
(2008) 07 CAL CK 0004
In the Calcutta High Court
Case No : C.S. No. 392 of 1984

Tara Properties Private Limited

APPELLANT

Vs

Shalimar Paints Limited

RESPONDENT

Date of Decision : 15-07-2008

Acts Referred:

Income Tax Act, 1961 — Section 226(3)
Transfer of Property Act, 1882 — Section 106, 116
West Bengal Premises Tenancy Act, 1956 — Section 13(6)

Citation : (2008) 4 CALLT 296

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : P.C. Sen, Soumya Ghosh, Subir Ranjan Ghosh and Priyankar Saha, for the Appellant; Ashis Chakraborty, Rohitendra Chandra Deb and Soma Biswas, for the Respondent

Judgement

Jayanta Kumar Biswas, J.—In this suit instituted on May 31st, 1984 the plaintiff is seeking decrees for recovery of possession of the suit property, for damages by way of past mesne profits amounting to Rs. 2,74,954.69 upto May 10th, 1984, and for damages or future mesne profits at the rate of Rs. 3,872.60 per day with interest till delivery of vacant possession of the suit property, or alternatively for a decree for the sum determined upon enquiry into mesne profits or damages with interest.

2. By Ex E, a registered instrument dated March 4th, 1963, the ground floor office accommodation having a carpet area measuring 5806 sq. ft. at 13 Camac Street, Kolkata was leased out by the plaintiff to the defendant for non-residential purpose for a period of 21 years with effect from March 1st, 1963 at a monthly rent of Rs. 7,257.50. The lease was to expire on February 29th, 1984. By Ex A, lawyer's letter dated December 14th, 1983, the plaintiff, while reminding the defendant that by efflux of time limited by the lease, the lease would determine on February 29th, 1984, called upon it to inform the date and time when it would deliver possession of the suit property. By efflux of time the

lease determined on February 29th, 1984, but the defendant did not put the plaintiff into possession of the property. Under the circumstances, the plaintiff instituted the suit.

3. The defendant entered appearance and filed written statement on November 29th, 1984 taking the defence (in para.5):

...the defendant further states that by mutual agreement and/or arrangement of the parties the defendant is "holding over" the demised premises in question and has become a monthly tenant of the plaintiff under the same terms and conditions as contained in the said Lease dated March 4, 1963.

4. By order dated November 5th, 1986 the defendant's application for amendment of its written statement was allowed, and consequently para 10A was inserted in the original written statement. In para 10A the defendant stated that in reality and effect the lease dated March 4th, 1963 was for a period of two years, and hence on expiration of that term it became a monthly tenant entitled to get the protections of the provisions of the West Bengal Premises Tenancy Act, 1956. It was contended that since notice u/s 13(6) of the West Bengal Premises Tenancy Act, 1956 had not been given, the suit was not maintainable. The plaintiff filed an additional written statement on November 27th, 1986 denying and disputing the correctness of the case made out in para 10A.

5. By order dated August 4th, 2006 the following issues were framed and recorded:

- a) Is the suit maintainable?
- b) Has this Court jurisdiction to entertain the suit?
- c) Is the tenancy of the defendant governed by the provisions of the West Bengal Premises Tenancy Act?
- d) Is the plaintiff entitled to get a decree as prayed for?
- e) To what relief, if any is the plaintiff entitled?

6. In support of its case the plaintiff examined P.W. 1, Bhagirath Agarwall, a director of the plaintiff, an existing company within the meaning of the Companies Act, 1956; and P.W.2, Sundarlal Mitra, a chartered valuation surveyor engaged by the plaintiff for assessing the fair letting out value of the suit property. On the other hand, the defendant examined D.W. 1, Nabarun Basu, a project officer of the defendant, also an existing company within the meaning of the Companies Act, 1956. Through the witnesses the parties have exhibited the documents on which they intended to rely. The suit appeared for arguments and has been argued before me.

7. Although the defendant alleged in the written statement that the lease did not expire by efflux of time limited thereby, at the first hearing of the suit, when the issues were framed and recorded, it did not take any defence on the basis of the

allegation; it rather took the defence that the tenancy in question was regulated by the provisions of the West Bengal Premises Tenancy Act, 1956. Again, in the written statement it alleged that since for its holding over the tenancy on the basis of mutual agreement or arrangement or both between the parties the lease stood renewed from month to month, it did not take a specific defence to that effect at the time of first hearing of the suit on the basis of such allegation as well; and these are apparent from the issues framed and recorded.

8. Mr. Chakraborty, counsel for the defendant, has argued that this is a clear case of holding over within the meaning of Section 116 of the Transfer of Property Act, 1882. Section 116 reads as follows:

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.

9. He has not made any argument on maintainability of the suit and jurisdiction of this Court to entertain and try it. Neither he has argued that on expiration of the initial period of two years the tenancy came to be regulated by the provisions of the West Bengal premises Tenancy Act, 1956 entitling the defendant to the protections against eviction provided by the provisions thereof, nor has the defendant given any evidence in proof of its such case stated in para 10A of the written statement, and presumably, on the basis whereof issue (c) was framed and recorded. Hence there is no reason to say that the suit is not maintainable, or that this Court has no jurisdiction to entertain and try it, or that in view of facts stated in para 10A of the written, not proved, the tenancy is regulated by the provisions of the West Bengal Premises Tenancy Act, 1956.

10. Accordingly, issues (a) and (b) must be answered in the affirmative, and issue (c), as to the case stated in para 10A of the written statement, must be answered in the negative.

11. The defendant has not given any evidence in proof of the facts stated in the written statement- "that by mutual agreement and/or arrangement of the parties the defendant is "holding over" the demised premises in question and has become a monthly tenant of the plaintiff under the same terms and conditions as contained in the said lease dated March 4, 1963." It rather tried to extract, by putting questions and suggestions to P.W. 1, facts in proof of a case that the effect of holding over flowing from a different bundle of facts connected with Ex 1, a notice dated August 2nd, 1985 issued to its principal officer by the Income Tax Officer, E-Ward, C-N, Cal. u/s 226(3) of the Income Tax Act, 1961, about which nothing was stated in the written statement, brought about a month to month renewal of the lease within the meaning of Section 116.

12. The Income Tax officer issued the notice, Ex 1, stating that a sum of Rs. 3,50,321 was due from the plaintiff on account of Income Tax, penalty and interest. There is no dispute that a copy of the notice was sent to the plaintiff. By the notice the defendant was called upon by the Income Tax officer to pay to him any amount due from it to or, held by it, for or on account of the plaintiff upto the amount of arrears shown therein, and also to pay any money which might subsequently become due from it to the plaintiff.

13. The cases the defendant sought to establish by extracting facts through cross-examination of P.W. 1 are that in obedience to the notice it paid to the Income Tax officer every month, from September, 1985, an amount equivalent to the rent that was payable for the property to the plaintiff in terms of the lease dated March 4th, 1963; and that though the plaintiff had full knowledge of the notice and the payments, it never raised any objection in any manner. The fact of payment has been established; and there is nothing to show that the plaintiff ever raised any objection either to the steps taken by the Income Tax officer, or to the steps taken by the defendant to make payment in response thereto.

14. On these facts, Mr. Chakraborty has argued that since the two essential situations required for renewal of the lease u/s 116 of the Transfer of Property Act, 1882, viz. (i) the defendant's remaining in possession of the suit property after determination of the lease, and (ii) acceptance of rent by the plaintiff, ultimately came into existence during pendency of the suit, the lease stood renewed from month to month by operation of law and the provisions of the West Bengal Premises Tenancy Act, 1956, totally non-suiting the plaintiff, became applicable to the tenancy.

15. Mr. Sen, counsel for the plaintiff, has argued that the defendant's case of renewal of the lease effected by holding over as sought to be established only through the process of cross-examination of P.W. 1 must be rejected for the simple reason that facts the existence whereof was sought to be proved in support of the case had not been, and rather could not be, stated in the written statement filed on November 29th, 1984. He has pointed out that while the defendant abandoned the case of mutual agreement or arrangement between the parties, as alleged in the written statement, it never set up any case of holding over on the basis of any fact connected with the Section 226(3) notice dated August 2nd, 1985, although it obtained the order dated November 5th, 1986 to amend its written statement for taking a new defence.

16. On the strength of the Privy Council decision in AIR 1930 57 (Privy Council) he has argued that unless a case is based on facts which must appear from the pleading and give rise to an issue of fact no amount of evidence can be a warrant for entertaining and examining it. To this, Mr. Chakraborty has said that the right flowing from the effect of holding over was asserted in the written statement, and hence it cannot be said that the defendant is not entitled to rely on evidence proving the facts and circumstances connected with the Section 226(3) notice dated August 2nd, 1985, though those were not in existence at the date the

written statement was filed, especially when all documents connected with the notice were duly disclosed, and exhibited while cross-examining P.W. 1.

17. In my opinion, Mr. Sen is right in his submission. The defendant's case of holding over, according to its pleading, is based on the fact of certain mutual agreement or arrangement between the parties, presumably in existence at the date the pleading was filed. No claim was made that the plaintiff had accepted rent by implication. No fact relating to the notice was incorporated in the pleading by amendment. Hence nothing connected with the notice could be a fact in issue or a relevant fact entitling the defendant to give evidence in proof of it. It was not entitled to give evidence of a fact which was not stated in its pleading.

18. Two situations - the defendant's remaining in possession and the plaintiffs acceptance of rent - cumulatively could constitute the fact of holding over and the effect of holding over was to be the renewal of the lease. When it was stated in the written statement how these two situations had come into existence, the defendant could prove the fact of holding over by proving the manner how those situations had happened and come into existence. The fact of remaining in possession was admitted by the plaintiff that prayed for a decree for recovery of possession. So there was no need to prove the existence of the fact of remaining in possession.

19. No step was taken to prove the existence of the fact of acceptance of rent. So the case of holding over based on mutual agreement or arrangement between the parties remained not proved. The case of acceptance of rent by implication during pendency of the suit based on the fact of payments made to the Income Tax officer in response to the notice dated August 2nd, 1985, not stated in the written statement, was not one the defendant could prove in proof of the fact of holding over. Hence the defendant was not entitled to put or suggest such case to the plaintiffs witness.

20. In my view, the defendant having taken no step to prove the facts on which the plea of holding over was based in the written statement, and the facts of determination of the lease by efflux of the time limited by it, and the defendant's failure to put the plaintiff into possession of the property having been proved, the plaintiff is entitled to get decrees for recovery of possession of the suit property, and past and future mesne profits.

21. Assuming I am wrong in my foregoing view, and further assuming that the defendant is entitled to support its plea of holding over by referring to the facts and circumstances connected with the Section 226(3) notice, I propose now to examine whether the payments made by it in response to the notice dated August 2nd, 1985, Ex 1, amounted to acceptance of rent by the plaintiff within the meaning of Section 116 of the Transfer of Property Act, 1882.

22. For examining whether the lease stood renewed from month to month in view of the provisions of Section 116, examination of fulfilment only of this condition is necessary, because there is no dispute regarding fulfilment of the

other condition, that is, the defendant's remaining in possession of the property after determination of the lease. By efflux of time the lease determined on February 29th, 1984, and the defendant remained in uninterrupted possession of the suit property, and it is still in possession thereof. Hence one of the ingredients mentioned in Section 116 stands satisfied, and now if it is found that the plaintiff accepted rent, then it will be a case of renewal of the lease from month to month within the meaning of Section 116, and in such case the suit will fail.

23. There is no evidence to show that after February 29th, 1984 rent was ever tendered by the defendant to the plaintiff. Hence the question of the plaintiff's refusing to accept rent did not arise at any point of time. Though the defendant has not adduced any evidence that it tendered rent to the plaintiff after February 29th, 1984, Mr. Chakraborty has argued that from the applications and affidavits filed in this suit from time to time it will appear that the defendant made out a case that rent tendered by it having been refused by the plaintiff, the defendant started depositing the rent with the rent controller, and that it continued to do so till the Section 226(3) notice dated August 2nd, 1985 was issued by the Income Tax officer.

24. I do not think there is any reason for me to go by anything which was stated by the defendant in any application or affidavit filed in the suit, since at its hearing no evidence on the question has been adduced.

25. On the strength of AIR 1949 124 (Federal Court) Mr. Chakraborty has argued that even if rent had not been tendered by the defendant till before it started paying in response to the Section 226(3) notice dated August 2nd, 1985, the situation will make no difference, if it can be shown that payment made by it in response to the Section 226(3) notice amounted to acceptance of rent by the plaintiff within the meaning of Section 116. Correctness of the proposition that if it can be shown that even after refusing to accept rent for any period of time subsequently the plaintiff accepted rent, then such acceptance will amount to renewal of the lease from month to month within the meaning of Section 116, has not been disputed by Mr. Sen.

26. In AIR 1949 124 (Federal Court) , initially the lessor declined to accept rent tendered by the lessee remaining in possession after determination of the lease, but subsequently accepted the tendered rent, and such acceptance was held to be sufficient for fulfilment of the condition of acceptance of rent mentioned in Section 116 for renewal of the lease concerned. Applying this principle it is to be seen whether payments made by the defendant to the Income Tax officer in response to the Section 226(3) notice amounted to acceptance of rent by the plaintiff.

27. Both the sides have relied on AIR 1949 124 (Federal Court) for showing the purport of the concept of holding over explained in (para 13 of) the majority judgment saying:

It is perfectly right that the tenancy which is created by the "holding over" of a lessee or under-lessee is new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and it cannot be disputed that to bring new tenancy into existence, there must be a bilateral act. What Section 116, T.P. Act, contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by the lessee's or sub-lessee's continuing in occupation of the property after his interest has ceased and on the other side there must be a definite assent to this continuance of possession by the landlord expressed by acceptance of rent or otherwise. It can scarcely be disputed that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it.

28. Mr. Chakraborty has relied upon *Ganga Dutt Murarka Vs. Kartik Chandra Das and Others*, , and *Bhuneshwar Prasad and Another Vs. United Commercial Bank and Others*, in support of his contention that for ascertaining whether rent has been accepted by the lessor within the meaning of Section 116 what is necessary is the conduct and intention of the parties, and not any express contract. According to him, payments made by the defendant in response to the Section 226(3) notice amounted to acceptance of rent by implication by the plaintiff that never chose to raise any objection whatsoever, though it had full knowledge of the payments.

29. On the basis of *Badrilal Vs. Municipal Corporation of Indore*, , and *Sudarshan Trading Company Limited v. L.D"*Sauza AIR 1984 Kar 214 F V.Z(DB) Mr. Sen has argued that in the absence of an offer to have a renewal or fresh lease by the lessee evidenced by remaining in possession, and acceptance of such offer by the lessor expressed by acceptance of the rent, both together constituting a bilateral act, there is no scope for imposing the fact of acceptance of rent on the lessor through the process of any supervening act, such as payment of amount equivalent to the monthly rent by the lessee remaining in possession of the property after determination of the lease to the Income Tax officer in response to a notice issued to the lessee u/s 226(3) of the Income Tax Act, 1961.

30. Mr. Sen has referred me to *Income Tax Officer, Madras Vs. Budha Pictures, Madras*, ; *Dhunseri Tea and Industries Ltd. Vs. The Hanuman Estates Private Ltd.*, ; and *Vysya Bank Ltd. and Global Trust Bank Ltd. Vs. Joint Commissioner of Income Tax and Another*, in support of his contention that payment in response to a Section 226(3) notice that can be issued only when there is a subsisting relationship between the noticee and the defaulting assessee, though may be valid in so far as the discharge of an obligation such as payment of rent by a tenant to his landlord is concerned, by no stretch of imagination can create a tenancy, and hence a landlord-tenant relationship between the noticee and the defaulting assessee.

31. The authorities support his contentions that payment of rent has to be only in terms of the provisions of the statute governing and regulating the tenancy,

and that a notice issued by the Income Tax officer u/s 226(3) can fasten liability on a tenant only, if between him, qua debtor, and the landlord, qua creditor, a relationship of landlord-tenant exists.

32. The question therefore is whether the plaintiff's total silence on the Section 226(3) notice, Ex 1, amounted to acceptance of rent by it within the meaning of Section 116 of the Transfer of Property Act, 1882. In his examination-in-chief and cross-examination P.W. 1 has consistently said that after determination of the lease the plaintiff never accepted rent from the defendant, and that payments made by the defendant to the Income Tax officer were not binding on the plaintiff.

33. Mr. Chakraborty has taken me extensively through the evidence of P.W.1. He has said that incongruous statements made by P.W. 1 regarding withdrawal of the Section 226(3) notice, and silence maintained by the plaintiff throughout must be considered sufficient evidence to hold that payment made by the defendant amounted to acceptance of rent by the plaintiff by implication. He has referred me to the evidence of P.W. 1 wherefrom it will appear that on more than one occasion during the period from 1963 to 1984 the defendant had made similar payments to the Income Tax authority in response to similar Section 226(3) notices, and that the plaintiff never said that such payments did not amount to valid discharge of liabilities of the defendant to pay rent for the months concerned.

34. The plaintiff, as is evident from the letter of its lawyer dated December 14th, 1983, Ex A, did not intend to renew the lease. By efflux of time the lease determined on February 29th, 1984, and the plaintiff instituted the suit almost immediately thereafter on May 31st, 1984. After February 29th, 1984 the defendant never offered rent to the plaintiff. The plaintiff did not demand rent as well. Hence there was no scope for it to consider the question whether it would accept rent from the defendant. For fulfilment of the condition of Section 116 the defendant was required to offer rent to the plaintiff, and the plaintiff was required to accept it as such. Hence the payments made by the defendant in response to the Section 226(3) notice are absolutely irrelevant. For renewal of the lease the parties were required to act ad idem.

35. True it is that there can be a case of acceptance of rent by implication; but the inference is to be drawn from the bilateral activities of the lessor and the lessee in which a third party, such as the Income Tax officer, has no role to play. As has been rightly said by Mr. Sen, the Section 226(3) notice, Ex 1, could fasten a liability on the defendant only if a relationship, such as the one existing till before February 29th, 1984, was in existence on August 2nd, 1985 between the parties.

36. At this date no relationship of lessor-lessee was in existence; rather the defendant, as described by the English law, was a mere tenant at sufferance, it having remained in possession of the suit property even after determination of

the lease. Hence by issuing the notice, Ex 1, the Income Tax officer could not create a lessor-lessee relationship between the plaintiff and the defendant.

37. Therefore, it is apparent that the payments made in response to the Section 226(3) notice dated August 2nd, 1985, Ex 1, were made by the defendant at its own peril. In law the plaintiff was not required to react to the notice, a garnishee order, in any manner whatsoever. The suit had been instituted long before the notice was issued, and at the date the defendant decided to make payment in response to the notice the suit was pending, and the defendant was contesting the suit. In my judgment, there is no reason to say that the payments made by the defendant to the Income Tax officer amounted to acceptance of rent by implication by the plaintiff from the defendant.

38. I therefore hold that the lease never stood renewed by operation of the provisions of Section 116 of the Transfer of Property Act, 1882; that the defendant is not entitled to get any protection of any provision of the West Bengal Premises Tenancy Act, 1956; and that the plaintiff is entitled to get decrees for recovery of possession of the suit property and mesne profits, both past and future. Issues (c) and (d) are, accordingly, answered in the negative and affirmative respectively.

39. The last question is at what rate the plaintiff is entitled to get damages by way of mesne profits. In support of its case the plaintiff has examined P.W.2, a chartered valuation surveyor, who was engaged by it to determine the fair letting out value of the suit property. On the other hand, the defendant has examined D.W. 1, a person working as its project officer from the year 2006. Exhibit G is the report dated November 21st, 2006 submitted by P.W.2, who has been extensively cross-examined.

40. By taking me through the evidence of P.W.2 and D.W. 1. and Ex G, the report prepared and submitted by P.W.2, and Ext 5 and 6, the photographs taken and produced by D.W.1, Mr. Chakraborty has made the following arguments. P.W.2, not subpoenaed by the Court, cannot be treated as an independent expert witness. From question Nos. 68 and 69 of his deposition it is apparent that when he visited the suit property in 1984, he gave false evidence that he visited it only in 2006. Hence his evidence should not be relied on at all. Although in his report he recorded that he inspected the entire building, while giving evidence he tried to wriggle out that. He actually inspected only the ground and first floors of the building, and that too in a casual manner. From question Nos. 8, 9, 10, 11 and 17 it will appear that he prepared the report on the basis of certain documents which have not been produced. There is no evidence to show that the property at 230A, A.J.C. Bose Road and the suit property are comparable. The agreement related to State Bank of India, the one relied on by P.W.2, has not been produced.

41. Mr. Chakraborty's further arguments are these. P.W.2 proceeded on the basis that the building was fairly maintained. From the evidence of P.W. 1. P.W.2 and D.W. 1 it is evident that the condition of the building is very bad. The building in

a state of total non-repair could not earn the same rent as the other well-maintained adjacent properties could. The plaintiff intentionally did not disclose the rent income from the tenants in the other parts of the building and the adjacent building, though it is the owner of both the properties. The plaintiff has failed to discharge the burden of proving that with ordinary diligence the defendant might have received profits from the suit property at the rates mentioned by P.W.2 in Ex G.

42. This being the position it is entitled to get mesne profits only at the agreed rate. Court cannot fix any higher rate in the absence of evidence in support thereof, and on the facts no order can be made under Order 20, Rule 12 of the Code directing enquiry as to the quantum of mesne profits. Liability for mesne profits is to be determined on the basis of the present condition of the property, not on the basis of what profit one can earn from the property after the tenant leaves. As was held in Kally Nath Dutta Vs. Shew Bux Mohata and Another, it is the plaintiff's burden to prove what profit the defendant by ordinary diligence might have received from the property during the period in question.

43. On the other hand, Mr. Sen has argued as follows. It is immaterial that P.W.2 has given evidence at the instance of the plaintiff, and not in obedience to a subpoena issued by this Court. He has duly proved his report, Ex G, and the contents thereof. Once the plaintiff discharged its onus by examining an expert witness, the onus shifted on the defendant that chose not to give any evidence to disprove the facts stated by P.W.2 in his evidence. The evidence of P.W.2 has remained unchallenged. P.W.2. was not cross-examined on what he recorded in the penultimate para, on page 2 of Ex G. From question Nos. 57, 58, 59 and 60 of deposition of P.W.2 it will appear that while remaining in wrongful possession the defendant was maintaining the suit property.

44. The defendant's case based on diminishing value of the suit property for want of maintenance of the building has no relevance. The defendant has paid only a lip service to the mesne profits issue. D.W.1 has adduced no evidence to discharge the shifted onus. As was held in Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd., on determination of lease the erstwhile lessee becomes liable to pay damages by way of mesne profits. In any case, if the report of the expert is not accepted, the Court can definitely pass a preliminary decree directing inquiry in terms of the provisions of Order 20, Rule 12 of the Code as to mesne profits.

45. I am unable to accept the contention that since P.W.2 has not given evidence in obedience to any subpoena issued by this Court his evidence should not be relied on. There is no prohibition against examining a witness not subpoenaed by the Court. A party to a suit can bring his own witness or can ask the Court to subpoena a witness, or the Court; if it thinks necessary, can subpoena anyone to give evidence as a witness.

46. Evidence of a witness deposing at the instance of a party, and the evidence

of a subpoenaed witness are equally acceptable and reliable. A witness brought by a party does not of course become unworthy of credit. The question whether the Court will accept and rely on the evidence of the witness is not dependent upon whether he has given evidence at the instance of a party to the suit or in obedience to a subpoena issued by the Court. It is rather dependent on the substance of the evidence given by the witness.

47. I do not find any reason to say that P.W.2 has given any false evidence. Question Nos. 68 and 69 are as follows:

68. Do you find that the outside wall of the building bears various cracks? I find some cracks on the walls on the entrance of Shalimar Paints but as far back as in 1984 whether these cracks existed that I cannot say.

69. Would you like to stick to your answer to my earlier question?/Yes.

48. On the basis of this evidence Mr. Chakraborty has said that P.W.2 has given false evidence. He has said so in view of what the witness said in reply to question No. 40, which is:

40. When did you visit the premises No. 13 Camac Street?/ For the purpose of this assessment I visited the portion concerned - so far as I remember on 2 November 2006 but the exact date is mentioned in my report?

49. I have no hesitation in saying that on the basis what the witness said in reply to question Nos. 68 and 69 it cannot be concluded that though he had actually visited the suit property in 1984, he falsely deposed that he visited the suit property for the first time only in 2006. From the evidence there is no reason to say that he visited the suit property in 1984. The witness never said this. What he said is that it was not possible for him to say whether the cracks in question were in existence in 1984.

50. P.W.2 has proved his report dated November 21st, 2006, Ex G., and the contents thereof. He is a chartered valuation surveyor associated with Talbot & Co., valuers, land and estate agents, having its office at Tower House, 2A, Chowringhee Square, Kolkata-700 069. He is associated with Tablot & Co. for 48 years. This company is a reputed valuation company which is also the case of the defendant (q. No. 35 put to Pw.2). Hence there can be no doubt that he is an expert valuer.

51. It is evident that for determining the fair rent of the suit property for six different periods falling between March 1st, 1984 and November, 2006 he made necessary local investigations, and especially considered the rate at which portion of the ground floor and the entire first floor of a building at premises No. 230A, A.J.C. Bose Road were leased out to State Bank of India in 1982. It is a property close to the suit property. He has said that he was aware of the details of the lease.

52. In his report he gave a detailed narration of the nature and character of the

building in which the suit property is situate, and then said:

On inspection, we find that the building is maintained in fair state of repairs.

The premises is situated in a 1st class commercial locality in "South of Park Street area" and is surrounded by buildings occupied by Multinational Companies, Public Sector Units, Institutions and Major Banks.

The premise is easily approachable by all modes of transportation including Metro Rail. No vacant space is available in the area.

There has been and is upward trend in the Real Estate Market throughout the period under consideration. During this entire period there has been a good demand of show room space in Park Street, Camac Street and A.J.C. Bose Road. Practically no vacant space is available in these areas.

53. It is the last para of the portion of the report quoted above that Mr. Sen has pointed out with the comments that there was no cross-examination on it. He is right. The cross-examination was virtually with respect to the condition of the building as was found by P.W.2 at the time of his inspection thereof.

54. After adding and deducting at various percentages, and keeping in view the advantages and disadvantages of the suit property while determining the fair rent comparing it with the rate at which portions of a nearby building were leased out to State Bank of India, P.W.2 fixed the rent of the suit property at Rs. 19 per sft. per month on March 1st, 1984. Considering the increase in land value and rent from 1984 to 1989 he fixed the rent of the suit property at Rs. 28.50 per sft. per month on March 1st, 1989. He stated that on July 4th, 1991 Canara Bank rented a property at premises No. 7, Kyd Street at the rate of Rs. 26 per sft. per month of super built-up area. Considering advantages and disadvantages, time factor, etc. he fixed rent of the suit property at Rs. 43 per sft. per month on March 1st, 1994.

55. Stating that in 1997 IDBI Bank leased for 21 years office block Nos. G1 and G2 on the ground floor of the new building at premises No. 101, Park Street, measuring 5078 sft. super built-up area, at the rate of Rs. 60 per sft. per month of super built-up area, and also referring to leasing of a property by Vaisya Bank on July 16th, 1995 on the first floor of premises No. 4/1, Middleton Street at the rate of Rs. 50.80 per sft. per month of super built-up area, and applying the same principles as were applied for the previous periods, he fixed rent of the suit property at Rs. 75 per sft. per month on March 1st, 1999.

56. Stating that in 2002 Star Television rented the seventh floor of the building at premises No. 46D, Chowringhee Road at the rate of Rs. 55 per sft. of super built-up area, and after considering the lease dated January 12th, 2004 regarding the ground floor of the building at premises No. 36, A, B, C & D. Chowringhee Road that was let out at the rate of Rs. 114.50 per sft. and municipal takes extra, and applying the same principles, he fixed fair rent of the suit property at Rs. 110 per sft. per month on March 1st, 2004. He fixed rent of

the suit property at Rs. 150 per sft. per month for November, 2006 after considering the fact that in latter part of 2004 Tata Tele Services Ltd. rented the ground floor portion of the building at premises No. 35, Park Street, having an area of 1907 sft, at the rate of Rs. 200 per sft. per month, and in this case also he considered the relevant factors for addition and deduction.

57. It is true that he has not produced the relevant agreements on the basis whereof the several properties referred to in his report were let out to the respective tenants. But the question is whether for this reason alone his report and evidence should be rejected. On the facts stated in the report there was virtually no noticeable cross-examination. I do not find any valid reason why I should not rely on the report and its contents, especially when the defendant has not adduced any evidence to disprove the facts stated by P.W.2 in his report. Dw. 1 has given evidence only regarding the condition of the suit property. It was being maintained by the defendant, and after determination of the lease by efflux of time on February 29th, 1984 the plaintiff was not under any obligation to repair or maintain it.

58. In my considered opinion, what is relevant for determining the quantum of mesne profits is what profits the defendant, being the person in wrongful possession of the property, might with ordinary diligence have received there from. I think with ordinary diligence the defendant might have received the profits from the suit property at the rates mentioned by Pw.2 in his report, and hence it is liable to pay mesne profits at those rates with interest.

59. For these reasons, I allow the suit and order that there shall be decrees for recovery of possession of the suit property as described in the plaint and the schedule thereto, and also for mesne profits from March 1st, 1984 until the delivery of possession at the respective rates mentioned in Ex G, the report of the valuation surveyor, Pw.2. The plaintiff shall be entitled to interest on the mesne profits at the rate of 6% per annum.

60. If vacant and peaceful possession of the suit property is not delivered and mesne profits payable upon the decree are not paid within six months, the plaintiff will be entitled to put the decrees into execution. The plaintiff shall be entitled to all costs to be assessed according to the rules.

61. The department concerned of this Court is directed to draw up, prepare and complete the decrees within a fortnight from the date the records of the suit are sent down from the Court.

62. Urgent certified xerox copy of this judgment, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned.