

(2006) 11 CAL CK 0012
In the Calcutta High Court
Case No : C.S. No. 88 of 2000

Candlewood Holdings Ltd.

APPELLANT

Vs

Allahabad Bank

RESPONDENT

Date of Decision : 09-11-2006

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 193, 193(1), 194(1), 230, 231
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 14, Order 8 Rule 6, Order 8 Rule 6A,
Order 8 Rule 6B, Order 8 Rule 8A
Contract Act, 1872 — Section 73, 74
Evidence Act, 1872 — Section 114, 92
Interest Act, 1839 — Section 1
Registration Act, 1908 — Section 17(1), 49
Transfer of Property Act, 1882 — Section 107, 108, 109, 8

Citation : (2007) 1 CALLT 548 : (2007) 1 CLT 548

Hon'ble Judges : Arun Kumar Bhattacharya, J

Bench : Single Bench

Advocate : Shyam Sarkar and Sabyasachi Chowdhury and S. Singhvi, for the Appellant; Surajit Nath Mitra and Sarnendu Ghosh, for the Respondent

Judgement

Arun Kumar Bhattacharya, J.—This is a suit for recovery of Rs. 2,66,54,196/- towards arrear rents, hiring charges, municipal taxes and commercial surcharge with interest and Rs. 17,14,142/- towards compensation for damages to furniture and fixtures, interest and other reliefs.

2. The miniaturised version of the plaintiff is that the Calcutta Credit Corporation Ltd., hereinafter referred to as the Corporation, was the owner of fourth floor of premises No. 24, Park Street, Calcutta-16 consisting of two portions having covered areas of 9000 and 1400 sft., as described in schedule "A" to the plaint. By an agreement for lease dated 27.08.84 the said Corporation leased out 9000 sft. to United Industrial Bank Ltd. for a period of fifteen years from 01.09.84 at a monthly rental of Rs. 81,000/- on condition that after completion of every five years the rent would be increased by at least ten per cent and that lessee would bear and pay to the lessor the occupier's share of the municipal rates and taxes

and other municipal levies in respect of the said 9000 sft. without insisting upon production of assessment orders and/or bills. By a supplemental agreement dated 27.08.89 the Corporation hired out various furniture and fixtures to the said Bank for a period of fifteen years from 01.09.84 at a monthly hire-charges of Rs.24,300/- to be enhanced after every five years by at least ten per cent. By another agreement for lease dated 22.01.85 the said Corporation leased out 1400 sft. of the said premises to the aforesaid Bank for a period of fifteen years from 01.02.85 at a monthly rental of Rs. 12,600/- to be enhanced after completion of every five years by at least ten per cent and that lessee would bear and pay the lessor the occupier's share of municipal rates and taxes and other municipal levies in respect of the said portion without insisting upon production of assessment orders and/or bills. By a supplemental agreement dated 22.01.85 the Corporation let out further furniture and fixtures to the said Bank for a period of fifteen years from 01.02.85 at a monthly hire-charges of Rs. 3,780/- to be enhanced at every five years by at least ten per cent. In July, 1989 on account of merger of the said United Industrial Bank Ltd. with the defendant Bank, all rights-and obligations of the United Industrial Bank in respect of the said tenancy and hiring of furniture and fixtures stood transferred to the defendant Bank. The monthly rental in respect of portion of 9000 sft. was mutually enhanced to Rs. 89,100/- with effect from 01.09.89 and thereafter to Rs.2,25,000/- @ Rs.25/- per square foot with effect from 01.09.94. Similarly, the monthly rental in respect of portion of 1400 sft. was mutually enhanced to Rs. 13,860/- from 01.02.90 and thereafter to Rs. 35,000/- @ Rs.25/-per sft. from 01.02.95. The hire-charges for the furniture and fixtures under the supplemental agreement dated 27.08.84 stood enhanced to Rs.26,730/- from 01.09.89 and to Rs.29,403/- from 01.09.94 in view of the escalation clause. Similarly the hire-charges for the furniture and fixtures under the supplemental agreement dated 22.01.85 stood enhanced to Rs. 4,158/- with effect from 01.02.90 and to Rs. 4,573.80 from 01.02.95. The defendant and/or its predecessor-in-interest duly paid the occupier's share of municipal rates and taxes as also other municipal levies i.e. commercial surcharge upto August, 1994. It was agreed between the parties and/or their predecessors-in-interest that the defendant would bear the entirety of the municipal rates and taxes with effect from 01.09.94 which was recorded in a letter dated 14.12.94 by the defendant to the predecessor-in-interest of the plaintiff. With the expiry of February, 1995 the defendant surrendered the entirety of 1400 sft. portion as also 1753 sft. out of 9000 sft. portion to the predecessor-in-interest of the plaintiff and retained 7247 sft. of the premises, and thus the defendant and the predecessor-in-interest of the plaintiff also terminated the supplemental agreement dated 22.01.85. The Corporation by diverse process of merger ultimately came to be named "Magma Leasing Ltd." to whom the defendant attorned the tenancy. The defendant offered to surrender 7247 sft. to the plaintiff with the expiry of August, 1999, but ultimately made over the vacant possession thereof to the plaintiff on 12.01.2000. The supplemental agreement dated 27.8.84 as such stood terminated on the same date. The defendant failed to pay the rental of Rs. 1,81,175/- in respect of the

said 7247 sft. from the month of January, 1996 till 12.01.2000 aggregating to Rs. 87,68,870/-. The defendant made part payment towards hire-charges for furniture and fixtures upto December, 1995 leaving an amount of Rs. 2,40,475/- as short-fall and failed to pay any hire-charges for furniture and fixtures from January, 1996 till the date of delivery of possession on 12.01.2000 thus aggregating a sum of Rs. 13,72,320/-. The defendant also failed to pay Rs. 66,67,732/- on account of municipal rates and taxes and commercial surcharge. In acknowledgement of its liability to pay the arrear rent and hire-charges for furniture and fixtures, the defendant forwarded a letter dated 30.08.99 along with a banker's cheque for a sum of Rs. 67,91,787/- to the plaintiff towards arrear rent and hire-charges upto August 1999 in purported full and final settlement of its claim which was returned by the plaintiff as its claim on such account was far larger. In respect of municipal rates and taxes and commercial surcharge though the defendant through its letters acknowledged its liability wrongfully insisted upon production of municipal bills and proof of payment thereof. The plaintiff is entitled to interest on the said sum of Rs. 1,68,08,922/- @ 18% p.a., and the sum on this count as on 29.02.2000 stood at Rs. 98,45,274/-. Thus the total sum due comes to Rs. 2,66,54,196/-. On the date of delivery of possession of the said 7247 sft. to the plaintiff after a joint inventory many items of furniture and fixtures were found in damaged condition, several items missing, and the physical condition of the premises was damaged, and the value of the damage as reported by a Chartered Engineer and valuer, engaged by the plaintiff was to the tune of Rs. 17,14,142 which the plaintiff is entitled to claim. Hence the suit.

3. The suit is contested by the defendant by filing a written statement inter alia denying the material allegations made in the plaint and contending that originally Calcutta Credit Corporation Ltd. was the landlord of the defendant in respect of the said two portions. On the basis of instructions from the said Corporation, the defendant attorned its tenancies in favour of ARM Group Enterprise Ltd. and subsequently on the basis of instructions from the said ARM Group Enterprise Ltd. the defendant attorned its tenancies in favour of Magma Leasing Ltd. On the basis of instructions from Magma Leasing Ltd. the defendant attorned its tenancies in favour of several companies viz. Puneet Developers (P) Ltd., Puneet Holdings Ltd., Seville Estates (P) Ltd. and Bansal Estates (P) Ltd., and paid rents to them as per their respective shares but Magma Leasing Ltd. continued to collect furniture charges from the defendant. By a letter dated 19.11.98 the plaintiff informed the defendant that by an order dated 20.11.97 passed by this Court the said four companies were amalgamated with the plaintiff company. By a letter dated 30.08.99 the defendant informed the plaintiff about its decision to vacate its tenanted portion by the end of August, 1999 and forwarded a banker's cheque for Rs. 67,91,787/- towards full and final settlement upto 31.08.99. On 31.08.99 the defendant forwarded to the plaintiff the keys of the tenanted premises along with its letter dated 31.08.99 with the object of delivering vacant possession, but the plaintiff's representative Mr. S. Tulsyan refused to accept the

keys and also delivery of possession of the tenanted premises which was duly informed by the defendant to the representative of the plaintiff during subsequent discussion. Followed by a letter dated 04.01.2000 to the plaintiff intimating that the defendant had no liability to pay any rent and other charges from 1st September, 1999 and that the defendant was holding the keys from 01.09.99 due to wrongful refusal on the part of the plaintiffs representative, by a letter dated 10.01.2000 the plaintiffs advocate made certain false allegations. By its letter dated 12.01.2000 the defendant on denying the allegations reiterated the same thing and forwarded the keys of the premises which was accepted by the plaintiff through its representative. While going through the records it transpired that the said four companies by a letter dated 15.09.98 claimed rent till September, 1998 and the landlords of the defendant including the plaintiff arbitrarily collected from time to time a sum of Rs. 99,15,959.60p. from the defendant by way of municipal rates and taxes and surcharge thereon without rendering any accounts thereof. The defendant was liable to pay such municipal rates and taxes and commercial surcharge on actuals and proportionate to the area occupied. The defendant called upon the plaintiff to render true and faithful accounts of the amounts actually payable by the defendant as against the amounts paid by it, but the defendant failed to render such accounts. In 1992 during discussion it was agreed that the generator hire charges shall be increased from Rs.20,000/- to Rs.28,000/- per month from 01.04.92 and statutory payment as regards municipal taxes and surcharges in respect of the occupier's share will be paid to the landlord by the defendant subject to verification of the bills/receipts of CMC but there will be no increase in furniture rent. The defendant had or has no liability to pay any rent or other charges beyond 31.08.99. Hence, the suit merits dismissal. The defendant has prayed for a decree for accounts of the amounts paid by it by way of municipal rates and taxes and commercial surcharge as against the amounts actually payable by it and for the amounts found due and payable by the plaintiff to the defendant.

4. Upon the above pleadings, the following issues were framed:

- (1) Is the suit maintainable in its present form?
- (2) Has the plaintiff any cause of action to file the suit against the defendant?
- (3) Is the suit barred by limitation?
- (4) Is the suit bad for non-joinder and misjoinder of necessary parties?
- (5) Is the plaintiff entitled to receive the rent as claimed for?
- (6) Is the plaintiff entitled to receive the hire charges for furniture and fittings as claimed for?
- (7) Is the plaintiff entitled to receive any sum on account of municipal rates and taxes and commercial surcharges thereon as claimed for?
- (8) Is the plaintiff entitled to the rate of interest as claimed for?

- (9) Is the plaintiff entitled to get a decree as claimed for?
- (10) Is the defendant entitled to set off as claimed?
- (11) To what other relief or reliefs, if any, the plaintiff is entitled?

5. Issue Nos. 3 and 4: Not pressed.

6. Issue Nos. 1,2,5 to 11: All these issues are taken up together for the sake of convenience and brevity and in order to avoid repetition.

7. The plaintiff has brought this suit for recovery of arrear rents for the premises comprising of 7247 sft. @ Rs. 1,81,175/- per month for the period from January 1996 to 12.01.2000 amounting to Rs. 87,68,870/-, arrear hiring charges @ Rs.29,403/- per month for furniture and fixtures for the said period from January, 1996 to 12.01.2000 amounting to Rs. 13,72,320/-, arrear municipal taxes and commercial surcharge amounting to Rs. 66,67,732/-, interest @ 18% on the aforesaid sums amounting to Rs. 98,45,274/-, thus totalling to Rs.2,66,54,196/-, interest on Judgment, compensation for damage to the premises, furniture and value of missing items of furniture amounting to Rs. 17,14,192/- and other reliefs.

8. The facts admitted and/or undisputed in the present case are as follows:

The Calcutta Credit Corporation Ltd., hereinafter referred to as the Corporation, owner of fourth floor of premises No. 24, Park Street, Calcutta-16 comprising of two portions having covered areas of 9000 sft. and 1400 sft., as described in schedule "A" to the plaint, by an agreement for lease dated 27.08.84 (Ext. B) leased out 9000 sft. to the United Industrial Bank Ltd. for a period of fifteen years from 01.09.84 at a monthly rental of Rs. 81,000/-, to be enhanced by at least ten per cent after completion of every five years, on condition that the lessee would bear the occupier's share of municipal rates and taxes and other municipal levies and would pay the same to the lessor without insisting upon production of assessment orders and/or bills. By a supplemental agreement dated 27.8.84 (Ext. D) the Corporation hired out various furniture and fixtures to the said bank for a period of fifteen years from 01.09.84 at a monthly hire-charges of Rs.24,.300/-, to be enhanced by at least ten per cent after every five years. Similarly, by another agreement dated 22.01.85 (Ext. C) the Corporation leased out 1400 sft. to the said bank from 01.02.85 for a period of fifteen years at a monthly rental of Rs. 12,600/- on similar terms and conditions, and by a supplemental agreement dated 22.01.85 (Ext. E) hired out furniture and fixtures from 01.02.85 at a monthly hire-charges of Rs. 3,780/-, to be enhanced by at least ten per cent after every five years. The monthly rental of 9000 sft. was enhanced to Rs. 89,100/- from 01.09.89 and thereafter to Rs.2,25,000/- @ Rs.25/- per sft. from 01.02.95 and that of 1400 sft. was enhanced to Rs. 13,860/- from 01.02.90 and then to Rs. 35,000/- @ Rs.25/- per sft. from 01.02.95. The defendant and/or its predecessor-in-interest duly paid the occupier's share of municipal rates and taxes as also other municipal levies upto August, 1994. In

July, 1989 the United Industrial Bank Ltd. merged with the defendant Bank and as such all rights and obligations of the said United Industrial Bank Ltd. in respect of the tenancies and hiring of the said furniture and fixtures stood transferred in favour of the defendant Bank. On the basis of instruction from the said Corporation, the defendant attorned its tenancies in favour of ARM Group Enterprise Ltd., and on the basis of instruction from the said ARM Group Enterprise Ltd., the defendant attorned its tenancies in favour of Magma Leasing Ltd. On the basis of instruction from Magma Leasing Ltd., the defendant attorned its tenancies in favour of Puneet Developers (P) Ltd., Puneet Holdings Ltd., Seville Estates (P) Ltd. and Bansal Estates (P) Ltd. and paid rents to the said companies, but Magma Leasing Ltd. continued to collect hire-charges in respect of furniture from the defendant. By a letter dated 19.11.98 the plaintiff informed the defendant that by an order dated 20.11.97 (Ext. J) passed by this Court, the said four companies were amalgamated with the plaintiff. With the expiry of February, 1995 the defendant surrendered the entirety of 1400 sft. portion as also 1753 sft. out of 9000 sft. portion to the predecessor-in-interest of the plaintiff and retained 7297 sft. of the premises. By a letter dated 30.08.99 (Ext. O) the defendant informed the plaintiff its decision of vacating the tenanted portion by the end of August, 1999 and forwarded a banker's cheque for Rs. 67,91,787/- towards entire claim of its landlords upto 31.08.99 to the plaintiff, and on 31.08.99 the defendant along with said letter and also letter dated 31.08.99 forwarded to the plaintiff the keys of the tenanted premises for delivering vacant possession which was refused by the defendant. By a letter dated 12.01.2000 the defendant reiterated that its tenancy stood terminated with effect from 01.09.99 and forwarded the keys of the premises which was accepted by the plaintiff.

9. To prove the respective cases Mr. Kalyan Kr. Bose, Director of the plaintiff Co. and Mr. Prakash Bhattacharya-- an officer of the defendant bank were examined as P.W. 1 and D.W. 1 respectively.

10. The plaintiffs claim may be classified broadly under five heads as follows:

(1) Rent : (a) From 01.01.96 to 31.08.99 @ Rs. 1,81,175/-p.m. Rs. 79,71,700/- (b) From 01.09.99 to 12.01.2000 at the same rate Rs. 7,94,832/-

(2) Hire charges for furniture:

(a) From 01.01.96 to 31.08.99

(b) From 01.09.99 to 12.01.2000

(3) Municipal taxes and commercial surcharge:

(a) From 01.09.99 to 31.08.99

(b) From 01.09.99 to 12.01.2000

(4) Damages to furniture, fixtures and premises:

(5) Interest:

11. So far as Item I(a) above is concerned, Mr. Mitra, learned Counsel for the defendant, on referring to Sub-clauses 2 of clause III and Sub-clause 3(a) of clause IV at pages 8 and 9 respectively of the Indenture of Lease dated 24.06.97 by Magma Leasing Ltd. in favour of four companies (Exts. U etc.) and the proviso to Section 109 of the Transfer of Property Act contended that though his client has paid rents and other dues to the plaintiff from January 1996 till August 1999 by a banker's cheque for Rs. 67,91,787/-, the break-up of which has been shown at page 74A of the Judges brief of documents of the defendant, since the said provisions do not speak of right to recover arrear rents and as the merger of four and other companies with the plaintiff company took place on 20.11.97, the plaintiff cannot claim and recover any rent prior to the date of merger on 20.11.97. Mr. Sarkar, learned Counsel for the plaintiff, on the other hand, on referring to the term "Lessor" in the lease agreements (Exts. B&C) contended that since the said expression is deemed to include its successor or successors-in interest and/or assigns and the defendant attorned its tenancy in favour of the plaintiff, all the rights and obligations of the predecessor in-interest devolved upon the plaintiff which has every right to recover arrear rents from the defendant bank.

12. Section 108 of the T.P. Act which deals with "Rights and liabilities of lessor and lessee" applies subject to a contract or local usage to the contrary. In the present case though Clause 10 of the lease dated 19.06.97 (Exts. U etc.) specifically provides that the rights and liabilities of the lessor and lessee will be governed by the terms mentioned therein and Section 108 of the Transfer of Property Act will not be applicable, it is totally silent in regard to application of Section 109 of the said Act. In view of Section 109 of the said Act the assignee of the lessor has, as against the lessee, all the rights that the lessor had, including the right to receive the rent in terms of lease and the lessee cannot say that he is not bound to pay the same to the assignee merely because there is no privity of contract, and there is no need for a consensual attornment as it is brought about by operation of law. Reference may be made to the case of Mohar Singh v. Devi Charan reported in AIR 1986 SC 1365. Section 8 of the said Act provides that on transfer the transferee is entitled to the rents and profits thereof accruing after the transfer. The substantive part of Section 109 read with the Proviso necessarily indicates that the arrears of rent due is one of lessor's right as to the property transferred. Right to recover the arrears of rent vested with the original owner, and on transfer of all his rights the same vests in the transferee as per the provisions of Section 109. Proviso to Section 109 indicates that if there is an assignment of rent due, then the transferee/landlord would be entitled to recover the same from the tenant as arrears of rent. A transferee is not entitled to recover the arrears of rent for the property on transfer unless the right to recover the arrears is also transferred. If right to recover the arrears is assigned, then the transferee/landlord can recover those arrears as well. Reference may be made to the cases of Sheikh Noor and Another Vs. Sheikh G.S. Ibrahim (dead) by Lrs., and Girdhari Lal (Dead) by Lrs. Vs. Hukam Singh and Others, . The term

"Lessor" as defined in clause A(i) of the lease deed dated 24.06.1997 (Exts. U etc.) includes its successors-in-interest and/or assigns and shall also mean and include Calcutta Credit Corporation Ltd. which got merged with ARM Group Enterprises Ltd. and the said ARM Group Enterprises Ltd. has been subsequently renamed as Magma Leasing Ltd., the lessor herein. The expression "Lessee" within the definition of clause A(ii) includes its constituents, if any," for the time being and its successors and/or legal representatives. The term "License Agreement" within the definition of clause A(xviii) means the Short Lease and/or License Agreements dated 27.08.89 and 22.01.85 between the lessor herein of the one part and United Industrial Bank Ltd. (which subsequently merged with and became a part of Allahabad Bank) of the other part. Sub-clause 2 of Clause III provides that the lease and/or the demise as aforesaid is together with the proportionate benefits under the said license, and the lease will be entitled to receive all rents, profits and issues from the demised units and/or is also entitled to take possession of the demised units whenever the same be vacated. Sub-clause 3 of clause IV inter alia provides that the lessor shall sign such papers and grant such co-operation at the cost of the lessee as the lessee may require from time to time:

(a) for enjoying the benefit of the said license including the right to receive rent, taxes and other amounts as well as to receive vacant possession of the demised units.

13. The words are to be construed in the context they are used. So the above words "to receive all rents" should not be narrowly interpreted and it means and includes arrear rents too. All the rights, interests, duties and liabilities of the transferor company were transferred and vested in the plaintiff company by virtue of the order of the merger and accordingly the plaintiff company can very well claim and recover the arrear rents prior to the date of merger i.e. 20.11.97.

14. As regards item I(b) aforesaid, Mr. Mitra on referring to the defendant's notice dated 30.08.99 (Ext. O) and plaintiffs letter dated 31.08.99 (Ext. P) to the defendant contended that the fifteen years' lease which commenced on and from 01.09.89 was to expire on 31.08.99 and though the defendant duly gave notice conveying their decision to vacate the premises with effect from the end of August, 1999, the plaintiff refused to accept the keys on the alleged ground of their higher claim. On drawing Court's attention to Ext. P refusing to accept the banker's cheque for Rs. 67.91,787/- and answers to questions 316 to 337 of P.W. 1 Mr. Kalyan Kumar Bose, Mr. Mitra canvassed that though Mr. S. Tulsyan was one of the Directors of the plaintiff company, he did not accept the keys and delivery of possession of the premises on 31.08.99 for which the defendant should not be penalised by payment of rents from 01.09.99 to 12.01.2000 i.e. date of delivery of possession, for illegal and wrongful refusal of the plaintiff. Mr. Sarkar, learned Counsel for the plaintiff, on referring to Clause 2.2 of the lease agreements (Exts. B&C) contended that for termination of the lease six months notice is required whereas in the present case one day's notice was given and

since the defendant's conduct and approach was very casual and in the past despite giving such notice (Ext. I) the defendant failed to deliver possession on the expiry of December, 1995 and even if Mr. Tulsyan, for argument sake, is held to be Director at the relevant time, he was not in a position to accept the keys and cheque as there was need for nomination of a particular person authorising him to accept the keys which was not possible within that short time.

15. If a lease commencing on certain date is for a specific period without any provision for option to either the landlord or the lessee for renewal and as such there was no scope for holding over by the lessee unless rent was accepted by the lessor after the fixed period, in such a case it was the duty and obligation of the lessor to arrange for acceptance of the delivery of possession of the premises prior hand and the plea that on previous occasion there was failure on the part of the lessee to deliver possession of the premises cannot be considered to be any ground at all. Regarding notice, when the lease itself is going to end on expiry of the period which was knocking at the door and there was no provision for renewal, the question of service of six months notice is immaterial. Agreement signed both by the landlord and tenant whereby the tenant agreed to vacate the premises on the expiry of a certain date is a sufficient notice. Nevertheless, relying upon its earlier decisions it was held in the case of *Anthony v. K.C. Ittoop & Sons* reported in AIR 2000 SC 3523 that unregistered instrument required to be compulsorily registered by virtue of Section 107 of the T.P. Act read with Sections 17(1)(d) and 49 of the Indian Registration Act, 1908 cannot create a lease. The Court is disabled from using the instrument as evidence, but the Court can still determine whether there was in fact a lease otherwise than through an unregistered instrument. In the case of AIR 1931 79 (Privy Council) it was held that if registration of a lease is compulsory u/s 107 of the T.P. Act, the lease can only be made by a registered instrument and if not so made is void altogether. Though an unregistered lease is void it can be deemed to be a monthly lease, as was held in the case of *Chandra Nath Mukherjee Vs. Chulai Pashi and Another*, . If the lease is void for want of registration neither party to the indenture can take advantage of any of the terms of the lease. Reference may be made to the case of *Satish Chand Makhan and Others Vs. Govardhan Das Byas and Others*, . Here on consideration of various other documents, there cannot be any doubt regarding existence of jural relationship between the parties that of lessor and lessee falling within the purview of second paragraph of Section 107. If after delivery of possession the rent is paid and accepted, as happened in this case, it takes effect as a lease from month to month. In this connection, the cases of *Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others*, and *Budh Ram Vs. Ralla Ram deceased through Lrs*, may be relied on. Therefore, there is no scope for relying upon the said lease documents (Exts. B & C).

16. As discussed earlier, it is undisputed that the lease was to expire on 31.08.99 and it is also buttressed by clause 4 of the Supplemental Agreement dated 27.08.84 (Ext. D) which provides that on the expiry or sooner determination of this agreement the lessee shall handover to the lessor all the furniture, fixtures

and fittings in good condition etc. The evidence of P.W. 1 regarding authority of Mr. S. Tulsyan is self contradictory inasmuch as while at one place (Q-139) he stated that on 31.08.99 he was not involved with the plaintiff company, at another place (Q-319) he deposed that he was the Director of the plaintiff company but he does not remember whether before 1999 or after 1999. His subsequent evidence (Q-324) is that in 1999 he used to look after only financial matters and nothing else, but no document in this regard was produced nor Mr. Tulsyan was examined on behalf of the plaintiff to refute the allegation on oath nor any document i.e. prescribed form to be filed with the Registrar of Companies showing induction of different Director other than Mr. Tulsyan has been disclosed on behalf of the plaintiff (Q-335 and 337). The letter dated 15.01.2000 from the plaintiffs advocate has gone one step ahead stating that Suresh Tulsyan was neither a Director nor a shareholder nor an employee of his client which is falsified by the plaintiffs letter dated 12.08.99 (Ext. N) to the defendant revealing that Mr. K.K. Bose (P.W. 1) and Mr. Tulsyan were authorised representatives of the plaintiff to deal with the matter which is admitted by P.W. 1 (Q-351, 352). Plaintiffs another letter dated 31.08.99 (Ext. P) to the defendant which was signed by Mr. Tulsyan (Q-171 of P.W. 1) shows that Mr. Tulsyan had the requisite authority to deal with the matter. The above contention is also nullified by the endorsement of Mr. Anup Kumar Das, Assistant. Manager of the defendant on the original copy of defendant's letter dated 31.08.99 to the plaintiff regarding refusal by Mr, Tulsyan to accept the letter (D-15 of the affidavit of evidence of the defendant). If Mr. Tulsyan had no authority, he had no authority to refuse and he could at best take the representatives of the defendant to the proper person who was authorised to deal with the matter. The reason for non-acceptance of delivery of possession as deposed by P.W. 1 (Q-105) is that the amount in the cheque was much lesser than their demand and this was not the final settlement which cannot be held to be any cogent ground for refusal since if the amount was really less they had different course open for recovery of the balance amount. That apart, the question of acceptance of delivery of possession did not hinge upon the question of payment of lower amount as offered. In other words, it is not that acceptance of the keys and delivery of possession will absolve the defendant from payment of the actual amount if found due. So, in the above facts and circumstances, when the plaintiffs refusal to accept the delivery of possession was wrongful and without any basis, the, defendant cannot be saddled with the burden of payment of rent from 01.09.99 to 12.01.2000. Accordingly, this part of the plaintiffs claim for rent with interest is not sustainable.

17. The plaintiff has claimed interest @ 18% p.a. on cumulative basis, the reason for which is not clear. There is no agreement between the parties for payment of interest in case of default in payment of rent. In such circumstance, the statutory provision of 8.1/3% p.a. which may be considered to be the guidelines may be pressed into service. This may at best be taken to be 9% p.a. in the present case, which is reasonable, on the due sum of Rs. 79,71,700/- to be calculated

from the date payable to the date when the amount was tendered but wrongfully refused i.e. 30.08.99. The defendant has already paid the said sum of Rs. 79,71,700/- through the banker cheque dated 30.08.99. The interest @ 9% p.a. on the said sum upto 30.08.99 comes to Rs. 13,95,224.38, say Rs. 13,95,224/-.

18. Regarding Item 2(a) above, the plaintiff has claimed Rs. 13,72,320/- from 01.09.89 to 12.01.2000, as detailed in annexure "H" to the plaint, contending that the defendant made part payment towards hire charges for furniture and fittings upto December, 1995, leaving an amount of Rs.2,40,475/- as shortfall. Mr. Sarkar on referring to paragraphs 10 & 18 of the plaint and Clause 2 of the supplemental agreements dated 27.08.84 and 22.01.85 (Exts. D & E) contended that in view of the said escalation clauses the monthly hire charges in respect of 9000 sq. ft. stood enhanced to Rs.26,730/- from 01.09.89 and then to Rs.29,403/- from 01.09.94 and that of 1400 sq. ft. stood enhanced to Rs. 4,158/- from 01.02.90 and then to Rs. 4,573.80 from 01.02.95, but such enhanced charges were never paid by the defendant. On the other hand, Mr. Mitra who referred to the bill dated 05.04.95 for April 1995 (page 65 of defendant's affidavit of evidence) containing a remark "Furniture hire charge taken on old rate basis pending final settlement", contended that as there was no further claim on behalf of the plaintiff, the amount of Rs. 19,567/- was taken as final and as such the question of payment at the enhanced rate did not arise. Mr. Mitra on referring to a letter dated 04.04.92 of the defendant to the plaintiff's predecessor ARM Group Enterprises (P-75 of the defendant's affidavit of evidence) further, contended that in view of following discussion that the generator hire charges will be increased from Rs. 20,000/- to 28,000/- per month from 01.04.92 but there will be no increase in furniture rent, the question of payment of hire charges at the enhanced rate did not arise.

19. Rent does not mean rent in the strict sense but the total payment under the instrument of letting, and the additional payment for the use of linoleum was held to be rent in the case of *Wilkes v. Goodwin* reported in (1923)2 KB 86. In *Karnani Properties Ltd. Vs. Augustin*, it was held that the term "rent" has not been defined in the Act and hence it must be taken to have been used in its ordinary dictionary meaning. The term rent is comprehensive enough to include all payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances but also of furnishings, electric installations and other amenities agreed between the parties to be provided by the landlord. When the tenant has agreed to pay rent as well as service charges, the said service charges were also held to be integral part of rent even though the service charges were realized separately. Reference may also be made to the cases of *Sm. Anita Dasgupta Vs. A.C. Sett*, and *S.K. Chatterjee and Another Vs. Residence Ltd.*, . In other words, all things which are intended to be enjoyed as part of the tenancy would be part and parcel of the tenancy and all sums payable on that account would be rent, as was held in the case of *Khem Chand Dayal Ji and Co. Vs. Mohammad Bhai Chand Bhai*, . In the

present case, as per escalation clause in the two supplemental agreements (Exts. D & E), the hire charges for furniture, fixtures and fittings shall stand increased by at least 10% every five years. On account of surrender of 3153 sft. in total thus bringing the leased out area to 7247 sft. from 01.03.95, though the plaintiff has shown the reduced rental amount in respect of the said area at Rs. 1,81,175/- p.m., it failed to disclose the proportionate reduced rate of hire charges from 01.03.95 in the plaint. However, mere failure on the part of the plaintiff to claim enhanced rate of hire charges in terms of the agreement i.e. @ 10% minimum at an interval of every five years, will not absolve the defendant from payment at such agreed rate. So far as the defendant's letter dated 04.04.92 is concerned, it is a unilateral decision of the defendant, but there is nothing to show that it was accepted by the plaintiff and D. W. 1 Mr. Prakash Bhattacharya has also admitted it in his evidence (Q-52 and 55).

20. To a question (Q-59) put to said D.W. 1 that the furniture rent should be at the original rate of 2.67 per sft. approximately, he replied that it was continuing at the old rate. Taking the rate of monthly hire charges at Rs. 24,300/- from 01.09.84 and Rs. 3,780/- from 01.02.85 for 9000 sft. and 1400 sft. respectively, the rate of hire charges comes to 2.7 per sft. Therefore, applying the said escalation clause the hire charges in respect of 9000 sft. stood at Rs. 26,730/- from 01.09.89 and then at Rs. 29,403/- from 01.09.94. Similarly, the hire charges in respect of 1400 sft. stood at Rs. 4,158/- from 01.02.90 and then at Rs. 4,573.80, rounded off to 4574/-, from 01.02.95. The hire charges in respect of 7297 sft. stood at Rs. 23,675.94, rounded off to Rs. 23,676/-, from 01.03.95. So, the total sum payable comes to:

(1) 01.09.89 to 31.08.94 @ Rs. 26,730/- (60 months) Rs. 16,03,800/- i.e. @ Rs. 2.97 per sft. (2) 01.09.94 to Feb. 1995 @ Rs. 29,403/- (6 months) Rs. 1,76,418/- i.e. @ Rs. 3,267 per sft. (3) 01.02.90 to 31.09.95 @ Rs. 4,158/- (60 months) Rs. 2,49,480/- i.e. @ Rs. 2.97 per sft. (4) 01.02.95 to Feb. 1995 @ Rs. 4,574/- (1 month) Rs. 4,574/- i.e. @ Rs. 3,267 per sft. (5) 01.03.95 to 31.08.99 @ Rs. 23,676/- (54 months) Rs. 12,78,504/- i.e. @ Rs. 3,267 per sft.
_____ Total Rs. 33,12,776/-

The defendant all along paid hire charges @ Rs. 19,567/- i.e. @ Rs. 2.17 per sft. and thus the total payment made from 01.09.89 to 31.08.99 (120 months) Rs. 23,48,040/- Amount Still Payable _____ Rs. 9,64,736/-

21. As regards Item 2(b), it has already been held that the plaintiffs refusal of acceptance of delivery of possession was without any basis and wrongful and as such on the same ground as set forth in paragraph 16 above, the plaintiffs claim for hire charges from 01.09.89 to 12.01.2000 is not at all sustainable.

22. In annexure "H" a separate column has been reflected showing interest @ 18% p.a. As a matter of fact, when the plaintiff itself did not claim the enhanced rate of hire charges with a remark for consideration of the same at the time of final settlement, the question of payment of any interest by the defendant on the

due sum is out of the way.

23. Regarding Item 3(a) above i.e. municipal rates and taxes and commercial surcharge, the plaintiffs claim is Rs. 66,67,732/- from September, 1994 to 12.01.2000, as stated in paragraph 19 of the plaint and detailed in annexure T. Mr. Sarkar on referring to Sections 193, 194(1) 230 and 231 of the Kolkata Municipal Corporation Act, 1980 and the case of Mayank Poddar and Others and Magma Leasing Limited and Others Vs. Development Consultant Ltd., contended that municipal tax is a part of rent and though the defendant paid the municipal taxes and levies up to August 1994, it suddenly stopped payment from September, 1994 onwards on the pretext of non-production of document showing payment of municipal taxes by the plaintiff which they cannot do in view of Sub-clause (b) of clause 5.3 of the agreements for lease (Exts. B and C) providing payment by the lessee to the lessor at the beginning of every quarter without requiring the lessor to produce any assessment year's bill and/or rates. Referring to the penultimate paragraph of the defendant's letter dated 14.12.94 to Magma Leasing Ltd. (Ext. G) stating that the total municipal taxes to be fully borne by the Bank from 01.09.94 and affirmative answer of D.W. 1 Prakash Bhattacharya (Q-34), Mr. Sarkar further contended that the total municipal taxes will be borne by the bank and there is no provision which prevents the parties to mould the provision by mutual arrangement, in support of which reliance was placed upon an unreported decision of this Court in C.P. 324/91 Tea Trading Corporation of India Ltd. v. Saturday Club Ltd. and Appellate Courts Judgment in Appeal No. 18/92 delivered on 05.04.2002 confirming the single Bench decision. Mr. Mitra, on the other hand, on referring to Clauses 5, 5.1, 5.2 and 5.3 of the agreements for lease (Exts. B and C), Sections 193 and 230 of the Kolkata Municipal Corporation Act and relying upon the case of Calcutta Gujrati Education Society and Another Vs. Calcutta Municipal Corporation and Others, advanced argument contending that primary liability for payment of municipal tax and levies is upon the owner/landlord who can recover half of the tax so paid, from the occupier, and so though his client cannot insist upon the plaintiff for production of bills and/or rates, there is no bar on its part in demanding production of documents evidencing payment of taxes and levies by the plaintiff which is the sine qua non for recovery of the occupier's share. Referring to answer to Q-286 and 287 of P.W. 1 - K.K. Bose, Mr. Mitra submitted that though the plaintiff claims to have paid the municipal taxes and levies, no document in this regard has been disclosed which should lead the Court to draw an adverse inference u/s 114(g) of the Evidence Act that no payment was practically made by the plaintiff, and as such until and unless the plaintiff can produce documents revealing payment of municipal taxes and levies by it, it cannot recover any amount on this score.

24. Before opening the discussion, the penultimate paragraph of defendant's letter dated 14.12.94 (Ext. G) may be disposed of. The plaintiffs case as borne out in paragraph 13 of the plaint is that with effect from 01.09.94 it was agreed by and between the parties and/or their predecessor-in-interest that the defendant would bear the entirety of the municipal rates and taxes retained by it

which was recorded in a letter dated 14.12.94 by the defendant to the predecessor-in-interest of the plaintiff. The defendant has totally disputed it contending that the said letter was with reference to a letter dated 01.09.94 of Magma Leasing Ltd. For proper construction of the expression, the relevant portion of the letter is reproduced:

This has reference to the discussions and your correspondence for renewal of the lease and enhancement of rent for the office premises occupied by our Bank, at the above address.

We have to inform you that the following terms have been approved in regard to rent and the area to be engaged:

1. From the present area under occupation, an area around 4000 sft. will be vacated, thus retaining an area around 6000 sft. (approx) subject to joint measurement.

2. x x x x

3. x x x x

4. The rent and taxes in respect of the space of 6000 sft. (approx) area will be as follows w.e.f. 01.09.94:

a) Area : 6000 sft. (approx)

b) Rent & taxes : To be increased from @ Rs. 9.90 per sft. to Rs. 25/- per sft. p.m. effective from 01.09.94 (1st September, 1994). Total municipal taxes to be fully borne by the bank.

25. The said correspondence between the defendant and the plaintiff's predecessor-in-office took place long before 3? years of the plaintiffs coming into the picture, and so the plaintiffs representative cannot be expected to have participated in the discussion. However, the rule of construction demands that a document is to be read as a whole and not in piecemeal and thus it is unsafe to adopt the process of etymological dissection and after taking words or sentence out of their context to proceed to construe it. In this case, the sentence "Total municipal taxes to be fully borne by the bank" is preceded by the sentence "The rent and taxes in respect of the space of 6000 sft. (approx) area will be as follows w.e.f. 01.09.94." So the said municipal taxes obviously relate to the space of 6000 sft. only. Variation in the terms of a lease can be made only by another registered instrument, and any other communication purporting to introduce a variation in the lease is excluded by Section 92 of the Indian Evidence Act. Reference may be made to the case of Raval and Co. Vs. K.G. Ramachandran and Others, . Moreover the intention is to be gathered not only from the document but also from the surrounding facts and circumstances Here, the relevant portion of plaintiff's letter dated 14.09.95 (Ext. H) runs as follows:

1. (a) According to Clauses 5, 5.1, 5.2 & 5.3(a)(b) of the mutual agreement for lease dated 27.08.84 which is reproduced on the attached annexure yourselves

are bound to pay the municipal tax amount to ourselves based on calculations stipulated as per relevant law. And yourselves have been paying accordingly and upto 31.08.94.

(b) By your letter No. EZ/Dev./65/1119 dated 14.12.99 yourselves agreed to bear the entire amount on account of municipal tax.

(2) x x x x The liability for payment of consolidated rates has arisen since your taking possession and the law clearly provides for calculation of taxes based on rental and service charges etc., which is as under:

Thereafter some provisions of the Calcutta Municipal Corporation Act, 1980 were quoted. A glance to the above will reveal that the said decision relating to bearing the entire amount of municipal taxes was a unilateral decision of the defendant bank and not a joint decision of the parties. PD-18 is a letter dated 22.10.99 (page 58 of the Judges Brief of documents filed by the plaintiff) issued by the defendant to the plaintiff stating that in terms of telephonic discussion they have not yet received the basis of valuation of taxes supported by documentary evidence of corporation bill etc. with a further request for submitting the same for their making payment of proportionate CMC taxes which spells out the intention and willingness of the defendant. Furthermore, there is nothing to suggest that the decision as disclosed in the aforesaid letter dated 14.12.94 (Ext. G) was a joint one and final, as alleged by the plaintiff in paragraph 13 of the plaint. It was a mere proposal on behalf of the defendant following some discussion and correspondence between the parties which was yet to take final shape, since it is nobody's case that the defendant ultimately retained 6000 sft. with effect from 01.09.94 as stated in the above letter. It is undisputed that from 01.03.95 due to surrender of 3153 sft. the leased out area was brought to 7247 sft. So, as the defendant's letter dated 04.04.92 was not considered due to the same being a unilateral decision, as discussed in the last sentence of paragraph 19 above, on the same ground the aforesaid contention of Mr. Sarkar relating to the defendant's letter dated 19.12.99 is not sustainable.

26. The unregistered two agreements for lease, as stated earlier, being void and inadmissible in evidence, neither party can take any advantage of any term of the lease, and as such there is no scope for considering the term regarding payment by the lessee to the lessor without requiring the lessor to produce any assessment year's bill and/ or rates. It is well settled that payment of occupier's share of municipal tax falls within the purview of rent. Reference may be made to the cases of Usha Kenjan Bhattacharya v. Makalaxmi Thacker reported in 79 CWN 221, Mayank Poddar (supra) etc. u/s 193(1) of the Kolkata Municipal Corporation Act, 1980, hereinafter referred to as the said Act, the property tax on lands and buildings shall be primarily leviable amongst others, upon the lessor of the land or building let out. Section 194(1) provides that if the annual valuation of any land or building exceeds the amount calculated on the basis of the rent of such land or building payable to the person upon whom the property tax on such land or building is leviable u/s 193, such person shall be entitled to

receive from his tenant the difference between the amount of the property tax on such land or building and the amount which would be leviable if the consolidated rate on such land or building were calculated on the basis of rent payable to him. u/s 230, the person primarily liable to pay the property tax in respect of any land or building may recover (a) if there be but one occupier of the land or building, from such occupier half of the rate so paid, and may, if there be more than one occupier, recover from each occupier half of such sum as bears to the entire amount of rate so paid by the owner the same proportion as the value of the portion of the land or building in the occupation of such occupier bears to the entire value of such land or building.

Provided that if there be more than one occupier, such half of the amount may be apportioned and recovered from each occupier in such proportion as the annual value of the portion occupied by him bears to the total annual value of such land or building;

(b) the entire amount of the surcharge on the consolidated rate on any land or building from the occupier of such land or building who uses it for commercial or non-residential purposes;

Provided that if there is more than one such occupier, the amount of surcharge on the property tax may be apportioned and recovered from each such occupier in such proportion as the annual value of the portion occupied by him bears to the total annual value of such land or building.

27. Therefore, the lessee's liability in respect of municipal tax extends to the half. The expression "so paid by the owner" is significant thereby denoting that payment of tax by the occupier must be preceded by payment of tax by the owner. In other words, payment by the sine qua non for recovery of tax from the lessee. Here, it is the evidence of P.W. 1 K.K. Bose that the defendant requested the plaintiff from time to time to produce documents showing payment of rates and taxes by the plaintiff in respect of the premises, but they did not comply with it as the defendant as per agreement would not ask for any document (sic) to rates and taxes of the Municipal Corporation (Q-267 to 269). The lessor or its successor-in-interest i.e. plaintiff paid the municipal rates and taxes and he is in a position to produce such documents (Q-286 and 287). But no such document has been produced which will lead to necessary inference that no payment of rates and taxes and municipal levies was made by the plaintiff or its predecessor-in-interest. Consequently, so long the payment is made by the lessor, the question of recovery of proportionate municipal taxes and levies from the defendant does not arise.

28. As regards item 3(b), on the same ground as discussed in paragraph 16 above, this is not tenable.

29. Regarding Item No. 4 i.e. damages to furniture, fixtures and premises, the plaintiff's claim, as reflected in paragraph 28 of the plaint, is Rs. 17,14,142/-, as detailed in annexure "M". Mr. Sarkar on referring to Clause 4 of the supplemental

agreement dated 27.08.84 (Ext. "D") in respect of furniture and fixture, schedule thereunder and inventory list (Ext. S - subject to objection) which was signed by P.W. 1 K.K. Bose and D.W. 1 Prakash Bhattacharya on all the pages submitted that though the valuer's report (marked X for identification) could not be proved due to valuer's death, when the damage has been proved, the Court can grant compensation on guess-work, in support of which the cases of Gambhirmull Mahabirprasad Vs. The Indian Bank Ltd. and Another, and Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., were relied on. Mr. Sarkar further submitted that if it is really difficult to assess the loss or damage, a Commissioner may be appointed for the purpose. Mr. Mitra, on the other hand, on referring to answer of D.W. 1 to Q-79 contended that the remarks against each item of the inventory list, as stated by D.W. 1, were not done in his presence and when the valuer's report has not been proved at all and thus there being no evidence regarding the alleged damage or loss, in compensation can be granted.

30. Clause 4 of the supplemental 27.08.84 (Ext. D) provides that on the expiry or sooner determination of the agreement the Lessee shall hand over to the Lessor all the said furniture, fixtures and fittings in good condition and in the same condition as they now are, reasonable wear and tear excepted, and shall in the meantime keep the same in good maintenance and repairs at their own costs. It is undisputed that the inventory list (Ext. S - subject to objection) bears the signatures of P.W. 1 K.K. Bose and D.W. 1 Prakash Bhattacharya with date 12.01.2000. Ext.6 is a letter dated 12.01.2000 from the plaintiff to the defendant whereby the keys of the premises were sent through D.W. 1 Prakash Bhattacharya with a request for acknowledgement of the same. The said document bears an endorsement with signature of P.W. 1 K.K. Bose to the effect "Received the keys on date 12th January, 2000 after taking inventory of furniture, fixture in presence of Mr. P. Bhattacharya, Senior Manager (P & Dev.) and Mr. A.K. Das of Allahabad Bank and K. Bose of Candlewood Holdings Ltd. Inventory list enclosed." There is no indication in the above endorsement of P.W. 1 that the furniture and fixtures were found in damaged condition. No inventory list appears to have been enclosed. The sentence "Inventory list enclosed" appears to have been added later since the word "enclosed" finds place at a bit less than middle portion of the signature/initial of P.W. 1 K.K. Bose. D.W. 1 Prakash Bhattacharya admitted of his presence at the time of inventory but stated that the remarks in the inventory list at the right hand side were not in handwriting of anyone of them nor those were done in his presence and that no such inventory list was handed over to him (Q-62 to 70). The evidence of P.W. 1 in this regard is that the markings in inventory list would show which furniture were damaged and such inventory list has been submitted in this proceeding (Q-419 and 426), and it necessarily supports the above observation that no copy of the same was made over to the defendant which is the specific evidence of D.W. 1. To the suggestions that at the time of taking possession of the furniture and fixtures on 12.01.2000 the same were not in damaged condition for which there was no endorsement on the copy of the letter dated 12.01.2000 and that

the inventory list was subsequently interpolated, P.W. 1 categorically denied (Q-427 and 429). In the absence of cogent evidence showing that the remarks against each item of the inventory list were recorded in presence of the defendant, no reliance can be placed upon such remarks, and so far as valuation report (X for identification) is concerned, as the same has not been proved, it cannot be taken into consideration.

31. The function of damages for breach of contract is compensatory and not punitive. Section 74 of the Contract Act provides for the measure of damages in two classes viz. (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty, none of which is involved here. Section 73 of the said Act applies only where a contract has been broken and breach of contract must be proved before setting about the question of damages. No damage can be awarded by the Court without coming to any conclusion about breach. In the case on hand, no damage having been proved the question of awarding any compensation in favour of the plaintiff does not arise. Regarding appointment of Commissioner, as contended by the learned Counsel for the plaintiff, where prima facie damage does not appear to have been established the need for ascertainment of the question of alleged damage and money value by the Commissioner after long seven years is immaterial. The facts and circumstances of both the above decisions, so referred to by Mr. Sarkar, being quite different, none of the said decisions has any application in this case.

32. As regards Item No. 5 i.e. interest, the plaintiff has prayed for interest on Judgment. Mr. Mitra on referring the case of Clariant International Ltd. and Another Vs. Securities and Exchange Board of India, contended that there was no agreement for payment of interest and if at all it is to be granted it should be reasonable as per market value.

33. Interest may be recoverable in the following cases:

- (1) where there is an agreement to pay interest;
- (2) where interest is payable in accordance with a usage;
- (3) where a course of dealing between the parties justifies the award of interest, and
- (4) where a case falls within the provision of Interest Act, 1839, or some other law.

In the case of AIR 1938 67 (Privy Council) it was held that though there can be no objection to the order for the payment of interest from the date of institution the suit to the date of the decree and from the date the decree of the Trial Court to the date of payment of the same found due to the plaintiff at the date of the said decree u/s 34 of the Civil Procedure Code, interest prior to the date of the suit may be awarded, if there is an agreement for the payment of the interest at a fixed rate, or it is payable by the usage of trade having the force of law, or

under the provision of any substantive law entitling the plaintiff to recover interest. It was further observed that the proviso to Section 1 of the Interest Act, 1839 applies to a case in which the Court of equity exercises jurisdiction to allow interest. But in order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction. Reference may also be made to the case of Mahabir Prashad Rungta Vs. Durga Datt, . Here, existence of a state of circumstances having not been established, the plaintiff is not entitled to get any interest prior to the date of institution of the suit barring that as allowed vide paragraph 16 above. Interest on the amount of hire charges could not be granted as the plaintiff itself failed to claim the amount. In the facts and circumstances no further interest being justifiable should be allowed. Therefore, the total sum payable and due from the defendant to the plaintiff is as follows:

1) Rent from 01.01.96 to 31.08.99 2) Rs. 79,71,700/- 2) Interest @ 9% p.a. Rs. 13,45,224/- 3) Hire charges for furniture etc. Rs. 33,12,776/-
_____ Rs. 1,26,29,700/-

T.D.S. @20% 25,25,940/- Already paid or adjusted (-) 19,27,124/-
_____ Still payable 5,98,816/- _____ 4) T.D.S. (-) Rs. 5,98,816/-
_____ Rs. 1,20,30,884/- 5) Rent already paid (-) Rs. 79,71,700/-
_____ 6) Hire charges already paid (-) Rs. 40,59,184/- Rs. 23,48,040/- _____

_____ 7) Security deposit (-) Rs. 17.11,144/- Rs. 4,34,925/-
_____ Rs. 12,76,219/- _____

34. The defendant has prayed for a decree for accounts for the amount paid by it by way of municipal rates and taxes and commercial surcharge as against the amount actually payable by it on that account and for a decree for the amount found due and payable by the plaintiff to the defendant inter alia contending in paragraphs 1(m) and 1(n) of the written statement that on going through the records it transpired that the said four companies by a letter dated 15.09.98 claimed rent of the premises till September, 1998 and that the landlords of the defendant including the plaintiff arbitrarily collected from time to time an aggregate sum of Rs. 44,15,959.60 from the defendant towards municipal rates and taxes and surcharge thereon without rendering any accounts thereof. The plaintiff has categorically denied the above allegations, its written statement contending that such bold allegations without any particulars in support of the same should not be sustainable.

35. A set off dealt with in Order VIII, Rule 6 C.P. Code and a counter claim dealt with in Order VIII, Rule 6AC.P. Code are not the same thing. In one sense both are cross-actions. But a set off is a ground of defence and if established it affords an answer to plaintiff's claim wholly or protanto whereas, the counter-claim is a weapon of offence. The main conditions amongst others for applicability of Rule 6 are:

- a) Suit must be for recovery of money.
- b) The claim demanded to be set off must be an ascertained sum.
- c) It must be legally recoverable from the plaintiff,
- d) Both parties must fill the same character as they fill in the plaintiff's suit.

36. A counter-claim has to be treated as a plaint and is governed by rules, applicable to the plaint and it is to be filed within the limitation period, and where no limitation is prescribed within three years from the date of accrual of the cause of action. Rule 6B of Order VIII requires a defendant who seeks to rely upon any ground as supporting a right of counter-claim to state specifically in his written statement that he does so by way of counter-claim which has not been complied with by the defendant here. Moreover, Rule 8A requires the defendant to file documents on which he bases his defence together with the written statement, as the plaintiff is required to file documents on which he sued with the plaint under Order 7, Rule 14 C.P. Code. In this case, the defendant could easily produce necessary documents in support of its contention of payment of Rs. 44,15,959.60 to its landlords including the plaintiff towards municipal rates, taxes and surcharge so that the Court could dispose of the matter without passing any decree for accounts, but it failed to do so. Accordingly, on the aforesaid grounds the case of the defendants for set off/counter-claim is not entertainable.

37. The issues are accordingly answered in part in favour of the plaintiff.

38. In the premises, in the light of the above discussion the suit succeeds in part.

39. The suit be decreed in part with proportionate cost against the defendant. The plaintiff do get a decree for Rs. 12,76,219/-.

40. The defendant is directed to pay the said decretal amount with cost to the plaintiff within one month from date, failing which the plaintiff will be at liberty to recover the same in due course of law. The defendant is also directed to deposit the T.D.S. to the tune of Rs. 5,98,816/- so adjusted, as shown at page 35 with the concerned authority early.

41. The defendant's claim for set off/counter-claim stands dismissed.

42. Let the decree be drawn up by the department as expeditiously as possible. .

43. The department and all parties are to act on a signed copy of the operative part of this Judgment on the usual undertakings.

44. Urgent xerox certified copy of this Judgment, if applied for, be supplied to the parties with utmost expedition.