

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

% **Date of decision: 10th August, 2018**

+ **RSA 148/2017, CM No.20020/2017 (for stay), CM No.20021/2017 and CM No.20022/2017 (both for exemption) and CM No.20023/2017 (for extension of time to file deficient court fee).**

AVERY INDIA LTD.

..... Appellant

Through: Mr. B. Mohan, Adv with Mr. P.R. Bahl, Mr. Raghav Gupta and Mr. Siddharth Aggarwal, Advs.

Versus

NIRMAL KUMAR JAIN AND ANR

..... Respondents

Through: Mr. V.K. Srivastava, Mr. B. B. Jain and Mr. Abhay Jain, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 16th February, 2017 in RCA 21/14/13 (New No.60786/16) of the Court of Additional District Judge-03 (West)] of dismissal of First Appeal under Section 96 of the CPC preferred by the appellant against the judgment and decree [dated 28th February, 2013 in Suit No.537/2002 of the Court of Additional Civil Judge (West)] allowing the suit filed by the two respondents/plaintiffs for ejection of the appellant/defendant from the ground floor of house No. XI/4234 situated at 1-Ansari Road, Daryaganj, New Delhi-110002 and for recovery of mesne profits.

2. The Second Appeal came up first before this Court on 24th May, 2017 when the senior counsel then appearing for the appellant/defendant stated that the appellant/defendant had already

vacated the premises, for ejectment of the appellant wherefrom decree had been passed by the Suit Court and the First Appellate Court, and the claim in the Second Appeal was confined only to the decree insofar as for recovery of mesne profits.

3. Notice of the appeal was issued, though without indicating the substantial question of law if any arising but recording the contention of the senior counsel then appearing for the appellant that the First Appellate Court, in violation of Section 105(1) of the CPC, held itself not entitled to interfere with the order of the Suit Court closing the right of the appellant/defendant of cross examination of PW2 and PW3. While issuing notice, subject to the appellant depositing 50% of the decretal amount in this Court less the amount already paid during the pendency of the suit and the appeal, the recovery of the balance decretal amount from the appellant was stayed and the Trial Court record requisitioned.

4. The counsel for the appellant/defendant and the counsel for the respondents/plaintiffs have been heard.

5. During the hearing, on enquiry by the counsel for the appellant/defendant whether the appeal was being finally heard, the counsel was informed that if after hearing the counsels, the appeal was found to entail any substantial question of law, then the counsels will be informed of the same and it will be enquired from them whether they needed adjournment for addressing on the said substantial question of law; however if on hearing, no substantial question of law

was found to arise, the question of entertaining the appeal would not arise.

6. The Suit Court record and the First Appellate Court record requisitioned in this court have been perused.

7. The respondents/plaintiffs, on 1st October, 1993 instituted the suit, from which this appeal arises, pleading (as per amended plaint verified on 14th December, 1998) :

- i. that the appellant/defendant was a month to month tenant under the respondents/plaintiffs on the ground Floor of property No. XI/4234 situated at 1-Ansari Road, Daryaganj, New Delhi at a rent of Rs.5500/- per month;
- ii. that the tenancy of the appellant/defendant was terminated vide notice dated 22nd June, 1993;
- iii. that the appellant/defendant was liable to pay damages/mesne profits at the rate of Rs.71830.20p per month w.e.f. 1st August, 1993 to 30th September, 1993;
- iv. that since the filing of the suit, the prevalent letting value of the premises had increased multifold and was at the rate of Rs.67.50p per sq. ft. per month and the appellant/defendant was liable to pay future mesne profits/damages from use and occupation

w.e.f. 1st October, 1993 at the rate of Rs.1,61,617.95p per month.

8. The appellant/defendant contested the suit, by filing a written statement, pleading:

- a. that the appellant/defendant was inducted by one Nannu Mal Jain as a tenant in the premises, comprising of one hall, bathroom, latrine, with two entrances, one from the main gate of the hall and the other from the service road on the rear of property 1-Ansari Road, Daryaganj New Delhi;
- b. subsequently, in November 1970, Nannu Mal Jain informed the appellant/defendant of partition of property No.4234, Ward No.XI at 1-Ansari Road, Daryaganj, New Delhi; the appellant/defendant was informed that the premises aforesaid in its tenancy were partitioned equally between Nannu Mal Jain and his wife Chander Kala Jain and that half of the tenancy premises in the front i.e. abutting Ansari Road, was owned by Nannu Mal Jain and the other half portion at the rear, having access from the service road, was owned by Chander Kala Jain;
- c. however, since the entire premises were in the tenancy of the appellant/defendant, no partition wall between the two portions was raised;

- d. that Chander Kala Jain, on coming to own rear half of the premises in the tenancy of the appellant/defendant, accepted the appellant/defendant as a tenant under her in the said portion belonging to her;
- e. Nannu Mal Jain and Chander Kala Jain also requested the appellant/defendant to pay them rent separately in equal proportion of their separate premises; ever since then, the appellant/defendant paid rent to the two landlords separately for their respective premises;
- f. in or about January, 1990, on the demise of Nannu Mal Jain, it was represented to the appellant/defendant that the rent of the premises owned by Nannu Mal Jain should be paid by the appellant/defendant in the name of Savita Jain, being the daughter-in-law of Nannu Mal Jain;
- g. that the rent of the premises in the tenancy of the appellant/defendant, earlier under Chander Kala Jain and after the demise of Chander Kala Jain, now under her son respondent no.1/plaintiff Nirmal Kumar Jain as well as of the premises in the tenancy of the appellant/defendant under respondent no.2/plaintiff Savita Jain, is less than Rs.3,500/- per month and the provisions of Delhi Rent Control Act, 1958 are applicable to such tenancies and suit for ejectment from such premises before the Civil Court was misconceived;

- h. that the tenancy of the appellant/defendant was of two premises and not of one premises;
- i. that notice dated 22nd June, 1993 of determination of tenancy was not in compliance with Section 106 of the Transfer of Property Act, 1881 and two separate tenancies could not be terminated by a single notice; and,
- j. denying the claim of the respondents/plaintiffs for *mesne* profits.

9. Though a replication was also filed by the respondents/plaintiffs to the written statement aforesaid of the appellant/defendant but the need to refer thereto is not felt.

10. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 3rd May, 1994:-

- “(1) Whether the tenancy of the Defendants stands terminated by legal and valid notice as per section 106 of TP Act as alleged, if so its effect? OPP*
- (2) Whether the plaintiff is entitled to recover possession of suit remises as alleged? OPP*
- (3) Whether the plaintiff is entitled to recover any damages, if so at what rate for what period and to what amount? OPP*
- (4) Whether the plaintiff is entitled to any injunction? OPP*
- (5) Whether the suit is bad for mis-joinder of parties and causes of action as alleged? OPD*

(6) *Whether the plaintiffs own separate and distinct premises as alleged in para 2 of the preliminary objections of written statement, if so its effect?*
OPD

(7) *Relief."*

11. Notwithstanding the issues having been framed in the suit as far back as on 3rd May, 1994, the suit remained pending till 28th February, 2013, when it was allowed in favour of the respondents/plaintiffs and a decree for ejectment and recovery of *mesne* profits/damages for use and occupation as claimed passed against the appellant/defendant, finding/observing/reasoning (i) that there was no specific denial in the written statement of service of the notice dated 22nd June, 1993 of determination of tenancy; (ii) even otherwise, the respondents/plaintiffs had proved service of notice dated 22nd June, 1993 of determination of tenancy; (iii) the respondent no.1/plaintiff, in his evidence had proved that the rate of rent w.e.f. 1st August, 1998 was Rs.5,500/- per month and that the tenancy always remained one but the rent was being received by way of two separate cheques but one receipt was being issued with respect to the rent; (iv) the respondent no.1/plaintiff had further deposed that the appellant/defendant used to send rent along with duly prepared and attached receipts; (v) no cross-examination was done by the respondents/plaintiffs on the aspect of ownership of the respondents/plaintiffs except for putting questions on the Will of Chander Kala Jain in favour of Nirmal Kumar Jain and that too only to the effect that no probate thereof had been obtained; however, in Delhi, it was not essential, to claim under the Will, to have the Will

probated; (vi) a reading of the notice dated 22nd June, 1993 showed determination of tenancy and there was no cross-examination in this respect also; (vii) that the possession of the appellant/defendant, after determination of tenancy, was unauthorised and the respondents/plaintiffs were entitled to a decree of ejectment of the appellant/defendant; (viii) the respondents/plaintiffs had examined two independent witnesses to prove the prevalent letting value and the testimony of which witnesses also had remained unrebutted; (ix) PW2 had deposed that Vijaya Bank had taken basement of property no.2/10, Daryaganj, measuring 1874 sq. yds. on January, 1988 @ Rs.12 per sq. ft. per month w.e.f. 1998 and after five years, rent was increased by 25% and thereafter it was again increased in 1997; (x) PW3 had also deposed having taken premises on rent in Daryaganj area on 30th March, 1998 @ Rs.1,90,825/- per month; (xi) no cross-examination was done by the appellant/defendant of the said witnesses; (xii) the appellant/defendant had failed to prove that the suit was bad for mis-joinder of any party or for mis-joinder of causes of action; (xiii) the sole witness of the appellant/defendant, though deposed that the sole tenancy stood split up into two tenancies by virtue of documents Ex.DW1/1 to Ex.DW1/5 but a reading of the said documents did not show any such splitting up of tenancy and showed that only the share of the rent was distributed between Nannu Mal Jain and Chander Kala Jain; (xiv) there was no partition of tenancy; (xv) only one rent receipt was being issued with respect to the rent paid of the premises; (xvi) the sole witness of the appellant/defendant also admitted that no partition wall as at any

point of time erected, separating the tenancy premises; (xvii) the tenancy premises remained one with a single entrance; (xviii) no separate rent receipts were admittedly issued with respect to the separate tenancies alleged by the appellant/defendant; (xix) the appellant/defendant, in none of the correspondence, with Chander Kala Jain and Savita Jain had taken the stand of separate tenancies; and, (xx) merely because rent paid by the appellant/defendant was shared by the two respondents/plaintiffs, did not mean that there was any partition of tenancy. Hence, the decree of ejectment and recovery of *mesne* profits, in favour of the respondents/plaintiffs and against the appellant/defendant “along with interest @ 6% per annum and cost of the suit”.

12. The First Appeal preferred by the appellant/defendant has been dismissed, finding/observing/recording (i) that it was the contention of the appellant/defendant that the Suit Court did not give adequate opportunity to the appellant/defendant to cross-examine PW2 and PW3, leading to denial of principles of natural justices and resulting in grave miscarriage of justice; however, admittedly the orders dated 21st July, 1998 and 27th May, 1999 whereby the right of the appellant/defendant to cross-examine PW2 and PW3 respectively was closed by the Suit Court, had not been challenged by the appellant/defendant and had become final; thus there was no merit in the said contention; (ii) it was the contention of the appellant/defendant that in pursuance to the decree dated 28th January, 1970 Ex.DW1/6 in Suit No.401/1969 of this Court, half portion of the tenanted property came to be owned by Nannu Mal

Jain and the other half portion by Chander Kala Jain, thus making both of them separate individual owners of the two severed portions of the property; the said decree not only determined the shares but also partitioned the tenanted premises by metes and bounds and thus the tenancy of the appellant/defendant was under two separate lessors, each of whom was being paid rent @ Rs.2,750/- per month and to which two tenancies the provisions of Delhi Rent Control Act were applicable and the Civil Court did not have jurisdiction to order ejectment from the tenanted premises; (iii) it was however suggested by the appellant/defendant to the respondent no.1/plaintiff in cross-examination, that no partition wall separating the portions of the two tenancies was ever erected and which showed that the tenanted premises, according to the appellant/defendant also, were not divided/partitioned by metes and bounds; (iv) the counsel for the appellant/defendant relied on *Sk. Sattar Sk. Mohd. Choudhari Vs. Gundappa Ambadas Bukate* (1996) 6 SCC 373 and *Mohar Singh Vs. Devi Charan* AIR 1988 SC 1365; (v) it was the contention of the counsel for the appellant/defendant that though a single rent receipt was issued, but signed by owners of both portions of the tenancy premises; (vi) the counsel for the respondents/plaintiffs relied on judgment dated 23rd November, 2000 of this Court in RFA No.318/1999 titled *Good Year India Ltd. Vs. Bharat Bhushan Jain* holding that merely because the owners/landlords share the rent as per respective shares in the property, did not make it a case of separate tenancies; (vii) in the present case also, inspite of partition of the property and payment of rent by two separate cheques, single

rent receipt continued to be given; (viii) in ***Sk. Sattar Sk. Mohd. Choudhari*** supra, it was held that if all the co-owners agree to split up the demised property by partition by metes and bounds, then they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor; however in the present case, the respondents/plaintiffs as co-owners chose to continue to deal with the tenanted property as one unit by not effecting its partition by metes and bounds and by continuing to issue a composite rent receipt in respect of rents received by them; (ix) it was also not in dispute that the rent, receipts were being prepared by the appellant/defendant itself and were only furnished to the respondents/plaintiffs along with cheques for rent, for signatures of the respondents/plaintiffs; (x) there was not an iota of evidence to establish bifurcation of tenancy; (xi) thus ***Sk. Sattar Sk. Mohd. Choudhari*** supra was not applicable; (xii) on the contrary ***Raja Simhadri Appa Rao Vs. Prattipati Ramayya*** ILR (1906-08) 29 Mad 29, ***Satyees Chandra Sarkar Vs. Haji Jilfar Rahman*** (1918) 27 Cal LJ 438 and ***Keshava Prasad Singh Bahadur Vs. Mathura Kaur*** AIR 1922 Pat 608, holding that it is open to the owners to apportion the rent *inter se* but on such apportionment the obligation of the tenant remains single and the lessor will not be allowed to split up the tenancy by recovering rent of a part only, were applicable to the facts of the present case; (xiii) the appellant/defendant, in the reply Ex.PW29 to notice dated 22nd June, 1993 of determination of tenancy, did not state that there were two separate tenancies at a rent of Rs.2,750/- per month each and the plea in this regard was an

afterthought; (xiv) the appellant/defendant had also challenged the rate at which *mesne* profits had been awarded; (xv) PW2 and PW3 examined by the respondents/plaintiffs qua the rate of *mesne* profits were not cross-examined by the appellant/defendant despite several opportunities; and, (xvi) the appellant/defendant had not led any independent evidence of its own about the rate of *mesne* profits. Hence the First Appeal was dismissed.

13. As aforesaid, the appellant/defendant, after the judgment of the First Appellate Court and before filing this appeal, has complied with the impugned judgment and decree in so far as of ejectment of the appellant/defendant, by handing over the possession of the premises to the respondents/plaintiffs. The counsel for the respondents/plaintiffs admits the same.

14. It is the contention of the counsel for the appellant/defendant that the impugned judgment and decree, in so far as for recovery of *mesne* profits, is contrary to law for the reason of the tenancy of the appellant/defendant having stood split up pursuant to the judgment and decree dated 28th January, 1970 of this Court in Suit No.401/1969 whereunder, besides Nannu Mal Jain who alone had let out the premises to the appellant/defendant, his wife Chander Kala Jain was also held entitled to a share in the tenancy premises and a decree demarcating the portions of the tenancy premises owned by Nannu Mal Jain and Chander Kala Jain was passed. It is argued that since on passing of the said decree, instead of one, two separate tenancies came into existence, each at a rent less than Rs.3,500/- per

month, the jurisdiction of the Civil Court was barred by Section 14(1) read with Section 50 of the Delhi Rent Control Act, to order ejectment from such tenancy premises or to order recovery of *mesne* profits with respect thereto.

15. The counsel for the respondents/plaintiffs contends that since the appellant/defendant has vacated the premises prior to the filing of the appeal, it is now not open to the appellant/defendant to take up the said plea and the challenge by the appellant/defendant to the decree for *mesne* profits can only be as to the rate at which the same have been awarded.

16. Per contra, the counsel for the appellant/defendant argues that merely because the appellant/defendant has of its own chosen to vacate the premises, would not take away the right of the appellant/defendant to challenge the decree for ejectment also and the consequent decree for *mesne* profits, including on the ground of jurisdiction of the Civil Court being barred.

17. I agree with the counsel for the appellant/defendant. The present appeal was filed within the period prescribed therefor and this Court, while issuing notice of this appeal, has not imposed any kind of restrictions qua the scope of the appeal. Merely because a person aggrieved by a decree chooses to voluntarily comply with some part thereof, for whatsoever reason, cannot take away the right of that person to challenge that part of the decree also, to the extent it affects the remaining decree which has not been complied with. Rule 33 of Order XLI, while defining powers of appellate court and which

per Order XLII Rule 1 applies to second appeals also, vests the appellate court with powers to pass order which ought to have been made. Supreme Court, in *Nirmala Bala Ghose Vs. Balai Chand Ghose* AIR 1965 SC 1874 interpreted the said Rule 33 as entitling the appellate court to interfere with decree, which by acquiescence or acceptance has become final. I thus hold that notwithstanding the factum of the appellant/defendant having vacated the tenancy premises, the appellant/defendant is be entitled to challenge the decree, insofar as for *mesne* profits, to the extent the same is dependent upon the plea of the appellant/defendant of the jurisdiction of the Civil Court being barred owing to there being two and not one tenancy and both of which tenancies were protected under the Delhi Rent Control Act.

18. The counsel for the appellant/defendant has proposed the following substantial questions of law on the aspect of splitting up of single tenancy into two tenancies as a legal consequence of decree for partition by metes and bounds between the co-lessors:-

- “C. Whether the tenancy of the Appellant would remain indivisible notwithstanding the fact that there is partition of tenanted accommodation amongst Respondents/Co-owners by metes and bounds?”*
- D. Whether the parties can by choice or action alter and/or avoid the legal effect and consequences of a partitions of a property by metes and bounds? If so, whether the learned Courts below have erred in ignoring such fundamental legal principles?”*

E. Whether splitting up of the tenancy as a consequence to partition of tenanted accommodation by metes and bounds amongst Respondents/Co-owners will not come into effect without notice of splitting of tenancy to tenant?

19. The counsel for the appellant/defendant states that no evidence is required to be shown on the aforesaid aspect, as splitting up of the tenancy, on passing of a final decree for partition between landlords, is automatic and/or a legal consequence. Reliance in this regard is placed, as before the First Appellate Court, below on ***Sk. Sattar Sk. Mohd. Choudhari*** supra.

20. I have enquired from the counsel for the appellant/defendant, the statutory provisions in this regard.

21. The counsel for the appellant/defendant has referred to Section 37 of the Transfer of Property Act which is as under:-

“37. Apportionment of benefit of obligation on severance

When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract, to the contrary amongst the owners, be performed in favor of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation the duty shall be performed for the benefit of such one of the

several owners as they shall jointly designate for that purpose:

PROVIDED *that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.*

Nothing in this section applies to leases for agricultural purposes unless and until the State Government by notification in the Official Gazette so directs.”

22. I have further enquired from the counsel for the appellant/defendant, whether not I have also pronounced on the said aspect and whether not I have held that even on partition between landlords, no splitting up of tenancy takes place.

23. The counsel for the appellant/defendant has fairly drawn attention to my judgment in ***Ashok Kumar Vs. Anil Aggarwal*** MANU/DE/1564/2016 holding as under:-

*“33. Even otherwise, as per Section 37 and Section 109 of the Transfer of Property Act, 1882 there is no severance of the tenancy by reason merely of partition between the co-owners and landlords and there is no separate demise in respect of divided part and the landlord to whom a divided part has been allotted acquires no right by reason merely of the partition to terminate the tenancy by giving notice to quit qua that part. Though the counsel for the respondents handed over photocopies of judgments viz. ***Charanjit Lal Mehra Vs. Kamal Saroj Mahajan*** MANU/SC/0191/2005: 2005 III AD (SC) 525, ***Kamal Saroj Mahajan Vs. Charanjit Lal Mehra*** MANU/DE/0824/2004 : 2004 VI AD (Delhi) 537 and ***Mercury Travels (India) Ltd. Vs. Mahabir Prasad*** MANU/DE/0001/2001 : 89 (2001) DLT 440 (DB) but*

the same are found to be of no assistance on the said issue.

34. The senior counsel for the appellant though has drawn attention to the partition deed to contend that there has been division by metes and bounds but has not been able to cite any case law to the contrary, neither at the time of hearing nor thereafter.

*35. On the contrary, I find the Division Bench of the High Court of Kolkata in **Dr. Amar Prasad Goopta Vs. Arun Kumar Shaw** MANU/WB/0089/1979 : AIR 1979 Cal 367 and the High Court of Allahabad in **Mahmudul Haq Vs. Seventh Addl. District and Sessions Judge** MANU/UP/0774/1984 to be holding that there is no splitting up of the pre-existing tenancy on partition amongst landlords. It is also not the case of Ashok that the firm which was a tenant had agreed to partition.”*

24. The contention of the counsel for the appellant/defendant however is that **Ashok Kumar** supra is contrary to **Sk. Sattar Sk. Mohd. Choudhari** supra.

25. **Sk. Sattar Sk. Mohd. Choudhari** supra was not noticed or dealt with in **Ashok Kumar** supra. In **Sk. Sattar Sk. Mohd. Choudhari** supra, a shop measuring 23’x19’ was let out in the year 1964. In the year 1974, one of the brothers of the person who had let out the shop and who was receiving the rent thereof informed the tenant that in a partition between the brothers, a portion measuring 23’x12-1/2’ of the shop had fallen to the share of the said brother and the tenant was called upon to pay the rent to the said brother and on non-payment of rent, petition for eviction from the said portion, under the provisions Hyderabad Houses (Rent, Eviction and

Lease) Control Act, 1954, was filed. It was the plea of the tenant, that his tenancy was indivisible and the petition for eviction from part of the shop was not maintainable and he had never attorned to the brother who had filed the petition for eviction and the partition claimed, was not *bona fide*. The Rent Controller ordered eviction of the tenant and the appellate authority dismissed the appeal. However the High Court reversed the order of eviction, primarily on the ground that the partition between the brothers would not affect the lease which would remain indivisible and eviction proceedings at the instance of only one of the co-landlords was not maintainable. However the Supreme Court allowed the appeal and restored the order of eviction, reasoning (i) that Section 36 of the Transfer of Property Act read with Section 8 of the said Act enacts the rule relating the apportionment by time; Section 37 refers to apportionment by estate; (ii) before a tenant can be required to split up the rent and pay separately to each owner, he has to be informed of the transfer by a notice, which by itself will be sufficient to convert the single obligation into several obligations and the tenant will be liable to pay rent to each co-sharer separately; (iii) it is open to the owners to apportion the rent *inter se* but if no such apportionment is made, the obligation of the tenant remains single and in that situation the lessor will not be allowed to split up the tenancy by recovering the rent of a part only; (iv) under Sections 36 & 37 of the Transfer of Property Act, even if the estate is in possession of a tenant who is under an obligation to pay rent, there can still be severance of such estate; (v) however the properties

which are covered by leases, are dealt with separately in Section 109 of the Transfer of Property Act; (vi) though partition is not a transfer within the meaning of Section 109 of the Transfer of Property Act but if a suit for partition is filed and partition is brought about through a decree of Court, it would amount to transfer vide Section 2(d) and Section 5 stands overridden by Section 2(d) of the Transfer of Property Act; (vii) though tenancy cannot be split up either in estate or in rent or any other obligation by unilaterally act of one of the co-owners, but if all the co-owners or the co-lessors agree amongst themselves and split up by partition the demised property by metes and bounds and come to have definite, positive and identifiable share in that property, they become separate individual owners of each separate severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor; (viii) there is no right in the tenant to prevent the joint owners or co-lessors from partitioning the tenanted accommodation among themselves; (ix) whether the premises, which is in occupation of a tenant shall be retained jointly by all the lessors or they would partition it amongst themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant.

26. No other judgment has been relied upon by the counsel for the appellant/defendant and no other argument in this regard has been urged.

27. My research shows that *Ashok Kumar* supra was not appealed against. I further find the Supreme Court, in *M. Meeramytheen Vs.*

K. Parameswaran Pillai (2010) 15 SCC 359, to have held that a subsequent partition between co-landlords cannot divide the original single tenancy and enable one of the landlords in whose share part of the tenanted premises had fallen, to seek eviction of the tenant therefrom. Accordingly, the order of eviction passed by the Courts below was set aside.

28. In **Ashok Kumar** supra, reliance was placed on **Dr. Amar Prasad Goopta Vs. Arun Kumar Shaw** AIR 1979 Cal 367 (DB) and on **Mahmudul Haq Vs. Seventh Addl. District and Sessions Judge** 1984 SCC OnLine All 17, both holding that there is no splitting up of the pre-existing tenancy on partition amongst landlords. The reasoning which prevailed for holding so was, that (i) though by virtue of Section 109 of the Transfer of Property Act, a transferee of a portion of the premises acquires all the rights of the lessor in respect of the portion of the premises transferred, but the question is, whether the transferor/lessor had a right to evict the lessee from a part of the premises; (ii) there can be no doubt that the lessor cannot evict the lessee from a part of the property leased; (iii) a suit for a decree for partial eviction is not maintainable; (iv) as the lessor has no right to evict the lessee from part of the property, it is absurd to think that Section 109 of the Transfer of Property Act has conferred such a right to the transferee of a part of the premises leased; (v) even if the lessee, pursuant to the transfer has apportioned the rent, such apportionment does not have the effect of severing the tenancy, because under Section 37 of the Transfer of Property Act the tenant is bound to apportion the rent; (vi) the third paragraph of Section 109

of the Transfer of Property Act also provides for apportionment of rent by mutual agreement amongst the lessors, transferee and the lessee, failing which the same may be made by the Court; (vii) the relationship of landlord and tenant arises out of a contract; (viii) a contract of tenancy with respect to whole of the premises, cannot in law, consequent to partition between owners/lessors stand converted to new contracts of tenancy with respect to each of the sub-divided premises let out as a whole, in the absence of plea and proof of fresh contracts of tenancy having been created with respect to each part of the partitioned property, with the owners thereof; (ix) that neither the transferee nor a co-sharer, on partition, can be allowed to disturb the lessee in possession of the property leased out to him; the lessors can of course get rent of their share apportioned; apportionment of rent is made for the convenience of the lessors but the law does not further lay down that on transfer of defined portion of the tenancy, the original tenancy will get spilt up into as many portions as there might be co-sharers after the transfer; (x) even in the event of transfer by a single owner of the leased property to two persons whose shares in the transferred property have been clearly defined, the lease does not become split up into two; (xi) the right of the lessee to remain in possession of the accommodation let out to him, without interruption, is conferred by clause (c) of Section 105 of the Transfer of Property Act and the tenancy cannot be split unless the transferor, transferee and the lessee, all agree to it; and, (xii) the conduct of the tenant in agreeing to pay rent to different landlords according to their shares, would not imply any fresh tenancy.

29. I also find an earlier judgment of the Calcutta High Court in *Adam Ali Vs. Chandu Molla* AIR 1928 Cal 876 to have held that the act of partition among the landlords, without a concurrence of the tenant, though surely has the effect of dividing the holding so as to give to each of the owners the right to recover their shares of the rent which had been fixed on the portions allotted to their share, but that cannot be said to confer a new right upon the owners/landlords to bring in ejectment against the tenants who were not liable to be evicted previous to partition; thus if the tenant was entitled to continue as a tenant with regard to the entire tenancy holding, by partition it cannot be said that the tenant was liable to be evicted from a part of the property.

30. Mudholkar J., speaking for the Bombay High Court (Nagpur Bench) in *Daulatsingh Gulabsingh Vs. State of Bombay* 1957 SCC OnLine Bom 221 also negated the contention that Section 109 of the Transfer of Property Act results in severance of the lease where a part of the leased premises is transferred by the lessor. It was held that only new right which comes into being upon a transfer of a portion of the demised premises is a right to the apportionment of land. The contention that since one of the rights of the transferor was to terminate the lease and this right passed to the transferee consequent on the transfer was rejected reasoning that it has to be borne in mind that while the transferor had a right to terminate the entire tenancy, he never had a right to terminate only a part thereof; thus what would pass to the transferee consequent on the transfer, would be only such right as the landlord unquestionably had and not

something which the landlord never had; no new right to terminate a part of a tenancy was held to come into being by virtue of a transfer.

31. On the reasoning given above, of eviction from part of the tenanted premises leased out as whole being not permissible in law, suffice it is to refer to ***Harihar Banerji Vs. Ramshashi Roy*** AIR 1918 Privy Council 102 and to ***S. Sanyal Vs. Gian Chand*** AIR 1968 SC 438, ***Habibunnisa Begum Vs. G. Doraikannu Chettiar*** (2000) 1 SCC 74 holding that the contract of tenancy being single and indivisible, in the absence of any statutory provision to that effect, cannot stand substituted by a contract of tenancy of different portions with different landlords thereof. Mention may also be made of ***Chemons India Pvt. Ltd. Vs. Vijay Singh Sandhu*** 204 (2013) DLT 260.

32. I do not find anything in language of Section 37 or Section 109 of the Transfer of Property Act for splitting up of a single tenancy into several tenancies. All that the said provisions provide is, (i) that if in consequence of a transfer, a property is divided and held in several shares and the benefit of any obligation relating to the property “as a whole” passes from one to several owners of the property, the corresponding duty shall be performed in favour of each of the owners in proportion to value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; if the duty cannot be severed or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit

of such of the several owners as they shall jointly designate; and, (ii) that the transferee shall possess all the rights to the property or part transferred. Nothing in the said provision provide for splitting up of the single tenancy into several tenancies.

33. The counsel for the appellant/defendant in this regard though has also referred to ***Bismillah Be Vs. Majeed Shah*** (2017) 2 SCC 274 but the same is not found to have application to the facts of the present case. All that the said judgment holds is that though by virtue of Section 116 of the Indian Evidence Act, 1872, the tenant is estopped from challenging the title of his landlord during continuance of the tenancy, yet the tenant/lessee is entitled to challenge the derivative title of an assignee/vendee of the original landlord/lessor of the demised property in an action brought by the assignee/vendee against the tenant for his eviction from the demised property under the Rent laws; this right of a tenant however is subject to the caveat that the tenant/lessee has not attorned to the assignee/vendee; if the tenant/lessee pays rent to the assignee/vendee of the tenanted property, then it results in creation of an attornment between the parties, which in turn deprives the tenant/lessee to challenge the derivative title of an assignee/vendee in the proceedings. The said judgment cannot be permitted to be stretched to the question, whether on partition/transfer there is splitting up of erstwhile single tenancy.

34. As far as the argument of the counsel for the appellant/defendant with respect to receipts is concerned, admittedly

the receipts were prepared by the tenant and sent along with the cheques for rent. It has already been discussed above that mere apportionment of rent or the act of the tenant of paying proportionate rent to the transferee or to another who has been found to have share in the property, in the absence of a plea or evidence of a fresh contract of tenancy, does not constitute a fresh contract of tenancy.

35. What follows is that in the absence of fresh agreement of lease, there can be no splitting up of tenancy.

36. Neither has the appellant/defendant pleaded any fresh agreement nor has the counsel for the appellant/defendant urged so. On the contrary, the contention of the counsel for the appellant/defendant is of splitting up of tenancy being a legal consequence of partition and which is not found to be a correct proposition of law especially in view of recent dicta in **M. Meeramytheen** supra.

37. There is thus no merit in the contention, that the tenancy of the appellant/defendant under Nannu Mal Jain with respect to the premises stood split up into separate tenancies under Nannu Mal Jain and his wife Chander Kala Jain or the payment by the appellant/defendant of half of the rent to Nannu Mal Jain and the other half to Chander Kala Jain by separate cheques having resulted in splitting up of tenancy. The position has already been well enunciated in **Dr. Amar Prasad Goopta** and **Mahmudul Haq** supra.

38. Before parting with the subject, I may however record that both Sections 37 & 109 of the Transfer of Property Act provide for

consequences of transfer of property. Section 5 of the Transfer of Property Act defines 'transfer' as an act by which a living person conveys property in present or in future to one or more other living persons or to himself and one or more other living persons. Strictly speaking, in the case of partition, there is no transfer/conveyance of property from one person to another; what happens is that the shares of more than one owner of the property, hitherto undivided, are determined and/or property divided by metes and bounds. Thus though the question hereinabove has been discussed in the context of Section 37 and Section 109, *stricto sensu* the said provisions are not applicable to a case of transfer.

39. I am thus of the view that the proposition urged does not admit any question of law which is not finally settled or is not far from difficulty or calls for discussion of alternate views and which alone as per dicta in ***Chunilal V. Mehta and Sons, Ltd. Vs. Century Spinning and Manufacturing Co., Ltd.*** AIR 1962 SC 1314 and ***Kashmir Singh Vs. Harnam Singh*** (2008) 12 SCC 796, constitutes a substantial question of law.

40. That brings me to the contention of the counsel for the appellant/defendant on which notice was issued i.e. of the First Appellate Court having erred in not considering the challenge made by the appellant/defendant in the First Appeal to the orders of the Suit Court closing the right of the appellant/defendant to cross-examine PW2 and PW3 examined qua the rate of *mesne* profits. The First Appellate Court is indeed found to have erred in holding the

said orders to have attained finality on no challenge immediately being made thereto. The counsel for the appellant/defendant has rightly referred to Section 105(1) of the CPC in this regard which entitled the appellant/defendant to challenge the same in First Appeal preferred against the final judgment in the suit.

41. However merely for the said error committed by the First Appellate Court, the Second Appeal will not be entertainable. The same would not constitute a substantial question of law. I have thus perused the Suit Court record requisitioned in this Court to find, whether the closure by the Suit Court of the right of the appellant/defendant to cross-examine PW2 and PW3 amounts to violation of the principles of natural justice or an error, defect or irregularity affecting the decision of the suit, within the meaning of Section 105 of the CPC.

42. It is found, (i) that the issues in the suit were framed on 3rd May, 1994; (ii) however the statement of the respondent no.1/plaintiff was recorded only on 29th January, 1997; (iii) statement of PW2 Shri P. Satish Sethi, General Manager of the branch of Vijaya Bank at 2/10, Daryaganj, Delhi was recorded on 21st July, 1998; Shri Sanjay Bhardwaj proxy counsel for the appellant/defendant present on behalf of the appellant/defendant on that date refused to cross-examine the said witness and sought adjournment; finding that the suit was being adjourned several times for recording the evidence of the said witness, adjournment was denied and right to cross-examine PW2 closed; (iv) thereafter,

several dates were consumed in the application of the respondents/plaintiffs for amendment of the plaint and completion of pleadings in the amended plaint; (v) the appellant/defendant did not file any application seeking opportunity to cross-examine PW2; (vi) the respondents/plaintiffs examined PW3 Shri D.K. Suri, Senior Manager, Allahabad Bank on 27th May, 1999; none appeared for the appellant/defendant from morning till 1320 hours to cross-examine the said witness and hence the opportunity to cross-examine the said witness was also closed and the suit put up on 28th July, 1999 for evidence of the appellant/defendant; (vii) the appellant/defendant did not make any application explaining absence on 27th May, 1999 or seeking opportunity to cross-examine PW3; (viii) the sole witness of the appellant/defendant was examined and cross-examined on 12th May, 2007 and 5th November, 2007; and, (ix) the appellant/defendant at no point of time, till the judgment in the suit, applied for an opportunity to cross-examine PW2 or PW3 or explained the reasons for non-cross-examination of the said witnesses when their examination-in-chief was recorded.

43. The suit, as aforesaid, remained pending from 1st October, 1993 till 28th February, 2013 i.e. for nearly twenty years.

44. I have also perused the First Appellate Court file requisitioned in this Court to see the errors pleaded, by the appellant/defendant in the memorandum of First Appeal, in the orders dated 21st July, 1998 and 27th May, 1999 by which the right of the appellant/defendant to cross-examine PW2 and PW3 respectively was closed. All that is

pleaded is, (i) that the counsel for the appellant/defendant could not appear in cross-examination “on account of some difficulty”; (ii) that the Suit Court did not consider that PW2 was a crucial witness; (iii) that the testimony of PW2 itself had been brought on record to the Court after several opportunities and equal number of opportunities should have been afforded to the appellant/defendant also to cross-examine PW2; (iv) that the Court, notwithstanding non-appearance of the counsel for the appellant/defendant on 27th May, 1999, after examining PW3, should have adjourned the suit for cross-examination of PW3.

45. It would thus be seen that there was no explanation whatsoever lest sufficient cause in the memorandum of First Appeal, for failure of the appellant/defendant to cross-examine PW2 and PW3. On the contrary, the counsel for the appellant/defendant appears to be under an obviously wrong impression that it is not the duty of the counsel to at least appear on the dates fixed for hearing and that the Court, notwithstanding the counsel’s non-appearance, is required to await the counsel and/or issue “invitation” to the counsel to come to the Court and perform his duty. There is not a whisper in the memorandum of First Appeal as to why the appellant/defendant did not immediately apply to the Suit Court as indeed in law it could have done, for an opportunity to cross-examine PW2 & PW3. It appears that the appellant/defendant did not have anything to cross-examine the said witnesses and was only interested in keeping the suit pending as indeed the appellant/defendant has succeeded in doing for nearly twenty years. If the suit had proceeded as is the want

of the appellant/defendant, it would have perhaps remained pending for double that amount of time.

46. Even before me, the counsel for the appellant/defendant has not given any such reason or explanation whatsoever.

47. Once that is so, the Second Appeal cannot be entertained for the reason of error aforesaid committed by the First Appellate Court. The outcome of the First Appeal would have still been the same. Similarly, it cannot be said in the aforesaid circumstances that the non-cross-examination by the appellant/defendant of PW2 and PW3 affected the outcome of the suit.

48. The only other argument of the counsel for the appellant/defendant is, (i) that the Suit Court has arbitrarily awarded damages/*mesne* profits at the same rate as claimed in the amended plaint; (ii) that *mesne* profits have been awarded relying on depositions of PW2 and PW3, without giving any reason as to why the deposition of only one of the said witnesses has not been accepted; and, (iii) that the rate at which *mesne* profits have been awarded would be much lower if determined on the basis of testimony of one of the witnesses only.

49. I may at the outset mention that though the appellant/defendant in the First Appeal also challenged the rate at which *mesne* profits have been awarded, but the First Appellate Court has qua the rate also concurred with the findings of the Suit Court. Thus, there are concurrent findings of the Courts below qua the rate of *mesne* profits and I have wondered whether any

substantial question of law can be said to arise with respect to the challenge in the Second Appeal qua the rate at which *mesne* profits/damages for use and occupation have been awarded.

50. Supreme Court, in ***Damodar Lal Vs. Sohan Devi*** (2016) 3 SCC 76, referring to ***Kulwant Kaur Vs. Gurdial Singh Mann*** (2001) 4 SCC 262, ***Krishnan Vs. Backiam*** 2007) 12 SCC 190, ***Gurvachan Kaur Vs. Salikram*** (2010) 15 SCC 530 and ***S.R. Tewari Vs. Union of India*** (2013) 6 SCC 602 held, (a) that the First Appellate Court under Section 96 CPC is the last Court of facts; (b) the High Court in Second Appeal under Section 100 CPC cannot interfere with findings of fact recorded by the First Appellate Court under Section 96 CPC; (c) the findings of fact of First Appellate Court can be challenged in Second Appeal on the ground that the said findings are based on no evidence or are perverse; (d) even if the finding of fact is wrong, that by itself will not constitute a question of law; the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjunctures and surmises; (e) if to a reasonable man, the conclusion on the facts in evidence made by the Courts below is possible, there is no perversity; (f) inadequacy of evidence or a different reading of evidence is not perversity; (g) Code of Civil Procedure (Amendment) Act, 1976 introduced a definite restriction on the exercise of jurisdiction in a Second Appeal; (h) where it is found that findings stand vitiated on wrong test and on the basis of assumptions and conjunctures and resultantly there is an element of perversity involved therein, the High Court will be within its jurisdiction to deal with the issue; this is however only in the event such a fact is brought to light

explicitly; (i) the findings of fact recorded by Court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material or if the finding is against the weight of evidence or if the finding so outrageously defies logic as to suffer from vice of irrationality; (j) however if there is some evidence on record which is acceptable and which could be relied upon, the conclusion would not be treated as perverse and the findings will not be interfered with.

51. Applying the aforesaid parameters, the arguments aforesaid of the counsel for the appellant/defendant qua the rate of *mesne* profits, do not raise any substantial question of law. The Suit Court in this regard has reasoned, (i) that PW2 deposed that Vijaya Bank had taken basement of property bearing no.2/10, Daryaganj, measuring 1874 sq. yds. in January, 1988 at a rent of Rs.12 per sq. ft. per month w.e.f. 1998 with an increase in rent after five years by 25% over the last paid rent; (ii) that PW3 Shri D.K. Suri, Senior Manager, Allahabad Bank also deposed of having taken premises in Daryaganj area on 30th March, 1990 at a rent of Rs.1,90,825/- per month. Accordingly, the Suit Court passed a decree for recovery of *mesne* profits from the appellant/defendant for the months of August and September, 1993 of Rs.1,43,660/-, w.e.f. 1st August, 1993 till 26th February, 1998 @ Rs.71830.20p per month and w.e.f. 1st March, 1998 @ Rs.1,61,617.95 per month.

52. The First Appellate Court has found the rate at which *mesne* profits have been awarded by the Suit Court to be in consonance with the evidence of PW2 and PW3.

53. In the aforesaid circumstances, the finding of fact qua the rate of *mesne* profits cannot be said to be perverse and the counsel for the appellant/defendant has also been unable to contend so. This Court, in ***M.R. Sahni Vs. Doris Randhawa*** 2008 (104) DRJ 246, exercising jurisdiction under Section 100 of the CPC, finding “some evidence” to sustain finding of *mesne* profits, held the same cannot be faulted with. Similarly, in ***Aisha Begum Vs. Mohd. Ibrahim*** 2010 SCC OnLine Del 2807 it was held that no question of law lest substantial question of law arose qua rate of *mesne* profits.

54. The counsel for the appellant/defendant has however handed over in the Court the judgment titled ***Union of India Vs. M/s. Banwari Lal & Sons (P) Ltd.*** 2004 (4) SCALE 443, though without referring to the same, where, in the course of fixation of damages under the Requisition and Acquisition of Immovable Property Act, 1952, reference was made to the valuation in the municipal record. The said judgment can have no application. The Requisition and Acquisition of Immovable Property Act, in Section 8 thereof lays down the parameter for assessment of damages. On the contrary, Section 2(12) of the CPC defines *mesne* profits as profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits. The benefit which the appellant/defendant

derived from continuing in unauthorised possession of the premises inspite of determination of tenancy with respect thereto, for merely 24 years, is the rent which the appellant/defendant would have paid for similar accommodation if had immediately on determination of tenancy vacated the premises. There could be no better measure of such *mesne* profits than the prevalent rent of the premises in the vicinity and on which evidence, *mesne* profits in the present case have been determined.

55. Even otherwise, considering the prime location of the property and the size thereof, the *mesne* profits determined are found to be on the lower side only. The premises, earlier in the tenancy of the appellant/defendant, as per the site plan Ex. P23 comprises of a total covered area of 2394.34 sq. ft. and the *mesne* profits awarded of Rs. 1,43,660/- w.e.f. 1st August, 1993 till 26th February, 1998 @ Rs.71830.20p per month and w.e.f. 1st March, 1998 @ Rs.1,61,617.95 per month cannot be said to be outrageously absurd.

56. The counsel for the respondents/plaintiffs states that the respondents/plaintiffs have filed cross-objections qua the date from which interest is payable. It is contended that there is no clarity in the judgment of the Suit Court affirmed by the First Appellate Court in this regard.

57. The Suit Court has awarded interest @ Rs.6% per annum, without specifying the date from which the interest is to run and till when.

58. The cross-objections are not found on record and are reported to be lying in the Registry in objections.

59. The counsel for the appellant/defendant however has no objection to the same being clarified. He also states that it be also clarified that the amounts paid by the appellant/defendant from time to time are to be adjusted out of the *mesne* profits decreed.

60. The counsel for the respondents/plaintiffs has no objection.

61. Accordingly, while dismissing this Second Appeal as not raising any substantial question of law, it is clarified (i) that interest on *mesne* profits @ 6% per annum is to be computed on the *mesne* profits due for each month, from the end of that month and till the date of payment/realisation; and, (ii) that from the *mesne* profits decreed for each month, the amount if any paid by the appellant/defendant to the respondents/plaintiffs for that month is to be deducted.

62. The counsel for the appellant/defendant having argued this appeal expeditiously and in a fair manner, no costs.

63. Trial Court record be sent back.

RAJIV SAHAI ENDLAW, J.

AUGUST 10, 2018

Mp/pp