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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO. 1791 OF 2007

Shri Purshottam Shankar Shetye
since deceased through his
legal heirs and representatives :-

1. Vasundhara @ Mandakini P. Shetye
Age: Major, Occ.: Household
R/o. Room No.16, Chokshi Building,
Ranade Road Extension, Dadar,
Mumbai – 400 028.

2. Ujwala Hari Shende
Age: Major, Occ.: Household
R/o. 3/18, Samarth Nagar Society,
Chunabhatti (East),
Mumbai – 400 022.

... Appellants

Versus

Abhay Shridhar Shetye
Room No.2, Ground Floor,
189 Dinath Terrace, L.J. Road,
Mahim, Mumbai – 400 006.

... Respondent

.....

Mr. Ranjit A. Thorat, Sr. Advocate along with Mr. Kishor S. Patil, Mr. J.S. Parmar, Mr. S.P. Chavan and Mr. P. Kasar for the Appellant.

Mr. U.S.R. Singh along with Mr. C.M. Lokeshappa for the Respondent.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 31st JANUARY, 2020

PRONOUNCED ON : 19th MAY 2020

JUDGMENT :

. By this First Appeal, the appellants (original defendants) have

impugned the judgment and order dated 20th March, 2007 passed by the Bombay City Civil Court at Bombay, thereby decreeing the suit filed by the respondent no.1 (original plaintiff) *inter-alia* praying for recovery of the business premises and for other reliefs and directing the appellants to deliver the said business premises described in the plaint. Some of the relevant facts for the purpose of deciding this First Appeal are as under :-

2] Mrs. Malati Rajaram Parshetye was the original respondent no.1 and was the original plaintiff before the Trial Court whereas the Mr. Purshottam Shankar Shetye was the original defendant. Upon demise of the original defendant his legal heirs were brought on record. It was the case of the respondent no.1 that she is the widow of late Shri Rajaram Appa Parshetye who expired on 26th March, 1967. Her late husband was carrying on business of selling Pan, Bidi and Cigarette etc. in the name and style of “Masrice Bidi Works” as owner thereof at Shop No.5, admeasuring 9’x15’, Ground Floor, Choksi Building, Ranade Road, Dadar, Mumbai – 400 028 (hereinafter referred to as “the suit premises and its business” for short). The husband of the respondent no.1 was the tenant of the suit premises. It is the case of the respondent no.1 that her tenancy right in the suit premises are still intact and subsisting after demise of her husband. Parties in this judgment are referred to as per their original status before the trial court.

3] It was the case of the plaintiff that in the year 1965, her late husband was suffering from illness and was not able to run his business personally in the suit premises and thus decided to give his business for conducting to some needy and fit person who was able to conduct the said business on the basis of Conducting Agreement for the period of 11 months only.

4] It was the case of the plaintiff that Mr. Purshottam Shankar Shetye the original defendant had approached her husband and requested him for giving the said business being run in the suit premises for conducting on the basis of a Conducting Agreement. The late husband of the plaintiff accepted the said request of the original defendant and told him to enter into a Conducting Agreement for a period of 11 months. Late husband of the plaintiff and the original defendant entered into a Conducting Agreement on 2nd January, 1966 for a period of 11 months commencing from 2nd January, 1966 to 1st December, 1966. It was the case of the plaintiff that the original defendant started conducting the business of the husband of the plaintiff as per the terms and conditions recorded in the said Conducting Agreement dated 2nd January, 1966. The original defendant handed over the possession of the said business run in the said suit premises to the husband of the plaintiff after conducting period of 11 months was over on 2nd December, 1966.

5] The husband of the plaintiff and the original defendant executed

another Conducting Agreement for a period of 11 months commencing from 1st July, 1967 to 31st May, 1968 in respect of the said business being run in the said suit premises. On 10th September, 1970, the husband of the plaintiff and the original defendant entered into another Conducting Agreement for conducting the said business in the said suit premises for the period of 9 months. Last Conducting Agreement executed between the plaintiff and the original defendant was for the period of 11 months commencing from 1st March, 1986 to 31st January, 1987.

6] It was the case of the plaintiff that the original defendant had handed over possession of the said business to the plaintiff. The plaintiff thereafter declined to give her business for conducting to the original defendant. The plaintiff however considered the request of the original defendant subsequently and told him to prepare a Conducting Agreement once more and for the last time commencing from 5th February, 1987 to 14th January, 1988. The original defendant however prepared an agreement in the form of a letter on Rs.10 stamp paper which was treated as Conducting Agreement by the parties. On 10th December, 1987, the plaintiff issued a notice upon the original defendant which was delivered to the original defendant for handing over of the business of the plaintiff being carried on in the suit premises. The original defendant however did not hand over the business of the plaintiff being conducted in the suit premises.

7] The original defendant on the other hand filed a Declaratory Suit bearing No. 649 of 1988 in the Small Causes Court at Bombay against the plaintiff for declaration of his alleged tenancy rights in the suit premises. The original defendant filed an application (Injunction Notice No. 934 of 1988) for various reliefs. The plaintiff filed an application for appointment of Court Receiver and to take possession of the business of the plaintiff being carried on in the suit premises. By an order dated 20th July, 1989, the Small Causes Court at Bombay disposed of both the applications by a common judgment. The Small Causes Court granted reliefs in favour of the original defendant in the said Injunction Notice and rejected the application filed by the plaintiff for appointment of Court Receiver. The plaintiff preferred an appeal from order before the Appellate Bench of the Small Causes Court at Bombay.

8] It was the case of the plaintiff that the Establishment License of her business in the suit premises was initially in the name of her late husband and after his demise was transferred in her name. The plaintiff was paying monthly rent of the suit premises to the landlord during the period mentioned in the Conducting Agreement. It was the case of the plaintiff that she being poor and old widow was unable to run her business personally and therefore had permitted the original defendant to run the said business on Conducting Agreement basis from the said suit premises. The right of the original defendant to conduct the business of the plaintiff in the suit

premises expired after 14th January, 1988 and has no right, title and interest of any nature whatsoever to use, occupy and conduct the said business of the plaintiff in the suit premises.

9] On 30th January, 1990, the plaintiff filed Short Cause Suit No. 979 of 1990 against the Purushottam Shankar Shetye *inter-alia* praying for an order and declaration that the original defendant was trespasser and had no right, title and interest in the suit premises and her business being carried therein after the period given under the Conducting Agreement dated 14th January, 1987 executed by and between the parties was over. In prayer clause (b), the plaintiff also prayed for an order and direction against the original defendant to vacate the suit premises and its business being carried on the suit premises. In prayer clause (c), the plaintiff prayed for mense profit @ Rs.3,000/- p.m. from the original defendant.

10] On 17th April, 1990, the original defendant filed a written statement in the said suit before the City Civil Court. In the said written statement, the original defendant raised a plea of lack of jurisdiction before the City Civil Court to entertain the said suit by invoking the Section 9A of the Code of Civil Procedure, 1908 on the ground that the suit filed by the plaintiff for possession of the suit premises was not maintainable in view of the provisions of Section 41 of the Presidency Small Causes Court Act and also brought on record that the suit filed by the original defendant for declaration

that he was a tenant in respect of the suit premises was then pending before the Small Causes Court. The original defendant also contended that the suit filed by the plaintiff subsequently in point of time was liable to be stayed under Section 10 of the Code of Civil Procedure, 1908.

11] On 3rd August, 1995, the Small Causes Court at Bombay dismissed the R.A.D. Suit No. 649 of 1988 filed by the original defendant *inter-alia* praying for declaration of alleged tenancy of the original defendant in the suit premises. The original defendant thereafter preferred an Appeal bearing no. 370 of 1995 against the judgment and decree passed by the Small Causes Court in the said R.A.D. Suit No. 649 of 1988 on 11th September, 1995. On 12th October, 1998, the Appellate Court of the Small Causes Court at Bombay dismissed the said Appeal No. 370 of 1995 filed by the original defendant against the decree of dismissal of suit passed in R.A.D. Suit No. 649 of 1988.

12] On 9th August, 2005, Writ Petition bearing No. 3521 of 1999 filed by the original defendant in this Court *inter-alia* impugning order dated 12th October, 1998 passed by the Appellate Court of the Small Causes Court at Bombay and judgment and decree dated 3rd August, 1995, came to be dismissed. The original defendant did not file any Special Leave Petition against the said order passed by the learned Single Judge of this Court dismissing the said Writ Petition on 9th August, 2005.

13] Both the parties led oral and documentary evidence before the Trial Court. On 20th March, 2007, the Trial Court decreed the said Short Cause Suit No. 979 of 1990 filed by the plaintiff and directed the defendants to deliver the business and the premises described in the plaint to the plaintiff and granted time till 20th June, 2007 to handover possession to comply with the directions issued in the said judgment and further directed not to part with the possession of the suit premises in favour of any third party in respect thereof. The Trial Court also directed the defendants to continue to deposit whatever amount they had been depositing in compliance to the earlier orders of the said Court. The Trial Court ordered enquiry in respect of the mesne profit under Order 20 Rule 12 of the Code of Civil Procedure, 1908 from the date of institution of the suit till actual delivery of the business and the suit premises to the plaintiff. Being aggrieved by the said decree passed by the Trial Court, the defendants preferred this First Appeal which came to be admitted on 16th July, 2007.

14] Mr. R.A. Thorat, learned Senior counsel for the defendants, invited my attention to some of the paragraphs from the pleadings filed by the parties, oral and documentary evidence by both the parties, various findings rendered by the Trial Court in the Declaratory Suit filed by the predecessor of the defendants before the Small Causes Court, judgment of the Appellate Bench of the Small Causes Court at Bombay dismissing the appeal preferred

by predecessor of the defendants, order passed by this Court in the Writ Petition dismissing the said Writ Petition, findings rendered by the Trial Court in the suit filed by the plaintiff, prayers in the plaint filed by the plaintiff before the City Civil Court and the defence raised by the plaintiff in the written statement in the suit filed by the predecessors of the defendants.

15] Mr. Thorat, learned senior counsel for the defendants invited my attention to the averments made in paragraph 12 of the plaint in respect of the valuation of the suit claim and would submit that the plaintiff had valued prayer clause (a) for an order and declaration that the defendants were the trespasser and have no right, title and interest in the suit premises after the period given in the conducting agreement was over at Rs.1,140/- and prayer (b) for seeking an order and direction against the defendants to vacate the suit premises and its business. He submits that even though the suit claim was valued at Rs.1,140/- and Rs.17,150/-, only the Small Causes Court had exclusive jurisdiction to entertain, try and dispose off the suit filed by the plaintiff. He invited my attention to the paragraph 2 of the written statement filed by his clients before the Trial Court raising an issue of jurisdiction. He submits that the suit was for possession of the suit premises and was not maintainable in view of the provisions of Section 41 of the Presidency Small Cause Courts Act, 1882. He submits that under the said provision, the Small Causes Court only has exclusive jurisdiction regardless of the valuation of the suit claim made by the plaintiff in the plaint. The suit was for relating to

recovery of possession filed by the plaintiff who was a licensor and the defendants who were the licensee of the suit premises. He submits that under Section 41 of the Small Causes Court Act, 1882 in view of the non-obstante provision, only the small causes court could have entertained the said suit filed by the plaintiff. The suit was totally without jurisdiction.

16] Learned senior counsel placed reliance on the judgment of this Court in case of *Nagin Mansukhlal Dagli v/s. HaribhaiManibhai Patel, AIR 1980 Bom 123* and in particular paragraphs 2, 4, 8, 9 and 11, in support of his submission that only the Small Causes Court in view of Section 41 of the Presidency Small Causes Courts Act had jurisdiction to entertain the said suit filed by the plaintiff. He also placed reliance on Sections 18 and 19 of the said Act and would submit that Section 19 of the said Act has to be read with non-obstante provision prescribed under Section 41 of the said Act. Since, the suit was valued less than Rs.25,000/-, even otherwise the suit was maintainable only before the Small Causes Court and not before the City Civil Court.

17] Learned senior counsel placed reliance on the judgment of this Court in case of *Sagir Ahmed Nanhe v/s. Mania P. Gonsalves, 2003 (4) Bom Cases Reporter 635* and in particular paragraphs 2 and 7 in support of the submission that the suit between a licensor and licensee for recovery of possession was maintainable only before the Small Causes Court and not

before the City Civil Court. He submits that the City Civil Court has acted without jurisdiction and has passed a decree against the defendants and in favour of the plaintiff without having jurisdiction. Learned senior counsel also placed reliance on the judgment of this Court in case of ***Rasiklal K. Gala v/s. Manilal Ravji*, 2005 (4) ALL MR 798** and in particular paragraphs 2 to 7 in support of this submission.

18] Learned senior counsel invited my attention to the issues framed by the City Civil Court and would submit that the issue of jurisdiction was not framed by the City Civil Court. Issue of jurisdiction can be argued by his clients even at this stage. In support of this submission, he invited my attention to the issues at page 16 of the First Appeal, which are highlighted by the learned Trial Judge in the impugned judgment. He also invited my attention to various clauses of last conductor's agreement entered into between the parties.

19] Learned senior counsel invited my attention to the judgment delivered by full bench of this Court in case of ***Prem Ratan Vohara v/s. Lalit Kumar Dayalji Kakhani*, 1988 Mah. Gen. 321** and in particular paragraphs 9 and 10 and would submit that this judgment was considered by the Trial Court in the impugned judgment. He also invited my attention to the order passed by the City Civil Court in the Chamber Summon filed by the defendants *inter-alia* praying for recast of the issues framed by the Trial Court. He submits

that the defendants had prayed before the Trial Court in the said Chamber Summon to frame the issues ‘whether the plaintiff had properly valued the suit ?’ ‘Whether City Civil Court had pecuniary jurisdiction to try and entertain the suit ?’ ‘Whether the plaintiff proves that she has put the defendant in possession of the suit shop by conducting agreement dated 15th December, 1987 ?’ He submits that the learned Trial Judge dismissed the said Chamber Summon by an order dated 30th April, 2005. He submits that the Trial Court gave a finding on the issue as to whether the plaintiff has properly valued the suit and whether the Trial Court had pecuniary jurisdiction to try and entertain the suit and that the valuation was done properly. In so far as the issue as to whether the plaintiff had put the defendant in possession of the suit shop by conducting agreement or not, the Trial Court held that the Trial Court had already framed an issue as to whether the plaintiff proves that the defendant was trespasser.

20] It is held by the Trial Court that while cross-examining the witnesses of the plaintiff on that issue and while leading evidence contrary to that issue, the defendants can establish that they have stated in the proposed issue nos. 3 and 4. There was thus no necessity of framing proposed issue nos. 3 and 4 also. The defendants had also prayed for framing an additional issue as to whether the defendants prove that he was in exclusive possession of the suit shop continuously since 1958 and was doing his own business.

21] Learned senior counsel invited my attention to the order dated 12th

December, 2005 passed by this Court in Writ Petition No. 4672 of 2005 filed by his clients impugning the said order dated 30th April, 2005 passed by the City Civil Court dismissing the Chamber Summon filed by the defendants seeking recast of the issues. He submits that this Court while dismissing the said writ petition made it clear that the High Court had not interfered with the order passed by the Trial Court on the ground that the procedural and interlocutory order in the course of the trial should not be interfered with in writ jurisdiction under Article 227 of the Constitution of India. This Court clarified that all issues were kept open to be decided when the final orders are passed in the matter.

22] Learned senior counsel for the defendants submits that the issues of net income to be considered for the purpose of suit valuation and for the issue of jurisdiction is not pleaded by the plaintiff in the plaint. The said concept has been adopted only on the basis of the judgment of full bench of this Court. The Trial Court thus could not have conferred jurisdiction on itself based on the net income issue not pleaded by the plaintiff in the plaint. Mr. Singh learned counsel for the plaintiff on the other hand strongly placed reliance on Section 41(2) of the Presidency Small Cause Courts Act, 1982 and would submit that the said provision would clearly apply to the facts of this case. He also placed reliance on Section 75 of the Maharashtra Rent Control Act, 1999 and would submit that even the definition of licensee clearly indicates that the licensee does not include the person conducting a

running business belonging to the licensor. The expression licence, licensor and premises given on licence have to be construed accordingly. He submits that the husband of the plaintiff had given business to the original defendant on conducting basis. The original defendant or the defendants subsequently impleaded in the suit who are the legal heirs of the original defendant were not licensee within the meaning of licensee prescribed under Section 7(5). He submits that in any event since the business was given to the original defendant on conducting basis, the same is specifically excluded under Section 7(5) of the Maharashtra Rent Control Act, 1999.

23] It is submitted by the learned counsel that since the year 1988 onwards, it was not the case of the original defendant that he was the licensee of the premises or that the suit premises was given to him on licence by the original plaintiff. Learned counsel invited my attention to various averments made by the defendant in the written statement filed before the Trial Court and would submit that even in the said written statement, there was no averment that the defendant was the licensee of the plaintiff in respect of the premises. It was also not the case of the plaintiff in the plaint that the premises were given on licence to the original defendant by the plaintiff.

24] It is submitted that the averments in paragraph 2 of the written

statement filed by the defendant is false averment. The suit filed by the plaintiff was not between the licensor and licensee in respect of the suit premises. He invited my attention to the averments made in paragraph 11 of the plaint filed by the original plaintiff and would submit that the plaintiff has not admitted the relationship of a licensor and licensee between the plaintiff and the defendant in the plaint. The defendant had also prayed for stay of the suit in the written statement and more particularly in paragraph 1 on the ground that the issues involved in the suit filed by the defendant for a declaration that he was a sub-tenant of the suit premises and the suit filed by the plaintiff in the City Civil Court were identical.

25] Learned counsel for the plaintiff invited my attention to the prayers in the declaratory suit filed by the defendant seeking a declaration that the defendant (the plaintiff in the said declaratory suit) was a sub-tenant of the plaintiff in this suit. Learned counsel placed reliance on Section 14(1) of the Bombay Rent Act, 1947 and would submit that these defendants cannot be allowed to change its stand now and to contend that the original defendant was a licensee of the plaintiff in respect of the suit premises. Learned counsel placed reliance on Section 14(2) of the Bombay Rent Act, 1947. Learned counsel for the plaintiff invited my attention to paragraph 15 of the written statement filed by the defendant and would submit that it was the case of the defendant that the suit filed by the plaintiff was between the licensor and licensee. It was not the case of the plaintiff that the defendant

was a licensee of the plaintiff in respect of the suit premises.

26] Learned counsel for the plaintiff invited my attention to the issues framed by the Small Causes Court in the declaratory suit filed by the defendant herein. One of the issues framed by the Small Causes Court was whether the defendant therein proves that the plaintiff was conductor of her business being conducted in the suit premises. He submits that by a detailed judgment delivered by the Small Causes Court, the said declaratory suit filed by the original defendant herein came to be dismissed. He also invited my attention to the order passed by the Appellate Bench of the Small Causes Court and more particularly the points for determination framed by the Appellate Bench and would submit that various issues have been decided by the Appellate Bench of the Small Causes Court also in favour of the plaintiff herein and against the defendant herein.

27] By a detailed judgment delivered by the Appellate Bench of the Small Causes Court, the appeal filed by the defendant herein came to be dismissed. He also invited my attention to the order passed by this Court in the Writ Petition No. 3521 of 1999 filed by the defendant herein impugning the judgment and decree passed by the Single Judge of the Small Causes Court and the Appellate Bench of the Small Causes Court. He submits that the Writ Petition filed by the defendants herein also came to be dismissed. The decree passed by the Trial Court dismissing the suit for declaration of the

defendant herein as alleged sub-tenant of the plaintiff in respect of the suit premises has attained finality. The findings rendered by the Trial Court, Appellate Bench and this Court on the issue of sub-tenancy and licence attained finality.

28] Learned counsel for the plaintiff invited my attention to prayer clause (a) of the plaint filed by his client before the City Civil Court. He submits that it was the case of the plaintiff that the original defendant was a trespasser. The plaintiff had applied for mandatory injunction against the defendant in prayer clause (b) for vacating the premises under Section 39 of the Specific Relief Act, 1963. Prayer clause (c) was for mesne profit against the defendant.

29] Learned counsel for the plaintiff placed reliance on Section 19 of the Presidency Small Cause Courts Act and would submit that the said provision clearly provides as to which suits can be filed before the Small Causes Court and which suits cannot be tried by the Small Causes Court. He relied upon Section 19(i), (s) and (w) and would submit that all the prayers in the plaint filed by his client would fall under those provisions and thus those suits were barred to be tried by the Small Causes Court in view of Section 19(i), (s) and (w). It is submitted that the question as to whether the defendant was a trespasser or not could not be decided by the Small Causes Court and could be tried only by the City Civil Court.

30] Learned counsel for the plaintiff relied upon Section 39 of the Specific Relief Act and would submit that the plaintiff was entitled to seek a mandatory injunction against the defendant to prevent the breach of an obligation to compel performance of the requisite acts. He submits that the conducting agreement entered into between plaintiff and the defendant had already expired. The defendant was thus bound to vacate the premises and the business given to the defendant on conducting basis. Section 39 of the Specific Relief Act was thus applicable in so far as prayer clause (b) of the plaint is concerned.

31] It is submitted by the learned counsel that the stand taken by the plaintiff in both the suits i.e. in the suit filed by the plaintiff herein and in the suit filed by the defendant before the Small Causes Court was same. He invited my attention to the written statement filed by the plaintiff in the declaratory suit filed by the defendant herein. He submits that in paragraph 1 of the written statement itself, it was averred by the plaintiff herein that the defendant herein was given the suit premises on conducting basis to run the business of the plaintiff. In the said written statement the plaintiff herein had also referred to the suit filed by the plaintiff before the Small Causes Court for various reliefs. Learned counsel for the plaintiff placed reliance on Section 41(1) of the Small Causes Court Act and would submit that since the suit filed by the plaintiff before the City Civil Court was neither between

landlord and tenant nor between licensor and licensee, Section 41(1) was not applicable to the parties. Section 41(2) of the Small Causes Court Act was applicable to the parties.

32] It is submitted that Bombay Rent Act, 1947 does not apply to the facts of this case. Section 28 of the said Act therefore did not apply. He relied upon Section 5(8) of the said Act which defines premises. He submits that the definition of premises even under the said Act does not include the business for conducting. Definition of premises under Section 7(q) of the Maharashtra Rent Control Act is in *pari materia* with the definition of premises under the provision of the Bombay Rent Act. He submits that since the business run by the husband of the plaintiff was given to the defendant prior to 1999, the provisions of Bombay Rent Act, 1947 has to be considered.

33] Learned counsel for the plaintiff placed reliance on the Section 9 of the Code of Civil Procedure and would submit that in view of the said provision only Bombay City Civil Court has jurisdiction to entertain the said suit filed by the plaintiff for the reliefs prayed and not the Small Causes Court under the provisions of the Presidency Small Cause Courts Act, 1882. Learned counsel for the plaintiff placed reliance on the judgment of this Court in case of **Anusuyabi Narayanrao Ghate v/s. Maktumbi S. Nadaf, 1999 (2) Bom Cases Reporter 374** and in particular paragraphs 4, 5 and 7 in

support of the submission that in view of the conducting business permitted under the agreement by the owner of the business to the other party, Section 41 (1) of the Presidency Small Cause Courts Act could not be invoked.

34] Learned counsel for the plaintiff also placed reliance on the judgment of this Court in this case of ***Fatimabai Noor Mohamed v/s. M. Khallil Ahmed and Anr., 1992 Mah. Gen. 1605*** and in particular paragraph 7 in support of the submission that under Section 5(4A) of the Bombay Rent Act, 1947 make it abundantly clear that the permission given for conducting the ‘*pan beedi*’ business in the suit premises does not fall within the definition of word ‘licence’ and therefore there was no question of protection the respondent under the Bombay Rent Act. He submits that the both these judgments clearly would apply to the facts of this case.

35] Learned counsel for the plaintiff distinguished the judgment of this Court in case of ***Nagin Mansukhlal Dagli*** (supra) relied upon by the learned senior counsel for the defendant on the ground that the premises given on leave and licence in the said matter were residential premises whereas in this case the business of ‘*pan beedi*’ was given by the plaintiff to the original defendant on conducting basis. He invited my attention to paragraph 4 of the said judgment which refers to the prayers in the said suit which was subject matter of the said judgment.

36] Learned counsel for the plaintiff also distinguished the judgment of

this Court in case of **Sagir Ahmed Nanhe** (supra). He invited my attention to paragraphs 6 and 7 of the said judgment which records that the plaintiff had given the premises to the defendant on licence. No such averments are made in the plaint filed by the plaintiff in this case. Learned counsel distinguished the judgment of this Court in case of **Rasiklal K. Gala** (supra) relied upon by the learned senior counsel for the defendant. He invited my attention to the paragraphs 2, 3 and 6 of the said judgment and would submit that the averments in respect of the premises in the plaint which was subject matter of the said judgment were totally different. He submits that paragraph 6 of the said judgment would assist the case of the plaintiff and not the defendant. Learned counsel distinguished the judgment of this Court in case of **Prem Ratan Vohara** (supra) relied upon by the learned senior counsel for the defendant on the ground that the said judgment is not applicable to the facts of this case and is clearly distinguishable in the facts of this case.

37] In so far issue of pecuniary jurisdiction of the City Civil Court raised by the defendant is concerned, learned counsel for the plaintiff submits that the defendants had filed a Chamber Summons bearing No. 216 of 2005 in the said suit filed by the plaintiff *inter-alia* praying for recast of the issues and for framing additional issues. Learned counsel invited my attention to the affidavit in reply filed by the plaintiff herein in the said Chamber Summon. He submits that the plaintiff had specifically averred in the said affidavit in reply that the monthly royalty was fixed at Rs.700/-. Out of the

said amount the plaintiff was spending Rs.500/- per month. The plaintiff was getting only a sum of Rs.105/- per month from the suit business. Applying the principles of Annual Rack Rent and multiplying the said amount of Rs.105/- by 150 months rent, the value for the jurisdiction of the City Civil Court was rightly arrived at Rs.15,750/-. The jurisdiction of the Bombay City Civil Court at the relevant time was Rs.50,000/- which is now increased to Rs.1 crore.

38] Learned counsel for the plaintiff invited my attention to the order passed by the City Civil Court in the said Chamber Summon and would submit that the said Chamber Summon filed by the defendant herein came to be dismissed. It was specifically held by the City Civil Court that the valuation of the suit claim was done properly by the plaintiff. The expenses incurred by the plaintiff were required to be deducted from the compensation agreed to be paid by the defendant under the said conducting agreement. He submits that this Court however while dismissing the said writ petition filed by the defendants made it clear that all issues were to be kept open.

39] Learned counsel for the plaintiff invited my attention to issue no.3B on valuation. He submits that the burden to prove that the suit property is not properly valued had shifted on the defendants. The defendants however did not enter the witness box. Mr.Thukral who had filed an affidavit in lieu of examination in chief on behalf of the defendants did not remain present

for the cross examination. The defendants filed a pursis before the trial court. In view of the defendants giving up the evidence of the said witness, the City Civil Court passed an order cancelling the evidence of the said witness (DW-1).

40] The defendants thereafter examined Mr.Arvind Bhaskar who had submitted a valuation report on the suit claim. Learned counsel invited my attention to the said valuation report submitted by the said witness and would submit that the said report was submitted on the basis of claim of sub-tenancy made by the defendants and not on the basis of conducting licence. In the said report, the learned valuer had also not considered the expenses incurred by the plaintiff out of the compensation received from the defendants and did not consider the net income in the hands of the plaintiff. It is submitted by the learned counsel that on the contrary, the plaintiff had paid more amount of court fees than payable on the claim valued in the suit. He relied upon section 14 of Bombay Court Fees Act and would submit that dispute in respect of the valuation of suit claim and the payment of court fees has to be decided by the court. The decision of the court is final. The appeal court however can correct the amount. He submits that his client had given an undertaking to pay the differential amount of court fees if found payable by the trial court. He furnishes the same undertaking also before this court. Undertaking rendered by the learned counsel is accepted.

41] Learned counsel for the plaintiff placed reliance on section 21(2) of

the Code of Civil Procedure, 1908 and would submit that since there was no case of consequent failure of justice, the suit filed by the plaintiff could not be dismissed on the ground of alleged deficit of payment of court fees. Learned counsel for the plaintiff placed reliance on sections 102 and 103 of the Indian Evidence Act and also section 3 and would submit that the burden of proof that the suit was not properly valued by the plaintiff was on the defendants. The plaintiff had already discharged the initial burden cast on her. The defendants however did not discharge the burden shifted on them.

42] Learned counsel for the plaintiffs placed reliance on the judgment of Supreme Court in case of ***Ishwarbhai C. patel Vs. Harihar Behera and anr.*** - ***(1999) 3 SCC 457*** and in particular paragraph nos. 17, 22 to 23 and 29 in support of the submission that since the defendants did not enter the witness box to prove the contents of the written statement, an adverse presumption shall be drawn against the defendants by this court.

43] Mr.Thorat, learned senior counsel for the defendants in rejoinder would submit that even if the licence fee was considered as Rs.700/- per month, the valuation of the suit claim made by the plaintiff was not done properly and even with such amount under consideration, the City Civil Court did not have pecuniary jurisdiction to entertain the said suit filed by the plaintiff. He submits that there was no averment made in the plaint by the plaintiff that though the compensation received by the plaintiff was in

the sum of Rs.700/- per month, the net income in the hands of the plaintiff was only in the sum of Rs.150/- per month. He invited my attention to the averments made by the plaintiff in paragraphs 9 and 12 of the plaint insofar as issue of valuation is concerned. He submits that in prayer clause (b) of the plaint, the plaintiff had specifically asked for possession of the suit premises and thus the valuation shown by the plaintiff insofar as prayer clause (b) is concerned is not correct. The trial court ought to have considered this aspect before entertaining the suit. He submits that even in the affidavit of evidence filed by the plaintiff, there was no deposition that the plaintiff had valued the suit claim on the basis of the net income in the hands of the plaintiff.

44] Learned senior counsel invited my attention to paragraph 13 of the impugned judgment and decree and would submit that the trial court has considered the earlier order passed by the trial court in chamber summons filed by the defendants without considering the fact that there was no pleading in the plaint and has erroneously rendered a finding on net income. He submits that pleadings does not include the affidavits filed in the chamber summons and thus the trial court could not have considered the affidavit in reply filed by the plaintiff to the chamber summons filed by the defendants alleging that the net income in the hands of the plaintiff was Rs.150/- per month and not Rs.700/-. He submits that though this court had kept all the issues raised by the defendants in the writ petition open, the

learned trial judge did not consider the order passed by this court in the said writ petition. Learned senior counsel placed reliance on section 5 of the Small Causes (Enhancement of Pecuniary Jurisdiction) Act, 1986 and would submit that the pecuniary jurisdiction of the Small Causes Court was enhanced from Rs.10,000/- to Rs.25,000/- by the said amendment. The Small Causes Court only thus have jurisdiction to entertain, try and dispose of the said suit filed by the plaintiff.

45] Mr.Singh, learned counsel for the plaintiff submits that section 5(4A) of the Bombay Rent Act applies to the parties in the facts and circumstances of this case. The definition of premises under the said provision does not include the person conducting a business on the basis of conducting agreement.

REASONS AND CONCLUSIONS

46] It is undisputed position that on 2nd January 1966, the husband of the plaintiff had given his running business for conducting on security deposit and monthly royalty to the predecessor of the defendants for a period of 11 months from 2nd January 1966 to 1st December 1966. After demise of the husband of the plaintiff, the plaintiff executed various agreements with the original defendant No.1, who was predecessor of the defendants from time to time. The period for conducting business in the last Conducting Agreement expired on 14th January 1988. It is also an admitted position that the original defendant filed a Declaratory Suit bearing No. 649 of 1988 in

the Small Causes Court at Bombay *inter alia* praying for a declaration that the said original defendant was a lawful sub-tenant of the plaintiff in the suit before the City Civil Court in respect of the suit shop. The said suit was resisted by the husband of the defendant herein by filing a written statement. Both the parties had led oral as well as documentary evidences before the Small Causes Court in the said Declaratory Suit.

47] The Small Causes Court had framed nine issues in the said suit including the issue of jurisdiction of the Small Causes Court to try the said suit filed by the original defendant. Issue No.4 was “Does the plaintiff prove that the suit premises was let out to him by the deceased husband of the defendant in the year 1958 as the sub-tenant?” Issue No.5 was “Does the plaintiff prove that since 1958 he is in exclusive use, occupation and possession of the suit premises?” Issue No.6 was “Does the defendant prove that the plaintiff is conductor of her business in the suit premises?”

48] Insofar as Issue No.4 is concerned, the Small Causes Court, in the judgment and order dated 3rd August 1995 held that the predecessor of the defendants herein (original plaintiff in the suit) admitted in his evidence that the shop given by the husband of the plaintiff therein was for conducting. The plaintiff therein had not pleaded the case of the protected licensee in respect of the suit premises. The said plea however, was raised in the written statement. The Small Causes Court, after considering the oral and

documentary evidence, recorded the finding that the possession of the plaintiff therein was not as a Licensee but as conductor of the business. Possession of the suit premises is consequential to conducting the business and therefore, merely because the said plaintiff was in possession of the suit premises was not protected under Section 15-A of the Bombay Rent Act, 1947. The execution of the agreement of conducting was admitted by the plaintiff therein himself. The Small Causes Court, accordingly, held that the plaintiff therein had failed to prove his case that the deceased husband of the defendant herein (defendant in the said suit) had let out the suit premises to him in the year 1958. The Small Causes Court also held that the plaintiff therein was conductor of the business and thus, was not entitled to declaration that he was lawful sub-tenant of the suit premises.

49] The plaintiff in that suit, thereafter, filed an appeal bearing No. Appeal No. 370 of 1995 before the Appellate Bench of the Small Causes Court. The Appellate Bench also formulated various points for determination. The Appellate Bench, after considering the oral and documentary evidence and also the pleadings of the parties, dismissed the said appeal preferred by the plaintiff in that suit and held that the business was given by the deceased husband of the plaintiff in this case, who was defendant in that suit, to the plaintiff therein for conducting.

50] The plaintiff in that suit before the Small Causes Court, thereafter

filed Writ Petition bearing Writ Petition No. 3521 of 1999 before this Court impugning the judgment and decreed passed by the Small Causes Court and also by the Appellate Bench thereafter. This Court passed a detailed judgment in the said writ petition on 9th August 2005 dismissing the said writ petition filed by the plaintiff therein. It has been specifically held by this Court in the said judgment that the plaintiff therein was allowed to conduct the said business on the terms and conditions as agreed between the parties. It was made clear in the agreement entered into between the parties that the owner of the suit premises was in possession of the said Beedi shop in question. This Court also recorded the finding that there was nothing in the agreement entered into between the parties which had created any interest in the property in question.

51] This Court held that the clauses in the agreement entered into between the parties were clear enough to reflect the intention of the parties that it was the agreement whereby the plaintiff therein was allowed to conduct the running business in the name and style as “Masrice Bidi Works”. It was never intended to create any lease or license in the premises or any interest in the premises as sought to be contended by the plaintiff therein. It was specifically held that the possession of the premises of the plaintiff therein was based on the agreement, if taken note of that it was only agreement of conducting business and therefore, there was no question of creating any lease or license in favour of the original plaintiff. The plaintiff therein was

thus not entitled to be granted any protection under the provisions of the Rent Act in respect of the suit premises. There was no Special Leave Petition filed by the plaintiff therein before the Hon'ble Supreme Court impugning the said judgment dated 9th August 2005 delivered by this Court dismissing Writ Petition No. 3521 of 1999 and upholding the judgment and decree passed by the Small Causes Court as well as by the Appellate Bench thereafter.

52] It is thus clear beyond reasonable doubt that the case of the original defendant in these proceedings that an interest was created in his favour in respect of the suit premises as licensee or sub-tenancy thereof was totally disbelieved by the Small Causes Court which judgment and decree is upheld by this Court. Various findings of fact rendered by the Small Causes Court that the suit premises was given to the defendant in these proceedings and the plaintiff in the proceedings before the Small Causes Court were purely on conducting basis and no interest of any nature whatsoever including licensee was created in his favour in respect of the suit premises.

53] It is not in dispute that the period of such Conducting Agreement ultimately expired on 14th January 1988. The original defendant was thus a trespasser in respect of the suit premises. The plaintiff, accordingly, filed a separate Suit bearing Suit No. 979 of 1990 *inter alia* praying for declaration and for other reliefs. In prayer clause (a) of the plaint, the plaintiff had

prayed for an order and declaration that the defendants are trespassers and they have no right, title and interest in the suit premises and her business being carried therein after the period given under the Conducting Agreement dated 14th January 1987 was over. In prayer clause (b), the plaintiff prayed for an order and direction against the defendants, the heirs and legal representatives, to vacate the suit premises and its business being carried therein. In prayer clause (c), the plaintiff prayed for an order and direction to pay sum of Rs.3000/- per month towards mense profit.

54] The said suit was resisted by the original defendant initially and thereafter by his legal heirs by filing written statement. The legal heirs of the original defendant adopted the written statement filed by the original defendant. In paragraph 2 of the said written statement, the defendants contended that the plaintiff having prayed for possession of the suit shop was not maintainable before the City Civil Court in view of the provisions of Section 41 of the Presidency Small Cause Courts Act, 1882 and thus, the plaint was liable to be returned to the plaintiff for presentation in proper Court. The defendants also prayed for framing an issue of jurisdiction under Section 9A of the Code of Civil Procedure, 1908 as a preliminary issue.

55] The Trial Court framed various issues. When those issues were framed by the Trial Court initially, the suit filed by the defendants herein before the Small Causes Court for declaration of his alleged sub-tenancy was

pending. The defendants, thereafter, filed Chamber Summons in the suit before the City Civil Court *inter alia* praying for recast of some of the issues and for framing additional issues. The defendants prayed for framing following additional issues:

- (1) Whether the plaintiff has properly valued the suit ?
- (2) Whether this Court has pecuniary jurisdiction to try and entertain the suit ?
- (3) Does the plaintiff prove that she has put the defendants in possession of the suit shop by Conducting Agreement dated 15th December 1987 ?
- (4) Does the defendant prove that he is exclusive possession of the suit shop continuously since year 1958 and he is doing his business ?

56] The said Chamber Summons was resisted by the plaintiff by filing affidavit-in-reply. In the affidavit-in-reply filed by the plaintiff in the said Chamber Summons, it was contended that the plaintiff had valued her suit rightly on the basis of annual rack rent of the suit premises tentatively and had undertaken to pay the additional court fees as and when it is demanded by the City Civil Court. It was contended that out of Rs.700/- recovered by the plaintiff from the defendants as and by way of royalty per month, she was spending Rs.500/- every month towards maintenance of her suit premises and to keep the business in good conditions and Rs.95/- was

incurred towards monthly rent to the landlords. The plaintiff was thus in effect getting Rs.105/- per month towards the income from the suit business. If the income of Rs.105/- was multiplied by 115 months, the suit valuation would have come to Rs. 15,750/-. The plaintiff also relied upon the provisions of Bombay City Civil Court and the Bombay Court of Small Causes (Enhancement Pecuniary Jurisdiction and Amendment) Act, 1986, thereby increasing the pecuniary jurisdiction of the City Civil Court from Rs.50,000/- to unlimited amount. However, due to law on infrastructural facility, the said Act could not be implemented till then.

57] By an order dated 30th April 2005, the City Civil Court dismissed the said Chamber Summons filed by the defendants. It was held by the learned Trial Judge that by consent of parties in the Notice of Motion filed by the plaintiff for recasting the issues, original issue Nos.1,2,4,6 and 7 were deleted and issue No.3(a) was framed, i.e., “Does plaintiff proves that the defendants are trespassers ?”

58] The learned Trial Judge considered the issue whether valuation of the suit was properly done by the plaintiff or not. After following the judgment delivered by the Full Bench of this Court, in a case reported in **1988 (2) Bom.CR 210**, it is held by the learned Trial Judge in the said order that the valuation of the suit was done properly by the plaintiff. The expenses have to be deducted. There was, thus, no necessity of framing Issue Nos.1 and 2

as suggested by the defendants. Insofar as Issue Nos.3 and 4 suggested by the defendants are concerned, the learned Trial Judge has held that while cross-examining the witness of the plaintiff from Issue No.3(a) and while leading evidence contrary to the said issue, the defendants can establish what they have stated in the proposed Issue Nos.3 and 4 and thus there was no necessity for framing proposed Issue Nos.3 and 4 also.

59] By an order dated 12th December 2005 passed by this Court in Writ Petition No. 4672 of 2005 including the said order dated 30th April 2005 dismissing the Chamber Summons by learned Trial Judge. This Court held that such a procedural and interlocutory order in the course of trial should not be interfered with in writ jurisdiction under Article 227 of the Constitution of India. This Court made it clear that all issues were kept open to be decided when the final orders were passed in the matter.

60] In view of deletion of Issue Nos.1,2,4,6 and 7 by consent of the parties, the learned Trial Judge decided the remaining issues in the impugned judgment and decree. The learned Trial Judge rendered the finding in affirmative on the issue whether the plaintiff proves that Conducting Agreement dated 15th February 1987 came to an end on 13th January 1988. The Trial Court also held in affirmative that the plaintiff proves that the defendant was a trespasser. Insofar as Issue No.3(b) is concerned, the Trial Court answered the said issue, i.e., “whether the

defendant proves that the suit is not properly valued and on its proper valuation, it is beyond pecuniary jurisdiction of this Court”, in the negative. The Trial Court held that the plaintiff was entitled to the reliefs prayed in the plaint and also *mense profit* as prayed for.

61] The Trial Court dealt with the orders passed by the Small Causes Court in the declaratory suit filed by the defendants, order passed by the Appellate Bench of the Small Causes Court and the order passed by this Court in Writ Petition No. 3521 of 1999 filed by the original defendant recording various findings in favour of the plaintiff herein and against the defendants. The Trial Court, accordingly, rightly held that the original defendant was judicially held to be just conductor of the business and nothing more, which finding had attained the finality. In view of the fact that various issues which were raised by the defendants in this Suit were already concluded by the Small Causes Court and upheld by the Appellate Bench and this Court, those submissions made by both parties were rightly not considered by the Trial Court once again in the impugned judgment and decree. In my view, the findings rendered by the Small Causes Court, Appellate Bench of the Small Causes Court and this Court in respect of the suit premises were binding on the parties in the parallel proceedings raising similar issues.

62] Both the learned counsel appearing in this matter, however, dealt with

the issue whether the City Civil Court had jurisdiction to try, entertain and dispose of the suit filed by the plaintiff for the reliefs claimed therein or not or whether such Suit should be tried only by the Small Causes Court, Bombay under Section 41(1) of the Presidency Small Cause Courts Act, 1882 or not. The provisions of Maharashtra Rent Control Act, 1999 were not applicable to the facts of this case.

63] Section 5(4A) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short Bombay Rent Act) defined expression “licensee” which does not include a person conducting running business belonging to the Licensor. The Small Causes Court as well as this Court has already recorded a finding the said proceedings filed by the defendants herein had failed to prove the alleged sub-tenancy. The husband of the plaintiff during his lifetime and thereafter by the plaintiff had given running business belonging to them to the original defendants on conducting basis.

64] Section 41(1) of the Presidency Small Cause Courts Act would apply only to the suit and proceedings between the licensor and licensee or landlord and tenant relating to recovery of the possession of any immovable property situated in Greater Bombay or relating to the recovery of license fees or charges or rent therefor irrespective of the value of the subject matter of the suit suits or proceedings. In my view, since the Small Causes Court has already recorded the finding that the suit business was given by the

husband of the plaintiff to the predecessor of the defendants on conducting and there being no relationship of a landlord and tenant or licensor or licensee, Section 41(1) of the Presidency Small Cause Courts Act, 1882 would not apply to the facts of this case. Perusal of the prayers in the plaint and more particularly, prayer clause (a) clearly indicates that the plaintiff had applied for declaration that the defendants were trespassers and have no right, title or interest in the suit premises or in her business after the period prescribed under the Conducting Agreement was over. In prayer clause (b), the plaintiff had prayed for an order and direction against the defendants to vacate the suit premises and its business being carried therein.

65] In my view, the reliefs sought in prayer clause (b) is incidental to the prayer clause (a) and more particularly, would depend upon whether the plaintiff had given the suit business to the defendants on conducting suit business. The premises were given to the defendants for conducting the suit business. In my view, prayer clause (b) thus, even otherwise could not be considered as a suit for recovery of possession of the licensee premises. The period of Conducting Agreement was admittedly over much before the date of filing suit by the plaintiff. The alleged rights and interest claimed by the defendants in the suit premises were already rejected by the Small Causes Court by recording detailed findings of fact which findings have admittedly, attained finality. The defendants thus being trespassers in respect of the suit business and also the premises, the Suit filed by the plaintiff for various

reliefs claimed in the plaint was thus maintainable.

66] This Court in case of *Anusuyabi N. Ghate (Supra)* has held that since there was a Conducting Agreement between parties for running business of Tailoring, the possession of the room given to such party had become consequential and had become indivisible part of the contract and that for conducting business, occupation of the room was necessary. This Court, accordingly, held that Section 41 of the Presidency Small Cause Courts Act could not be invoked by the conductor of the business. In my view, the principles laid down by this Court in the said judgment would apply to the facts of this case. I am respectfully bound by the said judgment.

67] This Court in case of *Fatimabai Noor Mohamed (supra)* interpreting Section 5(4A) of the Bombay Rent Act, 1947 held that the said provision makes it abundantly clear that the permission given for conducting Pan Beedi business in the suit premises does not fall within the definition of word 'license' and therefore there is no question of protection of the respondent therein under the Bombay Rent Act. The provisions coupled with agreements produced by the parties would make it further clear that the dominant intention of the parties was to create conducting license for conducting the said Pan Beedi business and incidentally the premises was allowed to be used by the respondents as permissive user and, therefore, the case of the respondent therein would fall within the exception of the word

‘licensee’ as mentioned in Section 5(4A) of the Bombay Rent Act. In my view, the principles laid down by this Court in case of *Fatimabai Noor Mohamed (supra)* squarely applies to the facts of this case. Since the person who has been given a business for conducting basis by the owner of the business to be conducted in premises which is incidental to run the said conducting business does not fall within the definition of ‘licensee’ under Section 5(4A) of the Bombay Rent Act, Section 41 (1) of the Presidency Small Cause Courts Act would not apply to the suit filed by the plaintiff for the reliefs claimed therein in any manner whatsoever.

68] Insofar as the judgment in case of *Nagin M. Dagli (supra)* relied upon by Mr. Thorat, learned Senior Counsel for the defendants, in support of the submissions that only Small Causes Court did have jurisdiction to entertain the said Suit filed by the plaintiff is concerned, a perusal of the said judgment clearly indicates that the relationship of the parties as licensor and licensee was not disputed in that matter. The Suit therein was not for a declaratory decree, but was for recovery of possession on determination of license. In my view, the said judgment is clearly distinguishable in facts of this case and would not assist the case of the defendants.

69] Insofar as the judgment of this Court in *Sagir Ahmed Nanhe (supra)* relied upon by the learned Senior Counsel for the defendants is concerned, the said judgment is also clearly distinguishable in the facts of this case. This

Court in the said judgment held that the immovable property was used incidental to the business. The Suit was not excluded from cognizance of the Small Causes Court under Section 19(1)(d) of the Presidency of Small Cause Courts Act. In this matter, the Small Causes Court had already rendered finding in favour of the plaintiff that the plaintiff had given running business to the defendants for conducting. The said finding has, admittedly, attained finality.

70] Insofar as the judgment of this Court in ***Rasiklal K. Gala (supra)*** relied upon by the learned Senior Counsel for the defendants is concerned, this Court in the said judgment has specifically held that the word “licensee” referred in Section 5(4A) of the Bombay Rent Act specifically excludes the conducting business and thus occupant or such person is not entitled for protection as available under the Bombay Rent Act either as licensee or sub-tenant. In my view, the said judgment would not assist the case of the defendants, but on the contrary would assist the case of the plaintiff.

71] Insofar as the judgment delivered by the Full Bench of this Court in *Prem Ratan Vohara (supra)* and the judgment of the Hon’ble Supreme Court in case of ***Prabhudas D. Kotecha and anr. Vs. Manharbala J. Damodar*** and the judgment of Hon’ble Supreme Court in the matter arising out of the judgment delivered by this Court reported in ***(2013) 15 SCC 358*** are concerned, the issue before this Court and also before the Hon’ble

Supreme Court was whether the expression “licencee” would include a gratuitous licensee and accordingly, suit filed by a licensor against a gratuitous licensee would be maintainable before the Small Causes Court or not. In facts of this case, admittedly, the predecessor of the defendants in the declaratory suit filed before the Small Causes Court could not prove his claim of the alleged sub-tenancy or even licensee in respect of suit premises. Since Section 41(1) of the Presidency Small Cause Courts Act would not apply, the principles laid down by this Court and upheld by the Supreme Court in case of *Prabhudas Kotecha (supra)* would not apply to the facts of this case and would not assist the case of the defendants.

72] Insofar as unreported judgment of this Court in case of ***Kasturi Shethi (supra)*** relied upon by the learned Senior Counsel for the defendants is concerned, the said judgment was delivered in a Suit filed before this Court. In my view, Mr. Singh, learned counsel for the plaintiff, rightly distinguished this judgment on the ground that it was not the case of the defendants that they are licensees or claiming license under Section 41(A) of the Presidency Small Cause Courts Act. The case of the defendants before the Small Causes Court was that the original defendant was sub-tenant in respect of the suit premises. The said judgment would thus not assist the case of the defendants.

73] Mr. Thorat, learned Senior Counsel for the defendants, also raised an

issue of pecuniary jurisdiction of the City Civil Court to entertain the Suit on the ground that the plaintiff had not valued the suit properly. He vehemently urged before this Court that the plaintiff had not pleaded before the Trial Court that the suit claim was valued on the basis of net rack rent but had only relied upon the judgment of Full Bench of this Court in case of *Prem Ratan Vohara (supra)* . He submits that the issue of valuation decided by the learned Trial Judge while dismissing the Chamber Summons filed by the defendants were admittedly kept open by this Court while dismissing the writ petition filed by the defendants. It was also vehemently urged that even in the affidavit in lieu of examination-in-chief filed by the plaintiff also, the plaintiff did not depose as to how the suit claim was valued and the amount actually earned by the plaintiff out of royalty recovered under the said conducting business.

74] The Full Bench of this Court in case of *Prem Ratan Vohara (supra)* has clearly held that the net income calculated on the basis of compensation minus the charges indicated therein and not rent of the premises should form the criterion for determining the market value of the premises. The Trial Court, in my view, has rightly applied the principles laid down by the Full Bench of this Court, which was binding on the parties as well as the learned Trial Judge. I do not find any infirmity in this part of the judgment and decree passed by the Trial Court.

75] The plaintiff had already discharged his burden that the suit claim was

valued properly for the purpose of jurisdiction. The defendants though examined the valuer as witness, the said valuer in his report clearly admitted that the valuation report was given by him on the basis of claim of sub-tenancy of the defendants. He had not considered the principle of net rack rent in the said valuation report. The other witness had though filed affidavit in lieu of examination-in-chief on behalf of the defendants, but did not turn up for the cross-examination. The Trial Court thus rightly cancelled the evidence of the said witness from the record.

76] In my view, there is no merit in any of the submissions made by learned Senior Counsel for the defendants. The Trial Court, as a matter of record, by consent of parties, had already deleted Issue Nos.1,2,4,6 and 7 including the issue whether the defendant proves his lawful sub-tenancy in respect of the suit shop, whether the plaintiff proves that the plaintiff is entitled to possession in respect of suit business and the suit shop. In my view, the Trial Court has rightly recorded the finding that the defendants had failed to prove that the suit was not property valued and on its proper valuation, it is beyond pecuniary jurisdiction of the Trial Court. The Trial Court rightly held that the plaintiff had proved that the defendants were trespassers.

77] In my view, the Trial Court, after considering the overall evidence

placed on record by the parties and considering the provisions of the law and the pleadings, has rightly decreed the suit in favour of the plaintiff and against the defendants. The First Appeal is totally devoid of merits.

78] I, therefore, pass the following order:

- (a) First Appeal No. 1791 of 2007 is dismissed.
- (b) The appellants (original defendants) are directed to deliver the business and the suit premises to the plaintiff within eight weeks from the date of uploading of this judgment. During this period, the appellants (original defendants) are directed not to part with possession of the suit premises in favour of any third party and shall not create any third party interest in respect thereof and shall continue to deposit whatever amount they have been depositing in deference to the orders passed by the Trial Court.
- (c) The Trial Court is directed to proceed with the enquiry into *mense* profit under Order 20 Rule 12 of Code of Civil Procedure, 1908 expeditiously.
- (d) There shall be no order as to costs.
- (e) Office is directed to transmit the records and proceedings of the trial Court received by the office, if any, to the concerned trial Court expeditiously.

79] This judgment will be digitally signed by the Private Secretary of this Court. Sheristedar of this Court is permitted to forward the appellant and the respondents copy of this order by e-mail. All concerned to act on digitally signed copy of this order.

(R. D. DHANUKA, J.)