

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 458 OF 2007
WITH
CIVIL APPLICATION NO. 278 OF 2007
IN
CIVIL REVISION APPLICATION NO. 458 OF 2007

1. Bombay Suburban Art & Craft Education Society
St. Martins Road, Bandra, Mumbai.
2. Raghunath Narhar Zurale
The Secretary, Bombay Suburban Arts & Crafts
Education Society ..Applicants

Vs.

1. Govind Gajanan Dabholkar
Sai Niwas, First Floor, 3, St. Martin Road,
Bandra (West), Mumbai.
2. Uma Vasant Samant
Vrindavan Co-op. Hsg. Society, Koldongri,
Andheri (East), Mumbai.
3. Anjali Vijaykumar Pradhan

Philjoy Society, Ground Floor, Himmat Nagar,
Borivali (West), Mumbai.

4. Vaishali Suryakant Thipse

Snehdhara, Block No.70, Third Floor,
Dadabhai Road, Vile Parle (West),
Mumbai.

5. Kishore L. Bhatija

6. J.T. Bhatia

7. Y.T. Rawal

8. G. Raheja

9. S.K. Patkar

10. D.R. Parulekar

11. G.C. Nichani

12. K. Shridharan

13. A.D. Mandlik

All c/o Bombay Suburban Arts & Crafts

Education Society, St. Martins Road,

Bandra (West), Mumbai.

...Respondents

Mr. P.S. Dani, Sr. Advocate along with Chetan Kapadia and Mayur
Khandeparkar, Advocates i/b K.D. Abichandani for Applicantss.

Mr. R.M. Nakhawa, Advocate i/b Vasant Dhawan for Respondent Nos. 1 to 4.

Mr. Sheelang Shah, Advocate i/b Ms. Sangeeta Lanjekar for Respondent Nos. 7, 8, 11, 12, 13.

CORAM : N.M. JAMDAR, J.

DATED : 23 APRIL 2015

ORAL JUDGMENT:

By this Civil Revision Application, the Applicants challenge the judgment and decree dated 24 March 2007 passed by the Appeal Bench of the Small Causes Court and judgment and decree dated 10 June 2005 passed by the Small Causes Court, Mumbai. By the impugned judgments and decrees, the Applicants have been directed to hand over the possession of the suit property.

2. The property in question is a plot of land admeasuring 852 sq. yards (712.36 sq.mtrs.) bearing Plot No. 9/2 T.P.S. II, New City Survey No. F-1175 (Part), Bandra, Mumbai. The subject matter of this Civil Revision Application is this plot and the structure upon it ie one building ,having ground plus three floors.

3. Applicants no.2 is the secretary of Applicants no.1. The Respondent no.5 to 13 are the office bearers of the Applicants no.1. Hereinafter the Applicants no.1 and 2 and Respondents no. 5 to 13 are referred as Applicants. Respondent no.1 to 4 are referred as Respondents.

4. A lease deed was executed on 8 March 1960 between Gajanan Govind Dabholkar - the predecessor of the Respondents, and the Applicants. It was agreed that the plot of land will be

given on lease to the Applicants from 1 May 1959 for a term of 20 years, at the monthly rent of Rs.100/- and thereafter Rs.125/-. The Applicants agreed to pay the rent and all the taxes etc., and not to assign the mortgage or charge the demised premises, without obtaining the consent of the Respondents in writing. It was agreed that there shall be no default in payment of rent, also that if during the subsistence of the lease the premises or any portion thereof is acquired by the Government or Municipality, the compensation payable will be proportionate. If the Respondents during the continuation of the lease intended to sale the premises, first option of purchase was to be given to the Applicants. It was agreed that the Applicants would be at liberty to construct or erect upon any part of the land, and at the determination of the tenancy, the Applicants will yield up the land and the structure. It was agreed that the Respondents will pay an amount to the Applicants for the structure upon a joint valuation, by the valuers to be appointed by the parties. Thereafter the Applicants constructed a building, having ground floor and three storeys. Building was put to use to house an educational institute.

5. A notice was issued on 4 June 2003 by the Respondents to the Applicants stating that lease dated 8 March 1960 has expired by efflux of time and the Respondents were ready for joint valuation of the structure. The Respondents called upon the Applicants to hand over the vacant and peaceful possession of the suit premises. The notice was replied by the Applicants on 6 August 2003. It was stated that the Applicants did not accept the interpretation of the Respondents regarding nature of transaction and legal effect thereof and only if there is valid termination, question will arise regarding valuation of property. In short, the Applicants refused to hand over the possession or to take steps for joint valuation.

6. The Respondents thereafter filed a T.E. & R. Suit No. 69/86/2003 in the Small Causes Court, Mumbai, on 10 October 2003. The Respondents contended that the lease had come to an

end by efflux of time. It was stated that earlier, a suit bearing no. 105/339/1980 was filed on the ground of bonafide requirement which was dismissed on 28 November 2000. It was stated that the suit was filed when the provisions of Bombay Rent Act, 1947 were in force as regard the land in question, however, after the Maharashtra Rent Control Act, 1999 having come into force, tenancy in respect of the land is not protected. The Applicants were not ready and willing to cooperate with the valuation of the structure, for which the Respondents were ready. The Respondents accordingly sought, for possession of the suit premises, a piece of land admeasuring 852 sq. yards as stated above and mandatory injunction in respect of the building standing on the premises. In the alternative, a declaration that the Respondents are owners and landlord of the building was sought also a prayer for mesne profit at the rate of Rs.25,000/- per month or such reasonable rate.

7. A written statement was filed on behalf of the Applicants on 8 March 2004. The Applicants contended that the the Court had no jurisdiction. It was contended that earlier, Suit No. 105/339/1980 was dismissed on merits and the same issue cannot be again be agitated. It was also contended that another Suit No. T.E. & R. 139/137/2001 filed was unconditionally withdrawn. It was also contended that the Applicants are tenants in respect of the suit premises and structure and the tenancy is protected under provisions of Maharashtra Rent Control Act, 1999. It was contended that the suit is not for land alone but in respect of composite tenancy of the land with structure. It was further contended by the Applicants that the premises were given for purpose of education institution and substantial cost was incurred by the Applicants and therefore an irrevocable license was granted in favour of the Applicants. It was contended that the tenancy of the Applicants continues to be protected under the Maharashtra Rent Control Act 1999 (Act of 1999) It was further contended that the claim of the respondent to enforce the terms and conditions of the lease were barred by the limitation. The claim of the respondent to pay mesne profit was contested. On these and other

grounds, the Applicants sought dismissal of the suit. The office bearers of the Applicants filed their written statement supporting the written statement of the Applicants institute. On behalf of the Respondents, P.W.1 Govind Gajanan Dabholkar examined himself, who was also cross examined. On behalf of the Applicants, R.N. Zurale, General Secretary of the Applicants examined himself on oath and was cross examined. Both the parties produced documentary evidence.

8. The Small Cause Court Judge, Mumbai framed these issues: whether the respondent had duly terminated the tenancy of the Applicants; whether the suit was barred by res-judicata in view of the decisions of earlier two suits; whether the suit was maintainable; and whether the Respondents were entitled to decree of possession and injunction and the amount as prayed for. The Trial Judge held that: the tenancy was duly terminated and the suit was not barred by the principles of *res-judicata*; it was maintainable; the Respondents were entitled to decree of possession of the suit premises. The Trial Judge however declined the relief as regard the decree for amount of permanent injunction as prayed for. The learned Judge also did not grant declaration as sought for. The learned Judge observed that the issues in Suit No. 105/339/1980 were different from the present suit and the second suit i.e. 139/137/2001 was withdrawn on a technical ground and therefore principles of *res-judicata* will not apply. The learned Judge thereafter held that there was no question of grant of irrevocable license in favour of the Applicants, in view of the specific clauses of the lease. The Trial Judge, after interpreting the lease, came to the conclusion that upon termination, the Respondents were entitled to the ownership of the building on payment as per valuation. The Trial Judge observed that the Respondents have claimed the possession of the land and not of the building constructed thereupon and unless they proved that they had become the owner of the structure, they may not be entitled to claim the possession of the building. The learned Judge negatived the contention that the Applicants was entitled to the protection of

the Act of 1999. The learned Judge held that Respondents were entitled to grant of injunction. The suit was maintainable under Section 41 of the Presidency Small Causes Court Act 1882 (Act of 1882). The learned Judge accordingly was pleased to decree the suit by order dated 10 June 2005 as under:

“Suit stand decreed.

The defendants are directed to deliver the plaintiffs the possession of the suit premises i.e. piece of land admeasuring 852 sq.yds. And bearing Plot No. 9/2, T.P.S. II, Bandra, New City Survey No. F-1175(part), situate at St. Martins Road, Bandra, Mumbai – 400 050, on condition of payment of the value of the building constructed by the defendants.

The parties are at liberty to determine the value of the building by appointing valuer and engineer.

The defendants are restrained by an order of injunction of this Court from parting with the possession of the suit premises viz. Piece of land admeasuring 852 sq.yds. And bearing plot No. 9/2, T.P.S. II, Bandra, New City Survey No. F-1175(part), situate at St. Martins Road, Bandra, Mumbai – 400 050.

No order as to costs.

Decree be drawn accordingly.”

9. Thereafter the Applicants filed an Appeal No. 235/2005 before the Appeal Bench of the Small Causes Court, Mumbai. The Appeal Bench framed the issues as regard jurisdiction, applicability of Act of 1999, res-judicata, application of provisions of Section 60 of Easement Act, validity of the notice, competence of Small Causes Court to give ownership and whether the Small Causes Court erred in imposing the condition precedent of payment of valuation of building for handing over the possession of the suit premises. The Appeal Bench held that the Small Causes Court had jurisdiction

under Section 41 of Act 1882. The Appeal Bench held that the building which was constructed with the permission of the Respondents had become integral part of the lease. The Appeal Bench held that after the lease period was over in 1979, the Applicants neither offered to vacate the building nor requested for continuing as a tenant, therefore Applicants were liable to be evicted. The Appeal Bench held that there was no renewal of lease period neither any right under the Act of 1999 arose in favour of the Applicants. It was held that in view of Section 108(d) of the Transfer of Properties Act, a tenant has no right to compel the landlord to treat him as a tenant of the building. The Appeal Bench concurred with the Trial Judge that principles of *res-judicata* will not be attracted. The Appeal Bench also held that Section 60 of Easement Act could not be resorted to as the terms of lease were clear. As regard the contention of the lease for imparting education, the Appeal Bench held that there was no reference in the lease to that effect and purpose of lease was not for imparting education. The Appeal Bench also upheld the finding that the notice was validly issued and the tenancy was validly terminated. The Appeal Bench however came to the conclusion that certain parts of the order of Small Causes Court Judge were not correct. The Appeal Bench held that as per the Section 108 (q) of the Transfer of Properties Act, the tenant upon expiring or terminating of tenancy has to deliver possession of the demised property to the landlord. The building which was constructed with permission of the Respondents will yield to the Respondents after the lease period was over. The Applicants could not have refused to give possession upon the expiry of the lease and grant of payment of money could not have been made condition precedent for handing over the possession of the property. It was also held that in absence of any express covenant in the lease, the Applicants could not retain the possession of the building and the possession had to be handed over and the factum of compensation was to be determined independently. The Appeal Bench accordingly disposed of the appeal by following order:

“1. Appeal stands dismissed with no order as to costs. However, the trial court's order dated June 10, 2005 is being substituted as follows:

2. Defendants shall hand over peaceful and vacant possession of the suit premises viz. viz. piece of land admeasuring 852 square yards and bearing Plot No. 9/2, T.P.S. II, Bandra, New City Survey No. F-1175(Part), situate at St. Martins Road, Bandra, Mumbai – 400 050 coupled with building over the piece of land within six months from the date of this order without creating any third party right over the same in any manner whatsoever.

3. Defendants are hereby perpetually restrained from causing any interference with the lawful possession of the plaintiffs over the suit premises including the building.

4. Separate enquiry be held as per Order 20 Rule 12 of Code of Civil Procedure in respect of mesne profit.”

10. Thereafter the Applicants filed the present Civil Revision Application. The Civil Revision Application was admitted by order dated 14 September 2007 and ad-interim relief was granted. Thereafter by order dated 11 February 2008, by consent of parties ,but subject to rival contentions, a valuer from panel of valuers of this court was appointed for the purpose of valuation and superstructure.. The valuer accordingly submitted a valuation report. Civil Application No. 438/2007 was taken out by the Respondents for a direction to the Applicants to pay a sum of Rs.46,21,057.43/- for arrears of rent/compensation till 31 April 2007 and Rs.6,696/- by arrears of non-agricultural taxes. The learned Single Judge took into consideration the report of the valuer and directed the Applicants to deposit a sum of Rs.22,20,000/- for compensation for the period of June 2005 to July 2008 at the rate of Rs.60,000/- per month and directed the

Applicants to continue depositing compensation at the rate of Rs.60,000/- per month. Thereafter Civil Application No. 80/2008 was taken out by the Respondents for modification of order dated 31 July 2008. By this order, the learned Single Judge modified the order dated 31 July 2008 and directed that reasonable compensation would be Rs.85,000/- per month and that the Applicants shall deposit the compensation at the rate of Rs.85,000/- per month. The amount to be deposited was to be invested in a fixed deposit with nationalized bank. The Respondents was at liberty to receive quarterly interest on fixed deposit. The orders dated 31 July 2008 and 24 October 2008 were challenged by the Applicants in the Apex Court and by order dated 16 December 2008 the Special Leave Petition was dismissed.

11. A Civil Application No. 572/2012 was taken out by the Respondents for enhancement of the compensation. The Civil Application was rejected on 31 January 2013 . The Respondents challenged the order dated 31 January 2013 by way of Special Leave Petition in the Apex Court. The Apex Court by order dated 16 August 2013 disposed of the Special Leave Petition with a request to the High Court to make an endeavor to decide the main Civil Revision Application as early as possible. Accordingly the Civil Revision Application is taken up for final hearing on priority basis.

12. I have heard the Mr.Dani learned Senior Counsel for the Applicants and Mr.Nakhva the learned Counsel for the Respondents, at length.

13. Mr.Dani argued that the Appeal Bench had no jurisdiction to grant a relief in favour of the Respondents which was expressly not granted by the Trial Court without there being any appeal or a cross objection. It was contended that the power of Appeal bench under order XLI Rule 33 of Civil Procedure Code,1908 is not limitless and is circumscribed by provisions of Order XLI Rule 22.

Even otherwise, the Appeal Bench must keep in mind the scope and ambit of Order XLI Rule 22 while exercising power under Order XLI Rule 33. It was contended that the structure and the land are not integral part and are not inseparable. It was further contended that the Respondents in the earlier litigation had treated both these structure as well as the plot of land differently. It was also contended that not only the Appeal Bench had any power to grant relief to the Respondents in absence of cross objection or appeal but even the relief so granted is not in terms of wording of the lease. It was further contended that the Applicants was entitled to remain in possession until the price of superstructure was paid and therefore the Trial Court had rightly placed the payment of amount as condition precedent which could not have been reversed, without there being any cross objection. It was contended that the relief regarding declaration that the Respondents had become landlord of the premises, could have been granted without there being cross objection or appeal. It was then contended that the suit is not maintainable under Section 41 of the Act of 1882. By their own conduct, the Respondents have treated the property i.e. the plot of land to include structure and therefore the protection of the Act of 1999 is not lost and is contrary to the stand of the Respondents themselves. It was further contended that the terms of the lease specified that the structure would belong to the Applicants and therefore the Small Causes Court under Section 41 of the Act of 1882 did not have jurisdiction. It was contended that two separate suits had to be filed, one for the possession of the plot of land and other for building and that too under different enactments. It was contended that Clause 2 (e) (5) and (6) of lease deed will have to be construed as contract to the contrary as envisaged under Section 108 (d) of Transfer of Properties Act, 1882. The contention that the earlier suit filed was withdrawn without liberty, was reiterated. It was argued that the dismissal of the suit may not strictly apply as *res-judicata* the conduct of the Respondents in taking different stands in respect of the structure and plot of land ought to have been taken into consideration. Accordingly, Mr.Dani prayed that both the impugned judgments and orders be set aside.

14. Mr.Nakhava on the other hand submitted that the conduct of the Applicants has to be considered by this Court. He submitted that upon the expiry of the lease period, the Applicants did not hand over the possession of the suit property, and when called upon to do so, gave an evasive reply. He submitted that the Applicants never cooperated for fixing market value and have merely continued to occupy the property without any payment. He submitted that a valuer was appointed by consent of parties and though the valuer was appointed for the purpose of compensation, the valuer has placed on record the correct market value of the property. Mr.Nakhawa submitted that the Respondents are ready and willing to pay the amount to Applicants as per valuation or any other such just amount that the Court may determine ,even as a condition precedent for the Applicants to vacate the premises . He further submitted that the Respondents are also willing to forgo the recovery of mesne profit and that the amount of compensation which is deposited in this Court by the Applicants which otherwise would accrued to the Respondents if the revision is dismissed, can be adjusted towards the market value to be paid to the Applicants. Mr.Nakhawa submitted that even otherwise the Appeal Bench was well within its jurisdiction under Order XLI Rule 33, as the Appeal Bench has all the powers to pass such order as interest of justice is required. He submitted that it is not possible to obtain possession of the land without direction to deliver the possession of structure as the structure occupies the central part of the property. He further submitted that the Appeal Court has merely adjusted the rights of the parties as envisaged under the lease deed. The Appeal Bench has ample power to do so even in absence of the appeal or cross objection. Mr.Nakhawa submitted that arguments regarding jurisdiction was never taken in the terms it is argued in this Court. Mr.Nakhawa submitted that the lease having expired and that Respondents were ready to abide by methodology provided in the lease upon expiry of lease in respect of the structure,there was no question of filing of any separate suits in two different Courts. He submitted that both the Courts have rightly rejected the contentions based on *res-judicata*. He submitted that the suit was filed when the provisions of Bombay Rent Act were applicable and were on

completely different facts. He submitted that the second suit was withdrawn because of technical defect and leave was not refused. Mr.Nakhava further submitted that the Applicants do not require the premises. The premises have become dilapidated. Only few classes are being held and that too only for the purpose to create record for the present litigation. He relied on the have photographs and various documents placed on record. He also submitted that the Applicants have been allotted a plot by the planning authority in nearby locality for conducting architectural college and while obtaining the plot of land, in the application, the Applicants have mentioned that they need the plot in view of the termination of the present lease. He submitted that there is no error in the judgment and decree passed by both the Courts and that no equities be shown to the Applicants.

15. The first question is whether the Appellate Bench exceeded its jurisdiction in granting relief to the Respondents without there being any appeal or cross-objections. Order XLI Rule 22 Code of Civil Procedure deals with the rights of a respondent in an appeal. Order XLI Rule 22 provides that a respondent, though he may not have appealed from any part of the decree, can contend that any finding rendered against him by the trial court in respect of an issue which should have been decided in his favour, is incorrect. He may also file cross-objection. If the Respondents files a memorandum of objections, it will be heard irrespective of the fact that the original appeal is withdrawn or dismissed for default. Order XLI Rule 22 regulates the conduct of the parties in the appeal. It lays down the manner in which a party can invoke a jurisdiction of the appellate court. The Code however has one more provision i.e. Order XLI Rule 33. This provision clothes the appellate court with wide powers. It lays down that the appellate court shall have powers to pass any decree and make any order which ought to have been passed, and to pass or may such further or other decrees as the case may require, and may even exercise it in favour of or any of the Respondents, even though they may not have file any appeal or objections. A bare perusal of this provision

shows that the appellate Court, if it finds that the justice of the case requires a particular order or decree to be passed, then it will not be deterred by the absence of an appeal or cross-objections by the Respondents. Power of the appellate court under Rule 33, therefore, is not taken away merely because the Respondents has not filed cross-objection or an appeal. Rule 22 places an embargo on the Respondents, but the powers of the court to pass orders in furtherance of substantial justice are preserved in Rule 33. Rule 33 confers power of very wide amplitude on the appellate court to do complete justice between the parties. Even while confirming the decree, the appellate Court may pass such orders, which ought to have been passed by the Court below which the trial court would have passed if it would have noticed the errors which have been noticed by the appellate court.

16. The Apex Court in the case of ***Banarasi & ors v/s Ram Phal, reported in AIR 2003 SC 1989***, has held that the object sought to be achieved by conferment of power under Order XVI Rule 33, on the appellate court, is to avoid inconsistency, inequality in reliefs and to correct unworkable decrees or orders coming into existence. The Apex Court has emphasized that the overriding consideration is to achieve and serve justice. The power however must be exercised with care. The circumstances should be that not taking a particular step, would result in injustice. In the case of ***Pannalal v/s State of Punjab, reported in 1961 I SCR 980***, the Apex Court laid that not only the Appellate Court can give or refuse the relief to the appellant but while allowing or dismissing the appeal can grant such relief as a case may require. By way of illustration, if the decree which is to be upheld is not complete or workable unless the portion which is not granted by the trial court, is granted, then the appeal Court would step in and correct such an anomaly. In the case of ***Rameshwar Prasad & ors. v/s Shambehari Lal Jagannath & anr., reported in AIR 1963 SC 1901***, the Apex Court held that the appellate Court has wide discretion to pass such decrees and orders as the interest of justice demands and the power is to be exercised in exceptional cases

when its non-exercise will lead to difficulties in the adjustment of rights of the various parties. In the case of ***Harihar Prasad Singh & ors. v/s Balmiki Prasad Singh & ors. reported in A.I.R. 1975 SC 733***, the Apex Court laid down that the examples where the Appellate Court can exercise power under Rule 33 are illustrative and is not exhaustive, as various situations may arise where interest of justice would require that the Appellate Court should exercise the power. This being the position of law, it will have to be seen as to whether the circumstances existed for the appellate court to grant the relief in favour of the Respondents even though no appeal or cross-objection was filed.

17. The learned Trial Judge, while decreeing the suit observed that the Respondents landlords were entitled to the possession of the land and unless they proved that they have become owner of the structure, they were not entitled to claim possession, which was also not sought by the Respondents landlords. The learned Trial Judge held that unless the market value is determined as provided in the lease deed and paid, the relief of possession and the declaration of ownership cannot be granted to the Respondents. The learned Trial Judge, however, granted relief of injunction from parting with possession of the land. The learned Trial Judge did not pass any order as regard the mesne profits. The Appellate Court however held that there was no clause in the lease which indicated that right to obtain possession of the structure after the determination of the lease, will be postponed till market value is paid. The Appellate Bench held that, in view of the covenant in the lease, the Applicants would be entitled to possession of grant of structure and as regard the market value, it will be open to the Applicants to institute proceedings to get the same determined. The Appellate Bench also directed that an enquiry as to mesne profits be held.

18. What the Trial Court essentially did was to make the payment of the market value of the structure to the Applicants as a condition

precedent for grant of relief in the favour of the Respondents. It held that, unless this amount is paid, the Respondents will not become owners. The Appellate Court found that the lease deed did not contemplate any such condition precedent. After the expiry of the lease, the methodology was provided as to how the parties should proceed. During the pendency of the lease, if the Respondents were to dispose of their interest in the property to any third party, first choice was given to the Applicants. If no such contingency arose and the lease expired, then Respondents landlords, would offer the market value of the structure upon valuation to the Applicants. Obviously, it was contemplated that the Applicants would cooperate for fixation of market value. The Applicants refused even to acknowledge that there exists such a clause. The lease cannot be read that the Applicants can keep on to the premises without cooperating with the valuation and then contend that Respondents cannot claim any right even though they are ready to pay market value, till it is actually ascertained and paid. This would be perverse reading of the lease. It is this perversity which has been pointed out by the Appellate Court. Since it was on this interpretation, the Trial Court refused any relief in respect of the structure, the Appellate Court passed an order under Rule 33. There is one more situation due to which power under Rule 33 was necessary. The structure is right in the middle of the land and occupies almost the entire area, and it is informed that, with only margin left for setback. Merely passing a decree for possession of land would be meaningless unless there is a decree for structure as well. Granting of decree for possession of land without passing any order as regard structure, would only remain a paper decree, of little practical value. Therefore, grant of relief in respect of the structure was intermixed with the grant of relief in respect of the land.

19. Mr.Dani contended that the Respondents landlords have always treated the land and structure separately and even the clauses of the lease deed would show that situation. After the land was exempted from the purview of the rent law, the Respondents

landlords have instituted a suit for possession of the land. The provision of Transfer of Property Act, and the lease deed have mentioned the structure as part of the land, having constructed with the permission of the Respondents landlords. This aspect has been considered in detail later on in this decision. Therefore, in my opinion, the exercise of powers by the Appellate Court in granting relief on respect of the structure to the Respondents landlords removing the condition precedent, would be justified. In any case, this issue will not assume much importance as Mr.Nakhawa has submitted that the Respondents landlords are ready to pay the market value of the structure to the Applicants and the amount which the valuer appointed by this Court had fixed, can be paid to the Applicants, before taking possession. In short, respondents are agreeable for making a payment of the structure to the applicants first, before taking possession. He has, on instructions, also submitted that Respondents are not interested in pressing for *mesne* profits as directed by the Appellate Court. In view of this statement, prejudice caused to the Applicants, if any, by exercise of power under Rule 33 by the Appellate Court, does not survive.

20. It was then contended by Mr.Dani that the suit filed was not maintainable under Section 41 of the Presidency Small Causes Court Act, 1882. It was submitted that, a suit cannot be filed for recovery of possession as Clause 2(e)(5) & (6) state that the structure belongs to the Applicants. He also submitted that Section 108(d) of Transfer of Property Act, 1882 will not apply as the Clause 2(e)(5) & (6) of the lease deed are contracts to the contrary as contemplated under this section. Mr. Dani relied on the decision in the case of *J.F. Perrott & Co. Ltd. v/s Cohen* reported in **1950 (2) All.E.R. 934**.

21. The suit has been filed under the provisions of Act, 1999 which exempts land from the purview of the Act. Admittedly, Section 41 of Act 1882 permits the suit for recovery of the possession of land. Section 108 of the Transfer of Properties Act

governs the leases of immovable property. Part-A of Section 108 lays down rights and liabilities of lessor and lessee. Section 108(p) places an embargo on the lease to erect any permanent construction without the permission of the lessor. Section 108(q) places a duty on the lease to put the lessor in possession of the property upon determination of the lease. Therefore, with the permission of the lessor, lease can put up a construction and upon determination of the lease has to hand over the property to the lessor. Provisions of Section 108, however, are in absence of a contract or local uses to the contrary. In the present case, the permission was given by the lessor to put up the construction and the lease has been determined. Upon determination of the lease, the tenant will have to hand over the property, unless the party agree to the contrary. That is the plain reading of the provisions. The question is whether the lease in question is a contract to the contrary.

22. What is to be done with the structure which is constructed with the permission of the lessor, can always be regulated by the contract between the parties. For that purpose, the provisions of the present contract i.e. the lease need to be examined. The lease which was executed on 8 March 1960 was for a period of 20 years. The lessee was to pay the rent regularly. He was not to assign mortgage or charge the structure without obtaining the consent of the lessor and it was reiterated in the lease in clause (e) that, upon determination of the tenancy deed, the premises which structure standing thereon to lessor. Clause (5) gives first option to the Applicants to purchase the property in case the Respondents landlords are contemplating to dispose the same. Clause 6 which is material reads as under :-

“Clause 6: *It is hereby agreed and declared that the lessees shall be at liberty at all time and from time to time hereafter to construct and erect upon any part of the land hereby demised buildings of any description however but subject to the rules and regulations of the Municipality and Government and in the event of the Lessees not exercising*

the option to purchase as mentioned in Clause 5 herein above the Lessor on termination of the lease pay to the Lessees an amount as may be fixed on joint valuation to be made by the engineers one to be appointed by each of the parties hereto.”

Clause 6 as reproduced above shows that Respondents upon termination of the lease will pay an amount of the structure as may be fixed by joint valuer. Though strenuous attempts have been made on behalf of the Applicants to complicate the reading of the lease, I do not find any complication in it at all. The document is plain and simple. Lease for 20 years have been given to the Applicants. During the lease, the Applicants will not create third party rights. Upon determination of the lease, the Applicants will hand over the possession of land and structure to Respondents and the Respondents will pay the price as per the joint valuation. Section 108 of the Transfer of Property Act, as mentioned above, lays down that, upon determination of the lease, the structure constructed thereupon will be handed over to the lessor. The preset contract i.e. the lease deed does not deviate from this position of law. It only provides that the structure will not be handed over free of cost but upon payment of a value determined by a joint valuation. This confers an additional advantage on the Applicants and by no interpretation this can be construed as a contract to the contrary.

23 As regard the contention of Mr.Dani that the lease deed creates ownership rights in favour of the Applicants, there is nothing in the lease deed to indicate so. Merely because there is an embargo not to create third party rights, does not mean that the Applicants are treated as owner of the property. Clause 5 of the deed which gives first option to purchase the property , makes it clear that the Applicants are not the owners of the structure, as contended.

24. The second submission of Mr.Dani is that, the Applicants are tenants of the structure and concept of dual ownership is permissible in India. There is no suggestion in the lease regarding creation of separate tenancy rights in respect of the structure. The structure has been put up with the permission of the lessor i.e. Respondents and what is to be done with the structure is provided in the lease itself. There is therefore no question of creation of any tenancy rights. Mr.Dani submitted that, when the lease deed was executed, the Bombay Rent Act was in force, which cover both land as well as structure and, therefore, it was not necessary to mention to create separate rights of the structure. This submission cannot be accepted. The tenancy cannot be created by implication. There has to be a specific intention of the parties to create tenancy. The lease deed is a self-contained contract which permits the Applicants to construct the structure and hand over the same after the expiry of lease and that Applicants will receive a fair price for it. Mr.Dani submitted that there are various properties owned by public bodies in Mumbai where land is held by one and structures are occupied by other , and upon expiry of the lease the structures are directed to be handed over, it will create various difficulties for the occupants of the structures.It is not necessary to entertain such academic questions. In the present case, there is no such factual situation wherein there are different occupants of the land and different occupants of the structure, and that separate prejudice will be caused to the occupants of the structure. The legal position will have to be discussed and applied to the present facts and it is trite that decision has to be read in the context of the facts.

25. Though various submissions have been advanced by the Applicants as enumerated above, one will have to see what was the stand of the Applicants in the courts below. In the beginning, when the Respondent asked for possession of the structure and joint valuation, the applicants replied as under:

“Sir,

My clients Bombay Suburban Art & Craft Education Society have placed my hands your letter dated 4.6.2003 issued by you on behalf of your clients Shri Govind Gajanan Dabholkar and 3 ors. With instructions to reply as under :

- 1. My clients states that as regards your paraphrase of the nature of the transaction between the parties and the legal effect thereof, my clients do not accept the same and wish to state that the notice is invalid and bad in law.*
- 2. My clients states that with regard to your statements made in paragraph No.5 of your letter under reply as to the valuation of the property, the question will only arise as and when it is established that there is a valid determination. My clients continue to be in valid and lawful possession and occupation of the property.*
- 3. In the above circumstances any action taken by your clients against my clients shall be defended by my clients entirely at your clients risk as to costs and consequences thereof.”*

s/d

The reply is cryptic. A lessee who has enjoyed possession of the property for 20 years and upon expiry of the lease was under legal obligation to vacate should at least put-forth its stand. Elaborate arguments have been made by Mr.Dani on the issue of jurisdiction, but in the written statement ,the respondent chose to employ only five words, “Hon’ble Court has no jurisdiction.” The stand taken is that the Applicants are tenants of the structure and that the lease is for educational purpose and therefore the tenancy of the Applicants continues to be governed by the Rent Act. At every successive step in the litigation new and varied arguments are conjured up by the Applicants only to create as many legal hurdles.

26. The Apex Court in the case of ***Madanlal v/s Bhai Anand Singh***, reported in **1973 (1) SCC 84**, had occasion to consider similar factual situation. In the lease therein it was provided that upon the expiry of the lease, the structure built by the lessee at their own cost will become property of the lessor subject to the condition that lessor will have to pay 50% of the market value. After the expiry of lease, the lessor applied under section 13 (2) of the East Punjab Urban Rent Restriction Act. The lessee applied to the Rent Controller for stay of the eviction proceeding pending the dispute before the parties as to who was entitled to possession pending determination market value by the arbitrator. The Rent Controller dismissed the stay application and the High Court dismissed lessee's appeal. It was urged on behalf of the lessee before the Apex Court that in view of the agreement, section 108 would not apply because there was contract to the contrary. The Apex Court after analysis of the lease deed concluded that there was no provision in the lease deed that right to obtain possession will be postponed until ascertainment of the market value. The Apex Court held that it was really the intention; nothing prevented the parties from incorporating a specific clause. Reliance is placed by Mr. Dani on the decision of the Court of Appeal in the case of ***J.F. Perrott*** (supra), to contend that the possession of the Applicants can only be treated as one of a tenant. The observation in the decision in the case of ***J.F. Perrott*** (supra) cannot be straight way made applicable to the facts of the present case irrespective of the factual possession. Even otherwise, in the case of ***Madanlal*** (supra), the Apex Court has made the position clear that the except for the contract to the contrary, liability cast on the lessee under the Transfer of Property Act must follow.

27. Applicants are unable to show either tenancy rights or ownership right in respect of the structure. The Applicants will have to follow the methodology laid down in the lease deed, read with Section 108 of the Transfer of Property Act. In absence of any tenancy right in respect of the structure, the suit instituted in the Small Causes Court under Section 41 of the Small Causes Court

under Section 41 of the Presidency Small Causes Court Act was maintainable. The land is no longer protected under the provision of the Rent laws. The structure which was constructed with the permission of the Respondents landlords either have to be taken away by the Applicants or the Respondents landlords will pay the appropriate value as provided under the lease. I do not, therefore, find any substance in the contention that the suit as filed was not maintainable.

28. It was then contended by Mr.Dani that the Respondents had earlier filed a suit for both, land and the structure, under the provisions of Bombay Rent Act for bonafide requirement, which suit has been dismissed. He submitted that having treated the land and structure together, the Respondents are now estopped from contending that they are separate for the purpose of jurisdiction. He also submitted that Respondents will now have to file two different suits, one for the possession of the structure and one for the possession of the land in view of the position of law as it exists in city of Mumbai. There is no merit in these submissions. Firstly, the position of law has undergone a change, as land no longer enjoys the protection of Rent laws, there is no question of any estoppel. Secondly, the suit, which is filed for possession of the land, shall also include permanent structure, which was built with the permission of Respondents and which the Applicants are under obligation to demise upon expiry of the lease. If there is any independent right in respect of both, they will be treated differently under different laws. Since there is no independent right in respect the structure, it is not necessary for the Respondents landlords to file an independent suit in respect of the structure.

29. It was then contended by Mr.Dani that the Respondents had filed a suit bearing No.139/157 of 2001 which was dismissed as withdrawn and no liberty was granted under Order 23 Rule 1 of the Code. The Respondents had filed a suit for the same reliefs in the Small Causes Court earlier. An application was made by the

Respondents to the Trial Court for withdrawal of the suit that there is a technical defect in termination notice. The advocate for the Applicants had opposed the withdrawal at a belated stage without imposing any cost. The advocate for the Respondents stated that the reason for which the suit is being withdrawn, no order for the costs was needed. The suit was thereafter allowed to be withdrawn. Mr. Dani submitted that since there are no words "with liberty" mentioned in this order dated 31 February 2003, the Respondents cannot file a fresh suit. The application and the order passed by the Trial Court clearly indicates that, neither the Respondents nor the learned Judge had any doubt that the Applicants were not withdrawing the suit to put a quietus to the litigation. The Respondents had clearly represented that they wanted to withdraw the suit in view of technical lacuna. Furthermore the entire argument of the Applicants in the court below was that leave was refused, which is factually incorrect. There is no such order of refusing leave. It is in the Revision that argument is modified to contend that leave was not granted, which is different than to say that it was expressly refused. Apart from this position, the decision of learned Single Judge of this court in the case of ***Hindustan Petroleum Corpn. Ltd. v/s Dilip Prabhakar Dingorkar & anr.*** reported in **2006(3) Mah.L.J. 488** needs to be noticed. In this decision, the learned Single Judge considered the argument raised by the defendant's therein raising plea of *res judicata*. Earlier suit filed by the landlord under Transfer of Property Act was dismissed. It was urged that the facts in the first suit and second suit were identical and, therefore, the second suit was not maintainable. The learned Judge held that there is no bar under the provisions of Transfer of Property Act to prohibit a landlord from filing second suit, if the earlier notice is not legal, and the right to recover the property is not lost forever. I, therefore, find no perversity in the view taken by both the Courts below that the suit filed by the Respondents was not barred by *res judicata*.

30. It was then faintly urged by Mr.Dani that the lease was for the purpose of education and, therefore, irrevocable license was deemed to have been granted in favour of the Applicants and it could not have been terminated by the notice. This argument was raised in the courts below and which has been rightly rejected by both the courts on the ground that there is nothing in the lease deed to indicate that it was given for the purpose of imparting education. This view cannot be faulted with.

31. Subsequent developments during the pendency of the litigation also need to be taken note of. Both the parties have filed their affidavits. It is placed on record by the Respondents , by annexing photographs, that the premises are dilapidated and the classes in the Applicants' institute are conducted only in one or two rooms. The Applicants have disputed the position, but the structure is admittedly old. The photographs do show one side of the building as seriously affected. It may not be conducive for conducting classes of college, where students attend. It is alleged that there are hardly any activities of the college being carried out from the structure in question

32. The Respondents have also placed on record that the Applicants, are now conducting various courses in an college building nearby, which is newly constructed by them. The photographs of the new building constructed by the Applicants, and the information contained in their brochure have been placed on record. The Respondents have also placed on record the applications made by the Applicants to the government to the Government to grant Applicants land on concessional basis on the ground that the present lease has come to an end and land as so been allotted. On this plot of land a substantial structure has been erected by the Applicants and education activities are being carried out there.

33. The Applicants have secured a plot in the nearby locality, from the government ,for the purpose of imparting education and has built a building with several floors. While obtaining the land from the government, the Applicants have cited the reason of expiry of present lease. Inspite of obtaining the land from the government for the very purpose, the applicants are only trying to prolong the litigation to deprive the Respondents of their rights. The lease has expired. The Applicants have resolutely refused to vacate the premises. They have refused to cooperate with the valuation and they have refused to pay the amount of compensation, which had to be directed by this Court. No argument worthy of credence establishing a right in the property is advanced. After expiry of lease the Applicants have no right whatsoever to continue in the possession of the structure or the land. The only entitlement is to receive compensation for the structure. The Respondents are ready to pay fair compensation as agreed and there is no reason why the Applicants should not be held bound to what is agreed. Therefore, in my opinion, apart from the fact that there is no merit in the challenge of the Applicants, they have absolutely no case on equity as well.

34. Before passing the final order, the statements made by the learned Counsel for the Respondents on instructions must be taken note of. The learned Counsel for the Respondents has stated that Respondents ready to pay market value as per the report of the valuer to the Applicants. Secondly, it is stated that the Respondents is not pressing the direction to hold enquiry as to mean profit in view of the fact that the Respondents are not in position to start another round of litigation.

35. As regard the payment of market value is concerned, the Applicants have admittedly not cooperated for fixing the market value by valuation, as it is clear from the reply given by the Applicants to the notice and which stand has continued till date. Mr.Dani ,to a specific query, submitted that he has no instructions

to make statement or on fixation of market value or to agree for a joint valuation. I have no choice but to go by the valuation report which is placed on record by the valuer appointed by this Court. Though the said valuer was appointed for fixing the compensation, the valuer has carried out the exercise of determining the market value. The valuer has determined the value of the superstructure at Rs.75 lakhs. The valuation report was tendered on 26 March 2008. In the valuation report itself the age of the structure has been shown as 45 years. It is also noted that the structure has developed cracks due to corrosion of the re-enforced beams, and the condition of the structure does not seem to have improved since the valuation report is submitted. Even that being so, considering the fact that the valuation report was submitted nine years back and there has been devaluation of rupee to some extent, I am of the opinion that the market value to be paid to the Applicants would roughly around Rs.1,00,00,000. As per Mr.Nakhawa the amount of compensation deposited by the Applicants in this Court pursuant to the interim orders is Rs.1,08,51,000/-. As per the decision of the Apex Court in the cases of ***State of Maharashtra Vs. Super Max International Pvt. Ltd.***, reported in 2009(9) SCC 770 and ***Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.***, reported in 2005(1) SCC 705, since the revision application is being not entertained, the Respondents will be entitled to this amount. I am of the opinion therefore the Applicants should be paid Rs.1,08,51,000 as value for the structure, which is already deposited.

36. Accordingly, the Civil Revision Application is disposed of as under:

The impugned order dated 24 March 2007, passed by the Appeal Bench of the Small Causes Court, Mumbai is confirmed, however with the following modifications;

(a) the direction to hold the separate enquiry under Order XX Rule 12 of the Code of Civil Procedure, is quashed and set aside.

(b) the direction that the defendant shall hand over the peaceful and vacant possession of the suit premises i.e. plot of land and structure thereupon within six months shall be modified to the extent that the Applicants shall hand over the peaceful and vacant possession of the plot of land and the superstructure ,with a right to receive an amount of Rs.1,08,51,000/-.

(c) the Applicants shall hand over the possession of the suit plot and the structure standing thereupon within a period of 16 weeks from today. The Applicants will have right to right to withdraw the amount which is deposited in this Court , which shall be operative till the period of 16 weeks from today.

(d) when the the Applicants hand over the possession to the Respondents of the suit property as well as the structure, they shall be entitled to withdraw the amount which is deposited in the Registry of this Court. If the Applicants do not hand over the possession of the plot and the structure within a period of 16 weeks from today, the order passed by the Appeal Bench shall stand restored in it's entirety and the Respondents will be entitled to execute the same.

(e) till the property is so handed over, the obligation of the Applicants to pay the compensation as per the interim order shall continue. This amount which the Applicants shall henceforth deposit can be withdrawn by the Respondents.

(f) till the possession is handed over by the Applicants, Applicants shall not create any third party rights in the property.

37. The learned Counsel for the Applicants states that the Civil Application No. 278/2007 does not survive, the same is accordingly disposed of.

38. After the judgment was dictated in the open Court, the Mr.Nakhawa mentioned the matter with notice to the learned counsel for the Applicants and pointed out that the amount deposited by the Applicants in this Court is not Rs.1,08,51,000/- but Rs.1,00,55,000/- .The learned counsel for the Applicants also confirms this position. However, I am not inclined to change the direction that the value to be paid to the Applicants is Rs.1,08,51,000/-. Since the amount deposited by the Respondents is less than Rs.1,08,51,000/-, the Respondents landlords will to make good the shortfall. The learned counsel for the Respondents landlords agrees to do so. For that purpose the Applicants will give two weeks advance notice to the Respondents.

39. No costs.

(N. M. JAMDAR, J.)