Sri Ramnik Vallabhdas Madhvani And Ors vs Taraben Pravinlal Madhvani on 5 November, 2003

Equivalent citations: AIR 2004 SUPREME COURT 1084, 2003 AIR SCW 6839, (2004) 1 ALLMR 180 (SC), (2004) 15 ALLINDCAS 510 (SC), 2004 (15) ALLINDCAS 510, 2004 (1) ALL MR 180, 2004 (1) SCC 497, 2004 (1) ALL CJ 691, 2004 ALL CJ 1 691, 2003 (9) SCALE 412, 2003 (7) SLT 639, (2004) 6 JT 144 (SC), (2003) 4 CURCC 312, (2003) 8 SUPREME 208, (2003) 9 SCALE 412, (2004) 13 INDLD 234, (2004) 3 CIVILCOURTC 98, (2004) 3 GUJ LH 191, (2004) 4 MAD LW 209, (2004) 1 RECCIVR 194, (2004) 4 BOM CR 217

Author: Arun Kumar

Bench: V.N. Khare, S.B. Sinha, Arun Kumar

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           CASE NO.:
Appeal (civil)  6429-31 of 1995

PETITIONER:
SRI RAMNIK VALLABHDAS MADHVANI AND ORS.

RESPONDENT:
TARABEN PRAVINLAL MADHVANI

DATE OF JUDGMENT: 05/11/2003

BENCH:
V.N. KHARE, CJ & S.B. SINHA & ARUN KUMAR

JUDGMENT:
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JUDGMENT 2003 Supp(5) SCR 230 The Judgment of the Court was delivered by ARUN KUMAR, J. C.A. Nos. 6429-31/1995:

> These appeals arise from a suit filed by respondent in the court of Subrodinate Judge at Ootacamund, State of Tamilnadu on 28th October, 1972. The parties to the suit are closely related. Respondent Taraben is the widow of Pravinilal Madhvani while Santokben, original defendant No. 1., was the widow of Vallabhdas Madhvani real brother of Pravinlal Madhani. Santokben died during the pendency of the litigation. Her three sons who were defendants No. 2 (Ramnik), No. 3 (Praful) and No. 4 (Rajnikant) in the suit, were appellants in these appeals. Appellants Santokben and her son Praful died during pendency of the appeals. Necessary steps regarding substitution have been taken. Appellant No. 4 M/s. Bengorm Nilgiri Plantations Co., is a partnership firm.

The family owned a tea estate in the Neelgiris area. It was known as Bengorm Tea Estate. It was a co-wonership property of the members of the family. A partnership firm was constituted under the name and style of Bengorm Tea Plantations to manage the tea estate. The partnership did not have any proprietory interest in the estate. The shares of the parties in the tea estate as well as in the partnership firm are not in dispute. Pravinilal died on 4th May, 1969. He left behind a will. Taraben respondent No. 1 claiming to be sole executor of the estate of her husband Pravinlal filed the present suit claiming the following reliefs:

"18(a) Decree for partitions by metes and bounds of the plaintiff's 33% share in Bengorm Estate mentioned in Schedule to the Plaint and separate possession thereof against defendants 1 to 4 and/or 6 in severally.

(b) A decree for accounts against the defendants for the 30% share of Pravinlal Vithaldas Madhvani deceased in the defendant No. 6 in respect of profits and monies to his credits and in the assets of the firm including stocks in trade, stores and spares, standing crops, investments, provisions, reserves and goodwill as mentioned in paragraph 12 of the plaint and decree for the amount found to be due to the plaintiff as ascertained in this suit on enquiry with interest at 6% per annum from 4th May, 1969.

(c) Decree for accounts for mesne profits and/or illegal gains from 5th May, 1969 till payment as mentioned in paragraph 13 the plaint and decree for the amount found to be due to the plaintiff as ascertained in this suit on enquiry with interest at 6% per annum from the date herein."

A preliminary decree was passed by the trial court on 13th April, 1978 granting a decree in favour of the plaintiff (respondent herein) for accounts against defendants for the 30% share of Pravinlal in the partnership firm with interest thereon at the rate of 6% per annum from 4th May, 1969 till realisation. The suit with respect to other reliefs was dismissed. The plaintiff appealed against the said preliminary decree with regard to relief denied to her by the trial court. During the pendency of the appeal before the High Court on 21st November, 1980, the plaintiff (appellant before the High Court) applied for amendment of the plaint. An amendment was sought with respect to the rate of interest as mentioned in paragraphs 18(b) and 18(c) of the plaint. The plaintiff had originally claimed interest at the rate of 6% per annum in both these paras of the plaint. By amendment the rate of interest was sought to be revised from 6% per annum to 13% per annum. The High Court disposed of the amendment application simultaneously with the appeal against the preliminary decree vide judgment and orders dated 16th December, 1985. The only amendment allowed was with respect to rate of interest in para 18(c) of the plaint. The plaintiff was allowed to amend the said prayer so as to raise the claim with respect to rate of interest from 6% per annum to 13% per annum. Similar amendment sought in para 18(b) of the plaint was specifically rejected. So far as appeal against preliminary decree passed by the trial Court is concerned, the Division Bench of the Madras High Court allowed the same, thereby the prayer of the plaintiff with respect to 33% share in the Bengorm Tea Estate and mesne profits after the death of Pravinlal Vithaldas Madhvani on 4th May,

1969 alongwith interest on the amount found due by way of mesne profits was allowed. The preliminary decree passed by the trial Court on 13th April, 1978 with respect to prayer contained in para 18(b) of the plaint became final. On the question of interest with respect to para 18(c) of the plaint even though the High Court had allowed the amendment to enable the plaintiff to claim interest at the rate of 13% per annum, the High Court took note of amendment of Section 34 C.P.C. in the meanwhile and treating the suit claim as a commercial transaction, allowed interest at the rate of interest as charged by nationalised banks during the relevant years from time to time on commercial loans. The trial court passed a final decree on 6th January, 1988 and determined a sum of Rs. 2633016.33 paise as due by way of mesne profits. It awarded simple interest thereon at the rate of 13% per annum till realization. It also passed a decree for Rs. 67,111.37 paise in pursuance of prayer in para 18(b) of the plaint with simple interest at the rate of 6% per annum w.e.f. 5th May, 1969 till realisation.

The appellants appealed against the said final decree before the Madras High Court. During the pendency of the appeals, with the agreement of counsel for the parties, the High Court appointed a Commission to determine the amount of mesne profits payable to the plaintiff in the suit. The Commission filed its report on 2nd September, 1990 determining a sum of Rs. 33,32,847.83 in this behalf. Ultimately by its impugned judgment dated 23rd September, 1993, the High Court dismissed to the appeals filed by the present appellants against the final decree of the trial court. It modified the decree of the trial court and passed a final decree in the following terms :

> "The respondents/defendants do pay the petitioner/plaintiff the sum of Rs. 78,33,560 by way of mesne profits and interest due for the period from 5.5.1969 to 5.8.1986 with simple interest at the rate of 13 per cent per annum of Rs. 39,41,920 from 6.8.1986 till date of realisation and defendants do also pay the plaintiff the sum of Rs. 1,23,111.37 by way of her share of good-will, standing crops and missing items with simple interest at the same rate of 13 per cent per annum on this sum from 5.5.1969 till date of realization and the proportionate cost. The petitioner/plaintiff should pay the court fee at the time of execution."

On the question of interest, the High Court has in Para 42 of the impugned judgment noted that it was wrong on the part of the High Court while passing the preliminary decree vide judgment dated 16th December, 1985 to award interest as per the rate of interest charged by nationalised banks on commercial transactions form time to time. It was also felt that the High Court ought not to have proceeded on the basis of amended Section 34 of the Code of Civil Procedure. Yet the High Court did not interfere with award of interest only for the reason that the Special Leave Petition against the preliminary decree had been dismissed by this Court.

The appellants who were defendants in the suit have filed the present appeals against the judgment dated 23rd September, 1993 of the High Court. During the hearing the learned counsel for appellants raised three points for decision of this Court in these appeals.

(i) Determination of quantum of mesne profits payable to the respondent- plaintiff by the appellants;

(ii) Rate of interest to be awarded on the decretal amount;

(iii) Adjustment of admitted liability of Pravinlal towards the partnership firm in the sum of Rs. 4,13,364.24 paise.

So far as the question of determination of quantum of mesne profit is concerned the liability to pay is not being disputed. The only dispute is with respect to the determination of amount payable by way of mesne profits. As pointed out earlier the Division Bench of the High Court had appointed a Commission headed by a retired judge of the Madras High Court and assisted by two Chartered Accountants, one nominated by each party, to carry out the exercise regarding determination of mesne profits. The Commission filed its report in the High Court. The High Court arrived at a finding regarding quantum of mesne profits after looking into the accounts, the report of Commission and other relevant facts and material. We have no reason to differ with the view of the High Court on this aspect. We are not required to reappreciate the material. As a matter of fact during the course of hearing, counsel for the appellant indicated willingness to go by the Commissioner's report in this behalf. Therefore, we accept the finding of the High Court on this issue. Total amount by way of mesne profits as per the impugned judgment of the High Court comes to Rs. 39,41,920. This figure does not include interest.

Interest is leviable on the amount of mesne profits. The High Court has in its impugned judgment awarded interest w.e.f. 5th May, 1970 till 5th August, 1986 on periodical basis at varying rate of interest. Periods have been fixed based on change in bank rate of interest. The rate of interest varies between 10% p.a. to 19% p.a.. The award of interest by the High Court is based on its earlier order dated 16th December, 1985 regarding levy of interest as per prevailing bank rate of interest on commercial transactions form time to time. This part of the judgment of the High Court in our view is not correct. The rate at which interest is to be awarded is being separately considered under Point No. 2 That decision will govern the award of interest on mesne profits.

A mistake has been committed by the High Court in calculation of interest on mesne profits. Interest has to be calculated on yearly basis because the amount of mesne profits on which interest is to be awarded has to be arrived at on year to year basis. Mesne profits for the first year would be from 5th May, 1969 to 4th May, 1970, for the second year it will be from 5th May, 1970 to 4th May, 1971 and so on. It keeps adding on from year to year. The total amount of mesne profits found due by the High Court on the basis of Commissioner's report comes to Rs 38,41,920. This amount is the total of mesne profits calculated on yearly basis. Interest cannot be allowed on the whole amount form the beginning. Interest had to be worked out on amounts falling due towards mesne profits on yearly basis i.e. on the amount of mesne profits which could be taken to be due to the plaintiff at the end of each successive year.

The question of rate of interest has been the subject matter of serious controversy between the parties. The learned counsel for the appellant submitted that in the plaint filed on 28th April, 1972 interest claimed in paras 18(b) and 18(c) was at the rate of 6% per annum. He has further drawn our attention to Section 34 of the Code of Civil Procedure as it stood at the time of institution of the suit. It permitted interest being awarded maximum at the rate of 6% per annum from the date of decree

till realisation of the decretal amount. The said section is reproduced below:

> "34(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent, per annum as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.
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> (2) Where such a decree is silent with respect to the payment of further interest on such principal sum from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie."

Our attention was invited to para 18(b) of the plaint in which decree for accounts of the partnership firm to the extent of 30% share of Pravinlal is sought alongwith interest at the rate of 6% per annum from 5th May, 1969. The trial Court passed a preliminary decree on 13th April, 1978 as per which only para 18(b) of the plaint was decreed i.e. 30% share of Pravinlal in the partnership firm with interest at the rate of 6% per annum from 4th May, 1969 till realisation. This part of the preliminary decree was never challenged by any party. Rest of the prayers in the plaint were rejected in the preliminary decree. The plaintiff appealed against the preliminary decree only to the extent it rejected other prayers in the plaint. There was no challenge to the award of interest at the rate of 6% per annum as claimed in para 18(b) of the plaint. Thus according to the learned counsel this part of the preliminary decree became final and so far as the decree for accounts is concerned, the plaintiff is entitled to interest only at the rate of 6% per annum.

Paras 18(a) and 18(c) of the plaint relate to award of mesne profits and interest thereon on the share of Pravinlal as a co-owner in the Bengorm Tea Estate. The High Court accepted the appeal filed by the plaintiff against the preliminary decree. A decree for partition of the Bengorm Estate to the extent of one-third share of the plaintiff and for mesne profits on that one-third share after the death of Pravinlal till separation of the one- third share was passed on 16th December, 1985. The High Court awarded interest on the amount of mesne profits as per rate of interest charged by the nationalised banks during the relevant years from time to time on commercial loans in view of amended Section 34 of the Code of Civil Procedure. The learned counsel for the appellant challenged this part of the judgment of the High Court on various grounds particularly:

> (a) in the original plaint interest had been claimed only at the rate of 6% per annum;
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> (b) amendment of the plaint was applied for in 1980 and was allowed on 16th December, 1985 which enabled the plaintiff to amend para 18(c) of the plaint to claim interest at the rate of 13% per annum instead of 6% per annum as originally pleaded. This means that the question of interest being charged at the rates prevailing with nationalised banks from time to time on commercial transactions could never arise.

The decree could not go beyond prayer of the plaintiff;

(c) The share of the plaintiff in Bengrom Estate with respect to which mesne profits were awarded and on which interest was being sought, could not be said to be a commercial transaction so as to attract rate of interest charged by nationalised banks from time to time on commercial transactions;

(d) In view of Sections 13 and 97 of the Code of Civil Procedure (Amendment) Act 1976, the present suit having been instituted prior to amendment of the C.P.C., interest could be awarded as per provisions of unamended Section 34 only. Unamended Section 34 permitted interest maximum at the rate of 6% per annum from the date of decree till realisation.

Clause (e) of sub-section (2) of Section 97 of the Amending Act of 1976 is reproduced as under:

"(e) the provisions of Section 34 of the principal Act, as amended by Section 13 of this Act, shall not affect the rate at which interest may be allowed on a decree in any suit instituted before the commencement of the said section 13 and interest on a decree passed in such suit shall be ordered in accordance with the provisions of Section 34 as they stood before the commencement of the said Section 13 as if the said section 13 had not come into force;"

(e) Amendment of plaint once allowed relates back to the date of original plaint. Therefore, in view of the specific bar contained in Section 97 referred to above, such an amendment was clearly illegal;

(f) The Court had only permitted amendment of the plaint which does not mean that the plea contained by way of amendment is accepted by the Court. The defendants had to be given a chance to contest the plea without which the amended claim with respect to rate of interest could not be enforced.

It may be noted at this stage that on applications moved by the plaintiff in this behalf, one-third share of the plaintiff in the Estate known as Bengorn Tea Easte was delivered to the plaintiff by the defendants on 5th March, 1988 and there is no dispute about this fact.

The grounds raised on behalf of appellants can now be conveniently dealt with. First we deal with the question of amendment of para 18 (C) of the plaint allowed by the High Court in an application moved for that purpose. One is a procedural aspect while the other is a legal aspect. Procedural aspect demands that on amendment of being allowed, the opposite party has to be given a chance to respond to the amended pleading and if the plea is contested the Court has to give its decision thereon. Not affording an opportunity to the contesting party to contest a plea, which has been allowed to be amended, is negation of justice. In the present case the fact remains that amendment application of the plaintiff was allowed vide order dated 16th December, 1985 when on the same date the appeal against the preliminary decree was disposed of and rate of interest going even beyond what was permitted by way of amendment, was awarded. The decree which was passed was

for much more than the amendment allowed. The plaintiff had only sought leave to amend the rate of interest as originally pleaded as 6% per annum to 13% per annum. This amendment was allowed. But in the decree the Court allowed interest to be charged at the prevailing bank rate of interest charged by nationalised banks from time to time on commercial transactions during the relevant period. Thus the High Court while allowing the prayer for amendment simultaneously passed a decree not only based on the amended plea, but for exceeding it. No amended pleadings were filed. No opportunity was given to defendants to contest the plea. A bare reading or Order VI Rule 17 of Code of Civil Procedure shows that amendment is of a plea contained in the pleadings and the object of allowing amendment of pleadings is to determine the real questions in controversy between the parties. This means the parties have to be given a chance to contest the questions in controversy and the Court has to give its decision ultimately on such contested issues. This procedure was not followed in the present case. The procedure followed is wholly illegal. This Court had occasion to pronounce on this issue in J. Jermons v Aliammal and Ors., [1999] 7 SCC

382. It was held that a new plea cannot be allowed to be raised without effecting amendment of pleadings, without giving reasonable opportunity to the opposite party to file further pleadings and adduce evidence. Thus the decision of the High Court in allowing interest on mesne profits at rate of interest charged by nationalised banks from time to time on commercial transactions is wholly illegal and unsustainable. As noted earlier even the High Court while passing the final decree felt that in its earlier order dated 16th December, 1985, it should not have proceeded on the basis of amended Section 34 of the Code of Civil Procedure while awarding interest at the rate charged by nationalized bank on commercial transactions from time of time. The impugned award of interest is thus wholly unwarranted and illegal and has to be set aside.

Coming to the legal aspect of the amendment of plaint allowed in the present case by the High Court, it is to be noted that Section 34 of the Code of Civil Procedure deals with the question of award of interest. Section 34 C.P.C. as it stood before amendment in February 1977 deals with the question of interest in three stages. First is, interest prior to the date of institution of suit, second stage is interest from the date of institution of suit till date of decree and the third stage is from the date of decree till realisation of the decretal amount. About the first stage, Section 34 does not say anything while about the second stage it says that the interest to be awarded should be as considered reasonable by the Court. About the third stage i.e. from the date of decree till realisation, the power of the Court to award interest is circumscribed i.e. it cannot be more than 6% per annum.

An amendment of plaint relates back to the date of institution of the suit, Section 97(2) (e) of the Civil Procedure Code (Amendment) Act, 1976 provides that in suits instituted before enforcement of the amended provision, interest has to be awarded as per the unamended Section 34 C.P.C. In the present suit which was instituted much before amendment of Section 34 of the Civil Procedure Code, therefore, interest had to be allowed as per the unamended Section 34 C.P.C. which means that from the date of decree till realisation interest could not be more awarded than 6% per annum.

For the period prior to passing of the decree it is left to the court to consider what would be the reasonable rate of interest. While considering a reasonable rate of interest to be awarded for the pre decree period we have to note that in the present case mesne profits are being awarded on account

of retention of share of a co-owner in a property by the other co-owners. This cannot be said to be a commercial transaction. Moreover plaintiff herself claimed interest in the plaint originally instituted at the rate of 6% per annum. By way of amendment of the plaint she wanted to take advantage of the amended provisions in the Code of Civil Procedure so as to claim interest at a higher rate which in law she was not entitled to. Therefore, we consider award of interest at the rate of 6% per annum on the amount found due on account of mesne profits to be calculated on any yearly basis as indicated earlier would be fair and reasonable in the facts and circumstances of the case.

We may now note the submission on behalf of the respondent in reply to the arguments of the appellants on the question of award of interest. The learned counsel for respondent only banked upon the fact that a Special Leave Petition against the preliminary decree dated 16th December, 1985 had been dismissed by this Court on an earlier occasion and according to the learned counsel, the consequence of that dismissal would be that the decision on the question of award of interest contained in the preliminary decree dated 16th December, 1985 had the seal of approval of this Court and therefore, it need not be interfered with at this stage. The learned counsel further argued that assuming that award of interest by the High Court as per the preliminary decree dated 16th December, 1985 was erroneous, it was not such an error as may render the decree a nullity. According to him the court had earlier declined to interfere with these findings therefore, at this stage, this Court should not go into this.

The learned counsel for respondent tried to draw our attention to the limitations in exercise of jurisdiction by this Court under Article 136 of the Constitution of India. In our view, the argument advanced by the learned counsel for the respondent has no substance. The scope of powers of this Court under Article 136 of the Constitution of India was elaborately considered in a recent decision of this Court in Kunhayammed and Ors. v. State of Kerala and Am., [2000] 6 SCC 359. The following observation are worth noting.

> "The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding the petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.
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> It follows that disposal of SLP against a judgment of the High Court does not mean that the said judgment is affirmed by such dismissal. The order on Special Leacial petition is also never res judicata. In the present case we are at a stage where we are hearing appeals i.e. leave to appeal has already been granted and these are full fledged appeals against the judgment of the High Court before us. Therefore, we are entitled to go into the question of legality and correctness of the impugned judgment.
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> We have demonstrated the clear illegality committed by the High Court in awarding interest on the decree for mesne profits at a rate much higher than what was claimed or what is admissible in the present case. Similar is the illegality regarding award of

interest at the rate of 13% per annum on decree for accounts as per para 18(b) of the plaint. The decree to that extent is a nullity and cannot be allowed to be enforced.

Our attention has been drawn to several judgments of this Court which support the view that an illegal decree is a nullity and can be ignored. These are Anil R. Deshmukh v Onkar N. Wagh and Ors., [1999] 2 SCC 205, Smt. Nai Bahu v. Lala Ramnarayan and Ors., [1978] 1 SCC 58 and Srimathi Kaushalya Devi and Ors. v. Shri K.L. Bansal, [1969] 1SCC 59.

The result is that the appellant succeeds on point No. 2 i.e. with regard to award of interest on the decree passed by the Court with respect to prayers contained in para 18(b) and para 18(c) of the plaint. The appellant will be liable to pay interest under both the heads at the rate of 6% per annum. In the case of decree for mesne profits i.e. prayer as per para 18(c) of the plaint, the interest has to be calculated on yearly basis as indicated already at the rate of 6% per annum and on the lump sum amount of Rs. 39,41,920 at the same rate from 6.8.1986 till realisation. Similarly on the decree for accounts as per prayer contained in para 18(b) of the plaint the respondent No. 1 will be entitled to interest at the rate of 6% per annum on the sum of Rs. 1,23,111.37 from 5th May, 1969 till realisation.

Point No. 3.

The learned counsel for the appellant vehemently argued that the admitted liability of Pravinlal towards the partnership in suit to the extent of Rs. 4,13,364.24 paise has to be adjusted against his share of the amount falling due to the plaintiff on accounts being taken. The High Court accepted the finding of the trial court that this amount stood already adjusted. The learned counsel for the appellant challenged this finding and tried to demonstrate that the adjustment had not been made so far.

The learned counsel for appellant also argued that the respondent-plaintiff was not entitled to any share in the goodwill of the partnership firm because the firm had no goodwill. The firm was only managing the affairs of the tea estate and the question of goodwill did not arise. The tea produced by the tea estate does not have a name, or a brand name. It has no registered trade marks. The entire produce is auctioned as tea and not as any particular brand or type of tea. Therefore, it could not be said that the firm had any goodwill and the award of share of goodwill to the plaintiff was uncalled for.

In our view, these are matters of accounts which High Court has examined. The High Court arrived at certain findings on the basis of record and after considering the report of the Commission appointed by it to go into accounts. The Commission consisted of a retired High Court Judge and two Chartered accountants one of each party. Therefore, we would not like to interfere with the findings arrived at by the High Court on these matters.

In the result the appeals are allowed to the extent indicated above. The decree for accounts passed by the High Court under para 18 (b) of the plaint will stand modified with respect to the rate of interest. The High Court has awarded interest at the rate of 13% per annum on the decretal amount of Rs. 1,23,111.37 paise w.e.f. 5th May, 1969 till realisation. In view of our decision interest will be payable on the said decretal amount at the rate of 6% per annum instead of 13% per annum. The decree on account of mesne profit as per para 18(c) of the plaint stands modified with respect to the rate of interest and the method of calculation of interest. Interest is to be calculated on the amount of mesne profits arrived at on yearly basis at the rate of 6% per annum for the entire period. On the final figure Rs. 39,41,920 interest is payable at the same rate i.e. 6% per annum from 6th August, 1986 till realisation. The appeals are disposed of accordingly. There will be no order as to costs.

The plaintiff will pay court fee on the decretal amount in accordance with law.

C.A. Nos. 6432-34/1995 :

These appeals stand disposed of in terms of the above judgment.

C.A. Nos. 6484-86/1995 :

These are cross appeals filed by the plaintiff in the suit against the judgment and decree dated 23rd September 1993 passed by the Madras High Court. The respondents' appeals against the said judgment are Civil Appeals No. 6429-31/1995. All the appeals including the present appeals were heard together and are being disposed of in terms of the judgment in C.A.Nos. 6429-31/1995. In Civil Appeals No.6484-86/1995, the appellant was plaintiff in the suit. Two question have been raised. One pertains to reimbursement regarding payment of gratuity alleged to have been made by the plaintiff to the workers who came to her share along with the l/3rd share in the Bengorm Tea Estate which she received in terms of the decree passed by the appellant is with respect to the award of interest under the decree in her favour by the courts below.

So far as the question of reimbursement of the appellant regarding amount of gratuity paid by her to the workers who came to her share along with l/3rd share in the Bengorm Tea Estate allotted to her in terms of the decree, the claim is totally untenable in our view. The learned counsel for the defendants submitted that in fact the defendants never wanted to transfer any of the workers to the plaintiff. It was at the insistence of the plaintiff that some of the workers were transferred to her. The plaintiffs insistence was on account of the fact that she wanted trained workers to continue the operations in the portion of tea estate which fell to her share. It is submitted on behalf of the defendants that when the plaintiff took over a certain number of workers, all the obligations qua them would be deemed to be taken over by her. In our view this submission has substance. The plaintiff was fully conscious of

her obligations qua the workers when she took them. It is also on record that the plaintiff sold the part of the tea estate which came to her share, soon after getting its possession. Therefore, we are not inclined to entertain the claim regarding liability towards gratuity with respect to the workers allotted to the plaintiff on partition of the tea estate. This issue cannot be allowed to be reopened at this stage.

The other question raised in these appeals is regarding award of interest. The same stands concluded by our judgment in C.A. Nos. 6429-31/1995. For reasons stated in the said judgment, this claim is hereby rejected.

The result is that these appeals fail and are hereby dismissed with no order as to costs.

S.B. SINHA, J. The predecessors in the interest to the parties have been carrying on business in plantation and sale of tea under the name and style of Bengorm Niligiri Plantations Company since 1954. The said Pravinlal Vithaldas Madhvani, the husband of the plaintiff-respondent was a partner in the said firm having 30% share therein. The firm was reconstituted from time to time. The firm was reconstituted on 14.12.68 with effect from 1.7.68. Pravinlal died on 4th May, 1969. On his death the remaining partners reconstituted the firm ignoring the claim of the plaintiff. She was not paid any amount towards her share. The Bengorm Tea Estate comprised of 417 acres of lands wherein Pravinlal had 33% interest. The said estate was a joint family property and not an assets of the partnership firm.

In the aforementioned situation, a suit came to the filed by the plaintiff herein praying inter alia for the following reliefs :

"(a) Decree for partitions by mates and bounds of the Plaintiffs 33% share in Bengorm Estate mentioned in Schedule to the Plaint and separate possession thereof against defendants 1 to 4 and/or 6 in severally.

(b) A decree for accounts against the defendants for the 30% share of Pravinlal vithaldas Madhvani deceased in the defendant No. 6 in respect of profits and monies to his credits and in the assets of the firm including stocks in trade, stores and spares, standing crops, investments, provisions, reserves and goodwill as mentioned in paragraph 12 of the plaint and decree for the amount found to be due to the plaintiff as ascertained in this suit on enquiry with interest at 6% per annum from 4th May, 1969.

(c) Decree for accounts for mesne profits and/or illegal gains from 5th May, 1969 till payment as mentioned in paragraph 13 of the plaint and decree for the amount found to be due to the plaintiff as ascertained in this suit on enquiry with interest at 6% per annum from the date herein.

(d) for appointment of Receiver

(e) for the costs of the suit, and

(f) for such other reliefs as to this Hon'ble Court may seem fit and proper in the circumstances of the case."

The Trial Court in terms of its judgment and preliminary decree dated 13.4.1978 did not grant any relief in lespect of prayers (a) and (c) treating the business as one run by the partnership and granted relief in favour of the plaintiff in relation to prayer (b) only with 6% interest thereon. The plaintiff thereagainst filed an appeal before the High Court. The High Court while allowing the said appeal also granted enhanced interest at the bank rate varying between 10% and 19%, upon allowing an application for amendment of plaint claiming interest at the rate of 13% p.a. Two Special Leave Petitions filed by the appellants herein-one against the impugned judgment and the other against the order allowing amendment were summarily dismissed by this Court.

A final decree proceeding was thereafter initiated which was numbered as O.S. No. 3 of 1986.I.A. No. 3 of 1987 was filed by the Plaintiff purported to be under Order 26 Rule 13 and Order 20 Rule 10 of Code of Civil Procedure for passing a final decree for partition and award of mesne profits in terms of the preliminary decree. LA. No. 5 of 1987 was filed by her under Order 20 Rule 12 and Section 151 of Code of Civil Procedure for passing a decree for mesne profits for the period 5.5.1969 till the date of delivery of possession.

By a common judgment dated 6.1.1988, the learned District Judge disposed of the said applications in terms whereof the Commissioner was directed to sell the two bungalows, the factory and ancillary buildings by holding a private auction amongst the parties and deposit the sale proceeds in the court. In I.A. No. 5 of 1987 the Court directed the defendants to pay unto the plaintiff a sum of Rs. 12,51,762,46 with simple interest at the rate of 13% per annum on 11,84,651.09 and with simple interest at the rate of 6% per annum on Rs. 67,111.37 from 5.5.1969 till date of realisation. The defendants were further directed to bear the proportionate costs of the suit.

Being aggrieved thereby and dissatisfied therewith the plaintiff preferred an appeal there against which was marked as A.S. No. 1305 of 1988. The defendants 1 to 4 and 6 also preferred an appeal against the said judgment which was marked as A.S. No. 998 of 1988. The plaintiff also filed I.A. No. 3 of 1987 praying therein that possession of the properties to the extent of her share be delivered free form all encumbrances like gratuity liability etc. On 16.3.1988 an order was passed holding the defendant Nos. 1 to 4 liable to pay gratuity to workers from 5.5.1969 to 6.8.1986. The said order came to be challenged by the defendants by filing a C.R.P. being No. 337 of 1989. Another Interlocutory Application marked as I.A. No. 211 of 1988 was filed to incorporate the two items "missing articles" and "gratuity deposits" in the final decree passed in O.S. No. 1 of 1987 which was allowed. There against also the defendants preferred an appeal before the High Court which was marked as A.S. No. 350 of 1988. On 14.12.1990 an order was passed in I.A. No. 211 of 1988 amending the operative portion of the final decree whereagainst also the defendants preferred a civil Revision Application marked as C.R.P. No. 1008 of 1991. The trial judge further made some

correction in the decree which again became a subject matter of Civil Revision Application before the High Court. By reason of the impugned judgment the High Court disposed of all the matters. The parties herein have preferred three appeals before this Court against the judgment of the High Court.

Various other interlocutory applications were also filed before the District court. The orders passe thereon were subject matter of different Civil Revision Applications, details whereof are not required to be adverted to herein.

In the said proceedings, it is pertinent to note that Receiver and joint Receiver had been appointed.

The High Court having regard to the nature of controversy and upon taking into consideration the fact the mesne profits were required to be evaluated, at the suggestions of the parties, appointed a Commissioner.

The Commissioner, inter alia, upon examining the books of accounts of the partnership firm submitted a report before the High Court. The plaintiff filed objections thereagainst. It was directed that the report of the Commissioner shall be taken on file in A.S. no. 998 of 1998 and would be considered at the time of the hearing of the first appeal. The High Court did not accept the Commissioner's report on assigning sufficient and cogent reasons therefor. In doing so, it inter alia took into consideration the observations made by it on the earlier round of litigation namely A.S. No. 1037 of 1978 to the effect that the defendants had every reason to manipulate the accounts because they intended to deprive the plaintiff of their due share. It also took into consideration the fact that at the initial stage of the litigation the defendants had made an offer of only Rs. 1,12,064.15 towards the interest of the plaintiff in relation to the valuable assets belonging to her husband. It further opined that the books of accounts whereupon the Commissioner had relied upon was not proved by the 5th defendant who, according to the second defendant, knew thereabout entry by entry. Mr. Ramnik, the second defendant, who examined himself as R.W. 1. according to the High Court, did not know about the entries in the books of account. The High Court was furthermore of the opinion that the entries in the books of account were required to be proved by independent materials and they by themselves are not admissible as evidence. The High Court further pointed out that the defendants have committed several irregularities in maintaining the books of account stating:

> "All the family members of the defendants have been operating the accounts. The personal expenses of the defendants and their family members are debited to the account of the firm. It is even seen that several foreign trips undertaken by the second defendant and his wife were made at the expenses of the firm. Even small items of expenditure like personal gifts made to sisters, hotel expenses, club expenses and the like find a place in the firm Accounts. Defendants cannot be heard to say that club expenses and travel expenses were intended to promote the business since during the life time of Pravinlal no such expenses were incurred by the Firm. Further we find from Ex. A-129 that there were over drawings made by the defendants even beyond their capital contribution. And all the monies borrowed form Central bank of

> India were diverted by the defendants to their own other Companies like Kodanandu Estate, Koshipathi Estate and Powraj Chemical etc."

It also noticed the fact that the defendant had entered into transaction with their sister concerns.

Before the High Court, it is relevant to notice that it was contended that the genuineness of the said books of account was not disputed. The books of accounts, it was urged, also came to be accepted by the Income-Tax Department.

The High Court, however, on analyzing the materials on record found the said pleas to be unacceptable. By way of example, it noticed that while the price of green leaves per kilogram of tea was Rs. 1.25, such leaves were purchased from kodanad Tea Estate, a sister concern of the defendants at the price of Rs. 2.75 per kilogram. It was also found that no such admission was made on behalf of the plaintiffs. It was observed:

> "Even assuming that there was such an admission by the counsel, it would not certainly bind the plaintiff."

As regard quantification of the mesne profit, the High Court relied upon various circumstances in support of its conclusions. It noticed that the tea Estate was making profit since 1954. It was observed that even when the area was gong through severe drought the tea Estate at the hands of joint Receiver made a sizeable profit in 1986 and, thus, was capable of making a sizeable profit throughout. The High Court pointed out that the firm had been earning profits from 1960 to 1968 of more than Rs. 31/2 lakhs per annum except in 1964 when the profit earned came down to Rs. 2,35,502.47 and as such there was no reason as to why the profit should have come down after 1969. In the aforementioned situation the High Court calculated the quantum of mesne profit on the basis of the profits earned by the joint Receiver from 6.8,1986 onwards for a period of 21 months. The High Court further noticed that the defendant has not exhibited any document to show the profits for the period 1.7.1985 to 5.8.1986 and the Commissioner, thus, committed a manifest error in failing to take note thereof. It was further pointed out that even account of 1985-86 was not produced by the defendants. It found that the Commissioner without any basis whatsoever arrived at certain figures for the subsequent period beginning from 1.7.1985 holding:

> "It is not known how the Commission got the figures for the subsequent period from 1.7.1985. If the plaintiffs share in the profits for the period 1-7-1985 to 6-8-1986 is to be calculated on the basis of the receivers accounts for the period 6-8-1986 to 4-5-1988, the amount would come to Rs. 7,32,969.63. Even if the amount is calculated on the basis of the profits for the year ending 30-6-1985, it will be more than Rs. 7,00,000. Even as it is, the Commission has worked out the share of the plaintiff at Rs. 33,32,847.63. If the share of the plaintiff for the period 1.7.1985 to 5.8.1986 is calculated as above, the total will exceed Rs. 40,00,000 which will be more than the total amount claimed by the plaintiff,"

It was further noticed that in any event the plaintiff could not be made liable for any part of the loss purported to have been suffered by the firm as it was for it to compensate the Plaintiff for the user of her share in the immovable properties and the mense profit has to be worked out only after payment of such compensation. It, thus, came to the conclusion that irrespective of the fact as to whether the firm was earning any profit or not, the plaintiff was entitled to be suitably compensated.

The Court found that even if the Commissioner's report after making necessary correction of the mistakes contained therein is accepted, the plaintiff would be entitled to mesne profit amounting to a sum of Rs. 47,00,000 which would exceed the amount claimed by her.

The Court noticed that the Auditor had filed a calculation memo wherefrom it would appear that the plaintiffs claim for her l/3rd share of mesne profits crimes to Rs. 1,63,08,623. The said figure was arrived at on the basis of the capital value of the entire tea Estate being Rs. 32,00,000 in 1969. The High Court observed:

> "P.W. 2 Guha the Auditor has filed a calculation memo regarding the plaintiffs claim for her 1/3 share of mesne profits at Rs. 1,63,08,623. He states in his evidence that his calculation is based on the capital value of the entire Tea Estate. He has adopted the value of the entire Estate Rs. 32,00,000 in 1969 and proceeded to estimate the reasonable return at the rate of 10%, of the value. The value of the plaintiffs 33% share in the entire Estate in 1969 was Rs. 10,56,000. On the basis of 10% of the value of plaintiffs 33% share he arrived at the figure Rs. 1,08,000. He has added interest to the return from the capital and shown the amount due as Rs. 2,51,748. He took into account the increase in the value of the Estate during the five years and fixed the annual return from the property in 1975 at Rs. 2,00,000. From 1975 to 1979 he has estimated the return on this basis. For the next period from 1980 he calculated the return at Rs. 3,00,000 per annum. From 1985 he has proceeded on the basis that the annual return at Rs. 4,00,000. He has calculated interest on the basis of bank lending rate. On the basis of the above said mode of the calculation as on 4.5.1986 according to him the value of the plaintiffs 1/3 share of mesne profits was Rs. 1,63,08,623.
>
> The High Court further considered the matter from another angle that is to say as to what amount the 'Estate' could have earned had it been given on rent and on the said basis it came to the conclusion that even 33% share belonging to Pravinlal would have fetched Rs. 1,56,9582.17. It further took into consideration the profit which was being earned by the competing neighbouring tea estates. According to p.w 3 the plaintiffs share of mesne profit for the relevant period would have been calculated at Rs. 1,68,99,813. It was in the aforementioned premise the High Court held that the plaintiff was at least entitled to the amount Rs. 39,41,000 as claimed by her. It further opined that the reference to the Commissioner by the High Court was not in accordance with rules inasmuch as a Commissioner appointed in terms of the provisions of the Code of Civil Procedure could not have been made a quasi arbitrator although the law relating to arbitration was not to be made applicable.

The submission of Mr. Ramamoorty is that having regard to the fact that the parties are co-owners, the question as regard quantification of mesne profit should have been considered strictly in terms of order 20 Rule 12 of the code of Civil Procedure. The learned counsel would contend that having regard to the fact that there has been no suppression as regard the quantum of yield of tea from the tea estate and as no major irregularities have been found in respect thereof, the Commissioner could not be held to have committed a manifest error in relying on the books of account maintained by them. We do not agree.

Mesne profit has been defined in Section 2(12) of the Code of Civil Procedure to mean as profits which the person in wrongful possession of property actually received or might with ordinary diligence would have received therefrom together with interest on such profits.

A decree for mesne profit was granted in favour of the plaintiff respondent for wrongful use of the property. The quantum of mesne profit can be arrived at by the High Court keeping in view the well-known principles of valuation for determining the same. The Court is not enjoined with any duty to accept the quantification determined only on the basis of books of account maintained by the defendants, particularly when the same had not been proved. The High Court in our opinion has rightly considered the matter from different angles. Even if any of the methods adverted to the High Court and referred to hereinbefore is adopted, the plaintiff would have been entitled to much more amount than claimed by her. We are, therefore, of the opinion that the findings of the High Court being just and proper need not be interfered with.

So far as the question of rate of interest is concerned, it may be noticed that the High Court itself found that the rate of interest should have been determined at 6%. The principles of res judicata which according to the High Court would operate in the case, in our opinion, is not applicable. Principles of res-judicata is a procedural provision. The same has no application where there is inherent lack of jurisdiction.

In Chief Justice of A.P. and Anr. v. L.V.A. Diskhitulu and Ors. etc., AIR (1979) SC 193 : [1979] 2 SCC 34, the law is stated in the following terms:

"23. As against the above, Shri Vepa Sarathy appearing for the respective first respondent in C.A. 2826 of 1977, and in C.A. 278 of 1978 submitted that when his client filed a writ petition (No. 58908 of 1976) under Article 226 of the Constitution in the High Court for impugning the order of his compulsory retirement passed by the Chief Justice, he has served, in accordance with Rule 5 of the Andhra Pradesh High Court (Original Side) Rule, notice on the Chief Justice and the Government Pleader, and, in consequence, at the preliminary hearing of the writ petition before the Division Bench, the Government. Pleader appeared on behalf of all the respondents including the Chief Justice, and raised a preliminary objection that the

> writ petition was not maintainable in view of Cl 6 of the Andhra Pradesh Administrative Tribunal Order made by the President under Article 371-D which had taken away that jurisdiction of the High Court and vested the same in Administrative Tribunal. This objection was accepted by the High Court, and as a result, the writ petition was dismissed in limine. In these circumstances-proceeds the argument-the appellant is now precluded on principles of res judicata and estoppel from taking up the position, that the Tribunal's order is without jurisdiction. But, when Shri Sarathi's attention was invited to the fact that no notice was actually served on the Chief justice and that the Government Pleader who had raised this objection has not been instructed by the Chief Justice or the High Court to put in appearance on their behalf, the counsel did not pursue this contention further. Moreover, this is a pure question of law depending upon the interpretation of Article 371-D. If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of res judicata or estoppel as urged in the case."

In Dwarka Prasad Agarwal (D) by Lrs. and Anr. v. S.D. Agrawal and Ors., [2003] 6 SCC 230, it is stated:

> "It is now well-settled that an order passed by a court without jurisdiction is a mullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. In the instant case as the High Court did not have any jurisdiction to record the compromise for the reason stated hereinbefore and in particular as no writ was required to be issued having regard to the fact that public law remedy could not have been resorted to the impugned orders must be held to be illegal and without jurisdiction and are liable to be set aside. All orders and actions taken pursuant to or in furtherance thereof must also be declared wholly illegal and without jurisdiction and consequently are liable to be set aside. They are declared as such."

In M/s Shree Bharat Laxmi Wool Store, Panipat and Ors. v. Punjab National Bank and Anr., [1992] 1 SCC 204, this Court held:

> "In the instant case the suit was filed on April 20, 1972. The amendment of Section 34 referred to above, therefore, clearly is not applicable. The Court is required to allow proper rate of interest under the unamended Section 34. As we have seen earlier Section 34 has two parts, first part covering the period from the date of suit till the date of decree and second covering the period from the date of decree till the date of payment. We are concerned only with the second part. The trial court has awarded interest more than 6 per cent under the unamended provisions for the period from the date of decree till payments. The High Court appears to have not noticed the non-applicability of the amendment to suits filed prior to the amendment."

We, therefore, are of the opinion that in the facts and circumstances of the present case, the principles of res judicata was not applicable.

The only other question which survives for consideration is computation of net amount payable in terms of the decree in relation to prayer (b) of the suit as determined in the final decree dated 6.1.1988. In the suit a decree in respect of the following items was played for :

> "(i) 30% share of profit and monies lying to the credit of Late Pravinlal Madhani in the assets of partnership firm M/s Bengurm Tea Plantation Company as on 4.5.1969 on account of dissolution of the said firm upon death of Late Pravin Madhavani and 33% share in the capital assets and goodwill of the said firm.
>
> (ii) Stock in trade as on 4.5.1969 - 30% share
>
> (iii) Stores and Spares as on 4.5.1969 - 30% share
>
> (iv) Standing Crops as on 4.5.1969 - 30% share
>
> (v) Investments as on 4.5,1969 - 30% share
>
> (vi) Provisions as on 4.5.1969 - 30% share
>
> (vii) Reserves as on 4.5.1969 - 30% share
>
> (viii) Goodwill as on 4.5.1969 - 33% share
>
> (ix) Capital assets as on 4.5.1969 - 33% share
>
> Admittedly, no appeal was filed against the preliminary decree. Thus, it attained finality. The Trial Court in Us judgment found that a sum of Rs.

5,34,993.94 is due to the plaintiff; wherefor the loan taken by the husband of the plaintiff as proprietor of Darjeeling Tea Plantation Company and liabilities towards Income Tax adjusted had already been deducted, the details whereof are as under ;

_____ "Amount found payable Rs.

5,34,993.94
Less DTP Loan Rs. 4,13,364.24
Less towards Income tax Rs. 20,996.00
Less towards Firms' Tax Rs. 33,522.33
(his share - 30% of Rs.
1,11,741,10)
Rs. 4,67,882.57 Rs. 4,67,882.57
Balance

Rs. 67,111.37
Missing Articles
Rs. 56,000.00
Total
Rs. 1,23,111.37

The amounts receivable by the plaintiff were as under:

Share in the assets of the firm:

(1) 30% share of 4,17,687.31 being Rs.

1,25,306.34 difference of receivable over payable as per Balance Sheet of 4.5.1969 (2) 30% share of further claims on pro-rata Rs.

23,102.98 basis for 4.5.69 on the basis of balance sheet and profit & loss account as on 30.6.69 (3) 33 share in the Goodwill of the firm as Rs.

3,45,139.34
on 4.5.69
Rs. 4,93,548.64
Add: Balance in current Account or Rs.
3,870.00
4.5.69 before crediting profit for the period Rs. 4,97,418.64
4.5.69
Add: Profit actually credited in Balance
Sheet on 4.6.69 Rs. 3870 + 9480 -
13359) as in Bengorm Niligiri Plantations Rs. 9,489.64
Co;
Rs. 5,06,907.64
Less: Amount due by Darjeeling Plantations
Co. in the book of Bengorm Niligri Plantation Rs. 4,13,364.24
Co.
Rs. 93,543.40
II. OTHER ADJUSTMENTS:
Amounts due being refunds of IT and Agril
IT as per accounts
Rs. 10,575
Amounts due by us for payments made by
Bengorm for IT and Agril Rs.
20,996

The following chart shows the accounts as prepared by the parties. (As shown on next page).

RECEIVABLE PAYABLE 260 Closing Stock Rs. 1,39,585.30 Sundry Creditors Rs.

2,02,655.27 S
(Stock in trade &
U
transit) P

Development rebate Rs. 1,43,436.14 Loans & Overdrafts Rs. 13,66,332.13 Rs. 15,68,982.40 R reserve E Iniral depreciation Rs. 31,986.26 Difference of Receivable Rs.

```
4,33,193.43            M
                over payable carried
                E
                forward
Provision for Gratuity  Rs. 3107.37            C
Provisions for Taration Rs. 1, 27, 246.74              O
Stores & Space  Rs. 1,03,957,90         U
Investments     Rs. 17,787.00           R
Deposits & Prepaid      Rs. 21,428.91           T
Expenses
Loans and Advances      Rs. 13,70,828,52               R E
Sundry Debtors  Rs. 36,612.27           P
Cash & Bank Balances    Rs. 6.184.44     Rs. 20.02.180.85       Tax Payable
Rs. 20,02,180.85         O
                        R
```

Difference brought Rs. 4,33,193.45 Total provision for Rs. 1,27,246.74 T forward Taxation S Less: Total tax paid Rs. 1,11,741.10 Rs.

```
                15,505.64        2
                as per Loans & advances 0
                Difference of Receivable        0
                over payable carried    3
                toward  Rs. 4,17,687.81         S
        Rs. 4,33,193.45         Rs. 4,33,193.45         U
Difference brought      Rs. 4,17,687.81         P
forward                 P
```

_____ The amounts receivables, inter alia, are closing stock, stores and spares and loans and advances. So far as the closing stock is concerned, the plaintiff stated that the defendants inclusion of Rs. 1,39,685.80 on 4.5.1969 is a duplicate one as on the said date they had shown the profit and loss as income as also on the assets side in the balance sheet of Bengorm Nilgiri Plantations Co. On 30.6.1969 being the same financial year, they have also taken the same amount from the income and, thus making nil profit towards that. It has, therefore, been contended that this amount is an asset and rightly included as a receivable.

Pro-rata profit to the extent of Rs. 23,102.96 has been claimed as the defendants have shown a larger profit during the period 5.5.1969 to 30.6.1969 and less profit from 1.7.1968 to 4.5.1969. A higher profit has been shown for a period of 1 month 27 days and less profit has been shown for 308 days. The plaintiff claimed the entire amount having regard to the fact that the profit of the whole year has been apportioned. We do not see any illegality in the order of the High Court in this regard.

So far as the goodwill is concerned, the submission of Mr. Naik is that the goodwill of the tea estate had been offered to the plaintiff but she declined the same. Further contention of Mr. Naik is that as

the plaintiff has sold her share in the tea estate for a sum of Rs. 90 lakhs including goodwill of the firm; she cannot claim the same. Further contention of Mr. Naik is that as the tea is sold at auction house, it having no brand name did not have any goodwill.

> "Goodwill", as Lord Machaghten described a thing very easy to describe, very difficult to define, in Inland Revenue Commissioner v. Muller & Co., [1991] AC 2231.
>
> The term 'goodwill' signifies the value of the business in the hands of a successor, so far as increased by the continuity of the undertaking being preserved in the shape of the right to use the old name and otherwise. It is something more than a mere chance of probability of old customers maintaining their connection, though this is a material part of the practical fruits. 'Goodwill' may be the whole advantage belonging to the firm, its reputation as also connection thereof. It, thus, means that every affirmative advantage as contrasted with negative advantage that has been acquired in carrying on the business whether connected with the premises of business or its name or style everything connected with or carrying the benefit of the business. In Halsbury's Laws of England (Fourth Edition) Volume 35 at page 114, the law is stated in the following terms:
>
> "201. Goodwill generally; right to use name; sale to a partner. The goodwill of the business carried on by a partnership forms part of the assets to be realised on distribution. If the goodwill is not sold, each partner may use the name of the firm, if by doing so he does not hold out the other partners as still being partners with him. If a partner agrees to retire and his partners buy this share but do not take any express assignment of the goodwill, they are not entitled to continue the use of his name as part of the firm name, and where a business is carried on under the name, solely or with any addition, of an outgoing partner who is still living and not bankrupt, a purchaser of the business including the goodwill is not entitled to use the name of the outgoing partner in such a way as to suggest that he is still connected with the business, unless the right to use the firm name is expressly assigned. On dissolution, a partner may advertise that he is no longer connected with a periodical that the firm publishes.
>
> Where the goodwill becomes on dissolution the property of one of the partners (either by purchase in the ordinary way or pursuant to a provision in the articles), the outgoing partner or partners may not carry on a similar business in the name of the old firm, and may not solicit only customers,"

The goodwill is generally considered to be an asset of the partnership. In the aforementioned volume of Halsbury's Laws of England at page 116, it is further stated :

> "204. When goodwill is to be treated as an asset. Although, generally, the goodwill should be included where, under the partnership articles, a general account and valuation is to be taken on the death of a partner, the value of the goodwill should

> not, in the absence of contrary agreement, be included in the firm's periodical balance sheets; and, therefore, where the value of the share of a deceased partner is, by agreement, governed by the balance sheet, his estate is not entitled to treat the goodwill as an asset.
>
> Where a surviving partner sells the partnership business, the estate of his deceased partner is entitled to a share of the purchase money representing, the value, if any, of the goodwill; but, having regard to the rights of the surviving partners to carry on a similar business, this value may be infinitesimal.
>
> It is unlawful for a medical practitioner whose name is entered on any list or medical practitioners undertaking to provide general medical services under the national health service to sell any part of the goodwill of his medical practice."

The goodwill has been claimed for the firm's continuous business since 1954. The court has proceeded to calculate the amount of goodwill on the basis of the profits derived by the firm for the last five years on an average. It is not contended that such a method is unknown in commercial field. Whenever a firm is dissolved the value of the goodwill has to be worked out and divided between the partners.

The district judge as also the High Court had assigned sufficient and cogent reasons for awarding a sum of Rs. 3,45,139.14 towards the plaintiff's share in goodwill. The second defendant examining himself categorically stated that the firm is the only one which has been continuously doing business since 1954. We do not, therefore, find any infirmity in the judgment of the courts below in this regard.

So far as the loan amount to Rs. 4,13,364.24 is concerned, it appears that the same stood adjusted as far back as in the year 1972.

The learned District Judge in his judgment has recorded:

> "The debt due from M/s. Darjeeling Tea Plantations Company stands adjusted by taking of accounts as per Ex. A24. The 6th respondent obtained the Reserve Bank permission Ex. B666 and has adjusted the debt due from Darjeeling Tea Plantation Company to Bengorm firm on 24.6.1972. In the Balance sheets subsequent to 1972, the Darjeeling Tea Plantations Company is not shown as a debtor and demand of payment was not made."

It was further observed:

> The debt due from the Darjeeling Tea Plantations Company to the Bengorm firm has been adjusted in 1972 and the debt is no longer subsisting and no amount is due from Darjeeling Tea Company to the Bengorm firm is the admission of R.W. 3. The debt due from Darjeeling Tea Plantations Company has been adjusted as on 4.5.1969 as

> per the admission of R.W.3. The debt due from Darjeeling Tea Plantations Company to the Bengorm firm has to be adjusted as on 4.5.1969 is admitted by the respondents 1 to 6 in paragraph 29 of Ex. A 109."

The claim of the appellant to the effect that the plaintiffs husband was liable to pay 13% interest to the defendants has been rejected by the High Court inter alia on the ground that no such case had been made out in the written statements. Even no counter claim therefor was filed.

We, therefore, accept the reasonings of the High Court recorded in relation to the said items.

For the reasons aforementioned. 1 respectfully agree with the opinion of Brother Arun Kumar. J,