

(2008) 12 DEL CK 0089

In the Delhi High Court

Case No : Regular First Appeal 389 of 1999

Shri Ram Pistons and Rings Ltd.

APPELLANT

Vs

C.B. Agarwal Huf and Others

RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8, Order 20 Rule 12
Delhi Rent Control Act, 1958 — Section 14
Evidence Act, 1872 — Section 114
General Clauses Act, 1897 — Section 27
Transfer of Property Act, 1882 — Section 106, 108, 111, 116

Citation : (2009) 3 ILR Delhi 249

Hon'ble Judges : Pradeep Nandrajog, J;J.R. Midha, J

Bench : Division Bench

Advocate : T.K. Ganju, A.K. Thakur and R.K. Mishra, for the Appellant; Sandeep Sethi V.K. Sharma, Arvind Nigam, Bhagabati Prasad and Amit Goel, for the Respondent

Judgement

Pradeep Nandrajog, J.—The predecessor-in-interest of the appellant Shriram Pistons & Rings Ltd.; namely Delhi Cloth and General Mills Ltd., New Delhi was inducted as a tenant in flat bearing No. 31-A, Himalaya House, 23 Kasturba Gandhi Marg, New Delhi in the early 1970s. The landlord was M/s. C.B. Agarwal HUF. Mr. C.B. Agarwal, Karta of M/s. C.B. Agarwal HUF died on 13.6.1973. There was a partial partition of the HUF. 2 coparceners; namely Mr. Satish Chandra and Mr. Vinod Chandra separated and constituted their own Hindu undivided family. A letter dated 23.6.1973, Ex.PW-1/17, was addressed to Delhi Cloth and General Mills Ltd. on behalf of Mr. Satish Chandra HUF, Mr. Vinod Chandra Agarwala HUF and Dr. C.B. Agarwala HUF, requesting that the rent payable be bifurcated with one-sixth rent being paid in the name of Mr. Satish Chandra HUF; one-sixth rent being paid in the name of Mr. Vinod Chandra Agarwala HUF and the remaining 4/6th rent being paid in the name of Dr. C.B. Agarwala HUF.

2. The letter reads as under:

The above referred flat is owned by Dr. C.B. Agarwala HUF. Shri C.B. Agarwala died on 13th June, 1973. There has been a partial partition in the HUF. Shri Satish Chandra and Shri Vinod Chandra two of the coparceners have separated. The members of the HUF namely:

1. Shri Pramod Chandra, 2. Shri Ashok Chandra, 3. Shri Sudhir Chandra, all sons of late Shri C.B. Agarwala and 4. Smt. Chandra Kala, wife of late Shri C.B. Agarwala, continue joint and now constitute Dr. C.B. Agarwala, HUF with Shri Pramod Chandra Agarwala as the Karta.

Effective from 13th June, 1973, the rent in respect of the above flat may please be apportioned as under:

1. Shri Satish Chandra HUF 1/6 (one sixth share)
2. Shri Vinod Chandra Agarwala HUF 1/6 (one sixth share).
3. Shri Pramod Chandra Aggarwala Karta of Dr. C.B. Aggarwala HUF 4/6 (four sixth) share.

Rent cheques made out as above may please be sent respectively to the following addressed until change of address, is communicated:

1. Mr. Justice Satish Chandra,
25A, Kanpur Road, Allahabad.
2. Mr. Vinod Chandra Aggarwala,
82 Jorbagh, New Delhi.
3. Mr. Pramod Chandra Aggarwala,
Flat No. 10,
233 Lower Circular Road,
Calcutta.

3. By the year 1975 the appellant became the successor of the Delhi Cloth and General Mills Ltd. and took over the possessory rights of Delhi Cloth & General Mills Ltd. qua the flat in question. The tenancy period was coming to an end. 3 nearly identically worded letters dated 1.10.1975, 24.11.1975 and 28.11.1975 were addressed to Satish Chandra HUF, Vinod Chandra Agarwala HUF and Mr. C.B. Aggarwal HUF respectively; being Ex.PW-1/D-2, Ex.PW-1/D-1 and Ex.PW-1/14.

4. The letters confirmed that increased rent would be paid as before and period of lease would be extended from 1st July 1975 till 30th June 1978. It was recorded in the letters that the rent would be paid one-sixth each to Satish Chandra HUF and Vinod Chandra Agarwala HUF and balance four-sixth rent would be paid to C.B. Agarwal HUF. The three letters are lengthy and hence need

not be extracted in toto. The relevant contents of the three letters on which reliance was placed by the respondent may be noted. The same reads as under:

Ex. PW-1/D-2

Messrs. Satish Chandra HUF 8

Hastings Road,

Allahabad.

Dear Sir,

Space in Himalya House - Flat No. A

With regard to renting of the premises we herein after spell out the terms and conditions on which we take on lease your office premises No. Flat-A on the 3rd floor of Himalaya House, 23, Kasturba Gandhi Marg, New Delhi.

1. We will be paying you Rs. 930/- (Rupees Nine hundred and thirty only) per month in respect of your one sixth share as rent. The rent will be payable by us to you or to your Bankers before the 5th day of every English Calendar month.

2. The tenancy of the aforesaid premises is for the fixed period of three years commencing from July 1, 1975. Further extension will be strictly with the consent of both the parties and on the terms and conditions to be mutually agreed upon for which three calendar months' notice, in writing, will be given by us for fresh signing of the lease before the expiry of this lease. If the parties do not come to any agreed terms and conditions, we undertake to give you peaceful vacant possession of the premises by June 30, 1978.

xxxx

Ex.PW-1/D-1

Mr. Vinod Chandra Agarwal, HUF

82 Jog Bagh,

New Delhi.

Dear Sir,

Space in Himalya House - Flat No. A

With regard to renting of the premises we herein after spell out the terms and conditions on which we take on lease your office premises No. Flat-A on the 3rd floor of Himalaya House, 23, Kasturba Gandhi Marg, New Delhi.

1. We will be paying you Rs. 930/- (Rupees Nine hundred and thirty only) per month in respect of your one sixth share as rent. The rent will be payable by us to you or to your Bankers before the 5th day of every English Calendar month.

2. The tenancy of the aforesaid premises is for the fixed period of three years

commencing from July 1, 1975. Further extension will be strictly with the consent of both the parties and on the terms and conditions to be mutually agreed upon for which three calendar months' notice, in writing, will be given by us for fresh signing of the lease before the expiry of this lease. If the parties do not come to any agreed terms and conditions, we undertake to give you peaceful vacant possession of the premises by June 30, 1978."

xxxx

Ex.PW-1/14

Mr. P.C. Agarwal, Karta of

Shri C.B. Agarwala, HUF

Flat No. 10,

233, Lower Court Road,

Calcutta-20

Dear Sir,

Space in Himalya House - Flat No. A

With regard to renting of the premises we herein after spell out the terms and conditions on which we take on lease your office premises No. Flat-A on the 3rd floor of Himalaya House, 23, Kasturba Gandhi Marg, New Delhi.

1. We will be paying you Rs. 3720/- (Rupees Three thousand seven hundred twenty only) per month in respect of your four-sixth share as rent. The rent will be payable by us to you or to your Bankers before the 5th day of every English Calendar month.

2. The tenancy of the aforesaid premises is for the fixed period of three years commencing from July 1, 1975. Further extension will be strictly with the consent of both the parties and on the terms and conditions to be mutually agreed upon for which three calendar months' notice, in writing, will be given by us for fresh signing of the lease before the expiry of this lease. If the parties do not come to any agreed terms and conditions, we undertake to give you peaceful vacant possession of the premises by June 30, 1978.

xxxx

5. The lease continued for another period of 3 years, as recorded in Ex.PW-1/D-2, Ex.PW-1/D-1 and Ex.PW-1/14, till 30th June 1978. Post 30th June 1978 the rent was increased and the appellant continued to remain in possession of the tenanted premises.

6. Share of C.B. Agarwal HUF towards 4/6th rent as enhanced came to Rs. 4340/-. On 10th April 1980 a letter, Ex.PW-1/D-3, was addressed by the Karta of C.B. Aggarwal HUF to the appellant informing that there was a further partition

of C.B. Aggarwal HUF with one co-parcener, Ashok Chandra Aggarwal branching out and forming his own HUF. Following was communicated:

Shri C.B. Agarwala HUF

Flat No. 7,

233, Lower Circular Road,

Calcutta-700020

April 10, 1980

Registered A/D

Shriram pistons & Rings Ltd.,

23, Kasturba Gandhi Marg,

New Delhi-110001.

Dear Sirs,

2/3 Share in Flat No. 31A in

Himalaya House, Calcutta.

Upto 31.3.1980, 2/3 share in the above flat was owned by Shri C.B.Agarwala H.U.F. From 1.4.1980 there has been a partial partition of the said H.U.F. pursuant to which 1/4 of 2/3 share in the said flat is owned by Shri Ashok Chandra Agarwala H.U.F. and 3/4 of 2/3 share in the said flat is continued to be owned by Shri C.B. Agarwala HUF.

This is to request you that accordingly rent Rs. 4340/= per month for 2/3 share of above flat hitherto paid to Shri C.B.Agarwala HUF may please be paid, for the period 1.4.1980 onwards, as under:

1/4 (of 2/3) to Ashok Chandra Agarwala HUF of 82 Jorbagh, New Delhi-110003.... Rs. 1085/-

3/4 (of 2/3) to Shri C.B. Agarwala HUF of Flat No. 7, 233, Lower Circular Road, Calcutta-700020.... Rs. 3255/-

Kindly acknowledge and confirm.

Thanking you,

Yours faithfully,

For Shri C.B. Agarwala H.U.F.

Sd/-

Karta.

7. Accordingly the appellant started paying 1/4th of the 4/6th rent to Ashok

Chandra Agarwal HUF and the balance 3/4th of 4/6th to C.B.Agarwal HUF.

8. In this manner 4 different entities became the landlord of the flat in question.

9. The Delhi Rent Control Act 1958 was in force when the tenancy commenced. In view of the provisions of the said Act, no tenant could be evicted by a Civil Court. Notwithstanding any contract or law to the contrary, no tenant could be ejected, save and except on a ground available to a landlord u/s 14 of the Delhi Rent Control Act 1958. With effect from 1.12.1988, by virtue of the promulgation of the Delhi Rent Control Amendment Act 1988, being Act No. 57 of 1988, the Delhi Rent Control Act 1958 stood amended resulting in the Act being made inapplicable to premises whose monthly rent exceeded Rs. 3,500/-.

10. The landlords claimed to have issued a letter terminating the tenancy on 27.4.1989, Ex.PW-1/2. The four kartas of the four HUFs namely C.B. Agarwal HUF, Satish Chandra HUF, Vinod Chandra Agarwala HUF and Ashok Chandra HUF are the stated signatories. Following are the contents of the letter:

We write to notify as under:

1. That you are in occupation of the above office flat as monthly tenants, at a rent of Rs. 8370/- every month. The month of tenancy commences on the first and ends on the last day of each succeeding English calendar month.

2. Vide our notice dated 27th December 1988 we terminated your tenancy from 31st January 1989. However without prejudice to that notice we once again give you this notice of termination of your tenancy on the expiry of next month i.e. 31st May 1989 or on such other day as according to you the month of tenancy would have ended and call upon you to quit and vacate and handover peaceful and vacant possession of the said premises to us.

3. We further notify you that in the event of your not handing over the vacant and peaceful possession as aforesaid, you will be liable to pay mesne profits and/or damages and/or compensation at the rate of Rs. 3,500/- per day plus the interest at the rate of 21%. We state that by unauthorized occupation, you are deriving benefit and/or depriving us of the benefit of at least Rs. 3,500/- per day, and whilst claiming this sum of money, we reserve our right to claim such other enhanced amount as we may be entitled in law.

4. Please note that after receiving the rent for the month of May 1989 we will be unable to accept any amount as rent. If after termination of your tenancy from 31st May as above you wrongfully do not vacate and continue to make any payments, the same will be adjusted by us in part payment of damages, or mesne profits or compensation for unauthorized occupation as notified above, which will be without prejudice to our right and we will proceed to file legal proceedings against you for recovery of possession, profits, damages, compensation as stated above and hold you further liable for all costs and consequences thereof.

5. Please further note that all correspondence in this behalf should be addressed and possession handed over to Shri Satish Chandra of D-5, Sector 14, Noida, Dist. Ghaziabad.

6. Needless to add that under the Rent Control Act, 1958, as amended by the Delhi Rent Control (Amendment) Act, 1988, the said Act i.e. the Delhi Rent Control Act, 1958, does not apply inter alia to premises where monthly rent exceeds Rs. 3,500/-.

Please take notice.

11. The notice terminating the tenancy was purported to be sent by Regd. A.D. Post vide receipt No. 1968 dated 29.4.1989 from the post office at Noida, District Ghaziabad, UP, Ex.PW-1/3. Since the AD card was not produced, alleging that the same was not returned, a certificate issued by the post master, Noida Post Office, Ex.PW-1/5, was relied upon which certified that the postal envelope posted vide postal receipt No. 1968 was duly delivered to the addressee.

12. Needless to state, the respondents, landlords sued for ejectment of the appellant and sought recovery of possession of the tenanted premises being Flat No. 31-A, Himalya House, 23 Kasturba Gandhi Marg, New Delhi as also claimed mesne profits/damages on account of the stated unauthorized use and occupation of their flat by the appellant. It was stated in the plaint that the current rate of rent is Rs. 25/- per sq.feet.

13. While making pleadings in the plaint, in para 10, it was pleaded that the Court should determine the quantum of damages in terms of Order 20 Rule 12 CPC till the defendant i.e. the appellant delivered vacant and peaceful possession and that the plaintiffs would pay the Court fee payable on the determination of the quantum of damages payable to them by the appellant.

14. The suit was resisted on the plea that the appellant was a tenant under four landlords and each tenancy was a separate tenancy and thus the claim for ejectment could not be clubbed in a single suit. It was brought to the notice of the Court in the written statement that in respect of the three tenancies under Satish Chandra HUF, Vinod Chandra HUF, and Ashok Chandra HUF, rent payable was far below Rs. 3,500/- per month. On said count it was pleaded that the Civil Court had no jurisdiction to entertain the plaint on behalf of the said three plaintiffs. Receipt of the notice determining the tenancy, Ex.PW-1/2 was denied. Ownership of the respondents was denied. It was pleaded that if notice determining the tenancy stood proved, the landlords waived the same evidenced by the fact that subsequent to the date of the notice they accepted the rent which was tendered by the appellant. Pleas were raised regarding misjoinder and non-joinder of necessary parties, details whereof we ignore for the reason at the hearing of the appeal, Learned Counsel for the appellant Shri T.K. Ganju, Senior Advocate, restricted submissions on four counts; being tenancies being separate; three out of four being with a rent of less than Rs. 3,500/- per month. A common action could not be maintained for ejectment. Plea urged was that the notice

determining the lease has not been proved to be served upon the appellant. The third plea urged was that if it is held that the notice determining the lease stood proved to be served, by accepting the rent for subsequent months, the landlords waived notice and lastly that the mesne profits granted by the learned Trial Judge at the rate of Rs. 70/- per sq.foot per month were excessive and in any case without any evidence and lastly; could not exceed Rs. 25/- per sq.foot per month since this was the amount stated to be recoverable in the plaint.

15. Vide impugned judgment and decree dated 24.2.1999, the learned Trial Judge has negated all defences and has held that the tenancy was a single tenancy. That the notice determining the tenancy has been proved. That there was no waiver of the notice. Mesne profits have been determined @ Rs. 70/- per sq.foot per month.

16. On the issue whether tenancy was a single tenancy or whether there were four tenancies, the findings of the learned Trial Judge are predicated on the evidence of DW-1, the witness of the appellant, who stated that there was no structural partition of the flat which was taken on rent and that there were no separate municipal numbers. The relevant part of the testimony noted by the learned Trial Judge of DW-1 is as under:

...There were no structural partition of different portion of the third floor and we had made out own wooden partition. There are no municipal number of different partition of the third floor. We were told by the DCM Limited and the landlords the area owned by different persons/landlords on the third floor and we had agreed to pay rent at the rate of Rs. 3/- per sq. ft. in the year 1975 and accordingly rent was paid to different landlords after signing of lease deed with them of the area owned by them multiplied by 3 and even the landlords were not able to identify the specific portion owned by each of them on the third floor at that time. I know Mr. C.B. Aggarwal HUF as they own 930 sq. ft. area, now on the third floor and we are paying them rent at the rate of Rs. 4.50 paise per sq. ft. per month total Rs. 4185/- per month. Earlier they were owning a bigger area of 1240 sq. ft. and in the year 1980 there was a partition between C.B. Aggarwal HUF and Mr. Ashok Chandra and after which C.B. Aggarwal HUF became the owner of 930 sq. ft. and Mr. Ashok Chandra became the owner of 310 sq. ft. and Mr. Ashok Chander became the owner of 310 sq. ft. each on the third floor and we are paying rent of Rs. 1395/- P.M. separately to each one of them, by account payee cheques. The flat No. of all these persons is referred to A and I do not know why there is one flat number only but must be as per convenience of the landlords and because they belong to the same family....

17. The conclusion drawn by the learned Trial Judge is as under:

13. The defendant itself divided the area of the flat according to their suitability, but at the same times, he also referred in his statement above noted, "The flat Number of all these persons is referred to A and I do not know why there is one flat number only, but must be as per convenience of the landlords and because

they belong to the same family." It clearly goes to show that there is one property and not many. It is also admitted in cross-examination, recorded on 15.10.98 by DW1. "...It is correct that at the third floor of Himalaya House, there is only one company by the name of M/s. Sri Ram Pistons and Rings Limited. It is correct that Himalaya House is located on 23, Kasturba Gandhi Marg, New Delhi." And the DW1 tried to prove that the tenancies are more than one, but in his own statement, it proved otherwise i.e. against the defendant and the argument of the Counsel for the defendant Shri R.S. Endlow that there are four tenancies and not one, cannot be accepted and the same is turned down.

18. With reference to Ex.PW-1/2, the postal receipt Ex.PW-1/3, and the certificate issued by the post master, Noida post office, Ex.PW-1/5, learned Trial Judge has held that the same, together with the testimony of PW-1 Shri Vinod Chandra Aggarwal established that the notice Ex.PW-1/2, sent by Regd. A.D. Post, was duly received by the appellant.

19. Noting that the suit for recovery of possession was filed in the month of August 1989 and that Ex.PW-1/2 was issued on 27th April 1989; there being not much time lag between the determination of the tenancy and filing of the suit, the learned Trial Judge held that the same evidences no waiver on account of acceptance of the rent. Learned Trial Judge has opined that merely because the landlords accepted the tender of rent after determining the tenancy is no proof of waiver. For so holding, the learned Trial Judge has noted two decisions reported as 1979 (RCR) 291 Hiralal and Ors. v. Banarasi Das and VII-1994 (2) 82 Kailash Kumar and Ors. v. Dr. R.K. Kapur (It is apparent that the learned Trial Judge has failed to correctly list out the citation of the decision in Kailash Kapur's case because the name of the journal/publication is not mentioned in the judgment).

20. The finding pertaining to the award of mesne profits @ Rs. 70/- per sq.foot per month is a little cryptic. Be that as it may, the learned Trial Judge has returned the finding as under:

46. The property in dispute is in the heart of the City and most flourishing business place and most important place of the City. As such, under these circumstances, I allow Rs. 70/- per sq.ft. per month as damages/mesne profits from 1.6.1989 till the possession of the suit premises is handed over by the defendant to the plaintiffs. However, it is made clear that the plaintiffs shall pay additional court fee on the amount of mesne profits so accrued to the plaintiffs.

21. At the hearing held on 11.11.2008 Shri T.K. Ganju, learned senior Counsel for the appellant agitated four points briefly noted in para 14 above.

22. Pertaining to the plea that there were four separate and independent tenancies, learned senior Counsel urged that partial partition of C.B. Agarwal HUF resulting in two coparceners branching out and constitution of Satish Chandra HUF and Vinod Chandra Agarwala HUF in the year 1975 and thereafter further partition in the year 1980 resulting in the formation of Ashok Chandra HUF resulted in partition of the flat in question inasmuch as title was severed and

four different entities became owners thereof. With reference to the decision of the Supreme Court reported as Kalyani (Dead) by Lrs. Vs. Narayanan and Others, Learned Counsel urged that the result was that the four HUFs became separate owners as title was dissipated and status became that of tenant in common. Hence, Counsel urged that there were four separate tenancies. Elaborating on the submission, Learned Counsel urged that Ex.PW-1/14, Ex.PW-1/D-1 and Ex.PW-1/D-2 established that his clients were interacting separately with each landlord and that each landlord, acting individually, consented to the continuation of the lease which evidences that there was no jointness in action by the landlords when tenancy commenced or was continued from time to time.

23. With respect to the plea that the evidence on record does not establish that Ex.PW-1/2 was served upon the appellant, learned senior Counsel drew attention to the fact that the notice in question was posted at 23 Kasturba Gandhi Marg, New Delhi, a multi storey building having numerous flats on different floors. Counsel urged that by not mentioning the flat number the notice could not have been received by his client. The legal aspect of the plea was that in the absence of the postal envelope being received back unserved, the presumption of service when a notice is sent by Regd. A.D. Post, is available only if it is established that the same was sent at the correct address. Counsel referred to the testimony of the sole witness of the plaintiff i.e. Vinod Chadra Agarwala who was examined as PW-1 who, during cross-examination admitted that the letter Ex.PW-1/2 was sent from the address mentioned on the right corner above the letter and that he did not remember who posted the letter. Drawing attention of the Court to the fact that the address mentioned on the right corner of the notice Ex.PW-1/2 was:

Flat No. 7,

233 Lower Circular Road,

Calcutta-700020

counsel urged that if the letter was sent from the address mentioned as above, where was the question of the receipt of posting, Ex.PW-1/3, emanating from Noida. On proof of service of the postal envelope sent vide postal receipt No. 1968, Ex.PW-1/3, through the medium of Ex.PW-1/5 i.e. the certificate issued by the post master Noida, Counsel urged that neither the post master concerned nor any officer from the post office was summoned and that the certificate could not be proved by the testimony of PW-1. Learned Counsel drew attention of the Court to the fact that the mode of proof of the notice was objected to, as recorded by the learned Trial Judge while recording the testimony of PW-1 on 22.1.1997. Counsel urged that by not examining the post master, the appellant has been denied the opportunity to cross-examine the post master on the contents of the certificate.

24. On the issue of notice not being proved, Learned Counsel cited the following authorities:

- (a) Mrs. Surender Bala and Another Vs. M/s. Sandeep Foam Industries P. Ltd.,
(b) Tarak Nath Sha Vs. Bhutoria Bros. Pvt. Ltd. and Others,
(c) 1975 RLR 523 Jagat Ram Khullar v. Battu Mal.

25. In sum and substance, learned senior Counsel urged that the ratio of the three decisions was that the law relating to presumption of service by registered post is that a mere presumption arises that a notice sent by registered post at the correct address, if not returned unserved, is presumed to be served upon the addressee and that once the addressee steps into the witness box and disputes the receipt of the notice, the presumption stands nullified; with onus shifting on the sender to establish by cogent, reliable and unimpeachable evidence, that the same was served upon the addressee.

26. The plea pertaining to waiver of notice was urged very meekly by Learned Counsel for the appellant who stated that by accepting the rent which was tendered in the months of May, June and July, the landlords are deemed to have waived the notice.

27. Arguing forcefully on the quantification of the mesne profits, the learned senior Counsel urged that the presumptive finding by the learned Trial Judge that the rents have risen, without there being any evidence of quantum of rise, was insufficient to hold that the landlords would be entitled to the rent @Rs. 70/- per sq.foot per month. Counsel urged that even otherwise, since claim was made in the plaint to be awarded mesne profits @Rs. 25/- per sq.ft. per month, no claim in excess thereof could be allowed.

28. The adjudication of the matter involves consideration of the following four aspects:

- I. Nature of tenancy.
- II. Service of notice to quit.
- III. Waiver of notice to quit.
- IV. Determination of mesne profits.

Nature of Tenancy

29. As already noted in the preceding paragraphs, the learned senior Counsel for the appellant had placed strong reliance upon the decision of the Hon"ble Supreme Court reported as Kalyani (since deceased through Kalyani (Dead) by Lrs. Vs. Narayanan and Others, in support of the plea that there were four separate and independent tenancies qua the flat in question and that since three out of four tenancies pertained to a monthly rent less than Rs. 3,500/- per month, the civil court had no jurisdiction to entertain the suit qua three plaintiffs and hence, even qua the fourth where rent was more than Rs. 3,500/- per month, the suit had to be dismissed.

30. To appreciate the submission advanced by the learned senior Counsel in its correct perspective it would be apposite to refer to the following observations of the Hon'ble Supreme Court in Kalyani's case (supra):

The next stage in the unfolding of the case is whether Ext. P-1 is effective as a partition. Partition is a word of technical import in Hindu law. Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severally. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an impact on devolution of shares of such members. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property (see *Approvar v. Rama Subha Aiyar* (1886) 11 M.I.A. 75 quoted with approval in *Smt. Krishnabai Bhritar Ganpatrao Deshmukh Vs. Appasaheb Tuljaramarao Nimbalkar and Others*, A disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time, be claimed by virtue of the separate right (see *Girja Bai v. Sadashiv* 41 I.A. 151. A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense.

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One thing is crystal clear that Ext. P-1 is not a deed of partition in the sense it does not purport to divide the property amongst various coparceners by metes and bounds. However, in Hindu law qua joint family and joint family property the word "partition" is understood in a special sense. If severance of joint status is brought about by a deed, a writing or an unequivocal declaration of intention to bring about such disruption, qua the joint family, it constitutes partition, (see *Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another*, . To constitute a partition all that is necessary is a definite and unequivocal indication of intention by a member of a joint family to separate himself from the family. What form such intimation, indication or representation of such interest should take would depend upon the circumstances of each case. A further requirement is that this unequivocal indication of intention to separate must be to the knowledge of the persons affected by such declaration. A review of the decisions shows that this intention to separate may be manifested in diverse ways. It may be by notice or by filing a suit. Undoubtedly, indication or intimation must be to members of the joint family likely to be affected by such a declaration.

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Partition can be partial qua person and property but a partition which follows disruption of a joint family status will be amongst those who are entitled to a share on partition. On death of Karappan, Kesavan, the son of the second wife obtained a physical partition of the property, took his own share and left the family. There was first a disruption of the joint family by specifying the shares in Ext.P-1. Till disruption of joint family status takes place no coparcener can claim what is his exact share in coparcenary property. It is liable to increase and decrease depending upon the addition to the number or departure of a male member and inheritance by survivorship. But once a disruption of joint family status takes place, coparceners cease to hold the property as joint tenants but they hold as tenants-in-common. Looking to the terms of Ext.P-1 there was a disruption of joint family status, the shares were specified and vested, liabilities and obligations towards the family members were defined and imbalance out of unequal division was corrected. This certainly has effect of bringing about disruption of joint family status and even if there was no partition by metes and bounds and the coparceners continued to remain under the same roof or enjoyed the property without division by metes and bounds, they did not hold as joint tenants unless re-union is pleaded and proved.

31. The learned senior Counsel had argued that the legal norm which emerges from the afore-noted observations of the Hon''ble Supreme Court is that the severance in the status of joint family leads to partition of the joint properties of said family irrespective of the fact whether or not there was an actual division of the said properties by metes and bounds and that the said properties are held by the separated members as "tenants-in-common" and not as joint owners, from the date of the severance of status. He had further sought to impress upon this Court that when the said legal norm is applied to the facts of the present case, the irresistible conclusion which would result is that the act of some of the coparceners of C.B. Agarwala HUF of branching out of the said HUF and Constituting their separate HUF has resulted in partition of the joint properties of C.B. Agarwala HUF, particularly of the flat in question, which is further strengthened by the fact that the rent in respect of the said flat was being apportioned as per the respective shares of said HUFs and being received separately by the members of the said HUFs.

32. The legal norm culled out by the learned senior Counsel from the judgment of the Hon''ble Supreme Court in Kalyani's case (supra) that the severance of joint family status ipso facto results in partition of the joint properties of the said family is not correct in the light of observations made by the Hon''ble Supreme Court in a recent decision reported as M. Venkataramana Hebbar (D) by L.Rs. Vs. M. Rajagopal Hebbar and Others,

Any co-owner can cause a severance in the status of joint family by expressing his unequivocal intention to separate. Such intention can be expressed even by filing a suit for partition. But, despite such separation in joint status, parties may

continue to possess the lands jointly unless a partition of the joint family properties takes place by metes and bounds.

(Emphasis supplied)

33. The legal position with regard to partition of joint family property needs to be noted.

34. The Judicial Committee of the Privy Council in the decision reported as *Palani Ammal v. Muthuvenkatacharla Monigar and Ors.* L.R. 52 IndAp 83 had observed as under:

In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves, is now well-established law.... But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be.

(Emphasis supplied)

35. The afore-noted observations of the Privy Council in *Palani Ammal's* case (*supra*) were noted with approval by the Hon^{ble} Supreme Court in the decision reported as *Girja Nandini Devi v. Bijendra Narain Choudhary* AIR 1967 SC 124. In the said decision, it was observed as under:

In a Hindu undivided family governed by the Mitakshara law, no individual member of that family, while it remains undivided, can predicate that he has a certain definite share in the property of the family. The rights of the coparceners are defined when there is partition. Partition consists in defining the shares of the coparceners in the joint property; actual division of the property by metes and bounds is not necessary to constitute partition. Once the shares are defined, whether by agreement between the parties or otherwise, partition is complete. The parties may thereafter choose to divide the property by metes and bounds, or may continue to live together and enjoy the property in common as before. If they live together, the mode of enjoyment alone remains joint, but not the tenure of the property.

Partition may ordinarily be effected by institution of a suit, by submitting the dispute as to division of the properties to arbitrators, by a demand for a share in the properties, or by conduct which evinces an intention to sever the joint family : it may also be effected by agreement to divide the property. But in each case the conduct must evidence unequivocally intention to sever the joint family status. Merely because one member of a family severs his relation, there is no

presumption that there is severance between the other members; the question whether there is severance between the other members is one of fact to be determined on a review of all the attendant circumstances.

(Emphasis supplied)

36. After noting the afore-noted judgments of the Hon''ble Supreme Court and the Privy Council, the Chattisgarh High Court, in the decision reported a Krishna Kumar Soni and Others Vs. Rajulal Soni and Others,) summarized the law relating to partition of joint family properties as under:

Thus, in order to constitute the partition of the joint family property severance of joint status and a definite and unequivocal indication of the intention by the members of the Joint Hindu Family to separate themselves and to enjoy their respective shares in severality is required to be established by the party, who pleads that under the family arrangement, there was a disruption of status under a definite and unequivocal indication of the intention by the members of the joint family to separate and to enjoy their shares in severality. Only such an unequivocal intention to separate brings about the disruption of joint family status. In Pata Sahu and Anr. v. Hiru Sahu and Ors. (supra), it was held that mere fact of separate mess and separate residence by themselves are not conclusive proof of partition.

(Emphasis supplied)

37. From the afore-noted decisions, the legal norm which can safely be culled out is that in order to constitute partition of joint family property, the conduct of the coparceners must evidence unequivocally the intention to sever the joint family status and to enjoy their respective shares separately.

38. In such circumstances, the conduct of the members of C.B. Agarwala HUF and the members who had separated therefrom and constituted their separate HUFs assumes central importance in adjudication of the question as to whether there was a partition of the flat in question.

39. The first document which throws light upon the said aspect of the matter is the letter dated 23.06.1973, Ex.PW-1/17, addressed to the predecessor-in-interest of the appellant on behalf of respective Kartas of Mr. Satish Chandra HUF, Mr. Vinod Chandra Agarwala HUF and Dr. C.B. Agarwala HUF, the contents whereof have already been reproduced in paragraph 2 above.

40. The said letter records the factum of separation of some members-coparceners from C.B. Agarwala HUF and the constitution of separate HUFs by such separated members. The letter clearly records that "Effective from 13th June, 1973, the rent in respect of the above flat may please be apportioned as under:....

41. It is most pertinent to note that the flat in question has been referred to as one single unit in the said letter. The unity of possession of the flat has been kept

intact. The only request made is to apportion the rent as per the letter.

42. The next relevant documents are the three identically worded letters dated 01.10.1975 Ex.PW-1/D-2, 24.11.1975 Ex.PW-1/D-1 and 28.11.1975 Ex.PW-1/14, issued by the appellant and addressed to Mr. Satish Chandra HUF, Mr. Vinod Chandra Agarwala HUF and Mr. P.C. Agarwala, Karta of Mr. C.B. Agarwala HUF respectively, the contents whereof have already been reproduced in paragraph 4 above.

43. The said letters record the factum of apportionment of the rent in respect of the flat between the said three HUFs. The letters record that "With regard to renting of the premises we herein after spell out the terms and conditions on which we take on lease your office premises No. Flat-A on the 3rd floor of Himalaya House, 23, Kasturba Gandhi Marg, New Delhi."

44. It is most relevant to note that the appellant has also referred to the flat in question as one single unit even in the individual letters addressed to the members of said three HUFs.

45. The next document is the letter dated 10.04.1980, Ex.PW-1/D-3, written by the Karta of C.B. Agarwala HUF and addressed to the appellant informing it of the factum of separation of another member from C.B. Agarwala HUF and constitution of a separate HUF by said member, the contents whereof have been reproduced in paragraph 6 above. The said letter records that "This is to request you that accordingly rent Rs. 4340/- per month for 2/3 share of above flat hitherto paid to Shri C.B. Agarwala HUF may please be paid, for the period 1.4.1980 onwards, as under."

46. It is again pertinent to note that the flat in question has been referred to as one single unit in the said letter.

47. The last document is a letter dated 27.04.1989, Ex.PW-1/2, written by the kartas of the four HUFs, namely, C.B. Agarwala HUF, Satish Chandra HUF, Vinod Chandra Agarwala HUF and Ashok Chandra HUF, terminating the tenancy of the appellant in the flat in question, the contents whereof have been reproduced in paragraph 10 above. The letter records that "That you are in occupation of the above office flat as monthly tenants, at a rent of Rs. 8370/- every month (Note : As would be dealt with hereinafter and findings recorded, service of said letter has not been proved, but the intent of the authors of the letter, even if not delivered to the appellant is important qua the issue of tenancy being single or not."

48. Even the testimony of the witness of the appellant, Mr. Pawan Anand, DW-1, is to the effect that there was no structural partition of the flat in question, meaning thereby, the flat was a single entity flat with unity of possession and enjoyment.

49. The afore-noted letters and testimony of the witness of the appellant unerringly points to the fact that there was community of interest and unity of

possession between the members of the said four HUFs in the flat in question. The severance in title of the flat in question was only with respect to apportionment of the rent of the flat between the said four HUFs.

50. In the light of the law laid down by the Hon''ble Supreme Court in Girja Nandini Devi's case (supra) as explained by the Chattisgarh High Court in Krishna Kumar Soni's case (supra) and the conduct of the members of the said four HUFs and even that of the appellant evidencing that they were treating the flat in question as one single unit, it cannot be held that there was partition of the flat in question resulting in four independent and separate tenancies being created in respect thereto.

51. The conclusion which results from the above discussion and the attendant circumstances of the case is that the four HUFs were the joint landlords of the flat in question and thus the suit instituted by them for ejection of the appellant from the flat in question was maintainable.

Service of notice to quit

52. The essence of the submission advanced by the learned senior Counsel for the appellant under this head was that since neither the post master who had issued the certificate Ex.PW-1/5 nor any other officer from the post office was summoned to prove the service of the notice Ex.PW-1/2 upon the appellant, it must be held that the respondents have failed to establish the service of notice to quit, Ex.PW-1/2, upon the appellant. More so, for the reason PW-1, the sole witness of the appellants stated in cross-examination that he did not remember as to who posted the letter and that it was correct that the letter was sent from the address mentioned on the right corner of Ex.PW-1/2, which we note is: Flat No. 7, 233, Lower Circular Road, Calcutta-700020. Counsel urged that the receipt of posting pertained to the post office at Noida. It was urged that to avail the benefit of the presumption u/s 27 of the General Clauses Act 1897, the sine qua non was the proof that the letter in question was put inside the postal envelope dispatched vide postal receipt in question. Counsel urged that the notice could do no more to discharge the burden other than to step into the witness box and deny the receipt of the letter.

53. Per contra, it was argued on behalf of the respondents that it has been held in a plethora of judicial decisions that when presumption arising u/s 27 of the General Clauses Act 1897 regarding service of a document is available to a party, then examination of officials of postal authorities to prove the said service is not necessary. In support of the said submission, strong reliance was placed by the respondents upon the decision of the Hon''ble Supreme Court reported as Pwada Venkateswara Rao Vs. Chidamana Venkata Ramana,

54. Before adjudicating upon the correctness of the legal proposition advanced on behalf of the respondents, the primary question which needs consideration is; whether the presumption arising u/s 27 of the General Clauses Act 1897 is available to the respondents.

55. Section 27 of the General Clauses Act 1897 reads as under:

27. Meaning of service by post - Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

56. A bare perusal of Section 27 of the General Clauses Act 1897 reveals that it is divisible into two parts. The first part deals with the mode of service and the second part deals with the time of the service. On proof of the facts that a letter for which postal charges are pre-paid and is properly addressed to the notice and which contains the document sent, a two-fold presumption arises under the Section; namely, (i) that the service shall be deemed to have been effected and (ii) deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

57. The tenor of Section 27 of the General Clauses Act, 1897, in the light of Section 106 of the Transfer of Property Act, 1882 was explained by the Calcutta High Court in the decision reported as *Sushil Kumar Chakravarty v. Ganesh Chandra Mitra* AIR 1958 Cal 251 in following terms:

Under this section, the service of the notice to quit, which is required by the Transfer of Property Act, shall be deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the notice to quit. As soon, therefore, it is proved that the letter containing the notice to quit was properly addressed, prepaid and posted by registered post, service shall be deemed to be effected. This "deeming" has been held to amount to a presumption, which, unless rebutted, would prove the fact of service. Even if, therefore, the actual refusal by the addressee is not proved, service of notice may well be held to be proved.

58. In the backdrop of afore-noted legal position, the testimony of the sole witness of the respondents i.e. Mr. Vinod Chandra Agarwala, PW-1 needs to be examined.

59. The relevant portion of the testimony of Mr. Vinod Chandra Agarwala, PW-1 reads as under:

...before the institution of the suit all the 4 plaintiffs through their Karta have served the notice of termination of the tenancy upon the defendants being dt. 27th of april 1989 carbon copy of the same is Ex.PW1/2. (Objected to on the ground of lot being primary evidence and being carbon copy of the respondent by the parties themselves and no notice under Order, 12 Rule 8 having been given). The postal receipt of the same is Ex.PW1/3. AD card with regard to the

said notice was not recd. back therefore letter was written to the post master concerned copy of the same is Ex.PW1/4. (Objected to on the ground of not being primary document and original not having been summoned this objection as well as earlier objection get open for decision at the time of the hearing). Also objected as the witness is not the signatory to the letter. The confirmation of the delivery of the registry notice recd. in response in Ex.PW1/4 from the department of Posts is Ex.PW1/5. (objected to not the ground of not being approved objection kept open)....

XXXX by Shri R.S. Andlaw Counsel for the defendant.

....It is correct that letter Ex.PW1/2 was sent from the address mentioned on the right corner above and circled in ink. The address which is encircled mentioned above belongs to my brother. I also sometimes go there. I do not remember whether I was there in Calcutta on 27-4-89. I do not remember who posted this letter.

Q. Who posted this letter?

Ans. The answer has already been given.

I do not remember who wrote the addresses on the envelop.

Q. Did you see the envelop in which letter Ex.PW2/1 was posted.

Ans. Question is irrelevant and disallowed.

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Q. Did you see the envelop with the address written on it in Ex.PW1/2 is stated to have been sent?

Ans. I do not remember.

It is correct that letter Ex.PW2/1 was not posted by me. My brother Pramod Chandra wrote this letter. I did not make inquiry personally from the post office regarding the delivery of this letter. I do not identify the sig. On Ex.PW1/5. I did not see any material on basis of which the letter Ex.PW1/5 was written. (Ex.PW1/5 was marked on a black accomplished paper and the same has been marked on the letter itself which be read dt. 21-2-97. It is incorrect to suggest that Ex.PW1/5 does not pertain to Ex.PW1/2. It is correct that 23-Kasturba Gandhi is the plot on which multi-storeyed building constructed which is known as Himalaya House. I do not know how many floors is digging. I cannot say whether it 10 floors or more than 10 floors or below 10 floors. This building is occupied by other occupants also. The deft. Is occupying Flat No. 31 in this building. Flat No. is not written in the notice Ex.PW1/2 or Ex.PW1/3. Floor is also not mentioned. I do not know to whom the letter was delivered.

(Emphasis supplied)

60. The learned senior Counsel for the appellant had strenuously argued that the

notice Ex.PW1/2 was not sent at the correct address inasmuch as municipal number of the flat in question was not mentioned either on the notice Ex.PW1/2 or on the postal receipt Ex.PW1/3 and therefore the presumption u/s 27 of the General Clauses Act, 1897 was not available to the respondents.

61. This argument of the learned senior Counsel for the appellant has no legs to stand in view of the testimony of the Mr. Pawan Anand, DW-1, witness of the appellant to the effect that a letter addressed in the name of appellant whereupon the municipal number of the flat in question is not mentioned is delivered at the flat in question.

62. But, the question of whether the notice to quit was put inside the postal envelope needs to be independently examined being an essential requisite of Section 27 of the General Clauses Act, 1897. The evidence on record establishes that the same has not been proved by the witness of the respondents. The witness of the respondents nowhere in his examination-in-chief has deposed that the postal envelope purportedly sent by registered post to the appellant contained the notice Ex.PW1/2. In fact, in his cross-examination the said witness has stated that he did not remember seeing the postal envelope which was purportedly sent to the appellant.

63. It is further relevant to note that the witness of the respondents had no personal knowledge about the posting of the notice Ex.PW1/2, inasmuch as he had deposed that he had neither posted the said notice nor he has any knowledge as to who had posted the said notice.

64. At this stage, we note a decision of a Division Bench of this Court reported as Mrs. Surender Bala and Another Vs. M/s. Sandeep Foam Industries P. Ltd., In said case, the daughter and attorney of one of the two landlords had sought to prove the notice to quit given by the landlords to the tenant; postal receipt vide which the said notice was sent and certificate/letter from the Post Office regarding the service of the notice. Mode of proof of said documents was objected to by the tenant. The trial court had come to the conclusion that the landlords had failed to establish the service of notice to quit upon the tenant. In appeal, the Division Bench of this Court affirmed the decision of the trial court. Relevant discussion contained therein is being reproduced herein under:

However, in the present case the facts are quite different. No evidence was adduced to the effect that the notice, Ex.PW1/7 was actually sent through registered post; nobody was examined from the office of the lawyer and even PW-1 did not state that the notice dated 9th December, 1993 was sent by her or in her presence through registered post. Admittedly PW-1, Mrs. Rita Roy, became attorney of the plaintiffs only on 30.6.97. There fore she could not possibly say anything about the notice sent on 9th December, 1993. Her evidence in this regard has to be treated as hearsay; no person from the post office was examined to state that notice was delivered at the address of the respondent; no acknowledgment due has been produced on record. Above all even the duplicate

copy of the certificate issued by the postal authorities with regard to the alleged delivery of the notice stated to have been sent vide postal receipt No. 4564, marked as PW-1/9 was not proved on record. It was sought to be proved through PW-1, Mrs. Roy. Method and manner of proof of the same was objected to on behalf of the respondent. Despite such objection appellant did not make any effort at any stage of the trial of the suit to get the said document proved in accordance with law by summoning appropriate witness. In fact, during the course of arguments it was conceded by Learned Counsel for the appellant that document marked as Ex.PW-1/9 has not proved in accordance with law and, therefore, it can be ignored from consideration. If Ex.PW-1/9 is ignored, in our considered view, there is hardly any evidence to prove that notice copy of which is Ex.PW-1/7 was in fact ever sent through registered post or was delivered to the respondent more so when it was addressed in the wrong name. Admittedly, the correct name of the respondent is "M/s Sandeep Foam Industries Private Limited". The notice is purported to have been sent in the name of "M/s Sandeep Foam Private Limited". It is true on postal receipts complete addresses are rarely mentioned. The receipt issued by the postal authorities only carry the name of the addressee and the post office of the destination. However, on request in writing postal authorities normally issue a certificate certifying that whether the document sent through registered post was or was not delivered to the addressee. In this case, such a certificate marked as PW-1/9 was not proved in accordance with law, in this case.

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As observed earlier we would like to reiterate that in the present case presumption u/s 27 of the General Clauses Act, 1897 could have been raised, had any person from the office of the Advocate been examined to prove copy of the notice, Ex.PW-1/7 which was sent through registered post and was not received back and that the acknowledgment due was also not received back. Otherwise, the plaintiffs could have led some other evidence in this regard to show that the notice was sent by registered post and same was not received back. In this case the evidence adduced is only hearsay. PW-1 was not the attorney of the plaintiffs when the notice was sent. None of the plaintiffs appeared in witness box. Certificate of the postal authorities regarding delivery of the notice was also not proved in accordance with law. If the said certificate is excluded from certificate there is no proof that any notice or letter was actually sent and if sent that the same was not returned undelivered.

Presumption u/s 114(f) of the Evidence Act is on the same footing, as a presumption u/s 27 of the General Clauses Act. Presumption u/s 114(f) arises on proof of the facts of posting of a letter in the ordinary post, whereas presumption u/s 27 of the Act is with regard to the letter sent through registered post. There is no evidence of the notice having been sent through courier also, therefore, the question of raising any presumption u/s 114(f) of the Evidence Act does not arise.

65. We thus hold that the respondents have failed to establish that the notice

determining the tenancy was served.

66. However, there is yet another aspect of the matter. It was submitted on behalf of the respondents that no notice determining the tenancy of the appellant in the flat in question was required to be served upon the appellant before the institution of the present suit in view of the following observations made by the Hon''ble Supreme Court in a recent decision reported as Nopany Investments (P) Ltd. Vs. Santokh Singh (HUF),

...In any view of the matter, it is well settled that filing of an eviction suit under general law itself is a notice to quit upon the tenant. Therefore, we have no hesitation in holding that no notice to quit was necessary u/s 106 of the Transfer of Property Act in order to enable the respondent to get a decree of eviction against the appellant. This view has also been expressed in the decision of this Court in V. Dhanapal Chettiar Vs. Yesodai Ammal,

67. Learned Counsel for the appellant urged that the aforesaid view of the Hon''ble Supreme Court ran contrary to the plethora of decisions that to determine a tenancy a notice to quit being served upon the tenant by the landlord is a prerequisite for ejection of the tenant and that it was incorrectly stated by their Lordships that it was settled law that in a suit to evict a tenant under General Law there is no requirement to issue a notice to quit and that the filing of the suit itself was a notice to quit.

68. We note that in Nopany Investments? case (supra) the Hon''ble Supreme Court has noted and relied upon a Constitution Bench decision in V. Dhanapal Chettiar's case (supra).

69. The question which required adjudication by the Constitutional Bench in V. Dhanapal Chettiar's case (supra) was "whether in order to get a decree or order of eviction against a tenant under any State Rent Control Act is it necessary to give a notice u/s 106 of the Transfer of Property Act" and in said context the Constitutional Bench had concluded as under:

...That being so, making out a case under the Rent Act for eviction of the tenant by itself is sufficient and it is not obligatory to found the proceeding on the basis of the determination of the lease by issue of notice in accordance with Section 106 of the Transfer of Property Act.

70. While discussing the law relating to the requirement of service of notice envisaged u/s 106 of the Transfer of Property Act, in actions initiated under the State Rent Control Acts, the Hon''ble Supreme Court in V. Dhanapal Chettiar's case (supra) observed that where a lease of an immovable property does not stand expired by any of the modes prescribed under Clauses (a) to (g) of Section 111 of the Transfer of Property Act, the notice for determination of lease as required u/s 106 is necessary to be served upon the tenant but not otherwise. It appears that these observations of the Constitutional Bench have escaped the notice of their Lordships of the Hon''ble Supreme Court in Nopany Investments''

case (supra).

71. But, the decision in V. Dhanapal Chettiar's case (supra) guides us in a very interesting direction.

72. It is no longer res integra that there is no requirement of service of notice to determine a tenancy as envisaged u/s 106 of the Transfer of Property Act in case where a lease of immovable property is determined by any one of the modes prescribed under Clauses (a) to (g) of Section 111 therein. (See the decisions of the Hon'ble Supreme Court reported as Firm Sardarilal Vishwanath and Others Vs. Pritam Singh, and V. Dhanapal Chettiar Vs. Yesodai Ammal,

73. In the decision reported as Smt. Shanti Devi Vs. Amal Kumar Banerjee, the Hon'ble Supreme Court has held that where tenancy expires by an efflux of time, notice u/s 106 of the Transfer of Property Act is not necessary.

74. The creation of every lease has its origin in a bilateral contract between the lessor and the lessee which necessarily includes the period for which the lessee is authorized to possess the tenanted premises. The moment this agreed period is over the tenancy expires by efflux of time. The obligation of the tenant to restore possession to the landlord comes into play. If he does not do so, the landlord gets a right to approach a civil court to seek recovery of possession. But, with the enactment of Rent Control Legislations, the contracts of tenancy as also all laws to the contrary were superseded by statutory enactments which gave right to a landlord to evict the tenant on grounds available under the Rent Control Law and none more. Special Tribunals of Rent Controllers were constituted under the Rent Control Legislations. Notwithstanding the lease having expired by efflux of time, these landlords, whose premises were covered by the Rent Control Legislations, were by the force of law compelled to receive rents from the tenants whose continued possession was not under a contract, but under a statute. Law treated such tenants to be statutory tenants and not contractual tenants. Thus, merely because the landlords received under compulsion of law rent from the tenants, same did not result in the continuation of the landlord tenant relationship due to the free volition of the landlord. Such tenants cannot claim to be tenants holding over because a tenancy holding over requires that the acceptance of rent by the landlord is with a consent for the tenancy to be continued. This flows out of a bare perusal of Section 116 of the Transfer of Property Act 1882 which reads as under:

116. Effect of holding over-If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

75. The mandate of Clause (q) of Section 108 of the Transfer of Property Act

1882 is that on the expiry of the lease, the lessee is bound to hand over possession of the leased premises to the lessor and therefore the lessor would be entitled to maintain an action to compel the lessees to abide by the mandate of Clause (q) of Section 108 of the Transfer of Property Act 1882.

76. What is the nature of possession of this lessee who continues to retain possession without complying with his legal obligation to restore possession?

77. A person who enters upon the property of another without authority of law is a trespasser. It could be argued that the very next moment after the period of lease stands expired the act of entering upon property by the tenant is an act of trespass. But law says No. A lessee who continues in possession after expiry of the lease, without the consent of the lessor or without any agreement between the parties or in disagreement with the lessor, is treated in law as a tenant by sufferance. But where the lessor consents to the continued possession of lessee on the same terms and conditions as per the original lease a tenancy by holding over comes into operation.

78. Section 116 of the Transfer of Property Act has to be understood in this context, with reference to the words "accepts rent or otherwise assents to his continuing in possession". Said words contemplate that from the side of the lessee, there should be an offer to take a new lease and on the side of the lessor there must be a definite consent to the continuation of possession. In other words there must be a bilateral contract.

79. Such a bilateral contract could be express or implied. Thus, mere continuance of possession after the expiry or determination of the lease is not enough to entitle the tenant to establish tenancy by holding over.

80. In the instant case it has to be noted that the Delhi Rent Control Act 1958 was amended in December 1988 and till then the respondents could do nothing except to reconcile to their fate because of the protection available to the tenanted premises under the Delhi Rent Control Act 1958. Thus, acceptance of rent after tenancy expired by efflux of time cannot be treated as evidence of acceptance of rent with consent to continue the contractual tenancy or to create a new tenancy.

81. We hold that the principles of law laid down by the Constitution Bench of the Hon"ble Supreme Court in V. Dhanapal Chettiar's case (supra) are capable of being extended to cases where due to the application of a Rent Control Legislation a landlord could not evict his tenant and thus under compulsion of law continued to accept the rent even after tenancy expired by efflux of time; requiring no notice to determine the tenancy because the status of the tenant was not that of a tenant holding over.

82. We note that the suit for ejectment was filed soon after the embargo of the Delhi Rent Control Legislation was removed when tenancies, rent whereof was above Rs. 3,500/- per month, were taken out from the purview of the Delhi Rent

Control Act 1958.

83. The issue of waiver of the notice to quit thus becomes irrelevant because we have held that there was no requirement to serve any notice to quit and because we have held that in the facts and circumstances of the case the status of the appellant was not that of a tenant holding over and that the tenancy expired by efflux of time but right could not be enforced to evict the tenant due to the embargo created by the Rent Control Law; on removal of which embargo the suit could be filed to seek recovery of possession on the allegation that after the tenancy expired by efflux of time the appellant could not occupy the subject premises.

Determination of Mesne Profits

84. Standard of evidence required to prove mesne profits in a given case was succinctly stated by the Division Bench of this Court in the decision reported as National Radio and Electronic Co. Ltd. Vs. Motion Pictures Association, . Para 34 of the said decision which is relevant for the said purpose is being reproduced hereinbelow:

34. Judicial notice is taken of only such facts of which there can be only one view. In the light of the aforesaid position in law, there can be no manner of doubt that so far as the increase of rent is concerned, judicial notice can be taken of a fact that over a certain period rents generally have arisen. However, so far as quantification of the rate at which the increase has actually taken place, a finding can be arrived at only on the basis of legal evidence and material establishing the actual rates at which properties have been let over the period and comparison of such properties with the property which is the subject matter of the lis. Rents may vary based on location of properties, nature of construction, period of construction, purpose/user for which the premises are let, variation between demand for tenanted premises and availability of premises and even factors relating to the position of the economy. Therefore, while a learned trial Judge may be justified in taking judicial notice of the fact that rents have risen over a certain period of time in the area in question, it would be incumbent upon a person laying a claim of entitlement to mesne profits to prove the same by cogent and reliable evidence in accordance with law.

(emphasis supplied)

85. The learned Trial Judge has granted mesne profits @Rs. 70/- per month with effect from 1.6.1989 till possession is handed over. The reasoning of the learned Trial Judge is as per para 46 of the impugned judgment, contents whereof have been noted in para 20 above.

86. The reasoning is weak. But, we note that the learned Trial Judge has ignored evidence on record being Ex.PW-1/19, Ex.PW-1/20, Ex.PW-1/21 and Ex.PW-1/22. The same are decrees and compromise applications in Suit No. 298/1990 and Suit No. 2553/1989 decided, on a compromise, between the

landlords and the tenants of the said suits; evidencing that pertaining to flats in a similar multi-storeyed commercial building on 18, Barakhamba Road, New Delhi and 15, Barakhamba Road, New Delhi agreed rents were Rs. 20/- per sq.ft. per month as on 1.4.1990; increased to Rs. 24/- per sq.ft. per month as of 1.4.1993 and Rs. 28.80 per sq.ft. with effect from 1.4.1996 in respect of property No. 18, Barakhamba Road, New Delhi and Rs. 100/- per sq.ft. per month w.e.f. 15.11.1993 for property No. 15, Barakhamba Road, New Delhi. It has to be noted that pertaining to the property at 18, Barakhamba Road an existing tenancy was extended.

87. The aforesaid evidence is good evidence to show that the rate of rent has increased in the area.

88. The impugned decree is dated 24.2.1999.

89. The contention that in the suit mesne profits were asked for @Rs. 25/- per sq.ft. per month and hence nothing more could be awarded has to be noted and rejected for the reason, in the plaint, the respondents had prayed to the court that an inquiry be held as contemplated by Order 20 Rule 12 of the CPC 1908 and damages be awarded to them at said rate. The respondents undertook to pay the requisite court fee on the amount determined, which they have so done after a decree was passed in their favour.

90. The period for which mesne profits has to be determined is 1.6.1989 till the date of decree. A mean average would be a good basis to determine mesne profits for the said period of nearly ten years rather than to determine the same every three years. Inherent in the determination of market rent of a given premises with reference to other premises in the vicinity is an element of some guess work. It is difficult to achieve exactness in this exercise. But taking a help from Ex.PW-1/19 to Ex.PW-1/22, we are of the opinion that the mean average rent of Rs. 50/- per sq.ft. per month would be a figure which would approximate to reality. Since the appeal is being disposed of in the year 2008 and the appellant has continued to occupy the subject premises under interim orders passed by this Court on the reasoning of the decision reported as Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., the appellant is liable to pay damages at a higher rate which we fix @Rs. 80/- per sq.ft. per month for the period 24.2.1999 till possession is handed over.

91. The appeal stands disposed of affirming the decree of ejectment but modifying the mesne profits awarded by decreeing as per para 90 above.

92. The respondents shall be entitled to costs against the appellants.