

(2002) 06 CAL CK 0024
In the Calcutta High Court
Case No : Civil Suit No. 53 of 1996

The Model Manufacturing Company Ltd.	APPELLANT
Vs	
Union of India (UOI)	RESPONDENT

Date of Decision : 18-06-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 7 Rule 11, 80
Constitution of India, 1950 — Article 229, 299, 52, 77
Income Tax Act, 1961 — Section 117
Limitation Act, 1963 — Article 67
Specific Relief Act, 1963 — Section 34
West Bengal Premises Tenancy Act, 1956 — Section 13, 17(1), 17(2), 17(2A)

Citation : (2002) 3 CALLT 579

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Ranjan Deb, A. Chakroborty and S. Dube, for the Appellant; P.K. Mallick, D.K. Shome and R.K. Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This is a suit for ejectment with incidental prayers for money-decree on account of unpaid rent and mesne profits/damages etc. The suit was instituted on 4th March, 1996. In the course of hearing of the suit, an application for amendment of the plaint was made in 1998 when the application was allowed by this Court on contest by incorporating the amended portion in the red ink alongwith a prayer for decree for Rs. 51,52,083.61 paise on account of difference in rent actually paid and as has been acknowledged to pay.

2. The plaintiffs case is that the company is the owner of the fifth and sixth floors of the premises No. 40, Strand Road, Calcutta measuring an area of 31,608 square feet little more or less as prescribed under the Schedule "A" of the plaint. By a registered Indenture of Lease dated 3rd June, 1967 in between the plaintiff by the pen of one of the Directors of the plaintiff company (hereinafter called as lessor/plaintiff) as per the resolution of the Board of Directors dated 24th May,

1967 and President of India by the pen of Public Relations Officer, Income Tax Department, West Bengal, (hereinafter called as lessee/defendant) the entire premises with fittings and fixtures were given to the lessee for a period of three years at a rental of 95 paise per square feet per month and service charges at the rate of 10 paise per square feet per month as mentioned in the plaint. After the efflux of time, the concerned Income Tax Department being the party contesting defendants herein used to occupy the said premises as monthly tenant. However, inspite of making promise to vacate the premises, the defendants did not vacate the premises. On 16th May, 1988 one Deputy Commissioner of Income Tax Headquarters (Administration), West Bengal, Calcutta from the office of the Chief Commissioner of Income Tax (Administration) informed the plaintiff that the Income Tax Department will vacate the space hired by it on the fifth and sixty floors at 40, Strand Road, Calcutta by the 30th June, 1988. The plaintiff acknowledged the same but by a further communication dated 21st June, 1988 another Deputy Commissioner of Income Tax Headquarters (Administration) West Bengal, Calcutta, on behalf of the office of the Chief Commissioner (Administration) withdrew the letter dated 16th May 1988 saying that they shall be continuing to be in occupation of the premises until further order. Inconvenience caused was regretted.

3. It is significant to note herein that the first Deputy Commissioner of Income Tax, was one Mr. P.K. Mishra, wherein the second Deputy Commissioner of Income Tax was another Mr. J. Chakroborty. The first person, issued the notice to vacate the premises, was produced by the department as their witness before the Court. But did not produce the second person, who issued the withdrawal letter, as their witness.

4. However, the plaintiff issued a notice u/s 80 of the CPC on 19th December, 1995. But before that on 1st December, 1995, the defendants revised the rent of the premises in question with effect from 18th October, 1986 on the basis of the approval of the Central Board of Direct Taxes, New Delhi. Such letter was written by the Income Tax Officer, Headquarters (Buildings), West Bengal & Calcutta, for Chief Commissioner of Income Tax.

5. The defendants filed their respective written statement. According to them, after expiry of the lease the defendant No. 1 became a statutory tenant. The validity or legality of the letter dated 16th May, 1988 is denied and disputed by saying that the author of the letter lacked authority or competence to waive the statutory protection enjoyed by the tenant i.e. President of India. Hence, such letter is not binding on the defendants. Notice to quit by the plaintiff is also not binding upon the defendants. The purported agreement to quit and/or the notice to quit militates with the provision of Article 299 of the Constitution of India. The plaintiff duly accepted the withdrawal of the letter dated 16th May, 1988. The plaintiff has given a go-bye to the notice to quit by a subsequent letter dated 21st March, 1989 whereby he wanted enhancement of rent. There is no factual or legal basis of claiming of mesne profits and/or damages from 1st July, 1988.

The claim for further mesne profit is ex facie barred by limitation. The legality, validity and sufficiency of the notice u/s 80 of the CPC is under challenge. The cause of action in respect of acknowledgment to receive occupation charge at market rate on the basis of the letters between 6th January, 1989 and 1st December, 1995 is barred by law of limitation. The relationship between plaintiff and defendant No. 1 is governed by West Bengal Premises Tenancy Act, 1956.

6. In the additional written statement so filed by the defendants as against the amendment of plaint, they have taken a plea that the claim of the plaintiff introduced by way of amendment of the plaint on account of claim for the period in between 18th October, 1986 to 30th June, 1988 is hopelessly barred by law of limitation. The plaintiff is estopped from raising any claim on the basis of the purported letter dated 1st December, 1995 since the plaintiff never accepted the same nor acted in terms thereof.

7. It is to be remembered that original written statement was verified by one Sri Krishna Kumar Sharma, Deputy Commissioner of Income Tax (Headquarters Administration) and the additional written statement is verified by one Sri Binada Nand Jha, Deputy Commissioner, Income Tax (Headquarters Administration).

8. On the basis of the suggestions made by the parties following issues are framed hereunder:

1.(a) Is the notice, as pleaded in the paragraph 6 of the plaint a valid notice?

(b) Is the letter dated 16th May, 1988 invalid and not binding on the defendant No. 1 for the reasons alleged in paragraphs 5 & 7 of the written statement?

2. Was the notice dated 16th May, 1988 given a go-bye by the plaintiffs by inter alia their letter dated 21st March, 1989, as alleged in paragraph 6 of the written statement?

3. Is the plaintiff's claim for mesne profit maintainable in absence of a specific demand for mesne profit being made in the notice u/s 80 of the Code of Civil Procedure, 1908?

4. Is the plaintiff entitled to claim mesne profit or damages either in law or in facts against the defendants from July 1, 1988?

5. Is the claim on any account barred by law of limitation at all?

(a) Are the defendants liable to pay rent for the period from October 18, 1986 till July 1, 1988 on the basis stated in the letter dated December 1, 1995 addressed on behalf of the defendants to the plaintiff as pleaded in paragraph 15A of the plaint?

(b) Is the plaintiff estopped from raising claim on the basis of the letter dated 1st December, 1995, as alleged in paragraph 1(a) of the additional written statement?

6. Has the plaintiff any cause of action against defendant Nos. 2, 3 and 4?

7. Has the Court pecuniary jurisdiction to try and determine the suit?

8. To what relief or reliefs, if any, are the parties entitled?

9. The plaintiff produced one witness on their behalf when the defendants produced two witnesses on their behalf including said Sri P.K. Mishra. They were thoroughly examined and cross-examined. Documentary evidence was also produced and exhibited. Since the witnesses on behalf of the defendants examined last, following the prevailing practice of the Court I have called upon the learned counsels appearing on behalf of the defendants to make their respective arguments at first. Mr. P.K. Mallick, learned senior counsel, appearing on their behalf, contended before this Court that taking into totality of the issues they have formulated various points and they want to make arguments on the basis of such points which will ultimately cover the answers to the issues. Such points are as follows: (i) cause of action arose on 16th May, 1988 when the notice was served, therefore, the claim is barred by Law of Limitation; (ii) tenant is President of India, therefore, Article 299 applies with its full force and the Deputy Chief Commissioner is not the authorised representative; (iii) Mesne profits/ damages vis-a-vis fair rent is not independent of passing an eviction decree; (iv) The suit is hit by pecuniary jurisdiction of this Court which can not be saved by way of amendment; (v)(a) Prayers in the amended plaint is militating with the prayers originally made for eviction; (v)(b) withdrawal of rent justifies the claim as per the amended plaint; (vi) no pleading of enhancement of rent is made in the amended plaint; (vii) notice u/s 80 of the CPC is disputed.

10. The defendants answered the issue No. 1(a) and 1(b) corresponding to point No. (ii) at first. According to them, the eviction was claimed under the notice dated 16th May, 1988 on two grounds. One is Section 13(i)(j) and another is Section 13(i) (k) of the West Bengal Premises Tenancy Act by which if a tenant subsequent to creation of tenancy makes a promise to quit, vacate and deliver up the premises in question and fail to do so, the eviction will be enforceable. Admittedly the lease agreement was executed in between the plaintiff and the President of India which after the expiry of the lease hold period became monthly tenancy in between the self-same parties as per the aforesaid Act. Therefore, when contractual relationship exists between the parties governed under the Article 299 of the Constitution of India admittedly the notice as aforesaid cannot confirm the mandate of such Article.

11. Learned senior counsel, appearing in support of the defendants cited various decisions in support of their contentions. Firstly, he relied upon *Karamshi Jethabhai Somayya Vs. The State of Bombay*, in its head note and page 1721 as well as 1987 SCC 84 (*Union of India v. Hanuman Oil Mills Ltd. and Ors.*). From the aforesaid first judgment I find that the Court construed certain parts of Government of India Act as to the question of executing contract by or on behalf of the Governor of a Province. There, it has been held that two conditions are to be fulfilled for the purpose of validity of the contract, namely ((i) it should be expressed to be made by the Governor of the Province and (ii) it should be

executed on behalf of the Governor by such persons and in such manner as he might direct or authorise. Thereafter, the Supreme Court held on the following factual basis.

"We have nothing on the record to disclose whether the Superintending Engineer, though he acted under oral instructions of the Minister, was authorised by the Governor or under relevant rules to enter into such a contract."

So far as the aforesaid second judgment is concerned there also the Supreme Court held on the factual basis that there was no concluded contract with Union of India and the authority was not authorised for and on behalf of the President of India in terms of Article 299 of the Constitution. He cited two more decisions on this point being K.P. Chowdhary Vs. State of Madhya Pradesh and Others, its head notes and The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others, its paragraph 10. The ratio of the third judgment is that in view of Article 299(1) of the Constitution there can be no implied contract between the Government and any other person. If such implied contract between the Government and any other persons allowed that would, in effect, make Article 299(1) nugatory. If a contract between a Government and another person is not in compliance with Article 299(1), it would be no contract at all and could not be enforced either by the Government or any other person as a contract. In fourth cited judgment it was held that the provision of Article 299 of Constitution is mandatory in character. A contract made in the exercise of the executive power of the Union or of a State must satisfy three conditions viz. (i) it must be expressed to be made by the President or the Governor of the State as the case may be (ii) it must be executed on behalf of the President or the Governor as the case may be; (iii) its execution must be by such person and in such manner as the President or Governor may direct or authorise. Failure to comply with these conditions nullifies the contract and renders it void and unenforceable. There is no question of estoppel or ratification in a case where there is contravention of the provision of Article 299(1) of the Constitution.

12. Against these background the purported notice to quit, vacate and deliver of the possession by the defendants is void.

13. I have taken note of one factual background in this respect. The defendants wanted to handover vacant possession under the letter dated 16th May, 1988 by the pen of one P.K. Mishra, Deputy Commissioner of Income Tax (Headquarters Administration), West Bengal, Calcutta from the office of the Chief Commissioner of Income tax (Headquarters Administration) and said Mr. P.K. Misra was examined as witness in this Court on their behalf.

14. Learned senior counsel for the defendants contended that said Mr. P.K. Misra was not authorised by the President of India to write the letter. He disclosed various circulars whereunder the power of hiring or de-hiring of the premises on behalf of the Government have been indicated. The letter of Mr. Misra is contrary to the provisions of the circulars. Therefore, Court will decide what weight will be

given to the evidence of such Mr. P.K. Misra. The power of delegation has given under Article 77 of the Constitution of India.

15. I have gone through the certain questions answers of Mr. P.K. Misra who was the then Deputy Commissioner of Income tax issued such notice and examined as witness of the defendants. It appears from his depositions that the notice to quit the premises dated 16th May, 1998 was signed by himself and issued at the instance of the Chief Commissioner in usual course of business. He further stated that there was an order in the file. The draft notice was also there and he was asked to sign the notice and get it issued. On enquiry, this Court came to know from the learned counsel of the Income Tax Department that the file is not available in their custody. Therefore, it is a strong case of drawing presumption against the defendants. It is further surprising that although the Income Tax authorities are disputing with the issuance of the notice but they have produced Mr. P.K. Misra as their witness for the purpose of examination who supported incident of issuance of notice but Mr. J. Chakravarty, the other Deputy Commissioner who had supported to be withdrawn such notice has not been called for examination. Moreover unless and until there is an existence of notice there can not be existence of withdrawal or cancellation of the notice. Until and unless there was any question of dis-continuance of occupation there cannot be any existence of continuance of occupation of the premises. Until and unless there is any cause of physical inconvenience on the part of such governmental authority subsequently regret for such inconvenience can not exist. Therefore, the truth of the existence of the letter dated 16th May, 1988 is deep-rooted which cannot be ignored by the Court only on the basis of the elequence of argument of Mr. Mallick, learned senior counsel appearing for the defendant/s.

16. In this context I have gone through the respective Article of the Constitution of India. Article 299 is as follows:-

"299. Contracts:--(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by President, or by the Governor of the State, as the case may, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purpose of this Constitution, or for the purpose of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof."

17. The aforesaid Article has two parts. First part is exercise of power and second is liabilities of the President and Governor if it is taken together and carefully read it will be seen that a general power has been given to the executives of the Union and State under the Constitution to proceed with the name of the

President or Governor. But if such proceeding suffers from any misconception, the persons who executed will be responsible but not the President or Governor personally on whose behalf he or they had acted upon. It is apparent in the present case that the original lease agreement was made in between the plaintiff by the pen of one of the Directors and the President of India by the pen of Public Relation Officer of the concerned Income Tax Department of the State of West Bengal.

18. It appears to this Court that there is no dispute in respect of execution of such lease agreement on behalf of the President by the pen of such Public Relation Officer. According to the defendants they had become the tenant immediately after expiry of such lease agreement. If it is so, then the contractual obligation comes to an end and the West Bengal Tenancy Act stepped into the shoes of such contract. A claim of statutory tenancy or so arises when a tenant under a lease or a contractual tenancy, remains in possession without the landlord's assent after the termination of the contractual tenancy. Therefore, such tenancy after the lease period of three years cannot be based on contract as argued by the defendants or at all. If the contract continued after the contractual period by the agreement of the parties then the question may arise that maker of such contract on behalf of the defendants is capable of executing the same on behalf of the President of India or Governor of the Province as provided under Article 299 of the Constitution of India or not. But when the defendants' own contention is that they are statutory tenant under the provision of the local statute there is no question of applicability of Article 299 of the Constitution of India. When the executive at their own risk continued in possession, they will be bound by the statutory provisions made for the same. However, by these analysis I have not decided in merit as yet, that after expiry of the lease or the contractual tenancy whether the defendant/s can be able to retain the possession as a statutory tenant or not. I have only discussed the issue that if one by his own averment says that he is a statutory tenant he cannot claim to be a contractual tenant for the purpose of getting any benefit under Article 299 of the Constitution of India.

19. The second important part is the power of delegation. It is a consistent stand on the part of the defendant/s that a Deputy Commissioner of Income Tax of the concerned office is supposed to take any steps from the office of the Chief Commissioner of Income Tax (Administration). It is available at the time of notice dated 16th May, 1988 by which the Income Tax Department wanted to vacate the premises. It has also available from the Notice where under such letter as wanted to be withdrawn. It is further available in the verification parts of the written statement as well as additional written statement. Therefore, it cannot be construed that Deputy Commissioner from the office of the Chief Commissioner of Income Tax had or has no authority to act as a representative of the President of India. It is to be remembered the tenancy right has been obtained for the purpose of having office of the Income Tax Department by the pen of Public Relation Officer, Income Tax Department, West Bengal. Therefore, the Income

Tax Department is the beneficiary. u/s 116 of the Income Tax Act, 1961 the Income Tax Authorities are as follows: (a) The Central Board of direct taxes constituted under the Central Board of Revenue Act, 1963; (b) Directors/General of Income Tax or Chief Commissioner of Income Tax; (c) Directors of Income Tax or Commissioners of Income Tax or Commissioners of Income Tax (appeals); (cc) Additional Directors of Income Tax, Additional Commissioners of Income Tax or Additional Commissioners of Income Tax (appeals); (d) Deputy Directors of Income Tax, Deputy Commissioner of Income Tax (appeals); (e) Assistant Directors of Income Tax or Assistant Commissioners of Income Tax; (f) Income Tax Officers; (g) Tax Recovery Officers; (h) Inspectors of Income Tax.

20. As per Section 117 of the Act the Central Government may appoint such person as it thinks fit to the Income Tax authorities. Central Government may authorise a Board or a Director General or Chief Commissioner or a Director or a Commissioner not below the rank of the Assistant Commissioner. I do not find any post of Public Relation Officer under the Income Tax Act. If at all it exist, the same cannot be seen to be superior than the Deputy Commissioner of Income Tax.

21. However, before coming into the conclusion in respect of these issue I have to justify the arguments put forward by the plaintiff. According to Mr. Ranjan Deb, learned senior counsel, appearing for the plaintiff, a notice to quit by the tenant itself determines the tenancy. Unilateral action of the tenant cannot be said to be a contract. A contract is an outcome of bilateral transaction. Either in the West Bengal Premises Tenancy Act, 1956 or in the Transfer of Property Act, difference between a notice to quit an the contract are spelt out. He cited a judgment reported in *The Calcutta Credit Corporation Ltd., and Another Vs. Happy Homes (P) Ltd.,*] to establish that once notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting. Whether the notice is given by the landlord or the tenant the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent. Accordingly, the Article 299 of the Constitution of India has no manner of application in the facts and circumstances of this case.

22. He also cited another judgment being *Thakur Dan Singh Bisht Vs. State of Uttar Pradesh*, to show that a contract cannot be culled out from the correspondence but it requires execution of formal document.

23. If I peruse Article 77 of the Constitution of India I shall be able to find that all executive actions of the Government of India shall be expressed to be taken in the name of the President including orders and instruments made and executed but validity of an order or instrument which is so authorised shall not be called in question on the ground that it is not an order or instrument made or executed by the President. In all, it appears to this Court that conduct of business of the Government of India will be taken in the name of the President

and similarly with the contracts under Article 299 and in both the cases the President is not personally responsible for the same. There is a reason in saying so because the President is not the beneficiary. There is no existence of any expressed agreement other than the lease agreement on behalf of the President of India. Therefore, Article 299 has no manner of application beyond the period of the expressed contract. At best, a question may arise by the defendant/s about conduct of business of the Government of India by the appropriate Officers of the Income Tax authorities under Article 77 of the same. But I do not find any reason to disbelieve such conduct of the business stated to be operative by the appropriate authority or authorities of the defendants. The names of authorities are definitely changed. But post or position of such person or persons have not been changed. Even thereafter, if the defendant/s want to challenge the authority of the Deputy Commissioner of Income Tax then they are challenging their own locus standi to contest the suit by the pen of whom written statement or additional written statement were filed. It appears that the withdrawal letter from surrendering tenancy was also written by he similarly placed Officer i.e. Deputy Commissioner of Income Tax. Therefore, if I allow the defendant/s to take such stand then I have to allow the double stand of the Income Tax authorities one in merit and other in technicality. Moreover, from the Supreme Court judgment as cited above it is amply clear when and under what circumstances the Court will come to a definite conclusion about the applicability of Article 299 of the Constitution of India. Two conditions have to be fulfilled: (a) There should be existence of an expressed agreement; (b) It has to be signed by the empowered authority under the President of India. So far as the first part is concerned it appears it is restricted only upto the execution of the lease agreement which is a formal one. It cannot proceed beyond the period specified under the agreement admittedly. There is no dispute that the same was not done by an authenticated person, Therefore, this second part has to be governed Article 77 but not Article 299 of the Constitution of India. If it is so, the principles and power of delegation have to be applied in this case. This Court has no manner of doubt that the person concerned who made the correspondence on different occasions and contested the suit by the pen of Deputy Commissioners of Income Tax are the appropriate persons to conduct the business of the Income Tax authorities on behalf of the Union of India in this respect. Therefore, the applicability of Article 299 in this case is a futile attempt on the part of the defendants which cannot be accepted. Thus, I hold the issue Nos. 1(a) and 1 (b) against the defendants and affirmatively in favour of the plaintiff.

24. As per the tenor of argument, the issue Nos. 5(a) and 5(b) corresponding to point No. (i) is placed to follow the chronological events. These issues have two parts: (a) whether the claim is barred by Law of Limitation and (b) whether the defendants liable to pay rent from 18th October, 1986 till 1st July, 1988 on the basis of the letter dated 1st December, 1995. Plaintiff is estopped from raising claim under paragraph 15(A) of the plaint on the basis of such letter in view of paragraph 1(a) of the additional written statement. Defendant/s admitted the

position in the written notes of argument that for the purpose of claiming eviction period of limitation will be governed by Article 67 of the Limitation Act which is twelve years from the date of issuance of notice. Therefore, when a notice was issued on 16th May, 1988 terminating the tenancy with effect from 30th June, 1988 the suit for the purpose of the eviction is within the period of limitation. But so far as the claim of the plaintiff on account of arrears of rent as pleaded in the amended paragraph 15(A) of the plaint for the period between 18th October, 1986 and 30th June, 1988 for a sum of Rs. 51,52,083.61 is concerned, the same is a money claim. Therefore, the period of limitation of such claim is three years from the date of accrual of right between October, 1986 and June, 1988 taking the last date i.e. 30th June, 1988 as per Article 52 of the Limitation Act. The instant suit was instituted on 4th March, 1996 and thereafter the claim was incorporated by way of amendment in 1998. Therefore, *ex facie*, the entire claim on account of arrears rent is barred by law of limitation. Assuming the letter dated 1st December, 1995 is an acknowledgment of liability, the same cannot save the period of limitation since the claim of enhanced amount of rent in between October 1986 and June 1988 automatically became time-barred on 1st July, 1991 when the time period of three years was expired. By the amendment of the plaint Court did not decide the question whether such claim is barred or whether there was any acknowledgment of liability. Moreover the plaintiff challenged the legality or validity of such letter by way of writ petition and thereafter get the suit amended by making the claim and withdrawn such writ petition. Thus, there was no acceptance of purported acknowledgment by the plaintiff. Even in the affidavit in opposition of the plaintiff in an application of the defendants u/s 17(1) of the West Bengal Premises Tenancy Act, the plaintiff expressly rejected the offer. Therefore, neither the plaintiff accepted the offer nor acted on the basis of such offer. Mere withdrawal of writ petition will not substantiate the acceptance of acknowledgments of such letter by the plaintiff. The suit has not filed on the basis of such revision of rent on 1st December, 1995. Therefore, the plaintiff cannot be entitled to claim such amount. Moreover, when there is a termination of tenancy dated 16th May, 1988 with effect from 30th June, 1988 is subsisting the arrears of enhancement of contractual rent between 18th October, 1986 and 30th June, 1988 will run contrary to the claim of termination of tenancy. If the plaintiff now accepts letter dated 1st December, 1995, as acknowledgment then three consequences will be there; (a) relationship between landlord and tenant will continue; (b) the case of eviction will fail by such acceptance; (c) the acceptance of the letter will have to be made in toto but not in truncated form. Moreover, raising a claim on the basis of the letter of the defendants dated 1st December, 1995 cannot give a cause of action. Cause of action of enhancement of rent can only give by way of mutual agreement between the parties either expressly or impliedly. There is no pleading in the plaint that there has been any expressed or implied agreement for enhancement of rent. In paragraph 15(A) the plaintiff has raised a claim and nothing more. Cause of action is to be pleaded and proved. It should be consistent in between pleading and proof.

25. References have been made in connection with the Order 6 Rule 22(i), (iii) and (vii) as well as Abubakar Abdul Inamdar (dead) by LRs. and others Vs. Harun Abdul Inamdar and Others, and Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, to that extent.

26. It has further submitted that one of the witnesses on behalf of the Union of India Sri Sanjoy Mukherjee, Income Tax Officer, Headquarters (building) admitted the correctness of the contents, of the letter dated 1st December 1995. It has not denied at all. But the question is that the officer has neither been accepted nor acted upon by the plaintiff, therefore, such letter cannot have any foundation of claim under the paragraph 15(A) of the amended plaint. Moreover, the plaintiff having been rejected the offer previously, should not be permitted to raise a claim for enhancement of rent on the basis of such letter.

27. The plaintiff contended that the cause of action for the purpose of claim on account of enhancement of rent cannot arise before the issuance of the letter dated 1st December, 1995. The amendment incorporating this claim is made within the prescribed period. Thus, the claim is not barred by limitation. Amendment having been allowed on contest raising of grievance whether the plaintiff disclosed a cause of action or not is hit by principles of res judicata. It was never the case of the defendants either in their affidavit-in-opposition to the amendment application or in the additional written statement that the pleadings on account of rent does not disclose a cause of action. The parties have gone on trial on the basis of the pleadings made, the issue settled and evidence led. The question answers being 60-66, 184-211, 255-332 and 365-369 of the plaintiffs witness Mr. Ashok Saraf and the question answers being 51-60, 123-127 of the defendants" witness Mr. Sanjoy Mukherjee are to be taken into account in this respect.

28. Learned senior counsel, appearing for the plaintiff relied upon three judgments reported in Bhagwati Prasad Vs. Shri Chandramaul, , Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, and British Airways Vs. Art Works Export Ltd. and Another, . By showing the relevant part of the first judgment he stated that the ratio of the judgment of the Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, as cited on behalf of the defendants has thoroughly considered by the judgment referred by him. The ratio of the four Judges Bench of the Supreme Court is that undoubtedly if a party asked for a relief on a clear and specific ground, and in the issues or at the trial, no other ground covered either directly or by necessary implication, would be open for the said party to sustain the same claim on a ground which is entirely new. But in considering the application of this doctrine to the facts of a particular case Court must bear in mind the other principle that consideration of form cannot override the legitimate consideration of substance.

29. From the second cited judgment he contended that Order 6 Rules 2, 4, 12 and Order 7 Rules 1 and 3 of the CPC should be liberally construed. A pleading need not contend the exact statutory language or expression in order to connect

the statutory provisions. On the basis of the three cited judgments, he contended that there is no cause of action for the suit is not same as to say that the plaint does not disclose any cause of action which is a ground of rejection of the plaint. Indeed the plaint discloses a cause of action. The correctness of the cause of action is beyond the purview of the Order 7 Rule 11 of the Code of Civil Procedure. In distinguishing the cited judgment of the defendants reported in Abubakar Abdul Inamdar (dead) by LRs. and others Vs. Harun Abdul Inamdar and Others, he contended that the ratio of that case should be limited to its own facts i.e. no pleading at all. On the other hand, in the instant case, the defendants for the first time submitted that paragraph 15(A) of the plaint discloses no cause of action.

30. As against the dispute whether the plaintiff refused to accept the amount or acted upon the letter dated 1st December, 1995, he stated that the plaintiff has already sent the rent bills at the rate of 9.02 paise per square feet per month on the basis of the letter dated 1st December 1995 which is an admitted position. He referred question No. 60 of Sanjoy Mukherjee, one of the witnesses on behalf of the defendants. However, such bill was raised upto 30th June, 1988 and not for any period thereafter. If the Court goes by the record of the writ petition No. 673 of 1996 which was withdrawn, it will be available that the plaintiff claimed such excess amount on the basis of the letter but not beyond 30th June, 1988. See question No. 64 of Mr. Ashok Saraf, the plaintiff's witness. Furthermore, the writ petition was in any event withdrawn on 9th March, 1988 as a condition of allowing amendment, whether the writ petition was withdrawn or not, for such reference, he has drawn attention of the Court to the question No. 120 of Mr. Sanjoy Mukherjee, one of the witnesses of the defendants. Mr. Sanjoy Mukherjee as against question No. 124-127 specifically stated that the Income Tax Department is not contesting its liability to pay rent as claimed by the plaintiff at the rate of Rs. 9.02 paise per square feet per month. Therefore, the plaintiff is entitled to get the enhanced rent as per the letter of the defendants dated 1st December, 1995 from 18th October, 1986 till 3rd June, 1988.

31. I have carefully taken into account the rival contending of the parties in this issue. It is true that the plaintiff has incorporated the claim by way of amendment as against the condition of withdrawal of writ petition. The said application for amendment of plaint was hotly contested among the parties. The following points were taken by the defendants in opposing the amendment: (a) By way of the amendment the plaintiff/petitioner wanted to introduce new cause of action which unavailable in the notice u/s 80 of the Code of Civil Procedure; (b) The document being letter on behalf of the defendants/respondents dated 1st December, 1995 on which the amendment is sought for, was not only available before the institution of the suit on 2nd March, 1996 but also before the notice u/s 80 of the CPC dated 19th December, 1995. Since the plaintiff did not choose to incorporate the same either in the notice or in the plaint, amendment cannot be allowed to introduce such cause of action in this suit; (c) The claim of the plaintiff under the letter dated 1st December, 1995 is barred by Law of Limitation

since it relates to period of 18th October, 1986 and in view of Section 18 of the Limitation Act by which an acknowledgment beyond the period of Limitation cause of action cannot be revived; (d) The letter dated 1st December, 1995 is mere proposal subject to raising bills by the plaintiff, since the plaintiff did not send rent bills, the letter cannot be treated to be an acknowledgment of payment of rent; (e) Since the present introduction of amendment speaks for "rental being difference of rent actually paid and since the rent as claimed in earlier on old rate already paid admittedly no cause of action survives in respect of the notice dated 19th December, 1995 u/s 80 of the Code of Civil Procedure.

32. Upon hearing the parties this Court was pleased to hold on 3rd March, 1998 that the amendments will be allowed and such order was upheld by the Division Bench on 12th August, 1998. It is to be recorded hereunder that 9th March, 1998 the writ petition was dismissed for non-prosecution at the instance of the plaintiff. Therefore, the original order is there. Order of compliance of original order is there. The order of appeal is also there.

33. Under such circumstances, although the questions as agitated herein had already been considered but in due compliance of the guidelines of the Division Bench of this Court the parties are allowed to make the aforesaid submissions. However, according to me, each and every case has his own factual basis which cannot be same or similar with the other. In the instant case, the question is whether there was any cause of action available before the Court or not. It is true that there was a cause of action available before the Court. Such cause of action is termination of the tenancy right of the defendants. Admittedly, the suit was instituted against such termination within the prescribed period of limitation as governed under Article 67 of the Schedule under the Limitation Act, 1963. Such Article 67 is available under the Part V of the Schedule which deals with the suit relating to immovable property. The point which has been taken by the defendants in respect of limitation is in respect of arrears of rent which, according to them, covered by Article 52 of the Schedule. Therefore, from the arguments of the defendants it appears although the original suit for the purpose of the eviction is maintainable as per Article 67 of the Limitation Act, 1963 but the amended portion of the plaint under Article 52 cannot be maintainable. It appears to me, such Article 52 for arrears of rent is prescribed under Part III of the Schedule i.e. suit relating to contracts. Therefore, the arrears of rent must have to be outcome of the contract which means money claim simpliciter. But the own case of the defendants is that they are the statutory tenant after expiry of the contractual period of lease or tenancy. If it is so, such arrears of rent cannot be an outcome of monetary claim simpliciter arising out of a contract. Hence, Article 52 has no manner of application in respect of such claim. The order which has been passed by allowing the amendment already considered the question of limitation. At the time of upholding such order a Division Bench of this Court held that if the claim is barred by limitation it will be applicable as barred by limitation at the time of institution of the suit, therefore, there cannot be any change of circumstances for allowing amendment. I believe that the defendants have not

followed the purport of the order of the Division Bench. The Division Bench was intended to say that if the original claim is barred by limitation subsequent claim cannot have any leg to stand, therefore, it will become barred which will be tested at the time of hearing of the suit. But when the defendants admitted that the original claim is not barred by following Article 67 subsequent claim cannot fail. According to me, such claim cannot be bifurcated since it is not arising out of the contractual obligation. It appears that the defendants wanted to put the letter dated 1st December, 1995 as a defence by raising the rate of rent as per square feet per month against the original claim of ejectment of the plaintiff. Therefore, the claim proposed under the amendment appears to be a consequential relief in addition to the original claim which can not be said to be barred by limitation unless the original claim is treated to be barred. Since the defendants admitted that the original claim is not barred, such consequential relief cannot be treated to be barred.

34. A plea has been taken by the defendants that there is no pleading or proof in respect of such claim. I am sorry to say that it is not a justifiable stand on the part of the defendants. There is no question of formal proof if it is a question of acknowledgments. It has not only been acknowledged by the defendants in writing under the letter dated 1st December, 1995 but on oath at the time of witness action in support of such acknowledgments.

35. Therefore, there is no question of further proof. More over if the Court want to go by the technicality paragraph 15(A) of the amended plaint it will be available that the plaintiff is "entitled to" and "claims" a decree for a sum of Rs. 51,52,083.61 against the defendants being the difference in rent actually paid and as has been calculated as per the letter to be payable at the rate of Rs. 2,85,104.16 per month with effect from 18th October, 1986 to 30th June, 1988. Both the aforesaid quoted words have distinct feature. One is by way of pleading and another is by way of claim. Therefore, when a plaintiff avers that it is "entitled to" it expresses its pleading and when "claims" it satisfies the test of relief sought for. Therefore, I do not find any exception in the pleading. Apart from the principle I agree that the consideration of form cannot override the legitimate consideration of substance. Therefore, according to me, the plaintiff has subsequently made his claim in this respect.

36. A further question has been raised by saying that since the plaintiff wants to go by the notice determining the tenancy and thereafter accepts the enhancement of rent, the originally cause of action will automatically evaporate. I do not find any basis of such logic. For an example, if a suit for ejectment is filed by the landlord against a tenant and the tenant upon being served, file application before the Court or Rent Controller to deposit defaulted amount and it is allowed by the Court and the landlord withdraw such amount, the claim for ejectment will not evaporate automatically. This is an unsustainable argument according to me because subsequent deposit or prayer to deposit itself proves the default of rent dispute.

37. Thus, I hold and say that issue No. 5 is affirmative in favour of the plaintiff.

38. It appears to this Court that the issue No. 7 being the point No. IV was taken thereafter to follow the sequence. The defendants contended that this Hon''ble Court has no pecuniary Jurisdiction to entertain the suit. The claim on account of eviction is valued at Rs. 3,98,260/- and other claims are on account of mesne profits or for arrears of rent which are not sustainable in law. According to them, a pecuniary jurisdiction of the Court has been attracted by paragraph 16 of the plaint both in the original and after amendment. There are three sets of claims. The value of Rs. 3,98,260.80/- for the purpose of possession, Rs. 5,19,63,552.00/- on account of mesne profits and/or damages and Rs. 51,52,083.61/- on account or arrears of rent totalling to Rs. 5,75,13,896.41/-. According to the defendants the claim of mesne profits cannot be taken on account of determination of pecuniary jurisdiction of this Court. The claim of the arrears of rent is also time barred for the reasons stated above. Therefore, the suit appears to be below the pecuniary jurisdiction of Rs. 10,00,000/-. As such the same will be defeated on such ground.

39. According to the principle of determination of the pecuniary jurisdiction of a Civil Court ordinarily the Court has to go by the plaintiffs own valuation. The valuation of the suits are depending upon the plaintiff's valuation in the plaints which determines in which Court it will be presented. I have taken note of the submissions of both the parties in this respect. I find that the last part of the submission of the learned counsel appearing for the plaintiff is much more attractive amongst others. This is correct to say that it is not a case of gross over valuation. It is a case of alleged misconceived valuation which according to me cannot be equated with the over-valuation. The words "alleged misconceived" have been used by them. I find that the defendants wanted to say that the suit has been clubbed together on three different heads for the purpose of attracting the pecuniary jurisdiction of this Court. My question is where in the bar? Supreme Court has already given answer in this respect. The valuation is depending upon the reliefs and plaintiff's valuation in his plaint determines the Court's jurisdiction. In the aid of acceptance of such ratio, I should say that the jurisdiction of the Court for the purpose of eviction is based upon twelve months'' rental. But that does not necessarily mean that other claims cannot be added with such rental. Precisely, valuation is not only restricted on the basis of twelve months'' rental or rental plus mesne profits but claim on account of fair rent. Whether the claim of the fair rent is barred or not has already been tested by this Court in earlier issues. Thus, I do not find any reason to hold against the plaintiff in this issue. Thus, the issue No. 7 goes affirmatively in favour of the plaintiff.

40. The next point is in respect of issue No. 3 corresponding to point No. VII as above under which defendants wanted to establish that the claim of mesne profits cannot be maintainable in absence, of specific demand in the notice u/s 80 of the Code of Civil Procedure, 1908. In support of their arguments learned

counsels submitted that by a notice of termination of monthly tenancy the defendants held the premises as statutory tenant and if the Court passed a decree for eviction of the plaintiff the claim of mesne profit can only arise from the date of decree. Therefore, the entire claim of mesne profits is ex facie bad in law. He referred to a judgment reported in Smt. Chander Kali Bai and Others Vs. Shri Jagdish Singh Thakur and Another, . The plaintiff stated that in the notice u/s 80 of the Code a demand of decree for mesne profits and/or damages has already been made. Accordingly, the issue No. 3 was framed by this Court. The aforesaid judgment holds a view that the plaintiff is not entitled to claim mesne profits or damages either in law or in facts until a decree for eviction is passed. Such principle is well settled. But as soon as a decree is passed such claim become effective from the dated of termination.

41. According to me, this question is interesting one. In the notice u/s 80 of the Code of Civil Procedure, a decree for peaceful and vacant possession was called for upon expiration of 29th February, 1996 and decree for mesne profits and/or damages were called for from 1st July, 1988 until the vacant possession at such rate as the Hon"ble Court may think fit and proper alongwith the costs of the suit. Therefore, factually there is a claim. Even if such part not had been there in the notice the claim would not have been failed. It is an admitted position that question of mesne profits and damages is a consequential effects of an eviction decree. Therefore, if the suit is decreed in favour of the plaintiff, the cause of action for mesne profits and/or damages will rise automatically, irrespective of such part having been made in the notice or not. The appropriate purpose of the notice u/s 80 of the Code is to give the Government reasonable opportunity of show-cause why the relief will not be granted. But that does not necessarily mean that a consequential relief to the suit cannot be granted without mentioning such relief in the notice. As the cause of action of mesne profits and/or damages cannot arise before the decree same principle would apply in respect of the notice. Had it been the position that the defendants vacated the premises pursuant to the notice there would not have been any necessity of filing the suit for ejectment or for claiming any amount by way of mesne profits and/or damages. Therefore, the notice is meant necessarily for the purpose of making the Government or Governmental authorities alert about the forthcoming suit. Even Section 80 of such Code states that no suit shall be dismissed merely by reason of an error and defect in the notice referred to the Sub-section 1 such section if such notice gives name, description and residence of the plaintiff etc. and to be delivered or left in the office of the appropriate authority and the cause of action and relief claimed by the plaintiff had been substantially indicated. There is no dispute as regards the plaintiff's description of address nor there is any dispute in respect of the service of such notice. Therefore, the remaining part is the substantial indication of the cause of action. The cause of action is the eviction which has to be indicated in the notice. Therefore, the Governmental authority is aware what would be the effect of any delivery of the possession. This legal aspect not necessarily been incorporated when substantial part of the

cause of action is available in the notice. Therefore not only mesne profits or damages but also fair rent for an appropriate period are incidental outcome of the original object which forms a cause of action. So far as the amendment of plaint is concerned I find that there is no submission on the part of the defendants in this respect in their written notes or argument. But to clarify the position I repeat and say that such part is incidental to the original cause of action. Can it be said that the order of amendment has been obtained by the plaintiff in absence of the defendants? My answer is "no". It was not only hotly contested before this Court particularly in presence of the learned Additional Solicitor General but an appeal was preferred from such order and the same was dismissed. I agree with the argument of Mr. Deb that the notice of motion which has been served in connection with the application is also a notice arising out of such claim. The notice u/s 80 is to be served for the purpose of instituting the suit nor for any interlocutory application because the Government or the Governmental authority has already been informed. Under such circumstances, the claim, if any, which has been added by the way of amendment cannot be said to be inconsistent with the main relief.

42. That apart the judgment of the Supreme Court reported in *Kishore Singh and Another Vs. The State of Madhya Pradesh*, is not only the judgment in this respect. Two judgments are there. One is as aforesaid and another is *Shyam Charan Vs. Sheoji Bhai and Another*, . Both are governing the field. In the first judgment, it was held that the cause of action for the purpose of mesne profit is arising on an eviction decree when in the subsequent judgment it was said such claim relates back the termination. It has to be so because the tenant is becoming a statutory tenant after the contractual period is over. But even after the determination of tenancy by the notice, if anybody holds the possession, he will occupy the same at his risk. If this suit against him, becomes unsuccessful his notice of termination has to be declared expressly or impliedly a non-est document in the eye of law. Obviously the tenant will be declared as a statutory tenant. But if the decree says that the occupation pursuant to the termination notice or otherwise is invalid then it will relate back the period when the notice was served. The tenant cannot be escaped from paying the consideration for his illegal occupation. Thus, I hold in favour of the plaintiff even in this issue by saying that notice u/s 80 of the CPC is good enough for the claim of mesne profits or damages.

43. A further question arose in the mind of the Court that whether mesne profits or damages and fair rent are independent from passing an eviction decree or not. The learned senior counsel appearing for the defendants contended that the same is not independent. In other words, unless and until there is an eviction/ejectment decree there cannot be any existence of mesne profits and/or damages. Such submission is correct. But so far as the case of fair rent is concerned I do not find any reason to hold that the same cannot be independent of eviction decree. The case of fair rent even can be decided in the application under Sections 17(1), 17(2) and 17(2A) of the West Bengal Premises Tenancy

Act irrespective of the result in the ejectment suit. Learned counsel for the plaintiff fairly contended that it has not claimed any mesne profits and/or damages upto 30th June 1988 because of the acceptance of proposal of the defendants for revision of rent from 18th October, 1986 till 30th June, 1988. From the witness Box, the witness of the defendants admitted the correctness of contents of the letter of such proposal. Therefore, this Court does want to go for fixation of fair rent beyond the rate already proposed by the defendants and accepted by the plaintiff nor for fixation of mesne profits or damages for such period.

44. However, I find the plaintiff has not made any submission in respect of the merit of eviction. Learned counsel has formulated certain legal points. On the basis of such legal points I have heard elaborately and taken note of the legality or validity of the same but according to me such submissions cannot overcome the situation of eviction of the defendants from the premises. Therefore, I have no other alternative but to pass a decree in terms of prayer (a) and (b) of the plaint. Plaintiff will also be entitled to decree in terms of prayer (f) of the plaint. The plaintiff will be entitled mesne profits and/or damages from 1st July, 1988 till the date of recovery of the possession by the plaintiff from the defendants. Therefore, there will be preliminary decree to such extent. The rate of mesne profits and/or damages will be fixed by the Court. A set of Commissioners appointed hereunder who will make the appropriate valuation of market rental of the similarly placed premises of the locality and furnish a report before this Court at the earliest to pass a final decree thereon. If there is any difference of opinion they can file report separately. Therefore, I appoint hereunder Mr. Mihirlal Bhattacharjee, learned senior counsel, was normally appearing on behalf of the Income Tax authority, Mr. Ashoke Das Adhikary, learned counsel, was normally appearing for the Calcutta Municipal Corporation and Mr. Arabinda Sen learned counsel, who normally appearing for the private parties to apply their mind independently, to collect information from the locale and furnish a report before this Court about the market rental value for the aforesaid period. For the purpose of doing the needful 600 gms. each is fixed as remuneration of the learned Commissioner which will be borne by the plaintiff. The other incidentals and conveyance will also be borne by the plaintiff. All such expenses will be added to the claim of the plaintiff as to the costs of the suit at the time of final decree subject to sanction of the Court. There is also be a decree as to costs assessed at Rs. 20,000/-.

45. Xeroxed certified copies of this judgment will be supplied to the parties within seven days from the date of putting the requisites for drawing up and completion of the order and certified copy of this judgment.

All parties are to act on a signed copy minute of the operative part of this judgment on the usual undertaking and subject to satisfaction of the Officer of the Court in respect as above.