the finding cannot be faulted. The Appellate Court has rightly considered instance no. 1 which was based on computation by the Small Causes Court in respect of other premises in respect of the premises situated in the same locality.

39. As regards the contention that the area of the premises is 569 square feet, neither the Trial Court nor the Appellate Court has dealt with the submission and has accepted the area to be 669 square feet. In that respect, the description of suit premises in the plaint will have to be considered. In the plaint, the area of suit premises has not been described and it is only described as shop no.8. In the appeal memo, a specific ground was taken by the applicant that carpet area of the premises is 569 square feet and the area of loft cannot be taken into consideration for the purpose of computing the mesne profits. This factual position is not disputed by the learned counsel for the respondent. There is no decision or norm demonstrated to this Court which permits the addition of loft area and open space in front of premises while calculating mesne profits. As such, in my opinion for the purpose of calculating the mesne profits it is only the carpet area of 569 square feet which will have to be taken into consideration and not 669 sqft.

40. Now, coming to the submission that in the absence of any request for enhancing of mesne profits, the appellate Court could not have enhanced the amount of mesne profits, the record indicates that the impugned common judgment of appellate Court is passed in Misc. Appeal No.3 of 2016 in Mesne Profit Proceeding No.6 of 2010 in T.E. Suit No.21/23 of 2002 filed by the Respondent Society and Misc. Appeal No.86 of 2016 in Mesne Profit Proceeding No.6 of 2010 in T.E. Suit No 21/23 of 2002 filed by the Applicant. The impugned judgment notes the contention of Respondent that the appeal has been filed for modifying the order and there is a prayer for enhancing the compensation, i.e. mesne profits awarded by the trial Court. That being the contention raised by Respondent, the observation of appellate Court that not a single sentence has been stated by the plaintiff, appears to be an observation in the context of evidence of the Secretary of Respondent Society. Even though the witness may not have in specific words deposed that the Appeal is filed for enhancement of the amount of mesne profits, the appeal itself was filed for enhancement of compensation. As such the appellate Court was well within its right to consider the evidence on record and to arrive at a proper valuation.

41. As far as the submission that the tenancy stood terminated from the date of eviction order and the Applicant was not liable to pay mesne profits for the period prior to the suit is concerned, as indicated above, the applicant is admittedly exempt under the provisions of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 and, as such, the tenancy stands determined from the date of termination of tenancy and not from the date of passing of decree of eviction.

42. As regards the submission that in the eviction suit the damages were claimed @ Rs 20,000/, in paragraph 10 of the plaint, the plaintiff has averred that the Plaintiff is also entitled to damages @ Rs 20,000/ from date of termination of tenancy of the tenancy till the filing of the suit. In paragraph 11, it is averred that the Plaintiff are also entitled to mesne profits from the date of filing of the suit till delivery of possession @ Rs 20,000 per month or at such other rate as may be decided by the Hon'ble Court under Order 22 Rule 12 of CPC. The averments in the plaint clearly indicate that the Plaintiff had not confined its claim for mesne profits to Rs 20,000 but had left it to be determined in inquiry under Order XX Rule 12 of CPC. It is also not the case of the Applicant that the claim for Rs 20,000/ as damages was substantiated by evidence or based on any valuation report. As such I am not inclined to accept the submission that by the averments in the plaint, the claim for mesne profits was confined to Rs 20,000/ per month.

43. As regards the decisions in Fateh Chand (supra) and Purificaco Fernandes (supra), in the case of Purificaco Fernandes (supra), the Court held that nowhere the mesne profits are linked with any benefits that the owner of land may get from the said land. The Court noted the decision in the case of Kesardeo Baijnath vs Nathmal Kisanlal [AIR 1966 Bom 266] that the defendant who was no longer a tenant could not still insist on saying that the rent which the plaintiff could have got under the rent control regulation should be treated as measure of damages. In Fateh Chand (supra), the Apex Court held that the normal measure of mesne profits therefore is the value of user of land to the person in wrongful possession.

44. As regards the decision in the case of Chittoori Subhanna (supra), the same has been relied upon in support of the submission that in the absence of a request for enhancement of mesne profits, the quantum of mesne profits could not have been increased. As stated above, the order of appellate Court itself records that the respondent-landlord had filed an appeal against the order of Small Causes Court seeking enhancement of mesne profits. As such, the decision in the case of Chittoori Subhanna (supra) does not assist the case of Applicant.

45. The decision in the case of A. Noorjehan v. Kabir (supra) was relied upon with regard to the submission that mesne profits can be granted within a period of three years from the date of final decree. The said decision takes into consideration the provisions of sub-rule 1(c)(iii) of rule 12 of Order 20 of CPC which is conspicuous by its absence in the Bombay Amendment of Order XX Rule

12 of CPC.

46. As regards the decision in Wasudeo Ramaji Atkare (supra), the learned Single Judge of this Court considered the decision in the case of Atma Ram Properties (supra) and held that the tenant is liable for mesne profits with the passing of decree of eviction and the inquiry into future mesne profits under Order 20 needs to be modified that it should be from the date of decree. In the present case, the applicant is admittedly exempt under the provisions of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 and, as such, the tenancy stands determined from the date of termination of tenancy and not from the date of passing of decree of eviction. From the said decision it does not appear that the tenant in that case was exempt from the rigors of rent control legislation and as such the said decision is clearly distinguishable.

47. Mr. Naidu has rightly placed reliance upon the decision in the case of Hindustan Petroleum Corp. Ltd v. Dilbahar Singh (supra) on the aspect of revisional jurisdiction of this Court where the Apex Court has held that the revisional jurisdiction cannot be invoked as a cloak of an appeal in disguise and there cannot be re-hearing of the issue raised in original proceedings.

48. Having regard to the discussion above, in exercise of powers under section 115 of the CPC there is no warrant for interference with the computation of mesne profits at Rs 185.50 per square feet. However, the area for computation of mesne profits is reduced to 569 square feet which is the carpet area of the suit premises. As such the monthly mesne profits is computed at the rate of Rs 185.50 per square feet for the area i.e. 569 square feet for the period from 22nd January, 2002 to 31st March, 2012 alongwith interest @ 6% p.a. to be paid by the Applicant within three months from the date of uploading of this order on the official website.

49. Revision is partly allowed with the modification in the area as indicated above. Rule is made partly absolute.

[Sharmila U. Deshmukh, J.]

50. At this stage, learned counsel for the parties inform this Court that during the pendency of present proceedings a sum of Rs.1 crore was deposited by the applicant. If within a period of three months, arrears are not paid as directed nor any order is obtained from the Apex Court, respondent will be at liberty to withdraw the amount lying deposited along with accrued interest.