2022 LiveLaw (SC) 744

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
K.M. JOSEPH; J., PAMIDIGHANTAM SRI NARASIMHA; J.
September 06, 2022
CIVIL APPEAL NO.6199 & 6200 OF 2022 (Arising out of SLP(C)No.15587 & 15588 of 2022) (Diary NO.16519/2019)
INDIAN OIL CORPORATION LTD. *versus* **SUDERA REALTY PRIVATE LIMITED**

Code of Civil Procedure, 1908; Section 2(12) - Transfer of Property Act, 1882; Section 111(a) - Tenant while continuing in possession after the expiry of the lease liable to pay mesne profits - A tenant at sufferance is not a tenant by holding over. While a tenant at sufferance cannot be forcibly dispossessed, that does not detract from the possession of the erstwhile tenant turning unlawful on the expiry of the lease. *(Para 60)*

For Appellant(s) Mrs. Priya Puri, AOR Mr. Ranjay Dubey, Adv. Mr. S. K. Puri, Adv.

For Respondent(s) Dr. A. M. Singhvi, Sr. Adv. Mr. Nakul Diwan, Sr. Adv. Mr. Ejaz Maqbool, AOR Mr. Avishkar Singhvi, Adv. Ms. Nooreen S., Adv. Mr. Saif Zia, Adv.

J U D G M E N T

K.M. JOSEPH, J.

Delay condoned. Leave granted.

1. The appellant is the defendant in the suit. By the impugned judgment, the division bench of the High Court has partly allowed the appeal filed by the appellant and modified the decree granted by the learned Single Judge in a suit filed by the respondent seeking mesne profits.

2. The respondent-plaintiff instituted the suit on the following basis. The respondent demised the centrally air-conditioned 2nd, 3rd and 4th floors of premise no. 1, Shakespeare Sarani, Kolkata and a nonair-conditioned guest house on the 9th floor. The lease was to subsist for a term of 21 years commencing from the date when the said floors were handed over to the appellant lessee. The respondent further claimed that there is a supplementary agreement which is also duly registered on 12.09.1969, which had brought about certain modifications in the original lease dated 21.11.1968. It was further the case set up by the respondent that the 2nd and 3rd floors came to handed over on 12.09.1969 and the possession of the 4th floor was made over to the appellant on 18.12.1969. It was alleged that there was failure on the part of the appellant to join and cooperate with the respondent in the matter of finalisation, execution, and registration of an appropriate document of lease in regard to the 2nd, 3rd and 4th floors. There is reference to an earlier suit which was filed in the year 1978, and which was not followed to its logical culmination but ended in a compromise. More of it later. Suffice it to notice at this stage that the proximate cause for the litigation was the failure of the appellant to hand over vacant possession of the 2nd, 3rd and 4th floors, upon the expiry of the lease. Possession was handed over to the respondent only on 31.05.1994. Resultantly, the respondent alleged that the appellant was in wrongful possession of the 2nd, 3rd and 4th floors after the expiry of the lease on 11.09.1990 i.e., for the 2nd and 3rd floors and for the 4th floor on 17th December, 1990 or alternatively on the expiry of the 3rd or 4th of November, 1991 till 31.05.1994. Even in terms of the computation of the period of 21 years by the appellant, this illegal possession continued till 31.05.1994. The respondent

claimed mesne profits in respect of 57105 sq. feet at the rate of Rs.31 per sq. feet per month.

3. In the written statement filed by the appellant the case inter alia set up was that the period of lease was to be computed from the date of delivery of possession. The document dated 21st November, 1968 constituted the actual demise of the property. By notice dated 7th December, 1977, the respondent had determined the lease and there was a suit filed by the respondent which was dismissed as not pressed and appellant had constructed a new office building. It took some time to vacate. There was a clause for premature termination of the lease at the option of the appellant. Appellant was entitled to the protection of the West Bengal Tenancy Act, 1956 (hereinafter referred to as the 'Tenancy Act'). The case of wrongful possession was denied. In the alternative, it was contended that respondent accepted monthly rent after the determination of the tenancy by notice dated 7th December, 1977. The tenancy is also protected therefore under the Tenancy Act.

4. The learned Single Judge found the plaintiff entitled to mesne profits. A referee was appointed to quantify the mesne profits. Both the appellant and the respondent filed appeals.

THE FINDINGS IN THE IMPUGNED JUDGMENT

5. The impugned judgment would show that the appellant addressed the following contentions.

Mere reference to a document as a lease could not be a ground to find that the document dated 21.11.1968 was a lease deed. The nature of the document required examination. The effect of the withdrawal of the suit filed by the respondent in the year 1986 and the impact of the Tenancy Act was not properly assessed. There was holding over. Therefore, a decree of mesne profits was without warrant. The Court found that the appellant had not pleaded the case that a fresh tenancy was created after the expiry of the lease by efflux of time, and found itself unable to accept the said contention. The receipt of occupation charges by the respondent as evident from the letter of the respondent dated 02.01.1991 was without prejudice. It did not create a fresh tenancy. Mere continuation in occupation of the demised premises after the expiry of the lease, notwithstanding the receipt of an amount by the landlord, would not create a tenancy. The appellant was to be treated as a tenant at sufferance and akin to a trespasser. The lease did not contain any renewal clause and it was determined upon the expiry of the fixed period. However, the division bench took the view that in the absence of any other evidence, as to the exact date when the appellant took possession of the 2nd and 3rd floors, it was safe to accept 16th September, 1969 as the starting point of the lease in regard to the 2nd and 3rd floors. Accordingly, the division bench modified the judgment in regard to the starting point, by finding that the starting point of the lease for the 2nd and 3rd floors would be 17.09.1969. Whereas, in regard to the 4th floor, the finding of the learned Single Judge that the lease commenced on 04.11.1970 was affirmed. Accordingly, it was that appeal (APD no. 494 of 2014) was allowed in the aforesaid manner. This is after dismissing the appeal (APO no. 207 of 2015). It is against the said judgment, namely, the judgment in APO No.207/2015 and APD No.494/2014, that the appeals have been carried by the appellant.

6. We heard the Ms. Madhavi Diwan, learned ASG on behalf of the appellant and Dr. A.M. Singhvi, learned Senior Counsel on behalf of the respondent.

7. Ms. Madhavi Divan, Additional Solicitor General raised the following contentions. The agreement of lease dated 21.11.1968 contemplated that the term of 21 years would commence from the date when the premise was handed over. The lease was terminable at any time after the expiry of 8 years of the term of 21 years. The construction of the premises was ongoing. On 21.11.1968, none of the floors to be leased to the defendant had been completed. Even on 12.09.1969, when the supplementary agreement as also the deed of mortgage was executed, the possession did not change hands. The mortgage deed, it is pointed out, records that the 2nd and 3rd floors were in the course of construction. Advances were given under the mortgage to the respondent as it was in need of money to complete construction of the building, in particular, the 2nd, 3rd and 4th floors. The parties contemplated a formal lease deed being executed at a later date. The premises were admittedly not ready for effective occupation till 04.11.1970. Reliance is placed on the letter dated 12.09.1969, the deed of mortgage and the minutes, dated 05.06.1980, by which the suit, and the cross-suits came to be withdrawn and the respondent agreed to forego the rent prior to 1970, on account of late possession. The appellant continued to occupy the premises after the issuance of the notice to quit and the filing in the year 1977 of the cross-suits. Payment of monthly rent and acceptance without demur is pointed out. The letter dated 19.10.1990, required the tenant to vacate the premises by 11.09.1990, as far as the 2nd, 3rd floors are concerned and the 4th floor was to be vacated by 17.12.1990. This was short of 21 years from the date of effective possession. It is pointed out that the claim for mesne profits commenced from these very dates, namely, 12.09.1990 and 18.12.1990. The appellant has paid rent for the entire period. The claim for mesne profits is in excess of 45 crores. It is pointed out that the respondent entered into the lease agreement with another company where the rate was Rs.15 per sq. feet about 13 years thereafter namely in 2008 whereas Rs.31 per sq. feet is said to be the rate at which mesne profits is calculated qua the appellant.

8. The appellant contends that having regard to the definition of the mesne profits in Section 2(12) of the CPC, it is indispensable for the respondent to establish wrongful possession. The respondent has agreed that effective possession could not be reckoned even from 15.09.1969 and, therefore, the question of the term of 21 years expiring based on 11.09.1969 could never have arisen. The impugned judgment, having been accepted by the respondent, the 21 years lease could not have come to an end as early as on 11.09.1990 as the division bench has found that in regard to the 2nd and 3rd floors, 17.09.1969 as the date of the appellant being put in possession. It is contended that the period of 21 years had not expired when notice dated 19.10.1990 had been issued. It was the respondent which curtailed the expiry period of 21 years by issuance of notice dated 19.10.1990. The notice dated 19.10.1990 met the requirement of Section 106 of the Transfer of Property Act. On account of the determination prior to the expiry of the lease, the appellant became entitled to the protection under the Tenancy Act. Section 13 of the said act proscribed any order or decree for recovery of possession of any premise against a landlord except on a ground set out in the said enactment. The provisions of the said act were not complied with. The court should reject the contention of the respondent that the notice dated 19.10.1990 was not a notice to quit.

9. It is further contended that having regard to the notice issued by the respondent, dated 12.12.1977, the appellant became entitled to the protection of the Tenancy Act. Reliance is placed on the judgment reported in ***Calcutta Credit Corporation Ltd., &***

Another v. Happy Homes (P) Ltd.[1]. Reliance is also placed on the decision in Tayleur v. Wildin[2] to contend that the withdrawing of the notice and the contention of the parties would not avail the landlord. Section 113 of the Transfer of Property Act is invoked to contend that there is no waiver. A new tenancy has come into existence thereupon in view of the quit notice, and what is more, of the suit, despite the arrangement arrived between the parties. The decision reported in ***Ranjit Chandra Chowdhury v. Mohitosh Mukherjee***[3] relied upon by the respondent is sought to be distinguished both on the basis that the earlier judgment in ***Calcutta Credit Corporation Ltd. (supra)*** was rendered by a bench of three learned judges and the later judgment was pronounced by a bench of a lesser strength, and furthermore, on the basis that the earlier judgment had not been analysed by the later bench. It is further contended that the respondents are equally misplaced in relying on ***Tayabali Jaffarbhai Tankiwala v. Messrs. Asha and Co. and another***[4]. It is described as a judgment rendered per incuriam. It is also contended that it is otherwise distinguishable. The petitioner, it is pointed out was a monthly tenant from November, 1968. In an argument raised in the alternative and without prejudice to the earlier argument, it is further contended that a large portion of the claim for mesne profits was barred by limitation. Article 51 of the Limitation Act applies. The claim for the entire period prior to three years before the filing of the suit, i.e., for the period prior to 10.04.1992, would be barred.

THE SUBMISSIONS OF THE PLAINTIFF

10. The dispute spread over 30 years is on account of conduct of the appellant. The respondent has been unable to recover any mesne profits due to it. As on the date of the registered agreement for lease 21.11.1968, the construction of the 2nd, 3rd and 4th floors were ongoing. It is submitted that there was indeed a valid lease deed between the parties. It was the admitted case and the appellant cannot be permitted to resile from the said position. It is next contended that the case that the lease deed was determined in 1977 is untenable. The alleged termination notice is dated 07.12.1977. The lease ran uninterrupted for 21 years and expired by the efflux of time. The decision on ***Pabitra Kumar Roy and Another v. Alita D'Souza***[5] is relied upon. It is pointed out that the termination notice dated 07.12.1977 did not result in the actual determination of lease prior to expiry and the appellant continued to occupy the premise "as before". Notice was not even tendered in evidence by the appellant in these proceedings. The parties never acted upon the termination notice. The respondent did not go so far as to seek the appellant's eviction. The respondent brought a suit seeking rent for the period 15.09.1969 to 04.11.1970. In the meeting held on 05.06.1980, the litigation ended in view of the binding settlement. It was understood that the parties have no further claim. It is contended that neither party admitted to the other's entitlement for the claims raised.

11. As regards the termination prior to the expiry is alleged to have taken place consequent upon the communication dated 19.10.1990, it is described as a letter of inquiry and not a notice of termination as contended by the appellant. It is contended that as far as the attempt by the appellant to evolve a new case before this Court that there was a fresh tenancy created as a result of the waiver, it is countered contending that the

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[1] 1968 2 SCR 20
[2] (1867- 68) LR 3 Ex Cases 303
[3] (1969) 1 SCC 699
[4] (1970) 1 SCC 46
[5] (2006) 8 SCC 344

argument of the appellant is de hors the facts in the present case. The decision of this Court in ***Calcutta Credit Corporation Ltd. & Another v. Happy Homes (P) Ltd.***[6] was not dealing with the question whether the waiver of the determination notice results in a fresh tenancy. That is not the ratio. The observations that consent to waive the notice results in a new agreement are only obiter. Reliance is placed on subsequent judgments to contend that there would be revival of the old tenancy, when there is waiver [(1969) 1 SCC 99, (1970) 1 SCC 446, AIR 1976 Cal 274, (2006) SCC Online Calcutta 248]. On facts, it is pointed out that appellant continued to make rent payments. The statement in paragraph 14 filed by the appellant that it occupied premises and paid monthly rent "as before" is emphasised. The respondent lay store by contemporaneous communication wherein appellant continues with the stand that lease has not expired. Regarding the alleged termination by letter dated 19.10.1999, it is complained that the appellant never raised such a case in response to communication or even in defence before the Court. The letter of inquiry is not a determination. The appellant itself understood that the respondent had sought vacation of the premises on the basis of the expiry of the lease period alone. The argument is a mere afterthought. The acceptance of the occupation charges by the respondent after the expiry of the lease did not create monthly tenancy. The payments were received on a "without prejudice basis" "as on account payment". The judgment of this Court in ***Nand Ram (Dead) Through Legal Representatives and others v. Jagdish Prasad (Dead) Through Legal Representatives***[7] did not consider the consequence of the payment being collected. The suit for mesne profits is not barred by limitation. Mesne profits accrues from day to day and the cause of action is a continuing one. Being a continuing breach of contract and a fresh cause of action arising on each day, the appellant wrongfully occupied the property. Reliance is placed on the judgment of this Court in ***Shakti Bhog Food Industries Ltd. v. Central Bank of India and Another***[8] to contend that limitation does not bar the suit. The inconsistency in the stand of the appellant at various stages is underlined.

ANALYSIS

The following points arise:

Point No.01: - Whether the documents styled as agreement dated 21.11.1968 and the supplementary agreement for lease dated 12th September, 1969 constituted a lease?

Point No.02: - Whether the possession of 2nd and 3rd floors were handed over on 17.09.1969 and 4th floor stood handed over on 04.11.1970?

12. An agreement for lease was executed between the appellant and the respondent on 21.11.1968 in regard to the 2nd, 3rd and 4th floors of the premises. While it is true that it contained a clause which did contemplate that the respondent as the lessor put in place a formal deed of lease in favour of lessee, if the lessee would require the same, we are of the view that the agreement of lease dated 21.11.1968 on its own operated as a lease. It was a demise and operated as such. Admittedly, it was a registered document. Further, as correctly contended by the respondent, the appellant in its pleadings proceeded to

[6] (1968) 2 SCR 20
[7] (2020) 9 SCC 93
[8] (2020) SCC OnLine 482

contend that the agreement of lease dated 21.11.1968 operated as a lease. In paragraph 4 of the written statement, the appellant states as follows:

"4. With reference to paragraph 9 of the plaint, it is denied that the defendant failed and neglected to join or co-operate with the Plaintiff in execution or registration of the formal deed of lease. It is denied that there was any question of any finalization of the deed of lease. All the terms and conditions of the lease were finalized and set out in the document described as agreement for lease dated 21st November, 1969. The document envisaged that the possession would be given to the defendant upon completion of the building. The period of lease was to be computed from the date of delivery of possession. The said document dated 21st November, 1968 constituted the actual demise of the property and operated as deed of lease. Since the Plaintiff and the defendant treated the said document dated 21st November, 1968 as deed of lease as modified by the Supplementary deed dated 12th September, 1969, neither the Plaintiff nor the defendant insisted upon execution of a formal deed of lease as requisite stamp duty as applicable to lease had been paid and the said documents had been registered."

(Emphasis supplied)

Therefore, we cannot permit the appellant to draw support from the aforesaid clause which gave the appellant the right to require that a formal lease of deed be executed.

13. A perusal of the agreement of lease dated 21.11.1968 would reveal the following:

The 2nd, 3rd and 4th floors of the premises along with the guest house which is collectively referred to as 'demised premises' was the subject matter of the lease of 21 years. The term of the lease has been described as commencing from the date when the demised premises would be handed over. It is true that construction of the premises may not have been over but at the same time, the term of the lease has been specified as period of time (21 years) from the date on which the demised property would be handed over. We have no hesitation in repelling the argument of the appellant that the fact that the construction of the building was not over, would in the facts as mentioned, detract from a transfer by lease coming into being. As already noticed, the provision was for a formal deed and that too, if the tenants so requested. It will not stand in the way of the transfer by way of a lease taking place. As already noticed, there is a supplementary agreement of lease on 12.9.1969. It would appear that there were certain financial transactions, as amounts were advanced by the appellant towards the construction of the building. The interest of the appellant was sought to be secured by a mortgage. The supplementary agreement made certain modification to the original agreement. Additional obligations were undertaken by the lessor and certain rights were conferred on the lessee inter alia. But what is relevant to notice is the term of the original agreement dated 21.11.1968 that the lease for a term of 21 years (Agreement to create the lease for 21 years) would commence from the date of handing over the premises.

14. Thus, we find that there was indeed a written agreement of lease dated 21.11.1968. The term of the lease was 21 years which was to begin from the date on which demised premises was handed over to the lessee. The rent for the demised premises was also fixed.

15. The next question which would arise is, as to when the possession was handed over? As we have noticed, the dispute which is raised pertains to the 2nd, 3rd and 4th floors of the building in question. As already noticed by us, the Division Bench has found in modification of the judgment of the learned Single Judge that as there are no documents

to show the exact date, the appellant was put in possession of the 2nd and 3rd floors and fixed 17.09.1969 as the starting point.

16. It is found that appellant was put in possession of 4th floor on 04.11.1970. The case of the appellant is that the possession of all the three floors in question was handed over to it on 04.11.1970. The respondent, on the other hand, would reiterate that the 2nd and 3rd floors were handed on or before September, 1969 and the security deposit for those floors already handed over, was made by 27.09.1969.

17. According to the appellant, a perusal of the mortgage deed, which is also executed on the same day as the supplementary lease deed, would reveal that as on the date of execution of documents, that is, 12.09.1969, the 2nd, 3rd and 4th floors were described as "now in the course of construction on the said leasehold land". It is as the respondent was in need of money to complete the construction of the building that funds were given by the appellant. These facts are borne out by the mortgage deed and the appellant would contend that premise was handed over only on 04.11.1970. Now let us cull out the consequences of accepting the different dates of handing over possession. As far as the 4th floor is concerned, in view of the findings by the High Court that the possession of the 4th floor was handed over on 04.11.1970 and the same not being questioned before us, we can safely proceed on the basis that the 4th floor was handed over on 04.11.1970. In regard to the 2nd and 3rd floors are concerned, the High Court has laid store by Exhibit 2 to find that the possession was handed over on 17.09.1969. Exhibit-2 is a letter dated 16.09.1969 from the respondent to the appellant. In the said letter it is stated as follows:

"Dear Sir

It is to inform you that we have spent Rs.8,54,265.60 being the payment in terms of Indenture of Further Charge and Modification dated 12.9.1969.

we are sorry to inform you that we have not yet received payment as Security Deposit for the floors already handed over to you. As such, you are requested to kindly inform the department concerned for the payment of Security Deposit."

18. In this regard, we may notice the relevant clauses in the original agreement dated 21.11.1968. There is reference to loans advanced or to be advanced by the Lessee (appellant) to the respondent remaining unpaid entitling the lessee to deduct 50% of the monthly rent and appropriating the same to the satisfaction of the loan with interest. In other words, apparently the lessee (appellant) advanced money. The building was to be constructed. The appellant which advanced money to be inducted as tenant, was liable to pay rent. The parties agreed that 50% of the rent need not be paid to the landlord (respondent) and it could be appropriated towards the loan or loans with interest. Clause 8 of the agreement contemplated that the appellant will deposit to the account of the respondent a sum of Rs.1,68,300/- which is equivalent of three months' rent together with air conditioning and service charges. The amount was to be held as security deposit and to be refunded to the appellant without interest on the termination of the period of the lease or determination earlier. In regard to the 2nd, 3rd and 4th floors, clauses 17, 18 and 19 may be noticed.

"17. The Lessor shall complete construction of the second floor in all respects, make it fully equipped with all electrical and sanitary fixtures and installations and air-conditioned and hand over the same to the Lessee immediately upon expiration of six months from the date hereof. With the making over possession of the second floor to the Lessee the Lessor shall also arrange for providing space of accommodation to the Lessee sufficient for parking 20 curs in a convenient place to be selected mutually by the Lessor ·and the Lessee.

18. The Lessor complete construction of the third floor in all respects and make it fully equipped with all electrical and sanitary fixtures and installations and airconditioned and handover the same to the Lessee immediately upon expiration of eight and a half months from the date hereof and with the making over possession of the third floor to the Lessee the Lessor shall also arrange for providing space or accommodation to the Lessee sufficient for parking 10 more cars in the convenient space to be selected mutually by the Lessor and the Lessee.

19. The Lessor shall complete construction of the Fourth floor in all respect and make it fully equipped with all electrical and sanitary fixtures and installations and airconditioned and hand over the same to the Lessee immediately upon expiration of eleven months from the date hereof and with the making over possession of the fourth floor to the Lessee the Lessor shall also arrange for providing space or accommodation to the Lessee sufficient for parking 10 more cars in a convenient place to be selected by the Lessor and the Lessee mutually..."

19. In other words, under the said agreement, in regard to the 2nd floor, the respondent-Lessor undertook to hand over possession to the Lessee upon the passage of six months from the date of the agreement. It was also obliged to make space for parking. Likewise, in Clause 18, the possession was to be handed over immediately upon the expiration of eight and half months.

20. Clause 19 provided for making available the 4th floor immediately after expiration of eleven months from the date of agreement dated 17.11.1968. Clause 21 provided for complying with the schedule for handing over possession and resultantly, making the respondent liable for penalty or damage settled at 10% of the monthly rent *inter alia*. Clause 22 makes it clear that the respondent was to complete the construction of the entire building (multi storey building) within 3 years from 17.11.1968.

21. In the Supplemental Agreement, there were certain changes by way of additional rights being created in favour of the appellant. Clause 8 of the original agreement stood modified, in that, in place of the liability of the lessee for Rs.1,68,300/-, as already noticed, it is provided that a sum of Rs.1,64,462.40 was to be paid in three equal instalments. The first of such instalment was to be paid when the possession of the 2nd floor was given. Second instalment was to be paid when possession of the 3rd floor was given. The third instalment was to be paid when possession of the 4th floor was given. Rs.9900/- was payable in connection with guest house. It is in light of this clause that the Exhibit 2 letter dated 16.9.1969 must be appreciated. In other words, the said letter would indicate that in terms of the agreement, as 2nd and 3rd floors stood handed over, the respondent was insisting for payment of the security deposit, the appellant was obliged under the agreement (clause 8) as modified in the supplementary agreement to pay to the respondent. No doubt, the case of the appellant would appear to be that the possession was not handed over in total compliance of the agreement and the attendant facilities were not still made available.

22. We would think that the findings rendered by the High Court is a plausible view and we would, therefore, take the view that possession of 2nd and 3rd floors was handed over on 17.09.1969 and 4th floor stood handed over on 04.11.1970.

Point No. 3: - Whether the appellant is a monthly tenant from November, 1969?

23. The next question which would arise is whether the appellant should be treated as a monthly tenant for the reason that a formal registered deed was contemplated. The agreement dated 17.11.1968 as also the construction of the premises was not completed.

24. We are of the view that the contention that the appellant should be treated as a monthly tenant even from the very beginning is without any merit. Accepting such a stand would in the first place run counter to the written statement filed by the appellant. In the written statement it is inter alia stated as follows:

"..All the terms and conditions of the lease were finalized and set out in the document described as agreement for lease dated 21st November, 1969. The document envisaged that the possession would be given to the defendant upon completion of the building. The period of lease was to be computed from the date of delivery of possession. The said document dated 21st November, 1968 constituted the actual demise of the property and operated as deed of lease. Since the Plaintiff and the defendant treated the said document dated 21st November, 1968 as deed of lease as modified by the Supplementary deed dated 12th September, 1969, neither the Plaintiff nor the defendant insisted upon execution of a formal deed of lease as requisite stamp duty as applicable to lease had been paid and the said documents had been registered…"

(Emphasis supplied)

25. The agreement dated 12.9.1969 is admittedly a registered document. We do not find any force in law or on facts to permit the appellant to contend that the appellant be treated as a monthly tenant since 1968. We have noticed the stand taken by the appellant that neither the appellant nor the respondent insisted upon execution of a formal deed of lease. The requisite stamp was paid. Thus, the lease for 21 years came into being. The period of the lease is to be calculated from the date when the possession was handed over. We have although found that possession, in fact, was handed over on the dates when it is handed over as found in the impugned judgment. The cases of the appellant is also in the teeth of the correspondence dated 21.08.1990 and 03.11.1990, *inter alia*.

Point No. 04: - Whether there was a prior determination of the lease of 21 years by the respondent, if so, whether the appellant is entitled to protection of the Tenancy Act?

26. The next contention raised by the appellant is that in the development in the year 1977, the respondent put an end to the lease dated 17.11.1968 and transformed the appellant into a monthly tenant and what is more relevant, it entitled it to the benefits under the West Bengal Tenancy Act. This argument is based on the notice dated 12.12.1977 issued by the respondent by which according to the appellant, the lease was terminated. According to the appellant, the matter did not stop with the mere issuance of the notice. Parties went to court. The respondent filed O.S. No. 20/1978. The appellant also filed a Suit.

27. A settlement took place between the parties on 05.06.1980. The minutes of the meeting dated 05.06.1980 read as follows:

"Minutes of the meeting held between Mis. Indian Oil Corporation Ltd. (Tenants) And M/s. Sudera Enterprises Pvt. Ltd. (Landlord) In respect of the office premises at 1, Shakespeare Sarani, Calcutta. - 71 under occupation by Indian Oil Corporation Ltd., Eastern Region.

PRESENT

Shri R. M. Basrur:	GM (P), IOC, HO
Shri G. S. Pandya:	FC, IOC, HO
Shri S. C. Ghose :	GM, Eastern Region
Shri M. B. Ramgadia:	RPM, Eastern Region
Shri D.B. Puri :	Secretary, IOC, HO

On behalf of the landlord, Shri S. Rampuria, Shri M. Jha and Shri B.S. Agarwal were present.

The meeting was hold in Bombay at 10:30 AM on 5th June, 1980 in Shri Basruria Cabin.

1. As per Shri Rampuria, the main irritant between the parties for a very long time has been the non-settlement of air-conditioning charges consequent time notified by the Calcutta Electricity Supply Corporation (India) Ltd. It was stated that their company have forwarded to IOC at various points of time the rise as and when notified by the C.E.S.C. Similarly, service charges which are subject to osculation with increase in electricity charges has not been settled for a long time. As per the lease agreement, the osculation is provided as under: -

"The charges for the electricity to be consumed for working the air-conditioning machines and the said lift to be used by the Lease exclusively shall be borne and paid by the Lessors. If at any time in future the rate of charge per unit of electricity consumed JS increased. the lessee shall pay such increased charges or differences, the disagreement between the Lessee and the Lessor in fixing the proportion the opinion or decision of the Lessor will be final and the Lessor shall accept the proportion to be fixed by or on behalf of the Lessee".

2. The second, point was on account of amount approximately to Rs.83,388.53 recovered as liquidated damages from them on account of late possession of three floors. This amount is subject to verification.

3. It was stated that the amount found due to them should be paid with interest.

4. On behalf of IOC, the corporation out that in the present conditions of load-shedding consequent power shortage, particularly in Calcutta, the corporation intends to put up a Generator for which they nee the help of the landlord by way permission to do so and also providing space for putting up the same.

5. The matter was discussed at length in the morning session and various points expressed by both the parties were taken into account and considered by both the parties. The parties, thereafter adjourned to most again in the afternoon with their considered opinion n the matter.

6. In the second session in the afternoon, the following formula was agreed subject to: -

(i) The Board's approval of the Board of Directors of IOC;

(ii) That all pending disputes will stand settled and that the parties will have no other claims against each other for the past on any account whatsoever;

(iii) The cross suits pending from each side will be withdraw immediately on implementation of these arrangement are delayed beyond three months from the date the parties will be free to extend time for implementation or act otherwise as they deem fit.

(iv) This is, however, without prejudice to the landlords right to obtain enhancement of rent, if any, as permissible under the law applicable.

7. The conclusions were as follows: -

(i) In interpretation of the escalation clause for air-conditioning charges, the Corporation agreed offer on the basis that the electricity component of the airconditioning charges of 30 paise per sq. ft. per month will be taken as 1.25 unit per sq.ft per month of the so determined 30 paise air-conditioning charges. Landlord agreed to this in final settlement of their claim for increase in the air-condition charges.

(ii) The Corporation would be willing to refund a sum of Rs. 83,388.53 which was recovered by the Corporation as liquidated damages on account of late possession of the three floors, on clear understanding that the landlord will withdraw his counter claim of rent amounting to Rs. 4,76,371.14 for the 95 period from 15-091969 to 4-11-1970. The amounts are subject to verification.

(iii) The Corporation would further be willing to refund the several sums totaling to Rs.20,392.03 which were deducted by the Corporation out of the rent, service charges and air conditioning charges at various points of time. The amount is subject to verification.

(iv) No interest shall be payable by IOC on any of the amount payable in terms of para (i), (ii) and (iii) above.

(v) with regard to IOC's request for space on the ground floor for setting up a generator, M/s. Sudera Enterprises Pvt Ltd. agreed to provides space (already in IOC's occupation) in the car parking area on ground floor sufficient enough to install generator. IOC agreed that in lieu of the space to be provided by M/s. Sudera Enterprises, ICC will provide to M/s. Sudera Enterprises equal space of the car parking area in front. M/s. Sudera Enterprises will extend all cooperation to enable IOC connect the generator to IOC's electrical circuit as well as electricity· supply meter etc.

8. It is understood by both the parties that in future both the parties as will cooperate and the conditions of air conditioning and other facilities like lift and others will run properly to the benefit of the both. For this purpose, as the landlord has suggested, the air distribution system (i.e. ducting and false ceiling) located in the floors occupied by IOC will have to be modified at the cost of IOC, whereinafter it is agreed by the landlord that the temperature of the premises will be maintained at 78ºF ± 2ºF.

9. On the service charges, it was agreed that the earlier claim of Rs. 0.06 unit per sft. per month will be the basis for the element of electricity consumption.

10. It was also agreed by the landlord that one bigger size lift will be exclusively given to the corporation besides the use of service lift in lieu of the existing arrangement."

28. In order to appreciate the point, before we turn to the pleadings, we may notice the following correspondence between the parties. On 21.08.1990, the appellant wrote to the Solicitors. It, inter alia, reads as follows: -

"Under the Agreement of Lease dated 21/11/1968 executed by and between M/s Sudera Enterprises (P) Ltd. (The Lessors) and M/s Indian Oil Corporation Ltd. (the Lessee) which is for a period of 21 years commencing from the date of handing over possession to the Lessee i.e., 4th Nov., 1970 we are entitled to continue in occupation of the leased premises upto 3rd November, 1991."

We may also notice the following contentions inter alia:

"You may however bear in mind that it is covenant in the agreement of lease that so long as any loan is outstanding against them, they cannot determine the lease. Therefore, due care has to be taken that while releasing the Corporation's charge over the property we do not expose ourselves to any threat or coercion which may affect our peaceful occupation of the premises during the term of the lease and even thereafter, if required, in accordance with the agreement and/or the law."

29. Next, we may notice the communication by a letter dated 19.10.1990 sent by the respondent to the appellant.

"SUDERA

Ref:01:001:0002:1520:10 OCTOBER 19,1990.

Indian Oil Corporation Limited, 1, Shakespeare Sarani, Calcutta-700071.

Dear Sirs/

Re: 2nd / 3rd and 4th Floors of premises known as Airconditioned Market - being No. 1, Shakespeare Sarani, Calcutta - 700 071.

Please refer to the Registered Agreement for Lease dated 21st November/ 1968 and the Registered Supplemental Agreement for Lease dated 12th September, 1969.

The possession of the 2nd and 3rd Floors was delivered by us and taken by you on the 12th September/ 1969 and that in relation to the 4th Floor was delivered by us and taken by you on the 18th December, 1969. The agreed period of Lease of 21 years in relation to the 2nd and 3rd Floors has expired by efflux of time on the 11th September, 1990 and that in relation to the 4th Floor such agreed period in due to expire by efflux of time on 17th December, 1990.

Consequently, we became entitled to peaceful and vacant possession of the 2nd and 3rd Floors on the expiry of 11th September, 1990. Will you please let us know when you propose to deliver possession of the 2nd and 3rd Floor. We shall appreciate a line in confirmation that you will deliver possession of the 4th Floor on the expiry of the agreed term on the 17th December/ 1990.

We have enjoyed a warm and cordial relationship of land-lord and tenant over two decades. We understand that your huge office complex in South Calcutta is nearing completion where you propose shifting. We look forward to hear from you in the matter immediately.

This is without prejudice to our rights and contentions.

Thanking you,

Yours faithfully
for SUDERA, ENTERPRISES PVT. LTD.,
(B. S. BAID)
DIRECTOR"

30. The appellant sent the communication by a letter dated 03.11.1990 which reads as follows: -

"INDIAN OIL CORPORATION LIMITED 1, SHAKESPEARE SARANI, CALCUTTA- 700 071 In reply, please refer to:

P&A/ER/1841

3rd November, 1990

Messrs, Sudera Enterprises Private Ltd.

1, Shakespeare Sarani

Calcutta- 700 071

Dear Sirs

Re: 2nd, 3rd and 4th floor of premises No. 1, Shakespare Sarani, Calcutta.

Kindly refer to your letter No.

01:001:0002:1520:10 of the 19th October, 1990.

We may mention that possession of the 2nd, 3rd and 4th Floors were delivered to us on 4th November, 1970 and not on 2nd September, 1969 as stated in your letter. The period of the Lease has therefore not yet expired and the question of delivering possession at this stage does not arise.

Possession of the 2nd, 3rd and 4th Floors of premises No. 1, Shakespeare Sarani, Calcutta, will be delivered to you in accordance with law.

Yours Faithfully,
FOR INDIAN OIL CORPORATION LTD.
(MARKETING DIVISION)
DY. GENERAL MANAGER, (PERSONNEL)
Regd. Office: G-9, Ali Yabar Jung Marg,
Bandra (East), Bombay- 400 051 (India)
Regional Office: 1, Shakespeare Sarani,
Calcutta-700 071."

31. Next, we notice letter dated 09.11.1990 sent by the respondent to the appellant.

November 9,1990

"The Indian Oil Corporation Ltd.

1, Shakespeare Sarani,

CALCUTTA- 700 071

Dear Sirs,

Re: Second, Third and Fourth Floors of Premises No. 1 Shakespeare Sarani, Calcutta.

We thank you for your Letter No. P&A/ER/1841 dated the 3rd November, 1990 in reply to our letter No.01 :001:0002:1520:10 dated the 19th October, 1990.

We reiterate and maintain that the possession of the 2nd and 3rd Floors were delivered to you on the 12th September, 1969, and the possession of 4th Floor was delivered to you on 18th December, 1969 and not on 4th November, 1970 as alleged.

According to us, the Lease has expired by efflux of time and we are entitled to receive and you are liable to make over possession of the 2nd and 3rd floors in your occupation to us. In respect of the 4th Floor the lease is due to expire on 17th December, 1990, and you are liable to make over possession to us on the expiry of the lease.

You are aware of the astronomical increase of prices on all counts. You are also aware of the present prevailing market conditions as to rent service and Air-conditioning charges.

For the interim period from September, 1990 in respect of 2nd & 3rd floors, until you deliver possession of such floors in your occupation on the alleged expiry of the Lesse which according to you would be in November 1991, we request you to pay us mesne profits or occupation charges having regard to the prevailing market conditions. According to us the prevailing rent, service and Airconditioning charges for similar or nearly similar property in the locality would be Rs.31/- per sq. ft.

On account of the cordial relationship between us, we shall be obliged if you consider and let us have your agreement for payment of the mesne profit or occupation charges at the aforesaid rate or such other reasonable rate as we may arrive at mutually and agree, for which we hereby offer to sit across the table and discuss the same with you.

We look forward to hear from you at the earliest.

Yours faithfully,
For Sudera Enterprises Pvt. Ltd .
Sd/-
DIRECTOR"

32. The respondent writes on 02.01.1991, with reference to a letter dated 11.12.1990, which is as follows, *inter alia*.

"Ref: 01:001:0002:1520:16 January 2, 1991

Indian Oil Corporation Ltd. 1, Shakespeare Sarani, Calcutta - 700 071

Dear Sir,

Re: 2nd, 3rd and 4th floor of premises

No.1, Shakespeare Sarani, Cal- 700 071

We acknowledge receipt of your letter dated 11th December, 1990 and note its contents with utter surprise.

At the outset we repeat and reiterate the statements and contents of our earlier letters to you and state that the same are true and correct and deny and dispute all allegations to the contrary.

Without prejudice to our rights and contentions and without in any manner admitting any of the allegations contained in your instant letter, we are accepting the cheques for a total sum of Rs.4,41,896.58 (Rupees four lacs forty-one thousand eight hundred and ninety-six and paise fifty-eight only) as an on-account payment of our dues in relation to your occupation of the second and third floors.

This is strictly without prejudice. All allegations contrary to the aforesaid are denied and disputed.

Thanking you,

Yours faithfully
For SUDERA ENTERPRISES PVT. LTD.
Sd/-
(P.N. TICKOO)
CHIEF EXECUTIVE"

33. Next, we notice in communication letter dated 04.11.1993 sent by the appellant to the respondent.

"Ref: DGM (HR)/1

Date: 04.11.93

M/s. Sudera Enterprises (P) Ltd.

1, Shakespeare Sarani

Calcutta-700 071

Sub: Our tenanted office area at 2nd, 3rd and 4th floors of Premises No.1, Shakespeare

Sarani, Calcutta- 700 071

Dear Sir,

We have received your letters dated 20th September, 1993 on 1.10.93 and dated 8.10.93 on 12.10.93.

We have noted that the proposal of the Flat Deleasing Committee conveyed to you by Shri Janakraj Gupta, has not been accepted by you and you want to keep your claim for alleged mesne profit alive. We make it clear that the suggestion conveyed by you is not acceptable to us. The premises in question is still required by us and our valuable articles and assets are still lying therein. We shall pay you rent at the last rate paid so long we continue in the possession of the aforesaid premises and that is all that we are obliged to pay to you and you are entitled to get from us. There is no scope for any genuine or real claim for mesne profits/damages and the question of arbitration does not arise.

The rights and obligations are governed by the West Bengal Premises Tenancy Act. It is totally incorrect to allege that the Corporation is in possession of the premises without any authority.

We take strong obligation to your appointing a date for taking over possession as you have purported to do by the above letter. We are shocked and surprised to learn that you had actually sent your man to take over forcible possession of the tenanted premises but you failed. We never gave you notice that we would quit the tenanted area on October 1, 1993. This wrongful act of yours is serious and pose a serious threat of damage and loss of our valuable articles lying in the tenanted area. Please do not repea1 any attempt of taking over forcible possession.

We refer to our earlier correspondences and we reiterate that after the expiry of the lease period we have been holding over as a monthly tenant at a rent of Rs.2, 15,460. 77. The monthly rent is being regularly paid to you. We are, as conveyed to you, not liable to pay air-conditioning charges.

We hope that we have clarified the matter and there will be no misunderstanding any further.

We, however, do not appreciate your objective to get back possession of our tenanted area and at the same time to keep alive your unreasonable and illegal claim for mesne profits/damages. Your stand should also be fair and reasonable as ours.

Yours faithfully,

F/lndian Oil Corporation Ltd.

Sd/

(S. Basu)

Dy. General Manager (HR)

34. On 02.05.1994 the respondent refers to certain discussions and notes. It was agreed in the discussions that the appellant would hand over the lease property inclusive of the furnitures, fixtures, fittings thereon, on as is where is basis, which was also agreed to be purchased by the respondent. It was allegedly agreed that the claim for mesne profits would be looked into by the chairman of the appellant and therefore the respondent would not insist on reference to arbitration. By letter dated 24.05.1994 the appellant wrote as follows:

"WITHOUT PREJUDICE

No.: HO:LAW:REC:1476:PT 24th May, 1994

Mis. Sudera Enterprises Pvt Ltd.

1, Shakespeare Sarani, ·

CALCUTTA- 700 001

Dear Sirs,

We refer to your letter dated 2.5.94. It is correct that discussions were held on 27.4.94. It is not however correct to say that any question of delivery of possession on the ground of expiry of the lease was raised or discussed. IOC. has repeatedly pointed out to Sudera that IOC enjoys the status of a monthly tenant governed by the West Bengal Premises Tenancy Act, 1956. Be that as it may, with regard to the text of the discussions recorded in your letter our comments are as follows:

Clauses (i), (ii) and (iii) are substantially correct save and except that the possession is to be taken over by you immediately and the claim for proportionate share of

Corporation taxes however will be ascertained on production of proof and verification by IOC in regard to tax liability. We may therefore, request you to produce immediately the necessary documentary proof to evidence the extent of the tax liability to IOC, Eastern Region.

So far as clauses (iv) and (v) are concerned, it was discussed that Chairman will first decide the question of maintainability of your claim for mesne profits.

IOC has been consistently contending by several letters to you that there can be no question of mesne profits in this case. If the Chairman decides that the claim for mesne profits is maintainable in law after hearing the view points of both sides in the matter only then he will go into the question of the assessment of the amount thereof.

You were kind enough to say that you would accept the advice of the Chairman on every respect as final and binding. At the same time you will appreciate that no agreement for arbitration agreement was concluded or entered into. A draft was never finalized and no agreement for arbitration was ever finally prepared nor signed by any party because talks for arbitration fell through at the stage of discussions.

The appropriate Deed of Re-Conveyance of Mortgage will be registered by IOC immediately after the possession is taken over by you.

We may therefore request you to depute your representative to take over possession of the property including· furniture, fittings, and fixtures etc. in consultation with Executive Director of our Eastern Regional Office at Calcutta on the above basis.

Yours faithfully

for INDIAN OIL CORPORATION LIMITED

Sdl-

(G.R. RAMACHANDRAN)

DY. GENERAL MANAGER (LAW)"

35. Now, we may refer to the relevant pleadings contained in the written statement filed by the appellant. They are as follows: -

"Paragraph 7. With reference to paragraph 11 and 12 of the plaint, it is stated that the Plaintiff by a Notice dated 7th December, 1977 had determined the tenancy and called upon the Defendant to forthwith vacate the three floors of the said premises. The Defendant did not vacate. Thereafter, the Plaintiff filed the suit No.20 of 1978 in the Hon'ble High Court at Calcutta claiming a decree for possession against the Defendant. The said suit No.21 of 1978 was ultimately not pressed and was dismissed on 20th June, 1986. The Defendant contained to occupy the said three floors of the said premises as before and paid monthly rents and other charges as before to the Plaintiff and the Plaintiff continued to accept the same month by month. Thereafter, by the letter dated 19th October, 1990 the Plaintiff again called upon the Defendant to make over. possession of the said 2nd, 3rd and 4th floors of the said premises to which a reply was given by the Defendant on 3rd November, 1990. Since the possession of the said 2nd, 3rd and 4th floors of the said premises was delivered to the Defendant on 4th November, 1970 the period of 21 years of the said lease had not expired on 19th October, 1990 and the Defendant had no obligation to give possession. It is denied that the contention raised in the letter dated 3rd November, 1990 are wrongful, it is denied that by the said letter dated 3rd, November, 1990 the Defendant gave notice to quite on the expiry of the period of 21 years as alleged."

"Paragraph 8. With reference to paragraph 13 of the plaint it is stated that the period of 21 years expired on 4th November, 1991 and all allegations to the contrary are denied and disputed."

36. In paragraph 10, the appellant purported to offer reasons for delay in vacating.

37. In paragraph 11, it is, inter alia, stated with reference to paragraph 15 of the plaint that the contractual tenancy of the appellant stood terminated on 31st May, 1994 and possession was delivered on 31st May, 1994.

38. In answer to paragraph 16 of the plaint, it is stated as follows in paragraph 12.

"Paragraph 12. With reference to paragraph 16 of the plaint, it is denied that the defendant was over in wrongful possession of the said three floors of the said premises as alleged in the said paragraph or at all. Each and all the allegations in the said paragraph are denied and disputed. The defendant was the lessee of the said three floors of the said premises for a term of 21 years with option to determine the said lease and deliver possession before the expiry of the said period of 21 years. The provisions of the west Bengal Premises Tenancy Act, 1956 were applicable and the possession of the defendant of the said three floors of the said premises was protected by the said Act. Alternately, the Defendant was a monthly tenant in respect of the said three floors of the said premises. The defendant has paid monthly rent to the Plaintiff month by month and the Plaintiff has accepted rent and issued rent receipts to the defendant regularly. Such tenancy of the defendant was all along protected and governed by the West Bengal premises Tenancy Act, 1956. No decree for delivery of possession of the said three floors has been obtained by the Plaintiff against the defendant. The Plaintiff purported claim of mesne profit is totally misconceived in law and in the facts of the case."

39. We may also notice Paragraph 13 and Paragraph 16.

"Paragraph 13. In further alternative, Plaintiff has after determination of the tenancy by the Notice dated 7th December, 1977 accepted monthly rent from the defendant month by month and have issued rent receipt and accordingly, the Defendant became a monthly tenant in or after January, 1978. The said tenancy of the defendant was also protected and governed by the provisions of West Bengal Premises Tenancy Act, 1956."

"Paragraph 16. With reference to paragraph 19 of the plaint it is denied that the Defendant was ever in wrongful possession of any of the floors of the said premises after the expiry of 3rd /4th November, 1991 or at all. The defendant was a tenant within the meaning of West Bengal Premises Tenancy Act, 1956 till 31st May, 1994, when possession was delivered back to and accepted by the Plaintiff

as mentioned before. The defendant has not been in wrongful occupation or possession of any portion of the said premises even for a single day. The purported claim for mesne profit as made in the suit is wholly misconceived and not maintainable."

40. The learned Single Judge drew inspiration from the judgment of this Court in ***Pabitra Kumar Roy*** (supra), that when the party allows the lease to run its full course and it cannot thereafter take shelter under the clause for earlier determination to contend that the lease is governed by the 'Tenancy Act'.

41. As far as the case based on the ***Calcutta Credit Corporation Ltd.***(supra), the learned Single Judge went on to find that the appellant continued to remain in possession of the 3rd/ 4th floors till it vacated the same in 1994. It was further found that the parties did not act on the basis of the notice of termination. The cross suits were withdrawn on agreement. The parties decided to refer the question of quantum of mesne profits to be pronounced upon by the chairman. All these facts, it was found, taken together would show that the notice of termination was not acted upon. In regard to this aspect, we may now also notice the findings in the impugned judgment. The Division Bench found that it is not open to a party to set up a new case in departure from the pleadings relying on ***Pabitra Kumar Roy*** (supra). It was found that mere inclusion of a prior determination clause will not alter the character of the lease for a fixed period unless the option is exercised. No evidence on record was found to show that the appellant took steps to exit the lease before May, 1994. In not choosing to exercise the option of prior determination and instead of allowing the lease to run its full course, the appellant cannot take refuge under the 'Tenancy Act'. Dealing with the argument that a fresh tenancy was created after the expiry of the efflux of time, it was found that the appellant had not pleaded such a case and that the respondent had assented to the appellant continuing in possession of the lease premises. The occupation charges were accepted by the respondent without 'prejudice' which did not lead to the creation of a new tenancy. We have found that we see no reason to disagree with the High Court that the term of lease was 21 years from the date on which the three floors in question was handed over. We further found that in regard to the 2nd and 3rd floors, possession must be found handed over to the appellant on 16.09.1969. As far as the 4th floor is concerned, we affirmed the finding of the High Court that possession was handed over only on 04.11.1970. There is also no dispute that the parties namely the appellant and the respondent could determine the lease prior to the expiry of 21 years. It cannot be in the region of dispute that the respondent did issue a notice dated 12.12.1977. The respondent followed it up by filing a suit, C.S. No. 20 of 1978, claiming possession. There was also a cross suit filed by the appellant. We have noticed how both these suits finally came to be compromised. The argument which we are called upon to pronounce on is as follows.

42. It is contended that with the issuance of the notice of termination of the lease by the respondent dated 12.11.1977, the original lease at any rate came to an end. The result of the settlement between the parties would not be to revive the original lease. In other words, upon the issuance of a notice for determination of the lease under Section 106 of the Transfer of Property Act, without anything more, the law operates and the lease is at an end. The effect of the waiver of the notice under Section 113 of the Transfer of Property Act can only be if at all to create a new tenancy. It is in this regard, that the appellant has placed reliance on judgment of this Court in ***Calcutta Credit Corporation Ltd.*** *(supra)*. The judgment was rendered in the said case by a bench of three learned judges. In the said case, after the expiry of the period of the original lease, the tenant

continued to hold over the premises. While so, it is the tenant who served a notice intimating its intention to vacate the premises on 12.08.1953. By a subsequent letter dated 26.08.1953, the tenant purported to resile from the notice and requested that the earlier notice be treated as cancelled. The landlord pointed out that the earlier notice could be withdrawn by mutual consent and the landlord was unable to give his consent. The tenant invoked the Rent Control Act and claimed they were holding over the premises in terms of the Act. The tenant sub-let the premises after it was called upon to vacate the premises. The landlord instituted the suit against the original tenant. There was a consent decree which inter alia declared that portion of the premises was handed over to the landlord and the landlord would have the option to eject the sub tenant. It is thereupon that the suit came to be filed against the sub tenant. This Court proceeded to hold, *inter alia*, as follows: -

"Clearly Section 113 contemplates waiver of the notice by any act on the part of the person giving it, if such an act shows an intention to treat the lease as subsisting and the other party gives his consent express or implied thereto. The law under the Transfer of Property Act on the question in hand is not different from the law in England. Once a 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. It was held in Tayleur v. Wildin [(1867-68) LR 3 Ex Cases 303] that a notice determining a tenancy cannot be withdrawn. In Tayleur v. Wildin [(1867-68) LR 3 Ex Cases 303] an annual tenancy of a farm under a written lease commencing on Lady Day i.e. March 25, was determined by a notice by which the landlord called upon the tenant to quit the farm at the expiration of the current year's tenancy. Before the expiry of the year of tenancy, the arrears of rent were paid up by the tenant, and the notice was withdrawn and the tenant continued in occupation of the farm under the terms of the original agreement. It was held by the court of Exchequer that the tenancy was determined by the notice to quit, and a surety for payment of rent under the original lease was not liable for rent falling due after the expiry of the notice. Kelly C.B., observed that 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 of both. The consent of the parties makes a new agreement, and the rent became, due under a new agreement. In our judgment, that principle applies to the law of landlord & tenant in India. Therefore, on the expiration of the period of notice dated August 12, 1953, the tenancy of Allen Berry stood determined.

(Emphasis supplied)

43. The appellant highlights this judgment. We have noticed that the appellant did refer to this judgment both before the learned Single Judge and the Division Bench. A Bench of two learned Judges in the decision reported in ***Ranjit Chandra Chowdhury v. Mohitosh Mukherjee***[9], was dealing with a suit for ejectment filed against the tenant for default of payment of rent. The matter was considered in light of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. The said act came to be repealed by the 'Tenancy Act' with which we are concerned in this case. The court was dealing with the scope of Section 12(1) and (14) of the Act. Under the said provisions, the prohibition against a decree for possession being granted against tenant did not apply in a case where the tenant had fallen into arrears of rent and had not paid it within the time under the contract. The tenant claimed the protection of Section 14 of the Act which granted power to the court to decree the payment of arrears and allow the tenant to avoid the consequences which otherwise would follow. The contention was that the action of

[9] (1969) 1 SCC 699

the landlord in having accepted the rent on a subsequent date had led to the creation of a new tenancy. The Court inter alia held in these circumstances as follows: -

"8. Mr Bhattacharji on behalf of the tenant contends that the old tenancy was dead after the notice and on acceptance of rent a new tenancy came into existence. The other side contends that by the acceptance of rent, the old tenancy on the old terms continued. Each side has cited a number of rulings. We do not consider it necessary to refer to these rulings or to discuss the question. In Ganga Dutt Murarka v. Kartik Chandra Das [AIR 1961 SC 1067] and in Anand Nivas Private Ltd. v. Anandji Kalyanji Pedhi [AIR 1965 SC 414] (particularly the first at p. 1069), it was held in connection with a statutory tenancy that a landlord accepting rent does not assent to a new contractual tenancy but continues the old tenancy. In Calcutta Credit Corporation Ltd. v. Happy Homes (P) Ltd., [(1968) 2 SCR 20] the subject has been discussed in detail. Under Section 113 of the Transfer of Property Act a notice is waived, by an act on the part of the person giving it showing an intention to treat the lease as subsisting, provided there is the express or implied consent of the person to whom it is given. Here the difficulty is solved by the attitude the tenant took in this case. His case was that the old tenancy revived and continued. According to him, the landlord acquiesced in having the old tenancy continued. If we go by the tenant's own case, it is obvious that the old tenancy with the default continued and the landlord was thus able to use the provisions of Section 12 (1)(i) against the tenant as also the proviso to sub-section (3) of Section 14 of the repealed Act. There were two consecutive defaults and in the period of 18 months there were more than three defaults. The benefit of Section 14 sub-section (1) of the repealed Act is not available to the tenant because of the operation of the proviso to sub-section (3). Further Section 24 of the new Act can hardly assist the tenant. That section is not retropective and will operate from the date on which it came into force. Mr Bhattacharji claimed that it may be taken as a rule of decision or laying down a rule of evidence but we think it impinges upon the substantive rights of landlord and tenants which can only be claimed after the commencement of the Act and not before. The section puts an embargo on any claim based on default in payment of rent when the landlord accepts rent after default and therefore it affects the substantive right of the landlords. According to the accepted canons of interpretation of statutes, a substantive right cannot be taken away retrospectively unless the law expressly so states or there is a clear intendment. There are no express words in the statute making Section 24 retrospective and we fail to see any intendment in it to apply to cases pending on March 31, 1956, when the new Act came into force, and this suit was then pending. If it had been merely a matter of procedure or creating a rule of decision we might have held that the provisions applied to the suit, but that is not the case here. As we said the section creates a change in the substantive rights and therefore must be held to be prospective in operation and not retrospective unless we can gather retrospectivity from the language of the statute or by clear implication in it.

44. A Bench of three learned Judges rendered the decision reported in ***Tayabali Jaffarbhai Tankiwala v. Asha & Co. and Another***[10]. We may notice the following paragraphs: -

"5. In the present case there can be no doubt that the serving of the second notice and what was stated therein together with the claim as laid and amplified in the plaint showed that the landlord waived the first notice by showing an intention to treat the tenancy as subsisting and that this was with the express or implied consent of the tenant to whom the first notice had been given because he had even made payment of the rent which had been demanded though it was after the expiration of the period of one month given in the notice."

"6. It further appears that the rent was sent by the tenant treating the tenancy as subsisting and not as having come to an end by virtue of the first notice. There is another significant fact which shows that it was the second notice which was considered by the landlord to be the effective notice. It was in the notice sent in October 1957 that the landlord, for the first time, raised the ground of personal necessity. In the suit requirement of personal necessity was made one of the main grounds on which eviction was sought. In the first notice which was sent in June 1956 no such requirement or ground

[10] (1970) 1 SCC 46

had been mentioned. It was not open, therefore, to the landlord to say that he did not want to rely on the second notice and should be allowed to base his action for eviction only on the first notice containing the ground of the default in payment of arrears of rent. We are satisfied that the suit of the landlord was rightly dismissed though we have sustained its dismissal on different reasoning."

45. We must pause here and notice the complaint of the appellant. The learned Additional Solicitor General would point out that in the ***Calcutta Credit Corporation Ltd.*** *(supra)* case, the Court had declared the law to be that when there is a waiver of a notice within the meaning of Section 113 of the Transfer of Property Act, the old tenancy is not resurrected. With the issuance of the notice of termination, the lease is determined. With the consent of the parties all that happens is the creation of a new tenancy. It is the complaint of the appellant that properly read the judgment of the later bench of two judges reported in ***Ranjit Chandra Chowdhury*** *(supra)* would show that though reference is made to ***Calcutta Credit Corporation Ltd.*** (supra), the Court proceeded on the basis that the old tenancy was revived and continued on the basis of the stand taken by the tenant himself. It is pointed out that this Court must proceed on the basis of law declared in ***Calcutta Credit Corporation Ltd.*** (supra) and must notice also that the facts persuaded the court to take the view it took in the later judgment.

46. Still further, it is contended that as far as the judgment of the later three judges' bench in ***Tayabali Jaffarbhai Tankiwala*** *(supra)*, it does not refer to the earlier judgment of a coordinate Bench of same strength, namely, ***Calcutta Credit Corporation Ltd.*** (supra) and the law is correctly laid down in ***Calcutta Credit Corporation Ltd.*** *(supra)*.

47. Per contra, the submission of the respondent is that the observations relied upon by the appellant in ***Calcutta Credit Corporation Ltd.*** *(supra)* constitute only obiter. Reliance is placed on the judgments in ***Ranjit Chandra Chowdhury*** *(supra)* and ***Tayabali Jaffarbhai Tankiwala*** (supra) to contend that the waiver does not lead to a new tenancy. In this regard, reliance is also placed on the judgments of the Calcutta High Court reported in ***Sudhir Kumar Paul v. Indu Prova Ghose and others***[11] and ***Khana Lahiri and others v. Suniti Kumar Chatterjee and others***[12]. It is further pointed out that the parties proceeded on the basis that the old tenancy revived. This is evident from the rent being paid in accordance with the lease by the appellant.

48. We have adverted to the stand of the appellant in its written statement. In paragraph 12, the appellant contended that it was a lease for a term of 21 years with an option to determine the said lease before the expiry of said period of 21 years. Immediately thereafter, the Tenancy Act was invoked. Thereafter, it is in the same paragraph, it is contended that the appellant is a monthly tenant. It had paid monthly rent on a month-by-month basis. Such tenancy is protected by the Tenancy Act. Further alternative argument set up is that after determination of the tenancy by notice dated 07.12.1977, the monthly rent being accepted, appellant became monthly tenant on or after January, 1998 and the tenancy was also protected under the Tenancy Act. Now it is necessary to refer to Section 3 of the West Bengal Premises Tenancy Act, 1956. It consists of two sub-sections. Sub-Section (2) was inserted in the year 1965. Section 3 reads as follows:

"3. *Certain provisions of the Act not to apply to certain leases.* — (1) The provisions relating to rent and the provisions of Sections 31 and 36 shall apply to any premises held under a lease for

[11] AIR 76 Cal 274

[12] (2006) SCC Online Cal 248

residential purpose of the lessee himself and registered under the Indian Registration Act, 1908, where—

(*a*) such lease is for a period of not more than 20 years, and save as aforesaid nothing in this Act shall apply to any premises held under a lease for a period of not less than 15 years.

(2) Notwithstanding anything to the contrary contained in sub-section (1) but subject to sub-section (3) of Section 1, this Act shall apply to all premises held under a lease which has been entered into after the commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1965:

Provided that if any such lease is for a period of not less than 20 years and the period limited by such lease is not expressed to be terminable before its expiration at the option either of the landlord or of the tenant, nothing in this Act, other than the provisions relating to rent and the provisions of Sections 31 and 36, shall apply to any premises held under such lease."

49. We understand the case of the appellant from the pleadings as follows:

The lease provided for an option for appellant to determine the lease before the expiry of 21 years. Therefore, though the lease was for a period of 21 years, the lease contained an option to terminate it with the appellant. Therefore, the provisions of the Tenancy Act came into play. It is in further alternative in paragraph 30 that the appellant set up the case of the impact of the notice of termination dated 7.12.1977. It is in support of the said alternative case that the entire debate before the court based on the judgment of this Court in ***Calcutta Credit Corporation Ltd.*** *(supra)* revolved around.

50. We have held that the lease agreement in 1968 along with the supplementary agreement in 1969 did constitute a lease. In Clause 9 of the agreement of lease dated 21.07.1968, it is provided as follows:

"9. That Lessee shall be at liberty to terminate the lease at any time after the expiration of eight years of the terms of 21 years by giving six calendar month previous notice in writing to the Lessor to that effect."

51. We must notice Clause 26 of the said lease. It reads as follows:

"26. In case the Lessee makes default in payment of the rent for three months or otherwise commits breach of any of the covenants or conditions on its part to be observed and performed it shall be lawful (but not compulsory) for the Lessor to determine the Lease and to re-enter the demised premises or any part thereof in the name of the whole and to take possession thereof."

52. The supplementary agreement dated 12.09.1969 added a proviso to Clause 26. It reads as follows:

"PROVIDED HOWEVER that notwithstanding anything contained in the said Agreement of Lease or these presents the Lessor shall not be entitled to forfeit the Lease in respect of the demised premises or any part thereof or to determine the same or to re-enter thereon so long as any amount of the loan or loans advanced and agreed to be advanced and the amount of Interest thereon are outstanding and due to the Lessee."

53. If thus Clause 26 read with the *proviso* is considered, right to forfeit and to determine the lease stood conditioned by the requirement of the payment of the amounts to the appellant under the mortgage. There is no pleading at all in this regard. The notice of termination by the respondent is not tendered in evidence as pointed out by the respondent. We have noticed the contents of the letter dated 08.03.1990 which clearly indicate that the appellant had in mind the proviso to Clause 26 which we have hereinbefore referred to. In paragraph 12 of the written statement, the case which was set up was that under the terms of the lease agreement and supplementary agreement,

the lease has been made expressly terminable before its expiry at the option of the appellant. This appears to be the case with reference to Clause 9.

54. As regards the case based on the effect of the waiver within the meaning of Section 113 of Transfer of Property Act, we notice the following aspects. The notice of termination is itself not produced. In this regard, we must notice that the judgment of this Court in ***Calcutta Credit Corporation Ltd.*** *(supra)* was rendered under Section 113 of the Transfer of Property Act. Waiver of forfeiture within the meaning of Section 111 (g) of the Transfer of Property Act is provided in Section 112 of the Transfer of Property Act. The considerations relevant for the operation of the Section 112 is different from that of Section 113 of the Transfer of Property Act. Since the notice itself is not before the Court, things are not clear. There is no adjudication about the notice of termination in the earlier suit. We have also noticed the *proviso* to clause 26. We have seen the stand of the appellant even in the year 1990 as made clear from the letter dated 21.08.1990 addressed by it to its solicitors. There is no case as to when the appellant stood paid. This is also relevant for the reason that the notice of termination referred to by the appellant dated 07.12.1977 if not legally permissible at the time when it was issued, it would not in law have the effect of determining the lease which was for a period of 21 years. In the circumstances of this case, we find no merit in the case of the appellant based on the decision of this Court in ***Calcutta Credit Corporation Ltd.*** (supra) as regards the effect of waiver under Section 111 of the Transfer of Property Act resulting in the creation of the new tenancy.

55. As regards the case based on Section 3(2) of the Tenancy Act, namely, the presence of an option with the appellant /lessee to terminate the 21 years lease immaturely, it is no doubt true that Clause 9 did give an option to the appellant to terminate lease after the expiry of 8 years and before the period of 21 years expired. It is here that the decision of this court in *Pabitra Kumar Roy (supra)* needs to be considered. In the said case, registered lease was dated 13.01.1969. The lease commenced from 01.01.1969 and was for a period of 21 years. The lease, in fact, contained a clause which permitted the parties to terminate the lease prior to its expiry. On 29.09.1972, the lessor determined the lease under Section 111(g) of Transfer of Property Act. What is more, a suit was filed against the lessee for eviction which was decreed on the ground of default in paying rent. The lessee went ahead and successfully invoked Section 114 of the Transfer of Property Act and on payment of the rent, he was allowed to continue. Thereafter, on completion of the period of 21 years, the suit for ejectment was filed. It is in this case that the tenant sought shelter under Section 3 of the Tenancy Act. It was the case of the tenant that the tenant was protected under the Tenancy Act, in view of the prior determination. We need only notice paragraphs 15, 19, 20 and 22.

"15. On a construction of the provisions of sub-section (2) of Section 3 of the 1956 Act, we are unable to subscribe to the view expressed by the High Court. The intention of the legislature in amending Section 3 appears to have been to prevent landlords from using long-term leases as a camouflage for excluding them from the protection of the 1956 Act and yet retaining the right of prior determination. Sub-section (2) appears to have been enacted to prevent such abuse, inasmuch as, once the lease was determined before the fixed period, it attracted the proviso thereof.

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19. The decision in *Savita Dey case* [(1995) 6 SCC 274 : AIR 1996 SC 272] makes the position clear that the mere inclusion of a clause for prior determination of a lease, which is otherwise for a fixed period of more than twenty years, will not *ipso facto* bring it within the exception contemplated

in the proviso to sub-section (2) of Section 3 of the 1956 Act. The inclusion of such a clause may be taken by the tenant as a defence in the event the option under the said clause is exercised. Such a defence was not set up by the lessee in the earlier suit when it was available to her and the same is not available to her after the lapse of the fixed period of the lease.

20. As was indicated by the Calcutta High Court in *Mahindra & Mahindra case* [(1989) 93 CWN 773 : AIR 1989 NOC 200 (Cal) : (1989) 1 CHN 1] a lease for a fixed period does not cease to be so by the inclusion of a clause entitling either the lessor or the lessee to determine the lease prior to its expiry, unless such option is actually exercised.

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22. The law is clear that lease deeds for periods of twenty years or more would stand excluded from the operation of the 1956 Act except in matters relating to Sections 31 and 36 thereof, unless the same were terminable before their expiration at the option either of the landlord or of the tenant. In other words, if such a lease is terminated before its fixed period expired, the proviso to Section 3(2) would be attracted as a defence against eviction. If, however, the lease was allowed to run its full course, both the lease and the conditions contained therein would come to an end and would cease to be operative and the clause for prior determination would no longer be available as a defence against eviction."

56. The Court also found that the tenant was estopped having submitted to the jurisdiction of the court under the Transfer of Property Act by seeking relief under Section 114 of the Transfer of Property Act. Since the Court has also relied upon the judgment of this Court in ***Savita Dey v. Nageswar Majumdar and Another***[13], we may advert to the same. In the said judgment, the Court was dealing with the lease which commenced on 01.07.1964 and ended on 30.06.1985. It was found that since lease was executed prior to the amendment inserting subsection (2) in Section 3 in 1965, the tenant could not succeed on the basis of the pre determination clause. We may also notice the following discussion:

"8. Additionally, in the lease in hand, neither the landlord nor the tenant had reserved to himself the unfettered right of termination of the lease during the period of 21 years. In the first place, as are the facts pleaded, neither of them has ever asserted the said right of premature termination. Perhaps no occasion arose. Secondly, the question of the suggested precariousness of the tenure did not arise in the circumstances of the case because the lessee/tenant had fully enjoyed the period of lease of 21 years. The heart of the matter is that the tenancy was never terminated either by the landlord or by the tenant during the period of the lease."

57. In this case it is no doubt true that there is pre-determination clause which gave an option to the appellant to determine the lease after a period of 8 years. From the evidence and the stand taken by the appellant as emerging from the documents, it is clear that the appellant continued for the full length of 21 years in terms of the lease. Its possession was never ruffled. The appellant also filed a suit. During the entire period after the execution of the deed in 1968 and the supplementary lease deed in 1969, it would appear that till the period of 21 years ran out, appellant never took up the case based on its right under the West Bengal Premises Tenancy Act in view of the option it had to determine the lease under Clause 9. The presence of the clause in question is not to be confused with the issue relating to the effect of the notice dated 07.12.1977 purported to have been sent to the respondent which we have separately dealt with. Therefore, in terms of *Pabitra Kumar Roy* (supra), the appellant may not succeed on the strength of the option it claimed under the agreement to lease.

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[13] (1995) 6 SCC 274

IS LETTER DATED 19.10.1990, A NOTICE UNDER SECTION 106 OF THE TRANSFER OF PROPERTY ACT?

58. The appellant would contend that there was a pre mature determination of the lease vide letter dated 19th October, 1990 and this would result in the occupation of the appellant from the said date being as a monthly tenant and, therefore, the Tenancy Act applied. It is the case of the respondent that this contention was not raised before the courts below and the contention which was raised before the High Court was that it became the monthly tenant in 1991 on the basis of holding over of possession after the expiry of the lease. The case of the respondent further is that it must be understood that the letter dated 19.10.1990 was one only enquiring whether the appellant would deliver possession of the 2nd and 3rd floors. The letter adverts to the lease expiring by efflux of time. We are of the view that there is merit in the contention of the respondent. We cannot on the terms of the letter dated 19.10.1990 hold that it amounted to termination of the lease. We have found that there was a lease for a term of 21 years commencing in the case of the 2nd and 3rd floors from 17.09.1969. Therefore, the period of 21 years had already run out by the time the letter dated 19.10.1990 came to be issued. In other words, it was a case of a lease qua the 2nd and 3rd floors which had expired by efflux of time, in September, 1990. We reject the argument of the appellant in this regard.

MESNE PROFITS: WAS THE POSSESSION OF THE APPELLANT WRONGFUL ON THE EXPIRY OF THE LEASE?

59. Section 111(a) of the Transfer of Property Act, 1882 provides that the lease is determined by efflux of time. On the expiry of the lease, the lease ends. As to its effect, we may only notice the following statement in the decision reported in *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.*[14]:

"11. Under the general law, and in cases where the tenancy is governed only by the provisions of the Transfer of Property Act, 1882, once the tenancy comes to an end by determination of lease under Section 111 of the Transfer of Property Act, the right of the tenant to continue in possession of the premises comes to an end and for any period thereafter, for which he continues to occupy the premises, he becomes liable to pay damages for use and occupation at any rate at which the landlord could have let out the premises on being vacated by the tenant.…"

60. A tenant continuing in possession after the expiry of the lease may be treated as a tenant at sufferance, which status is a shade higher than that of a mere trespasser, as in the case of a tenant continuing after the expiry of the lease, his original entry was lawful. But a tenant at sufferance is not a tenant by holding over. While a tenant at sufferance cannot be forcibly dispossessed, that does not detract from the possession of the erstwhile tenant turning unlawful on the expiry of the lease. Thus, the appellant while continuing in possession after the expiry of the lease became liable to pay mesne profits.

LIMITATION: WHETHER THE SUIT IS BARRED IN RELATION TO MESNE PROFITS BEYOND 3 YEARS OF THE SUIT?

61. Order VII Rule 6 of the CPC reads as follows:

"VII (6). Grounds of exemption from limitation law. —

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed:

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[14] (2005) 1 SCC 705

Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint."

62. A perusal of the plaint filed would, *inter alia*, reveal, the following pleading:

"24 The defendant expressly and/or impliedly admitted the existence of the jural relationship between the parties by its letter dated 24th May, 1994. By reason of the aforesaid and by reason of the acknowledgement contained in the letter dated 24th May, 1994 the plaintiff states that no part of its cause of action is barred by laws of limitation,"

Thus, the case of the appellant was that based on the admission and acknowledgment in letter dated 24th May, 1994, no part of the cause of action was barred.

63. In the Trial Court, the learned Single Judge framed an issue as to whether the Suit is barred by limitation. The Judgment would reveal that the plea of limitation was not pressed. The learned Single Judge also went on to find that the Suit is within the period of limitation. Before the Division Bench, the appellant did not raise the plea of limitation. It is in this Court that the plea is sought to be resurrected. The plea is based on the case that a Suit of mesne profits is governed by Article 51 of the Limitation Act, 1963, which reads as follows:

"

	"Description of suit	Period of limitation	Time from which period begins to run
51.	For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years.	When the profits are received.

"

The suit was laid on 10.04.1995. The contention is that for the period beyond 3 years before the date of the suit, the suit would be barred.

64. The case of the respondent is that the plea of limitation was not pressed before the learned Single Judge and was also not taken up before the Division Bench. It is further contended that a claim for mesne profits involves a liability, which accrues on a day-to-day basis. In this regard, attention is drawn to ***Ram Karan Singh and others v. Nakchhed Ahir and others***[15], which has been referred to by this Court in the Judgment reported in ***Raptakos Brett and Company Limited v. Ganesh Property***[16] and we may notice only paragraph-21 of **Raptakos Brett and Company Limited** (supra):

"21. In *Ram Karan Singh* [*Ram Karan Singh* v. *Nakchhad Ahir*, 1931 SCC OnLine All 39 : AIR 1931 All 429] , a Full Bench of the Allahabad High Court while examining the issue of maintainability of second suit for pendente lite and future mesne profits where earlier suit for possession and past mesne profits has already been decided has held as follows : (SCC Online All)

"It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of Order 2 Rule 4, indicate that the legislature thought it necessary to provide specially for joining a claim for mesne profits with one for

[15] AIR 1931 Allahabad 429
[16] (2017) 10 SCC 643

recovery of possession of immovable property, and that but for such an express provision, such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date when the original dispossession took place and the cause of action for recovery of possession accrued. The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession. Mesne profits accrue from day to day and the cause of action is a continuing one, and arises out of the continued misappropriation of the profits to which the plaintiff is entitled. …"

(Emphasis supplied)

65. In the said passage, what has been considered, was the issue relating to the maintainability of the second Suit for *pendente lite* and future mesne profits, in a situation, where an earlier suit for recovery of possession and for past mesne profits had been decided. We notice that what the Court has essentially held is that but for Order IV Rule 2 of the CPC, as it stood specifically providing for joining a claim for mesne profits with one for recovery of possession of an immovable property, such a joining together of claims in one suit, may have been not allowed. It is thereafter stated that a claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit. Still further, it is found that the date of cause of action for action for mesne profits may not coincide with the date of cause of action for recovery of possession. It is thereafter that the statement which is relied upon by the respondent has been made. The Court held that mesne profits accrue from day-to-day and the cause of action is a continuing one. It arises out of the continued misappropriation of the profits, which a plaintiff is entitled to.

66. Article 51 contemplates a period of three years from the date on which the profits from the immovable property is received by the defendant. If it is to be understood as profits actually received by the defendant, then, it is obvious that Article 51 may not apply. If a Suit for mesne profits of the kind involved in this case would fall more appropriately under Article 113 of the Limitation Act, which is the residuary Article, the Suit must be instituted within a period of three years from the date on which the right to sue accrue. This Article is in stark contrast with Article 58 of the Limitation Act, under which, the period of limitation is three years but from the date on which the cause of action first arises. If a claim for mesne profits is one, which accrues from day-to-day and it is a continuing one and if the suit for mesne profits would fall to be decided under Article 113 of the Limitation Act, then, since the cause of action is a continuing one, the suit may not be barred as regards any part of the claim as contended by the appellant.

67. In this case, there is another dimension. The case set up by the respondent plaintiff in the plaint, as noticed, was that, it by virtue of the acknowledgment and admission of the jural relationship in letter dated 24th May, 1994, there is no bar of limitation for any part of its cause of action. In their submission before this Court also, the respondent has laid store by the stand that the respondent was awaiting a decision by the Chairman.

68. It is true that a pure question of law which does not involve any investigation of facts, and if the plea of limitation in a given case is such, there can be no taboo in this court dealing with it even if raised for the first time. This is however not a case where the plea was not raised. It was raised and an issue was framed. But it was expressly given up before the Single Judge and not pursued before the Division Bench.

69. While on acknowledgment under Section 18 of the Limitation Act, this Court in ***Messrs. Lakshmirattan Cotton Mills Co. Ltd. and Messrs. Behari Lal Ram Charan v. The Aluminium Corporation of India Ltd.,***[17] held, *inter alia*, as follows: -

"9. It is clear that the statement on which the plea of acknowledgment is founded must relate to a subsisting liability as the section requires that it must be made before the expiration of the period prescribed under the Act. It need not, however, amount to a promise to pay, for, an acknowledgment does not create a new right of action but merely extends the period of limitation. The statement need not indicate the exact nature or the specific character of the liability. The words used in the statement in question, however must relate to a present subsisting liability and indicate the existence of jural relationship between the parties, such as, for instance, that of a debtor and a creditor and the intention to admit such jural relationship. Such an intention need not be in express terms and can be inferred by implication from the nature of the admission and the surrounding circumstances. Generally speaking, a liberal construction of the statement in question should be given. That of course does not mean that where a statement is made without intending to admit the existence of jural relationship, such intention should be fastened on the person making the statement by an involved and farfetched reasoning."

70. The case of the respondent appears to be that there is an admission of the jural relationship by virtue of the letter dated 24.05.1994. This is a letter written by the appellant in reply to the letter dated 02.05.1994. It is necessary to refer to the relevant portion of the letter dated 02.05.1994. After referring to a discussion held on 27.04.1994, wherein it was alleged that certain decisions were taken, it was, *inter alia*, stated as follows: -

"(iv)On the assurance that Sudera's claim of mesne profits as to the leasehold property in occupation of IOC will be looked into and decided upon by IOC's Chairman, Shri Bakshi in a reasonable, fair and judicious manner, Sudera will not insist on reference to Arbitration (for which the draft agreement for reference to arbitration was sent by IOC to Sudera and returned back to them duly confirmed with observations and clarifications). The amount of Rs.90,00,000/- (Rupees Ninety Lakhs only) odd paid by IOC to Sudera after the expiry of the Lease till date and received by Sudera as an 'on *a/c*' payment, shall be treated as payment received while settling the mesne profits payable as aforesaid.

(v) The two aspects of handing over of possession of the property and the determination of the claim for mesne profits of Sudera by the Chairman of IOC shall stand delinked. While the possession shall be made over forthwith, the claim for mesne profits shall be decided by the IOC's Chairman, Shri Bakshi as expeditiously as possible, but not later than two months from date of making over possession."

71. In the letter written by the appellant dated 24.05.1994, which we have already extracted hereinbefore, the discussion being held on 27.04.1994, was admitted. In regard to Clauses (iv) & (v) of letter dated 02.05.1994 which we have referred to, we may notice only the following: -

"So far as clauses (iv) and (v) are concerned, it was discussed that Chairman will first decide the question of maintainability of your claim for mesne profits.

IOC has been consistently contending by several letters to you that there can be no question of mesne profits in this case. If the Chairman decides that the claim for mesne profits is maintainable in law after hearing the view points of both sides in the matter only then he will go into the question of the assessment of the amount thereof.

You were kind enough to say that you would accept the advice of the Chairman on every respect as final and binding. At the same time, you will appreciate that no agreement for arbitration agreement was concluded or entered into. A draft was never finalized and no agreement for

[17] (1971) 1 SCC 67

arbitration was ever finally prepared not signed by any party because talks for arbitration fell through at the stage of discussions."

72. It is undoubtedly true that it has been clearly stated that the Chairman will take a decision on the maintainability of the claim for mesne profits. In the same breath, the appellant appears to indicate in the letter that it has been taking the stand that there can be no question of mesne profits. But the letter further indicates that the Chairman will take a decision after hearing the respondent also regarding the maintainability and only then the assessment of mesne profits will be carried out.

73. We have already noticed that an acknowledgment, as far as the admission of the jural relationship is concerned, need not be express. It would become necessary to probe the surrounding circumstances. This may include going into the facts. In this regard, in fact, no arguments were addressed on behalf of the appellant and indeed even on behalf of the respondent with reference to the impact of Order VII Rule 6 of the CPC or Section 18 of the Limitation Act. As already noticed, even in the letter dated 24.05.1994 it is not as if there is a categoric statement from the appellant admitting liability to pay mesne profits.

74. We may further notice as follows. In the plaint, it is, *inter alia*, stated as follows:

"The plaintiff is entitled to claim and claims mesne profits in respect of the said 57105 sq. ft. comprised of 2nd, 3rd and 4th floors in the premises No.1. Shakespeare Sarani, Calcutta @ Rs. 31/- per sq. ft. per month which the defendant, remaining or continuing. in wrongful possession of the said property actually received or might with the ordinary diligence have received therefrom having regard to the prevalent of rent in the locality where the premises no.1, Shakespeare Sarani, Calcutta within the jurisdiction of this Hon'ble Court is situate."

. .

75. Article 51 of the current Limitation Act corresponds to Article 109 of the Limitation Act 1908. We may notice that in ***Dullabhbhai Hansji and Another v. Gulabbhai Morarji Desai***[18], the question arose as to whether Article 109 of the Limitation Act, 1908 would apply in the following facts:

One Gulab Chand stood adjudicated as an Insolvent. On the application of the plaintiff as Receiver the sale by the insolvent was set aside on March 13, 1929. The suit was instituted in March, 1931 for mesne profits. The contention of the defendant was that the suit was barred for the period from 1925 to 1928. It is while dealing with these facts the Court held as follows:

".. It is no doubt perfectly true that the plaintiff could not have sued to recover these mesne profits until he had got the sale set aside. But Article 109 does not provide that the starting point of time for the recovery of mesne profits wrongfully received shall be the date when the cause of action to recover those profits arose; the starting point is the date when the profits were received…."

76. In ***Dwarkas Nathamal v. Balkrishna Baliram***[19], a learned Single Judge was dealing with essentially the question whether a subsequent suit for mesne profits for a different period would be barred by Order II Rule 2 of CPC. It was held as follows:

"10. With great respect, I am unable to agree with the view which the learned Judge has taken. It is clear from the passage quoted above that the basis of the view is that "the claim for *mesne* profits

[18] (1938) 40 Bom LR 100
[19] AIR 1964 Bom 42

can arise only when the defendant wrongfully appropriates the profits from the property in respect of which a claim is made". In the first place, in order to sustain a claim for *mesne* profits, it is not necessary that the defendant must wrongfully appropriate the profits of the property in respect of which a claim is made. What the plaintiff is required to establish in a suit for *mesne* profits is that the defendant is in wrongful possession of the property, and if that fact is established then the profits which the defendant has received or which he may with reasonable diligence have received must be paid to the plaintiff. Secondly, to hold that what gives rise to a right to claim *mesne* profits is the appropriation of the profits by the defendant and that "a right to claim *mesne* profits by a suit can accrue only when the person in wrongful possession of the property had actually received such profits", is to ignore that the liability of the defendant to pay *mesne* profits is not dependent upon the actual receipt of the profits. Section 2, cl. (*12*) of the Code of Civil Procedure defines 'mesne profits' as profits which are either actually made or which might with reasonable diligence have been made by the person in wrongful possession of the property. Then again, the reference made by the learned Judge to art. 109 of the Limitation Act is, with respect, not apposite, because, column (3) of the several articles in the 1st Schedule to the Limitation Act concerns itself with the "time from which period begins to run" and not with the date on which the cause of action for the suit accrues. The only implication of the third column of art. 109 is that a suit which is filed more than three years after the date on which the defendant received the profits would be barred by limitation. As stated by Sir John Beaumont in *Dullabhbhai* v. *Gulabhai* [(1937) 40 Bom. L.R. 100, at p. 103.]"

77. It is true that Section 2(12) of the CPC defines 'mesne profits' as follows:

"2(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;"

78. Undoubtedly, mesne profits, as defined in Section 2(12), includes not only the profits which a person in wrongful possession of such property actually receives but also those profits which he might with ordinary diligence have received therefrom together with interest on such profit. What is excluded is only the profit due to improvement made by the person in wrongful possession. However, Article 51 of the Limitation Act deals with a suit for profits of the immovable property belonging to the plaintiff which have been wrongfully received by the defendant. The time no doubt for such a suit begins to run when the profits are received. In fact, we may notice the judgment of the Privy Council in *Sri Raja Inuganti Venkata Rajagopala Rama Suryaprakasa Rao Garu v. Maharaja of Pithapuram and another*[20]. In the said case, the Collector recognised the respondent as land owner of the estate. This was in accordance with the decree of the lower court and pending an appeal therefrom. The respondent got into possession and collected the rents and profits. The decree was reversed in appeal. The Collector cancelled the recognition at the instance of the appellant. The appellant was recognised as land holder. The Privy Council took the view that the Article which would apply is Article 120 of the Limitation Act, 1908 corresponding to Article 113 of the present Law of Limitation. We may notice only the following:

"... Their Lordships are therefore of opinion that the plaintiffs had no right of suit for the rents or profits while the possession was under the order of 12th January, 1924. It was only after that order was cancelled in consequence of the decision of this Board that a right of action to recover rents and profits accrued to the plaintiffs, and that right is preserved to them by the proviso to S.67. the High Court's judgment recognizes that if suits had been brought each time that rents or profits were received they could have made no progress, but must have been stayed till the final determination of the question of title."

[20] AIR 1948 PC 175

79. In ***Phiraya Lal Alias Piara Lal and another v. Jia Rani and another***[21], while dealing with the case of a suit filed for possession and damages, after finding the right to sue based on possessory title while dealing with the aspect of mesne profits, it was, *inter alia*, held as follows:

"..It is to be noted that though mesne profits are awarded because the rightful claimant is excluded from possession of immovable property by a trespasser, it is not what the original claimant loses by such exclusion but what the person in wrongful possession get or ought to have got out of the property which is the measure of calculation of the mesne profits. (*Rattan Lal v. Girdhari Lal, AIR 1972 Delhi 11).* This basis of damages for use and occupation of immovable property which are equivalent to mesne profits is different from that of damages for tort or breach of contract unconnected with possession of immovable property."

80. It is apposite in this context to refer to the decision in ***Rattan Lal v. Girdhari Lal and Another***[22] which is relied upon in the aforesaid judgment. In the said case, the landlord obtained a decree for eviction. The decree became inexecutable because of a law but the decree was executed. The tenant was, however, restored the possession, under inherent jurisdiction. Thereupon, the tenant claimed mesne profits, *inter alia*. It was, in the said facts, that the Court held, after referring to Section 2(12), as follows:

"..the principle underlying the definition of "mesne profits" in Section 2 of the CPC is that the person in wrongful possession must pay to the person, who was wrongfully dispossessed, such profits which the former actually receives or might with ordinary diligence have received from the property together with interest on such profits. The test therefore is not what the tenant lost by being dispossessed but what the landlord got or could have got with reasonable diligence because of the dispossession."

81. The Court also did not agree with the argument which appealed to the lower Court, namely, that the tenant could not have sublet the premises and therefore there was no loss due to dispossession. Sub-letting was found legal. It is also found that the fact that the tenant was not paying rent during the period of dispossession was the wrong approach to deny mesne profits. The correct approach was whether the person in possession made profit or could have made profit. It is to be noted that, interestingly, in the said case, the roles were reversed. *Mesne* profits was sought against the landlord. In the case of a landlord, there could be no question of there being any restriction on his right to deal with his property and earn profit within the meaning of Section 2(12) of the CPC.

82. We have however noticed what this Court has laid down in *Atmaram (supra)*. This Court has declared that in the case of determination of a lease by the lease coming to an end, tenant would be liable to pay damages for use and occupation at the rate at which the landlord could have let out the premises on being vacated by the tenant. Without disagreeing with the said view for which we see no reason, we cannot adopt the principle which in the facts of the case commended itself to the High Court of Delhi in *Rattan Lal (supra).* What the landlord is entitled is, to get damages for the use and occupation at any rate, at which, the landlord could have let out the premises on being vacated by the tenant. Section 2(12), no doubt, includes profits, which the person, in wrongful possession, might, with ordinary diligence, have received therefrom. The liability of the tenant, to pay damages on the basis of the rate at which landlord could have let out the premises, may not be the same as the profit the tenant might have received with

[21] AIR 1973 Del 186
[22] AIR 1972 Del 11

ordinary diligence. In the first place, equating the same must involve a right with a tenant to transfer or sub-let the premises. In other words, the Court would have to find whether the tenant could have, in law, let out the premises and derived a higher amount.

83. Once the lease comes to an end, the erstwhile tenant becomes a tenant at sufferance. He cannot be dispossessed, except in accordance with law. But he cannot, in law, have any right or interest anymore. Even though, under Section 108 of the Transfer of Property Act, if there is no contract to the contrary, the tenant may have the right, under Section 108(j), to transfer his interest absolutely or even by sub-lease or mortgage, when the lease expires by afflux of time, his interest as lessee would come to an end. In this context, we may notice the following statement of the law in ***Bhawanji Lakhamshi and Others v. Himatlal Jammnadas Dani and Others***[23]:

"9. The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance…"

Thus, on the expiry of a lease, the erstwhile tenant, who remains a tenant at sufferance, would have no right to transfer.

84. In this regard, we would have to hold that there is a new lease by holding over. The acceptance of the amount after the expiration of the lease by the respondent was without prejudice to its case. We do not think that the appellants can persuade us to hold that there is a lease by holding over.

85. Therefore, it may not be appropriate to allow the appellant to raise the contention of limitation or to allow him to succeed on the same, based on the case falling under Article 51. This is, no doubt, despite noticing the averment in the plaint which appears to have been made with reference to Section 2(12) of the CPC. We would have to, however, bear in mind the principle laid down in *Atmaram* (supra) and the principles we have already considered. We are of the view that landlord by the suit seeks to realise, what in law is described as damages for unauthorised occupation by the tenant after the expiry of the lease. It is not to be conflated to the profits received within the meaning of Article 51 of the Limitation Act, as it involves finding out the rate at which the landlord could have let out the premises. It would be the residuary Article, namely, Article 113, which should apply.

86. The result would be that, in the factual context, it may not be possible to hold that the suit filed by the respondent, should still be found to fall under Article 51 of the Limitation Act and barred as regards part of the cause of action.

87. The upshot of the above discussion is that, we find no merit in the appeals. The appeals shall stand dismissed. The parties to bear the respective costs.

[23] (1972) 1 SCC 388