IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 264 OF 2021

Food Corporation of India
A Government of India Undertaking
having its office at 16/20,
Khadya Sadanm Barakhamba Rd,
New Delhi 100 011
and having its regional office on
4th floor, Mistry Bhavan,
Dinshaw Vacha Road,
Mumbai 400 020,
currently having its regional office
at 5th floor, Dattapada Road,
Rajendra Nagar, Borivali (East),
Mumbai 400 066. ..Applicant
(Org. Defendant)

v/s.

Lachax Commercial & Company
a partnership firm duly registered
under the Partnership Act, 1932
having its office at 5th floor,
Mistry Bhavan, Churchgate,
Mumbai 400 020 ..Respondents

Food Corporation of India
A Government of India Undertaking
having its office at 16/20,
Khadya Sadanm Barakhamba Rd,
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and having its regional office on
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Mumbai 400 020,
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Mumbai 400 066. ..Applicant
(Org. Defendant)

v/s.

Lachax Commercial & Company
a partnership firm duly registered
under the Partnership Act, 1932
having its office at 5th floor,
Mistry Bhavan, Churchgate,
Mumbai 400 020 ..Respondents

WITH
CIVIL REVISION APPLICATION NO. 265 OF 2021

Food Corporation of India
A Government of India Undertaking
having its office at 16/20,
Khadya Sadanm Barakhamba Rd,
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and having its regional office on
4th floor, Mistry Bhavan,
Dinshaw Vacha Road,
Mumbai 400 020,
currently having its regional office
at 5th floor, Dattapada Road,
Rajendra Nagar, Borivali (East),
Mumbai 400 066. ..Applicant
(Org. Defendant)

v/s.

Lateshkumar & Company
A partnership firm duly registered
under the Partnership Act, 1932
having its registered office at
5th floor, Mistry Bhavan,
Churchgate, Mumbai 400 020 ..Respondents
(org. Plaintiffs)

WITH
INTERIM APPLICATION NO. 2114 OF 2022
in
CIVIL REVISION APPLICATION NO. 265 OF 2021

Food Corporation of India
A Government of India Undertaking
having its office at 16/20,
Khadya Sadanm Barakhamba Rd,

New Delhi 100 011
and having its regional office on
4th floor, Mistry Bhavan,
Dinshaw Vacha Road,
Mumbai 400 020,
currently having its regional office
at 5th floor, Dattapada Road,
Rajendra Nagar, Borivali (East),
Mumbai 400 066. ..Applicant
(Org. Defendant)

v/s.

Lateshkumar & Company
A partnership firm duly registered
under the Partnership Act, 1932
having its registered office at
5th floor, Mistry Bhavan,
Churchgate, Mumbai 400 020 ..Respondents
(org. Plaintiffs)

WITH
CIVIL REVISION APPLICATION NO. 266 OF 2021

Food Corporation of India
A Government of India Undertaking
having its office at 16/20,
Khadya Sadanm Barakhamba Rd,
New Delhi 100 011
and having its regional office on
4th floor, Mistry Bhavan,
Dinshaw Vacha Road,
Mumbai 400 020,
currently having its regional office
at 5th floor, Dattapada Road,
Rajendra Nagar, Borivali (East),
Mumbai 400 066. ..Applicant
(Org. Defendant)

v/s.

Kartik Enterprises
A partnership firm duly registered
under the Partnership Act, 1932
having its registered office at
5th floor, Mistry Bhavan,

Churchgate, Mumbai 400 020 ..Respondents

WITH
INTERIM APPLICATION NO. 2115 Of 2022
in
CIVIL REVISION APPLICATION NO. 266 OF 2021

Food Corporation of India
A Government of India Undertaking
having its office at 16/20,
Khadya Sadanm Barakhamba Rd,
New Delhi 100 011
and having its regional office on
4th floor, Mistry Bhavan,
Dinshaw Vacha Road,
Mumbai 400 020,
currently having its regional office
at 5th floor, Dattapada Road,
Rajendra Nagar, Borivali (East),
Mumbai 400 066. ..Applicant
(Org. Defendant)

v/s.

Kartik Enterprises
A partnership firm duly registered
under the Partnership Act, 1932
having its registered office at
5th floor, Mistry Bhavan,
Churchgate, Mumbai 400 020 ..Respondents

WITH
CIVIL REVISION APPLICATION NO. 40 OF 2022

Kartik Enterprises
A partnership firm duly registered
under the Partnership Act, 1932
having its registered office at
5th floor, Mistry Bhavan,
Churchgate, Mumbai 400 020 ..Applicant

v/s.

Food Corporation of India
A Government of India Undertaking

having its office at 16/20,
Khadya Sadanm Barakhamba Rd,
New Delhi 100 011
and having its regional office on
4th floor, Mistry Bhavan,
Dinshaw Vacha Road,
Mumbai 400 020,
currently having its regional office
at 5th floor, Dattapada Road,
Rajendra Nagar, Borivali (East),
Mumbai 400 066. ..Respondent
(Org. Defendant)

WITH
CIVIL REVISION APPLICATION NO. 11 OF 2022

Lateshkumar & Company
a partnership firm duly registered
under Partnership Act, 1932
having its office at 5th floor,
Mistry Bhavan, Churchgate
Mumbai 400 020 ..Applicant
(Org. Plaintiff)

v/s.

Food Corporation of India
A Government of India Undertaking
having its office at 16/20,
Khadya Sadanm Barakhamba Rd,
New Delhi 100 011
and having its regional office on
4th floor, Mistry Bhavan,
Dinshaw Vacha Road,
Mumbai 400 020,
currently having its regional office
at 5th floor, Dattapada Road,
Rajendra Nagar, Borivali (East),
Mumbai 400 066. ..Respondents
(Org. Defendant)

WITH
CIVIL REVISION APPLICATION NO. 12 OF 2022

Lachax Commercial & Company

a partnership firm duly registered
under the Partnership Act, 1932
having its office at 5th floor,
Mistry Bhavan, Churchgate,
Mumbai 400 020 ..Applicant

v/s.

Food Corporation of India
A Government of India Undertaking
having its office at 16/20,
Khadya Sadanm Barakhamba Rd,
New Delhi 100 011
and having its regional office on
4th floor, Mistry Bhavan,
Dinshaw Vacha Road,
Mumbai 400 020,
currently having its regional office
at 5th floor, Dattapada Road,
Rajendra Nagar, Borivali (East),
Mumbai 400 066. ..Respondent
(Org. Defendant)

Mr. Atul Damle, Sr. Advocate i/b. Hafeezur Rehman for the Applicant in CRA 264 of 2021, 265 of 2021 and 266 of 2021 and for the Respondent in CRA 11 of 2022, CRA 12 of 2022 and CRA 40 of 2022.

Mr. Girish Godbole Sr. Advocate a/w. Ms. Heena Shaikh , Mr. Rakesh Singh, Mr. Santosh Singh for the Applicant in CRA 11 of 2022, CRA 12 of 2022 and CRA 40 of 2022 and for the Respondent in CRA 264 of 2021, CRA 265 of 2021 and CRA 266 of 2021

CORAM : ANUJA PRABHUDESSAI,J.
DATED : 2nd FEBRUARY, 2024.

JUDGMENT.

. These Civil Revision Applications challenge judgment and orders dated 22.09.2021, in Misc. Appeal Nos. 421 of 2019, 422 of 2019 and 423 of 2019, passed by the Appellate Bench of Small Causes Court, Mumbai. By the impugned judgment, the Appellate Bench reduced the mense profit from Rs.150/- to Rs. 115/- per sq. ft. and Rs.95/- per sq. ft. in respect of the premises situated on the second, third and fourth floor of Mistry Bhavan, Dinshaw Vaccha Road, Mumbai.

2. The applicants in Civil Revision Application 11 of 2022, 12 of 2022 and 40 of 2021 were the plaintiffs and the Food Corporation of India, i.e. the applicant in CRA Nos. 265 of 2021, 264 of 2021 and 266 of 2021 was the defendant in TE&R Suit Nos. 297/212 of 2001, 315/331 of 2001 and 298/313 of 2001, filed before Small Causes Court, Mumbai, and shall be hereinafter referred to as the plaintiffs and the defendant respectively.

3. The subject matter of Civil Revision Application No. 265 of 2021 with Civil Revision Application No. 11 of 2022 is the premises admeasuring 7357 sq. ft. situated on the second floor, subject matter of Civil Revision Application No. 264 of 2021,with Civil Revision Application No. 12 of 2022 is the premises admeasuring 7357 sq. ft. situated on the third floor, whereas, the subject matter of Civil Revision Application No.266 of 2021 with Civil Revision Application No. 40 of 2021 is premises admeasuring 6011.75 sq. ft on the fourth floor of Mistry Bhavan, Dinshaw Vaccha Road, Mumbai. The said premises shall be hereinafter referred to as the suit premises.

4. The brief facts necessary to decide these revision applications are as under:

The building Mistry Bhavan was constructed by Fakir Mohd. Karim Mistry and Rahim Karim Mistry. The second, thrid and fourth floor of the said building was rented to Jaydeep Trading Company, Chetan Trading Company and M/s. Tushar Trading Company. These three tenants by agreement dated 9.9.1969, put the defendant Food Corporation of India in possession of the premises on license basis. Subsequently, between 31.5.1972 to 30.5.1975 these three tenants assigned the tenancy rights in favour of the plaintiffs herein. By notice dated 9.5.2001, the plaintiffs called upon the defendant Food Corporation of India, to vacate the suit premises. The defendant having failed to vacate the premises, the plaintiffs filed eviction suits, on 30.05.2001, which came to be decreed on 03/04.05.2005. The defendant FCI was directed to hand over possession of the suit premises and separate inquiry was ordered into mesne profit under Order 20 Rule 12 of the CPC. The eviction decree was confirmed by the Appellate Bench of the Small Causes Court on 30.10.2017. During the interregnum period i.e. on 9.2.2006, the defendant Food Corporation vacated the premises and handed over possession of the same to the plaintiffs.

5. The plaintiffs filed applications for mesne profit on 2.1.2009. The

plaintiffs examined PW1-Sham Gajaria, P.W.2 Architect- S.P.Rao, and PW3 -Suryakant Shroff, the legal Officer of HDFC. The defendant examined DW1 -Sudhir Namdeo Gaokar, DW2 – Jayprakash Balkrishna, Deputy General Manager of the defendant, DW3- Achyut Damkondwar- Manager of Central Bank, DW4- Sunil Yetalkar- Asst. Manager of MTDC, and DW5 Sumeysh Krishnan- Officer of the Defendant. The trial Court relied upon the report of the Architect PW2 S.P.Rao and determined the mesne profit at the rate of Rs.150/- per sq. ft. with interest @ 6% from 9.5.2000 to 9.2.2006. These orders were challenged by the defendant Food Corporation in Misc. Civil Appeals filed before the Appellate Bench of the Small Causes Court, Mumbai. The defendant had also filed an application under Order 41 Rule 27 seeking leave to produce guidelines issued by Bombay Municipal Corporation fixing the annual rental value for the assessment of taxes. The Appellate Court dismissed the said application on the ground that the said guidelines relate to assessment of property tax and calculation of rateable value of the property and the same is not relevant to determine the 'mesne profit' which under the definition means the profits which a person in wrongful possession of the property actually derives.

6. The Appellate Court rejected the contention of the defendant that the possession pendent lite from 09.05.2000 to 09.02.2006 was permissive and that the plaintiffs are entitled to claim fair rent during the

said period. The Appellate Court rejected the objection regarding the starting point and held that the starting point for claiming compensation was 01.07.2000 i.e., the date on which the defendant was to handover vacant possession as per the eviction notice. The Appellate Court also rejected the contention that the application for mesne profit was barred by limitation on the ground that the appeal against the eviction decree was pending as on the date of filing of the application. Relying upon the judgment of this Court in ***UCO Bank v/s. Asaram 2017 (2) All.MR. 92***, the Appellate Bench rejected the contention of the defendant that the plaintiff was not entitled for mesne profits for more than three years.

7. On merits of the matter, the Appellate Bench held that the defendant had not questioned the condition of the suit premises and the building and hence, refused to give due credence to the evidence of Sudhir Gaonkar – DW1 and Sumeysh Krishnan – DW5, the employees of the defendant, who were examined to prove that the suit premises were not in good condition. The Appellate Bench also declined to rely upon the evidence of Chaitrakal Balkrishnan, the Deputy Manager of the defendant and Achut Damkondwar, Manager of Central Bank of India, who were examined to prove that as per the agreement between Kasturi and Sons and Central Bank of India, the prevalent rate of the premises in the area at Churchgate was between 35 to 42 per sq. feet. The Appellate Court observed that the said agreement was between an old lessor and

the lessee to continue lawful possession of the lessee and that the same cannot be the basis for calculating the mesne profits of the suit premises. The defendant had relied upon leave and license agreement dated 19.09.2017 whereunder the MTDC had taken the premises on leave and license basis for consideration of Rs.155/- per sq. feet per month. The Appellate Court held that the said agreement dated 19.09.2017 is not relevant to determine the mesne profit of the year 2000.

8. The Appellate Court observed that PW2 – Architect S.P. Rao viz-a-viz the report at Exhibit – 57 indicates that the license fees referred to in the instances relied upon by him include interest component. The Appellate Court also observed that the suit premises are situated on the second, third and fourth floor of the building. It is held that the commercial premises on the ground floor, have direct approach and fetch higher price as compared to the commercial premises on the higher floors. Hence, upon excluding the interest component and deducting 20% in respect of the premises situated on the second and third floor and 33% in respect of the premises situated on the 4^{th} floor, the Appellate Court determined the mesne profit at Rs.115/- per sq. feet in respect of the premises on the second and third floor and Rs.95/- per sq. feet in respect of the premises situated on the fourth floor. The orders passed by the Appellate Bench in the above appeals are assailed by the plaintiffs as well as the defendant.

9. The defendant has filed an interim application to take on record Valuation Report dated 28.02.2022 prepared by Architect – Roma Bajaj. It is sought to be contended that the defendant has now come across a leave and license agreement dated 01.12.2007 whereby the suit premises on the fourth floor, are given on rent to HDFC at Rs.115000/- per month. It is contended that the said agreement proves that the prevalent rate was Rs.16/- per sq. feet. It is stated that the report is relevant to decide the issue.

10. It is well settled that additional evidence under Order XL1 Rule 27 is permitted only under three circumstances i.e. (i) improper refusal of evidence by trial Court (ii) non-availability of evidence despite exercise of due diligence, (iii) requirement of additional evidence by the Appellate Court to pronounce judgment, (iv) for any other substantial cause. In ***Union of India vs. Abrahimuddin & Anr. (2012) 8 SCC 148*** the Apex Court has observed that an application for taking additional evidence cannot be filed as a matter of right. The Court can consider such an application with circumspection, provided it is covered under either of the pre-requisite conditions incorporated in the statutory provisions itself.

11. In the instant case, the application for mesne profit was filed on

02.01.2009 and the same was decided on 11.04.2019. The appeal against the said order, filed in the year 2019, was decided in the year 2021. The revision applications against the said order were filed in the year 2021 and the application under order XLI Rule 27, seeking leave to produce valuation report and a leave and license agreement dated 22.02.2007, has been filed in the year 2022. The defendant has not assigned any reason for not relying upon the evidence of the valuer as well as the Valuation Report before the trial Court or the Appellate Court. Similarly, no reasons have been assigned for not producing the leave and license agreement dated 01.12.2007 before the Trial Court and the Appellate Bench, though the said document was available as on the date the proceedings were pending before these two authorities.

12. It is also to be noted that the defendant has not sought to amend the written statement and to bring on record the facts relating to the leave and license agreement dated 01.12.2007. Moreover, the defendant has also not referred to the supplementary agreement dated 22.02.2007 executed by HDFC which shows payment of Rs.13,70,000/- per month. In such circumstances, the leave and license agreement is not relevant to decide the issue and no case is made out for production of additional evidence. Hence, the Interim Applications stand dismissed.

13. Now, coming to the merits of the matter, learned Counsel for the

defendant contends that the plaintiff had no locus to file the application for mesne profit. It is pertinent to note that the suit for eviction was also filed by the plaintiff. The issue of locus standi was raised in the suit and the trial Court as well as the Appellate Court has answered the said issue against the defendant. It is contended that the said findings are challenged before this Court and that the revisions are pending. Needless to state that mere pendency of the proceedings before the Appellate or Revisional Court would not nullify the findings and the conclusion arrived by the trial Court, unless and until such findings are set aside, modified or reversed. Hence, the challenge to locus standi of the plaintiff cannot be countenanced.

14. Learned Counsel for the defendant has also raised the issue of limitation on the touch stone of Article 51 of the Limitation Act. In this regard, it is relevant to refer to Rule 12 of Order XX of CPC, as amended with effect from 01.10.1983 reads thus:

> " 12. Decree for possession and mesne profits -(1) Where a suit is for recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree-
>
> (a) for the possession of the property;
>
> (b) for the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit, or directing an inquiry to such rent or mesne profits;

> (c) directing an inquiry as to rent or mesne profits from the institution of the suit until-
>
> (i) the delivery of the possession to the decree-holder, or
>
> (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court.
>
> (2) Where an enquiry is directed under clause (b) or clause (c) of sub-rule(1) above, a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry”

15. Order 20 Rule 12 CPC deals with the decree to be passed in a suit for possession of immovable property and rent or mesne profit, passed in future against a person in possession of such property. Rule 12(1)(b) enables the Court to pass a decree for the rent which have been accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profit. Whereas clause (c) enables the court to direct an enquiry to rent or mesne profit from the institution of the suit until (i) the delivery of possession to the decree holder or (ii) the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court. Sub rule 2 of Rule 12 stipulates that where an inquiry is directed under clause (b) or (c) of sub rule 1 a final decree in respect of the mesne profit shall be passed in accordance with the result of such inquiry.

16. The object of Order XX Rule 12 of CPC, which enables the Court to pass a decree for past and future mesne profit is to avoid the multiplicity of suit. The judgment directing an inquiry as to the mesne profit until the delivery of possession, partakes the character of a preliminary decree, which after enquiry under Order XX Rule 20 CPC has to be followed by a final decree for mesne profit to be passed in the same suit and not by way of an independent suit.

17. In ***Shankar Appaji Patil vs. Gangaram Bapuji Nagude AIR 1928 Bom 236***, the Division Bench of this Court has held that Order XX Rule 12 CPC does not provide for any application to be made for ascertainment of mesne profits. It is held that ascertainment of mesne profits is a proceeding in the suit and it is the duty of the Court to pass a final decree in accordance with the inquiry as laid down in Order XX Rule 12 and it is not within the power of trial Court to decline to exercise the jurisdiction and to dismiss the application on the ground of limitation. The contention that the suit is barred by limitation is liable to be rejected in view of the above enunciation of law.

18. Be that as it may, while considering a similar issue in ***Central Bank of India vs. Anil Puranmal Bansal 2016 (3) Mh.L.J. 774***, the learned Single Judge of this Court, and upon considering the scope of

Article 51 and 113 of the Limitation Act has observed that :

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

19. Reliance is also placed on the decision of the Apex Court in ***Indian Oil Corporation Ltd. vs. Sudera Reality Pvt. Ltd., AIR 2022 SC 5077,*** wherein it is held that

> *"Article 51 contemplates a period of three years from the date on which the profits from the immovable property is received by the defendant. It is to be understood as profits actually received by the defendant then, it is obvious that Article 51 may not apply. It a suit for mesne profits of the kind involved in this case would fall more appropriately under Article 113 of the Limitation Act, which is the residuary Article, the suit must be instituted within a period of three years from the date on which the right to sue accrues. This Article is in stark contrast with Article 58 of the Limitation Act, under which the period of limitation is three years but from the date on which the cause of action first arises. If a claim for mesne profit is one, which accrues from day to day and it is continuous one and if the suit for mesne profit would fall to be decided under Article 113 of the Limitation Act, then since the cause of action is continuing one, the suit may not be barred as regards any part of the claim as contended by the appellant."*

20. In the instant case, the suit for eviction was decreed on 4.5.2006 directing the defendant to hand over possession of the suit property with further directions of inquiry into mesne profit under Order XX Rule 12 of CPC. It is a matter of fact that the defendant had challenged the said judgment before the Appellate Bench. Resultantly, the subject matter of the lis had not attained finality. The plaintiff had filed the application for mesne profit during the pendency of the appeal, which is nothing but a continuation of suit. Consequently, the date of decree in the suit for eviction cannot be construed as the cause of action or the date of accrual of right to sue. Even otherwise, under Article 113 of the Limitation Act, the period of limitation is three years from the date the right to sue accrues and the cause of action, in the suit for mesne profit being continuous one , the suit was not barred by limitation.

21. It is contended that mesne profit can be granted only for three years preceeding the application for mesne profit. Rule 12 CPC as amended by the Bombay High Court by way of CPC (amendment) Act 104 of 1976 w.e.f. 1.2.1977, there is no restriction of three years. This aspect has been considered in UCO Bank (supra).

22. Learned Counsel for the defendant contends that the amount/mesne profit determined by the trial Court and the Appellate Bench is arbitrary and excessive, whereas the plaintiff has challenged

reduction of the amount determined by the trial Court. Before adverting to the merits of the matter, it would be relevant to refer to the definition of mesne profit as defined under Section 2 (12) of the Civil Procedure Code, which reads thus :-

> *" Mesne profit of property means those profits which the person in wrongful possession of the property actually received or might with ordinary diligence had received therefrom, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession. "*

23. In ***Humayun Dhanrajgir & Ors. vs. Ezra Aboody (2008), SCC Online Bom. 420*** this Court has summarized the methods of valuation as under:

> "32. Having taken survey of the various cases and methods of valuation, it can be broadly summarized as under :-
>
> (i) The claim for 'Mesne Profit' remains floating till the decree of possession is passed in favour of the plaintiff, which can also be termed as royalty;
>
> (ii) The measure of *Mesne Profits* is the value for the use of the premises and not necessarily the value of the property;
>
> (iii) Value of use will be determined by :-
>
> (a) What that value will be in the hands of the person in

wrongful possession;

(b) Comparables, if available and applicable in real sense;

(c) Finding out the prevailing rate of rental at which the wrongful person ought to have found equivalent accommodation."

24. In ***M/s. Martin & Harris Private Limited and Anr. v/s. Rajendra Mehta and Ors. (2022) 8 SCC 527*** the Apex Court has observed that the basis of determination on the amount of mesne profits depends on the facts and circumstances of each case considering the place where the property is situated i.e., village or city or metropolitan city, location, nature of premises i.e., commercial or residential and the rate of rent precedent on which the premises can be let out are the guiding factors in the facts of each case.

25. Reverting to the facts of the case, it is not in dispute that the building Mistry Bhavan is a multi storeyed building with ground + 6 upper floors abutting Dinshaw Waccha Road. The evidence of PW1 reveals that the said building has RCC frame structure with standard drainage, plumbing and electronic installation. It has car parking space and under ground water tank, and has amenity of two lifts. The evidence of PW1 as well as PW2 indicates that Mistry Bhavan is a

commercial premises, situated at Churchgate, Mumbai, which is a commercial zone with great demand. The evidence of PW1 and PW2-Architect - S.P.Rao vis-a-vis the valuation report reveals that all public amenities such as transport, schools, colleges, hospitals, Oval maidan, railway station and several other prestigious buildings are available in the close proximity of the suit premises. There is no serious dispute regarding the location of the building and the amenities available in the close proximity of the building.

26. The trial Court as well as the Appellate Court have determined the mesne profit on the basis of the report of PW2- Architect S.P.Rao. The evidence of PW2 indicates that he had inspected the premises and computed the mesne profit on the basis of comparative instances. One of such instances is the leave & license agreement dt.29.02.2000 in respect of the premises in the very same building. By the said agreement the Gajaria Family Trust had let out the premises admeasuring 3937 sq. ft. in favour of HDFC for their office use on payment of license fees of Rs.3,93,700/- per month i.e. at the rate of Rs.100/- per sq. ft. The water charges were to be borne by the licensee, who was also required to pay an amount of Rs.23,62,200/- towards license fee of six months as advance. PW2 has deposed that simultaneously, the parties had entered into another agreement whereunder the licensee was required to pay an additional monthly compensation of Rs.1,57,480/- i.e. at the rate of

Rs.40/- per sq. ft. Thus the licensor was to receive amount of Rs.140/- per sq. ft. of the built up area towards license fees/compensation. PW2 has observed that the licensor would have earned Rs. 6.82 per sq. ft. towards interest on the six months deposit of Rs.23,62,200/- at the rate of 9.75% per anum. On the aforesaid basis PW2 has determined the mesne profit at Rs.150/- per sq. ft. of the actual carpet area of 7740 per sq. ft.

27. As noted above, mesne profit is the profit which the person in wrongful possession of the property has earned or would with due diligence have earned during the period of such occupation. Hence the Court was required to determine the profit that the plaintiff would reasonably have earned from the property using ordinary diligence. Such determination is normally made on the basis of the rent received from a property, which is more or less of the same description, situated in the same building or in the same locality and let out during the relevant period.

28. In the instant case, the Appellate Court has fixed the mesne profit on the basis of a leave and license agreement of the premises let out to the HDFC. The leave and license agreement in favour of HDFC, is in respect of the premises in the very same building, having similar amenities and facilities as available in the suit premises. Hence, the said

leave and license agreement, which gives a fair indication of the profit which a person in wrongful occupation of the subject premises would have earned, is the best piece of evidence to determine the mesne profit in respect of the suit premises.

29. The monthly license fee payable under the said leave and license agreement dt. 29.02.2000 was Rs.100/- per sq. ft. in addition an amount of Rs.40/- per sq. ft. was paid as compensation for facilities and amenities. Thus under the said agreement, the licensor received total amount of Rs.140/- per sq. ft. for an area of 3937 sq. ft. PW2- Arch. S.P. Rao added an amount to Rs.6.82 towards the monthly interest on Rs.23,62,200/- being advance rent of six months and held that the licensee paid an amount of Rs.146.82 per sq.ft. per month in respect of built up area, which he rounded up the said figure to Rs.150 per sq.ft.

30. The Trial Court fixed the mesne profit at the rate of Rs.150 per sq.ft. However, the Appellate Court excluded the interest amount on advance and further deducted 20% and 33% from an amount of Rs.140 per sq.ft. in view of advantageous location of HDFC premises. Deduction of interest on amount on advance rent cannot be faulted with as the advance is normally paid as security deposit which is liable to be refunded on surrender or termination of tenancy.

31. As regards deduction of 20 and 30%, it on record that the premises let out to HDFC are situated on the first floor, whereas the suit premises are on the second, third and fourth floor of the building. It is well known that unlike residential premises, the commercial premises on lower floors fetch higher price/ rentals as compared to the premises on the higher floors for variety of reasons, including accessibility, visibility, and other factors which are important to attract more customers. Considering this aspect, it can be very well inferred that the premises let out to HDFC are more advantageously located compared to the suit premises.Furthermore, it is in evidence that Mistry Bhavan is a multi storeyed building having only two lifts, which as stated by DW1 Sudhir Gaokar were sometimes not in working condition. In such circumstances, the deduction is not unreasonable, though the rate of deduction appears to be on higher side.

32. It is pertinent to note that the area of the suit premises on the second and third floor is 7357 sq. ft, and on the fourth floor is 6011.75 sq. ft. whereas, the area of the premises let out to HDFC is 3937 sq. ft. It is thus evident that the suit premises are much bigger in size as compared to the premises leased to HDFC. The evidence of PW2 clearly indicates that the rate of the rent varies with the size of the premises. He has deposed that the rent is high when the area is small and conversely the rent is low when the area is large. Considering the

difference in area of the suit premises vis-a-vis the premises let out to HDFC and going by the statement of PW2, the rent in respect of the suit premises ought to be lower than the rent in respect of the premises let out to HDFC. The trial Court as well as the Appellate Court has not considered this factor while determining the mesne profit on the basis of the leave and license agreement in favour of HDFC.

33. The agreement in favour of HDFC reveals that the monthly license fee in respect of the HDFC premises admeasuring Rs.3937 sq. ft., situated on the first floor of the same building was Rs.140/- per sq. ft. and the suit premises are situated on the second, third and fourth floor of the same building and are much bigger in size. Hence, deducting 15% towards disadvantageous location and 10% towards the difference in area the mesne profit in respect of the suit premises situated on the second and third floor is fixed at Rs.105/- per sq. ft. Similarly, deducting 25% towards disadvantageous location and 10% towards difference in area, the mesne profit in respect of the premises on the fourth floor is fixed at Rs.91/- per sq. ft.

32. The order of the Appellate Court stands modified accordingly. It is stated that the revision application sfiled against the eviction decree are pending before this Court. Hence, the order of payment of mesne profit shall be subject to the final outcome of the said proceedings and

the plaintiffs shall be liable to refund the said amount with interest in the event it is held that termination of notice was illegal and the decree of eviction is set aside.

. Revision Applications as well as the Interim Applications stand disposed in above terms.

(ANUJA PRABHUDESSAI, J.)