

* IN THE HIGH COURT OF DELHI AT NEW DELHI
Date of Decision: 07.05.2014

+ **CM(M) 4/2014 & CM Nos.115-116/2014**
M/S FEDERAL MOTORS PVT LTD Petitioner
Through: Mr. Ravi Gupta, Sr. Adv. with
Mr. Yogender Vasisht, Adv.

versus

M/S ATMA RAM PROPERTIES PVT LTD..... Respondent
Through: Mr. J.P. Sengh, Sr. Adv. with
Mr. Amit Sethi, Adv., Ms. Puja
Anand and Mr. Sachin Aneja,
Adv.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

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1. The present petition under Article 227 of the Constitution of India arises from the orders dated 29th April, 2013 (“**first impugned order**”) and 28th September, 2013 (“**second impugned order**”) (hereinafter collectively referred to as “**impugned orders**”) of the learned ADJ – 02 & Wakf Tribunal, New Delhi (“**Appellate Court**”) in ARCT No. 1 of 2011 (formerly RCA No. 279 of 2001) (“**Appeal**”). By the impugned orders, the learned Appellate Court directed the petitioner/tenant herein to deposit an amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) *per mensem* towards user charges of half portion of showroom no. 9, together with one bathroom at ground floor, *kolki* and garages no. 12 and 13 of the Atma Ram Mansion (formerly Scindia House) (“**leased premises**”) pending decision of the Appeal. The petitioner will hereafter be referred to as the tenant and the respondent, as the landlord.
2. This Court would ordinarily, when called upon to exercise its supervisory jurisdiction under Article 227, be reluctant to interfere in

such exercises of discretion – especially of an interim nature – by the Appellate Court. However, owing to the nature of the averments raised in the petition – specifically *qua* the issues of the maintainability of the application giving rise to the impugned orders and of the jurisdiction of the Appellate Court to have passed the impugned orders – and given its peculiar circumstances this Court has heard the matter.

3. The dispute between the parties, which has now survived two decades and has also given rise to a judgement of the Supreme Court – a *locus classicus* in itself,¹ traces back to an eviction petition filed by the landlord against the tenant in 1992 in respect of the leased premises, which was under tenancy since about 1944. Filed under section 14 (1) (b) of the Delhi Rent Control Act, 1958 (“**Act**”), the petition was allowed on 19th March, 2001 and the tenant was directed to vacate the leased premises in view of its having sub-let a part thereof without permission from the landlord (“**order of eviction**”).
4. A statutory appeal was preferred under section 38 of the Act to challenge the order of eviction, which is admittedly pending final hearing before the Appellate Court. Pertinently, when registering the appeal and staying the order of eviction, the Appellate Court, by its order of 12th April, 2001, directed the tenant *inter alia* to deposit an amount of Rs. 15,000/- (Rupees fifteen thousand only) *per mensem* in Court. The deposit was towards continued use and occupation charges of the leased premises from the date of the order of eviction.

¹ *Atma Ram Properties Pvt. Ltd. v Federal Motors Pvt. Ltd.*, (2005) 1 SCC 705.

The stay was made conditional upon the deposit of the said amount, over and above the rent at the contractual rate – which was to be paid directly to the landlord. This imposition of condition for admission of the appeal/staying of the impugned orders was challenged by the tenant in this Court by CM (M) No. 280 of 2001. This Court, by its order of 12th February, 2002, set aside the condition of deposit and directed that the tenant may remain in the premises subject to his paying the rent at the contractual rate to the landlord.

5. Aggrieved by the order setting aside the condition of deposit, the landlord filed a petition seeking leave to appeal to the Supreme Court under Article 136 of the Constitution of India, which leave was granted. The judgement dated 10th December, 2004 in the resulting Civil Appeal No. 7988 of 2004 – being the *locus classicus* earlier adverted to – set aside the judgement dated 12th February, 2002 of this Court and thus restored the condition of deposit of Rs. 15,000/- (Rupees fifteen thousand only) *per mensem* for the stay of the order of eviction to remain in force. While the reasoning of the Supreme Court will be discussed in further detail at a more appropriate juncture, it requires noticing herein that the Supreme Court held *inter alia* that *the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter (sic: later) date.*²
6. Thereafter, in 2007, the tenant sought to file an application under order VI rule 17 of the Code of Civil Procedure, 1908 (“**Code**”) in

² *Id.*, at para. 19 (3), p. 718.

the Appeal. When issuing notice upon the same to the landlord on 31st January, 2007, the Appellate Court *suo motu* directed the tenant to deposit a monthly amount of Rs. 25,000/- (Rupees twenty five thousand only), instead of Rs. 15,000/- (Rupees fifteen thousand only). The Appellate Court, when passing the order of 31st January, 2007, observed that the amount of deposit ought to be increased in view of the order of the Supreme Court and the increase in value of the property. This order, admittedly, has not been challenged by the tenant. Thereafter, by an order of 11th October, 2007, the learned Appellate Court remanded the matter to the Trial Court directing it to return its findings as to a particular matter the parties were at issue on. While the particulars thereof are irrelevant for the present dispute, by its judgement and order of 14th July, 2010, returned its finding on the issue and the Appellate Court proceeded thereafter with the Appeal.

7. On 5th November, 2011, the landlord moved an application under order XLI rule 5 read with section 151 of the Code, seeking directions to the tenant to deposit (a) Rs. 370/- (Rupees three hundred seventy only) per square foot of half portion of the showroom, and (b) Rs. 1,00,000/- (Rupees one lakh only) each for the garages, from the date of the application till the disposal of the appeal. The landlord had contended that it is in the interest of justice that the amounts to be deposited be increased as prayed for. It was submitted that the value of the leased premises has skyrocketed over the years and the tenant is enjoying the same by depositing a meagre amount of Rs. 25,000/- (Rupees twenty five thousand only). The

earnings from similarly placed premises was sought to be relied upon to show both market rate of the leased premises as well as the steady increase in the same.

8. The tenant had opposed the application and contended that (a) the order of 12th April, 2001 whereby the tenant was directed to deposit Rs. 15,000/- (Rupees fifteen thousand only) had merged with the order of the Supreme Court and hence cannot be modified by the Appellate Court; (b) that even the order of 31st January, 2007 whereby the amount was increased from Rs. 15,000/- (Rupees fifteen thousand only) to Rs. 25,000/- (Rupees twenty five thousand only) is without jurisdiction; (c) the documents indicating earnings from similarly placed premises are irrelevant as they are collusive and not binding on the tenant; (d) the increase in rent cannot be made unilaterally by the landlord contrary to the provisions of section 6A of the Act; (e) the landlord had already filed a similar application in the past and is hence precluded from filing the present application; and (f) the purpose of order XLI rule 5 of the First Schedule to the Code is to secure the interest of the parties and hence enhancement of the amount of deposit cannot be sought.

9. By the first impugned order, the Appellate Court held that the application is maintainable but directed that appropriate documents supported by an affidavit be filed for calculating market value of the leased premises. It reasoned:

9.1. The doctrine of merger *qua* orders challenged in appeal is not of universal application; it would apply only where the superior

court has dealt with the issue that the lower Court has adjudicated upon.

- 9.2. The order of the Supreme Court only dealt with the issue of whether the Appellate Court had jurisdiction to impose the condition of a deposit while admitting an appeal; it did not consider the issue of quantum of deposit.
- 9.3. Hence, the order of the Appellate Court *qua* quantum of deposit does not merge with the order of the Supreme Court.
- 9.4. Judgements regarding section 6A of the Act would have no relevance in the present matter as the landlord has not increased the rent unilaterally before filing the suit.
- 9.5. The record bears out that the landlord has not filed any application in the past seeking the same or similar relief.
- 9.6. The issue involved is not of maintainability of the application, but of the power of the court to enhance the amount to be deposited.
- 9.7. From the judgement of this Court in *Dhruv Goel v Anand Parkash Goyal*,³ it is evident that the Appellate Court has power to enhance the amount to be deposited; the reasoning therefor can be found in the order of the Supreme Court itself.
- 9.8. While it is doubtless that the purpose of Order XLI rule 5 of the Code is to secure the interests of the parties, the interest of the parties may change over time.
- 9.9. The tenant has enjoyed use of the property since the order of eviction at a nominal cost of Rs. 15,000/- (Rupees fifteen

³ Judgement dated 19th March, 2010 in CS (OS) 420 of 1982.

thousand only) *per mensem* for the first six years and of Rs. 25,000/- (Rupees twenty five thousand only) *per mensem* for the next six years, over and above the admitted rent of about Rs. 300/- (Rupees three hundred only).

9.10. The value of the property would doubtless have increased manifold owing to the lapse of time.

9.11. The principles and objectives laid down by the Supreme Court when upholding the power of the Appellate Court to impose the condition of deposit of use and occupation charges applies *pro tanto* to increase of use and occupation charges.

9.12. The application seeking increase of the amount of security deposit is therefore maintainable.

10. As earlier observed, the first impugned order had, while holding that the application seeking increase of the amount of deposit was maintainable had directed both parties to file appropriate documents supported by affidavits to show the prevailing rate of rent in the immediate vicinity generally. It observed that the landlord had merely filed documents and other agreements that it had entered into with other parties, but has not filed any affidavit in support thereof. It observed further that the tenant has not filed any documents or affidavit in this regard. In these circumstances, directions were issued to file further material. Following this, the landlord had filed an affidavit in addition to the agreements already filed by it and the tenant filed an affidavit, but did not file any documents. Thereafter, the parties were heard *qua* the issue of the quantum by which the deposit ought to be increased.

11. The tenant contended against maintainability of the application and need for an enhancement. Both issues were refused to be considered by the Appellate Court at this stage as the first impugned order had already dealt with the same *in extenso*. The landlord had set out in its affidavit the relative merit of the leased premises in view of its location as well as amenities available nearby. It had brought on record the agreements entered into with other merchants in the same building, and supported the same with due averments in the affidavit earlier adverted to. Based on the agreements, the landlord contended that the other properties in the building are fetching it income in the range of Rs. 279/- (Rupees two hundred seventy nine only) and Rs. 420/- (Rupees four hundred twenty only) per square foot *per mensem*. The landlord had further contended that the garages are capable of earning Rs. 1,00,000/- (Rupees one lakh only) *per mensem*. The tenant opposed reliance on the said agreements, contending that the same have been entered into after the disputes have arisen between the parties and are false/collusive documents prepared by the landlord merely to create an illusion of high value of the property. The tenant had further contended that since the infrastructure status and facilities provided/available to the tenants of the premises under the said agreement was not known, the same cannot be considered to ascertain market value of the leased premises.

12. The second impugned order rejected the contention of the tenant *qua* the inadmissibility of the agreements entered into by the landlord with the other merchants in the same building. It observed that it is

inconceivable that a business house would enter into registered lease deeds with inflated rent values merely at the instance of the landlord and that the contention to the contrary inspires no confidence. It observed further that the premises are the closest available premises to the leased premises for the purpose of comparison, being located in the same building. It observed that the tenant cannot be heard to contend that the particulars of infrastructure status and facilities provided/available in the said premises are unknown, given that they are located in the same building. It observed that if the tenant had desired to contend that the infrastructure or facilities provided to these premises are in any way different from what is provided to the tenant, the tenant ought to have taken steps to ascertain the same and state as much in its affidavit. It remarked particularly on the complete lack of particulars or assistance from the tenant *qua* the market value of the leased premises. It observed that the tenant has, in any case, not impugned the agreements on the basis that the premises have not been let out to the entity mentioned in the agreements, or that the businesses stated to be run from the said premises are not actually being so run therefrom.

13. The second impugned order observed that the landlord has shown that the leased premises are likely to fetch income in the range of Rs. 279/- (Rupees two hundred seventy nine only) and Rs. 420/- (Rupees four hundred twenty only) per square foot *per mensem*. It observed that in view of the wide range and the possibility of variation on account of the facilities provided, the lower of the two figures ought to be considered as the income the leased premises is likely to fetch. It

rejected the contention that the garages are likely to fetch Rs. 1,00,000/- (Rupees one lakh only) each *per mensem* as being unsupported by any evidence or material. It held, however, that owing to their accessibility and location, they are likely to fetch at least Rs. 25,000/- (Rupees twenty five thousand only) each *per mensem*. It took into consideration the submission that the landlord seeks only fifty percent of the market rate, on the basis of the trend in recent decisions of the Supreme Court. On the above basis, the second impugned order directed the tenant to deposit an amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) *per mensem*, as use and occupation charges for the portion of the showroom and the two garages.

14. The propriety or otherwise of the impugned orders are now in dispute before this Court and this Court took time to consider. However, this Court was mindful of the *dictum* of the Supreme Court in *Surya Devi Rai v Ram Chander Rai & Ors.*,⁴ where, relying to a wide range of authorities on the issue,⁵ including the dicta of the Supreme Court in *Waryam Singh v Amarnath*,⁶ the Supreme Court warned against the indiscriminate exercise of the power of superintendence under the supervisory jurisdiction of the Court under Article 227.

⁴ (2003) 6 SCC 675.

⁵ *Corpus Juris Secundum* (Vol. 14, p. 121); *Administrative Law*, 8th Edn., p. 591; *Ryots of Garabandho v Zamindar of Parlakimedi*, AIR 1943 PC 164 : 70 IA 129; *Hari Vishnu Kamath v Ahmad Ishaque*, AIR 1955 SC 233 : (1955) 1 SCR 1104; *Custodian of Evacuee Property v Khan Sabeel Abdul Shukoor*, AIR 1961 SC 1087 : (1961) 3 SCR 855; *Nagendra Nath Bora v Commr. of Hills Division and Appeals*, AIR 1958 SC 398 : 1958 SCR 1240; *T.C. Basappa v T. Nagappa*, AIR 1954 SC 440 : (1955) 1 SCR 250; *Satyanarayan Laxminarayan Hegde v Mallikarjun Bhavanappa Tirumale*, AIR 1960 SC 137 : (1960) 1 SCR 890; *Umaji Keshao Mesbaram v Radhikabai*, 1986 Supp SCC 401; *Chandrasekhar Singh v Siya Ram Singh*, (1979) 3 SCC 118 : 1979 SCC (Cri) 666.

⁶ AIR 1954 SC 215 : 1954 SCR 565.

Pertinently, in its summary, which was quoted with approval by the Supreme Court more recently in *Sameer Suresh Gupta v Rahul Kumar Agarwal*,⁷ it observed:⁸

“38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene

⁷ (2013) 9 SCC 374.

⁸ *Surya Devi Rai v Ram Chander Rai & Ors.*, *supra*, n. 4, at p. 694-696.

would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

***”

(Emphasis supplied)

15. The Supreme Court, in conclusion, clarified that the injunction is not from exercising power under Article 227 in any case whatsoever, but to exercise the same sparingly and to correct errors of moment that need immediate attention. It held:⁹

“39. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a strait-jacket formula or rigid rules. Not less than often, the High Court would be faced with a dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where “a stitch in time would save nine”. At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge.”

(Emphasis supplied)

16. Thus, with the consent of the learned Senior Advocates appearing for the parties, the matter has been heard finally at this stage, but solely to identify whether the impugned orders is of such a nature as to warrant exercise of this discretionary power of superintendence that the Supreme Court has consistently warned against lightly exercising.

⁹ *Id.*, at p. 696.

As to Section 6A of the Act

17. Mr. Ravi Gupta, learned Senior Advocate appearing for the tenant, contended that the present matter is, indeed, one rightly deserving interference with under Article 227. He contended that the application by the landlord is nothing short of a unilateral attempt by the landlord to increase the rent payable *qua* the leased premises – an exercise prohibited by law. He contended that the provisions of the Act, specifically sections 6 and 6A thereof specifically disentitles the landlord from unilaterally increasing the rent payable *qua* the premises. He contended that an onerous condition – which is the expression sought to be assigned to the condition imposed by the impugned orders – cannot be imposed on the tenant, which is exercising its statutory right of appeal. He contended that the principles laid down for increase of rent under section 6A of the Act have been given a complete go by in the impugned orders. He contends that a wholly arbitrary figure has been specified as the amount to be deposited, without any regard to the mandate of the law. He submits that on this ground alone, the impugned orders deserve to be set aside as being in excess of law. He placed reliance on the judgement of the Supreme Court in *Niyas Ahmad Khan v Mahmood Rahmat Ullah Khan & Anr.*¹⁰ in support of his contention.

18. The premise of this contention is, in the opinion of this Court, somewhat misplaced. It must be clarified that the pronouncement in *Atma Ram Properties Pvt. Ltd. v Federal Motors Pvt. Ltd.*,¹¹ was not that

¹⁰ (2008) 7 SCC 539.

¹¹ *Supra*, n. 1.

the Court may direct payment of rent over and above the contractual or standard rent before staying the order of eviction. To the contrary, the judgement of the Supreme Court was that as the tenancy comes to an end upon the pronouncement of order of eviction, a reasonable sum may be directed to be deposited as *use and occupation charges* during pendency of the appeal. The provisions of sections 6 and 6A of the Act would have no applicability in determination of such charges. Rather, it would not be wholly incorrect to state that none of the provisions of the Act would apply to govern the relationship between the parties, for the tenancy comes to an end upon the order of eviction being passed.¹² Given the same, the present contention on behalf of the tenant hardly inspires any confidence in the mind of the Court.

19. The pronouncement in *Niyas Ahmad Khan v Mahmood Rahmat Ullah Khan & Anr.*,¹³ would have no application in the present case for the reason that the facts of that case were diametrically opposite to the present case. In the said case, the landlord had initiated proceedings under section 21 (1) (a) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 against the tenant, but was unsuccessful in the same. Even in the appeal

¹² 17. In the Delhi Rent Control Act, 1958, the definition of a “tenant” is contained in clause (j) of Section 2. Tenant includes “any person continuing in possession after the termination of his tenancy” [Section 2(j)(ii)] and does not include “any person against whom an order or decree for eviction has been made” [Section 2(j)(A)]. This definition is identical with the definition of tenant dealt with by this Court in *Chander Kali Bai case* [(1977) 4 SCC 402]. The respondent tenant herein having suffered an order for eviction on 19-3-2001, his tenancy would be deemed to have come to an end with effect from that date and he shall become an unauthorised occupant. It would not make any difference if the order of eviction has been put in issue in appeal or revision and is confirmed by the superior forum at a latter (sic) date. The date of termination of tenancy would not be postponed by reference to the doctrine of merger. [*Atma Ram Properties Pvt. Ltd. v Federal Motors Pvt. Ltd.*, *supra* n. 1, at p. 717].

¹³ *Supra*, n. 10.

therefrom, the landlord was unsuccessful and the matter was thereafter taken to the Allahabad High Court under Articles 226 and 227 of the Constitution of India. The Allahabad High Court had directed payment of an amount of Rs. 12,050/- (Rupees twelve thousand fifty only) as *rent* by the tenant to the landlord pending decision of the writ petition. It is in the aforesaid fasciculus of facts, and given that there was no order of eviction against the tenant therein that the Supreme Court deemed it appropriate to set aside the order of the Allahabad High Court. The same would have no applicability to the present case. A Bench of three judges of the Supreme Court that was called upon to clarify the apparent difference of opinion between *Atma Ram Properties Pvt. Ltd. v Federal Motors Pvt. Ltd.*,¹⁴ and *Niyas Ahmad Khan v Mahmood Rahmat Ullah Khan & Anr.*,¹⁵ gave a similar opinion.¹⁶

As to *res judicata* and maintainability of the application

20. Mr. Gupta then contended that the application is *per se* not maintainable. This he contends on the basis that the issue of the tenant being put to terms was already considered and decided by the Appellate Court when it issued notice on the application under Order XLI rule 5. He submitted that there can be no review of the order already passed by the Appellate Court on 12th April, 2001. He contended that even the order of 31st January, 2007 whereby the amount fixed on 12th April, 2001 of Rs. 15,000/- (Rupees fifteen

¹⁴ *Supra*, n. 1.

¹⁵ *Supra*, n. 10.

¹⁶ *State of Maharashtra & Ors. v Supermax International Private Limited & Ors.*, (2009) 9 SCC 772, at para. 13, p. 778.

thousand only) *per mensem* was without jurisdiction, but the tenant had *bona fide* complied with the same in the hope and belief that the appeal would soon be heard finally and disposed off. He submitted that the Appellate Court, once it has considered and passed an order on the issue of deposit to be made under Order XLI rule 5, cannot reopen the issue, whether on its own motion or on application by a party. This, he submits, is in view of the fact that Order XLI rule 5 is for the purpose of protecting the interest of the parties, not to further the interest of one party to the detriment of the other. He contends that neither was the application maintainable, nor was the order directing enhancement of the deposit amount specified in the order of 12th April, 2001 maintainable. He lastly contended that the reliance placed on the judgements of the Supreme Court in *Crompton Greaves Ltd v State of Maharashtra*,¹⁷ and *Anderson Wright & Co v Amar Nath Roy & Ors.*,¹⁸ to hold that the judicial trend has changed to the extent that even market rate may be imposed as user charges was incorrect. He submitted that inasmuch as these judgements do not set out the reasons why the final order was passed, they cannot be regarded as authoritative pronouncements.

21. In response, Mr. J. P. Sengh, learned Senior Advocate appearing on advance notice on behalf of the landlord, contended that the application would indeed be maintainable and that there was no infirmity in the impugned orders. He relied extensively on the *dictum* of the Supreme Court in *Atma Ram Properties Pvt. Ltd. v Federal Motors*

¹⁷ (2005) 11 SCC 547.

¹⁸ (2005) 6 SCC 489.

Pvt. Ltd.,¹⁹ and contended that the issue of the liability – to pay user charges – of the tenant who seeks to remain in the property after the order of eviction is no longer *res integra*. He contended that the tenant who continues in the property after the order of eviction stays at the sufferance of the landlord and ought to not be allowed to enjoy the premises at the contractual rate of rent. He further relied on the judgements of the Supreme Court in the case of *Crompton Greaves Ltd v State of Maharashtra*,²⁰ as well as *Anderson Wright & Co v Amar Nath Roy & Ors.*,²¹ to contend that the principle laid down in *Atma Ram Properties Pvt. Ltd. v Federal Motors Pvt. Ltd.*,²² was reaffirmed by subsequent judgements in relation to rent control laws even in other states. He submitted that these judgements clearly establish the power of the Court to impose conditions for the stay of the order of eviction and the power of the Court to consider the material submitted by the parties to come to a conclusion as to the rent to be paid. He thereafter drew attention of the judgement of the Supreme Court in *Mohammad Ahmad & Anr. v Atma Ram Chauhan & Anr.*,²³ as an illustrative instance where the Supreme Court had upheld the enhancement – on application by the landlord – of the interim user charges payable.

22. The contentions of the tenant as to the power of the Appellate Court to review the order of 12th April, 2001 are irrelevant in the present circumstances. The Appellate Court has not passed the impugned

¹⁹ *Supra*, n. 1.

²⁰ *Supra*, n. 17.

²¹ *Supra*, n. 18.

²² *Supra*, n. 1.

²³ (2011) 7 SCC 755.

orders under Section 114, read with Order XLVII of the Code. Nor has the Appellate Court purported to have *reviewed* the earlier order by the impugned orders. At the root of the contention of the tenant is the doctrine of *res judicata*. That the doctrine's boundaries far exceed the scope of section 11 of the Code is a well established principle as seen from the judgement of a Bench of three judges of the Supreme Court in *S. Pl. Narayanan Chettiar v M. Ar. Annamalai Chettiar*.²⁴ That the principle of *res judicata* would apply to the same proceedings at different stages is also the undisputable position in law.²⁵ However, whether this wide ambit can be extended to contend that once an amount of security and/or deposit has been set under Order XLI rule 5 it cannot be subsequently modified, is in issue.

23. While the judgement of the Supreme Court in *Mohammed Ahmad & Anr. v Atma Ram Chauhan & Anr.*²⁶ appears at first blush to answer this issue in favour of the landlord, it may not be wholly apposite to decide the present issue on the basis of the said judgement for two reasons. Firstly, the issue of applicability of the doctrine of *res judicata* to orders under Order XLI rule 5 was not directly in issue therein; it appears to have considered only the issue of whether the enhancement of the amount of deposit under Order XLI rule 5 was justified. Secondly, the judgement seems to indicate that the Supreme Court has proceeded on a concession made by the tenant therein as to maintainability of the proceedings and as to power of the Court to enhance the deposit, and the Supreme Court has cited the same as the

²⁴ 1959 Supp (1) SCR 237 : AIR 1959 SC 275.

²⁵ *Satyadhyan Ghosal & Ors. v Deorajin Debi (Smt.) & Anr.*, (1960) 3 SCR 590 : AIR 1960 SC 941.

²⁶ *Supra*, n. 23.

reason for not looking into precedents or the law *qua* the same.²⁷ In other words, being decided on its peculiar facts and having not considered the issue, the judgement may not be considered as a binding precedent *qua* the issue of applicability of the principle of *res judicata* to orders passed under Order XLI rule 5 of the Code.

24. However, this cannot be read to mean that the Appellate Court is, indeed, barred by *res judicata* from passing an order in the nature of the impugned orders. That *res judicata* as a salutary principle of law ought to apply to ensure that a sense of finality is attached to judicial orders is well established. Indeed, it is based on three irrefutable principles, both of private law: (a) *Nemo debet bis vexari pro una et eadem causa*,²⁸ and of public law: (b) *Res judicata pro veritate accipitur*²⁹ and *interest reipublicae ut sit finis litium*.³⁰ However, to apply this *ipse dixit* to every order would run counter to the very intent of the rule. A rule that, by its very nature, is intended to provide finality to judicial orders, ought to not lightly be applied to interim arrangements/orders.

25. That not all interlocutory orders ought to not be subject to the rigours of *res judicata* is a principle not merely of convenience in

²⁷ The Court observes in paragraph 14 of the report: **14.** A critical scrutiny of the aforesaid judgments/orders would show that in these cases neither was there any offer made by the landlord nor any corresponding acceptance by the tenant, still the High Courts, in each of these cases, had enhanced the rates of rent unilaterally. But in the case in hand it is clearly reflected that the respondent landlords made an offer to the appellants/tenants to which they agreed, only thereafter the rent was enhanced from Rs 600 per month to Rs 2100 per month, for both the shops. Thus, the ratio of the aforesaid judgments cited by the learned counsel for the appellants has no application to the facts of the present case. (Emphasis supplied) [*Ibid.* at p. 759].

²⁸ Latin: No one should be tried twice for one and the same cause.

²⁹ Latin: A matter decided is accepted as correct.

³⁰ Latin: It is in the interest of the Commonwealth that there be an end to litigation.

administration of justice, but also of a long standing, well established and judicially as well as a legislatively recognised rule of law. The basis for this is that interlocutory orders, as recognised by the Supreme Court in *Arjun Singh v Mohindra Kumar & Ors.*,³¹ may also be designed to maintain *status quo* or preserve property pending the delay of the adjudicatory process, or to ensure the just, smooth, orderly and expeditious disposition of the suit.

26. These orders cannot be subject to the principle of *res judicata*, being not final and being amenable to further modification. These orders would doubtless not be modified without sufficient cause for such modification by the Court – either on its own motion or upon application by the party. However, the same cannot be construed to mean that the bar is due to *res judicata*. The second and/or successive application/s will be rejected – as the Supreme Court in *Arjun Singh v Mohindra Kumar & Ors.*³² held either as an abuse of process of law or for the same reasons on which the earlier application be done – on general principles of law analogous to *res judicata*.³³

27. The inapplicability of *res judicata* to interlocutory orders amenable to alteration was also recognised by the legislature in the first part of the fourth explanation to section 13 of the Code of Civil Procedure, 1882, which provided for *res judicata*.³⁴ What needs consideration

³¹ AIR 1964 SCC 993, at para. 13, p. 1001 : [1964] 5 SCR 946, at p. 960.

³² *Id.*, at para. 13, p. 1001 : pp. 960-961.

³³ *Ram Kripal Shukla v Mussummat Rup Kuari*, (1883) 6 All. 269 (PC).

³⁴ Explanation IV. – A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

when applying the rule to interlocutory orders is borne out from the Explanation IV itself – whether the Court would have the power to alter the order *de hors* an application for review. This is also indicative of the legislative intent in the Code of Civil Procedure to empower Courts to *alter* certain *interlocutory* orders, i.e., those that have not attained *finality*. It is in this context that the Supreme Court, in *Arjun Singh v Mohindra Kumar & Ors.*,³⁵ after discussing the principle of *res judicata* as enunciated in *Satyadhyan Ghosal & Ors. v Deorajin Debi (Smt.) & Anr.*,³⁶ observed:

“(11) We agree that generally speaking, these propositions are not open to objection. If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competence to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being *res judicata* in latter proceedings. Similarly, as stated already, though S. 11 of the Civil Procedure Code clearly contemplates the existence of two suits and the finding in the first being *res judicata* in the later suit, it is well established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceeding. But where the principle of *res judicata* is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable.”
(Emphasis supplied)

28. The impugned orders draw reference to the said judgement in *Arjun Singh v Mohindra Kumar & Ors.*,³⁷ and hold that orders under Order XLI rule 5 are amenable to subsequent modification. It observes that an order under Order XLI rule 5 is passed to protect the interest of the parties and the “interest of the parties” may change with the passage of time. Consequently, the impugned orders proceeded to

³⁵ *Supra*, n. 31, at pp. 999-1000 : at pp. 957-958.

³⁶ *Supra*, n. 25.

³⁷ *Supra*, n. 31.

enhance the amount of deposit in the manner earlier rehearsed. This Court finds no impropriety in the same as to warrant interference. Although the impugned orders have not entered upon the inquiry as to why the order of deposit under Order XLI rule 5 is immune from the principle of *res judicata*, the conclusion it had come to was not incorrect.

29. An order imposing a condition of deposit at the time of granting stay of the decree appealed from is an order in equity, not in law.³⁸ The condition is imposed to afford reasonable compensation to the party successful at the end of the appeal. The purpose of the order is not to put an end to the proceedings or decide any of the controversies in issue. To the contrary, it is fashioned solely to ensure that the successful party in the Trial Court is not unduly deprived of the fruits of the decree; it is secured merely because of the delay that the appeal's adjudication is bound to take. Neither is the grant of the stay (or, as a corollary, the refusal thereof), nor are the conditions imposed therefor intended to conclusively determine any issue between the party. Even the inquiry that the Court undertakes to make a determination of the quantum of the deposit is of a summary nature – being usually done on the basis of affidavits filed by the parties and/or submissions of the Counsel for the parties. This is in view of the fact that the condition has to be imposed alongwith the stay; the stay will not operate unless the conditions are fulfilled. Given the same, the Court could hardly initiate a detailed trial with witnesses being summoned to ascertain the question of whether the stay ought

³⁸ *Supra*, n. 1, at p. 713.

to be granted with or without conditions. An order under Order XLI rule 5 is, in the opinion of the Court, doubtless an interlocutory order to which the rigours of *res judicata* cannot apply.

30. This Court finds support in the above conclusion by two factors; firstly, as far as it can ascertain, the issue of an order under Order XLI rule 5 being subject to *res judicata* was considered only in one judgement, and secondly, the Andhra Pradesh High Court rejected the plea in the said case. The case, *Bathini Syam Prasad v Bathini Mastanamma & Anr.*,³⁹ found CHANDRA REDDI J. (as he then was) tracing out the very law that the Supreme Court would reiterate ten years later in *Arjun Singh v Mohindra Kumar & Ors.*,⁴⁰ – that the Court has the inherent power to modify certain interlocutory orders *ex debito justitiae*.⁴¹ He found support in this view from the order of RANGNEKAR J. of the Bombay High Court in *Yusuf LA Lalji & Ors. v Abdullabbhoy Lalji & Ors. (No. 1)*,⁴² the commentary of Sir D. F. Mulla on the Code,⁴³ and the commentary of Mr. S. C. Sarkar on the Code.⁴⁴ The said commentaries, in turn placed reliance on the judgement of SIR JOHN EDGE C.J. (as he then was) of the Allahabad High Court in *Amir Hasan v Ahmad Ali*,⁴⁵ where the issue of the appellate Court's power to review an order staying execution was considered. The learned judge, in the said case, held that the order granting stay could

³⁹ AIR 1954 Andh. 40.

⁴⁰ *Supra*, n. 31.

⁴¹ *Bathini Syam Prasad v Bathini Mastanamma & Anr.*, *Supra*, n. 31, at p. 43.

⁴² AIR 1930 Bom. 294, at p. 295.

⁴³ Sir Dinshaw Fardunji Mulla, *The Code of Civil Procedure* (Twelfth Edition, edited by Sir Rupendra Coomar Mitter, Eastern Law House Ltd., Calcutta, 1953) at p. 1191.

⁴⁴ SC Sarkar, *The Law of Civil Procedure in India & Pakistan* (Third Edition, SC Sarkar & Sons Ltd., Calcutta, 1954) at p. 871.

⁴⁵ (1887) ILR IX All. 36.

indeed be reviewed under section 623 of the Code of Civil Procedure, 1882⁴⁶ and proceeded to set aside the stay granted therein.

31. CHANDRA REDDI J. observed⁴⁷ that while the judgement of the Judicial Committee of the Privy Council in *Chajju Ram v Neki & Ors.*,⁴⁸ on Order XLVII rule 1 of the Code precludes a review of the nature contemplated in *Amir Hasan v Ahmad Ali*,⁴⁹ the learned commentators earlier alluded to have nonetheless deemed it appropriate to consider the said judgement of the Allahabad High Court an authority for the proposition of amenability of an order under Order XLI rule 5 of the Code to alteration. Relying on this as well as the opinion of RANGNEKAR J. in *Yusuf LA Lalji & Ors. v Abdullabbay Lalji & Ors. (No. 1)*,⁵⁰ CHANDRA REDDI J. concurred with the final order in *Amir Hasan v Ahmad Ali*⁵¹ and held that an order under Order XLI rule 5 is doubtless not a final order and would be amenable to alteration.

32. Mr. Gupta placed reliance on the judgement of a learned single judge of this Court in *Ram Singh & Ors. v Sobinder Singh Bedi*,⁵² to contend that once an application under Order XLI rule 5 is made and the Court, after consideration thereof, has imposed certain conditions subject to which the order appealed from was to be stayed, there is a bar upon the re-agitation of the same issue by filing a further

⁴⁶ *Id.*, at p. 40-41.

⁴⁷ *Bathini Syam Prasad v Bathini Mastanamma & Anr.*, *Supra*, n. 39, at p. 43.

⁴⁸ AIR 1922 PC 112.

⁴⁹ *Supra*, n. 45.

⁵⁰ *Supra*, n. 42, at p. 295.

⁵¹ *Supra*, n. 45.

⁵² 2010 (118) DRJ 510.

application. He contends that the said judgement clearly lays down that once an appellate court comes to a conclusion that no security needs to be furnished by the appellant, the appropriate remedy for the aggrieved respondent is by way of an appeal. He further contends that should this Court arrive at a conclusion different from the observations of the learned Single Judge in the said judgement, judicial discipline dictates that it ought to refer the matter to a larger bench for deciding the issue.

33. While it is indisputable that judicial discipline requires this Court to refer the issue to a larger bench if it differs in its opinion from those of a coordinate or larger bench on the same question of law, the present matter does not require any such exercise being undertaken. The said judgement of *Ram Singh & Ors. v Sobinder Singh Bedi*⁵³ is clearly distinguishable in the issue of law before it from the matter before this Court. The said matter did not require the attention of the Court being directed towards the issue of whether an order made under Order XLI rule 5 of the Code is subject to *res judicata*. The said matter was not concerned with the issue of whether a Court is prohibited from imposing fresh conditions under Order XLI rule 5 of the Code if fresh facts are brought before it; indeed, no new facts were pleaded before it. To the contrary, the only reason given for invoking Order XLI rule 5 for a second time in the said case was that the Court therein had ignored the legislative mandate by not requiring the appellant to furnish security for stay of the impugned order.⁵⁴ The

⁵³ *Ibid.*

⁵⁴ *Id.*, at para. 3, p. 511.

party who sought to invoke Order XLI rule 5 therein had contended that furnishing of security was a mandatory requirement under the said provision and since the stay was issued without imposing condition of furnishing of security, the order issuing stay was contrary to the mandate of the said provision. It was in these circumstances that the learned Single Judge observed that the appropriate proceedings for agitating these questions of law is by way of an appeal.⁵⁵

34. Further, the Court also took notice of the fact that the order confirming the *ex parte* stay order *sans* security was confirmed by an order passed in the presence of the counsel for the aggrieved party, who had then not raised any issue as to lack of security.⁵⁶ It noted in its order that despite the fact that the party was duly represented and had not raised any objections to the lack of security at the time of confirmation of the order of stay, the party did not raise any objection for a period of over four and a half years thereafter as well.⁵⁷ It was in these circumstances that the second application under Order XLI rule 5 came to be dismissed. By no stretch of imagination can the said judgement – given the above distinguishing factors and given the nature of facts placed and contentions made before the Court – be said to be one involving the same question of law in the present matter. This Court finds no reason to regard the said judgement as an authority on the issues before it.

⁵⁵ *Id.*, at para. 11 *et. seq.*, pp. 516-517.

⁵⁶ *Id.*, at para. 9, pp. 515-516.

⁵⁷ *Id.*, at para. 9, p. 515.

35. Further, this Court bears in mind the very purpose of imposing such conditions when granting a stay against an order of eviction: to protect the interests of and to ensure compensation to the successful landlord who is being deprived of the fruits of the order of eviction. Even if the judgements in *Crompton Greaves Ltd v State of Maharashtra*,⁵⁸ as well as *Anderson Wright & Co v Amar Nath Roy & Ors.*,⁵⁹ cannot be regarded as authorities because they have not set out the reasons for the final order, it cannot be said that the judicial trend in such matters has remained unchanged. The Bench of three judges of the Supreme Court, in *State of Maharashtra & Ors. v Supermax International Private Limited & Ors.*,⁶⁰ repelling the contention that the principle enunciated in *Atma Ram Properties Pvt. Ltd. v Federal Motors Pvt. Ltd.*,⁶¹ applies only in respect of proceedings under the Act and not under diverse rent control legislations of other states observed:⁶²

“66. The Rent Act was the socio-legal response to certain historical developments, namely, the acute shortage of housing in the aftermath of the World War, the great influx of refugees in a number of States of the Union following the partition of the country and the massive migration inside the country from rural areas to the urban centres as a result of rapid urbanisation. All these developments that took place almost at the same time skewed the law of supply and demand totally in favour of the landlord. The need of the hour, therefore, was to protect the tenant, who would have otherwise been left completely at the mercy of the landlord. The legislature intervened and brought in the Rent Act, severely restricting the grounds for enhancement of rent and for eviction of the tenant from the rented premises, thus regulating the relationship between the landlord and the tenant beyond the general law under the Transfer of Property Act, 1882. In this regard the Court responded in equal, if not greater measures. But after about three quarters of a century and three generations later when things are no longer the same and the urban centres are faced with newer problems, some of those having their origin in the Rent Act itself, there is the need to take a relook on the Court's attitude towards the relationship between the landlord and the tenant and to provide for a more level ground in the judicial arena.”

⁵⁸ *Supra*, n. 17.

⁵⁹ *Supra*, n. 18.

⁶⁰ *Supra*, n. 16.

⁶¹ *Supra*, n. 1.

⁶² *Supra*, n. 16, at p. 793

(Emphasis supplied)

36. Going further, AFTAB ALAM J., who was speaking for the Bench, reiterated certain of the observations of G. S. SINGHVI J. in *Satyawati Sharma (Dead) by LRs v Union of India & Ors.*,⁶³ especially as to the doctrine of temporal reasonableness and affirming the same, observed:⁶⁴

“71. We reaffirm the views expressed in Satyawati Sharma [(2008) 5 SCC 287] and emphasise the need for a more balanced and objective approach to the relationship between the landlord and tenant. This is not to say that the Court should lean in favour of the landlord but merely that there is no longer any room for the assumption that all tenants, as a class, are in dire circumstances and in desperate need of the Court's protection under all circumstances. (The case of the present appellant who is in occupation of an area of 9000 sq ft in a building situate at Fort, Mumbai on a rental of Rs 5236.58, plus water charges at the rate of Rs 515.35 per month more than amply highlights the point.)”
(Emphasis supplied)

37. An order directing tenant to make payment of reasonable user charges commensurate with the market value of the leased premises is but a reflection of this changing trend in judicial approach to disputes that may more appropriately be termed *rent control disputes* than *tenancy disputes*. The interest of the landlord who obtains a decree of eviction but is refused the premises – doubtless to enable the tenant an opportunity to exercise his right of appeal – cannot be regarded as being protected merely because at the time of granting stay, a condition of deposit was imposed. This Court is of the view that when the initial condition of deposit was to be of reasonable user charges commensurate with the market rate, it cannot, by any stretch of imagination, be said that the interest of the landlord remains

⁶³ (2008) 5 SCC 287, paras. 14, 29 and 32.

⁶⁴ *State of Maharashtra & Ors. v Supermax International Private Limited & Ors.*, *supra*, n. 16, at p. 794.

protected when the quantum of deposit remains unchanged for over twenty years.

38. Given the above, this Court has no hesitation in coming to the conclusion that an order under Order XLI rule 5 imposing a condition of deposit/payment of reasonable user charges for the continued user of the premises from the date of order of eviction is not final and may be altered at a later stage in the proceedings. This may be done by the Appellate Court on its own motion or on the application of either of parties. The alteration may be either to increase or decrease the amount earlier set and will depend upon the facts and circumstances of the case. No straitjacket formula can be laid down as to how often or to what extent the quantum ought to be modified; the same shall be at the discretion of the Appellate Court to be decided based on the specific circumstances attendant to each case. However, no such application could be entertained unless the party seeking modification is able to show changed circumstances as would warrant the modification.

As to the doctrine of merger

39. This brings us to the second of Mr. Gupta's contentions; that in the present matter, the appropriate Court which could have modified the condition of deposit for stay is the Supreme Court. He contended that the order of 12th April, 2001 by the Appellate Court that imposed the condition merged with the order dated 10th December, 2004 of the Supreme Court in Civil Appeal No. 7988 of 2004. Given that the order of 12th April, 2001 merged with the said order of the Supreme

Court, it is contended that the condition of deposit imposed under Order XLI rule 5 may be modified only by the Supreme Court.

40. He contended that once the Supreme Court considered the issue of quantum of the deposit and, in the penultimate paragraph of the judgement upheld the imposition of Rs. 15,000/- (Rupees fifteen thousand only) *per mensem* as the condition of deposit, the same cannot now be modified by the Appellate Court in view of the doctrine of merger. The impugned orders observed that the doctrine of merger cannot apply in the matter as the order of 10th December, 2004 of the Supreme Court did not consider the issue of quantum of deposit. It relied on *Kunhayammed & Ors. v State of Kerala & Anr.*,⁶⁵ to hold that doctrine of merger does not apply where the judgement of the appellate court is *sub silentio* on a particular issue. This Court finds itself unable to agree with this contention of the tenant, as well as the basis of the findings of the Appellate Court. It proceeds on an incorrect understanding of the doctrine of merger and an incorrect understanding of the nature of the order imposing condition of deposit for stay of the order of eviction.

41. The doctrine of merger as expressed by a bench of three judges of the Supreme Court as early as in 1958 in *Commissioner of Income Tax, Bombay v Amrit Bhogilal & Co.*,⁶⁶ and reiterated and affirmed by two separate benches of three judges of the Supreme Court, in *Gojer Bros.*

⁶⁵ (2000) 6 SCC 359.

⁶⁶ (1959) SCR 713 : AIR 1958 SC 868.

(Pvt.) Ltd. v Ratan Lal Singh,⁶⁷ and in Kunhayammed & Ors. v State of Kerala & Anr.,⁶⁸ was as under:

“10. There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the Appellate Authority is the operative decision in law. If the Appellate Authority modifies or reverses the decision of the Tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the Appellate Authority, the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement...”
(Emphasis supplied)

42. In *Gojer Bros. (Pvt.) Ltd. v Ratan Lal Singh*,⁶⁹ the Court observed:

“11. The juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court.”
(Emphasis supplied)

43. After quoting from the decision of the Judicial Committee of the Privy Council in *Saiyid Jowad Hussain v Gendan Singh (since deceased) and Ors.*,⁷⁰ to the effect that the decree to be executed is the decree of the appellate court and not the original decree, the Court further observed:⁷¹

“17. An application of this very principle yields the result that if the court of appeal confirms, varies or reverses the decree of the lower court, the decree of the appellate court is the only decree that can be amended [Brij Nwam v. Tijbal Bikram, (1910) 37 LA 70 : ILR 32 All 295.] ; or that the limitation for executing a decree runs from the date of the decree capable of execution and that is the decree of the appellate court which supersedes that of the court of first instance [AIR 1926 PC 63 : 51 MLJ 781 : 53 LA 197] ; or that if mesne profits are ordered from the date of suit until the expiry of three years after

⁶⁷ (1974) 2 SCC 453.

⁶⁸ *Supra*, n. 65.

⁶⁹ *Supra*, n. 67, at p. 458.

⁷⁰ (1925-26) 53 IA 197 : AIR 1926 PC 93.

⁷¹ *Supra*, n. 67, at p. 460.

the date of the decree, the decree to be considered is the decree capable of execution so that if the decree of the trial Court is confirmed in appeal, three years will begin to run from the date of the appellate decree [Bhup Indar v. Bijai, (1900) 27 LA 209 : ILR 23 All 152 : 5 CWN 52].”

(Emphasis supplied)

44. After discussing the above authorities and before proceeding to consider the merits of the issue of law being considered by it, the Supreme Court, in *Kunhayammed & Ors. v State of Kerala & Anr.*,⁷² observed in a prolegomenary fashion:

“12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below.”

(Emphasis supplied)

45. The Supreme Court, in that case, was considering the issue of whether an application for review was maintainable *qua* a judgement despite a petition for special leave to appeal under Article 136 of the Constitution of India being heard and dismissed without grant of leave. It concluded that where the leave to appeal is granted and the appeal is decided with a reasoned order or otherwise, the original order merges with the appellate order and cannot be reviewed, being non-existent by operation of the doctrine of merger.⁷³ It also observed *inter alia* that where the leave to appeal is not granted or, on being granted, the appeal is dismissed without a reasoned order, the

⁷² *Supra*, n. 65, at p. 370.

⁷³ *Id.*, at para. 41, p. 383.

original order will continue to subsist and an application for review would indeed be maintainable, although the final decision may not differ from the opinion of the Supreme Court due to factors other than the doctrine of merger.⁷⁴

46. The above pronouncements all lead to the inevitable conclusion that the operation of doctrine of merger is *qua* operative effect of the subject order. The contention of the tenant before this Court is that the doctrine of merger would operate to prevent the quantum being revised by the Appellate Court at this stage inasmuch as the order of the Appellate Court as to the quantum of deposit has merged with the order of the Supreme Court. This cannot be accepted – at least not without mutilating the concept of the doctrine. The doctrine of merger, being an estoppel operating by record, is but an extension of the doctrine of *res judicata*. It operates against multiplicity of operative decrees/orders, not against the competence of a Court to issue an order or to draw up a decree. When an original decree/order merges by operation of the doctrine with the appellate decree/order, there are 3 incidents thereof:

46.1. The necessary incidents of the original decree/order cease to exist – they merge with and become the same as the incidents the appellate decree/order.

46.2. The findings in the original decree/order cease to exist and are not amenable to amendment or modification.

⁷⁴ *Id.*, at para. 40, pp. 382-383.

46.3. The judgement/reasoning in the original decree/order ceases to exist and cannot be regarded as having any authority as a precedent.

47. It was in similar circumstances that the authoritative pronouncements of the past have applied the doctrine of merger – such as to ascertain necessary incidents such as limitation⁷⁵ and executability,⁷⁶ or to consider whether a judgement would have authority as a precedent,⁷⁷ or to consider whether an order is final and unamendable.⁷⁸ In the instant case, the impugned orders have not sought to amend the earlier order, nor has it become final *qua* any issue. As already held, the order imposing the condition of deposit is not *res judicata* as to the condition or the quantum; nor does it preclude the Court from reconsidering the condition or the quantum. The observations of the Supreme Court in *Arjun Singh v Mohindra Kumar & Ors.*,⁷⁹ is instructive in this regard:

“(13) ...Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same fact, is not barred on the application of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issues, whereas in the other case, on proof of fresh facts, the court would be competent, nay would be bound to take

⁷⁵ *Batuk Nath v Musammat Munni Dei & Ors.*, (1913-14) 41 IA 104 : AIR 1914 PC 65; *Hukumchund Boid, since deceased (now represented by Juscurn Boid and Anr.) v Prithichand Lal Chowdhury*, (1918-19) 46 IA 52 : AIR 1918 PC 151; *Saiyid Jowad Hussain v Gendan Singh (since deceased) and Ors.*, (1925-26) 53 IA 197 : AIR 1926 PC 93. *S. S. Rathore v State of Madhya Pradesh*, (1989) 4 SCC 582.

⁷⁶ *Batuk Nath v Musammat Munni Dei & Ors.*, (1913-14) 41 IA 104 : AIR 1914 PC 65; *Gojer Bros. (Pvt.) Ltd. v Ratan Lal Singh*, *supra*, n. 67.

⁷⁷ *State of Madras v Madurai Mills Co. Ltd.*, (1967) 1 SCR 732 : AIR 1967 SC 681.

⁷⁸ *Commissioner of Income Tax, Bombay v Amrit Bhogilal & Co.*, *supra*, n. 66; *Kunhayammed & Ors. v State of Kerala & Anr.*, *supra*, n. 65.

⁷⁹ *Supra*, n. 31, at para. 13, p. 1001 : at p. 961.

those into account and make an order conformably to the new facts freshly brought before the court.”

(Emphasis supplied)

48. This Court is of the view that these principles would apply on all fours to an order under Order XLI rule 5 of the Code imposing a condition of deposit for grant of stay of the order of eviction. As earlier held, nothing will bar either party from reapplying to the Court seized of the appeal seeking that the grant of stay, condition to be imposed therefor, and/or the quantum of deposit be reconsidered – even if the same were approved, modified or set aside in appeal or revision prior to such second and/or further application. However, a note of caution must be struck in this regard: the second and/or further application shall not be maintainable unless further facts are shown warranting the Court’s undertaking the exercise again. It must also be noted that moving such an application *sans* such further facts may also amount to an abuse of the process of the Court.

49. However, where such new and fresh facts are indeed shown – doubtless facts that did not exist or could not be ascertained despite exercise of due diligence at the time when the original order was made – the Court seized of the appeal would be bound to consider the new facts and pass a fresh order as to either the grant of stay, the condition to be imposed therefor, and/or the quantum of deposit, as may be prayed for. A further note of caution must be struck in this regard, for the Court considering the second and/or further application must ensure that it pays due attention to any law laid down by the appellate or revisional Court at the earlier instance. The

Court ought to not give a go by to the provisions of Article 141 of the Constitution of India, the doctrine of precedent and the doctrine of *stare decisis* merely because the doctrine of *res judicata* and the doctrine of merger do not apply to an order under Order XLI rule 5. Indeed, this was the very note of caution struck by the Supreme Court in *Kunhayammed & Ors. v State of Kerala & Anr.*⁸⁰

50. In view of the above, this Court is of the view that while the reasoning given by the Appellate Court in respect of the issue of doctrine of merger was inaccurate, the conclusions do not warrant interference. The order of 12th April, 2001 of the Appellate Court indeed merged with the order dated 10th December, 2004 of the Supreme Court. However, the same does not preclude the Appellate Court from considering the application newly filed by the landlord and its having so done, this Court finds no reason to interfere with the same.

As to the procedure adopted by the Appellate Court and the quantum

51. At this juncture, ordinarily this Court would have dismissed the petition, inasmuch as it has been held that the Appellate Court indeed had jurisdiction to pass the impugned orders. However, Mr. Gupta has raised various further grounds challenging the impugned orders. He contends that each of these grounds in themselves, as well as all of them taken together, amount to material irregularity and/or patent illegality. He contends that these irregularities are of such a nature as

⁸⁰ *Supra*, n. 65, at para. 40, p. 383.

to warrant interference with under article 227 of the Constitution of India.

52. He contended that the application under Order XLI rule 5 of the Code was filed at a juncture when the appeal was fixed for final hearing. He further argued that the application was clearly filed with the intent to delay the proceedings. He submitted, thus, that the application ought to not have been heard at all. This Court is of the opinion that this ground, by itself, cannot be a ground for interference with the impugned orders. The landlord has a right to file the application under Order XLI rule 5 of the Code, which has been exercised in the instant matter. The Appellate Court was duty bound to consider the application and pass an order thereon, which has been done by it in the form of the impugned orders. *De hors* particulars of fraud, *mala fide*, or any attempt at abuse of process of the Court, neither the filing of the application, nor the passing of the impugned orders can be considered materially irregular or patently illegal.

53. He thereafter contended that the manner in which the application has been considered and the impugned orders were passed is patently illegal. As earlier observed, the first impugned order, after holding the application under Order XLI rule 5 of the Code maintainable, directed the parties to file documents supported by appropriate affidavits to assist the Court in calculating the quantum of deposit. He submits that the application, to be considered maintainable, ought to have been filed with sufficient material and be supported by an affidavit, before being considered. He submits that in the absence of

such an affidavit and documents, there was no basis for the Appellate Court to have exercised its jurisdiction in holding the application maintainable or directing the parties to file affidavits and/or documents. He submits that *sans* the affidavit and documents, the Appellate Court would have had no jurisdiction to have passed the first impugned order.

54. He submits further that even thereafter, prior to passing the second impugned order, no trial was conducted, nor was any evidence permitted to be led by the parties in respect of the value that could have been fetched by the premises. He submits that the documents relied on by the landlord in support of its case – being leases with business houses *qua* premises located in the same building – were unilateral documents that were prepared after the disputes commenced. He contended that the documents provide no particulars of the facilities provided to the tenants therein and hence the value of the lease ought to not have been regarded as indicative of the reasonable rent the premises may have fetched. He contended that in any case the tenant ought to have been given an opportunity to cross examine the parties to the agreements. Lastly he submits that in any case, the revised user charges ought to have been made payable from the date when the documents and affidavits were brought on record, since this was the day when material was actually available on record to justify exercise of discretion in revising the user charges. These submissions deserve to be rejected as being without merit for the reasons discussed hereinbelow.

55. It cannot be stated that the Appellate Court was without jurisdiction when it passed the first impugned order. The jurisdiction of the Court to impose conditions when granting a stay under Order XLI rule 5 of the Code is equitable in nature.⁸¹ The power is a necessary incident to the equitable power that the Court exercises in staying the order appealed from. It can be exercised even *suo motu*, provided there is sufficient material available on record to justify the exercise of the power. It is as a matter of judicial propriety and judicial discipline that the Court does not exercise the power on its own motion – especially considering the fact that more often than not, material may not be available on record to warrant such an exercise until a party actually moves the Court to so exercise its powers. However, this cannot be read to understand that the lack of material on record divests the Court of its power to impose conditions when granting a stay under Order XLI rule 5 of the Code.

56. The Appellate Court, being empowered to consider the application under Order XLI rule 5 of the Code, had passed the first impugned order holding that it was indeed competent to revise the user charges if sufficient cause is shown therefor. It was in view of the fact that documents were filed by the landlord in support of the application under Order XLI rule 5 of the Code without any affidavit supporting the same that the Appellate Court passed the first impugned order directing that an affidavit may be filed to support the application and documents. An order passed in exercise of a power vested in the authority, directing the parties to furnish documents to enable the

⁸¹ *Supra*, n. 1, at p. 713.

authority to appropriately exercise the power can hardly be regarded as illegal or contrary to material on record. To the contrary, the Appellate Court adopted the correct course in directing the parties to file documents supported by affidavits to assist it in the inquiry as to the quantum of deposit. In doing so, the Appellate Court was following the mandate of the Supreme Court in *State of Maharashtra & Ors. v Supermax International Private Limited & Ors.*,⁸² where the judgement cautioned the Court affixing the quantum to exercise restraint and not fix any excessive, fanciful or punitive amount.⁸³

57. Furthermore, it cannot be accepted that the second impugned order was patently illegal for the reasons canvassed before this Court. The order to be passed on an application under Order XLI rule 5 of the Code granting stay subject to conditions has to be seen as one package; the appellant cannot be heard to contend that it accepts the order insofar as it stays the execution but objects to the conditions.⁸⁴ It could hardly be said that the Appellate Court ought to decide the question as to whether the stay ought to be granted summarily, based on affidavits and photocopies of documents, but ought to conduct a detailed trial for the purpose of ascertaining the quantum of deposit. It was not – nor could it have been – the contention of the tenant that the procedure adopted by the Appellate Court was unprecedented or not founded in law. Merely because the Appellate Court has proceeded to ascertain the quantum based on the affidavits and documents filed by the parties, the same cannot be considered as

⁸² *Supra*, n. 16.

⁸³ *Supra*, n. 16, at para. 77, p. 796.

⁸⁴ *Supra*, n. 16, at para. 72, p. 795.

an error so gross and patent as to warrant interference under Article 227; this Court is of the view that this is not an error, but the appropriate course to have been followed.

58. It must also be borne in mind that the Appellate Court had given an opportunity to both parties, landlord and tenant alike, to file documents supported by affidavits, to enable the Court to ascertain the quantum to be fixed in the instant matter. The second impugned order specifically notes that while the landlord has furnished the rates of rent, details and particulars of tenancies in the vicinity, including of premises in the same building, the tenant has not even supplied basic particulars such as area of tenancy sought to be relied upon by it. It notes that the tenant has failed to produce any documents in support of its case and has further failed to rebut the case of the landlord as well. It observes that the tenant cannot be heard to contend that the documents indicating rent fetched by premises in the same building ought to not be considered inasmuch as it does not provide particulars of facilities provided to the tenancies. It observes that the Court can presume – albeit a rebuttable presumption – in the absence of proof to the contrary from the tenant, that the tenant is being provided the same facilities as are other tenants in the same premises. It further observes that the tenant, being based out of the same building, ought to have provided particulars as to the facilities made available to the other tenants if it seeks to distinguish its tenancy from the others, instead of raising a technical ground for rejection such as the failure of the landlord to have furnished particulars.

59. As to the objection that the various agreements and leases placed on record have grossly inflated values, the Appellate Court observed that the agreements are with business houses that are going concerns running their respective businesses from the premises. It observed that it is inconceivable that a business concern would execute a duly registered agreement with inflated rent rates merely at the instance of the landlord. It is in these circumstances that the Appellate Court proceeded to make the second impugned order. Where both parties have been given an equal and sufficient opportunity to make their case as to the quantum to be fixed, and where the Court considers all the material available on record and comes to a conclusion on the basis thereof, the same cannot be regarded as being patently illegal and warranting interference.

60. Mr. Gupta lastly contends that the fixation of the quantum of deposit at Rs. 1,60,000/- (Rupees one lakh sixty thousand only) *per mensem* towards user charges for the leased premises is wholly onerous. He contends that the sudden increase of the quantum from Rs. 25,000/- (Rupees twenty five thousand only) to Rs. 1,60,000/- (Rupees one lakh sixty thousand only) is wholly unwarranted, especially when the contractual rental rate is Rs. 371.90/- (Rupees three hundred seventy one and ninety paise only). He contends that the Supreme Court has, in its order of 10th December, 2004, even after noting that adjoining premises were let out for Rs. 3,50,000/- (Rupees three lakh fifty thousand only), observed that the amount of Rs. 15,000/- (Rupees fifteen thousand only) *per mensem* is reasonable user charges for the premises. He contends that in view thereof, the Appellate Court was

not right in increasing user charges to the exorbitant amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) *per mensem*.

61. He further contends that even assuming that the premises could indeed have fetched over Rs. 3,20,000/- (Rupees three lakh twenty thousand only) *per mensem*, the Appellate Court ought to not have granted user charges at fifty percent of the same without applying judicial mind to the facts and circumstances attendant to the case of the parties before it. He contends that the tenant would be gravely prejudiced as a result of the impugned order affixing the quantum of deposit at Rs. 1,60,000/- (Rupees one lakh sixty thousand only), inasmuch as the tenant is likely to be unable to make the deposit and might lose the premises as a result thereof. He submitted that the Appellate Court has not given any reasons for fixing the quantum at the figure it has and has proceeded almost entirely on surmises and conjectures and the second impugned order ought to be set aside.

62. This contention is one that ought to not be canvassed in a petition under Article 227, especially in respect of an interim order. The contentions, even if accepted, do not disclose an error of jurisdiction to be remedied in exercise of this Court's supervisory power; they are, at best, errors of facts. The supervisory jurisdiction of this Court will not be exercised to correct mere errors of fact or of law unless the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the

provisions of law, *and* a grave injustice or gross failure of justice has occasioned thereby.⁸⁵

63. The Appellate Court has considered the material made available by the parties and the fact that similar premises are fetching rent at rates ranging from Rs. 270/- (Rupees two hundred seventy only) to Rs. 420/- (Rupees four hundred twenty only) per square foot *per mensem* and keeping in mind the possibility of variation on account of facilities made available, came to the conclusion that the leased premises would be capable of earning at least Rs. 270/- (Rupees two hundred seventy only) per square foot *per mensem*. It observed that as no material was placed on record in support of the contention that the two garages forming a part of the leased premises could fetch Rs. 1,00,000/- (Rupees one lakh only) *per mensem*, they may be assumed to fetch Rs. 25,000/- (Rupees twenty five thousand only) *per mensem* considering their location and accessibility.

64. On this basis, and given that the landlord prayed only for fifty percent of the actual value that the premises would be capable of fetching, the Appellate Court had revised the quantum of deposit to Rs. 1,60,000/- (Rupees one lakh sixty thousand only) *per mensem*. It is thus evident that the Appellate Court has given due consideration to all material available on record and the facts and attendant circumstances relevant to the issue to arrive at its conclusion as found in the second impugned order. The tenant is, in effect, praying that this Court

⁸⁵ *Surya Devi Rai v Ram Chander Rai & Ors.*, *supra*, n. 3, at para. 38(5), p. 695.

reconsider the material to arrive at its own conclusion; this Court sees no justification to so apply itself.

65. This Court, in exercise of its supervisory jurisdiction, will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.⁸⁶ The view taken by the Appellate Court in affixing the quantum of deposit at the said figure is a reasonably possible view; it cannot be regarded as a patent error warranting interference with.⁸⁷

66. In the above circumstances, the petition is dismissed as being without merit. The parties shall bear their own costs.

**NAJMI WAZIRI
(JUDGE)**

MAY 07, 2014

⁸⁶ *Surya Devi Rai v Ram Chander Rai & Ors.*, *supra*, n. 3, at para. 38(8), p. 696.

⁸⁷ *Surya Devi Rai v Ram Chander Rai & Ors.*, *supra*, n. 3, at para. 38(6), p. 695.