Lucy Kochuvareed vs P. Mariappa Gounder And Ors. on 7 February, 1979

Equivalent citations: AIR1979SC1214A, (1979)3SCC150, [1979]3SCR58, AIR 1979 SUPREME COURT 1214, 1978 (3) SCC 150, (1979) 2 MAHLR 229, 1979 3 MAH LR 229, 1979 3 SCC 150

Bench: R.S. Sarkaria, V.D. Tulzapurkar, A.P. Sen

JUDGMENT

Sarkaria, J.

1. These two appeals on certificate arise out of execution petition No. 118 of 1962 on the file of the Subordinate Judge, Trichur, filed by P. Meriappa Gounder (hereinafter referred to as the plaintiff) to execute the decree of the Supreme Court in C.A. 129/56 passed on April 22, 1958. The common facts, out of which these appeals arise, are as follows:

2. The plaintiff filed a suit on August 23, 1950 in the District Court, Trichur, for specific performance of an agreement, dated May 22, 1950, made by Soliappa Chettiar (hereinafter referred to as defendant 1) to sell a factory known as "Sivakami Tiles Works", for a consideration of Rs. 90,003/-. The plaintiff made an advance payment on that very date of a sum of Rs. 5,003/- to defendant 1. It was stipulated in the agreement that the sale deed must be executed and registered on or before July 15, 1950. It was further provided that out of the balance of sale consideration, Rs. 50,000/- would be paid by the plaintiff at the time of the registration and for the remaining Rs. 35,000/-, the plaintiff was to execute a mortgage of the suit property to be redeemed on or before May 31, 1951. It was further agreed that on payment of Rs. 50,000/- at the time of registration, the plaintiff would be put in possession of the suit property. The plaintiff pleaded that he was ready and willing to perform his part of the agreement, but came to know that defendant 1 was trying to evade his obligation under the agreement. Accordingly, the plaintiff sent a registered notice, dated July 7, 1950, through his lawyer to defendant 1, to which the latter replied the same day, that the factory was in possession of one Neelakanta Iyer as lessee, who had refused to give up possession and therefore, it had become impossible to give effect to the agreement to sell the factory, as giving possession to the plaintiff was a condition precedent to the execution of the sale deed. The plaintiff further pleaded that the suit property was really in possession of defendant 1 and the alleged lease in favour of Neelakanta Iyer was a sham transaction and a device to evade payment of income tax and hence defendant 1 was bound to carry out the terms of the agreement to sell.

3. The suit was contested by defendant 1 (who originally was the sole defendant). His case was that, although there was an agreement to sell the suit property, it had been made clear at the time when

negotiation for sale was going on, that the factory was in the possession of Neelakanta Iyer as lessee and that it was a condition precedent to the sale that Neelakanta Iyer would surrender his right under the lease and give up possession and that if he refused to do so, the agreement to sell would not be given effect to. The defendant urged Neelakanta Iyer to surrender the possession, but he refused to do so. In the circumstances, the contract for sale had become incapable of performance. He denied that the lease in favour of Neelakanta was a sham transaction.

4. Pending the suit, T.V. Kochivareed (the deceased husband of the appellant, Lucy Kochivareed in C.A. 466/69) obtained an assignment of the lease (Ex. D-3) from Neelakanta Iyer on March 5, 1951. Since Kochivareed was later on, when the suit was pending in the Supreme Court impleaded as defendant 3, for the sake of convenience the appellant in C.A. 466/69, will hereinafter be referred to as defendant 3.

5. On March 8, 1951, defendant 1 executed a sale deed of the suit property in favour of George Thatil, who is the nephew of defendant 3, and will hereinafter be referred to as defendant 2. Like defendant 3, he also joined as defendant 2 at his own request, when the appeal was pending in this Court.

6. On December 23, 1950, the Court appointed a Receiver to manage the suit property. On March 21, 1951, defendant 3 obtained a lease of the suit property at a rent of Rs. 15,000/- for a period of one year from the Receiver. The term of the lease was extended for one more year and two years' rent, amounting to Rs. 30,000/- was collected and deposited in the Court by the Receiver.

7. The District Court, Trichur, on August 28, 1952, decreed the suit for specific performance and mesne profits at a reduced rate of Rs. 15,000/- per annum, instead of Rs. 30,000/- per annum claimed by the plaintiff.

8. Against the decree of the Trial Court, two appeals were filed in the High Court-one by defendant 3 and the other by defendant 2. The High Court allowed the appeals and dismissed the plaintiff's suit by a judgment dated March 31, 1953.

9. Aggrieved, the plaintiff filed C.A. 129/56 in this Court. The plaintiff's appeal was allowed by this Court as per its judgment and decree, dated April 22, 1958.

10. Since a good deal of argument centers round the construction of this Court's decree, dated April 22, 1958, it will be pertinent to extract here the material part of that decree.

> (a) That the appellant herein do deposit within thirty days of the receipt in the decree of this Court the sum of Rs. 85,000/- in the District Court of Trichur and that on the aforesaid amount being deposited the said District Court of Trichur do forthwith give notice thereof to the respondents above named and that on the aforesaid amount of Rs. 85,000/-being deposited respondents Nos. 2 and 3 herein, namely S.M.R. Solaiyappa Chettiar and George Thatil do within 30 days from the date of receipt of the notice of the said deposit execute and register a sale deed in favour of the plaintiff (Appellant) in respect of the suit property.

(b)...

(c)) That the respondents above-named do pay to the appellant the cost incurred by him in the Court of the District Judge, Trichur, in Suit No. 183 of 1950 and the costs in curred by him in the former High Court of....

(d)...

(e) ...AND THIS COURT DOTH FURTHER DECLARE that appellant shall be entitled to:

(a) mesne profits against such of the respondents as may have been in possession of the property except during the period that the property was in the custody and management of the receiver appointed by the trial court;

(b) the net sum collected by the Receiver during his management; and

(c) credit for all such sums as he may have advanced to the receiver under the direction of the Court for the management of property;

AND THIS COURT DOTH ACCORDINGLY DIRECT that the trial Court do hold an enquiry about the mesne profits and such sums as may be found to be due on inquiry against the second and third respondents in respect of the mesne profits be deducted from the amount to be deposited in cash in the Court by the appellant aforesaid in accordance with Clause (a) supra, and do direct the payment of the remaining amount, if any, to the third respondent (defendant 2) who is the assignee of the second respondent (defendant 1) pendente lite;

(emphasis supplied)

11. On September 12, 1958, the plaintiff filed an application in the District Court for execution of the said decree, dated April 22, 1958, in respect of all the reliefs allowed thereunder. After the decree-holder had deposited a sum of Rs. 85,000/-, as directed in the decree, the execution application was eventually made over to the Subordinate Judge, Trichur. As per the decree, the sale deed was executed on March 16, 1959, by the Court on behalf of defendants 1 and 2 in favour of the plaintiff and the possession of the property in consequence thereof, was delivered to him on March 29, 1959.

12. Thereafter, the plaintiff filed Miscellaneous Petition No. 229/60 in the Trial Court. Before the Court, defendant 3 on November 11, 1958, filed objections that he was not liable for mesne profits, as he was never in possession and occupation of the suit property. He further contended that his liability for mesne profits, if any, was limited to the period commencing from the date of notice of the deposit in Court of the amount of Rs. 85,000/- till the date of delivery of possession and that the plaintiff was not entitled to interest on mesne profits, or on costs by way of restitution. Defendant 2 contended that he was not liable for mesne profits as he had never been in possession and

management of the suit property, and that the entire liability, if at all any, for mesne profits was that of defendant 3, who had been in exclusive possession of the property.

13. On December 22, 1962, the court of first instance passed orders in respect of mesne profits, costs etc. It found that defendants 1, 2 and 3 were jointly and severally liable to the plaintiff for a sum of Rs. 10,162.67 on account of costs of the Trial Court and the Supreme Court. The Court further found that defendant 2 was separately liable to pay to the plaintiff, a sum of Rs. 11,941.63 consisting of three items, namely, Rs. 1,239.02 on account of costs recovered by defendant 2 from decree-holder and payable by former with interest by way of restitution, Rs. 2,577.01 on account of costs in the High Court, and Rs. 8125/-on account of mesne profits from the factory from the date of suit till date of Ex. D-3. The aggregate amount under these two heads came to Rs. 23,103.70, which was allowed to be set off against Rs. 85,000/-deposited in Court by the plaintiff and the balance was directed to be paid to the second defendant's mother, his assignee.

14. Apart from the sum of Rs. 10,162.67 jointly and severally payable by the third and second respondents, the District Court found that the third defendant was separately liable to pay the plaintiff a sum of Rs. 1,57,086.81 consisting of these items:

> (a) Rs. 7,298.10, by way of restitution on account of costs recovered from the decree-holder including interest thereon;
>
> (b) Rs. 39,975.00-Rent deposited and withdrawn by him together with interest thereon;
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> (c) Rs. 1,177.00, costs payable by him for the appeal in the High Court; and
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> (d) Rs. 1,08,636.71 net mesne profits payable by him from April 1, 1963 to the date of delivery of possession, during which period, he was found to be in possession and management. After giving credit of a sum of Rs. 48,321 deposited by the third defendant in Court on March 9, 1959, a net sum of Rs. 1,08,765.81 was directed to be realised by the plaintiff from the estate of defendant 3 in the hands of his legal representative (appellant in C.A. 466/69). By the same order, the Court dismissed Misc. Petition No. 229/60 that had been filed by the plaintiff for determination of the extent of waste committed upon the property by defendant 3.

15. Aggrieved by that Judgment and Order, Lucy Kochivareed, wife of defendant 3, as well as the plaintiff and the second defendant, preferred appeals in the High Court of Kerala. By a common judgment, dated August 6, 1968, the High Court partly allowed the appeals filed respectively, by the plaintiff and the legal representatives of defendant 3; but dismissed the appeal (A.S. 248/63) filed by defendant 2. The High Court, inter alia, affirmed the finding of the Trial Court that the third defendant was in sole and exclusive possession of the suit property during the period in question. The Trial Court's findings with regard to the quantum of mesne profits per year, were not found satisfactory. The High Court assessed the mesne profits at a flat rate of Rs. 15,000/- per year and determined the obligations of the parties accordingly. The High Court further found that the second

and third defendants were jointly and severally liable to pay Rs. 10,200/- by way of costs, and the second defendant alone was liable to pay Rs. 11,000/-by way of restitution, costs in the High Court and mesne profits to the plaintiff, and that the aggregate of Rs. 21,200/- be set off against the sum of Rs. 85,000/- deposited by the plaintiff and the balance be paid to the mother of defendant 2.

16. Aggrieved by the judgment, dated August 8, 1968, of the High Court, Lucy Kochivareed, wife of the deceased defendant 3, has filed Civil Appeal 466 of 1969; while the plaintiff has preferred Civil Appeal No. 2375 of 1969.

17. Both the appeals will be disposed of by this common judgment.

18. We will first take up Civil Appeal 466 of 1969 filed by the widow of defendant 3.

19. The main contention of Mr. K.S. Ramamurthy, learned Counsel for the appellant (Luci Kochivareed), is that if the decree, dated April 22, 1958, passed by this Court in C.A. 129/56 is properly construed in the light of the material on record and the law on the subject, then three consequences inevitably follow:

> (i) Both defendant 2 and defendant 3 would be deemed to be in possession of the suit property during the period in question. The possession of defendant 2 was juridical or legal possession of an owner, he being the purchaser of the property from defendant 1; while that of defendant 3 was on actual permissive possession with the consent of defendant 2. Defendant 2 and defendant 3 being in the position of joint-tort-feasors would be jointly and severally liable for mesne profits or compensation.

20. This being the case, the plaintiff was bound to suffer a set off to the purchase price (Rs. 85,000/-) deposited by him, against his claim for mesne profits against defendant 3. But after the decree of this Court, the plaintiff in pursuance of a collusion between him and defendant 2, allowed the High Court to cancel the security given by defendant 2 for withdrawal of Rs. 62,900/- out of the purchase price deposited by the plaintiff. The plaintiff was thus precluded by his conduct from claiming that much amount from defendant 3. After setting off the entire deposit of Rs. 85,000/-, defendant 3 will be liable only, for the balance of the mesne profit, jointly with defendant 2.

(ii) The plaintiff's right to possession of the property under the decree accrued when he deposited the price in Court and thereafter obtained the conveyance in his favour on March 16, 1959. The possession of defendants 2 and 3 as against the plaintiff became wrongful only from the date on which the conveyance was executed in his favour, at any rate on the date (September 12, 1958) on which he fully deposited the price in Court.

(iii) The period for which the mesne profits have been awarded, is to be restricted to the one permissible under Order XX Rule 12(1)(c) of the CPC. Such period in the light of this provision would be the one commencing from the date the institution of the suit and ending on the expiration of three years from the date of the decree of the Trial Court. The expression "the decree", occurring

in the aforesaid Clause (according to the counsel) means the decree of the Trial Court. In other words, the maximum period for which mesne profits can be awarded-and would be deemed to have been awarded-is three years from the date of the decree of the Trial Court; and the Courts below were wrong in awarding mesne profits for a period of more than six years, commencing from the date of the institution of the suit till the delivery of possession in accordance with the decree of this Court to the plaintiff.

21. Upon the above premises, Mr. Ramamurthy maintains that the plaintiff will not be entitled to any mesne profits because his right to possession did not accrue within three years of the date of the decree of the Trial Court. Such a right, according to the counsel, accrued to the plaintiff only on April 22, 1958 when his amended suit for specific performance and possession and future mesne profits was decreed. In the alternative, as already noticed, counsel submits that mesne profits could not be awarded for any period prior to the date (September 12, 1958) on which the plaintiff deposited the price, because his right to possession accrued on that date and not earlier.

22. In support of his contentions, Shri Ramamurthy has cited a decision of this Court in Chitturi Subbanna v. Kudapa Subbanna and Ors. . He has also referred to some other rulings, wherein some general principles have been enunciated as to who can be made liable for mesne profits.

23. On the other hand, Mr. Govindan Nair, under Counsel for the plaintiff, submits that the decree, dated April 22, 1958 of this Court is crystal-clear. There is no ambiguity in it. Read in the light of this Court's judgment, it unmistakably shows that whosoever, out of the defendants was/were in actual possession, would be liable for the mesne profits from the date of the suit till the delivery of possession. It is pointed out that in the courts below, the positive stand taken by defendant 3 was that he was never in possession of the suit property and therefore, was not liable for mesne profits. It was never the case of defendant 3 that he was in derivative possession under defendant 2. Counsel submits that defendant 3 should not be allowed to take a stand diametrically opposed to the one taken by him in the courts below. It is further submitted that the decree of this Court was final decree so far as it laid down that the liability for the mesne profits shall be fixed on the basis of the defendant found in actual possession of the suit property.

24. Before dealing with the contentions canvassed on both sides, it will be profitable to notice the general principles relating to the liability for mesne profits.

25. Mesne profits being in the nature of damages, no invariable rule governing their award and assessment in every case, can be laid down and "the Court may mould it according to the justice of the case". Even so, one broad basic principle governing the liability for mesne profits is discernible from Section 2(12) of the CPC which defines 'mesne profits' to mean "those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession". From a plain reading of this definition, it is clear that wrongful possession of the defendant is the very essence of a claim for mesne profits and the very foundation of the defendant's liability therefore. As a rule, therefore, liability to pay mesne profits 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 for mesne profits. But, where the plaintiff's dispossession, or his being kept out of possession can be regarded as a joint or concerted act of several persons, each of them who participates in the commission of that act would be liable for mesne profits even though he was not in actual possession and the profits were received not by him but by some of his confederates.

26. In such a case where the claim for mesne profits is against several trespassers who combined to keep the plaintiff out of possession; it is open to the Court to adopt either of the two courses. It may by its decree hold all such trespassers jointly and severally liable for mesne profits, leaving them to have their respective rights adjusted in a separate suit for contribution; or, it may, if there is proper material before it, ascertain and apportion the liability of each of them on a proper application made by the defendant during the same proceedings.

27. Another principle, recognised by this Court in Chitturl Subbanna v. Kudapa Subbanna (ibid) is that a decree under Order XX Rule 12 of the Code, directing enquiry into mesne profits, howsoever expressed, must be construed to be a decree directing the enquiry in conformity with the requirements of Rule 12(1)(c), so that the decree-holder is not entitled to mesne profits for a period (commencing from the date of the institution of the suit) extending beyond three years from the date of the preliminary decree.

28. Again, possession through another, such as a tenant, may be sufficient to create liability for mesne profits if such possession is wrongful.

29. We will now deal with the contentions advanced by Mr. Ramamurthy, in the light of these principles.

30. The first argument, as already noticed, is that both defendants 2 and 3 were in possession of the suit property during the period in question. It is contended that the possession of defendant 2 was the legal possession of an owner while that of defendant 3 derivative possession of a lessee or licensee under the former.

31. A perusal of the decree dated April 22, 1958, of this Court, extracted in a foregoing part of this judgment, shows that it was a composite decree, partly final, partly preliminary. It was final in so far as it granted the reliefs of specific performance and possession on deposit of the price by the plaintiff. It was preliminary inasmuch it directed an inquiry with regard to the assessment of mesne profits, and as to who out of the defendants was/were liable for payment of those mesne profits. But, it laid down in no uncertain terms that only such of the defendants would be liable for mesne profits "as may have been in possession of the property". Construed in conformity with the legal principles enunciated above, this direction in the decree, means that only the defendant or defendants found in actual possession and enjoyment of the property would be liable for mesne profits.

32. In the courts below, at no stage, defendant 3 took up the position that he was in derivative possession of the property under defendant 2. On the contrary, in his objection-petition filed before the District Court on November 11, 1958, defendant 3 emphatically asserted that he "is not liable for

mesne profits for the suit property as he was never in possession and occupation of the same". Defendant 3 further vehemently pleaded that it was never intended at any time that he (defendant 3) "should be a lessee of the property nor was he a lessee at any time". In para 3 of his petition, defendant 3 further pleaded that the purchase of the factory was made in favour of defendant 2, with money advanced by him (defendant 3), and the intention then was that the suit property should be worked by defendant 2 with funds advanced by defendant 3 who should be "recouped from the profits accrued from the properly or otherwise in respect of the purchase money advanced by him as also the advances for the working expenses". In paragraph 5, he further pleaded that "in any event he cannot be held liable for any amount more than what is stipulated in the lease deed (Ex. I) in favour of Neelakantha Iyer".

33. There is not even a whisper in the pleadings that defendant 2 and defendant 3 were joint-tort-feasors and therefore, jointly and severally liable for mesne profits.

34. The plea now pressed into argument by Mr. Ramamurthy is thus a complete somersault of the position that had been taken in the courts below.

35. The Court of first instance after an exhaustive consideration of the overwhelming evidence, oral and documentary, on record reached the finding that ever since March 5, 1951, defendant 3 was, while defendant 2 was not, in actual control, management and possession of the suit property, and therefore, in terms of the decree dated April 22, 1958 of this Court, defendant 3 alone would be liable for mesne profits of the property. In appeal, the High Court found that "the Court below was perfectly right in holding that the 3rd defendant was in sole and exclusive possession during the period in question and it is idle for him to pretend otherwise". Indeed, the third defendant himself had repeatedly admitted in various documents that he was in possession. In his application, Ex. D-77(a), made in the Court of first instance, on March 7, 1951, the defendant admitted that he was in possession in pursuance of assignment of lease made in his favour by Neelakantha Iyer on March 5, 1951. This lease has been found by this Court to be a sham transaction. Further, defendant 3 on March 21, 1951, executed a lease in favour of the Receiver appointed by the Court. In this lease also, he admitted that he had been in possession of the property since March 5, 1951. The lease executed by defendant 3 in favour of the Receiver ensured for a period of two years on a yearly rental of Rs. 15,000/- and he deposited Rs. 30,000/- therefore as rental in Court. Then, the Bank accounts of the factory (except for a short period from March 25, 1953 to November 11, 1954) were throughout in the name of the third defendant as lessee thereof.

36. We have absolutely no reason to differ from this concurrent finding of the courts below that the third defendant was in sole, actual possession and control of the suit property from March 3, 1951, when he obtained the alleged assignment of the lease in his favour from Neelakantha Iyer. In terms of the aforesaid decree of this Court, therefore, defendant 3 alone is liable for mesne profits in respect of the period he was in possession (excepting the period during which the property was under the management of the Court Receiver).

37. As regards the appellant's contention that the amount deposited by the plaintiff towards the price should have been set off against the liability of defendant 3 for mesne profits, it may be

observed that, there is nothing in the decree, dated April 22, 1958, of this Court which say's that such a set off should be allowed. On the contrary, it allowed deduction of the amounts found due against defendant 1 and defendant 2 from the deposit of Rs. 85,000/- to be made by the plaintiff towards the price, and further directed that after such deduction, the balance of such deposit made by the plaintiff, if any, shall be paid "to the third respondent (defendant 2) who is the assignee of the second respondent (defendant 1) pendente lite"

38. Assuming arguendo, that both defendants 2 and 3 were liable for mesne profits jointly and severally, then also, the plaintiff could, at his option, recover the whole of the amount of mesne profits from either of them; and how such inter se liability of the defendants was to be adjusted or apportioned, was a matter between the defendants only. The plaintiff was not bound to suffer a set off in favour of defendant 3, merely because defendant 2 or his assignee withdrew the price deposited by the plaintiff without furnishing any security for its refund or adjustment towards the liability of defendant 3, there being no evidence, whatever, on record to show that such withdrawal was the result of any collusion or conspiracy between the plaintiff and defendant 2 against defendant 3.

39. Assuming further, for the sake of argument, that defendant 2 and defendant 3 were both acting in concert to keep the plaintiff out of possession, it was not necessary for the courts below to decide the issue with regard to apportionment of liability and its adjustment between defendants 2 and 3. Indeed, the adoption of such a course would have militated against the finding that defendant 3 alone was in exclusive possession and control of the suit property ever since March 5, 1951.

40. We therefore, negative the first contention of the appellant.

41. This takes us to the second and third points pressed into argument by Mr. Ramamurthy. It is to be noted that defendant 3 entered into possession of the suit property under an assignment of sham lease from Neelakantha Iyer on March 5, 1951 during the pendency of the plaintiff's suit which was instituted on August 25, 1950. The plaintiff had deposited Rs. 50,000/- sometime after the presentation of the plaint. Under the agreement for sale, dated May 22, 1950, made by defendant 1 in favour of the plaintiff, the total sale consideration was fixed at Rs. 90,003/- Out of it, Rs. 5,003/- had been paid to defendants on the very date of the agreement. It was further stipulated that out of the balance, Rs. 50,000/- would be paid by the plaintiff-purchaser at the time of the registration of the sale deed which was to be executed and registered on or before July 15, 1950. It was further stipulated that on payment of the further sum of Rs. 50,000/-, the plaintiff would be entitled to be put in possession of the suit property. Thus, when defendant 3 entered into possession, first, under the garb of an assignee of a sham lease from Neelakantha Iyer, and then further purchased the property with his own funds in favour of defendant 2, pendente lite, he was fully conscious that he was purchasing a litigation. His possession was, therefore, wrongful qua the plaintiff from its very inception.

42. The material part of Rule 12(1) of Order XX of the CPC, provides:

> Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits, the Court may pass a decree-
>
> (a) for the possession of the property;
>
> (b) ...
>
> (ba)...
>
> (c) directing an inquiry as to rent or mesne profits from the institution of the suit until-
>
> (i) the delivery of possession to the decree-holder,
>
> (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
>
> (iii) the expiration of three years from the date of the decree, whichever event first occurs.

43. Mr. Ramamurthy argued, if we may say so with respect, somewhat inconsistently, that the word "decree" in Sub-Clause (iii) of Clause (c) of the aforesaid Rule 12(1), means the decree for possession and mesne profits which the trial court ought to have passed, and that in this view of the matter, the period of three years mentioned in Sub-Clause (iii) will be counted from August 28, 1952, the date of the trial court's decree, whereby mesne profits at the reduced rate of Rs. 15,000/- instead of Rs. 30,000/- per annum claimed by the plaintiff, were awarded. In that view of the matter, according to the counsel, the plaintiff was not entitled under the law to get a decree for mesne profits beyond August 27, 1955. It is pointed out that since the plaintiff had, as a result of the acceptance of the defendants' appeal and dismissal of his suit by the High Court, withdrawn the deposit of Rs. 50,000/- on August 19, 1953 and he had not redeposited the amount until February 9, 1959, he was dot then entitled to possession and, in consequence, to any mesne profits during this period.

44. The argument is certainly ingenious, but untenable, being founded on fallacious premises. The period of three years mentioned in Sub-Clause (iii) of Clause (c) of Rule 12(1) is to be computed from the date of the decree of this Court, i.e. from April 22, 1958 and it will expire on the date on which possession was delivered or relinquished by the defendant in favour of the decree-holder pursuant to that decree. In other words, the decree mentioned in Sub-Clause (iii) of the aforesaid Clause (c), would be the appellate decree, dated April 22, 1958, of this Court. The period of three years mentioned-in the said Sub-clause is, therefore, to be reckoned from April 22, 1958. The words "whichever event first occurs" in Sub-Clause (iii) imply that the maximum period for which future mesne profits can be awarded, is three years from the date of the decree for possession and mesne profits, finally passed. The courts below, therefore, while holding that defendant 3 was liable to pay mesne profits for a period of about 6 years commencing from March 5, 1951/March 21, 1951 till the delivery of possession in September, 1958 (less the period during which the property was under the

management of the Receiver), were acting in conformity with the law and the terms of the decree, dated April 22, 1958, of this Court.

45. We, therefore, reject these contentions, also.

46. Another contention canvassed by Mr. Ramamurthy was that the courts below have wrongly disallowed deduction for interest on the-deposit of Rs. 50,000/-, which the plaintiff had withdrawn on August 19, 1953 and had redeposited on February 9, 1959. It appears to us that in all fairness, the defendant is entitled to deduction for interest for the period from August 19, 1953 to February 9, 1959 on the sum of Rs. 50,000/-, which, at 6 per cent per annum, after deducting the interest for the period during which the property was under the management of the Receiver. (According to the agreed calculations made-by the counsel for the parties it works out to Rs. 14,000/- approximately. We see no reason why deduction of this amount be not allowed from the mesne profits assessed against defendant 3.

47. We will now take up Civil Appeal No. 2375 of 1969 filed by the plaintiff.

48. Mr Govindan Nair, learned Counsel for the plaintiff-appellant, has contended-

(i) that mesne profits ought to have been awarded at the rate of Rs. 25,000/- per annum. The High Court was in error in awarding the same at the rate of Rs. 15,000/-;

(ii) that the High Court was not justified in reducing the rate of interest from 6 per cent per annum awarded by the Trial Court to 4 per cent per annum;

(iii) that interest at 6 per cent per annum was rightly awarded" by the court of first instance on the sum of Rs. 30,000/-, which was two years rental paid by defendant 3, under the lease taken from the Receiver for the period from August 19, 1953 to March 9, 1959', an at the High Court was in error in disallowing that interest; and

(iv) that the Courts below were not justified in denying costs to the plaintiff in the inquiry as to mesne profits or in appeal arising therefrom.

49. We will deal with these contentions ad seriatim.

Contention (i):

50. In this connection, Mr. Nair drew dm attention to Exhibits D-8 to D-15, which are Balance Sheets and Profit & Loss Accounts of the Sivakami Tile Works, relating to the period from March 31, 1953 to November 5, 1958. These documents were prepared at the instance of the third defendant for the purposes of his Income-tax returns. The High Court found that these Balance Sheets and Profit & Loss Accounts prepared for Income-tax purposes were suspicious documents and by themselves were not proof of the profits derived. Mr. Nair has no quarrel with this finding. He, however, contended that the High Court ought to have worked out the real profits by taking into

account the quantity of clay purchased according to these documents. In this connection, it is submitted that according to the evidence produced on the side of the plaintiff about five candies of clay are required for producing 1000 small tiles and even according to the evidence of the second defendant as C.P.W. 2, 51/2 to 6 candies are required for 1000 small tiles.

51. We are not impressed by this argument. The High Court has fully considered the evidence produced on the side of the plaintiff. It noted that the plaintiff, also, had not produced any cogent evidence to show what were the profits earned by him by working the factory in dispute for the period of one year preceding the date of his examination. By the time plaintiff appeared in the witness-box, he had been working this factory for about one year.

52. In the alternative, Mr. Nair submitted that even during the period of two years when the Receiver was there and defendant 3 worked the factory as a lessee under the former, he had made a profit of Rs. 22,000/-. Our attention has, also been drawn to the document (Ex. D-8), that the income for the first year ending 1952 was Rs. 20,000/-. The point pressed into argument is that the highest profit made by him according to these Balance Sheets and Profit & Loss Accounts during any year by defendant 3, should be taken as the rate for calculating the mesne profits.

53. The contention does not appear to tenable. Once it was found that these Balance Sheets and Profit & Loss Accounts were not reliable, nor the evidence produced by the plaintiff, the only reliable evidence left on the file was the rate at which the factory was leased out by the Receiver to defendant 3. When the lease for the second year was granted to defendant 2 by the Receiver on a rental of Rs. 15,000/-, the plaintiff should have objected that the rent was less or he could himself take the lease on paying higher rent, The High Court was, therefore, not wrong in holding that this rent fixed under the lease granted by the Receiver represented the real rental value of the factory during the year in question and in the absence of any other reliable evidence for assessing the profits actually earned or which, with due diligence, could have been earned the mesne profits may reasonably be fixed at Rs. 15,000/- per annum.

54. We, therefore, negative, the first contention of Mr. Nair.

Contention (ii):

55. The Trial Court had awarded interest at the rate of 6 per cent per annum on the mesne profits assessed by it. The High Court reduced that rate to 4 per cent, with the observation that having regard to all the circumstances of the case, including that the plaintiff had the use of the sum of Rs. 85,000/- which he was to pay towards the price of the property a rate of 4 per cent per annum would be reasonable and just.

56. Even Mr. Ramamurthy has not been able to support this reduction in the rate of interest. It was after a long drawn out litigation that the plaintiff got possession of the property. The Trial Court, therefore rightly awarded the interest at the rate of 6 per cent per annum.

57. We, therefore, accept this contention and direct that interest as part of the mesne profits assessed in this case, shall be payable at the rate of 6 per cent per annum upto March 29, 1959 when possession was delivered in pursuance of the decree of this Court, to the plaintiff and further interest at 6 per cent per annum on the outstanding amount shall be payable till the date of payment.

Contention (iii):

58. A sum of Rs. 30,000/-, being the rent collected by the Receiver from the third defendant, was deposited in Court. This amount was withdrawn by the third defendant on August 19, 1953 following the dismissal of the plaintiff's suit, by the High Court. When the plaintiffs appeal succeeded in this Court and a decree was passed in his favour by this Court, then defendant 3 redeposited the sum of Rs. 30,000/-, only on March 9, 1959. The Trial Court had awarded interest at 6 per cent per annum on this amount of Rs. 30,000/- for the period from August 19, 1953, the date on which the defendant withdrew that deposit, until March 9, 1959, the date when he redeposited the sum. The High Court has disallowed interest on this account for the aforesaid period on the ground "that the Supreme Court does not award that".

59. We are unable to agree with this reasoning. It overlooked the fact that interest on the sum of Rs. 30,000/- was being claimed under Section 144 of the CPC, by way of restitution. Section 144 in terms says that for the purpose of the restitution, the Court may make any orders, including orders for the payment of interest, damages, compensation and mesne profits which are properly consequential on variation or reversal of the decree. There is nothing in the decree, dated April 22, 1958, of this Court which expressly or by implication prohibited the payment of interest on this sum, by way of restitution. The Trial Court had rightly allowed interest on amount for this period at 6 per cent per annum, and we restore the same direction.

Contention (iv):

60. The argument is that costs have been unfairly denied to the plaintiff by the Courts below. We do not agree. The Courts below could not have been oblivious of the fact that defendant 3 has since died and the respondent is his widow. We, therefore, do not want to interfere with the discretion of the Courts below in the matter of costs.

61. For the foregoing reasons, we partly allow the plaintiff's appeal (Civil Appeal No. 2375 of 1969) to the extent indicated above, with proportionate costs. We will dismiss the defedant's appeal (Civil Appeal No. 466 of 1969) except to the extent that the defendant shall be allowed a. set off in the sum of Rs. 14,000/-, being the interest on the sum of Rs. 50,000/- for the period from August 19, 1953 (the date of the withdrawal of the deposit by the plaintiff) to the date when he redeposited it. Interest on the outstanding amount at 6 per cent per annum shall be payable till the date of payment. In Civil Appeal 466 of 1969, however, the parties will bear their own costs in this Court.