

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM. SUMMARY SUIT NO. 33 OF 2009**

- 1 M/s. Mangla International Pvt. Ltd. Company duly incorporated and registered under the Companies Act, 1956, having its registered office at 161, Mittal Tower, 'C' Wing, Nariman Point, Mumbai 400 021
- 2 M/s. Shubh Mangal Finvest Pvt. Ltd. having its office at 161, Mittal Tower, 'C' Wing, Nariman Point, Mumbai – 400 021
- 3 M/s. Marve Beach Realtors Pvt. Ltd. having its office at 161, Mittal Tower, 'C' Wing, Nariman Point, Mumbai – 400 021
- 4 M/s. Garden View Realtors Pvt. Ltd. having its office at 161, Mittal Tower, 'C' Wing, Nariman Point, Mumbai – 400 021
- 5 M/s. Dahlia Estate Developers Pvt. Ltd. having its office at 161, Mittal Tower, 'C' Wing, Nariman Point, Mumbai – 400 021

...Plaintiffs

Versus

Next Media Works Ltd.
Peninsula, Dr. S. S. Rao Marg, Parel, Mumbai 400
012

...Defendant

Mr. Chetan Kapadia, a/w Mr. Aseem Naphade, Ms. Vidisha Rohira and Mr. S. L. Shah, i/b Shah Legal, for the Plaintiffs.

Mr. Mayur Khandeparkar, a/w Shailesh Poria, Swapnil Gupte, Shubhangi Khandelwal, i/b Economic Laws Practice, for the Defendant.

CORAM : N. J. JAMADAR, J.

RESERVED ON : 17th NOVEMBER, 2022

PRONOUNCED ON : 4th MAY, 2023

JUDGMENT:-

1. This commercial division summary suit is instituted to recover a sum of Rs.4,78,73,030/- alongwith further interest at the rate of 24% p.a. from the date of the institution of the suit till realization.

2. The material averments in the plaint can be stated, in brief, as under :

2.1 Plaintiff Nos.1 to 4 are the Private Limited Companies incorporated under Companies Act, 1956. Defendant No.1 is also a company incorporated under the Companies Act, 1956. Defendant was formerly known as “Mid Day Limited”.

2.2 M/s. Saidpur Jute Co. Pvt. Ltd. (“M/s. Saidpur”) was the owner of the premises situated at 63, Sitaram Mills Compound, N. M. Joshi Marg, Delisle Road, Ground Floor, Mumbai (“the Suit Premises”). By an agreement of lease dated 2nd July, 1975 M/s. Saidpur gave the suit premises on lease to M/s. MBK Enterprises for the period of 60 years. M/s. MBK Enterprises, in turn, gave the suit premises on lease to the plaintiffs for the period of 9 and ½ years.

2.3 The plaintiffs in the capacity of sub-lessees entered into a Memorandum of Understanding dated 18th July, 1995 with the defendant to give the suit premises on licence with effect from 16th August, 1995. A Leave and Licence Agreement came to be executed between the plaintiffs and defendant on 19th December, 1995. Initial term of licence was three years with two options of renewal at the end of 3 and 6 years, with 20% enhancement in the licence fee at each renewal. It was agreed that licence period shall not be extended beyond the expiry of 9 years. The Leave and Licence Agreement provided for differential licence fee to be paid for the initial period and during renewals. The licensee was to pay an interest free deposit to Rs.64,67,895/-.

2.4 Any delay or default in payment of licence fee would entail payment of interest at the rate of 24% p.a. compounded at quarterly rests. The licensee agreed, upon termination or earlier determination of the licence, the licensee would vacate the premises and in the event of default the licensors would have right to remove the licensee and its agents and servants alongwith their articles and belongings from the suit premises. It was further agreed that for each day's stay in the suit premises after the expiry or termination of licence, the licensee would pay an amount of Rs.1,00,000/- per day to the licensor.

2.5 Pursuant to the term of the Licence Agreement, the defendant was put in possession of the suit premises on 16th August, 1995. The licence was renewed after the expiry of the initial term of three years. Second renewal was granted after the expiry of six years. In accordance with the terms of the agreement, the licence was to expire on 15th August, 2004.

2.6 In the meanwhile M/s. Saidpur, the head landlord, instituted a suit being RAE Suit No.147A/306/1996 in the Court of Small Causes against MBK Enterprises, the lessee, and the defendant for a decree of possession of the suit premises on the ground that the defendant had allegedly made additions and alterations of structural nature in the suit premises. The plaintiffs were subsequently impleaded as party defendants in the said suit.

2.7 As the Leave and Licence Agreement was about to expire on 15th August, 2004, the plaintiffs addressed a letter to the defendant on 6th August, 2004 calling upon the defendant to make arrangement to hand over vacant

possession of the suit premises. Vide reply dated 13th August, 2014 the defendant offered to hand over possession of the suit premises only upon return of the security deposit.

2.8 By letter dated 13th August, 2004 the plaintiffs informed the defendant that in view of the suit having been instituted by the head landlord against M/s. MBK Enterprises, the security deposit cannot be returned till the said suit was finally disposed with no adverse orders being passed against M/s. MBK Enterprises. The plaintiffs had, however, shown their willingness to deposit the amount of security deposit in escrow with a mutually accepted person upon mutually agreed terms. The defendant was put to notice that if the possession was not handed over by 15th August, 2004 the plaintiffs would be entitled to claim compensation at the rate of Rs.1,00,000/- per day in accordance with the terms of the agreement.

2.9 In response by an Advocate's letter dated 16th August, 2014 the defendant contended that the plaintiffs were obligated to refund the security deposit under Clause 17 of the Agreement and the return of the security deposit had nothing to do with the suit filed by the head landlord against M/s. MBK Enterprises and the defendant.

2.10 In the wake of the aforesaid dispute a lengthy correspondence was exchanged between the parties. Eventually as the defendants failed and neglected to make payment of the outstanding amount, each of the plaintiffs addressed a notice dated 23rd May, 2005 under Section 434(1)(a) of the

Companies Act, 1956. On account of default, despite service of notice, the plaintiffs filed company petition for winding up the defendant company being Company Petition No.539 of 2005.

2.11 The plaintiffs claim it was only after the filing of the company petition the defendant handed over possession of the suit property to the plaintiffs on 25th November, 2005. The plaintiffs found that the defendant had caused damage to the suit premises and failed to maintain the premises in a good condition.

2.12 In this fashion, according to the plaintiffs, the defendant despite being under an obligation to hand over the possession of the suit premises on 15th August, 2005 held on to the possession thereof till 25th November, 2005, and, thus, overstayed for 467 days. Therefore, in accordance with the terms of the Leave and Licence Agreement the defendant incurred the liability to pay a sum of Rs.1,00,000/- per day for 467 days, aggregating to Rs.4,67,00,000/-. Asserting that the defendant was also in arrears of licence fee to the tune of Rs.11,73,030/- for the period 1st July, 2004 to 15th August, 2004, the plaintiffs instituted the suit for recovery of the sum of Rs.4,78,73,030/- alongwith interest thereon at the rate of 24% p.a.

3. The defendant resisted the suit by filing written statement. The suit was stated to be barred by law of limitation. The plaintiffs were allegedly guilty of suppression of material facts and were not entitled to any relief.

4. On the core of the dispute as regards the refund of the security deposit and retention of the possession of the suit premises by the defendant beyond the term of licence, the defendant categorically contended that in accordance with the terms of Clause 17 of the Leave and Licence Agreement the plaintiffs were enjoined to refund the security deposit simultaneously with the defendant vacating the suit premises. Yet, the plaintiffs never refunded the security deposit. The defendant contended that the defendant had repeatedly offered to hand over the vacant and peaceful possession of the suit premises subject to return of the security deposit and the plaintiffs were in breach of the obligation to refund the security deposit.

5. According to the defendants, the plaintiffs had no right to withhold payment of the security deposit on any count much less on the ground of pendency of any litigation. The fact that the Leave and Licence Agreement was modified on 1st August, 1998, after the institution of the suit by M/s. Saidpur, and yet the condition that the plaintiffs had right to withheld the security deposit was not inserted therein, was pressed into service on behalf of the defendant.

6. The very premise of withholding security deposit by the plaintiffs was stated to be flawed. The plaintiffs, according to the defendant, never themselves contended that the defendant had carried out unauthorized work and committed breach of Leave and Licence Agreement. In contrast the plaintiffs endeavoured to withhold the security deposit on the specious ground

that the head landlord had instituted the suit against the lessee. The plaintiffs had no authority to withhold the security deposit on the ground of possible materialization of a future contingent liability, which might or might not have crystallized, contended the defendant.

7. On the aspect of delivery of the possession of the suit premises the defendant contended it was handed over to the plaintiffs on 3rd March, 2005. In fact, the defendant had offered to hand over possession of the suit premises in the month of August, 2004 itself but the plaintiffs failed and/or refused to take possession by unjustifiably contesting their liability to refund the security deposit.

8. At any rate, according to the defendants, the claim in the suit is in the nature of penalty. Since monthly licence fee at the expiry of the term of licence was Rs.10,34,863/- only, the plaintiffs cannot claim a sum of Rs.1,00,000/- per day without establishing the loss suffered by the plaintiffs and on this count also the suit was liable to be dismissed.

9. In the light of the aforesaid pleadings, the following issues were settled.

I have recorded my findings against each of them for the reasons to follow :

	<u>ISSUES</u>	<u>FINDINGS</u>
(i)	Whether this Court has jurisdiction to receive, try and dispose of this suit?	In the affirmative
(ii)	Whether the suit filed is within limitation?	In the affirmative
(iii)	Whether the plaintiff proves that the	In the negative

	defendant committed breach of the Leave and Licence Agreement dated 19.12.1995 and therefore, the plaintiff was justified in vacating the plaintiff's premises?	
(iv)	Whether the defendant proves that the defendant was justified in not handing over vacant possession back to the plaintiff until the plaintiff refunded the security deposit amount and the defendant was not bound and liable to pay any licence fees for the period it retained possession after the expiry/termination of the Leave & Licence Agreement?	Partly in the affirmative
(v)	Whether the plaintiff proves that it is entitled to charge penalty for the period that the defendant occupied the premises post the expiry/termination of the Leave & Licence Agreement?	In the negative
(vi)	Whether the plaintiff proves that it is entitled to a decree in the sum of Rs.4,78,73,030/- together with interest thereon @ 24% p.a. and for what period?	In the negative
(vii)	What decree? What order?	Suit dismissed

10. In order to substantiate their case, the Plaintiffs have examined Mr. Sushil Gupta (P.W.1). A number of documents were also tendered for the perusal of the Court. The Defendant has not led any evidence in the rebuttal. At the conclusion of the trial, I have heard Mr. Kapadia, learned Counsel for the Plaintiffs and Mr Mayur Khandeparkar, learned Counsel for the

Defendant, at considerable length. The learned Counsel took the Court through the pleadings and the evidence on record.

11. Before advertng to note the submissions canvassed across the bar, I deem it apposite to note the facts which are, by and large, uncontroverted. Firstly, the fact that M/s. Saidpur was the owner and landlord of the suit premises, is incontestable. Secondly, the fact that M/s. Saidpur leased the suit premises to MBK Enterprises, a lessee, is also not disputed. Thirdly, there is not much controversy over the fact that M/s. MBK Enterprises, the lessee, sub-leased the suit premises to the Plaintiffs for a term of 9 and half years with effect from 15 July 1995 under an Agreement of Lease dated 25 November 1995 (Exhibit P-1/80). Fourthly, the execution of the Leave and Licence Agreement dated 19 December 1995 (Exhibit P-1/2) between the Plaintiffs and the Defendant is indisputable. Fifthly, there is not much controversy over the essential terms of the Leave and Licence Agreement including the fact that after two renewals, the term was to expire on 15 August 2004. Sixthly, the institution of RAE Suit No.147/A/306 of 1996 by M/s. Saidpur – head landlord, in the year 1996 has not been put in contest. Nor the fact that the said suit came to be decreed by a judgment and decree dated 25 June 2015. Indisputably, the Plaintiffs preferred an appeal against the said judgment and decree and it was subjudice before the appeal bench.

12. At the outset, it is necessary to note that the Plaintiffs gave up the claim for the arrears of licence fee from 1 July 2004 to 15 August 2004. The

claim, thus, subsisted for the amount payable in accordance with the terms of clauses 18 of the Leave and Licence Agreement.

13. In the light of the aforesaid facts, the controversy between the parties essentially revolves around the question as to whether the Plaintiffs are entitled to recover the sum named in Clause 18 of the Leave and Licence Agreement i.e. Rs.1 Lakh per day from the date of the expiry of the said agreement till the delivery of the possession of the suit premises. This core question is impregnated with further question as to jurisdiction of this Court to entertain such a claim, the bar of limitation to enforce the said claim and the entitlement of the Plaintiffs on facts and in law to recover the named amount, depending upon the finding as to the breach of contract.

14. All these questions have their genesis in, and can be answered with reference to, the terms of the Leave and Licence Agreement. The following clauses of the Leave and Licence Agreement bear upon the determination of the aforesaid questions :

“2. In consideration of the Licence fee herein reserved and contained and relying on the representations made by the Licensee and believing the same to be true, the Licensors have allowed the Licensee a licence to use and occupy the said premises for a period of three years from 16.8.1995 with an option to the Licensee to extend the term for a further period of three years at the end of three years subject to an escalation of 20% in the licence fee now fixed. The licensee also has an option to renew the lease for a further period of three years at the end of six years subject to an escalation of 20% of the licence fee prevailing during the sixth year. No extension in the lease period will

be granted by the Licensors to the Licensee after the expiry of nine years.

10. The Licensee will place an interest free deposit of Rs.64,67,895/- (Rupees Sixty Four Lakhs Sixtyseven Thousand Eight hundred and Ninety Five only) being equal to 9 months licence fee during the currency of this Leave and Licence. Any increase or decrease in the licence fee will result in corresponding adjustment of the deposit amount. The Licensee has paid to the Licensor 10% of the deposit amount on 18 July 1995 and 45% of the deposit amount on 15 August 1995 and the balance 45% on 15 September 1995.

14. The Licensee shall not use the premises in such a way as to cause damage, apart from normal wear and tear. The Licensee will be responsible for maintenance of premises, surrounding areas and facilities during the leave and licence period. For property owned by the Licensee, the Licensee will take out necessary insurance and the Licensors will not be responsible.

16. Any delay or default in payment by the Licensee will entitle the Licensor to claim compensation @ 24% per annum interest compounded at quarterly rests. The continuous outstanding default of two months licence fee will entitle the Licensor to terminate this Agreement by giving 15 day's notice in writing and take back full possession of the premises in the manner as provided hereinbelow in clause 19.

17. The Licensee shall have an option during the currency of the licence period to terminate the Leave and Licence at any time by paying compensation equal to 3 months licence fee in addition to the normal licence fee and a notice to that effect in writing. The deposit amount will be returned by the Licensors immediately on the Licensee vacating the premises, after adjustment of any dues under the Agreement.

18. Upon the termination or earlier determination of this licence and in the event of the Licensee and the persons referred to in clause 5 above, not removing itself, themselves and/or their articles, belongings and effects from the said premises or any part thereof, it is agreed that

the licensors shall have a right to remove from the said premises and/or to prevent from entering in or upon the said premises the licensee and its agents and servants and all its, their articles, effects and belongings. In such an event, if the licensee or any of the persons aforesaid enters upon the said premises, this will amount to trespass and the licensor shall have the right to take all steps to prevent the licensee and the persons aforesaid from committing such trespass upon the said premises and the licensor shall not be liable for any loss, damage or injury caused to any person or property therein while enforcing its rights under this agreement. The licensee agrees and undertakes for itself and each of the persons aforesaid not to enter upon the said premises or commit trespass after termination of the licence. For each day that the Licensee, or its agents or, servants stays in the said premises after the expiry or termination of this Agreement, the Licensee shall pay an amount of Rs.1,00,000/- (Rupees One Lakh only) per day to the Licensors with a grace period of 60 days maximum.

20.The Licensors agree and undertake that upon the Licensee observing and performing the stipulations and covenants herein contained to be observed and performed by it, they shall during the period of this agreement use and occupy the said premises without interference from the Licensors or any person or persons claiming under or through them.”

15. In the backdrop of the aforesaid uncontroverted facts, the stipulations in the agreement and the core controversy, I readvert to the issues which fall for determination.

Issue No.1 :

16. The jurisdiction of this Court to entertain, try and decide the suit is assailed on the ground that there is an express bar to entertain the suit claim engrafted by the provisions contained in Section 41 of the Presidency Small

Causes Courts Act, 1882, which confer exclusive jurisdiction on the Court of Small Causes to decide such claim. Section 41 of the Act reads as under :

41 (1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord or tenants, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject matter of such suits or proceedings.

(2) Nothing contained in sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of licence fee or charges or rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act [the Maharashtra Housing and Area Development Act, 1976 or any other law for the time being in force, apply].”

17. Evidently, Section 41(1) begins with a non-obstantive clause. The Court of Small Causes is vested with exclusive jurisdiction to entertain and try all suits and proceedings which fall within the sweep of sub-Section (1) of Section 41, *de hors* the value of the suit claim and any other provision in the said Act or any other law, for the time being in force, subject to the provisions of sub-Section (2). On a plain reading, the Court of Small Causes is vested with the exclusive jurisdiction if the following conditions are satisfied, (i) as to the parties : it must be a suit or proceeding between a licensor or licensee or a landlord or tenant; (ii) as to the subject matter : the suit or proceeding must

relate to the recovery of the possession of any immovable property situated in Greater Bombay or recovery of the licence fee or charges or rent therefor.

18. In other words, if the twin conditions of the parties filing in the character of licensor or licensee / landlord or tenant and the subject matter being the recovery of possession of a demised premises or recovery of licence fee, charges or rent in connection with such premises, are satisfied, the jurisdiction of regular civil court is ousted and such a suit or proceeding must be determined by the Court of Small Causes.

19. Mr. Kapadia, learned Counsel for the Plaintiffs submitted that the bar of jurisdiction pleaded on behalf of the Defendant is wholly unsustainable. A multifold submission was canvassed by Mr. Kapadia. First and foremost, the amount which the Plaintiffs professed to recover under clause 18 of the Agreement (extracted above) for the occupation of the suit premises, post expiry of the licence period, is a contractually stipulated amount. It does not partake the character of licence fee, rent or charges. Secondly, the amount which is payable under clause 18 is not in the nature of mesne profit. On the contrary, the parties, in the course of a commercial transaction, have named the amount which the Defendant would be liable to pay in the event of overstay. Thirdly, the said amount constitutes a fair estimate of damages and, consequently, covered by the provisions contained in Section 74 of the Indian Contract Act, 1872. Lastly, according to Mr. Kapadia, a suit for damages or contractually stipulated amount does not fall within the

ambit of the provisions contained in Section 41 of the Act, 1882 which confers exclusive jurisdiction on the Court of Small Causes.

20. Mr. Kapadia placed reliance on a number of judgments to lend support to the aforesaid submissions, to which a reference would be made later.

21. Per contra, Mr. Khandeparkar, learned Counsel for the Defendant, stoutly submitted that the suit claim which flows from Clause 18 of the Leave and Licence Agreement is essentially a claim for mesne profit. Amplifying the submission, Mr. Khandeparkar would urge that the fact that the term of the licence was over, was not material. Even when a licence is terminated, the dispute between the parties if it relates to either recovery of possession or licence fee, rent or charges, falls within the exclusive jurisdiction of the Court of Small Causes.

22. According to Mr. Khandeparkar, the words “relating to” employed in Section 41(1) of the Act, 1882 expand the scope of the disputes which fall within the purview of Section 41(1) of the Act, 1882. The claim for recovery of money in respect of the occupation of the demised premises, either in the nature of a sum named or otherwise, surely falls within the ambit of Section 41(1) of the Act, 1882, submitted Mr. Khandeparkar.

23. A strong reliance was placed by Mr. Khandeparkar on a judgment of a Division Bench of this Court in the case of Nagin Mansukhlal Dogli V/s. Haribhai Manibhai Patel¹ to bolster up the aforesaid submission. It was urged

¹ AIR 1980 Bom 123

that the statement of law in the case of Nagin Mansukhlal Dogli (supra) has been approved by the Supreme Court in the case of Mahadev P. Kambekar (dead) through legal representatives V/s. Shree Krishna Woolen Mills Pvt. Ltd.²

24. To begin with, I deem it in the fitness of things to consider the enunciation of law in the case of Mansukhlal Dhanraj jain and Ors. V/s. Eknath Vithal Ogale³ to which a reference was made by both Mr. Kapadia and Mr. Khandeparkar. In the said case, after adverting to the provisions contained in Section 41(1) of the Act, 1882 and the conditions which are required to be satisfied before the jurisdiction of the regular Court is ousted, the Supreme Court enunciated that the inquiry which is necessary to determine whether the jurisdiction of the civil court is ousted is to find out from the averments in the plaint whether the suit is between the licensor or licensee / landlord and tenant and whether it relates to the recovery of the possession of the property or licence fee, rent or charges.

25. In that context, explaining the import of the term “relating to” the Supreme Court expounded that there is a good deal of difference between the words “relating to the recovery of possession” on the one hand and the terminology “for recovery of possession of any immovable property.” The words ‘relating to’ are of wide import and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegally

² (2020) 14 SCC 505

³ (1995) 2 SCC 665

recover possession from the Plaintiff-licensee. Suits for protecting such possession of immovable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the Plaintiff, can clearly get covered by the wide sweep of the words “relating to recovery of possession” as employed by Section 41(1).

26. The Supreme Court observed in paragraph No.16 as under :

“16. It is, therefore, obvious that the phrase “relating to recovery of possession” as found in Section 41(1) of the Small Causes Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently, in the light of the averments in the complaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Causes Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits.”

27. In the case of **Prabhudas Damodar Kotecha and Ors. V/s. Manhabala Jeram Damodar and Anr.**⁴ the scope of exclusive jurisdiction of the Court of Small Causes under Section 41(1) was considered in the context of the question where a suit filed by the licensor against a gratuitous licensee is maintainable before the Court of Small Causes. After following the judgment in the case of **Mansukhlal Dhanraj Jain (supra)**, the Supreme Court held that

⁴ (2013) 15 SCC 358

the clubbing of the parties and causes under Section 41(1) of the Act, 1882 manifested the legislative policy of bringing all disputes under 'one umbrella'.

28. The observations in paragraph 57 are material and hence extracted below :

“57. We are of the considered view that the High Court has correctly noticed that the clubbing of the expression “licensor and licensee” with “landlord and tenant” in Section 41(1) of the PSCC Act and clubbing of causes relating to recovery of licence fee is only with a view to bring all suits between the “landlord and tenant” and the “licensor and licensee” under one umbrella to avoid unnecessary delay, expenses and hardship. The act of the legislature was to bring all suits between “landlord and tenant” and “licensor and licensee” whether under the Rent Act or under the PSCC Act under one roof. We find it difficult to accept the proposition that the legislature after having conferred exclusive jurisdiction in one Court in all the suits between licensee and licensor should have carved out any exception to keep gratuitous licensee alone outside its jurisdiction. The various amendments made to Rent Act as well the Objects and Reasons of the Maharashtra Act 19 of 1976 would clearly indicate that the intention of the legislature was to avoid unnecessary delay, expense and hardship to the suitor or else they have to move from the one court to the other not only on the question of jurisdiction but also getting reliefs.”

29. At this stage, the judgment of this Court in the case of Nagin Mansukhlal Dogli (supra), deserves to be noted. In the said case, the question with respect to the jurisdiction of this Court to entertain and try a suit filed on the Original Side arose in the backdrop of the following prayers (as noted by the Division Bench) :

“6. Prayer (a) of the plaint is for a declaration that the defendant was a trespasser upon and in respect of the said flat and that he has no right,

title or interest to remain or continue to remain in use and occupation or possession thereof. Prayer (b) of the plaint is for a mandatory injunction to direct the defendant to forthwith remove himself, his servants and agents, together with his belongings, from the said flat and to hand over vacant and peaceful possession of the said flat to the Plaintiff. Prayer (c) of the plaint is for a sum of Rs.35,625/- claimed by way of damages from June 1, 1970 till the date of the filing of the suit at the rate of Rs.375 per month. Prayer (d) of the plaint is for a sum of Rs.375 per month or such other sum as the court may think fit by way of future mesne profits or damages or compensation for wrongful use and occupation of the said flat from the date of the filing of the suit till vacant and peaceful possession of the said flat is handed over to the Plaintiff.”

30. In the aforesaid context, a submission was canvassed on behalf of the Plaintiffs therein that Section 41 has application where the parties fall in the character of a licensor or licensee and does not govern the case of the persons who once held that character, but such relationship came to an end either by expiry of term of licence or otherwise termination of the licence. Repelling the submission, the Division Bench observed as under :

“15. The next point urged before us by Mr. Sanghavi was that Section 41 in terms applies to a licensor and a licensee and does not refer to the case of persons who once held the relationship of licensor and licensee but such relationship had come to an end either by the period of the licence expiring by efflux of time or by the termination of the licence. With respect to this submission, the first point to be noted is that the section applies not only to suits between licensors and licensees but also between landlords and tenants in cases where the Rent Act does not apply. Further, the Section does not refer to only one category or suits but to several categories. These categories are :

(1) Suits between a licensor and licensee relating to the possession of any immovable property situated in Greater Bombay.

(2) suits between a landlord and tenant relating to the possession of any immovable property situated in Greater Bombay.

(3) suits relating to the recovery of the licence fee or charge in respect of such immovable property, and

(4) suits relating to the recovery of rent in respect of such property.

16. Now, a suit for the recovery of licence fee or charges may lie either when a licence subsists or after it has come to end, and similarly a suit for the recovery of rent may lie either when the tenancy subsists or after it has come to end, but it is difficult to envisage a case where during the subsistence of a licensee or where during the subsistence of a tenancy a landlord can file a suit against his tenant for the recovery of immovable property given on tenancy to his tenant. If a licensor or a landlord wants to recover possession of the property, his right to do so arises only on the termination of the licence or the tenancy, as the case may be, or upon the licence or the tenancy determining by efflux of time subject to the provisions of the Bombay Rent Act. Mr. Sanghavi, however, submitted that so far as licensors and licenses were concerned, a suit for the recovery of possession could be filed by a licensor even during the subsistence of the licence where the licence was revocable at will and had not been determined by a prior notice given by the licensor to the licensee, in which case, in Mr. Sanghavi's submission, the filing of the plaint would operate as a determination of the licence. The fallacy in this argument lies in this that since the very act of filing the suit would be termination of the licence, the suit cannot be said to be a suit between a licensor and licensee between whom such relationship is subsisting. Further, to put such a construction upon Section 41 and to confine it only to suits of this one particular class would be to render the section meaningless so far as suits between landlords and tenants for the recovery of possession provided for in the said section are concerned, because under the law a tenancy cannot be determined in the manner in which a licence can be determined where there is no period provided for the licence and the licence is revocable at will. The use of the words "a licensee and licensee" and "a landlord and tenant" in the said Section 41

has no such particular significance or effect as convassed for by Mr. Sanghavi.” (emphasis supplied)

31. The aforesaid enunciation of law was approved by the Supreme Court in the case of **Mahadev P. Kambekar (supra)** in the following words :

“26. This takes us to deal with the next argument of Mr Naphade, learned Senior Counsel for the appellants that once the tenancy is determined such suits would not come within the purview of Section 41 of the Small Causes Courts Act. This argument was rejected by the Division Bench and, in our view, rightly by placing reliance on the law laid down by the Bombay High Court in Nagin Mansukhlal Dogli (supra) of the said decision quoted in the order. We approve the law laid down by the Bombay High Court in Nagin Mansukhlal Dogli as laying down the correct principle of law. We, therefore, do not consider it necessary to elaborate our reasoning more than what we have said.”

(emphasis supplied)

32. Mr. Kapadia, learned Counsel for the Plaintiffs made an earnest endeavour to distinguish the aforesaid pronouncements, especially the judgment in the case of **Nagin Mansukhlal Dogli (supra)**. It was submitted that in the said case, there was a specific prayer for mesne profit for occupation of the premises after the expiry of the licence. In contrast, in the case at hand, the Plaintiffs seek to recover contractually stipulated amount.

33. Mr. Kapadia would urge that there can be no dispute about the propositions of law enunciated in the cases of **Mansukhlal Dhanraj Jain (supra)**, **Prabhudas Damodar Kotechan and Ors (supra)** and **Mahadev P. Kambekar (supra)**. However, they do not govern the facts of the case with

equal force as contractually stipulated amount or damages do not necessarily fall within the ambit of exclusive jurisdiction of the Court of Small Causes.

34. Mr. Kapadia placed reliance on a line of decisions which hold that a claim for refund of the security deposit and damages and compensation as well as the claim for damages in lieu of licence fee where the licence is terminated during the lock in period, do not fall within the exclusive jurisdiction of the Court of Small Causes. Reliance was placed on the judgments in the cases of **RMC Readymix V/s. Kanayo Khubchandani Motwani**⁵, **Sanjog Parab V/s. B.P. Gharda and Co.**⁶ **Brainvisa Technologies Pvt. Ltd. V/s. Subhash Gaikwad (HUF)**⁷, **Globsport India Pvt. Ltd. V/s. Mayfair Housing Pvt. Ltd.**⁸, **Royal Bank of Scotland V/s. Earnest Business Services Pvt. Ltd.**⁹.

35. It would be suffice to note the exposition of law in the case of **Brainvisa Technologies Pvt. Ltd. (supra)**, wherein after referring to the Full Bench decision of this Court in the case of **Central Warehousing Corporation V/s. Fortpoint Automotive Pvt. Ltd.**¹⁰ it was enunciated that for the provisions of Section 41 of the Act to be attracted or for that matter, those of the corresponding provisions of Section 26 of the Provincial Small Cause Courts Act, 1887, the suit must be of a description that is mentioned in Section

⁵ 2006 (4) MhLJ 299

⁶ (2012) 5 Bom CR 258

⁷ (2013) 7 Bom CR 540

⁸ (2015) 4 Bom. CR 304

⁹ (2017) SCC Online Bom. 9363

¹⁰ 2010 (1) ALL M.R. 497

41(1) of the former Act or Section 26 of the latter. A suit for the recovery of security deposit does not constitute a suit for the recovery of “licence fee or charges or rent therefor”. The expression ‘charges’ must receive meaning from the terms with which it occurs in context. Licence fees, charges and rent are periodical payments made for use and occupation. A security deposit is a form of security which the landlord as licensor obtains from the licensee to whom the premises are licensed for occupation. A claim for recovery of security deposit and seeking damages/compensation would not fall within the exclusive jurisdiction of the Small Causes Court.

36. In the light of the aforesaid enunciation of law, the crucial question is as to what is the nature of the suit claim. As noted above, clause 18 of the Leave and Licence Agreement stipulated that for each day that the Licensee, or its agents or, servants stays in the said premises, after the expiry or termination of the said Agreement, the Licensee shall pay the amount of Rs.1 Lakh per day to the licensor. Whether this amount, agreed to be paid by the licensee to the licensor after the termination of the licence, in the event it continued to occupy the suit premises, retains the character of licence fee or charges ?

37. To explore an answer, it is imperative to appreciate the nature of the contractual stipulation. Evidently, in the said stipulation, a breach of contract to deliver possession of the said premises, after the licence comes to an end, is implicit. It is a measure of damages for the breach of the contract

which the parties provided for. It is trite in the event of the breach of the contract, a party is entitled to compensation for any loss which naturally arises in the usual course of things of such breach. In a given case, the parties are free to provide for the compensation which, in their estimation, is the loss which would be occasioned on account of breach of contract.

38. The policy of law as enshrined in Sections 73 and 74 of the Indian Contract Act, 1872, is that a party who is entitled to be compensated for the breach of the contract ought to receive a reasonable compensation, even where a sum is named in the contract, to be payable in the event of breach of contract, if the court finds that the said amount is in the nature of penalty. Where the parties have named a sum, the Court is competent to award a reasonable compensation in case of breach, even if no actual damage is proved to have suffered in consequence of breach of contract.

39. In the case of Oil and Natural Gas Corporation Ltd. V/s. Saw Pipes Ltd.¹¹ the Supreme Court culled out the propositions which govern the award of damages. They read as under :

“68. From the aforesaid discussions, it can be held that :

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such

¹¹ (2003) 5 SCC 705

compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

40. If the stipulation in clause 18 is construed in the light of the aforesaid enunciation of law, it squarely falls within the ambit of Section 74 of the Indian Contract Act, 1872 as the measure of damages named by the parties to be paid in case of breach of contract.

41. This takes me to the question as to whether the aforesaid payment is in the nature of a mesne profit. Under sub-Section (12) of Section 2 of the Code of Civil Procedure, 1908, ‘mesne profits’ is defined as those 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 inquiry under sub-Section (12) of Section 2 of the Code, 1908 for ascertainment of the mesne profits involves the question as to the what the person in wrongful possession would have earned from the immovable property. The test is not what the Plaintiff has lost for being kept

out of the possession of the property, but what the person in wrongful possession has or might have earned by being in possession thereof.

42. Mr. Khandeparkar would urge that the claim for damages of the present nature is really a claim for *mesne* profit as the Plaintiffs claimed that the possession of the Defendant became wrongful post expiry of licence. Mr. Khandeparkar placed a strong reliance on a decision of this Court in the case of **Humayun Dhanrajgir and Ors. V/s. Ezra Aboody**¹². In the said case, explaining the measure of mesne profit, this Court observed as under :

“23. The measure of ‘Mesne Profits’ is not what the landlord had lost by not being able to get possession, but what the user of the property meant to the defendant who was in wrongful possession. In other words, the basis for determining the quantum of mesne profit is : what the defendant might with ordinary diligence have received from the property. The person in wrongful possession cannot be heard to say that he has not utilized the property, made no profits, no rent is being derived from the property in dispute as such not liable to pay mesne profit. At the same time person in wrongful possession is not liable to realize highest possible rates of rent or profit. A plain reading of the definition of mesne profit would leave no manner of doubt that the real test to be applied is, not what is the Plaintiff decree holder had lost or would have earned by letting out or using the property himself, but what the person in wrongful possession, namely with ordinary diligence would have received from it. The wrongful possession of defendant is the very essence of a claim for mesne profit. The very foundation of the defendant’s liability to pay the mesne profit goes with actual possession of the land. That is to say, generally the person in wrongful possession and enjoyment of the immovable property is liable to pay mesne profit. Thus, the claim for mesne profits is virtually the

claim for damages and has to be assessed by proper exercise of judicial discretion.” (emphasis supplied)

43. Mr. Kapadia countered by canvassing a submission that the amount, which the parties have named as payable in the event of breach of contract concerning an immovable property cannot be termed as mesne profit as it represents contractually stipulated amount.

44. It is imperative to note that mere fact that the term of licence expired, by itself, may not bring an end to the jural relationship between the parties for all intent and purpose. Even where the question arises as to recovery of possession of licenced premises or the licence fee between the parties, post termination of licence, in view of the wide amplitude of the provisions contained in Section 41(1) of the Act, 1882, the dispute falls within the purview of jurisdiction of the Court of Small Causes. Termination of licence cannot be the test to determine exclusivity of the jurisdiction of the Court of Small causes. If it could be shown that the parties filled in the character, in the past, and the dispute which subsists emanates from the said character and pertains to the subject matter, covered by sub-Section (1) of Section 41 of the Act, 1882, the fact that the jural relationship has since been altered is of no moment.

45. Conversely, not every dispute between the parties who shared the jural relationship would fall within the ambit of Section 41(1) of the Act, 1882. The dispute in relation to recovery of the security deposit or for that matter, the claim for damages for pre-mature termination of the licence has

consistently been held to be amenable to the jurisdiction of the regular civil court.

46. In the case at hand, in my view, the following factors assume significance. The parties have named a sum as a consequence of the breach of contract. It could be alleged that the sum is in the nature of '*in terrorem*'. Yet it retains the character of damages. Secondly, the claim is made after the Defendant handed over possession of the suit premises. Prayer for named damages is totally unconnected with possession. Nor it has any relation to the licence fee or charges.

47. In a situation of this nature, where all the trappings of licensor and licensee relationship have completely ceased and there is no dispute relating to possession of the demised premises, nor the Plaintiffs claim a sum which retains the character of licence fee, rent or charges and, in contradistinction, rests the claim on a contractual obligation to pay damages, in my view, such claim would not fall within the exclusive jurisdiction of the Court of Small Causes. I am, therefore, persuaded to answer issue No.1 in the affirmative.

48. **Issue No.2 :**

The tenability of the Suit was assailed on the ground that the institution of the suit on 17 November 2008 in the light of the claim for damages emanating from clause 18 upon expiry of licence by efflux of time on 15 August 2004 is clearly barred by limitation.

49. This challenge was sought to be met by the Plaintiffs by canvassing multi-pronged submission. First, the Defendant overstayed in the demised premises till 25 November 2005. Thus, the institution of the suit on 17 November 2008 was within the stipulated period of limitation. Second, the occupation of the demised premises by the Defendant after the expiry of licence by efflux of time was in the nature of a continuing breach of contract. Thus, a fresh period of limitation began to run at every moment of the time the breach of contract continued. Therefore, the institution of the suit within three years of the delivery of possession on 25 November 2005, the day continuing breach of contract ceased, is not barred by the law of limitation. Thirdly, the Plaintiffs had bonafide instituted winding up Petition being Company Petition No.539 of 2005 on 4 August 2005 and prosecuted the same, culminating in an order by Appeal Bench in Appeal No.928 of 2006 dated 30 January 2017. The said period, according to the Plaintiffs, deserves to be excluded under the provisions of Section 14 of the Limitation Act, 1963.

50. For the purpose of determining the bar of limitation, it may be apposite to note that there is not much controversy over the facts that the licence expired by efflux of time on 15 August 2004 and the Suit came to be instituted on 17 November 2008. The parties are not at issue over the fact that by 25 November 2005, the Defendant vacated the demised premises for all intent and purpose. However, there is controversy over the actual and physical delivery of the possession of the demised premises at an anterior point of time.

The suit claim is premised on the obligation to pay a sum of Rs.1 Lakh per day for overstay in the demised premises beyond the licenced period.

51. Article 55 of the Limitation Act, reads as under :

55	For compensation for the breach of any contract, express or implied not herein specially provided for	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.
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52. Under Article 55, the period of limitation for compensation for the breach of any contract, not specially provided for, begins to run when the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or where the breach is continuing, when it ceases. Three distinct dates of commencement of the period of limitation are, thus, discernible. First, if it is the case of breach of contract simplicitor, the date of breach. Second, where it is the case of successive breaches of contract, the date when the breach in respect of which the suit is instituted occurs. Third, where the breach of contract was of continuing nature, when the breach ceased.

53. Section 22 of the Limitation Act, which deals with continuing breaches of contracts and torts, reads as under :

“22. Continuing breaches and torts – In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.”

54. A conjoint reading of the provisions contained in Section 22 and Article 55 of the Limitation Act, 1963, would indicate that there is a distinction between a continuing breach of contract and successive breaches of contract. In the matter of the commencement of the period of limitation, Article 55 treats two types of breaches distinctly. The question which thus crops up for consideration is whether the breach of contract, in the case at hand, can be termed as “a continuing breach of contract”.

55. If the stipulation in clause 18 of the Leave and Licence Agreement which is the substratum of the Plaintiffs’ case, is correctly appreciated, the claim of the Plaintiffs is for damages for each days occupation of the suit premises. The parties had named a sum for the measure of the damages. Each days occupation beyond the licence period constituted a successive breach of contract, rather than a continuing breach of contract.

56. Mr. Kapadia would, however, urge that the Defendant’s refusal to vacate the suit premises constituted a continuing breach. A strong reliance was placed on a judgment of the Supreme Court in the case of **Samruddhi Co-operative Housing Soc. Ltd. V/s. Mumbai Mahalaxmi Construction Pvt.**

Ltd.¹³. In the said case, the Supreme Court after adverting to the

13 (2022) 4 SCC 103

pronouncements in the cases of **Commissioner of Wealth Tax V/s. Suresh Seth**¹⁴ and **Balakrishna Savalram Pujari Waghmare V/s. Shree Dhyaneshwar Maharaj Sansthan**¹⁵ enunciated that a continuing wrong occurs when a party continuously breaches an obligation imposed by law or agreement. In the facts of the said case, the Supreme Court held that the responsibility of the promoter to obtain occupancy certificate from the local authority was statutory as well as contractual and the failure to obtain an occupancy certificate was a breach of the obligation imposed on the Respondent under the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 and amounted to a continuing wrong.

57. In the case of **Balakrishna Savalram Pujari Waghmare (supra)** the Supreme Court had expounded the nature of the continuing wrong in the context of a dispute where the Appellants were kept out of possession. The Supreme Court enunciated the legal position as under :

“31. It is then contended by Mr. Rege that the suits cannot be held to be barred under Art. 120 because S. 23 of the Limitation Act applies; and since, in the words of the said section, the conduct of the trustees amounted to a continuing wrong, a fresh period of limitation began to run at every moment of time during which the said wrong continued. Does the conduct of the trustees amount to a continuing wrong under S.23 ? That is the question which this contention raises for our decision. In other words, did the cause of action arise de die in them as claimed by the appellants ? In dealing with this argument it is necessary to bear in mind that S.23 refers not to a continuing right but

14 (1981) 2 SCC 790

15 AIR 1959 SC 798

to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the 'doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that S. 23 can be invoked. Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs as hereditary , worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellants' rights though the damage caused by the said decree subsequently continued. Can it be said that, after the appellants were evicted from the temple in execution of the said decree, the continuance of their dispossession was due to a recurring act of tort committed by the trustees from moment to moment ? As soon as the decree was passed and the appellants were dispossessed in execution proceedings, their rights had been completely injured, and though their dispossession continued, it cannot be said that the trustees were committing wrongful acts or acts of tort from moment to moment so as to give the appellants a cause of action de die in diem.

We think there can be no doubt that where the wrongful act complained of amounts to ouster, the resulting injury to the right is complete at the date of the ouster and so there would be no scope for the application of S. 23 in such a case. That is the view which the High Court has taken and we see no reason to differ from it."

(emphasis supplied)

58. The aforesaid enunciation of law makes it abundantly clear that if the wrongful acts causes an injury which is complete, there is no continuing

wrong even though the damage resulting from such act may continue. If, however, wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong.

59. The judgment in the case of Commissioner of Wealth Tax (supra), is more instructive and nearer to the facts of the case at hand. In the said case, the instances of the continuing wrong were enumerated by the Supreme Court by way of illustration. The observations in paragraph 17 and 19 are, instructive, and hence extracted below :

“17. The true principle appears to be that where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the duty in question is one which requires him to continue to do that act. Breach of a covenant to keep the premises in good repair, breach of a continuing guarantee, obstruction to a right of the way, obstruction to the right of a person to the unobstructed flow of water, refusal by a man to maintain his wife and children whom he is bound to maintain under law and the carrying on of mining operations or the running of a factory without complying with the measures intended for the safety and well-being of workmen may be illustrations of continuing breaches or wrongs giving rise to civil or criminal liability. as the case may be, de die in diem.”

.....

19. Section 18 of the Act with which we are concerned in this case, however, does not require the assessee to file a return during every month after the last day to file it is over. Non-performance of any of the acts mentioned in Section 18(1)(a) of Act gives rise to a single default and to a single penalty, the measure of which, however, is geared up to the time lag between the last date on which the return has to be filed and the date on which it is filed. The default, if any committed is committed on the last date allowed to file the return. The default cannot be one committed every month thereafter. The words for every month during which the default

continued' indicate only the multiplier to be adopted in determining the quantum of penalty and do not have the effect of making the default in question a continuing one....." (emphasis supplied)

60. If the aforesaid enunciation of law is applied to the facts of the case, the injury was complete on the refusal of the Defendant to handover the possession of the suit premises without the security deposit being refunded. The cause of action arose on that day as it constituted a breach of the obligation contained in Clause 18 of the Agreement (in contemplation of the Plaintiffs). The liability to pay the compensation for the breach, thus, arose on that day. The subsequent possession of the Defendant over the suit premises, each day, may constitute a successive breach of the said obligation. However, it cannot be said that the breach continued and ceased only upon delivery of possession of the suit premises and, thus, the time began to run from 25 November 2005.

61. Reliance placed by Mr Khandeparkar, learned Counsel for the Defendant on the judgment of the Supreme Court in the case of **State of Gujarat V/s. Kothari and Associates**¹⁶ appears to be well-founded. In the said case, the Respondent therein, had instituted a suit seeking damages for delay in handing over the canal/site for the works contract. In the context of the bar of limitation on the ground that the claim was raised after lapse of more than three years from the accrual of causes of action, the Supreme Court enunciated the legal position as under :

¹⁶ (2016) 14 SCC 761

“11. It also appears to us that the contract was clearly not broken as the Respondents chose to keep it alive despite its repeated breaches by the Appellant State. The factual matrix presents a situation of successive or multiple breaches, rather than of a continuous breach, as each delay in handing over the canal/site by the Appellant State constituted to a breach that was distinct and complete in itself and gave rise to a separate cause of action for which the Respondent could have rescinded the contract or possibly claimed compensation due to prolongation of time and resultant escalation of costs. Of course the Respondent is enabled to combine all these causes of action in one plaint, as postulated in the CPC provided each claim is itself justiciable. Even the Respondent has argued before the High Court that the suit was based on successive breaches committed by the Appellant State. In our opinion, the suit was required to be filed within three years of the happening of each breach, which would constitute a distinct cause of action. Article 55 specifically states that in respect of successive breaches, the period begins to run when the breach in respect of which the suit is instituted, occurs. In this vein, Rohtas Industries Ltd vs. Maharaja of Kasimbazar China Clay Mines¹⁷ is apposite as it has held that when a party agrees to deliver certain goods every month for a duration spanning certain years, the cause of action for breach for failure to deliver in a particular month arises at the end of that month and not at the end of the period of the contract. The situation before us is similar in that the cause of action had arisen on each occasion when the Appellant State failed to hand over the site at the contractually stipulated time. Specifically, the limitation periods arose on 15.11.1976, 15.11.1977, 15.11.1978 and 15.11.1979, i.e. on the first day of each season, when the Respondent State committed a breach by failing to hand over the site. Thus the period of limitation did not commence at the termination of the contract period or the date of final payment. The High Court’s conclusion that the last date of breach and last date of payment were relevant, not each cause of action, was thus patently erroneous. For each breach, a corresponding amount of damages for additional costs could have been sought. The suit, however, was filed on 25.1.1985, well after the limitation period of three years for even the final breach, as the various causes of

17 ILR (1951) 1 Cal 420

action became time barred on 15.11.1979, 15.11.1980, 15.11.1981 and 15.11.1982 respectively.” (emphasis supplied)

62. The aforesaid proposition of law, in my view, applies with equal force to the facts of the case at hand. Each days failure on the part of the Defendant to hand over possession of the demised premises furnished a distinct cause of action and, thus, there were successive breaches of contract for which the parties had chosen to stipulate the damages for each day. The case would, thus, be not covered by the third part of Article 55 of the Limitation Act, 1963.

63. This takes me to the contention forcefully advanced by Mr. Kapadia that, in any event, the period spent by the Plaintiffs in prosecuting the Company Petition No.539 of 2005 bonafide deserves to be excluded under Section 14 of the Limitation Act. Since the Company Petition No.539 of 2005 was instituted on 4 August 2005 and it was dismissed on 2 March 2006 and the Plaintiffs assailed the said order by filing an Appeal being Appeal No.928 of 2006 on 31 May 2006, and the said Appeal also came to be dismissed by an order dated 30 January 2017, according to Mr. Kapadia, this entire period is required to be excluded from the computation for the purpose of limitation.

64. Mr. Kapadia would urge that Section 14 of the Limitation Act, is required to be construed liberally so as to advance cause of substantive justice. The Court ought to lean in favour of such construction as would save rather than bar determination of lis on merits.

65. To bolster up the aforesaid submission, Mr. Kapadia placed reliance on an order passed by the Supreme Court in the case of **Rameshwarlal V/s. Municipal Council, Tonk and Ors.**¹⁸ In the said case, the High Court had refused to exercise discretionary power under Article 226 of the Constitution of India to order grant of salary to the Petitioner as the claim was recoverable in a civil action. In that context, the Supreme Court held that since the limitation has run out to file a civil suit, which was not the case on the date of filing of the Writ Petition, the Civil Court was required to exclude under Section 14 of the Limitation Act, the entire time taken by the High Court in disposing of the matter from the date of the institution of the Writ Petition. It was noted that normally for application under Section 14, the Court dealing with the matter in the first instance, which is the subject of the issue in the later case, must be found to have lack of jurisdiction or other cause of like nature to entertain the matter. However, since the High Court expressly declined to grant relief relegating the Petitioner to a suit in the civil court, the Petitioner cannot be left remediless and, therefore, time taken in prosecuting the proceeding before the High Court and the Supreme Court pursued diligently and bona fide needs to be excluded.

66. The aforesaid judgment was followed by a Division Bench of this Court in the case of **Maharashtra State Farming Corporation Ltd. & Anr. V/s. Belapur Sugar & Allied Industries Ltd. & Anr.**¹⁹ wherein it was held

¹⁸ (1996) 6 SCC 100

¹⁹ 2004 (3) Bom. C.R.480

that the Appellant Corporation therein, having pursued winding up petition and appeals before this Court diligently and bona fide, time taken in those proceedings was required to be excluded under Section 14 of the Act, 1963.

67. Reliance was also placed on a judgment of the Division Bench of Punjab and Haryana High Court in the case of **Pavan Om Parkash Kejriwal V/s. Partap Steel Rolling Mills (1935) Limited**²⁰ wherein while relegating the Appellant therein, to ordinary remedy of civil court for the recovery of the amount claimed in the Petition instituted under Sections 433, 434, 439 of the Companies Act, 1956, it was held that the Appellant would be entitled to claim the benefit of Section 14 of the Act, 1963 for the period during which the Petition was pending in Company Court and the Appeal Bench.

68. Mr. Khandeparkar joined issue by canvassing a submission that the Plaintiffs have failed to demonstrate that the winding up Petition was prosecuted bona fide. Taking the Court through the averments in the plaint, Mr. Khandeparkar would urge that the plaint is conspicuously silent about the explanation now sought to be put forth for exclusion of the period of limitation under Section 14 of the Act, 1963. Inviting the attention of the Court to the provisions contained in Rule 6 of Order 7 which mandates that where a suit is instituted after the expiration of period prescribed by the law of limitation, the plaint shall show the grounds upon which an exemption from such law is claimed.

²⁰ (1992) SCC Online P&H 802

69. Mr. Khandeparkar strenuously submitted that there is a bald assertion in paragraph 32 of the plaint that no part of the suit claim is barred by the law of limitation. Therefore, the recourse to the provisions contained in Section 14 of the Limitation Act, 1963 cannot be made. Even otherwise, Mr. Khandeparkar would urge, the conditions stipulated in Section 14 of the Act, cannot be said to have been made out.

70. Taking the Court through the order passed in winding up Petition, it was submitted that the said Petition came to be dismissed not for defect of jurisdiction or other cause of like nature but on merits. In such a case, the benefit of the provisions contained in Section 14 of the Act, is not available, submitted Mr. Khandeparkar.

71. To buttress the aforesaid submission, Mr. Khandeparkar placed reliance on a judgment of this Court in the case of **Amjad Ali Shafi Khan V/s. Abdul Hameed Abdul Gai Shaikh**²¹. In the said case, after adverting to the provisions contained in Section 14 of the Act, 1963, and the judgment of the Supreme Court in **Consolidated Engineering Enterprises V/s. Principal Secretary, Irrigation Derangement and Ors.**²², this Court declined to extend the benefit of Section 14 of the Act on the ground that earlier proceedings were adjudicated on merits, and did not fail due to lack of jurisdiction and other cause of like nature.

²¹ 2019 (2) Mh.L.J. 930

²² (2008) 7 SCC 169

72. Mr. Khandeparkar further submitted that the benefit of Section 14 of the Act, cannot be claimed as the proceeding which arose out of winding up petition was still being prosecuted and had not come to an end on the date of the institution of the suit. To avail the benefit of the said provision, according to Mr. Khandeparkar, the earlier proceeding must have been terminated.

73. Section 14 of the Limitation Act, 1963 provides for exclusion of time in a proceeding prosecuted bona fide in a court which for defect or jurisdiction or other cause of like nature could not effectively adjudicate the subject matter of such proceeding. From the phraseology of Section 14 of the Act, the following conditions must be satisfied before the exclusion of period could be claimed : (i) the earlier and subsequent proceeding are civil proceeding prosecuted by one and the same party; (ii) the earlier proceeding had been prosecuted bona fide; with due diligence and in good faith; (iii) failure of the earlier proceeding was occasioned due to defect of jurisdiction or other cause of like nature; (iv) earlier proceeding and the subsequent proceeding relate to the same matter in issue; and lastly, (v) earlier and subsequent proceeding are both in a court.

74. In the case at hand, there is no qualm over the fact that the proceeding in Company Petition and the instant suit are civil proceedings prosecuted by the same parties. The aspects as to whether the earlier proceeding was prosecuted bona fide and it resulted in failure due to defect of

jurisdiction are sought to be put in contest. An endeavour was also made by Mr. Khandeparkar to draw home the point that the subject matter of the winding up Petition and the instant suit cannot be said to be the same as the winding up petition is not for recovery of debt.

75. At this stage, it may be appropriate to note the object of the exclusion provided in Section 14 of the Limitation Act, 1963. Section 14 has been liberally construed as it advances the cause of substantive justice. If the conditions enumerated above are fulfilled, the Plaintiffs should be put in the same position as he was when he started the abortive proceeding.

76. In the case of M.P.Steel Corporation V/s. Commissioner of Central Excise²³ the Supreme Court after adverting to the expansive and liberal ambit of Section 14 of the Act, held that what is necessary is the absence of negligence or inaction. So long as the plaintiff or applicant is bona fide pursuing a legal remedy which turns out to be abortive, the time beginning from the date of the cause of action of an appellate proceeding is to be excluded if such appellate proceeding is from an order in an original proceeding instituted without jurisdiction or which has not resulted in an order on the merits of the case.

77. The aforesaid pronouncement, in my considered view, assists the Plaintiffs in the instant case as the Plaintiffs claimed to have bona fide

²³ (2015) 7 SCC 58

prosecuted not only the winding up petition but also an appeal thereagainst before the Appeal bench.

78. The submission on behalf of the Defendant that winding up petition came to be dismissed not for defect of jurisdiction but on merits, and, therefore, the recourse to Section 14 is impermissible, does not seem to be well-founded. In the order dated 2 March 2006 in Company Petition No.529 of 2005, the learned Company Judge did observe that there is a bona fide dispute as to whether the Petitioners (Plaintiffs) were justified in retaining the security deposit not towards the licence fees but towards the contingency of the result in the suit filed by the Petitioners landlords and also as to whether the Company (Defendant), in fact, did not vacate and handover the premises as per the terms of the agreement, and, thus, the Petition came to be dismissed.

79. This determination, if considered in the light of the object of Section 14 of the Limitation Act, 1963, cannot be said to be a bar to avail the benefit of the ameliorative provisions contained in Section 14 of the Act. The expression 'defect of jurisdiction or other cause of like nature' has been construed liberally. It is not necessary that the earlier proceedings must fail for defect of jurisdiction. The expression 'other cause of like nature' expands the scope of the causes of failure of earlier proceeding.

80. In the case of Union of India and Ors. V/s. West Coast Paper Mills Ltd. And Anr. (III)²⁴ the Supreme Court, in the context of the benefit

²⁴ (2004) 3 SCC 458

of Section 14 being claimed on account of the dismissal of an earlier writ petition claiming monetary relief, held that it was true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Act is wide in its application, in as much as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceeding have failed on account of other causes of like nature.

81. The following observations of the Supreme Court are instructive and, hence, extracted below :

“14..... The expression “other cause of like nature” came up for the consideration of this Court in **Roshanlal Muthalia V R.Bmohan Singh Oberoi**²⁵ and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right.” (emphasis supplied)

82. On the aforesaid touchstone, when the learned Company Judge declined to entertain winding up Petition on the ground that the there were bona fide dispute as to whether the company (Defendant) indeed incurred the debt as claimed by the Petitioners (Plaintiffs), the said determination would fall within the expansive ambit of the expression “other causes of like nature”. Such determination can be considered as the one which prevented the

²⁵ (1975) 4 SCC 628

consideration on the merits of the claim of the Plaintiffs that the Defendant had incurred an obligation on account of breach of contract.

83. The next challenge on the ground that there was no identity of the subject matter as the winding up petition was not for recovery of debt, also does not seem to be well merited. Undoubtedly, the winding up proceeding is not for recovery of money. However, a winding up petition has been recognized as one of the legal remedies available to a creditor of a corporate entity.

84. The nature of the winding up petition came up for consideration before the Supreme Court in the case of Harinagar Sugar Mills Co. Ltd. Bombay V/s. M.W.Pradhan, Court Receiver High Court, Bombay.²⁶ In the said case, while considering the question as to whether the Court Receiver could have filed a Petition for winding up of the company, the Supreme Court held that though the winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it; but nonetheless it is a form of equitable execution. The Supreme Court adverted to the nature of the winding up petition in **Palmer's Company Precedents** which reads thus : “a winding up petition is a perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the Court gives to a creditor against a company unable to pay its debt.”

²⁶ AIR 1966 SC 1707

85. In view of the aforesaid enunciation, the contention on behalf of the Defendant that the subject matter of the instant suit and the winding up petition cannot be said to be identical, does not pass muster. Moreover, in a series of judgments relied upon by Mr. Kapadia, referred to above, the benefit of the provisions contained in Section 14 of the Act, has been extended where the earlier proceeding was the petition for winding up.

86. A learned Single Judge of this Court in the case of **Tata Consultancy Services Ltd. V/s. Inspira IT Products Pvt. Ltd.**²⁷ specifically repelled the contention therein that the winding up petition is not a bona fide remedy for recovery of debt. The learned Single Judge followed the judgment of the Division Bench in the case of **Maharashtra State Farming Corporation Ltd. (supra)**, to order the exclusion of time taken in an abortive company winding up petition while calculating the limitation for filing a suit on a disputed debt.

87. The last submission of Mr. Khandeparkar that the suit came to be instituted while the appeal preferred by the Plaintiffs against an order in winding up petition i.e. Appeal No.928 of 2006, was still pending and, therefore, there was no termination of the earlier proceeding, takes a very constricted view of the provisions contained in Section 14 of the Limitation Act, 1963. The termination of the earlier proceeding does not seem to be a *sine qua non* to avail the benefit of Section 14 of the Act. A party may realise the futility of earlier proceeding even during the pendency of such proceeding and

resort to a proper remedy in the form of a suit. It does not seem to be an immutable rule of law that earlier proceeding must terminate before the exclusion could be claimed on account of its bona fide prosecution. Termination of earlier proceeding becomes significant from the point of view of the computation of the period of limitation to be excluded. Termination of earlier proceeding, however, is not indispensable in all the situations.

88. The judgment of the Supreme Court in the case of **Sesh Nath Singh and Anr. V/s. Baidyabati Sheoraphuli Co-op. Bank Ltd. And Anr.**²⁸ puts to rest the controversy sought to be raised on behalf of the Defendant. In the said case, the Supreme Court in terms observed that the substantive provisions of sub-sections (1), (2) and (3) of Section 14 do not say that Section 14 can only be invoked on termination of the earlier proceeding prosecuted in good faith. Explanation (a) cannot be construed in a narrow pedantic manner to mean that Section 14 can never be invoked until and unless the earlier proceeding has actually been terminated for want of jurisdiction or other causes of such nature. Explanation (a), which is clarificatory, only restricts the period of exclusion to the period between the date of initiation and the date of termination.

89. Invocation of a proper remedy after realizing the futility of prosecuting an earlier proceeding, midway, in my view, manifests bona fide of a party rather than operate as an impediment in availing the benefit of Section 14 of the Act. On the contrary, if a party prosecutes an abortive proceeding,

²⁸ (2021) 7 SCC 313

despite being fully alive to its futility, upto to the last court, it may justify an inference that such party intended to take an undue advantage of the situation and desired to vex the adversary twice.

90. In the case at hand, the Plaintiffs were insisting for delivery of possession of the demised premise, and asserted right to claim compensation for overstay @ Rs.1 Lakh per day, the moment the Defendant contested the Plaintiffs' claim of retention of security deposit, and continued to pursue the same diligently. Institution of a winding up petition to enforce the said claim could be said to be an inappropriate recourse. However, it cannot be urged that there was lack of bona fide. It does not matter that the company court ruled that there was a bona fide dispute.

91. Lastly, the fact that there was no specific pleading, in conformity with the provisions contained under Order 7 Rule 6 of the Code, does not detract materially from the Plaintiffs' claim of exclusion. There are adequate pleadings in the plaint as regards the institution and prosecution of the company petition. In any event, the proviso to Rule 6 empowers the Court to permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint provided such ground is not inconsistent with the ground set out in the plaint. A plea for exclusion of the period of limitation on the ground of bona fide prosecution of the company petition, in the facts of the case, is not in derogation of the tenor of the plaint.

92 For the foregoing reasons, I am persuaded to hold that the Plaintiffs are entitled to the exclusion of the period spent in prosecuting the Company Petition No.539 of 2005 and the appeal thereagainst, being Appeal No.928 of 2006.

93. Thus, I am impelled to answer Issue No.2 in the affirmative.

94. **Issue Nos.3 to 6 :**

As the fate of all these issues hinges on a singular question as to whether the Plaintiffs were entitled to recover the named sum in accordance with Clause 18 of the Leave and Licence Agreement (extracted above), while retaining the security deposit, they are decided by a common reasoning.

95. Few facts deserve to be noted, at the cost of repetition. The term of licence expired on 15 August 2005. Before the expiry of the term of the licence, nay the execution of the renewal of licence in the year 1998, the head landlord had instituted a suit for eviction being RAE Suit No.147/A/306 of 1996 in the Court of Small Causes. The possession of the demised premises came to be delivered by the Defendant to the Plaintiffs on 25 November 2005, for all intent and purpose. I may hasten to add that the parties are at issue over the alleged delivery of possession in the month of March 2005 itself. At the heart of the controversy is the entitlement of the Plaintiffs to have the delivery of possession of the suit premises whilst the Defendant insisted for repayment of the security deposit.

96 Under clause 17 of the Leave and Licence Agreement, the licensor was obligated to return the security deposit on the licensee vacating the premises after adjustment of any dues under the Agreement. The Plaintiffs assert, they were entitled to withhold the security deposit on account of the institution of the suit by the head-landlord against the lessee and the Defendant for eviction on statutory grounds. The tenor of the defence is that under the terms of the Leave and Licence Agreement, the licensor had no such authority and, in any event, the supposed liability was contingent.

97. A reference to the documentary evidence in the wake of the controversy would be necessary. Vide communication dated 6 August 2004 (Exhibit P-1/4), the Plaintiffs called upon the Defendant to make necessary arrangement as the Leave and Licence Agreement was due to expire on 15 August 2004. The response of the Defendant dated 13 August 2004 (Exhibit P-1/5) is of significance. The Defendant stated that it desired to surrender the premises and handover possession thereof to the Plaintiffs. The Defendant called upon the Plaintiffs to convey time for handing over the possession, the representative to whom it was to be handed over and also confirm the return of the security deposit after deduction of last rental for the months of July and August 2004.

98. Vide communication of even date (Exhibit P-1/6) the Plaintiffs called upon the Defendant to handover possession on Tuesday, 17 August 2004 and named the representative who was authorized to accept the possession.

The response of the Plaintiffs to the demand of return of the security deposit is of critical salience. It reads as under :

“The Security Deposit will be refunded to your clients as soon as the pending suit filed by the owners M/s. Saidpur Jute Co. Ltd. Against our lessors M/s. MBK Enterprises and your clients is finally disposed off with no adverse orders being passed against said MBK Enterprises.”

99. The Plaintiffs went on to state that the said suit was instituted by the head landlord against the lessors on account of the extensive work carried out by the Defendant which the head landlord alleged to be additions and alterations of structural nature and, therefore, the security deposit could not be refunded till the said suit was finally disposed off with no adverse orders against the landlord. It was further added that in order to show the Plaintiffs bona fide, they were prepared to deposit the security deposit in escrow with a mutually agreed person of repute on mutually agreed terms.

100. It is pertinent to note that in the said communication itself, the Plaintiffs put the Defendant to notice that, in the event of default to surrender the demised premises, the Plaintiffs would be entitled to claim Rs.1 Lakh per day as provided in clause 18 of the Leave and Licence Agreement. Though a lengthy correspondence ensued thereafter between the Plaintiffs and Defendant, in my view, it would be superfluous to delve into the subsequent correspondence as the parties, by and large, stuck to the aforesaid rival stands.

101. Mr. Kapadia strenuously submitted that, under no circumstances, the Defendant had a right to hold on to the suit premises. It

was urged that Clause 17 of the Agreement which incorporated term of refund of security deposit, and Clause 18, which mandated the Defendant to handover possession of the demised premises on the termination of the licence, operated in different spheres.

102. Mr. Kapadia would submit that the absence of consequence of non-refund of the security deposit, in the Leave and Licence Agreement, is of decisive significance. Where the parties had explicitly provided that in no case the licensee shall continue to be in possession of the suit premises, post termination of licence by efflux of time or otherwise, the Defendant had no right to continue to occupy the demised premises, especially where the acts of the Defendant in carrying out extensive alterations in the demised premises gave rise to a suit for eviction by the landlord. Moreover, according to Mr. Kapadia, since the Plaintiffs had offered to deposit the amount in an escrow and also have a mediated settlement of the disputes, refusal to deliver possession of the demised premises was clearly in breach of the obligation under the Agreement.

103. Mr. Kapadia laid emphasis on the general nature of the security deposit and the clauses in the Leave and Licence Agreement, which permit the appropriation of the security deposit towards the amount due to be paid under the Agreement. It was urged that whether the Defendant-licencee incurred an obligation for deduction of the amount towards the damage to the suit premises could only be ascertained at the stage of the delivery of possession,

and, therefore, the Defendant could not have refused to deliver possession of the suit premises until the security deposit was refunded.

104. To bolster up this submission, Mr. Kapadia placed a strong reliance on a judgment of the Delhi High Court in the case of **Uberoisons (Machines) Ltd. V/s. Samtel Color Ltd.**²⁹ In the said case, the Delhi High Court considered the question whether a tenant could have retained possession of the premises without paying rent thereof on account of non-refund of security amount by the Plaintiff. Explaining the nature of the security deposit, a learned Single Judge of the Delhi High Court answered the aforesaid question in the following words :

“11. The security is paid to the landlord for the purpose of guarantee that no damage is done by the tenant nor any fixtures and fittings are removed and every landlord is entitled to use the security for repairing the damages done by the tenant. Though the security cannot be adjusted towards arrears of rent but in case the tenant hands over possession of the premises without any damage, the landlord has no right to retain the security. In such an event the landlord can be liable to pay the interest as any amount retained by the landlord unauthorisedly by way of security incurs liability of interest.

12. Now the question arises whether the tenant could have retained the possession of the premises without paying the rent thereof on account of non-refund of security amount by the plaintiff. The answer is emphatic ‘no’. The tenant has an independent remedy to recover the security but in no way can retain the possession of the premises on the plea that until and unless security is refunded, possession will not be handed over. Such a possession by the tenant is a possession for which he has to pay the rent as the premises could not have been put in use by the landlord nor have been let out by the

²⁹ 105 (2003) Delhi Law Times 383

plaintiff. No tenant can take the defense that he is entitled to retain the possession of the premises unless security amount is refunded to him. When there is an independent remedy to recover this amount, the retention of possession cannot be justified. In order to avoid the liability of rent, the tenant has the obligation to handover the possession. It is immaterial whether premises was put into use by the defendant/tenant or not. What is material was whether possession is retained by him or not.”

105. In opposition to this, Mr. Khandeparkar stoutly submitted that the moot question is of the justifiability of the cause ascribed by the Plaintiffs to withhold the security deposit. Laying emphasis on the fact that the Defendant had offered to deliver possession of the demised premises at the very moment of the expiry of the term of licence, Mr. Khandeparkar would urge that the Plaintiffs could not have withheld the security deposit for reasons which neither flowed from the terms of the contract nor were in the contemplation of the parties at any point of time.

106. Mr Khandeparkar would further urge that Clause 18 had no operation in a situation where the licence expired by efflux of time. In any event, according to Mr Khandeparkar, the licensee had a possessory lien for default in refund of the security deposit by the licensor. To this end, Mr. Khandeparkar placed reliance on a judgment of this Court in the case of Sumikin Bussan (Hong Kong) International Ltd. V/s. Manharlal Trikamdas Mody³⁰.

30 (2006) 4 Bom CR 131

107. The last two submissions of Mr. Khandeparkar do not detain the Court. From a plain reading of Clause 18 of the Agreement, it becomes abundantly clear that the parties had agreed that the licensee would vacate the suit premises upon the termination or earlier determination of the licence. Clause 18 is comprehensive enough to include the termination of the licence by efflux of time. It is not restricted to a case where the termination occurs before the expiry of the term of the licence, as was sought to be urged by Mr. Khandeparkar. The intent of the parties to put such a stringent term at the pain of compensation at a steep rate of Rs.1 Lakh per day is required to be appreciated in the light of the fact that the sub-lease in favour of the Plaintiffs was for a term of 9 and a half years only. This factor runs counter to the submission of Mr. Khandeparkar that the stipulation of payment of compensation for holding on to the suit premises was not attracted in the event of expiry of licence by efflux of time.

108. In the facts of the case at hand, reliance on the decision in the case of **Sumikin Bussan (Supra)**, is not of much assistance to the Defendant. In **Sumikin Bussan (supra)**, there was an express term in the Leave and Licence Agreement that in the event of the failure on the part of the licensor to return the security deposit, the licensee had a right to remain in the occupation of the licenced premises. Clause 28 of the Agreement therein, inter alia, provided that until the licensor refund the security deposit, the licensee shall be entitled to use and occupy the licenced premises without payment of licence

fee or compensation and such staying over would not constitute default by the licensee. It is in the face of such stipulation in the agreement, this Court held that the licensee therein was entitled to continue to use and occupy the licenced premises under clause 28 till the amount of the security deposit together with interest thereon was repaid. In the case at hand, there is no such stipulation.

109. The pivotal question which comes to the fore is whether the Plaintiffs were justified in withholding the refund of security for the reason which was articulated in the response dated 13 August 2004 (Exhibit P-1/6) extracted above. The stated reason was the pendency of the suit instituted by the landlord against the lessee – MBK Enterprises. The deposit was withheld with a contention that it would be refunded after the decision of the said suit with no adverse orders against the lessee. The tenor of the letter dated 13 August 2004 (Exhibit P-1/6) indicates that it was sought to be suggested that the action was initiated by the landlord against the lessee on account of the extensive work carried out by the Defendant which was alleged to be additions and alterations. This justification deserves to be tested.

110. It is imperative to note that the Plaintiffs did not categorically assert that the Defendant had carried out structural alterations. It was not the stand of the Plaintiffs manifested in the correspondence exchanged between the parties, immediately in the wake of the dispute, that the security deposit was withheld for such unauthorized additions and alterations and the resultant

damage to the suit premises. Nor was it the stand of the Plaintiffs that they were entitled to deduct the amount under clause 17 of the Leave and Licence Agreement, which permitted the deduction of the amounts which became payable under the said Agreement. The stated stand of the Plaintiffs was that it was the allegation of the landlord that there were additions and alterations of structural nature which entailed the consequence of forfeiture of tenancy.

111. The fact that the liability, towards the satisfaction of which the Plaintiffs professed to withhold the amount, was of contingent nature, even in the contemplation of the Plaintiffs, becomes abundantly clear from the letter dated 18 August 2004 (Exhibit P-1/8) wherein whilst asserting that the Defendant had carried out extensive work, it was stated that if the Court decides that the additions and alterations were illegal, the lessee would hold the Plaintiffs liable for the resultant loss and, therefore, they had no option but to fall back on the Defendant to cover the Plaintiffs for any such claim.

112. A communication addressed on behalf of the Plaintiffs on 13 September 2004, albeit without prejudice, also deserves notice. It was inter alia stated that the Defendant would observe that it was not the Plaintiffs who were then blaming the Defendant for major and/or structural changes and the Plaintiffs were only trying to safeguard their interest in case the Court holds the repairs carried out by the Defendant to be of structural nature.

113. The aforesaid stand of the Plaintiffs again underscores the contingent nature of the liability and the intent of the Plaintiffs to hold on the security deposit as a preemptive and insulatory measure.

114. At this juncture, the manner in which Mr. Sushil Gupta (P.W.1) fared in the cross examination assumes importance. To a pointed question as to when the Defendant was first informed that the security deposit furnished by the Defendant would be retained in view of the pendency of the suit instituted by the landlord, Mr. Sushil Gupta (P.W.1) declined to give a categorical answer. It was asserted that the security deposit was meant to address all situation including contingency which might arise on account of the institution of the suit by the landlord.

115. It would be contextually relevant to note that in the Written Statement filed on behalf of the Plaintiffs in RAE Suit No.147A/306/1996 instituted by the Landlord, the Plaintiffs (Defendants therein) categorically denied that structural alterations and additions had been carried out in the suit premises. Relevant parts of the Written Statement filed by the Defendants (Plaintiffs herein) in the said Suit read as under :

“12. With reference to para No.7 of the Plaint these Defendants deny that structural alterations and additions have been carried out in the suit premises to a large extent..... These Defendants deny that the identity of the suit premises has been changed as alleged or at all. These Defendants deny that any act which is contrary to the provisions of Section 108 of the Transfer of Property Act has been committed by them as alleged or at all.

13. These Defendants deny that structural alterations and additions were going on in the suit premises as alleged or at all.

14. With reference to para No.9 of the Plaint, these Defendants deny that they have violated the provisions of Bombay Rent Control Act by allowing the Defendant No.2 to use and occupy the suit premises. These Defendants deny that they have allowed the Defendant No.2 to carry out structural additions and alterations of a permanent nature as alleged or at all.....”

116. The aforesaid stand of the Plaintiffs continued even after the decree came to be passed in RAE Suit No.147A/306/1996. It is imperative to note that Mr. Sushil Gupta (P.W.1) went on to admit that in the appeal filed in the Court of Small Causes by the Plaintiffs against the decree passed in RAE Suit No.147A/306/1996, a ground was taken that the Defendant had not carried out any unauthorized additions and alterations of permanent nature and only permissible repairs and renovation were carried out. Mr Gupta attempted to wriggle out of the situation by asserting that the appeal memos were prepared on the advice of the Advocates.

117. The situation which thus obtains is that at the time of the expiry of the term of the licence, the Plaintiffs did not categorically allege that the Defendant had carried out unauthorized additions and alterations and, therefore, the Plaintiffs were entitled to hold on the security deposit. On the contrary, it was the stand of the Plaintiffs that the landlord was making such allegations. What impairs the cause of the Plaintiffs irredeemably is the stand in RAE Suit No.147A/306/1996 before the Court of Small Causes that no additions and alterations were carried out. Even after passing of the decree,

the Plaintiffs persisted with the said stand. This stand clearly militates against the stated reason for withholding the security deposit.

118. Mr. Kapadia made an endeavour to salvage the position by canvassing a submission that to protect the possession, the Plaintiffs were constrained to take such a stand in the eviction proceedings. I am afraid to accede to this submission. The pleaded case of the Plaintiffs in RAE Suit No.147A/306/1996, in a sense, works out retribution of the Plaintiffs claim that they were entitled to withhold the security deposit. Such pleadings dismantle the very substratum of the Plaintiffs case on which the refund of the security deposit was sought to be withheld.

119. Even otherwise, the inaction on the part of the Plaintiffs till the time for refund of the security deposit came, erodes the Plaintiffs case. Evidently, the suit was instituted by the landlord in the year 1996. The Renewal Agreement came to be executed on 1 August 1998. Had it been the case that the Plaintiffs took umbrage at the alleged unauthorized additions and alterations and the institution of the suit by the head landlord on the said ground, a stipulation to that effect could have been provided in the Renewal Agreement dated 1 August 1998. It does not appear that the Plaintiffs had raised the issue of the alleged unauthorized additions and alterations till the expiry of the term of licence, though the head landlord had instituted the suit much prior to the expiry of the licence by efflux of time. This inaction on the part of the Plaintiffs for more than six years, cannot be simply brushed aside as

inconsequential. All these factors bear upon the justifiability of the Plaintiffs claim to withhold the security deposit.

120. A finding on the justifiability of the Plaintiffs claim to withhold the security deposit bears upon the obligation of the Defendant to deliver possession of the demised premises under Clause 18 of the Agreement. I find it difficult to agree with the submission of Mr. Kapadia that Clauses 17 and 18 operate in water-tight compartments. It is imperative to note that on 13 August 2004 itself, the Defendant had categorically informed that it was willing to handover possession of the demised premises. Under Clause 17, it was an obligation of the licensor to refund the security deposit simultaneous with the delivery of possession.

121. From this standpoint, it cannot be urged that there was no connection between the refund of the security deposit and the delivery of possession. The Defendant, in the circumstances of the case, was justified in insisting for the refund of the security deposit. It was not the case that the Plaintiffs professed to withhold the security deposit under any of the clauses of the Leave and Licence Agreement. If the agreement is considered as a whole, clauses 17 and 18 of the agreement, in a sense, incorporated reciprocal obligations. The obligation of the Plaintiffs to return the security deposit was then clear and present. The Plaintiffs were enjoined to refund the security deposit simultaneous with the delivery of possession. In contrast, the liability, on the strength of which the Plaintiffs professed to withhold the security

deposit, on the own showing of the Plaintiffs, was contingent. Thus, on account of the non-performance of the obligation to refund the security deposit, when the Defendant had shown willingness to deliver the possession, the Plaintiffs disentitled themselves from enforcing the obligation of the Defendant under Clause 18 of the Agreement.

122. Reliance by Mr. Kapadia on the judgment of the Delhi High Court in the case of Uberoisons (Machines) Ltd. (supra) does not seem to advance the case of the Plaintiffs. In the said case, the Delhi High Court held that the tenant who had not been refunded the security deposit, was not entitled to occupy the demised premises without payment of rent. In the case at hand, what the Plaintiffs seek to enforce is the liability to pay the damages for holding on to the suit premises whilst contesting its liability to refund the security deposit on a ground which is shown to be contentious by the Plaintiffs own pleadings.

123. I am, therefore, impelled to hold that the Defendant cannot be said to have committed breach of the terms of the Leave and Licence Agreement. Resultantly, Issue No.3 is required to be answered in the negative.

124. Though in view of the breach of obligation on the part of the Plaintiffs to refund the security deposit, the Defendant was justified in not handing over vacant possession, yet the Defendant was liable to pay the licence fee. It is indisputable that no part of the security deposit was refunded by the

Plaintiffs and eventually the amount came to be adjusted towards the licence fee. Hence, issue No.4 is required to be answered partly in the affirmative.

125. Consequently, issue Nos.5 and 6 are required to be answered in the negative.

126. The upshot of aforesaid reasons and findings is that the suit fails. However, having regard to the facts of the case, in my view, it would be appropriate to direct the parties to bear their respective costs.

127. Hence, the following order.

: O r d e r :

- (i) The Suit stands dismissed.
- (ii) In the circumstances of the case, the parties shall bear their respective costs.
- (iii) Decree be drawn accordingly.

[N. J. JAMADAR, J.]