

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.765 OF 2015

Central Bank of India	]
a body corporate constituted under Banking	]
Companies (Acquisition & Transfer of	]
Undertakings Act), 1970 having their	]... Petitioner/Applicant
Central Office at Chandermukhi, Nariman	] (Original Defendant)
Point, Mumbai – 400 021	]

versus

1]	Anil Puranmal Bansal	]
	Age 39 years, Occ. Business, residing	]
	at Flat No.2, Sea Green 7/15, A.G.	]
	Khan Road, Worli Sea Face,	]
	Mumbai 400 018	]
		]
2]	Vimal Puranmal Bansal	]
	Age 37 years, Occ. Business, residing	]... Respondents
	at D-13, Paschimi Marg, Vasant Vihar	] (Original Plaintiffs)
	New Delhi – 110 057	]

Mr. Sharan Jagtiani a/w Mr. Aditya Thakkar and Mr. M S Detty Davis & Mr. Mantul Bajpai i/by Juris Corp for the Applicant.
Mr. G S Godbole a/w Mr. Chetan Kapadia i/by Mr. S S Kothari for the Respondents.

CORAM : R. M. SAVANT, J.
Reserved on : 04/02/2016
Pronounced on :- 07/03/2016

JUDGMENT :

1 Admit. With the consent of the learned counsel for the parties heard forthwith.

2 The revisionary jurisdiction of this Court is invoked against the order dated 24/10/2015 passed by the Appellate Bench of the Small Causes Court in Appeal No.351 of 2009 and Appeal No.61 of 2009 in Misc. Notice No.4705 of 2004 in RAE & R Suit No.1486/4851 of 1983. (“Misc. Notice No.4705 of 2004” is herein after for brevities sake referred to as “the Misc.Notice”). By the said order the Appellate Bench of the Small Causes Court has held that the Application being the Misc. Notice No.4705 of 2004 filed by the Respondents herein is within limitation. The parties would be referred to as per their nomenclature in the Suit i.e. the Respondents as Plaintiffs and the Applicant as the Defendant.

3 The factual matrix involved in the above Civil Revision Application can be stated thus :-

 The Respondents herein i.e. the Plaintiffs are the owners and landlords of the premises i.e. Block Nos. 7A and 7B on the 7th floor of the building known as Chandermukhi, Nariman Point, Mumbai. The said premises admeasure 7000 sq.ft built up area. Prior to the present Plaintiffs becoming the owners of the said property the predecessor in title of the Plaintiffs granted leave and license to the Applicant herein i.e. the Defendant by the Agreement dated 15/05/1972 on the terms and conditions mentioned in the said Leave

and License Agreement. On the Plaintiffs becoming the owners of the said property by virtue of the Agreement dated 25/08/1980 the Defendant became the licensee of the Plaintiffs and started paying license fee or compensation at the rate prevailing to the Plaintiffs. As the Defendant was occupying the suit premises on 01/02/1973 under a valid and subsisting Leave and License Agreement in terms of Section 15(A) of the Bombay Rent Control Act, 1947, it became a deemed tenant of the Plaintiffs. The Plaintiffs by their notice dated 19/06/1982 terminated the tenancy of the Defendant and thereafter filed eviction suit being RAE & R Suit No.1486/4851 of 1983. The said suit was founded on the bonafide requirement of the Plaintiffs in respect of the suit premises. The said suit of the Plaintiffs was decreed by the Trial Court by the judgment and order dated 12/07/1991 whereby the Defendant was directed to deliver vacant and peaceful possession of the suit premises on or before 30/09/1991.

4 Aggrieved by the said decree dated 12/07/1991, the Defendant filed an Appeal being Appeal No.220 of 1991. The said Appeal was allowed by the Appellate Bench of the Small Causes Court and decree dated 12/07/1991 passed by the Trial Court was set aside and the suit filed by the Plaintiffs was dismissed.

5 Against the said order the Plaintiffs herein filed a Writ Petition

being No.4053 of 1992 in this Court. The said Writ Petition came to be allowed by a learned Single Judge of this Court by the judgment and order dated 03/09/2002, resultantly the judgment and order dated 24/09/1992 passed by the Appellate Bench of the Small Causes Court was set aside and the decree of the Trial Court dated 12/07/1991 was restored.

6 Against the judgment and order dated 03/09/2002 passed in the said Writ Petition, the Defendant filed an SLP being SLP No.21206 of 2002 in the Apex Court which was summarily dismissed by the Apex Court by order dated 13/09/2002, and the Defendant was directed to hand over vacant and peaceful possession of the suit premises on or before 31/03/2003 by filing usual undertaking.

7 Pursuant to the said undertaking given by the Defendant, the possession of the suit premises was handed over on 31/03/2003. Since in the interregnum the Maharashtra Rent Control Act 1999 (for short the Rent Act 1999) had come into force. The Plaintiffs herein i.e. the landlords filed TE & R Suit No.229/274 of 2000 claiming mesne profits in respect of the suit premises for the period mentioned in the said suit.

8 The said suit came to be decreed and the mesne profits came to be granted for the limited period mentioned in the judgment and order dated

20/01/2007 passed by the learned Judge of the Small Causes Court. After the possession was handed over by the Defendant, the Plaintiffs filed an Application being Misc. Notice No.4705 of 2004 in the said RAE & R Suit No.1486/4851 of 1983 claiming mesne profits for the period from 19/06/1982 or alternatively from October 1983 till 30.09.2000. The said Misc. Notice was in addition to the said TE & R Suit No.229/274 of 2000 which was filed by the Plaintiffs for grant of mesne profits in respect of the suit premises though in the said suit the mesne profits claimed were for a different period i.e. post the year 2000. The Trial Court thereafter considered the said Misc. Notice and by its judgment and order dated 20/09/2008 directed the Defendant to pay a sum of Rs.141/- per sq.ft. per month from 30/09/1991 till the realization of the entire mesne profits with interest @ 6% p.a. The said figure of Rs.141/- per sq.ft. per month was arrived at by the Trial Court on the basis of the material that was on record.

9 The Defendant aggrieved by the said order dated 20/09/2008 filed an Appeal bearing No.351 of 2009 challenging the award of mesne profits. The Plaintiffs also filed an Appeal bearing No.61 of 2009 against the refusal of the Trial Court to grant mesne profits as claimed by them in the said Misc. Notice but being granted mesne profits only from September 1991.

10 The Appellate Bench of the Small Causes Court by the judgment

and order dated 19/12/2009 dismissed both the Appeals, however by its order dated 28/01/2010 stayed its own order so as to enable the Defendant to take appropriate recourse against the said order dated 19-12-2009.

11 The Defendant aggrieved by the said order dated 19/12/2009 of the Appellate Bench of the Small Causes Court filed Civil Revision Application in this Court being No.137 of 2010. The principal ground of challenge was that the Misc. Notice filed by the Plaintiffs was not maintainable under the provisions of Order XX Rule 12 of the Code of Civil Procedure and that assuming that the Misc. Notice was to be treated as a plaint, then the same was barred by the law of limitation. Having regard to the challenge raised by the Defendant in the said Civil Revision Application, a learned Single Judge of this Court allowed the said Civil Revision Application by order dated 20/03/2015 and remanded the matter back to the Appellate Bench of the Small Causes Court to consider as to whether the Misc. Notice is barred by law of limitation.

12 Pursuant to the order of remand, the Defendant filed its affidavit whereas the Plaintiffs herein filed their reply to the said affidavit on the point of limitation. The Appellate Bench of the Small Causes Court by the order dated 24/10/2015 has disposed of both the Appeals holding that Misc. Notice No.4705 of 2004 was within limitation. The Appellate Bench of the Small Causes Court has referred to the antecedent litigation between the parties viz.

the decreeing of the suit in the year 1991, the setting aside of the decree by the Appellate Bench of the Small Causes Court and thereafter reinstatement of the decree by this Court by virtue of the Writ Petition being allowed on 03/09/2002. The Appellate Bench of the Small Causes Court held that in so far as the issue of limitation is concerned, it is Article 113 of the Limitation Act that would apply and not Article 51 of the Limitation Act (for short herein after referred to as “the said Act”). The Appellate Bench of the Small Causes Court rejected the submission urged on behalf of the Defendant as regards the applicability of Article 51 of the said Act and held that in the instant case the issue of limitation would be covered by the residuary Article i.e. Article 113 of the said Act. However the Appellate Bench of the Small Causes Court held that even if Article 51 was to apply, the Misc. Notice was within limitation. The Appellate Bench held that in terms of the law laid down by the Apex Court in the judgment reported in (2005) 1 SCC 705 in Atma Ram Properties (P) Ltd. v/s. Federal Motors the Plaintiffs would be entitled to mesne profits from the date of the decree passed by the Trial Court i.e. 30/09/1991. As indicated above it is the said judgment and order dated 24/10/2015 which is taken exception to by way of the above Civil Revision Application.

13 **SUBMISSIONS OF SHRI SHARAN JAGTIANI, THE LEARNED COUNSEL APPEARING FOR THE APPLICANT/ORIGINAL DEFENDANT :-**

A] That the Appellate Bench of the Small Causes Court has erred in

holding that the instant Application (Misc. Notice No.4705 of 2004) filed for seeking mesne profits was within limitation.

- B] That the Appellate Bench of the Small Causes Court has erred in coming to a conclusion that the Misc. Notice was not only for mesne profits but more.
- C] That if the Plaintiffs are seeking mesne profits from the year 1982 i.e. from the date of the notice terminating the tenancy, the Misc. Notice filed for mesne profits was barred by limitation having regard to Article 51 of the said Act. Reliance is sought to be placed on the judgment of the Division Bench of this Court reported in (1938) Indian Law Reports 107 in the matter of Dullabhbbhai Hansji and another v/s. Gulabbhai Morarji Desai, Receiver of the Estate of Insolvent Gulabchand Rupaji, as also the judgment of a Learned Single Judge of this Court reported in AIR 1964 Bom. 42 in the matter of Dwarkas Nathamal v/s. Balkrishna Baliram.
- D] Since it is Article 51 which governs the period of limitation in so far as a claim for mesne profits is concerned and since according to the Plaintiffs, the Defendant is in receipt of the profits since the

year 1982 as per their own averments in the Misc. Notice, the Misc. Notice filed for mesne profits in the year 2004 is barred by limitation, as the same is required to be filed within 3 years of the receipt of profits by the Defendant in terms of Article 51 of the said Act.

E] Alternatively, assuming Article 113 of the said Act applies then the Plaintiffs cannot claim mesne profits from the year 1991 i.e. from the date when the suit was decreed by the Trial Court and could claim it only for the preceding 3 years prior to filing of the suit.

F] That there is no merger of the judgment and decree passed by the Trial Court with the judgment and order passed by this Court in Writ Petition No.4053 of 1992 as the Appeal filed by the Defendant Bank had been allowed and the decree has been set aside and therefore the Plaintiffs cannot claim mesne profits from the year 1991 when the suit was decreed.

14 **SUBMISSIONS OF SHRI G. S. GODBOLE, THE LEARNED COUNSEL APPEARING FOR THE RESPONDENTS/ORIGINAL PLAINTIFFS.**

i] That since the decree passed by the Trial Court was set aside by the Appellate Bench of the Small Causes Court and since the

judgment of the Appellate Bench of the Small Causes Court was set aside by this Court in Writ Petition 4053 of 1992 by virtue of which the suit in turn was decreed, the cause for filing the Misc. Notice for mesne profits arose only in the year 2002 when the suit was decreed by this Court in the Writ Petition and therefore the Misc. Notice filed in the year 2004 was within limitation in terms of Article 113 of the said Act.

- ii] That the claim for mesne profits in a rent suit arises only when the tenant's possession becomes wrongful and therefore sticto senso the claim is not for mesne profits which has been received by the Defendant but for damages for wrongful use of the tenanted premises. Reliance is sought to be placed on the judgment of a learned Single Judge of this Court reported in 2009(1) ALL MR. 844 in the matter of Humayun Dhanrajgir & Ors.v/s. Ezra Aboody.
- iii] That in the instant case, the cause of action for filing the claim of mesne profits assumes importance. In the instant case the decree passed by the Trial Court was set aside by the Appellate Bench of the Small Causes Court, this Court in the Writ Petition had set aside the judgment of the Appellate Bench of the Small Causes

Court, and in turn had decreed the suit in the year 2002 and hence the cause of action for filing the Misc. Notice for mesne profits arose in the year 2002 and therefore the Misc. Notice filed in the year 2004 was within limitation. Reliance is sought to be placed on the judgment of the Apex Court reported in (2004) 2 SCC 747 in the matter of Union of India and others v/s. West Coast Paper Mills Ltd. and another as also the judgment of a Division Bench of this Court reported in 1986 BCI 108 in the matter of Kumudini Ramdas Shah v/s. K.M.Mody (Dead) by L.Rs.

- iv] That the judgment of the learned Judge of the Small Causes Court has merged in the judgment of this Court in Writ Petition No.4053 of 1992 and therefore the Plaintiffs are entitled to make a claim for mesne profits from the year 1991 when the suit was decreed. Reliance is sought to be placed on the judgment of the Apex Court reported in (2000) 6 SCC 359 in the matter of Kunhayammed and others v/s. State of Kerala and another.

CONSIDERATION :-

- 15 Having heard the learned counsel for the parties, I have considered the rival contentions. The issue that arises for consideration is

whether the Application being Misc. Notice for mesne profits being Notice No.4705 of 2004 as filed is within limitation.

16 In so far as a suit under the Rent Act is concerned, there can be no gainsaying of the fact that the defining aspect in so far as a claim for mesne profit is when the possession of the tenant becomes wrongful. The possession becomes wrongful when the tenancy actually stands terminated on the passing of the order or decree for eviction and the building falls vacant by his actual eviction. (See *Dhanapal Chettiar v/s. Yesodai Ammal* reported in (1979) 4 SCC 214). There can be no dispute about the fact that a claim for mesne profits can be made both for pre-suit period as well as the post decree period. In the instant case, the claim is made from the year 1982 to the year 2000. In so far as the post 2000 period is concerned, a separate application has been filed with which this Court is not concerned with the above Civil Revision Application.

17 In the context of the issue that arises for consideration it would be gainful to refer to the judgment of a learned Single Judge of this Court in *Humayun Dhanrajgir's* case (supra). The concept of mesne profits vis-a-vis rent proceedings had come up before a learned Single Judge of this Court, and which was sought to be explained. The learned Single Judge of this Court in the said judgment has observed that the liability to pay rent flows by virtue of

the contract express or implied between the parties and after the contract of tenancy stands terminated, it will be damages or compensation that is payable for continued possession of the premises. It is observed that though the tenant had a rightful possession when he entered the immovable property but it is the decree of possession which makes his possession wrongful. It is held that wrongful possession of the person is the very essence for the claim for mesne profits. The learned Judge thereafter in paragraph 31 after referring to the conspectus of judgments cited before him concluded as under :-

“31. Having taken survey of the various cases and methods of valuation, it can be broadly summarised as under:-

- i) The claim for ‘Mesne Profit’ remains floating till the decree of possession is passed in favour of the plaintiff, which can also be termed as royalty;
- ii) The measure of Mesne Profits is the value for the use of the premises and not necessarily the value of the property;
- iii) Value for use will be determined by:-
 - a. What that value will be in the hands of the person in wrongful possession;
 - b. comparables, if available and applicable in real sense;
 - c. finding out the prevailing rate of rental at which the wrongful person ought to have found equivalent accommodation.”

Hence the test is as to when the possession of the Defendant has become wrongful. For the said purpose the facts of the instant case would have to be

re-visited. The RAE & R Suit No.1486/4851 of 1983 was decreed on 12/07/1991. However, in the said suit, the Plaintiffs did not claim any post or future mesne profits. Hence there was no decree in respect of any post mesne profits or enquiry into future mesne profits. The decree passed by the Trial Court was stayed by the Appellate Bench of the Small Causes Court in Appeal No.220 of 1991 filed by the Defendant Bank vide its interim order dated 16/11/1991. The said interim stay granted to the decree by the order dated 16/11/1991 continued till final disposal of the Appeal. The Appeal in question was allowed by the Appellate Bench of the Small Causes Court by the judgment and order dated 24/09/1992 as a result of which the decree passed by the Trial Court was set aside. The Plaintiffs thereafter filed Writ Petition No.4053 of 1992 in this Court. The said Writ Petition came to be allowed by a learned Single Judge of this Court by the judgment and order dated 03/09/2002 whereby the judgment and order passed by the Appellate Bench of the Small Causes Court was set aside and the decree passed by the Trial Court was restored. The judgment in the said Writ Petition was stayed for a period of 6 weeks to enable the Defendant/Bank i.e. the Defendant herein to approach the Apex Court. The Defendant i.e. the Judgment Debtor filed an SLP in the Apex Court which came to be dismissed by the Apex Court by order dated 13/11/2002 and the Apex Court granted time till 31/03/2003 to the Defendant/Judgment Debtor to hand over the possession on or before 31/03/2003. The Defendant accordingly has handed over the possession on

31/03/2003. Hence the possession of the Defendant can be said to have become wrongful on and from 03/09/2002 when Writ Petition No.4053 of 1992 was allowed by a learned Single Judge of this Court. It is thereafter that the instant Misc. Notice No.4705 of 2004 has been filed by the Plaintiffs for claiming mesne profits from the year 1982 to the year 2000. Since the issue is as to whether the said Misc. Notice for mesne profits in the year 2004 was within limitation, is to be considered, the applicability of the relevant provisions of the Limitation Act would be in contention.

18 In the light of the proposition laid down by the Apex Court in **V. Dhanapal Chettiar's** case (supra) that the tenancy is actually terminated on the passing of the order of eviction, the possession of the Defendant in the instant case had become wrongful when the decree of eviction was passed against it in RAE & R Suit No.1486/4851 of 1983. The said decree was stayed by the Trial Court itself. The Defendant challenged the decree by way of an Appeal before the Appellate Bench of the Small Causes Court. The Appellate Bench of the Small Causes Court by an interim order dated 16/11/1991 had stayed the decree which stay had continued till the disposal of the Appeal. The Appeal, as indicated above, was allowed by the Appellate Bench of the Small Causes Court and the decree was set aside by the Appellate Bench of the Small Causes Court by the judgment and order dated 24/09/1992. Against the judgment and order of the Appellate Bench of the Small Causes Court, the

Plaintiffs had filed a Writ Petition in this Court being Writ Petition No.4053 of 1992 which Writ Petition was allowed by a learned Single Judge of this Court by the judgment and order dated 03/09/2002 and the decree passed by the Trial Court was restored. The judgment of the learned Single Judge was stayed by him to enable the Defendant to approach the Apex Court. The Defendant accordingly approached the Apex Court by way of an SLP. The said SLP filed by the Defendant came to be summarily dismissed by the Apex Court. Hence the cause of action to claim mesne profits in the instant case arose only after this Court had allowed the said Writ Petition filed by the Plaintiffs by the judgment and order dated 03/09/2002. The ancillary question that arises for consideration is as to when the time has begun to run in so far as limitation is concerned. The two Articles of the Limitation Act which are in contention are Article 51 and Article 113. The said Articles are reproduced herein under for the sake of ready reference :-

Description of suit	Period of Limitation	Time from which period begins to run
51. For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years	When the profits are received.
113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

Hence under Article 51 the limitation is for three years and the time begins to

run when profits are received by the Defendant. In so far as Article 113 is concerned, it is in the nature of a residuary provision and applies when no period of limitation is prescribed elsewhere in the Schedule and the period of limitation is three years from the date when the right to sue accrues. Hence Article 51 governs the cases where the profits have actually been received by the Defendant or might with ordinary diligence would have received by a person in wrongful possession of the property. But as held in ***Humayun Dhanrajgir's*** case (supra), the claim for mesne profits as a consequence of a decree passed in a rent suit is a claim for damages or compensation for the continued possession of the premises after the decree of possession is passed. The claim therefore stands on a slightly different footing than may be a suit for simplicitor possession of immovable property. The claim for mesne profits in a rent suit cannot be connected to the fact that when the Defendant has wrongfully received the profits but has a causal connection as to when the possession of the Defendant has become wrongful and hence when the cause of action has arisen to claim mesne profits assumes importance.

19 In the said context a reference could be made to the judgment of the Apex Court in ***West Coast Paper Mills Ltd's*** case (supra). In the said case the Railway Tribunal had decided that the levy of freight on the goods transported on a particular basis as unreasonable. The judgment of the Railway Tribunal was delivered on 18/04/1966. The Appellant i.e. the Union of India

approached the Apex Court by way of an SLP. The SLP of the Union of India was dismissed by the Apex Court 14/10/1970. The Respondent i.e. the West Coast Paper Mills Ltd. had filed Writ Petitions in the High Court for recovery of excess freight charged. The said Writ Petitions were not entertained and the Petitioner i.e. the West Coast Paper Mills Ltd. was directed to adopt the ordinary remedy of filing a suit for appropriate relief. Two suits were accordingly filed by the West Coast Paper Mills Ltd. An objection was raised that the suits were barred by limitation on the ground that the cause of action for filing the same arose immediately after the judgment was passed by the Tribunal on 18/04/1966 and since in terms of Article 58 of the Limitation Act, 1963 they were required to be filed within a period of three years, the suits filed in the year 1972 were time barred. The Apex Court held that even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal. The Apex Court further held that once an Appeal is filed before it and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court cannot be said to have attained finality. Hence the Apex Court in the said judgment held that the cause of action for filing the suit arises only when the SLP filed by the Union of India was dismissed in the year 1970 and therefore the suits filed in the year 1972 were within limitation.

20 It would also be relevant to refer to the judgment of the Division Bench of this Court in *Kumudini Ramdas Shah's* case (supra). In the said case, the auction purchaser i.e. Kumudini Shah had filed Original Special Civil Suit No.224 of 1969 and had applied for mesne profits of the business and the income which had accrued from out of the property for the period from 06/08/1957 to 31/10/1968. A contention was raised that the suit is barred by limitation on the touchstone of Article 51. The Division Bench of this Court having regard to the decisions which were cited before it held that an aggrieved party can found his action for consequential relief on the date of decision of a Court which declares his rights and enables him to bring in such action rather than rush to the Court periodically treating it as a fortuitous gamble. The Division Bench further held in the said case that the suit in question can never be called a suit simplicitor for mesne profits as is envisaged by Article 51 of the Limitation Act. The Division Bench further held that in allied fields, the Supreme Court has expanded the concept of accrual of cause of action so as to make it co-ordinate with and concomitant upon the final determination of the lis by a Competent Court. In the said case since the suit filed by the Mortgagee of the property for declaration of his tenancy ultimately concluded in the SLP filed by the said Mortgagee being dismissed on 30/10/1967, the suit filed in the year 1969 by the auction purchaser was therefore within time. Hence the Apex Court has held that the accrual of the cause of action for filing of a claim for mesne profits in the facts of the said

case was the defining aspect. The aforesaid judgments (supra) would apply in the facts of the present case.

21 In my view, the judgment relied upon on behalf of the Defendant in *Dullabhbai Hansji's* case (Supra) would not aid the Defendant in so far as applicability of Article 51 (old Article 109) is concerned. In the said case the mesne profits were sought to be recovered on the basis of the receipt of profits by the Defendant between the period 1925 to 1928. In the said case the Division Bench held that part of the profits which have been recovered within 3 years the Suit was maintainable under Article 51. The Division Bench held that the accrual cause of action which was sought to be urged on behalf of the Plaintiffs had no relevance. Since the starting point of limitation in the said case is the point when the profits were received, it therefore can be said to be different than the starting point of limitation in the instant case which is the accrual of the cause of action for claiming mesne profits. The said judgment would therefore have no application similarly the judgment of a learned Single Judge of this Court in *Dwarkas Nathamal's* case (supra) would also not further the case of the Defendant. In fact in the said case the learned Single Judge has observed thus :-

“The cause of action is what gives occasion for and forms the foundation of the suit; the cause of action is something different from the starting point of limitation; and the cause of action in a suit for mesne profits is not the actual receipt of the profits by the person in wrongful possession as held by Badkas, J. but

the cause of action is the wrongful possession of the defendant.”

22 In the instant case since the accrual of cause of action is the defining aspect, hence it is Article 113 of the Limitation Act which is the residuary Article, which would apply in the facts of the present case. In terms of Article 113 of the said Act, the application is to be filed within three years of the cause of action having arisen. In the instant case, there was no decree till this Court allowed the Writ Petition and hence the cause of action for filing the Misc. Notice for mesne profits has arisen when this Court had allowed the Writ Petition No.4053 of 1992 by the judgment and order dated 03/09/2002. The Application being Misc. Notice No.4705 of 2004 filed on 06/09/2004 is therefore within time.

 Since the Appellate Bench of the Small Causes Court after coming to a conclusion that it is Article 113 that would apply, has alternatively held that even in terms of Article 51, the Misc. Notice is within time, this Court does not deem it necessary to go into the said aspect.

23 Since the applicability of Article 113 is determined, the incidental issue that arises for consideration is for what period the Plaintiffs/Plaintiffs are entitled to claim mesne profits. The Appellate Bench of the Small Causes Court has held that the Plaintiffs are entitled to the mesne profits from the year 1991.

This is on the basis that in terms of the judgment of the Apex Court in ***Atma Ram Properties'*** case (supra) on the decree being passed by the Trial Court on 30/09/1991, the possession of the Defendant has become wrongful from the said day.

The said finding recorded by the Appellate Bench of the Small Causes Court is sought to be supported on behalf of the Defendant i.e. the Applicant herein by placing reliance on the judgment of the Apex Court in ***Kunhayammed's*** case (supra). The said judgment is an exposition of the Apex Court on the doctrine of merger. The Apex Court has held that the said doctrine of merger postulates merger of the subordinate forum's decision in the decision of the appellate or revisional forum modifying, reversing or affirming such decision. The Apex Court has held that thereafter only the latter and not the former exists in the eye of law. The Apex Court has further observed that the said doctrine is not of universal or unlimited application but its applicability has to be determined keeping in view the nature of jurisdiction exercised by the superior forum and the content or subject matter of the challenge. The Apex Court has summed up its conclusion in paragraph 44 of the said judgment which for the sake of ready reference is reproduced herein under :-

“To sum up our conclusions are :-

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority

before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave,

then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the CPC.”

The Apex Court has therefore held that the decision of the subordinate forum merges in the decision of the superior forum and it is the latter which subsists, remains, operative and is capable of enforcement in the eye of law. The Apex Court in the said case was principally concerned with the jurisdiction exercised by it under Article 136 of the Constitution of India. It is in the said context that the Apex Court has made observations on the aspect of doctrine of merger

vis-a-vis the order passed by it. The Apex Court has held that once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger, the order may be of reversal, modification or merely affirmation. It is in the context of what the Apex Court has held amounts to merger, that the facts in the instant case would have to be seen.

24 As indicated above, in the instant case the decree passed by the Trial Court was set aside by the Appellate Bench of the Small Causes Court and was re-instated by virtue of the order passed in the Writ Petition. Hence the decree passed by the Trial Court had merged in the decree of dismissal passed by the Appellate Bench of the Small Causes Court and hence there was no decree till this Court allowed the Writ Petition No.4053 of 1992 by the judgment and order dated 03/09/2002. The doctrine of merger has no application in so far as merger of the decree of the Trial Court in the judgment and order passed by this Court is concerned. Hence it is only on 03/09/2002 that there was a decree in favour of the Plaintiffs so as to entitle them to lay a claim for mesne profits. Once it is held that Article 113 of the Limitation Act is to apply, then the logical corollary of the same would be that the Plaintiffs would be entitled to mesne profits for the preceding three years i.e. up to 1999. The Appellate Bench of the Small Causes Court held that the judgment of the Trial Court does not merge in the judgment of the highest forum.

However, the Appellate Bench by applying the law laid down by the Apex Court in *Atma Ram Properties'* case (supra) held that the Plaintiffs i.e. the Decree Holders would be entitled to mesne profits from 30/09/1991 i.e. when the decree was passed by the Trial Court. In my view, the Appellate Bench has erred in applying the judgment in *Atma Ram Properties'* case (supra) to a claim for mesne profits as the said judgment concerns the conditions that can be imposed at the time of granting stay to the decree passed by the Trial Court and therefore cannot be invoked to fix the date from which the Plaintiffs i.e. Decree Holders would be entitled for mesne profits. That apart, applying *Atma Ram Properties'* case (supra) would also militate against the provisions of the Limitation Act which specifically provide that a money claim can be made only for the preceding three years. Hence in so far as the impugned order holds that it is Article 113 that would apply no exception could be taken to the same however in so far as it holds that the Plaintiffs are entitled to mesne profits from the year 1991 is concerned the same is unsustainable and is accordingly required to be set aside to the said extent, and it is required to be declared that the Plaintiffs would be entitled to the mesne profits for the three years preceding 03/09/2002 i.e. from 03/09/1999.

25 Hence to conclude the finding of the Appellate Bench as regards applicability of Article 113 of the Limitation Act is upheld, however, the Plaintiffs i.e. the Decree Holders would be entitled to mesne profits only for the

three years preceding the said Misc. Notice i.e. from 03/09/1999 and not from the year 1991. The above Civil Revision Application is allowed to the aforesaid extent and disposed of.

[R.M.SAVANT, J]