* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 09.09.2020

% Judgment delivered on: 03.11.2020

\+ **ITA 106/2005**

M/S SKYLAND BUILDERS P. LTD. ..... Appellant

Through: Mr. Yogesh Jagia, Advocate

versus

INCOME TAX OFFICER ..... Respondent

Through: Mr. Deepak Anand with Mr. Vipul Agarwal, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

J U D G M E N T

VIPIN SANGHI, J.

1. The present appeal under Section 260A of the Income Tax Act (the Act) has been preferred by the assesse to assail the order dated 19.08.2004 passed by the Income Tax Appellate Tribunal Bench 'G', New Delhi (ITAT) in ITA No. 1730/Del/2003 pertaining to the assessment year 1999-2000. By the impugned order, the ITAT has rejected the submission of the appellant/ assesse that the mesne profits received by it constitute capital receipt and, as such, are not taxable as income under the Act.

2. The appeal was admitted on 15.04.2005 when the following question of law was framed by the Court for its consideration.

> *"Whether in the facts and circumstances of the case and in law, the ITAT was right in taxing mesne profit and interest on mesne profit received at the discretion/ directions of Hon'ble Civil Court in suit No. 814/90 for unauthorized occupation of immovable property by Indian Overseas Bank, under Section 23(1) of Act"*

3. The background facts are not in dispute, and have been noticed by the ITAT in the impugned order. Insofar as they are relevant, we reproduce the same hereinunder.

4. The assesse filed the original return of income declaring income of Rs. 21,79,770/-. The original return was filed on 29.12.1999. Subsequently, the return was revised on 11.04.2000 declaring income of Rs.11,55,450/- under Section 115JA. In the original return, mesne profits of Rs.77,87,303/- was declared as taxable income, whereas in the revised return, the assesse claimed it as a capital receipt, and excluded it from its taxable income. The original return was processed under Section 143(1)(a), but was taken up for scrutiny and statutory notices were issued to the assesse. Apart from other issues raised by the assesse – with which we are not concerned in the present appeal, the assesse claimed that mesne profits amounting to Rs.77,87,303/- received during the previous year, relevant to the assessment year in question, was not liable to be taxed as income. This claim was made by the assesse in the background that it had let out its property in the year 1980 for a period of five years, and the monthly rent was liable to be increased by 20 per cent after expiry of the first three years. The lessee did not comply with

the terms, and increased the rent by only 10 per cent. The assesse terminated the lease agreement with effect from 31.01.1990 by serving a notice upon the lessee. Since the lessee failed to vacate the premises, the assesse filed a suit for damages/ Mesne Profit and for restoration of the premises to itself. The said suit of the assesse was decreed vide judgment/ decree dated 27.07.1998. The decree included award of mesne profits and damages with interest. In compliance of the Court's decree, the lessee i.e. Indian Overseas Bank paid Rs.77,87,303/- to the assesse, which the assesse claimed as a capital receipt, not liable to be taxed as income. In support of its submission, the assesse placed reliance on certain decisions.

5. The assessing officer did not accept the contention of the assesse and held that mesne profits are recompense granted by the Court to the landlord for wrongful possession of his property by the tenant even after termination of the lease. The A.O. relied upon the definition of mesne profits contained in Section 2(12) of the Code of Civil Procedure, to mean those profits which the person in wrongful possession of the suit property actually received, or might have with ordinary diligence received therefrom, together with interest on such profits, but shall not include profit due to improvements made by the person in wrongful possession. The A.O. relied upon the decision of the Madras High Court in ***CIT Vs. P. Mariappa Gounder,*** 147 ITR 676, in which the Madras High Court held that mesne profits are also a species of taxable income. Following the decision in ***P. Mariappa Gounder*** (supra), the A.O. held that Mesne Profits awarded to the assessee is a revenue receipt and taxable as income. The A.O. treated the same as income

from other sources. However, he allowed deduction of legal expenses incurred in securing the mesne profits.

6. The assesse challenged the assessment order before the CIT(A) on the aforesaid aspect, apart from others.

7. Before the CIT(A) the assesse relied upon the decision of the Calcutta High Court in ***CIT Vs. Smt. Leela Ghosh,*** 205 ITR 9, which had dissented from the decision of the Madras High Court in ***P. Mariappa Gounder*** (supra). The Calcutta High Court in ***Smt. Leela Ghosh*** (supra) held that mesne profits received by the assesse in that case were in the nature of damages and, therefore, a capital receipt.

8. The assesse also raised an alternate prayer before the CIT(A) that, even if the amount received in the form of mesne profits is treated as arrears of rent and income, the same could not be treated as income derived in the previous year in question merely because they had been realized in the previous year, because Section 25B was inserted into the Act subsequently.

9. The CIT(A) rejected the claim of the assesse that mesne profits received by it were capital receipts. It held that mesne profits received by the assessee were revenue receipts, and were liable to be taxed as income. As far as the alternate plea – premised upon Section 25B of the Act is concerned, the CIT(A) observed that under the scheme of the said Section, the same does not bring about any change in law. It only sets at rest, doubts regarding taxability of income relating to earlier years, in the financial year/ previous year.

10. The assesse then preferred an appeal before the ITAT, wherein the thrust of the appellant's argument was on the point of taxability of mesne profits as income under the Act. The assesse canvassed the same proposition, namely, that mesne profits are capital receipts and, therefore, not liable to be taxed.

11. The ITAT rejected the assesses' claim with regard to non-taxability of mesne profits as income under the Act on the ground that it is a capital receipt. Consequently, the assesse has assailed the impugned order passed by the ITAT before us.

12. The submission of Mr. Jagia, learned counsel for the appellant, firstly, is that incomes falling under the specific heads enumerated in the Income Tax Act – as being taxable income, alone are liable to tax. He submits that not all income can be subjected to tax, and income which does not fall within the specific heads would not be liable to be taxed under the Act. In this regard, he has drawn our attention to Section 14 of the Income Tax Act, which enumerates the heads of income which would be liable to tax, save as otherwise provided under the Act. The heads of income enumerated in Section 14 are: (1) Salaries; (2) Income from house property; (3) Profits and gains of business or profession; (4) Capital gains; and (5) Income from other sources.

13. He has also drawn our attention to Section 22 which states as to what is the annual value of a property consisting of any buildings, or lands appurtenant thereto. Section 22 reads as follows:

"22. The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property"."

14. Mr. Jagia submits that Section 23 of the Act lays down the manner in which the annual value of property consisting of building, or land appurtenant thereto, are to be computed. The said section, inter alia, states that:

"For the purposes of section 22, the annual value of any property shall be deemed to be –

x x x x x x x x x

(b) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable."

15. Mr. Jagia has referred to the decision of the Supreme Court in ***Tuticorin Alkali Chemicals & Fertilizers Ltd., Madras vs. Commissioner of Income Tax, Madras***, (1997) 227 ITR 172 (SC). The Supreme Court in paragraphs 9 and 11 of this decision observed as follows:

"9. In our judgment neither of the two factors can affect taxability of the income earned by the Company. Under the Income Tax Act, 1961, the total income of the company is chargeable to tax under Section 4. The total income has to be computed in accordance with the provisions of the Act. Section 14 lays down that for the purpose of computation, income of an assessee has to be classified under six heads:

(a) Salaries.

(b) Interest on Securities.

(c) Income from house property.

(d) Profits and gains of business or profession.

(e) Capital gains.

(f) Income from other sources.

x x x x x x x x x

11. The computation of income under each of the above six heads will have to be made independently and separately. There are specific rules of deduction and allowances under each head. No deduction or adjustment on account of any expenditure can be can made except as provided by the Act. "

16. Mr. Jagia has then relied upon the decision of this Court in ***CIT vs. Ansal Housing and Construction Ltd***, (2013) 354 ITR 180. In this case, the Court was dealing with a situation where the assessee was engaged in building activity. It was argued on behalf of the assessee that flats are held by it as part of its inventory – as stock-in-trade, and are not let out. It was argued that unlike in other instances where builders let out flats, in the case of the assessee, there is not letting out and that the deemed income – which is the basis for assessment under the annual letting value method, could not be applied to the assessee. This Court, however, rejected the submission of the assessee – by relying upon ***East India Housing and Land Development Trust Limited Vs. CIT***, (1961) 42 ITR 49 (SC); ***Sultan Brothers Vs. CIT***, (1964) 51 ITR 353 (SC); and ***Karanpura Development Co. Ltd. Vs. CIT***, (1962) 44 ITR 362 (SC); by holding that the levy of income tax in the case of one holding house property is premised not on whether the assessee

carries on business , as landlord, but on the ownership. The incidence of charge is the fact of ownership. The Court held that one's capacity of being the owner was not diminished because the assessee carried on the business of developing buildings and selling flats in housing estates.

17. Mr. Jagia has also relied upon the definition of 'mesne profits' contained in Section 2(12) of the Code of Civil Procedure, to mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession. Mr. Jagia submits that mesne profits are a kind of damages which the owner of the property – which is a capital asset, is entitled to receive on account of deprivation of the opportunity to use the immovable property/ capital asset on account of the wrongful possession thereof by another. He submits that, therefore, such damages which are awarded for deprivation of the right to use the capital asset, constitute capital receipt.

18. Another submission advanced by Mr. Jagia is in relation to the invocation of Section 25 B of the Act. The consequence thereof has been to treat the mesne profit, and interest thereon received by the assessee in the previous year relevant to the assessment year in question, as the income from house property in respect of the said previous year, even though, the said receipt pertains to earlier financial years. The argument of Mr. Jagia is that Section 25 B was introduced in the Act vide Finance Act, 2001 w.e.f. 01.04.2001 and, therefore, the same could not be attracted and applied for the assessment year 1999-2000 (previous year 1998-1999), with which we

are concerned. Thus, the mesne profits could not be taxed as income for the assessment year in question.

19. Mr. Jagia has adverted to the *Halsbury Laws of England* to submit that if a tenancy determines by effluxion of time, or otherwise, and the former tenant remains in possession against the will of the rightful owner, the former tenant is a trespasser from the date of the determination of the tenancy. There is no longer the relationship of landlord and tenant. The amount received from the erstwhile tenant cannot be regarded as rent under the rent agreement, which ceases to exist.

20. As to what is the nature of mesne profits, Mr. Jagia has relied upon a decision of this Court in ***Phiraya Lal @ Piara Lal & Another Vs. Jia Rani & Another***, ILR (1972) II Delhi 205. The Division Bench in this decision held that:

> *"... ... ... When damages are claimed in respect of wrongful occupation of immovable property on the basis of the loss caused by the wrongful possession of the trespasser to the person entitled to the possession of the immovable property, these damages are called "mesne profits". The measure of mesne profits according to the definition in section 2(12) of the Code of Civil Procedure is "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received there from, together with interest on such profits". It is to be noted that though mesne profits are awarded because the rightful claimant is excluded from possession of immovable property by a trespasser, it is not what the original claimant loses by such exclusion but what the person in wrongful possession gets or ought to have got out of the property which is the measure of calculation of the mesne profits. (Rattan Lal v. Girdhari Lal, AIR 1972 Delhi 11). This basis of damages for use and occupation of immovable property*

which are equivalent to mesne profits is different from that of damages for tort or breach of contract unconnected with possession of immovable property. Section 2(12) and order XX rule 12 of the Code of Civil Procedure apply only to the claims in respect of mesne profits but not to claims for damages not connected with wrongful occupation of immovable property. The measure for the determination of the damages for use and occupation payable by the appellants to the respondent Jia Rani is, therefore, the profits which the appellants actually received or might with ordinary diligence have received from the property together with interest on such profits."

21. Mr. Jagia submits that the assessee received from the bank in the present case, damages – and not rent, since there was no subsisting relationship of landlord and the tenant between the assessee and the bank, post the termination of their tenancy.

22. Mr. Jagia has then relied upon the decision of this Court in ***Girish Bansal Vs. Union of India & Others***, (2016) 384 ITR 161. This Court in this decision observed that every receipt does not constitute income. For a receipt sought to be taxed as income, the burden lies on the Revenue to prove that it is within taxing provision. The Division Bench, inter alia, observed as follows:

"23.1 The settled legal position is that all receipts do not constitute income. For a receipt sought to be taxed as income, the burden lies upon the Revenue to prove that it is within the taxing provision. Among the earlier decisions of the Supreme Court is Parimisetti Seetharamamma v. CIT (1965) 57 ITR 532 (SC). There the Assessee explained that the jewellery and the money received by her were the gifts made by the Maharani of Baroda. Disbelieving the Assessee on the ground that she had failed to produce documents in support of her contention, the ITAT held that what was given to her was remuneration for

services rendered or to be rendered. This was upheld by the High Court leading to the consequent appeal by the Assessee to the Supreme Court.

23.2 The Supreme Court in Parimisetti Seetharamamma (supra) noted that it was not the case of the Assessee that the receipts were income that was exempted from taxation. Her case was that the receipt does not fall within the taxing provisions at all. It was explained by the Supreme Court as under:

> *"In all cases in which a receipt is sought to be taxed as income, the burden lies upon the Department to prove that it is within the taxing, provision. Where however a receipt is of the nature of income, the burden of proving, that it is not taxable because it falls within in exemption provided by the Act lies upon the assessee."*

23.3 It was further observed as under:

> *"Whether a receipt is liable to be treated as income depends very largely upon the facts and circumstances of each case; it is open to the income-tax authorities to raise an inference that a receipt by an assembly (assesse sic) is assessable income where he fails to disclose satisfactorily the source and the nature of the receipt. But here the source of income was disclosed by the appellant and there was no dispute about the truth of the disclosure.""*

23. In paragraph 28.5 of the same decision, the Division Bench relied upon the decision of the Bombay High Court in ***Cadell Weaving Mill Co. Pvt. Ltd. Vs. Commissioner of Income Tax,*** (2001) 249 ITR 265 : 2001 SCC OnLine Bom 1223, and observed as follows:

> *"28.5 In Cadell Weaving Mill Co. Pvt. Ltd. (supra), the Bombay High Court summarized its findings as under:*

> *"Whenever there is a receipt, one has to ascertain its source. If it is a business income or salary income or capital gains chargeable under Section 45 and, if so, it is taxable under that head, then no further inquiry has to be made, viz.; whether the receipt is casual and non-recurring. Since capital gains are brought within the tax net under Section 45, they cannot fall in Section 10(3); If any amount of capital gains is non-taxable for any reason as capital gains, that amount cannot be treated, automatically, as a casual and non-recurring receipt under Section 10(3). In order to attract Section 10(3), two conditions are required to be satisfied, viz., that the receipt should be casual and non-recurring and that it should not arise by way of business income, salary income or capital gains chargeable under Section 45. Therefore, the aforestated three types of incomes constitute exceptions to Section 10(3). That capital receipts do not fall under Section 10(3)."*

29.1 The decision of the Bombay High Court was carried in appeal by the Revenue and the said appeal was decided by the Supreme Court along with the appeal of D.P. Sandu Bros. (supra). A three-judge bench of the Supreme Court in D P Sandu Bros. (supra) upheld the judgement of the Bombay High Court holding that ***a tenancy right is a capital asset and the sum received on the surrender of the tenancy right is a capital receipt within the meaning of Section 45. It was further held that it was not open to the Revenue to impose tax on such capital receipt by the Assessee under any other Section since "income derived from different sources falling under a specific head has to be computed for the purposes of taxation in the manner provided by the appropriate Section and no other". The amount received on surrender of the tenancy right would attract Section 45 and the amounts derived if at all would be taxable only under the head "capital receipt and assessable if at all only under Item E of Section 14. That being so, it cannot be treated as a casual or non recurring***

receipt under Section 10(3) and be subjected to tax under Section 56". If the income cannot be taxed under Section 45 "it cannot be taxed at all…".

29.2 The Supreme Court in D.P. Sandu Bros. (supra) again reiterated the dictum in B.C. Srinivasa Setty (supra) to the effect that if the computation as provided under Section 48 could not be applied to a particular transaction, it must be regarded as "never intended by Section 45 to be the subject of the charge".

30.1 In CIT v. Saurashtra Cement Ltd., 325 ITR 422 (SC), the Assessee had entered into an agreement for supply of a cement plant with a condition that in the event of delay caused in delivery of the machinery, the Assessee would be compensated at 5% of the price of the respective portion of the machinery without proof of actual loss. With the supplier failing to supply the machinery within the stipulated time, the Assessee received Rs. 8,50,000 by way of liquidated damages, whereby the ITAT held this to be a capital receipt and the High Court answered in favour of the Assessee, the Revenue went in appeal before the Supreme Court.

30.2 Affirming the decision of the High Court, the Supreme Court in CIT v. Saurashtra Cement Ltd. (supra) held the damages received by the Assessee were "directly and intimately linked with the procurement of a capital asset viz., the cement plant. The amount received by the assessee towards compensation for sterilization of the profit-earning source, not in the ordinary course of business, was a capital receipt in the hands of the assessee." (emphasis supplied)

24. Mr. Jagia has also relied upon the decision of the Supreme Court in ***Commissioner of Income Tax, Gujarat Vs. Saurashtra Cement Limited***, (2010) 11 SCC 84, relied upon by the Bombay High Court in ***Cadell Weaving Mill Co. Pvt. Ltd.*** (supra). In this case, the High Court had answered the following questions – referred to it by the ITAT, Ahmedabad

under Section 256(1) of the Income Tax in the affirmative, and in favour of the assessee:

> *"(i) Whether the Tribunal has not erred in law on facts in holding that the amount of Rs.8,50,000 received by the assessee was not taxable as revenue receipt in the hands of the assessee?*
>
> *(ii) Whether the finding of the Tribunal that the receipt relating to liquidated damages cannot be treated as a revenue receipt but must be held to be a capital receipt not exigible to tax is correct in law?*
>
> *(iii) Whether the assessee is entitled to the addition made to the machinery during the year thus determining the capital employed for the purpose of claim under Section 80-J of the Income Tax Act, 1961?"*

25. The factual background of this case was that the assessee was engaged in the manufacture of cement, etc. It entered into an agreement with the supplier for purchase of an additional cement plant. The consideration amount was payable in four instalments by the assessee. The agreement contained a clause with regard to the manner in which the machinery was to be delivered and the consequence of delay in delivery. Clause 6 of the agreement is relevant and the same reads as follows:

> *"6.* * * *
>
> *Delayed deliveries – In the event of delays in deliveries except the reason of force majeure at Para 5 mentioned above, the suppliers shall pay the purchasers an agreed amount by way of liquidated damages without proof of damages actually suffered at the rate of 0.5% of the price of the respective machinery and equipment to which the items were delivered (sic), for each month of delay in delivery completion. It is further agreed that*

the total amount of such agreed liquidated damages shall not exceed 5% of the total price of the plant and machinery."

26. The supplier failed to supply the plant & machinery in scheduled time and, therefore, as per the terms of the contract, the assessee received an amount of Rs.8,50,000/- from the supplier by way of liquidated damages. The question arose whether this receipt of Rs.8,50,000/- by the assessee was a revenue receipt or a capital receipt. The Assessing Officer included the said amount in the total income of the assessee. The appeal preferred by the assessee before the CIT (Appeals) failed. The matter was carried by the assessee to the Tribunal which referred the question to the High Court for its opinion. The High Court opined in favour of the assessee. The Supreme Court agreed with the opinion of the High Court. The relevant discussion found in the said decision, relied upon by Mr. Jagia, reads as follows:

"14. The question whether a particular receipt is capital or revenue has frequently engaged the attention of the Courts but it has not been possible to lay down any single criterion as decisive in the determination of the question. Time and again, it has been reiterated that answer to the question must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a conclusion.

15. In Rai Bahadur Jairam Valji (supra), it was observed thus:

> *"2. The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any*

single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. Vide Van Den Berghs Ltd. v. Clark(1935) 3 I.T.R. (Eng. Cas.) 17. That, however, is not to say that the question is one of fact, for, as observed in Davies (H.M. Inspector of Taxes) v. Shell Company of China Ltd. (1952) 22 I.T.R. (Suppl.) 1,

> *"these questions between capital and income, trading profit or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts."*

16. In Kettlewell Bullen and Co. Ltd. (supra), dealing with the question whether compensation received by an agent for premature determination of the contract of agency is a capital or a revenue receipt, echoing the views expressed in Rai Bahadur Jairam Valji (supra) and analysing numerous judgments on the point, this Court laid down the following broad principle, which may be taken into account in reaching a decision on the issue :

> *"36. ... ... Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue :*

Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

17. We have considered the matter in the light of the aforenoted broad principle. It is clear from clause No.6 of the agreement dated 1 st September 1967, extracted above, that the liquidated damages were to be calculated at 0.5% of the price of the respective machinery and equipment to which the items were delivered late, for each month of delay in delivery completion, without proof of the actual damages the assessee would have suffered on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant.

18. It is evident that the damages to the assessee was directly and intimately linked with the procurement of a capital asset i.e. the cement plant, which would obviously lead to delay in coming into existence of the profit making apparatus, rather than a receipt in the course of profit earning process. Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement and clause No.6 thereof came into play. The afore-stated amount received by the assessee towards compensation for sterilization of the profit earning source, not in the ordinary course of their business, in our opinion, was a capital receipt in the hands of the assessee.

19. We are, therefore, in agreement with the opinion recorded by the High Court on question Nos. (i) and (ii) extracted in Para 1 (supra) and hold that the amount of

Rs.8,50,000/- received by the assessee from the suppliers of the plant was in the nature of a capital receipt."

27. Mr. Jagia has then sought to deal with the decision rendered by this Court in ***Commissioner of Income Tax-VI Vs. M/s Uberoi Sons (Machines) Limited***, (2012) 193 DLT 148 (DB). We may observe that this decision was relied upon by Mr. Anand, learned counsel for the Revenue.

28. The second question framed by the Court in the said appeal was: *Whether the ITAT was correct in law in holding that the excess amount payable to the assessee towards mesne profits/ compensation for unauthorized use and occupation of the premises accrued to the assessee only upon the passing of the decree by the Civil Court on 14.10.1998?*

29. The relevant facts in which the said question arose were that the assessee – a private limited company, was engaged in the real estate business and derived rental income from its commercial building which was a multi-storied complex let out to various tenants. During the financial year, relevant to assessment year 1992-93, the lease agreement between the assessee and the tenant Oriental Bank of Commerce expired on 31.03.1991. The premises were not vacated by the tenant and the assessee filed a civil suit before the High Court claiming a decree for possession by way of eviction. During the pendency of the suit, the tenant Oriental Bank of Commerce was paying rent regularly @ Rs. 45,900/- per month. This was charged to tax, on due basis. The suit was decreed by the High Court in October, 1998. The assessee was paid a total amount of Rs. 27,76,045/- as mesne profit towards arrears of rent. The decree for mesne profits/ damages against the tenant was @ Rs. 75,000/- per month, from the date of filing of

suit to the date of vacation, with costs. The AO sought to reopen the assessment proceedings for assessment years 1992-93 to 1998-99, on the premise that the assessee knew of the higher amount that was payable as rent in respect of the premises. The additions were sought to be made for these years. In assessee's appeal, the CIT (A) held that the action of the AO in adding the arrears of rent to the assessee's income from house property (by taking annual value @ Rs. 75,000/- per month for each of the assessment years), was not justified. The additions were deleted. The Revenue's appeal to the ITAT was rejected. Reliance was placed by the Revenue on Section 25 B which was introduced later after the assessment years in question. The Division Bench referred to and relied upon the decision of the Madras High Court in ***P. Mariappa Gounder*** (supra) which explained the precise nature of the right of a landlord seeking possession of the residential premises through a civil suit, which also includes the claim for mesne profits, in the following words:

> *"10. ... ... The Madras High Court, in Commissioner of Income-Tax, Tamil Nadu-V v. P. Mariappa Gounder 1983 (147) ITR 676 (Mad) explained the precise nature of the right of a landlord seeking possession of residential premises, through a civil suit which also includes a claim for mesne profits:*
>
> > *"We do not think it should take us long to find the correct answer.* ***A claim for mesne profits is usually directed against one who has deprived the true owner of possession of his property and who has thereby prevented the true owner from enjoying the income or usufruct of the property. When, in such a suit or proceeding, the court awards mesne profits to the true owner, that***

represents a just recompense to him for the deprivation of the income which ought properly to have come into his hands but for the interference of the person in wrongful possession of the property.

The Code of Civil Procedure defines mesne profits as that which a person in wrongful possession of property has actually received or might with ordinary diligence have received therefrom. The accent of the definition in section 2(12) of the Code concentrates more on the methodology of calculation of mesne profits rather than on what the true nature of mesne profits is. As we earlier stated, ***the rationale of awarding mesne profits is that the trespasser or the person in wrongful possession not only defies the title of the true owner, but also prevents the true owner from enjoying the income or the usufruct of the property in question. When, therefore, the court decrees mesne profits, that decree is in recognition of the position that the true owner is entitled to the income from the property and the person in wrongful possession is to compensate the true owner in that regard by paying either the actual income from the property or a reasonable estimate of that income. Having regard to these characteristics of mesne profits, there can be no doubt that they are also a species of taxable income. Under the scheme of the I.T. Act, anything which can properly be regarded as income and which is not expressly exempted from taxation under a specific provision of the statute must be regarded as taxable income.*** *We are, therefore, satisfied that the Tribunal and the other authorities were right in their view that mesne profits has to be assessed as taxable income in the hands of the present assessee.*

…… …… ……

…To say that we do not know how much is the mesne profits but nevertheless assert that mesne profits have accrued at a given moment of time, out of ignorance, is very much like an Irish Bull, an example of which was found in the description of an escaped convict from an Irish prison: "Age not known but looks older than he really is". If we do not know how much the mesne profits are, how can we say, with any modicum of confidence, that the mesne profits have already accrued? The question of accrual, like the question of receipt, cannot be based on any theory but must rest on the solid rock of actualities. ***We cannot say that whenever the amount of mesne profits are quantified, that amount must relate back to an earlier point of time when the right to mesne profits itself was declared by a competent court. "Relation back" theory cannot work and would be quite inappropriate for settling the question of accrual of income, when both the accrual and income are unknown quantities.***

…… …… ……

The assessee did not know how much was the income. The proceedings had, therefore, to go through the whole hog of a judicial inquiry before mesne profits could be ascertained. ***As it happened, the amount was fixed by the trial court only on December 22, 1962, during the year of account ended March 31, 1963. On principle as well as on authority, therefore, the mesne profits as an amount of income could be said to have accrued, in the income-tax sense of the term, only during the year ended March 31, 1963.*** *Hence, we must uphold the order of the AAC bringing to tax the entire amount in the assessment year 1963-64.*

The assessment of the same amount in 1964-65 relevant to the account year ended March 31, 1964, must be held to be erroneous."

This understanding was endorsed by the Supreme Court in the appeal against the decision of the Madras High Court. In P. Mariappa Gounder v. Commissioner of Income Tax 1998 (232) ITR 2 (SC) the Court held that:

> ***"In our opinion, the decision of the High Court does not call for any interference.*** *It will be seen that under Order XX, rule 12, of the Code of Civil Procedure when the court passes a decree for possession and mesne profits by clause (ba) it may pass a decree "for mesne profits or directing an enquiry as to such mesne profits". In the present case, from the portion of the decree extracted hereinabove, it is clear that this court passed an order directing an enquiry as to the mesne profits which would be payable by the judgment-debtor to the decree-holder. As on the day when this court decreed the appellant's suit, there was only an inchoate right which arose in his favour. The trial court was directed to hold an enquiry and then to determine the amount of mesne profits which was payable.*
>
> *XXXX XXXX XXXX XXXX XXXX XXXX*
>
> *The aforesaid passage was quoted with approval by this court in CIT v. Hindustan Housing and Land Development Trust Ltd. [1986] 161 ITR 524, in which case also this court was called upon to deal with a question as to when the additional compensation awarded was liable to be taxed. In that case the amount of compensation awarded by the arbitrator was in dispute. On an appeal having been filed by the State Government it was held that the said amount could be taxed only when the*

dispute was resolved because if the appeal had been allowed in its entirety, the right of payment of enhanced compensation would have fallen altogether.

Applying the ratio of the aforesaid decisions, it appears to us that the decree dated April 22, 1958, passed by this court only created an inchoate right in favour of the appellant. It is only when the trial court determined the amount of mesne profits that the right to receive the same accrued in favour of the appellant. In other words, the liability became ascertained only with the order of the trial court on December 22, 1962, and not earlier*. Following* ***the mercantile system of accounting, the mesne profits awarded by order dated December 22, 1962, were rightly taxed in the assessment year 1963-64*** *and it was wholly irrelevant as to when the amount awarded was in fact realised by the assessee. In our opinion, therefore, the High Court was right in deciding the reference in favour of the Department. We accordingly dismiss the appeals but in the circumstances of this case award no costs.""* (emphasis supplied)

30. The Division Bench then referred to its decision in ***CIT Vs. R.J. Wood***, 334 ITR 358, wherein the Court had noticed the newly introduced Section 25B, and observed that it was clarificatory in nature as it encapsulated the law existing, namely, that the receipts towards mesne profits should be taxed in the year of their receipt. The Division Bench quoted the following extract from ***R.J. Wood*** (supra):

"Once we proceed on this basis, the obvious conclusion would be that the arrears of rent received in the assessment year 2000-01 would not relate to the previous years and are to be

taxed in that year. For this reason, as far as these assessment years are concerned, the Tribunal was right in holding that the arrears of rent received in the assessment year 2000-01 could not be spread over the previous years, i.e., 1996-97 to 1999-2000."

31. The Division Bench further observed as follows:

"The above conclusion is in conformity with the law declared by the Supreme Court in P. Mariappa Gounder (supra). Therefore, this Court holds that there is no infirmity in the findings of the Tribunal that even on merits, ***the arrears of rent received by the assessee (as mesne profits) could not be brought to tax for the previous years, when they fell due. They could be brought to tax only during the year of receipt.*** *The revenue had further argued that during the year of receipt, the assessee had shown the amount so received as capital.* ***Its character was clearly as that of income, as is evident from the ruling of the Madras High Court in P. Mariyappa Gounder which was later affirmed by the Supreme Court - a fact recognized by this Court in R.J. Wood.*** *The revenue had not however, re-opened the assessment in respect of the year of receipt of the amounts, in this case. As a result,* ***this Court holds that though the amount received by the assessee was liable to tax, in accordance with the law declared by the Supreme Court - in the year of its receipt- there is no infirmity with the findings and conclusions of the Tribunal.*** *The questions of law framed are accordingly answered against the revenue, and in favour of the asseseee, subject to the above observations and findings. The appeals are consequently dismissed."* (emphasis supplied)

32. The submission of Mr. Jagia is that in ***Uberoi Sons (Machines) Limited*** (supra), the assessee received arrears of rent, and not mesne profits/ damages. He further submits that the real issue before the High Court in ***Uberoi Sons (Machines) Limited*** (supra) was: in which previous year the arrears of rent received by the assesse (as mesne profits) could be brought to

tax? The issue was not whether mesne profits received by the landlord/ assesse from the erstwhile tenant constitute revenue receipt, or capital receipt. Thus, ***Uberoi Sons (Machines) Limited*** (supra) cannot be regarded as a precedent to determine the said issue. Therefore, he submits ***Uberoi Sons (Machines) Limited*** (supra) cannot be pressed into service to determine the issue arising in the present case.

33. So far as the decision of the Madras High Court in ***P. Mariappa Gounder*** (supra) is concerned, Mr. Jagia has submitted that the said decision has not been followed by the Calcutta High Court in a subsequent decision reported as ***Smt. Lila Ghosh*** (supra). In fact, the Calcutta High Court has expressed doubts on the correctness of the decision of the Madras High Court in ***P. Mariappa Gounder*** (supra). Mr. Jagia has further submitted that the facts of ***P. Mariappa Gounder*** (supra) are also different from the facts of the present case. In that case, the assessee entered into an agreement to purchase a tile factory. In pursuance of the agreement, he made certain advance payment to the vendor under a written agreement. The vender, however, did not convey the property, as promised, and in breach of the agreement, sold it to a third party viz. Kochu Vareed, and put him in possession. The assessee sued the vendor for specific performance. Kochu Vareed impleaded himself in the said suit and contested the suit. The Trial Court decreed specific performance of the assessee's agreement with the original owner. Kochu Vareed, however, appealed against the decree. The Kerala High Court allowed the appeal. The Supreme Court, on an appeal by the assessee, reversed the decision of the High Court and restored the specific performance decree. The Court also sustained the assessee's claim

for mesne profits against Kochu Vareed. The matter was remitted to the Trial Court for inquiry and determination of the mesne profits. The Trial Court determined the mesne profits vide its order dated 22.10.1962 at Rs.67,093/-. The amount was received by the assessee during the financial year ending 31.03.1964. The two questions which arose during the income tax assessment of the assessee were: *Whether the amount of mesne profits in the sum of Rs.67,093 constitute taxable income in the assessee's hands; and the other: As to which year's income should this amount be brought to be charged for income tax***.** Mr. Jagia submits that in ***P. Mariappa Gounder*** (supra), it was not a case of grant of mesne profits against the erstwhile tenant who continued to occupy the premises, despite termination of the tenancy. It was a case where the subsequent agreement purchaser held on to the possession of the property, after facing of the decree for specific performance, and while the matter was pending adjudication by the higher Court.

34. Mr. Jagia has elaborately referred to the decision of the Calcutta High Court in ***Smt. Lila Ghosh*** (supra). In ***Smt. Lila Ghosh*** (supra), the asseessee had inherited a property which was under lease. Despite the lease expiring, the lessee did not handover the possession of the same to the assessee. The assessee filed a suit for eviction and mesne profits. The suit was decreed in favour of the assessee, right up to Supreme Court. While the assessee's execution proceedings were pending, the Government of West Bengal requisitioned the property. The requisition was challenged by the assessee before the High Court in a writ petition. A settlement was arrived at between the assessee and the State of West Bengal. Under the terms of

settlement, the property in question was to be acquired by the State of West Bengal under the Land Acquisition Act, and compensation was to be paid to the assessee therefor. A sum of Rs.11 Lakhs was advanced on account of compensation for acquisition by the State of West Bengal. Apart from the compensation for acquisition of the said premises, the assessee received a sum of Rs.2 Lakhs from the State of West Bengal, on account of mesne profits for the use and occupation of the said property by the erstwhile tenant. It was clarified that the amount of Rs.2 Lakhs had been paid to the assessee by the State Government on account of mesne profits for the period from May 1970 to February 1980. While making the assessment, the Income Tax Officer assessed the said Rs.2 Lakhs – representing mesne profits, as a revenue receipt in the hands of the assessee under the head "Income from other sources". On appeal, the Commissioner of Income Tax (Appeals) rejected the assessee's submission that the amount of Rs. 2 Lakhs received by the assessee was a capital receipt not chargeable to income tax. The Income Tax Tribunal, however, held that the mesne profits of Rs. 2 Lakhs arose as a result of transfer of the capital asset, and the same were assessable under the head "Capital gains". Certain issues were decided against the assessee by the Income Tax Tribunal. Cross references were sought to be made to the High Court. The High Court referred to several decisions and thereafter proceeded to hold in paragraph 20 as follows:

> *"20. All the aforesaid cases clearly support the assessee in this reference. Since mesne profits are only damages for loss of property or goods, these are not in the nature of revenue receipts. The receipt of Rs. 2 lakhs is clearly capital in nature. Counsel for the Revenue, however, invited our attention to a decision of the Madras High. Court in CIT v. P. Mariappa*

Gounder, [1984] 147 ITR 676. In that case, the assessee agreed to purchase a tile factory under an agreement dated May 22, 1950. The vendor, contrary to the agreement and in breach thereof, sold it to another person and put him in possession. The assessee sued the vendor for specific performance. This suit was decreed in favour of the assessee and the same was affirmed by the Supreme Court. The Supreme Court also decreed mesne profits payable to the assessee as fixed by the trial court. The Madras High Court held that a claim to mesne profits is usually directed against one who has deprived the true owner from possession of his property and who has thereby prevented the true owner from enjoying the income therefrom or usufruct of the property. When, in such a suit or proceeding, the court awards mesne profits to the true owner, it represents a just recompense to the true owner for the deprivation of the income which ought to have come to his hands but for the interference of the person in wrongful possession of the property. It is in recognition of this principle that the true owner is entitled to the income from the property and the person who is in wrongful possession is to compensate the true owner by paying either the actual income from the property or a reasonable estimate of that income. Consequently, the mesne profits are also a species of taxable income."

35. In paragraph 21 of the decision, the High Court recorded its disagreement view expressed by the Madras High Court in ***P. Mariappa Gounder*** (supra) by observing as follows:

"21. With great respect to the learned judges, we could not persuade ourselves to agree with the views expressed by the Madras High Court in the aforesaid decision so far as it holds that mesne profits awarded by the court for wrongful possession are liable to be assessed as income. Neither the decision of the Privy Council in Girish Chunder Lahiri, [1900] 27 I.A. 110, nor the decision of the Supreme Court in Lucy Kochuvareed, (1979) 3 SCC 150 : AIR 1979 SC 1214, were either cited or noticed by the learned judges of the Madras

High Court. In fact, even the decision of the Patna High Court in CIT v. Rani Prayag Kumari Debi, [1940] 8 ITR 25, and that of the Kerala High in CIT v. Periyar and Pareekanni Rubbers Ltd., [1973] 87 ITR 666, were neither noticed nor considered by the Madras High Court."

36. Mr. Jagia, therefore, submits that it is the view of the Calcutta High Court which is the correct view, and should be followed by this Court.

37. Mr. Jagia has also placed reliance on the decision of the Mumbai Bench of the ITAT in ***Narang Overseas Pvt. Ltd. Vs. ACIT*** decided on 28.02.2007, reported as MANU/IU/0005/2008. The Tribunal after a detailed analysis observed in paragraph 48 as follows:

"48. The above analysis clearly reveals that there is cleavage of opinion between High Courts. The Hon'ble Madras High Court has held that mesne profits is recompense for deprivation of income which the owner would have enjoyed but for the interference of the persons in wrongful possession of the property. Consequently, the same is revenue receipt chargeable to tax. On the other hand the Hon'ble High Courts of Andhra Pradesh, Calcutta, Kerala and Patna have held that mesne profit is in the nature of damages for deprivation for use and occupation of the property and therefore capital receipt not chargeable to tax. There is no judgment of the jurisdictional High Court on this issue. In our view, such conflict can be resolved only by the Hon'ble Supreme Court in some appropriate case. In the absence of the judgement of the highest court of land or of the jurisdictional High Court, the legal position is that, where there are two views then the view favourable: to the subject should be preferred. Reference can be made to various judgements of the apex court : CIT v. Vegetable Products 88 ITR 192 (SC), CIT v. Naga Hills Ten Co. Ltd. 89 ITR 236 (SC), CIT v. Madho Prasad Jatia 105 ITR 179 (SC), CIT v. J.K. Hosiery Factory 159 ITR 85, Shashi Gupta v. LIC 84 Comp. Cases 436. Therefore, following the same, it has

to be held that mesne profit received for deprivation of use and occupation of property would be capital receipt not chargeable to tax. We hold accordingly. Consequently, the decision of the Special Bench of the Tribunal in the case of Sushil Kumar fit Co. (supra), holding to the extent that mesne profit is taxable as revenue receipt is overruled."

38. Mr. Deepak Anand, learned counsel for the revenue has advanced his submission in opposition to the appeal. Mr. Anand submits that the damages/mesne profits received by the appellant are in the nature of revenue receipts. He submits that the tribunal has correctly answered the said issue. He has drawn our attention to paras 33 and 37 of the impugned order, which read as follows:

"33. Hon'ble Madras High Court in the matter of P. Mariappa Gounder [supra] also held that:

"The true principle to be applied is that where compensation is paid for deprivation of a capital asset or for restrain on trading or conduct of the business undertaking as such, it would be a capital receipt in the hands of the recipient of the compensation". In this case, no loss to the capital asset is stated. When the assessee did not get the enhanced rent from the lessee bank as per the agreement, therefore, assessee terminated the tenancy, as the bank did not comply with the contract. Assessee was entitled to enhance rate of rent after expiry of certain period, which was not complied with by the banker. Same facts were pleaded before Civil Courts in suit by assessee. Had the banker enhanced the rate of rent as per rent agreement, then probably assessee would not have filed the suit for possession and for Mesne Profit. Assessee was entitled for higher income as per contract with the bank but the bank did not

obey the terms of the contract. Therefore, assessee terminated the contract and filed the suit for possession and Mesne ProfIt. The suit was thus filed by the assessee in respect of the relief claimed for entitlement of the income, which was denied by the lessee bank. Mesne Profit is calculated with reference to the loss of rent suffered by assessee. Therefore, clearly it is a case of earning of income from house property by the assessee, which was received in the name of Mesne Profit/damages".

"37. According to section 22, the annual value of the property shall be chargeable to income tax under the head 'income from house property'. Hon'ble Delhi High Court in the matter of Ram Prasad and Sons Vs. CIT 81 Taxman 332 considering the fact that owner has been occupying the property in question and it was not let out held in respect of the consideration of the annual letting value that:-

"The manner of arriving at the income as stated in section 22 read with section 23 is to find out the annual value of the property. Whether the property is in direct occupation of the owner or leased to tenant, the basis to arrive at the income is the same subject to some variations regarding deductions. Nowhere. a different method is provided to arrive at annual value of the property when it is under occupation of the owner. As per section 23[1][a], the annual value of any property shall be deemed to be the same for which the property might reasonably be accepted to let out from year to year. In other words, reasonable estimate shall have to be made of the value as provided under the Act.""

39. Mr. Anand submits that the tribunal has rightly held that section 25B of the Act is clarificatory in nature and, therefore, applicable to the relevant

assessment year. Mr. Anand submits that the tribunal has correctly relied upon the decision of the Madras High Court in ***P. Mariappa Gounder*** (supra), which has been affirmed by the Supreme Court, and relied upon para 7 of the said decision in particular. He further submits that in ***Uberoi Sons (Machines) Limited*** (supra), this Court relied upon ***P. Mariappa Gounder*** (supra) and held that the arrears of rent received as mesne profits are taxable in the year of receipt, and that section 25B of the Act, which was introduced vide amendment in 2000 with effect from assessment year 2001-02 is only clarificatory in nature. The High Court also referred to and relied upon ***CIT v. Sadhna Chadha***, (2004) 270 ITR 534 Del. He submits that the decision of the Calcutta High Court in ***Smt. Lila Ghosh*** (supra) was a decision rendered prior to the Supreme Court deciding the appeal in the case of ***P. Mariappa Gounder*** (supra). He further submits that even subsequently, the Madras High Court has reiterated its view taken in ***P. Mariappa Gounder*** (supra), in ***S. Kempadevamma v. CIT***, 251 ITR 871 (2000). The submission of Mr. Anand is that the question raised by the appellant, in fact, has already been answered by this Court in ***Uberoi Sons (Machines) Limited*** (supra), and does not survive for any further consideration.

40. The real issue that needs consideration in the present appeal is whether the mesne profits, and interest on mesne profits, received by the appellant constituted revenue receipt, or capital receipt, in the hands of the appellant/assessee, in the facts and circumstances of the case.

41. Having heard the submissions of learned counsels for the parties and having given our due consideration to them in the light of the decisions

relied upon by the learned counsels, we are of the view that the mesne profits, and interest on mesne profits, received by the appellant in pursuance of the court decree, in the facts of the present case, constitute revenue receipt.

42. Reliance placed by Mr. Jagia on ***Tuticorin Alkali Chemicals & Fertilizers Ltd.*** (supra) and ***Ansal Housing and Construction Ltd.*** (supra) is of no assistance in answering the said question. The decision of this Court in ***Phiraya Lal @ Piara Lal*** (supra) also does not assist us in finding an answer to the aforesaid question. The statement of law contained in ***Girish Bansal*** (supra) is all too well settled, and does not throw light on the issue arising for our consideration in this appeal.

43. Reference made by Mr. Jagia to ***Cadell Weaving Mill Co. Pvt. Ltd.*** (supra), which was relied upon in ***Girish Bansal*** (supra), in our view, is of no avail, since the fact situation and the background in which the said decision was rendered was materially different. That was a case where the tenancy right was surrendered by the tenant and, in lieu thereof, the tenant had received consideration. The issue that cropped up for consideration was whether the said receipt was a capital receipt, or a revenue receipt. The Court held the same to be a capital receipt, since the tenancy right is a capital asset and consideration received in lieu thereof was held to be capital receipt.

44. The factual position before us is markedly different. The tenant, namely, Indian Overseas Bank, did not surrender the tenancy premises despite termination of the tenancy. It is not the Indian Overseas Bank,

which received any consideration for surrender of its tenancy. On the contrary, Indian Overseas Bank suffered a decree for its continued use and occupation of the premises of the appellant/assessee, even after the termination of the contractual tenancy. The Indian Overseas Bank was saddled with mesne profits and interest thereon under the courts decree. The income was generated in the hands of the landlord/assessee, and not in the hands of the tenant/ Indian Overseas Bank. Thus, reliance placed by Mr. Jagia on ***Girish Bansal*** (supra), which refers to ***Cadell Weaving Mill Co. Pvt. Ltd.*** (supra), is misplaced.

45. Mr. Jagia has also placed reliance on ***Saurashtra Cement Ltd.*** (supra). We have noticed the factual background in which the said decision was rendered. This was a case where the assessee, who was already engaged in the manufacture of cement, had entered into an agreement with the supplier for purchase of an additional cement plant i.e. a capital asset. There was delay on the part of the supplier in supplying the plant and machinery and in terms of clause 6 of the agreement, the supplier became liable to pay liquidated damages. The supplier paid an amount of Rs.8,50,000/- on account of liquidated damages to the assessee. It was this receipt which was a matter of debate i.e. whether it was a revenue receipt, or a capital receipt. The Supreme Court held the same to be a capital receipt. The Supreme Court held that the answer to the question: whether a receipt/income is a capital receipt, or a revenue receipt, must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a conclusion. It is not possible to lay down any single test as infallible, or any

single criterion as decisive, in the determination of this question, which must ultimately depend on the facts of the particular case. The Supreme Court in this decision relied upon ***Kettlewell Bullen and Co. Ltd***. (supra), wherein a broad principle had been laid down in para 36. We have extracted the same in para 26 herein above. Applying the said broad principle, the Supreme Court held that the damage to the assessee was directly and intimately linked with the procurement of a capital asset i.e. the cement plant, which would obviously lead to delay in coming into existence of the profit making apparatus, rather than a receipt in the course of profit earning process. Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee, as supplier had failed to supply the plant within the time as stipulated in the agreement, and clause 6 thereof came into play. The aforesaid amount received by the assessee towards compensation for sterilization of the profit earning source, not in the ordinary course of their business, was held to be a capital receipt in the hands of the assessee.

46. When we apply the said test to the facts of the present case, the only conclusion that we can draw is that the receipt of mesne profits and interest thereon by the appellant/assessee, was a revenue receipt. The capital asset of the appellant i.e. the property in question was earning revenue for the appellant by way of rent till so long as the lease subsisted. After the termination of the lease, the erstwhile tenant continued to occupy the premises unauthorisedly. It is in lieu of the rent which the appellant would have otherwise derived from the tenant, that the mesne profits and interest thereon have been awarded. So far as the capital asset of the assesse is

concerned, the same has remained intact. It is not the appellants case that there was any damage to the property/ capital asset inasmuch, as, the building structure was damaged by the bank, and that damages have been awarded by the Court on account of such physical damage. Even the title of the appellant in respect of the capital asset remained intact. Had it been a case where the capital asset would have been subjected to physical damage, or of diminution of the title to the capital asset, and damages would have been awarded under the head, there would have been merit in the appellant's claim that damages received for harm and injury to the capital asset, or on account of its diminution, would be a capital receipt.

47. We also find merit in the submission of Mr. Anand that the issue is no longer *res intergra*. The issue stands concluded not only by the decision of the Supreme Court in ***P. Mariappa Gounder*** (supra) but also by this Court in ***Uberoi Sons (Machines) Limited*** (supra). In ***Uberoi Sons (Machines) Limited*** (supra), this Court has followed the decision of the Madras High Court in ***P. Mariappa Gounder*** (supra) as affirmed by the Supreme Court. The facts of ***Uberoi Sons (Machines) Limited*** (supra) have been taken note of in 29 herein above. They are more or less identical with the facts of the present case. Like in the present case, in ***Uberoi Sons (Machines) Limited*** (supra), the Oriental Bank of Commerce – which was a tenant in the premises of the assessee, did not vacate the premises and the assessee filed a civil suit claiming a decree for possession by way of eviction. The suit was decreed by the High Court in October 1998. The assessee was paid a sum of Rs.27,76,045/- as mesne profits. The decree for mesne profits against the tenant was @ Rs.75,000/- per month. Pertinently, during pendency of the

suit, the tenant was paying Rs.45,900/- per month towards rent/ occupation charges. The submission of Mr. Jagia that in this case, the Court awarded/ decreed only arrears of rent, and not mesne profits, is incorrect. It is evident that Rs.75,000/- per month was not the agreed rent, but the assessment of mesne profits made by the Court. The agreed rent, it appears, was Rs.45,900/-. Moreover, the relationship of landlord and tenant having ended, what was assessed and paid was only damages, and not rent.

48. When the matter travelled to this Court, this Court relied upon ***P. Mariappa Gounder*** (supra) decided by the Madras High Court. We have already extracted the relevant portion of the decision in ***Uberoi Sons (Machines) Limited*** (supra) in 29 herein above. This Court not only held that Section 25B was clarificatory and was attracted for application to the assessment year in question, but also held that the receipt of mesne profits constituted revenue receipt. If they did not so constitute revenue receipt, there would have been no question of invoking Section 25B. In fact, we find that the present appeal is covered on all fours by the decision in ***Uberoi Sons (Machines) Limited*** (supra).

49. The submission of Mr. Jagia that the ratio of the decision in ***Uberoi Sons (Machines) Limited*** (supra) was not to hold that income by way of mesne profits constituted revenue receipts is misplaced. This is because the issue of invocation of Section 25B was intimately linked to the issue whether the said receipts were revenue receipts, or capital receipts. If they did not constitute revenue receipts, there would be no question of invoking or examining the applicability of Section 25B. Moreover, the Supreme Court has put its seal of approval on ***P. Mariappa Gounder*** (supra). We are,

therefore, bound by the said decision. Even when we examine the issue in the light of the principles laid down by the Supreme Court in ***Kettlewell Bullen and Co. Ltd.*** (supra), we reach to the same conclusion.

50. Reliance placed by Mr. Jagia on ***Smt. Leela Ghosh*** (supra) is of no avail for two reasons. Firstly, when Smt. ***Leela Ghosh*** (supra) was decided and the Calcutta High Court dissented from the view of the Madras High Court in ***P. Mariappa Gounder*** (supra), the decision of the Supreme Court in ***P. Mariappa Gounder*** (supra), was not available. ***P. Mariappa Gounder*** (supra), was decided by the Supreme Court much later i.e. 21.01.1998, whereas ***Smt. Leela Ghosh*** (supra) was decided on 18.01.1993. In the light of the Supreme Court having affirmed the decision of the Madras High Court in ***P. Mariappa Gounder*** (supra), the dissent in ***Smt. Leela Ghosh*** (supra) loses its force. Secondly, this Court has already followed the decision of the Madras High Court in ***P. Mariappa Gounder*** (supra), and taken note of that decision being affirmed by the Supreme Court, while deciding ***Uberoi Sons (Machines) Limited*** (supra). The same is a decision of a co-ordinate bench of this Court, and we are bound by that decision. We have not been persuaded by the submissions of Mr. Jagia to take a contrary view. Therefore, we reject the appellant's reliance on ***Smt. Leela Ghosh*** (supra).

51. Reliance placed on ***Narang Overseas Pvt. Ltd***. (supra) – a decision of the Mumbai Bench of the ITAT, is also misplaced. That is a decision rendered on 28.02.2007. The decision of this Court in ***Uberoi Sons (Machines) Limited*** (supra) was rendered on 31.08.2012. The ITAT did not had the benefit of the decision of this Court. Even otherwise, the Tribunal

proceeded on the basis that since there was cleavage of opinion between High Courts, where there are two views, the one favourable to the subject should be preferred. That cannot be said to be the position so far as this Court is concerned. We, therefore, reject the reliance placed by Mr. Jagia on ***Narang Overseas Pvt. Ltd***. (supra).

52. Accordingly, we answer the question of law set out in paragraph 2 hereinabove in favour of the revenue, and against the appellant. We hold that the ITAT was right in holding that mesne profits and interest on mesne profits received under the direction of the Civil Court for unauthorised occupation of the immovable property of the assessee by Indian Overseas Bank – the erstwhile tenant of the appellant, was liable to tax under Section 23(1) of the Act, since mesne profits, and interest on mesne profits, in the facts of the present case constitute revenue receipt.

53. The appeal stands disposed of in the aforesaid terms.

(VIPIN SANGHI)
JUDGE

(RAJNISH BHATNAGAR)
JUDGE

NOVEMBER 03, 2020