

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA (OS) NO. 118/2011 & CM No. 6572/2012**

% **Reserved on: 18th December, 2012**
Date of Decision: 31st January, 2013

FAB INDIA OVERSEAS PRIVATE LIMITED Appellant
Through Mr. Raman Kapur, Sr. Advocate.
Mr. Ajay Kapur, Sr. Advocate with Mr.
R.K. Mehta, Mr. Virender Mehta, Mr.
Kunal Mehta and Mr. Gautam Mehta,
Advocates.

Versus

S.N. SHEOPORI Respondent
Through Mr. Rajeev Sharma, Mr. Sanjiv
Sindhvani, Mr. Sahil Bhalaik and Mr.
Uddyam Mukherjee, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J:

This judgment disposes of the first appeal filed by Fab India Overseas Private Limited and the cross-objections filed by Janak Mushran against the judgment and decree dated 4th July, 2011 passed by the single Judge in CS(OS) No. 246/2009 titled *S.N. Sheopori* and *Janak Mushran v. Fab India Overseas Private Limited*.

2. Before dwelling into the disputed questions, we deem it appropriate to state the undisputed facts and contentions raised. For the sake of convenience, S.N. Sheopori has been referred to as

Sheopori, Janak Mushran as Mushran and Fab India Overseas Private Limited has been referred to as FIOP Limited.

3. Around 4th September, 1995 Sheopori and Mushran filed a suit against FIOP Limited seeking decree of possession of premises No. 14, N Block-Market, Greater Kailash-I, New Delhi-110048 (property, for short); decree of recovery of Rs.40,000/- towards arrears of rent from 1st May, 1995 to 30th June, 1995 with pendante lite and future interest @ 18% per annum; decree of mesne profits and damages @ Rs.1 lac per month for the period 1st July, 1995 to 31st August, 1995 with pendant lite and future interest @ 18% per annum; future mesne profits till the delivery of vacant possession at least @ Rs.1 lac per month or at any higher rate as may be prevailing and interest @ 18%.

4. The two plaintiffs Sheopori and Mushran, as admitted by FIOP Limited, were joint owners of the property constructed on 197 square yards, comprising of basement, ground floor, first floor and second floor, with covered area of approximately 4200 square feet.

5. FIOP Limited accepts that they were the tenant, under the co-owners Sheopori and Mushran. There was no written or registered lease and the tenancy was oral. The contentions regarding whether there was one single tenancy, as claimed by her (Mushran), or six separate and distinct tenancies, for the separate portions of the property, as claimed by FIOP Limited, is one of the disputes and will be examined subsequently. FIOP Limited contends that, in case, there were separate tenancies then the individual tenancies below Rs.3,500/- per month would be protected under the Delhi Rent Control Act, 1958 (DRC Act for short) and, consequently, the suit for ejectment should have failed.

6. Sheopori and Mushran had served legal notice, dated 10th May, 1995, through their counsel and had terminated the tenancy of FIOP Limited, from the mid night of 30th June, 1995. The receipt of notice is not disputed and was replied to by FIOP Limited, vide letter dated 31st May, 1995, claiming that the tenancy was protected under the DRC Act.

7. Sheopori and Mushran claimed that, at the time of termination of tenancy, FIOP Limited was paying monthly rent of Rs.20,000/- on which Tax at Source (TDS for short) was deducted. The aforesaid factum is not disputed by FIOP Limited but, it is claimed, that the consolidated said rent represented the rent paid in respect of six different tenancies and not for one tenancy.

8. Sheopori, the original plaintiff, died on 6th January, 1999 and his share in the suit property devolved on his elder daughter Lakshmi Dar, who too expired on 4th September, 2002. Consequently, Lakshmi Dar's two children Dhruv Dar and Preeti Atal were brought on record, in the civil suit.

9. Dhruv Dar and Preet Atal, by registered sale deed dated 21st October, 2005, sold their 50% share in the suit property to FIOP Limited.

10. Additional District Judge, before whom the suit was pending, by order dated 26th November, 2007 held that the suit for possession was not maintainable against the co-owner. By another order dated 29th April, 2008, issue No. 7 (whether the plaintiff, i.e., Mushran was entitled to recovery of possession of the suit property) was directed to be deleted and issue No. 3 was modified. The issues required to be decided were:

“1. Whether the plaintiff has concealed the material facts that the tenancy was governed by DRC Act; if so, its effect? OPD

2. Whether the tenancy for different portions was in different tenancy and same carried rent less than Rs.3,500/- p.m.? OPD

3. Whether the suit for recovery of rent and mesne profits is not maintainable in view of provisions of Sec. 50 DRC Act? OPD

4. Whether this Court has no jurisdiction in view of Sec. 50 DRC Act? OPD

5. Whether the defendant is entitled to receive Rs. two lakhs from the plaintiff, by way of counter claim, on account of excessive payment? OPD

6. Whether tenancy of the defendant has been validly terminated? OPD

7. XXX XXX XXX (deleted by order dated 29.04.2008).

8. Whether the plaintiff is entitled to the amounts towards arrears/damages/mesne profits, as claimed; if so how much and any interest, if so, at what rate? OPP

9. Relief.”

11. By another order dated 13th October, 2008, Mushran’s application for amendment of the plaint was allowed and paragraphs 10.A to 10.F were permitted to be incorporated. The said paragraphs refer to the subsequent developments i.e. sale deed executed by Dhruv Dhar and Preeti Atal, in respect of 50% share in the property, in favour of FIOP Limited. It was averred that Mushran remains owner to the 50% undivided share in the property. She did not wish to keep her share joint with FIOP Limited and sought partition. The joint ownership of Mushran and FIOP Limited stands acknowledged and admitted in the registered sale deed, dated 21st October, 2005, executed by Dhruv Dhar and Preeti Atal, in favour of the FIOP Limited. The

property was capable of being partitioned by metes and bounds. Paragraphs 10D and 10E refer to tenancy rights procured by FIOP Limited in respect of the shops in the same market, i.e., N Block, Greater Kailash, Part-I, New Delhi, under separate lease agreements with different landlords. In paragraph 10F it is claimed that Mushran was entitled to rendition of accounts under Order XX Rule 12 from FIOP Limited from 21st October, 2005 till the date of handing over of possession.

12. As a result of amendments, prayer clauses (e) and (f) were inserted and the amended prayer clause of the plaint was:-

“(a) a decree for possession in respect of premises bearing No. 14, N-Block Market, Greater Kailash Part-I, New Delhi-110048 as shown in Red in the Site Plan;

(b) a decree for recovery of Rs.40,000/- towards arrears of rent for the period 1.5.1995 to 30.6.1995 along with pendente lite and future interest at the rate of 18% per annum at monthly rests;

(c) a decree for mesne profits/damages at the rate of Rs.1,00,000/- per month for the period 1.7.1995 to 31.8.1995 along with pendent lite and future interest at the rate of 18% per annum at monthly rests;

(d) a decree for future mesne profits till delivery of vacant possession to the plaintiffs, at least at the rate of Rs.1,00,000/- per month or at a higher rate which may be prevailing at the time of the disposal of the suit along with pendente lite and future interest thereon @ 18% per annum at monthly rests; and

(e) a decree of partition in respect of premises bearing No. 14, N-Block Market, Greater Kailash-I, New Delhi as shown in red in the site plan or as the premises exist at the spot.

(f) A decree for rendition of accounts for the period 21.10.2005 upto the date of decree.

(g) costs of the suit with such other relief as deemed fit in the circumstances of the case.”

FIOP Limited filed written statement to the amendment plaint.

13. In spite of the amendment of the plaint, no new issues were added and the framed issues remained unmodified. Parties did not lead any fresh evidence. Arguments were heard and, thereafter, the impugned judgment was pronounced. As per the impugned judgment and decree, Mushran has been held entitled to preliminary decree of partition for half undivided share in the property. She is further held entitled to mesne profit from 1st July, 1995 to 21st October, 2005, i.e., the date on which Dhruv Dhar and Preeti Atal had sold 50% share in the property to FIOP Limited. Mesne profits have been restricted to 50%, as Mushran was owner of 50% of the property. Mesne profits for the entire property was determined at Rs.3.75 lacs and Mushran has been entitled to mesne profits @ Rs.1,87,500/- for the period 1st July, 1995 to 21st October, 2005. No mesne profits are to be paid for the period post 22nd October, 2005. Mushran was directed to pay court fees for the arrears of mesne profits, up to 21st October, 2005 from 1st July, 1995.

14. FIOP Limited has challenged the judgment/decreed raising the following points:

- (i) Single Judge has erred in passing a decree for partition as no issue was framed and no evidence was recorded. It is postulated that decree for partition should not have been passed, in view of the order dated 26th November, 2005, passed by Additional District Judge, Delhi holding, inter alia, that the suit for possession was not maintainable viz. the co-owner and as issue No. 7 (whether the plaintiff is entitled to

recovery of possession of the suit property) was deleted and issue No. 3 was modified.

- (ii) As per the doctrine of merger, the tenancy rights of FIOP Limited merged in the 50% ownership rights acquired by FIOP Limited. Suit for ejectment against the co-owner, who is also a tenant, is not maintainable in view of the doctrine of merger.
- (iii) There were six separate tenancies in respect of different portions of the property and, therefore, the suit for ejectment on the basis of one single tenancy was not maintainable. Some of the tenancies were/are protected tenancies under the DRC Act, as the rent payable qua the separate portions was less than Rs.3,500/- on the date of the filing of the suit. Therefore, suit was liable to be dismissed.

15. In the cross-objections filed by Mushran, it is submitted as under:

- (a) There is an error in awarding mesne profits @ Rs.1,87,500/- per month for the period 1st July, 1995 to 21st October, 2005. The mesne profits awarded should be enhanced.
- (b) Mesne profits should have been awarded for the period 22nd October, 2005 onwards.
- (c) Interest should have been awarded on the mesne profits.

16. In order to appreciate and decide the questions raised before us, we deem it appropriate to deal with the different aspects under separate headings.

(A) Whether there were six separate tenancies on the date of filing of the suit and, therefore, the suit for ejectment was not maintainable

17. In the plaint it was alleged that FIOP Limited was inducted as a tenant in the property sometimes in the 1970s. From time to time rent was increased and the rent paid, before and on the date when the suit was filed i.e. 4th September, 1995, was Rs.20,000/- per month.

18. As per FIOP Ltd., separate tenancies were created as under:

- (1) Shop on the ground floor given on rent with effect from 17th March, 1970 @ Rs.500/- per month.
- (2) Second shop on ground floor was given on rent with effect from 2^{1st} November, 1973 @ Rs.500/- per month.
- (3) First floor was given on rent in February, 1975 @ Rs.700/- per month.
- (4) Basement was given on rent @ Rs.1,200/- per month with effect from 1st April, 1976.
- (5) Second floor was given on rent @ Rs.400/- per month on 16th April, 1976.
- (6) Sample room on the ground floor was given on rent with effect from 1st June, 1976 @ Rs.300/- per month.

19. The appellant contends that once separate tenancies were created on different dates for specified stipulated rent, the said tenancies continued through with periodical increases from time to time. The said increases or payment of rent by one cheque, a matter of convenience, did not create one tenancy or a fresh/new tenancy. For a new/fresh tenancy to be created there should be surrender of

possession under the old tenancy. Reliance was placed on the chart Ex DW7/5.

20. Mushran accepts the position that different portions of the property were rented to Fab India Inc. during the period 17th March, 1970 to 1st June, 1976. With effect from 1st June, 1976 the entire property was on rent with Fab India Inc. No written or registered leased document was executed at the time of creation of tenancies. The tenancy(ies) was oral. It is an undisputed position that, at the time of induction and creation of tenancies between 17th March, 1970 to 1st June, 1976, Fab India Inc., a company incorporated in U.S.A., was the tenant. FIOP Limited was incorporated in India on 16th December, 1976, as per certificate of incorporation (Exhibit PW-1/D1). The letter dated 2nd December, 1976 (Exhibit DW-6/1) written to the Registrar of Companies by Mahender Puri and Company, Chartered Accountants, mentioned that one John S. Bissell, an American citizen, who was an Indian resident for 18 years or so, had been named as a director in the proposed company. No permission was required under Section 30 of the Foreign Exchange Regulation Act, 1973 as the Director did not want to make any remittance abroad. Another letter placed on record, by FIOP Limited, written by the said company to Registrar of Companies dated 8th March, 1979 (Exhibit DW-6/4) states that 25% of the share capital in FIOP Limited was held by corporate body Fab India Inc. in U.S.A. and, therefore, in terms of Section 43A(1) of the Companies Act, 1956 FIOP Limited was a public limited company and the said word private was directed to be deleted. Yet another letter (Exhibit DW-6/7) dated 23rd August, 1971 issued by Registrar of Companies, Delhi and Haryana records that FIOP Limited was incorporated and registered on 16th December, 1976 with the main

object to acquire and take over the business carried on in the name and style of Fab India, a company incorporated in U.S.A., with all its assets and liabilities. The said letter further records that Fab India Inc., a U.S.A. company, was a shareholder in the newly incorporated company and the said shareholder was a non-resident shareholder. The said factual position that Fab India Inc. is a shareholder was also mentioned in letter dated 3rd July, 1980 (Exhibit DW-6/9).

21. From the aforesaid letters it is clear that the company subsequently incorporated i.e. the present appellant FIOP Ltd. is different from Fab India Inc., U.S.A., in whose favour the initial tenancy rights were created during the period 17th March, 1970 to 1st June, 1976. Thus, after incorporation of FIOP Limited, a new tenant came in possession of the property and started paying the rent. Accordingly, creation of original tenancies, during different periods and for separate portions from 17th March, 1970 till 1st June, 1976 in favour of the Fab India Inc., gets obliterated and is irrelevant. When FIOP Ltd. was incorporated in December, 1976 and thereafter became the tenant in January, 1977, there were implied surrender of the tenancies or tenancy created in favour of Fab India Inc. To put it succinctly, tenancy in favour of FIOP Ltd. could not have been created without surrender of the tenancy/tenancies by Fab India Inc. It is now the stand of both parties that FIOP Limited became the tenant after its incorporation in December, 1976 and the legal consequences thereof have to be accepted by them.

22. The contention of FIOP Limited that there were six separate tenancies is based upon the grants or the transactions which had taken place between Fab India Inc. and the then landlords Sheopori/Musran during the period 17th March, 1970 to 1st June, 1976. Mere fact that

Fab India Inc. had taken tenancy rights on six different occasions, between 17th March, 1970 to 1st June, 1976, does not lead to presumption that the tenancy right in favour of FIOP Ltd., with effect from 1st January, 1977, were six multiple tenancies and not one single tenancy. On the question whether there exists a single or multiple tenancies viz. Sheopori and Mushran as landlord and FIOP Ltd. as a tenant, we are in agreement and find merit in the contention and the plea of Mushran. As there is no written lease agreement, we have to go with the intention of the parties and whether they had treated and regarded the tenancy rights as singular or had treated the occupation of FIOP Ltd. as one under the six separate tenancies. There are good and sound reason to hold that the landlord Sheopori and Mushran and the tenant FIOP Ltd., regarded the tenancy as one and singular and not multiple. Our reasons are as under:-

- (1) FIOP Ltd. became the tenant of the entire property i.e. premises bearing No. 14, N-Block Market, Greater Kailash-I, New Delhi.
- (2) It is accepted and admitted position that there have been periodical increase in rent as detailed below:-

1977 – March 1981	Rs.3,800/- (4 yrs approx)
April 1981 – August 1984	Rs.4,180/- (3 yrs. approx.)
Sep.1984 – April 1985	Rs.5,000/- (8 months)
May 1985 – April 1986	Rs.5,500/- (1 year)
May 1986 – April 1988	Rs.9,000/- (2 years)
May 1988 – April, 1990	Rs.9,900/- (2 years)
May 1990 – April, 1991	Rs.12,870/- (1 year)
May 1991 – April, 1993	Rs.14,160/- (2 years)

May 1993 – April, 1995	Rs.20,000/- (2 years)
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The rent was always paid by one cheque and by not separate or multiple cheques. FIOP Ltd. had right from the date they became the tenant from the very beginning i.e. Jan.,1977 till 1995 paid the rent by one cheque.

- (3) FIOP Ltd. have not produced their books of accounts or the resolutions passed by the Board of Directors agreeing or approving the enhancement of rent. FIOP Ltd. have propounded and had filed a chart Ex. DW7/5. The said chart bifurcates the consolidated rent, which has been paid from 1976 onwards, by way of one cheque and allocates separate rent to six different tenancies. The said chart is not supported by any vouchers or books of accounts and is merely an exercise undertaken by FIOP Limited for the sake of convenience. It is a self-supporting document, without supporting internal documents or vouchers of FIOP Ltd and the bifurcation does not get support by any document submitted by the parties. FIOP Limited did not produce their original books of accounts and vouchers in the court, in support of their contention that, in the books of accounts or records, they treated it as six separate tenancies. It is obvious that the bifurcation Ground Floor I, Ground Floor II, First Floor, Basement, Second Floor and the Ground Floor small room and division of rent had been created unilaterally by FIOP Ltd. It is self-created chart which is not corroborated or supported by corresponding entries in the books of accounts or the audited accounts of the company - FIOP Ltd. This document is of no value and is a waste paper.

(4) It may be interesting to note that as per the said chart, the first floor which was rented out in 1975 @ Rs.700 per month to Fab India Inc. was, on the date when the plaint was filed as per the FIOP Ltd., fetching rent @ Rs.6600/- per month, whereas the basement which was rented out to Fab India Inc. in 1976 at Rs.1200 per month at the time of institution of the plaint was fetching Rs.2800 per month. Similarly the second floor which was rented at Rs.2400 per month to Fab India Inc. as per FIOP Ltd. in 1994 was fetching Rs.3900 per month. There is hardly any logic in the said bifurcation and it has been done for the sake of convenience and to foster false defence. The chart has to be rejected.

(5) It is accepted position that tax was deducted at source by FIOP Ltd. while making payment of rent. Deduction of tax at source was required only if the tenancy was treated as one or single tenancy and not multiple or distinct tenancies as the provision of the Income Tax Act, 1961 become applicable only if the rent payable is above the specified amount. The said TDS certificates have been exhibited as DW7/PW-1 to PW-10 and relate to the period 20.3.94 to 31.3.95. It is obvious in the books of accounts and for the purpose of accounts maintained by FIOP Ltd. under the Companies Act, 1956, the tenancy was regarded and treated as a single and one tenancy and not multiple tenancies. The entire property was treated as one for the purpose of tenancy rights.

(6) The bifurcation as made out in the chart (Ex. DW7/5) was not made or mentioned in the original written statement filed on 30th December, 1995, though in the said written statement

it was stated that there were six tenancies and the rent of each tenancy was below Rs.3500/-. The defence of bifurcation of rent was taken in the amended written statement on 13th March, 1997 and the rent of Rs.20,000/- was bifurcated into the following:

“(a)	Half Ground Floor	Rs.2400
(b)	Other half portion of the ground floor	Rs.2400
(c)	First floor	Rs.6600
(d)	Basement	Rs.2800
(e)	Second Floor	Rs.3900
(f)	Sample Room of the Ground Floor	Rs.1900”

(7) Several letters exchanged between the parties during the period 1977 to 1995, have been placed on record by Mushran. These are mainly letters written by FIOP Ltd. enclosing therewith rent cheques. The said letters along with the cheques have been marked as Ex. DW7/P11 to P33. A perusal of these letters would show that while sending the monthly rent cheques FIOP Ltd. never treated the tenancy as multiple but treated the tenancy as one and singular. In most of the letters, it is mentioned that the cheque in question towards the rent was being sent after deducting tax at source. However, three letters are important and clearly show that FIOP Ltd. treated the tenancy right as singular. In letter (Ex. DW7/28) dated 8th February, 1996, it is mentioned as under:

“Dear Dr. Sheopori,

Enclose cheque No. 963005 dt. 8.2.96 for
payment of rent of February 1996 for 14 N Block Market,
G.K. I.

Sincerely
S. Madhok”

Similarly in the letter dated 8th March, 1995, Ex. D7/30, it is mentioned as under:

“Enclosed is cheque no. 818739 dt. 08/03/95 on American Express Bank Ltd. for Rs.16000.00 after deduction of Rs.4000/- as T.D.S. @ 20% in payment of rent for the month of March 1995 for 14 N Block Market, Greater Kailash-I, New Delhi 110048.”

Sincerely
Mrs. S. Madhok”

Earlier letter dated 2nd May, 1986 is even more categorical and reads as:

“Dear Dr. Sheopori,

In view of our very cordial relationship we are happy to raise the rent for No. 14, N Block Market to Rs.9000.00 per month with effect from May 1986.

We seek your continuous co-operation in the years to come.

Sincerely,
Sd/-
MeenaChowdhury”

Even in the response/reply to notice for termination and determination of tenancy, sent by FIOP Ltd., it was not claimed that there was six different tenancies and the rent paid was for six different tenancies. The plea or the defence raised in the said letter was as under:

“With reference to your above referred notice, we are to state that our lawyer is presently out of India and as such your notice under reference cannot be replied for the time being. However it is made

clear that our tenancy is protected under provision of Delhi Rent Control Act and there is no legal (sic.) ground with your client to terminate our tenancy.”

This was the first response by FIOP. In this letter it is written that the tenancy was one and not multiple tenancy. We are not treating this letter or other letters in isolation but along with other facts.

The said letters emanating from FIOP Limited relating to rent remittance is consistent and supports the stand of Mushran to the effect that there was single consolidated tenancy and not multiple or six tenancies in respect of separate floors/areas. It is to be noticed, in the reply to the notice of termination vide letter dated 31st May, 1995 (Exhibit PW-1/6) the plea taken by FIOP Limited was that the tenancy was protected under the DRC Act but they did not take specific plea that there were six separate tenancies. There is no such specific and clear cut averment in the said letter.

23. Mrs. S. Madhok (DW-7), who appeared for FIOP Limited, has in categorical terms, deposed that Fab India Inc. was incorporated under the laws of United States and FIOP Ltd. was a company incorporated in India in December, 1976. Fab India Inc. was still existing in the United States, when she was cross-examined on 25th August, 2002, as per the statement of Mrs. S. Madhok (DW-7). FIOP Limited could not have become tenant of the property as accepted and claimed by them without Fab India Inc. surrendering the tenancy rights which were acquired during the period 17th March, 1970 and 1st June, 1976. Thus, surrender of the tenancy right by Fab India Inc. has to be

accepted and admitted. It is not debatable. S. Madhok (DW-7), in her cross-examination, has further accepted and had voluntarily stated that there were conversation and discussion with the landlords, after FIOP Ltd. was incorporated, and it is pursuant to the mutual discussion that the said company became a tenant. Therefore, it has to be accepted that it was pursuant to the mutual discussion that FIOP Ltd. became the tenant of Sheopori and Mushran. For the sake of convenience we reproduce below the relevant portion of cross examination of Ms. S. Madhok (DW-7):

“It is correct that Fab India Inc. was a company created under the laws of U.S. (Vol. Although it was incorporated abroad but it had to abide by all the rules and regulations framed by Govt. of India.). The deft. Company was incorporated in December 1976. M/s Fabindia Inc. had transferred its assets and liabilities under FERA to the deft. And retained 40% of the equity in 1976. It is correct that M/s. Fabindia Inc. is existing in U.S.A. It is wrong to suggest that on 1.6.1976 all the tenancies of M/s. Fabindia Inc. had merged into one tenancy with the landlord and a consolidated cheque of Rs.3800/- was started to be paid as rent.

Q. I put it to you that since there was only one tenancy from 1.6.19 that is why the rent payment of Rs.3800/- initially by Fabindia I and thereafter the deft. Was being paid to the landlord?

A. It was only for the sake of convenience that the tenant and landlord decided that instead of six separate cheques let there be one cheque only as our organization was and is managed by ladies so we wanted to minimize the paper and book writing work. (Vol. There was no formal merger of the earlier tenancy into one tenancy).

I do not remember that whether the process of issuing one single cheque every month had began four months before my joining. The cheque was being issued jointly for all the tenancies as per the verbal discussion between the tenant and then landlord and there was no formal letter or other written document being sent by the tenant or the landlord in this regard. I do not think that I had seen any internal document in our office in which it had been stated in writing that one cheque was to be issue for the sake convenience. The same is true when Fabindia Inc. was the tenant. It is wrong to suggest that from 1.6.1976 till 1995 when the tenancy was terminated and even till today only one cheque is being issued as there was and is one tenancy. I do not

remember whether the fact regarding taking over of assets and liabilities of M/s. Fabindia Inc. by the present deft. was intimated in writing to the landlord. (Vol. we had discussed the same during our conversation with the landlord.) In the year 1976 from the said of M/s. Fabindia Inc. Ms. Sunita Beri and Mrs. Meen Chowdhary being the Finance Manager and General Manager respectively were normally dealing with the landlord and in their absence other officials could have also represented the company in its dealing with the landlord. Even after the incorporation of the deft. company these persons were dealing with the landlord as detailed above. I do not remember that whether we had informed the landlord after the incorporation of the present deft. company in writing that there are six tenancies and not one tenancy. (Vol. we had verbally discussed the same with the landlord after the incorporation of the present deft. company). ”

The aforesaid statement of DW-7 reflects that there was verbal discussion between the landlord Sheopori and Mushran and the newly incorporated company, i.e., FIOP Limited. DW-7 has stated that the bifurcation as propounded and made out in the chart (Exhibit DW-7/5) has been created to support their defence.

24. We need not examine whether there was a single or six multiple tenancies even after Fab India Inc. became the tenant of the entire property w.e.f. 1st June, 1976. This is not relevant. What is relevant and important is whether the landlords i.e. Mushran and Sheopori and FIOP Ltd. after the later were inducted and accepted as tenant, treated the tenancy as one or six multiple tenancies. We need not, therefore, dwell and refer to the position of what was the understanding between the parties prior to the tenancy acquired by FIOP Limited.

25. In these circumstances and the factual position, we do not think that the decisions of the Supreme Court in *T.K. Latika v. Seth Karsandas Jamnadas*, AIR 1999 SC 3335, the decision of single Judges of the Delhi High Court in *Inder Sain Madhok v. Phool Chand*, 1972 RCJ 322 and *Tejinder Tewari v. Subhash Lata Kumar* 28(1985) DLT 441, help or assist the contentions and the plea of FIOP

Limited. In *T.K. Lathika's case* (supra), the appellant had initiated the eviction proceedings under the Rent Control legislation for the property acquired under a gift deed from the appellant's father who was the landlord. There was prohibition that for period of one year after the new landlord acquires ownership rights he cannot sue the tenant for his bonafide requirement. The moot question was whether the said eviction proceedings were maintainable. Appellant's contention was that there was surrender of the tenancy and creation of a new tenancy and, therefore, the prohibition or bar should not apply. The plea taken by the landlord was that there was implied surrender under Section 111(f) of the Transfer of Property Act as there was increase in rent from Rs.65 per month which was paid to the old landlord/owner to Rs.150 per month as paid to the new landlord. However, it was accepted that the tenant continued to be in possession of the same building, in the same manner. The plea of implied surrender of lease and a new relationship between the landlord and the tenant was rejected holding that for the new tenancy to come into existence there has to be termination of earlier tenancy. Mere alteration, improvement etc. would not ipso facto amount to implied surrender of possession under the earlier tenancy. It was further observed that surrender would not follow from mere agreement made during the tenancy for reduction or increase in rent or other variation of its terms. The said decision is of no help in the present case as we have to construe whether there was a single or multiple tenancies with FIOP Ltd. after it was incorporated and became the tenant, when the Fab India Inc. had surrendered their tenancy. The factum that different portions of the property were leased to Fab India Inc. is inconsequential and loses its relevance.

26. In *Inder Sain Madhok's* case (supra), the tenant had sued landlord for fixation of standard rent under the Rent Control Legislation. The plea of the landlord was that application for fixation of standard rent was barred by limitation as the tenancy was created in 1960 and the application was filed in 1967. The tenant accepted that the original tenancy was created in 1960, but the plea raised was that there was implied surrender/determination of the said tenancy and a new tenancy came into existence w.e.f 1st September, 1966, when the rent was increased from Rs.60 to Rs.72/- per month without any stipulation for rebate for prompt payment and as the open verandah which also formed part of the original tenancy was covered and converted into a room. The plea of creation of new tenancy was rejected holding that there was no implied surrender of the old tenancy. Simply because some alternations were made in the property or there was marginal increase in the rent, implied surrender under Section 111(f) of the Transfer of Property Act cannot be assumed or accepted, as it was essential that the lessee should give up possession of the holding under the old lease even in cases of implied surrender.

27. The decision in the case of *Tejinder Tewari's case*(supra), was under the Rent Control Legislation and the question was whether the limited protected tenancy under Section 21 of the Delhi Rent Control Act, was validly created as the said tenancies should be new tenancies and the section is not applicable when a tenant is already in occupation and possession. In the said judgment, on the question of implied surrender, it has been observed as under:-

“22. One of the ways in which a lease of immovable property determines is by "implied surrender" as envisaged in Clause (f) of Section 111, Transfer of Property Act. It is well-known that implied surrender occurs by creation of new relationship or by

relinquishment of possession. The rule of "implied surrender" is founded on equity. Justice and good conscience and such surrender takes place by implication of law rather than the intention of the parties. Illustration to Clause (f) given below Section 111 itself demonstrates that where during the continuance of a lease the lessee accepts a new lease, there is an implied surrender by law. The essence of implied surrender is not change of possession but it is the doing of an act which is inconsistent with the continuance of the former lease or tenancy. Even though the tenant does not express his intention to surrender and determine the old lease but by his taking a new lease, the law infers termination of the existing lease. The reason is that the landlord has no power to grant a new lease except upon the fitting that the old lease is surrendered and the tenant being a party to the grant of new lease is estopped from denying the surrender. However, it is essential to such surrender that the new lease should be valid and take effect at once as a lease. No implied surrender can, Therefore, arise on the acceptance by the tenant of a new lease which is void In other words, the implied surrender will be taken to be subject to an implied condition that the surrender is to be void, if the new lease happens to be void The law on the subject has been neatly summed up by Coleridge, J. in *Doe, Earl of Egremont v Courtenay*, (1843) All E.R. Rep. 685 as under :

"When a new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease) that, in the case of a surrender implied by law from the acceptance of a new lease, the condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and that in case the express surrender is so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such an instrument ,in order to effect" tauter the intention of the parties, would make the surrender also conditional to be void in case the grant should be void."

23. This passage has been quoted with approval in *Gandavalla Munuswamy v. Marugu Muniramiiah* AIR 1966 AP 167 and *M. Gopalakrishna Menon v. K.P. Vellakutty* AIR 1953 Madras 399. Reference in this context be also made to *Abdul Ghafoor and another v. Lala Kunj Behari Lai and and Ors.* AIR 1957 Allahabad 346 , *Noratmal v.. Mohanlal*, Air 1966 Raj 89 and *Manphul Singh Sharma v. Mst. Ahmedi Begum* and

others, AIR 1987 Delhi 87 which is a Bench decision of this Court. In the last mentioned decision it was observed that:

"It is well known that implied surrender occurs by creation of new relationships or by relinquishment of possession. It is however essential that for the new lease to operate as a surrender of the old one, the new lease must be operative. If the new lease is void or voidable or does not pass an interest according to the intention of the parties it does not operate as an implied surrender of the old lease."

The aforesaid paragraph will support the plea raised by Mushran and goes against the contention of FIOP Limited.

28. Reliance placed by FIOP Limited on *Hiralal Kapur v. Prabhu Choudhury*, (1988) 2 SCC 172 has to be rejected. In the said case, initially there was one tenancy for which rent was being paid. Subsequently, the rent was paid by two different cheques, one drawn by the tenant and the other drawn from the account of the registered society, of which the individual tenant was the secretary. The Supreme Court held that this, by itself, does not amount to creation of two tenancies. The said decision goes on its own facts. The ratio is that where there was a single tenancy, which may be oral, then payment of rent by two different cheques does not alone create two separate tenancies. The Supreme Court had relied upon letters written by the landlord recognizing only one tenant and to these letters there was no reply from the tenant.

29. Supreme Court in *S. Sanyal v. Gian Chand*, AIR 1968 SC 438 has observed that the contract of tenancy was single and indivisible and in the absence of any statutory provision, it was not possible to divide it into two contracts. The said decision hardly assists the pleas and contentions raised by FIOP Limited.

30. In December, 1976 the tenancy rights, even if the rent was more than Rs.3,500/-, were governed by the DRC Act. The said Act prohibits transfer of tenancy rights or leasehold rights by the lessee, except with the written consent of the lessor (See Section 14(1)(b) of the DRC Act). Section 111 of the Transfer of Property Act recognizes express and implied surrender of lease under clauses (e) and (f). Fab India Inc., therefore, impliedly surrendered the lease by their conduct when they allowed the new company FIOP Limited to take over the business and the assets in India. On this aspect, we would like to reproduce the following observations of the Supreme Court in ***Cox and Kings v. Chandan Malhotra*** 1997 (2) SCC 687:

“ 5. Thus, it could be seen that under the consequence of agreement between the Foreign Company and the Indian Company, the Indian Company became the assignee with all rights and liabilities and subject to observance of the terms and conditions of all the tenancy rights contained in the leases or agreements for lease under which the same are being held by the Foreign Company. It would, thus, be clear that it is a case of assignment of the leasehold right, had from the respondent in favour of Indian Company, subject to the observance of the leasehold covenants contained in the lease held by the Foreign Company. The question, therefore, is : whether it is a sub-letting or assignment? It is seen that Sub-section 1(b) of Section 14, in clear terms envisages that the tenant shall not, after June 9, 1952, sub-let, assign, or otherwise part with the possession of the whole or any part of the premises, without obtaining the written consent of the landlord. It is seen that though by operation of FERA the Foreign Company had wound up its business, it assigned, under the agreement, the leasehold interest in the demised premises to the Indian Company which is carrying on the same business in the tenanted premises without obtaining the written consent of the landlord.

6. The respondent-landlord is not bound by such assignment, induction of the appellant-Company against her wishes. Her written consent is a pre-condition, as envisaged under Sub-section (1)(b) of Section 14 which was not obtained. Therefore, it is a clear case of sub-letting. Even otherwise, it would be an assignment, as admittedly agreed in the agreement referred to hereinbefore between the Foreign

Company and the Indian Company. In *P.H. Rao v. S.P.N.K Jain and Anr* : [1980]3SCR444 , the landlord had executed a lease in respect of the demised premises in favour of the Laxmi Bank on 1.4.1942; the Bank went into liquidation. The liquidator sold leasehold right to the respondent and the Court confirmed the same. An application for eviction came to be filed and it was contended that it being an involuntary transfer it was not a case of sub-letting under Section 14(1)(b) of the Act. This Court had negated the contention holding thus :

As regards point No. 3, the High Court relying on a decision of Calcutta High Court in *Krishna Das Nandy v. Bidhan Chandra Roy* AIR1959Cal181 , has found that as the transfer in favour of the respondent No. 1 by the Official Liquidator was confirmed by the Court, the status of the tenant by respondent No. 1 was acquired by operation of law and, therefore, the transfer was an involuntary transfer and the provisions of Rent Control Act would not be attracted. After careful perusal of Calcutta case, in the first place it appears that the section concerned has not been extracted and we are not in a position to know what was the actual language of the Section of the Bengal Act. Secondly, in our opinion, the official liquidator had merely stepped into the shoes of Laxmi Bank which was the original tenant and even if the official liquidator had transferred the tenancy interest to respondent No. 2 under the orders of the Court, it was on behalf of the original tenant. It was undoubtedly a voluntary sale which clearly fell within the mischief of Section 14(1)(b) of the Delhi Rent Control Act. Assuming that the sale by the official Liquidator was an involuntary sale, then it undoubtedly became an assignment as provided for by Section 14(b) of Delhi Rent Control Act. Section 14(b) runs thus:

14(b)--that the tenant has, on or after the 9th day of June, 1952, sublet, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord.

The language of Section 14(b) is wide enough not only to include any sub-lease but even an assignment or any other mode by which possession of the tenanted premises is parted. In view of the wide amplitude of Section 14(b) we are deeply of the opinion that it does not exclude even an involuntary sale. For these reasons, therefore, we are unable to agree with the view taken by the High Court. The appeal is accordingly allowed, the judgment and decree of the High Court are set aside and the plaintiffs application under Section 25 of the Delhi Rent Control Act is dismissed.”

31. In these circumstances, we accept the contention of Mushran that there was only one tenancy at the time when the suit was filed and there was only one tenant in occupation of the property, i.e., FIOP Limited.

31A. The aforesaid findings relating to surrender of tenancy rights by Fab India Inc. is based upon legal principle and admitted factual position and not based upon hearsay “personal” fact stated or attributable to statement of Vibhu Mushran (PW-1). Similarly, the reasons given in paragraph 22 above do not rely upon statement of PW-1, which was not based on his personal knowledge.

(B) Plea of merger and Mesne Profits or rendition of accounts

32. Doctrine of merger, i.e. smaller merger into the larger or bigger, envisaged in Section 111 Clause (d) of the Transfer of Property Act, does not help or assist the FIOP Limited. In fact, the said doctrine supports the case and the stand of Mushran. Section 111(d) of the Transfer of Property Act reads as under:-

“111. Determination of lease.- A lease of immoveable property determines—

.....

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right”

It is clear from the said Section that any existing lease whether month by month or a written lease does not get extinguished because the lessee purchases a part of the revisionary interest from the co-landlord/owner as there is no fusion of whole interest as mandated for determination of lease in terms of Section 111(d). The lease continues and remains in subsistence. In *India Umbrella Manufacturing Co & Ors. versus Bhagabandei Agarwalla & Ors., AIR 2004 SC 1321*, the suit

house was jointly owned by two co-owners and leased out to two tenants. The co-owner jointly filed suit for eviction but midway, one of the co-owners transferred her interest to the partner of one of the tenant firm. The transferee expressed his intention to withdraw the suit but this plea was not accepted because entire interest of the landlord did not merge with the tenants. The transferee had purchased only a share in the property and not entire property and, therefore, doctrine of merger as per clause (d) of Section 111 of the Transfer of Property Act was not attracted, the tenancy continued. It is, therefore, clear that by merely purchasing 50% share of the co-owner, the tenancy rights or the tenancy itself in favour of FIOP Ltd. did not get extinguished, it continued.

33. We are aware and conscious of the fact that the case of *Mushran* is that they had determined month to month tenancy by issue of notice dated 10th May, 1995 but this to our mind would not make any difference as far as the plea based on clause (d) to Section 111 of the Transfer of Property Act is concerned. The said principle would continue to apply.

34. We would only rely upon three judgments of the Supreme Court. In *Badri Narain Jha and Ors. v. Rameshwar Dayal Singh and Ors.*, AIR 1951 SC 186, it was observed that if the lessor purchases the lessee's interest, the lease gets extinguished as a person cannot be both, the landlord and the tenant, but there is no extinction of lease, if one of the lessees purchases a part of the lessor's interest. In such cases, the leasehold and the revisionary interest do not coincide. In *Pramod Kumar Jaiswal and Ors v. Bibi Husn Bano and Ors*, AIR 2005 SC 2857, three Hon'ble Judges of the Supreme Court considered the reference made pursuant to difference of opinion noticed between ratio in *Nalakath Sainuddin v. Koorikadan Sulaiman* (2002) 6 SCC 1 and *Indra Perfumery v. Moti Lal and Ors.* AIR 2002 SC 2562. In the said decisions, there was difference of opinion between views

expressed by P.K. Balasubramanayan, J., and the Chief Justice of India R.C. Lahoti, J concurred by G.P. Mathur, J., on an aspect which is not relevant in the present decision. However, the three Hon'ble Judges agreed on the ratio that the doctrine of merger as envisaged and stipulated in clause (d) of Section 111 of the Transfer of Property Act, requires merger of the whole of the leasehold right/interest of the lessee and the lessor in the property in one person and not when there is part coalescing of the leasehold right with one of the many tenants purchasing the ownership right in the property. The said doctrine is not applicable in case of assignment of fraction or revision/rights of a co-owner/landlord. The judgment of P.K. Balasubramanayan J, refers to the doctrine of merger as expounded and explained by *Blackstone, Cheshire and Burn's Modern Law of Real Property (16th Edition), Megarry's Manual of the Law of Real Property (8th Edition)* and Section 111(d) of the Transfer of Property Act. The decision also refers to the earlier judgments on the said issue and question. It was accordingly opined:

“36. A plain and grammatical interpretation of Section 111(d) of the Transfer of Property Act leaves no room for doubt that unless the interests of the lessee and that of the lessor in the whole of the property leased, become vested at the same time in one person in the same right, a determination of the lease cannot take place. On taking an assignment from some of the co-owner landlords, the interests of the lessee and the lessor in the whole of the property do not become vested at the same time in one person in the same right. Therefore, a lessee who has taken assignment of the rights of a co-owner lessor, cannot successfully raise the plea of determination of tenancy on the ground of merger of his lessee's estate in that of the estate of the landlord.”

35. The admitted facts have been noticed above. FIOP Limited was originally the tenant of the entire property under joint ownership of

Sheopori and Mushran, both of them being 50% owners though their portions were not separated. By sale deed dated 21st October, 2005, FIOP Limited purchased 50% share in the property from Sheopori. To this extent the FIOP Limited became 50% owner of the property. However, this will not affect and make FIOP Limited also owner of the balance 50% in the property owned by Mushran. They remained tenant of Mushran to the extent of 50% of the property and, hence, are liable to pay use and occupation charges to Mushran for the said 50%. The contention of FIOP Limited to the contrary is inequitable, unjust and unfair.

36. In view of the aforesaid discussion, it has to be held that even after FIOP Ltd. purchased 50% share of Sheopori, the tenancy was not determined, and continued. FIOP Ltd. would continue to be liable to pay rent i.e. share of Mushran. Their liability and obligation to pay the said rent does not get evaporated, and continues. Mushran has legal right to claim mesne profit or rent from FIOP Ltd.

37. We do not think Mushran is entitled to decree of rendition of accounts or a share in the profits, if any, earned by the FIOP Ltd. after 21st October, 2005. Mushan does not get any share in the profits or losses of FIOP Ltd. The reason is obvious that the tenancy rights or the right of occupation did not undergo a change with FIOP Limited acquiring 50% ownership rights in the tenanted property. They continued and remained a tenant of Mushran.

38. Thus the plea of merger, raised by FIOP Limited, has to be rejected. Accordingly, the cross-objections filed by Mushran, to this extent, are allowed and it is held that FIOP Limited is liable to pay use and occupation charges to the extent of 50% share owned and belonging to Mushran.

Rate of Mesne Profits and interest.

39. Mesne profit is nothing but the damages which the erstwhile tenant after determination of the lease has to pay. The landlord is compensated for the loss caused because he is denied and deprived of the possession of the property. A person in wrongful possession has to pay compensation on the basis of profit he actually received or with ordinary diligence might have received. (see *Fateh Chand vs. Bal Kishan* AIR 1963 SC 1405). The market rate of rent is a good measure and standard to compute the same. What would be market rate of rent requires undertaking comparative assessment of the nature, location, age and condition etc. of a property and similar premises in the surrounding areas which have been given on rent during the period in question. There is some element of guess work and no uniform or standard pattern of assessment can be applied.

40. On the question of quantum of mesne profit, we agree with the contention of Mushran that there is a flaw in the calculation made by the learned single Judge in the impugned judgment. Mushran had filed, before the trial court, copy of the registered lease deed (Exhibit PW-2/1) dated 19th January, 1998 in respect of ground floor and basement for No. N-4, Greater Kailash-I Market, New Delhi. The monthly rent stipulated in the deed was Rs.3,75,000/- per month for a period of three years till 19th December, 2000 with the option to renew on same terms and condition, with 25% increase in the rent, unless there was a notice to the contrary. The said deed was executed by Pradeep Bhaskar (PW-2), Senior Manager Oriental Bank of Commerce. The learned single Judge relying upon this deed has granted mesne profits @ Rs.1,87,500 being 50% of Rs.3,75,000/- per month. However, the total area leased out under (Exhibit PW-2/A)

was 2880 square feet and the total area leased out, in the present case, is approximately 4200 square feet. Mushran being entitled to the mesne profits, i.e., in respect of 2100 square feet. On prorate basis the rent/mesne profit works to Rs 2,75,000/- per month as accepted by FIOP Limited in their written submissions.

41. We also have lease deeds which were executed by FIOP Ltd. with third parties for taking on rent different properties within the same market where the property is located. Reference to these lease deeds was specifically made in sub paragraphs of paragraph 10 of the amended plaint as under:-

S. No.	Property No.	Date of Lease	Area	Rent
1.	N-13, Market, Greater Kailash-I, New Delhi	23.5.2007	Basement and Ground Floor	Rs. 4 Lacs per month with security deposit of Rs 20 Lac
2.	N-9 Market Greater Kailash-I, New Delhi (half portion)	8.6.1998	Ground Floor and First Floor	Rs. 1,50,000/- per month with security deposit of Rs 24 Lac
3.	N-9 Market, Greater Kailash-I, New Delhi (half portion)	14.6.2002	Ground Floor and First Floor	Rs. 1,50,000/- per month with security deposit of Rs 24 Lac
4.	N-5 Market, Greater Kailash-I, New Delhi	15.11.2007	First and Second Floors	Rs. 3 Lacs per month with security deposit of Rs 15 Lac

42. FIOP really cannot deny execution of the said lease deeds. There is no specific denial in the written statement to the amended

plaint. On the basis of this information and keeping the other relevant factors in mind, we feel that Mushran is entitled to mesne profit @ Rs.2,75,000/- per month with effect from 1st January, 1998 till 31st December, 2007. Taking into consideration the general increase in rent in Delhi and the information in the chart above, one cannot deny that the rent rate would have increased substantially by the year 2008. Accordingly, for period after 1st January, 2008, Mushran is entitled to use and occupation charges @ Rs.3,02,500 per month i.e. Rs 2.75 lacs plus 10% increase.

43. For the period prior to 1st January, 1998, we do not have any direct evidence and material as to the benefit derived by the FIOP Ltd. As per the prayer clause in the plaint, Mushran and Sheopori had claimed mesne profit and damages @ Rs.1,00,000/- per month w.e.f. 1st July, 1995 to 31st August, 1995 for the entire property. For this period i.e. 1st July, 1995 to 31st August, 1995, Mushran will be entitled to mesne profit @ Rs.50,000/- per month. For the period subsequent thereto, i.e. w.e.f. 1st September, 1995 till 31st December, 1997, Mushran will be entitled to mesne profit @2,47,500/- [Rs.2,75,000 – 27,500] which is a decrease of 10% from the amount awarded for subsequent period. The impugned decree to this extent stands modified.

44. We are also inclined to grant interest on the mesne profit so awarded. It has been held in *Fateh Chand's case* (supra) that mesne profit includes interest. Similarly, in **Mahant Narayana Dasjee Varu and Ors. v. Board of Trustees, The Tirumalai Tirupathi, Devasthanam**, AIR 1965 SC 1231, award of interest @ 6% was upheld. We are accordingly granting interest @ 6% p.a. on the said amount from the date the mesne profit became due and payable. On the amount deposited pursuant to the stay order passed in this appeal, the interest accrued thereon will be paid to Mushran. We feel that the award of

interest @ 6% p.a. is required and justified keeping in view the long period of pendency of litigation. This would be just, fair and equitable to both sides.

Decree for partition.

45. We do not agree with the FIOP Limited that the suit of the Mushran should have been dismissed once FIOP Limited had purchased 50% ownership rights from Dar and Preeti Atal, vide sale deed dated 21st October, 2005. Mushran was permitted to amend the plaint and incorporate the plea for partition vide order dated 13th October, 2008. The said order has not been specifically challenged in the appeal preferred by FIOP Limited. The effect thereof is that the Mushran prayed for partition of the property and this became a *lis* to be adjudicated in the suit. The amendment, therefore, nullified the legal effect of the earlier orders dated 29th April, 2008 and 26th November, 2007, which were obliterated by the amendment of the plaint allowed vide order dated 13th October, 2008. The learned single Judge in our opinion has rightly relied upon decision of the Supreme Court in ***Shub Karan Bubna @ Shub Karan Prasad Bubna v. Sita Saran Bybna & Ors.*** (2009) 12 SCALE 259 wherein it has been held as under:

“4. ‘Partition’ is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. ‘Separation of share’ is a species of ‘partition’. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be

joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues: (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds?

5. In a suit is for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as 'decree' under Order 20 Rule 18(1) and termed as 'preliminary decree' under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject matter of the final decree under Rule 18(2). The question is whether the provisions of Limitation Act are inapplicable to an application for drawing up a final decree."

Observations have been made in ***Ramagouda v. Lagmavva*** AIR 1982 Kar 82 which support the view we have taken.

46. The contention, that the Court had not framed any issue on partition and the parties were not granted any opportunity to lead evidence, before the preliminary decree of partition was passed, is an afterthought. It is a cavil plea for the reason that, even in this appeal, the preliminary decree of partition passed by the learned single Judge has not been challenged on the basis of the disputed facts or on merits. FIOP Limited does not dispute that Mushran and they are joint owners

of the property, each having 50% undivided share. Learned single Judge has proceeded on the basis of the accepted and admitted position and these facts are not in dispute. It is not the claim of FIOP Limited that they own more than 50% share of the property and any specific portion, of that 50%, is owned by them. Issues are framed when there are disputes, but when there are no disputes and the position is accepted, ocular evidence need not be recorded. Learned single Judge has gone into the question of partition in the impugned judgment. Arguments of the parties were heard, on the said aspect, and have been dealt with, in the impugned judgments. The parties were aware and conscious that the question of partition was being examined.

47. In these circumstances, we do not think that there is any necessity to set aside the findings recorded by the learned single Judge, merely because of the technical lapse of not framing a separate issue on the question of partition. As observed by the Supreme Court in ***Makhan Lal Bangal v. Manas Bhunia and Others***, (2001) 2 SCC 652, the issues are framed to narrow down and pin-point the area of conflict and concave the mirror held by the court reflecting the pleadings of the parties. The obligation is on the Court to frame the issue after reading plaint/written statement. Similar is the judgment in the case of ***Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and Another***, (2009) 17 SCC 796, wherein Order 14 Rule 1 of the Code of Civil Procedure, 1908 was referred to and position was explained.

48. As noticed above, the suit for ejectment was filed in 1995. It took nearly 10 years to record evidence, though it may be noticed that Sheopori and Mushran had closed evidence on 2nd September, 1998. On 25th October, 2005, the case was listed for cross-examination of the

last witness of the defendant i.e. FIOP Limited. However, the case was not shown in the cause list or notice board of the Court. On enquiry, it was learnt that some advocate had appeared and had withdrawn the suit on the basis of the sale deed dated 21st October, 2005, executed by Dhruv Dhar and Preeti Atal with regard to 50% share of the property in favour of FIOP Limited. The application for withdrawal of suit was not signed by Musran and, in fact, was filed by different advocate, who was earlier not appearing for the landlords. Applications for restoration was filed, but it took nearly two years before the suit was restored, vide order dated 12th July, 2007. Thereafter, suit was amended and the prayer for partition, rendition of accounts, etc., was added. We have already noted the other orders passed by the court relating to deletion of issue No.(3) and modification of issue No. (7). The said prayer for deletion/modification was nullified when the prayer for partition was made. We do not think that it would be just and fair to allow the appeal on the technical ground that specific issue should have been framed with regard to the partition, even though the judgment does deal with the said question on the basis of the admitted position. It is not disputed that the question of partition was contested before the learned single Judge on the basis of the admitted factual position. The plea of FIOP Limited is, therefore, rejected.

49. In view of the aforesaid discussion, we partly allow the appeal and the cross-objections and it is held as under:-

- A. The plea of FIOP Ltd. that there were multiple tenancies and doctrine of merger supports them is rejected.
- B. Preliminary decree of partition has been rightly passed and is valid. It is accordingly upheld.

C. Mushran is entitled to mesne profit equal to 50% of his share in the property and has been computed as under:

S.No.	Period	Mesne Profit per month
01.	01.07.1995 – 31.08.1995	Rs.50,000/-
02.	01.09.1995 – 31.12.1997	Rs.2,47,500
03.	01.01.1998 – 31.12.2007	Rs.2,75,000
03.	01.01.2008 onwards	Rs.3,02,500

D. Mushran will be entitled to interest @ 6% on the amount of mesne profit for the period it remains unpaid till the payment is made. (Refer paragraph 44 above).

E. Mushran will pay (deficient) court fee on the future mesne profit i.e. mesne profit w.e.f. 1st September, 1995 onwards as per the calculations made above, within a period of eight weeks from today. Modified decree sheet will be drawn accordingly.

F. Mushran is entitled to cost in the appeal and the cross objection.

50. The appeal and cross objection stand disposed of accordingly.

(SANJIV KHANNA)
JUDGE

(S.P. GARG)
JUDGE

January 31, 2013
VKR/kkb/NA