



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7607 OF 2021

1. Mr.Nikhilesh Kesharichand Jhaveri
Age : 60 years, Occupation Consultant
 2. Ms. Meera Keshrichand Jhaveri
Age : 54 years, Occupation Housewife
 3. Ms.Jayashree Jhaveri Lederman
Age : 62 years, Occupation Housewife
All the above Hindu Inhabitants having
their residence at 39, Chowpatty Seaface,
Ratnagar Palace, Mumbai 400 007
- ... Petitioners.

Versus

1. M/s.New Era Fabrics Ltd.
A Company incorporated under the
Indian Companies Act, 1956, having
Its registered office at Mogul Lane,
Tulsi Pipe Road, Matunga (West),
Mumbai 400 016.
2. Home Care Retail Marts (P) Ltd.
A Company incorporated under the Indian
Companies Act, 1956, having Its registered
Office at Unit-1, Wasan Udyog Bhavan,
Tulsi Pipe Road, Opp. Phoneix Mills,
Lower Parel, Mumbai 400 013
3. Television 18 India Limited,
A Company incorporated under the Indian
Companies Act, 1956, having Its
office at Empire House 1st Floor, Senapati
Bapat Marg, Lower Parel, Mumbai 400 013

4. Johnson Dye Works (P) Ltd.,
A Company incorporated under the Indian Companies Act, 1956, having Its office at Mogul Lane, Tulsi Pipe Road, Matunga (West), Mumbai 400 016
5. Hanil Era Textiles Limited
a Company incorporated under the Indian Companies Act, 1956, having Its office at Mogul Lane, Tulsi Pipe Road, Matunga (West), Mumbai 400 016
6. Royal Energy Limited,
A Company incorporated under the Indian Companies Act, 1956, having Its office at Mogul Lane, Tulsi Pipe Road, Matunga (West), Mumbai 400 016.
7. Gnani Investment & Trading Co. Pvt.Ltd.,
A Company incorporated under the Indian Companies Act, 1956, having its registered office at A/07 Banoo Mansion August Kranti Marg, Cumballa Hill, Mumbai 400 036.
- ~~Smt. Bhanumati Keshrichand Jhaveri~~ .. (now deceased)
age : 89 years, Occupation Housewife
8. Ms. Daksha Keshrichand Jhaveri
Age : 74 years, Occupation Housewife
- ~~Ms. Devika Keshrichand Jhaveri~~ .. (now deceased)
age : 74 years, Occupation Housewife
9. Smt. Vimal Dilip Jhaveri .. (now deceased)
Age : 76 years, Occupation Housewife
10. Mr. Sunil Dilip Jhaveri
Age : 51 years, Occupation Business

11.Mr. Manoj Dilip Jhaveri

Age : 42 years, Occupation Business

12.Mrs.Neeta Mahesh Tomar

Age : 57 years, Occupation Housewife

Respondent Nos.8 to 12 now residing at

Flat No.1903, Videocon Tower, "B" Behind

Sai Dham, Kandivali (East), Mumbai 400 101

~~Smt. Manorama Chandrakant Jhaveri..~~ ..(now deceased)

Age : 73 years, Occupation Housewife

13.Mr. Deepak Chandrakant Jhaveri

Age : 50 years, Occupation Business

All the above Hindu Indian inhabitants

having their residence at 39 Chowpatty

Seaface, Ratnagar Palace Mumbai 400 007

Now residing at Flat No.F-1704,

Ashok Garden, Jivraj Tokersi Road,

Sewree, Mumbai 400 015.

14.M/s.Goodwill Realtors and Properties

Private Ltd. A company incorporated

under the Indian Companies Act, 1956,

having its registered office at 101,

Arun Chambers Tardeo, Mumbai 400 034

Previous address at 37, Floor-2, Flat No.214

Lallubhai Mansion, Shankar Palav Marg,

Dadar (East), Mumbai 400 014.

... Respondents.

Mr. Vishal Narichania a/w Ms. Sushma Singh and Sayali Sawant, for the Petitioner.

Mr. Pradeep Thorat a/w Ms.Neha Bhosale, Ms.Laveena Tejawani, Mr.Gaurang Mehta and Ms.Neelam Dedhia i/by NDB Law, for the Respondent No.1.

Mr. Sean Wassoodew, for Respondent No.4

Ms. Namita Shirke i/by Mr. Jaydeep Thakkar, for Respondent No.7.

CORAM : SHARMILA U. DESHMUKH, J.
RESERVED ON : DECEMBER 13, 2023.
PRONOUNCED ON : DECEMBER 21, 2023.

JUDGMENT:

1. Rule. With consent of parties, Rule made returnable forthwith and taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, exception is taken to the order dated 24th September, 2021 passed by the Appellate Court in Revision Application No.97 of 2021 reversing the order of the trial Court dated 11th August, 2021 rejecting the Petitioner's application below Exh.606 filed to expunge/discard and rejected the Affidavit of examination-in-chief of PW-2.

3. For the sake of convenience, the parties are referred to by their status before the Trial Court. T.E.&R. Suit No.48/62 of 2009 was filed against the defendant seeking the following prayers:

“a) the Defendants be ordered and decreed to hand over to the Plaintiffs vacant and peaceful possession of the suit property viz. land bearing C.S.No.560 and 561, Final Plot No.268 TPS II of Mahim Division situate at Mogul Lane, (earlier known as Lady Harding Road), Tulsi Pipe Road, known as Senapati Bapat Road, situated at Mahim (W). Mumbai-400 016, along with structures standing thereon;

- (b) *pending the hearing and final disposal of the above suit, this Hon'ble Court be pleased to pass an order of injunction restraining the Defendant No.1 from further parting with possession of the suit property in any manner dealing with or transferring any right or interest in the suit property of any third party under any arrangement whatsoever;*
- (c) *defendant No.1 restrained from collecting any amount whatsoever from any of the other Defendant in respect of any portion of the suit property and Defendant No.2 to 7 be restrained from paying any amount under any arrangement whatsoever to Defendant No. 1;*
- (d) *pending the hearing and final disposal of the above suit, Defendant Nos.2 to 6 be directed to deposit all the amounts in this Hon'ble Court;*
- (e) *pending the hearing and final disposal of the above suit, that this Hon'ble Court be pleased to order and direct Defendant No.1 to submit details of payments being recovered including copies of agreements entered into with Defendant No.2 to 6 and pay over to the Plaintiff whatever money/compensation that they receive from any third party under any arrangement whatsoever, on account of mesne profits;*
- (f) *pending the hearing. and final disposal of the above suit, that this Hon'ble Court be pleased' to appoint a fit and proper person as Court Receiver in respect of the suit property under Order XL Rule 1 of the Code of Civil Procedure, 1908;*
- (g) *ad-interim and interim reliefs in terms of prayer clauses (b) to (f) above;*
- (h) *an inquiry into mesne profit be ordered under Order XX Rule 12 al the Code of Civil Procedure 1908;”*

4. Issues came to be framed on 1st April, 2016 and the Issue No.3 relevant for the purpose of the present petition reads as under:

“3. Are the plaintiffs entitled for recovery of possession and mesne profits? ”

5. On 16th November, 2019, in view of the amended plaint and the amended written statement, additional issues were framed and Issue No.8 came to be framed which reads thus:

“8. Are the plaintiffs entitled to get mesne profit as prayed ? If yes, how much ? ”

6. An application came to be filed by the defendant no.1 for recasting Issue No.8 as regards the *mesne profits* which came to be rejected vide order dated 6th March, 2020, as against which Revision Application filed stood dismissed.

7. Subsequently, the plaintiff adduced evidence of PW-2, who is an Architect and Structural Engineer and Government Approved Registered Valuer to prove the quantum of *mesne profits* to be paid by the Respondent No.1, in which the PW-2 deposed that the *mesne profits*/market rent prepared by him in respect of the suit premises is for the period from March 2009 to February, 2020 i.e. from the date of the suit notice dated 11th February 2009 to 29th February, 2020.

8. An application below Exh.606 came to be filed by the

defendant no.1 seeking to expunge and/or discard and/or to pass an order of rejecting the evidence of PW-2. Vide order dated 11th August, 2021, the trial Court rejected the application, as against which revision was preferred and by the impugned order dated 24th September, 2021, the order of the trial Court was set aside and the evidence of PW-2 was expunged and discarded from the record on the ground of relevancy.

9. Heard Mr.Vishal Narichania, learned counsel for the Petitioner and Mr.Pradeep Thorat, learned counsel for the Respondent No.1, Mr.Sean Wassoodew, learned counsel for the Respondent No.4 and Ms.Namita Shirke, learned counsel for the Respondent No.7.

10. Mr. Narichania, learned counsel for the plaintiff submits that the plaintiff has sought the relief of past and future *mesne profits*. Pointing out the prayer clauses of the plaint and in particular prayer clauses (c) and (e) he would submit that the relief claimed therein as regards the amounts received by the defendant from the third party was on account of *mesne profits*. He would submit that by rejection of the application for recasting additional Issue No.8, the plaintiff was entitled to lead evidence in support of Issue No.8 which casts

burden upon the Plaintiff as regards *mesne profits*. He points out the findings of the trial Court based on Order XX Rule 12 of the Code of Civil Procedure Code, 1908 (for short, “CPC”), which holds that the decree for *mesne profits* till the institution of the suit may be passed with the decree for possession of immovable property. According to him, the finding of the Appellate Court that only upon the final decree the evidence of *mesne profit* will necessarily follow is contrary to the settled position in law. Although he has tendered the following decisions, he relies upon the decisions at Sr. Nos.1 to 3, 5, 6, 8 to 10:

- [1] *Gopalakrishna Pillai and Others vs. Meenakshi Ayal and Others*, (AIR 1967 SC 155);
- [2] *Faredoon Maneckji Dalal vs. Phiroze Bomanji Javeri*, (1994 SCC OnLine Bom 150);
- [3] *Salgaonkar Engineers Private Ltd. vs. George Menezes Souza* in *First Civil Appeal No.109 of 1990*, dated 22nd April, 1998 of this Court.
- [4] *Hindustan Petroleum Corporation Ltd. vs. Mohanjit Singh (deceased) through Legal Heirs*, (2019 SCC OnLine Del 9419);
- [5] *Sewa International Fashions & Ors. Vs. Meenakshi Anand*, [ILR (2012) II Delhi 607];
- [6] *Consep India Pvt. Ltd. Vs. Cepco Industries Pvt. Ltd.* [2010 (116) DRJ 539];

- [7] *PR.Chikka Subba Rao and Others vs. Nama Ramaswami Setty and others, (1952 SCC OnLine Kar 86);*
- [8] *Vella Veeran Chetti vs. V.Veeran Chetti and Another (I.L.R. (1938) Madras Series);*
- [9] *A.P Bagchi vs. Mrs. F. Morgan, (1936 SCC OnLine All 269);*
- [10] *Ganeshi Lal Sharma vs. Sneha Laata Dasi (ILR (1945) Calcutta Series 599);*
- [11] *Dalhousie Properties Ltd. Vs. Surajmull Nagarmull, [(1977) 1 SCC 367];*
- [12] *Raptakos Brett and Co.Ltd. v. Ganesh Property [(2017) 10 SCC 643)];*
- [13] *Kanaklata Das and Ors. Vs. Naba Kumar Das and Ors. [(2018) 2 SCC 352];*
- [14] *Jainuddin Abdul Rehman Shaikh vs. Sitaram Damodar Varvadkar and Ors. [1980 SCC OnLine Bom 129];*

11. *Per contra*, Mr. Thorat, learned counsel appearing for the defendant no.1 submits that the decisions relied upon by the plaintiff are not applicable in view of the Bombay Amendment. He submits that the decisions interpret the provisions of Order XX Rule 12 of the Central Act and by the Bombay Amendment in its application

to the State of Maharashtra, the provisions of Order XX Rule 12 have been substituted as sub-clause (ba) of clause (1) introduced by the 1977 amendment does not find place in the Bombay Amendment. Pointing out to the relevant dates, he would submit that the termination notice was dated 11th February, 2009 and was to take effect after 30 days of the receipt of notice by the defendant no.1. He submits that the notice was received on 14th February, 2009 and the period of 30 days expired on 16th March, 2009. Pointing out to the date of filing of the suit which is 17th March, 2009, he submits that the possession itself could not be said to be unlawful prior to 16th March, 2009 and as such, there is no question of past *mesne profits* being claimed. He would submit that for the purpose of claiming past *mesne profits*, the amount of *mesne profits* have to be crystallized, there has to be necessary pleadings as regards the period for which the past *mesne profits* has been claimed as well as a specific prayer in this regard which is missing in the present case.

12. He would further submit that a specific relief has been claimed seeking enquiry into *mesne profits* by virtue of prayer clause (h). Pointing out to the valuation clause of the plaint, he submits that the undertaking was given to pay additional court fees on the *mesne*

profits being determined by this Court and in event of the past *mesne profits* being claimed the amount is crystallized and as such, the court fees have to be paid as on the date of institution of the suit. He would submit that taking over all consideration of the pleadings in the plaint the claim was not for the past *mesne profits* but for future *mesne profits* which requires an enquiry and as such, the evidence of PW-2 is irrelevant.

13. He has further pointed out the evidence affidavit of PW-1 and would submit that the PW-1 has deposed that an enquiry be conducted into the *mesne profits*. He has drawn attention of this Court to the observations of the trial Court while rejecting the application for recasting the issues that the absence of the word “enquiry” into *mesne profits* while framing the relevant issue does not itself render any direction to either party to lead evidence in the suit itself and in event such enquiry is to be made the same has to be directed while passing of the decree as per Order XX Rule 12 of CPC only, as it is the procedural aspect. He submits that it is in view of this finding of the trial Court the revision application came to be dismissed. He submits that the cross-examination of the three witnesses of the defendant has already been completed.

14. In rejoinder, Mr.Narichania, learned counsel for the Petitioner submits that even if it is taken that the other decisions are not applicable the judgment of the Calcutta High Court considers provisions *pari materia* with the provisions of the Bombay Amendment. He would further submit that the *mesne profits* have been quantified in paragraph 9 of the plaint and prayer clause “e” of the plaint seeks relief in respect of past as well as future *mesne profits* being the compensation which the defendant no.1 was receiving from the third party.

15. Considered the submissions and perused the record.

16. The provisions of Order II Rule 4 of CPC permits the joinder of cause of action for recovery of immovable property and claim for *mesne profits* or arrears of rent in respect of the property claimed or any part thereof. Order XX of CPC contains provisions governing “Judgment and Decree” and the provisions of Rule 12 of Order XX pertains to decree for possession and *mesne profits*.

17. The provisions of Order XX Rule 12 indicates two distinct periods for seeking rent or *mesne profits* i.e. period prior to the institution of the suit and period post institution of the suit, until the delivery of possession by the decree-holder or relinquishment of possession by the judgment-debtor. In exercise of its rule making

power under Section 122 of CPC in its application to the State of Maharashtra, the High Court has substituted Rule 12 of Order XX under the Central Act with the Rule framed by the High Court. The Central Act was amended by the Amendment Act 104 of 1976. Mr.Thorat, learned counsel for the Defendant has sought to distinguish the judgments cited by Mr.Narichanai on the ground that the position of Order XX Rule 12 *vis-a-vis* the Central Act and Bombay amendment differs pre and post the 1976 amendment and the decisions are therefore inapplicable.

18. Before advertng further it will be profitable to juxtaposition Order XX Rule 12 of CPC and the Bombay Amendment substituting Rule 12 *pre* and *post* amendment of 1976.

PRIOR TO 1976 AMENDMENT	
Order XX Rule 12	(1) <i>Where the suit is for recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree-</i> (a) <i>for possession of the property</i> (b) <i>for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits:</i> (c) <i>directing an inquiry as to rent or mesne profits from the institution of suit until-</i> (i) <i>the delivery of possession to the decree holder</i> (ii) <i>the relinquishment of possession by the</i>

	<i>judgment debtor with notice to the decree holder through the Court or</i> <i>(iii) the expiration of three years from the date of the decree, whichever event first occurs.</i> <i>2) Where an inquiry is directed under clause (b) or (c), a final decree shall be passed in accordance with the result of such inquiry.</i>
BOMBAY AMENDMENT	
Order XX Rule 12	<i>(1) Where a suit is for recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree-</i> <i>(a) for possession of the property</i> <i>(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits:</i> <i>(c) directing an inquiry as to rent or mesne profits from the institution of suit until-</i> <i>(i) the delivery of possession to the decree holder</i> <i>(ii) the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court</i> <i>2) Where an inquiry is directed under clause (b) or (c) of sub rule (1) above, a final decree shall be passed in accordance with the result of such inquiry.</i>
POST – 1976 AMENDMENT ACT 104 OF 1976:	
Order XX Rule 12	<i>12(1) Where the suit is for recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree-</i> <i>(a) for possession of the property</i> <i>(b) for the rent which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent :</i>

	(ba) for the mesne profits or directing an inquiry as to such mesne profits (c) directing an inquiry as to rent or mesne profits from the institution of suit until- (i) the delivery of possession to the decree holder (ii) the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court or (iii) the expiration of three years from the date of the decree, whichever event first occurs. 2) Where an inquiry is directed under clause (b) or (c), a final decree shall be passed in accordance with the result of such inquiry.
BOMBAY AMENDMENT POST 1976:	
Order XX Rule 12	(1) Where a suit is for recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree- (a) for possession of the property (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits: (c) directing an inquiry as to rent or mesne profits from the institution of suit until- (i) the delivery of possession to the decree holder (ii) the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court 2) Where an inquiry is directed under clause (b) or (c) of sub rule (1) above, a final decree shall be passed in accordance with the result of such inquiry.

19. The provisions of Order XX Rule 12 of the Central Act when juxtaposed with the Bombay amendment, indicates that till the

amendment of 1976 which took effect from 1st February, 1977, except sub-clause (c) (iii) of Clause (1) of Rule 12 which was absent from the Bombay amendment, the provisions are *pari materia*. Post the amendment in the year 1977, sub clause (ba) of clause (1) was introduced by Amendment Act 104 of 1976 in Rule 12 of Order XX which does not find place in the Bombay amendment.

20. Having summarised the statutory provisions pre and post the amendment vide Amendment Act 104 of 1976, the plaint will have to be scrutinised to ascertain the relief sought by the Plaintiff. The plaintiff has come with a case that by notice dated 11th February, 2009, tenancy has been terminated, which notice was received by the Defendant no.1 on 14th February, 2009. In paragraph 9 of the plaint, it is pleaded that the defendant no.1 is liable to pay the plaintiff's *mesne profits @* market rate of Rs 100/ per square foot per month amounting to Rs.1,16,10,000/ per month from the date of termination of his tenancy in respect of the suit property till defendant no.1 hands over the possession of the suit property to the plaintiff. In paragraph No.10 of the plaint, the plaintiff has pleaded that the defendant No.1 is liable to handover to the plaintiff the amount which they may recover from any third party whom the defendant no.1 has permitted to occupy the portion of the suit

property on account of *mesne profits* to be finally adjusted against the claim of *mesne profits* made by the Plaintiff. Paragraph 14 of the plaint, values the claim at the annual rack rent of Rs.6,500/- p.m. and undertaking is given to pay additional court fees on the *mesne profits* being determined. Prayer clause (h) prays for an enquiry into *mesne profits* under Order XX Rule 12 of the CPC and prayer clause (e) which is an interim relief seeks direction to the defendant no.1 to pay over money that they received from third party on account of *mesne profits*.

21. Perusal of the averments in the plaint would indicate that the *mesne profits* quantified at Rs.1,16,10,000/- per month @ Rs.100/ per square foot is sought from the date of termination of the tenancy till the handing over of the possession i.e. past and future *mesne profits*. However in the prayer clause (h) the relief sought is inquiry into *mesne profits* under Order XX Rule 12 of CPC. The submission of learned counsel for Plaintiff that prayer clause (e) of the plaint seeks past *mesne profits* is misconceived as firstly the prayer is for interim relief and secondly the amount has not been crystallised. Mr. Thorat, is therefore right in his contention when he points out the notice of termination which calls upon the defendant

no.1 to handover the possession after a period of 30 days from the receipt of the notice which expired on 16th March 2009 and the suit was filed on 17th March, 2009. The dates mentioned by Mr. Thorat is not disputed by Mr. Narichania.

22. What can be inferred is that the possession became unlawful on 16th March, 2009 and as such, the suit having been filed immediately on 17th March, 2009, there is no question of past mesne profits. Prayer clause (h) sought an inquiry into future *mesne profits*. The submission of Mr. Thorat is also supported by the decision in the case ***Gopalakrishna Pillai and Others***, (supra) which has been relied by the learned counsel for the Plaintiff, where the Apex Court, in an appeal from the decision of Madras High Court, in the context of a decree declaring that the plaintiffs therein were entitled to past *mesne profits* and inquiry into the future *mesne profits* under Order XX Rule 12 was considering the issue whether in the absence of the specific prayer, Court has a jurisdiction to pass a decree for such *mesne profits*.

23. The Apex Court held that with regard to past *mesne profits* the plaintiff has an existing cause of action on the date of institution of suit and the plaintiff must plead this cause of action, specifically

claim a decree for past *mesne profits*, value the claim approximately and pay court fees thereon. The Apex Court in that case held that the Court has discretionary power to pass a decree directing an enquiry in future *mesne profits* and the Court may grant this general relief though it is not specifically asked for in the plaint.

24. Considering the decision of the Apex Court if the plaint is perused, although there are pleadings as regards the claim from the date of termination of the tenancy and a specific amount has been claimed per month considering that the suit has been filed on the very next day of the expiry of the date by which the defendant no.1 was directed to hand over the vacant possession, the claim could not be said to be a claim for past *mesne profits* and the undisputed position is that the prayer clause does not seek any relief that the said amount be ordered to be paid to the Plaintiff. Neither the claim for past *mesne profits* have been valued nor Court fees have been paid thereon. It can therefore be inferred that the claim of the Plaintiff in the plaint was for an enquiry under Order XX Rule 12 of CPC for future *mesne profits*.

25. The question therefore arises whether the Trial Court has the discretion to pass a decree for future *mesne profits* alongwith the

decree for possession or the Trial Court has to pass a preliminary decree and direct an inquiry into the *mesne profits* post institution of the suit under Order XX Rule 12. As indicated above, it is only after the amendment of the year 1977 that clause (ba) was introduced which does not find place in the Bombay amendment which applies in the instant case.

26. Mr. Narichania by relying on various decisions noted above would contend that the position has been settled that the Trial Court has the discretion to pass the decree for future *mesne profits* alongwith the decree for possession, which has been sought to be distinguished by Mr. Thorat.

27. Coming to the decisions relied upon by Mr. Narichania, as regards the decision in the case of *Faredoon Maneckji Dalal* (supra), in facts of that case there was specific prayer for past mesne profits and future *mesne profits* quantifying both past and future *mesne profits* which came to be decreed. The learned Single Judge of this Court was considering the dispute raised by the Plaintiff as regards the payment of the additional fees on the aggregate amount of *mesne profits* till the date of judgment. The Court held that under the old Code of Civil Procedure, the Court could determine the amount of

mesne profits pendente lite upto the institution of the suit and pass a decree for it alongwith a decree for possession and the Court could not under the old Act determine the future *mesne profits* in the suit and pass a decree, whereas under the present Code, the Court can determine past and future *mesne profits* in the suit itself and make a decree called final decree for *mesne profits* capable for execution.

28. The learned Single Judge relied upon the decision of Madras High Court in the case of ***Vella Veeran Chetti*** (supra). The Madras High Court held that there is nothing to preclude the Court from passing the decree without directing an inquiry if the parties agree or do not object..... In cases where an inquiry is unnecessary, it seems to us that it would be an idle formality to pass such a decree. (*Emphasis supplied*).

29. Pertinently, the Madras High Court relied upon the decision in ***A.P. Bagchi vs Mrs. F. Morgan*** (supra), where the Allahabad High Court held that when the plaintiff made it clear that she confined her relief to the recovery of fixed rents which had been agreed upon by the parties, the amount was definitely ascertained and there was no occasion for framing a preliminary decree so that there may be another ascertainment of the amount due to the plaintiff. The

principle of law laid down by the Madras High Court is that the Courts are not precluded from passing the decree for future *mesne profits* if the parties agree or do not dispute in which case an inquiry becomes unnecessary as in case where the relief is confined to the fixed rent in which case an inquiry into the amount claimed becomes unnecessary.

30. The decision in ***Faredoon Maneckji Dalal*** (supra) was not considering the issue as to the power of Trial Court to pass a decree for future *mesne profits* alongwith decree for possession. In that case there was no challenge as in the present case that clause (ba) of Order XX Rule 12 is conspicuous by its absence in Bombay amendment and as such the decree for future *mesne profits* could not be passed.

31. In the case of ***Salgaonkar Engineers Private Ltd.*** (supra), the relief sought was for past and future *mesne profits* @ Rs.2,500/- whereas the lease rent was Rs.2,000/- p.m. The suit was decreed granting Rs.2,000/- as rent/*mesne profits* compensation from October, 1992 i.e. post institution of the suit till handing over possession. Learned Single Judge of this Court held that the use of the word “may” confers discretion on the Court either to direct or not

to direct an enquiry into future *mesne profits* and in case there is already sufficient material on record, it may not be necessary to direct enquiry.

32. The decisions of the Delhi High Court in case of *Hindustan Petroleum Corporation Ltd. vs. Mohanjit Singh* (supra), *Sewa International Fashions vs. Meenakshi Anand* (supra) and *Consep India Pvt Ltd vs. Cepco Industries Ltd.* (supra) considered Rule 12(1) (ba) of Order XX of the Central Act which does not find place in the Bombay amendment.

33. As regards the decision of the Calcutta High Court in the case of *Ganeshi Lal Sharma vs Sneha Lata Dasi* (supra) Mr.Narichania would submit that the decision of the Calcutta High Court was a pre-1977 decision which is *pari materia* with the Bombay Amendment, which was disputed by the learned counsel appearing for the defendant no.1, who placed on record pre-1977 Bombay Amendment to Rule 12 of Order XX, which reads thus:

“R. 12. Decree for possession and mesne profits.– (1)
Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the

Court may pass a decree

- (a) for the possession of the property;*
 - (b) for the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit, or directing an enquiry as to such rent or mesne profits;*
 - (c) directing an enquiry as to rent or mesne profits from the institution of the suit until –*
 - (i) the delivery of possession to the decree-holder, or*
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court.*
- (2) Where an inquiry is directed under clause (b) or clause (c) of sub-rule (1) above, a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such enquiry.” (1-11-1966)*

34. The provisions quoted above will indicate that the Calcutta High Court was considering the provisions of Order XX Rule 12(1) of CPC, which is reproduced in the decision and reads thus:

“Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree –

- (a) for the possession of the property;*
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits;*
- (c) directing an enquiry as to rent or mesne profits from the institution of the suit until –*
 - (i) the delivery of possession to the decree-holder,*
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or*
 - (iii) the expiration of three years from the date of the decree,*

whichever event first occurs.”

35. As held by the Calcutta High Court in ***Ganeshi Lal Sharma*** (supra), usually the Courts would pass preliminary decree for future *mesne profits*, however, the Courts have the discretion to pass decree for future *mesne profits* if in circumstances of the case the enquiry is unnecessary or waived by the parties. The Allahabad High Court in ***A.P. Bagchi vs. Mrs. F. Morgan*** (supra) held that the preliminary decree becomes necessary only where the exact amount has to be ascertained after an examination of fresh evidence and if the plaintiff claims *mesne profits* on the basis of rent, which is fixed and agreed upon between the parties or if the Court decided that the *mesne profits* ought to be allowed on that basis, the amount being definitely ascertained, there would be no occasion for passing a preliminary decree so that there may be another ascertainment of the amount due to the plaintiff. Although not binding on this Court, the decision of Calcutta and Allahabad High Court have persuasive value.

36. In the present case, in the plaint it is pleaded that the defendant no.1 is liable to mesne profit at the market rate of Rs.100/- per sq.feet. amounting to Rs.1,16,10,000/- p.m. from the date of termination of his tenancy till handing over the possession. As

such, the *mesne profits* is not an ascertained amount which was fixed and agreed between the parties. In this eventuality, it cannot be said that an enquiry into the *mesne profits* is unnecessary. The evidence of PW-2 would indicate that the valuation has been done by taking into account the comparable instances as well as the ready recknor value. As such, the exact amount will have to be determined after examination of the valuer. Mr. Thorat is right in pointing out the order of the trial Court dated 6th March, 2020 rejecting the Application for recasting of issue No.8 that the trial Court itself has held that the question of directing an inquiry would arise in event of decree of possession of immovable property is passed and if it is proved that such parties are entitled to *mesne profits* and that the same is to be directable by passing of the decree. It cannot thus be said that by virtue of issue No.8 the plaintiffs are entitled to lead evidence as to the future mesne profits in the suit itself.

37. The trial Court while rejecting the application of defendant no.1 to reject the evidence of PW-2 has held that in view of the issue No.8 being framed, the affidavit of PW-2 cannot be said to be irrelevant. While doing so, the trial Court had taken into consideration Clause (ba) of the Order XX Rule 12, whereas it was

the Bombay Amendment which was applicable in the instant case. Further the trial Court failed to notice its earlier finding while rejecting the Application for recasting of the issue. The trial Court held that the decree for *mesne profits* till the institution of the suit may be passed with the decree for possession of immovable property.

38. It appears that the trial Court considered the evidence of PW-2 as regards past *mesne profits*. The trial Court failed to notice that the relief sought in the plaint was in respect of future mesne profits, as the suit was filed on the next date of determination of tenancy and that the valuation report was also for the period from March, 2009 to February, 2020, whereas the plaint filed in the month of March 2009. The finding of the trial Court was clearly unsustainable.

39. The Appellate Court held that *mesne profits* has to be drawn after direction of the trial Court through a preliminary or final decree and if the issue of termination goes negative, there is no use of the evidence of mesne profits. Upon perusal of the Bombay Amendment of Rule 12 of Order XX, the Appellate Court held that only upon the final decree, the evidence of mesne profits will follow and no other fact situation. The Appellate Court considered the prayer clause (h) which sought an enquiry into the *mesne profits*.

40. In my view, reading of the Bombay Amendment would indicate that the use of the word, “*may*” vests discretion in the Court to direct an enquiry into future *mesne profits*. I am respectfully bound by the decision of Goa Bench of this Court in ***Salgaonkar Engineers Private Ltd.*** (supra), which holds that in case there is already sufficient material on record it will not be necessary to direct an enquiry into the future *mesne profits*. In my opinion, where the claim for future *mesne profits* is an agreed ascertained sum of money directing an enquiry into the future *mesne profits*, would be an exercise in futility. There is no rationale for reading the Bombay amendment as placing an embargo on the power of the Court in all cases to direct an enquiry into future *mesne profits*. In cases where the enquiry is unnecessary, the Court has the power to pass a decree for future *mesne profits* alongwith a decree for eviction. It is also well-known that even after the preliminary decree for enquiry into the *mesne profits* is passed, the determination of the future *mesne profits* takes a substantial time.

41. In the instant case, considering the pleadings in the plaint, an enquiry into future *mesne profits* is necessary.

42. In light of the above, the order of Appellate Court expunging the affidavit of evidence of PW-2 cannot be faulted. Petition fails and is dismissed.

(Sharmila U. Deshmukh, J.)