

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12584 OF 2022**

Nikhilesh Keshrichand Jhaveri And Ors

.. Petitioners

Versus

M.S Johnson Dye Works Pvt. Ltd. And Ors

.. Respondents

Mr. Gautam Ankhad a/w Mr. Vishal Narichania, Mr. Pritesh Parmar i/by.
Mr. Neel A. Gala for the Petitioners.

Mr. M. P. Vashi, Senior Advocate a/w Sean Wassoodew, Ms. Ashna Shah &
Mr. Abdul Rehaman for Respondent No. 1.

CORAM : SANDEEP V. MARNE J.

RESERVED ON : 1 APRIL 2024.

PRONOUNCED ON : 16 APRIL 2024.

JUDGMENT :-

1) By order dated 13 December 2022, this Court has already observed that the Petition required admission. Hence **Rule**. Rule made returnable forthwith. With the consent of the learned counsel appearing for parties, Petition is taken up for hearing and disposal.

A. THE CHALLENGE

2) Petitioners have filed this Petition challenging Judgment and Order dated 12 July 2021 passed by Appellate Bench of Small Causes Court at Mumbai in Revision Application No. 237 of 2015 thereby confirming the Order dated 15 July 2015 passed by Small Causes Court in application at

Exhibit 42 filed by the Original Plaintiffs under provisions of Order XV-A of Code of Civil Procedure, 1908 directing the Petitioners-Defendants to deposit Rs.5,85,80,203/- towards arrears of water charges.

B. FACTS

3) By Indenture dated 23 December 1938, Ardeshir Dadabhoi Baria and Bai Monie Ardeshir Baria (**Barias**) granted lease of land and building admeasuring approximately 13,000 sq. yards for a tenure of 999 years to Tarachand Navalchand Jhaveri and Ratanchand Navalchand Jhaveri (**Jhaveris**). It is the case of Jhaveris that Clause 8 of the Lease Deed conferred upon them right to create sub-lease in respect of portion of the demised premises for a term not exceeding one year without seeking prior consent of the lessors. Jhaveris contend that in accordance with the said covenant in para 8 of the Lease Deed, a monthly tenancy (which according to the Jhaveris does not exceed tenure of one year) was created in favour of New Era Textiles Mills Pvt. Ltd in the year 1968. On 18 October 1963 New Era Textiles Mills Pvt. Ltd. was ordered to be wound up and prior to the winding up Order, New Era Textiles Pvt. Ltd. had sold its assets and other rights to its sister concern - New Era Fabrics Ltd. (**NEFL**). According to the Jhaveris, this transaction was without their consent and therefore possession and occupation of the demised premises by NEFL was illegal. Jhaveris therefore filed Suit No. 236 of 1968 for eviction of NEFL from suit premises. In 1977, NEFL filed a declaration suit bearing RAD Suit No. 4081 of 1977 before the Small Causes Court against Jhaveris. Consent terms were executed between Jhaveris and NEFL in Suit No. 236 of 1968, under which NEFL was recognized as monthly tenant of Jhaveris. According to Jhaveris, NEFL agreed to pay all rates, taxes, easements, duties and impositions in respect of the suit premises and agreed to indemnify Jhaveris in respect all cost, charges, expenses, loss or damages suffered by Jhaveris by reason of their non-payment. Similar consent terms were filed in RAD Suit No. 4081

of 1977 filed by NEFL.

4) Prior to the year 1980, NEFL directly applied for and secured four independent water connections in its own name from Municipal Corporation for Greater Mumbai (**MCGM**) for operation of its factory in the suit premises. NEFL used to consume and pay charges for water consumed through those four water connections directly secured from MCGM. In January 1981, disputes arose between NEFL and MCGM in respect of the quantum of water supplied and in respect of payment of water charges. NEFL therefore filed Suit No. 3626 of 1986 in this Court challenging the Demand Notices and the Disconnection Orders passed by the MCGM. Various orders were passed by this Court from time to time in Suit No. 3626 of 1986 in respect of water charges and property tax claims of MCGM.

5) On 21 January 2000, Tenancy Agreement was executed by NEFL in favour of M/s. Johnson Dye Works Pvt. Ltd. (**JD**) for a period of 30 years in respect of premises admeasuring 65,000 sq. fts. forming part of the suit premises. Petitioners contend that NEFL and JD are controlled by Agarwal family members and that both the companies are part of same promoters/majority stake holders. A Leave and License Agreement was executed by NEFL on 27 August 2005 in favour of Home Care Retail Marts Pvt. Ltd. in respect of premises admeasuring 51,000 sq. ft. for 33 months under which the licensor (NEFL) agreed to pay all municipal or other taxes as well as outgoings. On 27 June 2006, JD executed Leave and Licence Agreement with M/s. Television Eighteen India Limited granting 5 year license in respect of area admeasuring 26,000 sq. ft. built up area and the licensor-JD agreed to pay all municipal and other taxes.

6) In the meantime, orders were passed in Suit No. 3626 of 1986 by this Court on 5 June 2002 and 21 October 2002 directing NEFL to pay

ad hoc water charges and property taxes to MCGM as an interim arrangement.

7) NEFL executed Leave and Licence Agreement on 6 January 2009 in favour of JD granting licence in respect of area admeasuring 30,000 sq. ft. under which it was *inter alia* agreed that JD would use existing licence of NEFL for running the factory and all 206 employees of NEFL shall work with JD on same terms and conditions and wages as provided by NEFL. JD also agreed to bear all future taxes, rates, assessment duties and levies as would be imposed in respect of the licensed premises.

8) On 17 March 2009, Jhaveris terminated NEFL's monthly tenancy *inter alia* on the ground that it was a public limited company having paid up share capital of more than Rs.1 Crore and that NEFL was also in breach of consent terms executed in the year 1977. Upon NEFL's refusal to vacate the suit premises, Jhaveris filed eviction suit bearing T.E and R Suit No. 48/62 of 2009 in the Court of Small Causes, Mumbai against NEFL in which JD and other entities, alleged to be in unauthorised occupation of the suit property, were also impleaded. The said suit is pending before the Small Causes Court.

9) In the above background a Conveyance Deed came to be executed between legal heirs of Barias in favour of JD on 10 November 2009 under which Barias conveyed their right, title and interest in favour of JD. The recitals to the Conveyance Deed acknowledged tenancy rights in favour of NEFL as well as conveyance of the property on "as is where is basis".

10) In its new capacity as the owner and landlord, JD terminated the Lease Deed executed in 1938 in favour of Jhaveris and filed RAE Suit No. 965/1247 of 2010 for eviction of Jhaveri's.

11) In the meantime, certain developments occurred in disputes pending between NEFL and MCGM in respect of outstanding property taxes and water charges dues. MCGM apparently disconnected the water connections provided to NEFL in 2002/2003 alleging breach of Order passed by Division Bench on 5 June 2002 and 21 October 2002 for payment of ad hoc water charges and property taxes by NEFL. MCGM filed Notice of Motion No.2156 of 2011 in NEFL's Suit No. 3626 of 1986 seeking direction against NEFL to pay outstanding dues of MCGM towards water charges and penalties. On 3 July 2012, MCGM issued Warrant of Attachment to NEFL for unpaid Water Charges dues of Rs.5,76,45,753/-, Property Tax dues of Rs.9,34,350 and warrant cost of Rs.100 (totaling Rs.5,85,80,203/-).

12) In the above background, JD filed Application at Exhibit 42 in its RAE Suit No.965/1427 of 2010 seeking direction against Jhaveris for deposit of amount of Rs.5,85,80,203/- by referring to the warrant of attachment. Jhaveris opposed the Application by filing Affidavit in Reply contending *inter alia* that the entire liability of payment of water charges is on NEFL. Jhaveris also alleged that NEFL and JD are sister concerns. Jhaveris also filed Suit No.159 of 2012 in this Court *inter alia* seeking cancellation of Conveyance Deed dated 10 November 2009 executed by Barias in favour of JD. In the meantime, NEFL's Suit No.3626 of 2006 filed against MCGM (which was transferred to City Civil Court) was dismissed for default on 29 January 2013. According to Jhaveris, NEFL's liability to pay water charges to MCGM attained finality.

13) Small Causes Court proceeded to reject Application filed by JD at Exhibit 42 for deposit of amount of Rs.5,85,80,203/- holding that the liability to pay taxes is of landlord at the first instance and that the same can be claimed by the landlord only after the payment thereof is made by the landlord. The Order passed by the Small Causes Court on 13 March 2014

came to be set aside by this Court on 30 April 2015 holding that the Order was cryptic. The Application filed by JD at Exhibit 42 was remanded to the Small Causes Court for fresh decision.

14) In the meantime, MCGM issued another warrant of attachment for non-payment of water charges of Rs.5,82,51,021/- and property taxes of Rs.2,55,18, 512/- aggregating to Rs.8,41,97,033/-.

15) The Small Causes Court heard the Application filed at Exhibit 42 afresh and by its Order dated 15 July 2015, allowed the same directing Jhaveris to deposit amount of Rs.5,85,80,203/- towards arrears of water taxes and towards warrant cost within 1 month. The prayer of JD for deposit of property taxes of Rs.9,34,350/- was however rejected. The Order was passed by the Small Causes Court by relying on provisions of Order XV-A of the Code of Civil Procedure, 1908 (**the Code**). Jhaveris filed Revision Application No.237 of 2015 before the Appellate Bench of Small Causes Court challenging Order dated 15 July 2015. The Appellate Bench of the Small Causes Court dismissed Revision Application No.237 of 2015 by Judgment and Order dated 29 September 2015 directing Jhaveris to deposit amount of Rs.5,85,80,203/- + Rs. 100/- within one month with liberty to JD to withdraw the same for payment of water taxes and warrant costs.

16) Jhaveris filed Writ Petition No.11530 of 2015 challenging the Judgment and Order dated 29 September 2015 passed by the Appellate Bench of the Small Causes Court. During pendency of the Petition, Small Causes Court passed Order dated 27 January 2016 striking off the defence of Jhaveris in RAE Suit No. 965/1427 of 2010 for failure to deposit the amount as directed by Orders dated 15 July 2015 and 29 September 2015. This Court disposed of Writ Petition No. 11530 of 2015 with consent of both the sides and remanded the Revision for *de-novo* consideration of Revision Application No.237 of 2015. This is how Revision Application

No.237 of 2015 came to be restored on the file of Appellate Bench of the Small Causes Court for fresh decision.

17) During pendency of Revision Application No. 237 of 2015 before Appellate Bench of Small Causes Court, certain developments occurred where MCGM and NEFL made correspondence with regard to NEFL's liability to pay water charges and property taxes. It appears that a meeting took place between NEFL and officials of MCGM on 9 December 2016 in which, MCGM promised to revise the outstanding water charges. Accordingly, the attachment action was withdrawn subject to NEFL paying amount of Rs.2,31,18,660/- towards property taxes. In the meantime, MCGM also passed Order dated 28 June 2018 fixing the capital value of the property in pursuance of complaint filed by NEFL against special notice dated 24 December 2012. NEFL also made correspondence with MCGM for reduction of disputed water charges.

18) In the meantime, JD filed another Suit bearing T.E. Suit No. 185 of 2018 against Jhaveris seeking their eviction.

19) In the above background, Appellate Bench of the Small Causes Court passed Judgment and Order dated 12 July 2021 dismissing Jhaveri's Revision Application No.237 of 2015 and confirming the Order dated 15 July 2015 passed by the Small Causes Court directing deposit of Rs.5,85,80,203/- + Rs.100/-. The Appellate Bench granted period of 30 days for deposit of the amount. Jhaveris have filed a present Petition challenging the Judgment and Order dated 12 July 2021 passed by the Appellate Bench of Small Causes Court. When Petition came up on 13 December 2022, this Court held that the Petition required admission and stayed the operation and execution of the Orders dated 15 July 2015.

C. SUBMISSIONS

20) Mr. Gautam Ankhad, the learned counsel appearing for Petitioners-Jhaveris would submit that the Small Causes Court and its Appellate Bench have erroneously directed Jhaveris to deposit the amount of Rs.5,85,80,203/- + Rs.100/- when Jhaveris are not liable to pay the said amount towards consumption of water by NEFL. According to Mr. Ankhad, Jhaveris are not liable either contractually or statutorily to pay the amount of water charges to Municipal Corporation and therefore the Small Causes Court and its Appellate Bench have committed a manifest error in passing order for deposit under provisions of Order XV-A of the Code. He would submit that both the Courts below have confused themselves between 'water tax' and 'water charges', which, according to Mr. Ankhad, are two separate levies under the provisions of Mumbai Municipal Corporations Act, 1888 (**MMC Act**). That what is demanded by MCGM is not water 'taxes', but 'charges' for actual consumption of water by NEFL in respect of the four water connections obtained directly by NEFL from MCGM. That contractually, NEFL is liable to pay the water charges in respect of water consumed by it for operating its factory. He would submit that under agreements executed by NEFL with various entities including with JD, it was specifically agreed that all taxes and outgoing in respect of the licenced/tenanted premises were to be borne by NEFL alone. That NEFL itself has accepted its sole responsibility to pay water charges, which is the reason why NEFL had filed Suit No.3626 of 1986 against MCGM before this Court. That this Court passed various Orders against NEFL from time to time directing it to pay amounts towards water charges and property taxes. That the demand of MCGM towards property taxes is fulfilled by NEFL alone. That NEFL has never denied its liability to pay water charges to MCGM and has in fact corresponded and fought with MCGM for reduction in the amount of water charges.

21) Mr. Ankhad would then demonstrate as to how NEFL and JD are companies controlled by same Agarwal family members. He would take me through the annual returns filed by NEFL and JD to demonstrate as to how several directors on board of both the companies are common. He would also invite my attention to observations made by this Court on 13 March 2014 in Writ Petition No.2467 of 2014 holding that NEFL and JD are group companies and were acting in collusion with each other for disposal of suit filed by Jhaveris against NEFL. He would also rely upon Order passed by the Apex Court on 3 March 2020 holding that Mr. R. K. Agarwal, director of NEFL has committed perjury in the records of the Apex Court and directing action to be taken against Mr. R. K. Agarwal and NEFL under Sections 193 and 199 of the Indian Penal Code.

22) Mr. Ankhad would further submit that even statutorily, Jhaveris are not liable to pay water charges to MCGM. He would rely upon provisions of sub-section 3 of Section 169 of MMC Act to demonstrate that the primary liability to pay water charges is on the person actually occupying the premises. He would submit that water taxes and water charges are two separate levies and though 'water tax' forms part of property taxes under Section 139-A of the MMC Act, 'water charges' do not form part of property taxes. He would rely upon provisions of Section 173 of the MMC Act, in support of his contention that a person paying water charges can recover the same from the occupier of the premises for whom it is paid. He would submit that the provisions of Section 173A of the MMC Act are pari materia with Section 69 of the Indian Contract Act. Mr. Ankhad would also rely upon provisions of Section 109 of the Transfer of Property Act in support of his contention that transferee of a property is not entitled to arrears of rent due before the transfer.

23) Lastly Mr. Ankhad would submit that considering the facts and circumstances of the present case, where there is no admitted liability on the

part of Jhaveris to pay the amount of water charges to MCGM and where water charges do not form part of rent, order for deposit could not have been passed by the Small Causes Court under Order XV-A of the Code. That provisions of Order XV-A of the Code are drastic in nature and the facts and circumstances of the case are such that passing of order for deposit, which has led to subsequent order of striking of defence of Jhaveris, could not have been passed. In support of his contentions, Mr. Ankhad would rely upon following judgments:

- i. *Krishnakumar Hariprasad Pandit since decd. Thr. LRs & Ors. Vs. Smt. Rasila Nandlal Bhatt (deceased) thr. LRs & Ors.*¹,
- ii. *Radheshyam Vs. Tuljaprasad & Ors.*²,
- iii. *Hotel Kings and Others Vs. Sara Farhan Lukmani and Others*³,
- iv. *Shri. Chhote Lal Vs. Shri Kewal Krishan Mehta*⁴,
- v. *Municipal Corporation of Greater Mumbai Vs. Harish Lamba of Bombay, Indian Inhabitant and others*⁵.

24) Mr. Vashi the learned senior advocate appearing for Respondent No.1-JD would oppose the Petition and support the orders passed by Small Causes Court and its Appellate Bench. He would submit that both the Courts have concurrently held Jhaveris liable for deposit of amount of water charges and warrant cost under provisions of Order XV-A of the Code. Mr. Vashi would submit that under provisions of the Lease Deed dated 23 December 1938, it is the responsibility of Jhaveris to pay all rates, taxes, charges, outgoings and assessments to local municipal provisional or imperial in respect of the demised premises. Relying on Section 12 of the Maharashtra Rent Control Act, Mr. Vashi would submit that water taxes as well as water charges payable by landlord to MCGM forms part of rent payable by the tenant. He would therefore submit that the water charges demanded by MCGM are part of rent liability payable by Jhaveris and that therefore the Small Causes Court has rightly directed

¹ Writ Petition No.12368 of 2022 decided on 21 September 2023.

² 2006 SCC Online Bom 1062.

³ (2007) 1 SCC 202.

⁴ 1971 (1) SCC 623.

⁵ (2020) 15 SCC 171.

Jhaveris to deposit the amount of water charges under provisions of Order XV-A of the Code. Mr. Vashi would submit that the amount of water charges is sought to be recovered against the demised premises and since the said amount is payable as well as recoverable against demised premises, and Order for depositing of the said amount can be passed and has been rightly passed under Order XV-A of the Code.

25) Mr. Vashi would further submit that NEFL has been illegally and unauthorisedly inducted by Jhaveris in violation of terms and conditions of the Lease Deed dated 23 December 1938. That there is specific prohibition in the Lease Deed not to let any portion of the demised premises for a term exceeding one year without renewal. That Jhaveris illegally created a sub tenancy in favour of NEFL in violation of clause 8 of the Lease Deed. That since Jhaveris are responsible for unlawful induction of NEFL in the suit premises, Jhaveris will have to shoulder the responsibility of clearing the mess created by NEFL by not paying the dues of water charges to MCGM. Mr. Vashi also rely upon clause 11 of Lease Deed under which Jhaveris have indemnified Barias in respect of any actions, proceeding costs, damages, claim, demands and liabilities in respect of any breach of the conveyance of the Lease Deed.

26) Mr. Vashi would further submit that in the facts and circumstances of the present case the word "may" used in sub-rule 1 of Order XV-A is required to be interpreted as "shall". That considering the broad objective behind incorporation of Order XV-A in the Code, which is to ensure that the tenant does not continue to occupy premises without paying rent and other charges, no discretion can be left with the Court for making an Order of deposit. According to Mr. Vashi, if such discretion is left for the Court to exercise in each individual case, the same would result in different Courts passing different Orders.

27) Mr. Vashi would further submit that Jhaveris have misrepresented before this Court at the time of securing interim Order that the warrant of attachment was withdrawn by MCGM. Inviting my attention to the Order dated 28 June 2018 passed by MCGM, Mr. Vashi would submit that the levy imposed by the MCGM is still subsisting. He would also rely upon letter dated 21 September 2018 addressed by MCGM to NEFL directing payment of outstanding water charges consequent to dismissal of Suit No.3626 of 1986. That the demand raised by MCGM towards water charges has not been withdrawn and that the same continues to subsist.

28) Mr. Vashi would rely upon Orders passed by Small Causes Court on 13 July 2018 for joining NEFL as a party Defendants to Jhaveri's RAE Suit No.965/1427 of 2010 and subsequently Jhaveris agreeing for setting aside the said Order by consent. That Jhaveris have thus agreed for deletion of NEFL from the suit filed by JD seeking eviction of Jhaveris.

29) Mr. Vashi would take me through various provisions of MMC Act in support of his contention that even water charges are recoverable as arrears of property tax dues. That since water charges can also be recovered as arrears of property taxes, the same are recoverable against the property. Relying of provisions of Section 146 (2) of the MMC Act, he would submit that since the premises are sub-let, the liability to pay the water charges forming part of property taxes, is primarily on Jhaveris.

30) Lastly, Mr. Vashi would contend that even if a discretion is assumed in the Court for passing an order for deposit under provisions of Order XV-A of the Code, such discretion has been exercised by the Trial Court and the Revisional Court in favour of JD and against Jhaveris considering the facts and circumstances of the present case. That exercise of such discretion is sound and that the same does not suffer from any manifest or palpable error. That therefore it would be beyond the jurisdiction of this

Court to interfere in such sound exercise of discretion in writ jurisdiction under Article 227 of the Constitution of India.

31) In support of his contentions Mr. Vashi would rely upon the following judgments:

- i. *Garment Craft Vs. Prakash Chand Goel*⁶,
- ii. *Bhaiya Punjalal Bhagwanddin Vs. Dave Bhagwatprasad Prabhuprasad and Ors.*⁷,
- iii. *L. Hirday Narain Vs. Income-Tax Officer, Bareilly*⁸.
- iv. *Shantaram Janu Raut Vs. Smt. Claradas Lourds*⁹,
- v. *Rajesh (DR) s/o Niranjan Singhania Vs. Surajmal s/o Karnidanji Dhadiwal since deceased through legal heirs Mrudula w/o Prakash Dhadiwal & Ors.*¹⁰,
- vi. *Ganpat Ladha Vs. Sashikant Vishnu Shinde*¹¹ and
- vii. *Hiralal Vallabhram Vs. Kastorbhai Lalbhai & Ors.*¹²

D. REASONING AND ANALYSIS:

32) The short issue that arises for determination in the present petition is whether Jhaveris can be made to deposit the amount of water charges under the provisions of Order XV-A of the Code. As observed earlier, a terse application running into two pages was filed by J.D. at Exhibit-42 on 17 October 2012 in its suit bearing R.A.E. Suit No. 965/1247 of 2010 seeking Order against the Defendants to deposit a sum of Rs.5,85,80,203/- with liberty to the Plaintiff (JD) to withdraw the amount for payment of MCGM to save the property from auction. The application did not refer to the provisions of Order XV-A of the Code and reads thus:

I Shri. Nareshchandra Seksaria is the Director of the Plaintiff company and residing at 65-A, Daria Mahal, Nepeansea Road, Mumbai, solemnly affirm and say as under:-

⁶ (2022) 4 SCC 181.

⁷ (1963) 3 SCR 312 : AIR 1963 SC 120.

⁸ 1970 (2) SCC 355.

⁹ 1998 (1) Mh.L.J. 639.

¹⁰ 2009 (4) Mh.L.J. 603.

¹¹ (1978) 2 SCC 573.

¹² (1967) 3 SCR 343 : AIR 1967 SC 1853.

1. The Plaintiff company had given the suit premises on lease to M/s.Tarachand Navalchand Jhaveri, under the Lease agreement dated 23.12.1938. Other Defendants are claiming to be the legal heirs of the Original Lessee but have failed to prove the same.

2. I say that the Defendants have illegally sub-let the suit premises to one M/s. New Era Fabrics Ltd. in violation of terms and conditions of Lease agreement dated 23.12.1938.

3. I say that under the Lease agreement dated 23.12.1938 the Lessee were suppose to pay all municipal taxes, property taxes etc. I say that the Lessee are responsible for all the dues or the liabilities that their sub tenant or they may create on the suit property.

4. I say that the Bombay Municipal Corporation on 3.7.2012 have pasted a notice dated 28.6.2012 on the suit premises for auctioning of the suit premises due to non payment of property taxes to the tune of Rs.9,34,450/-and water charges dues to the extent of Rs 5,76,45,753/- Hereto annexed as Exhibit "A" is the copy of the Notice Issued by the BMC.

5. I say that this liability is created due to illegal sub- letting of the premises by the Defendants to M/s. New Era Fabrics Ltd. and therefore the Defendants are liable to make good such liability.

6. I say that if the dues of BMC are not paid they have issued notice for auctioning the suit premises and recover their dues. I say that due to the illegal act of the Defendants such situation have arrived and the Defendants must make the payment to the BMC or deposit the amount in this Honourable Court so that the payment to BMC can be made and the property which is owned by the Plaintiffs can be saved from such auctioning or incumbrances.

7. I say that if the Defendants are not directed to pay the said dues of the BMC great harm and injury will be caused to the Plaintiffs for no fault of theirs and only due to the fault and act of the Defendants.

The Plaintiffs therefore pray:-

a) That the Defendants be directed and ordered by this Hon'ble Court to deposit a sum Rs.5,85,80,203/- in this Hon'ble Court.

b) The Plaintiff be allowed to withdraw such amount deposited in the Court and if necessary pay to the BMC to save the property from auction

c) Any other order of this Hon'ble Court.

33) Filing of application at Exhibit-42 by JD on 17 October 2012 was triggered essentially on account of issuance of warrant of attachment dated 3 July 2012 by MCGM demanding amount of Rs.5,76,45,753/- towards water charges, Rs.9,34,350/- towards property tax and Rs.100/- towards warrant cost (total Rs.5,85,80,203/-). The warrant was addressed to Navalchand Hirachand of NEFL and the warrant sought to attach the suit premises consisting of lands and buildings. Since the application was not filed under the provisions of Order XV-A of the Code, no averment was raised therein that the amounts demanded under the warrant of attachment formed part of rent payable by Jhaveris to JD. The application simply stated that the suit premises have been illegally sublet by Jhaveris to NEFL in violation of Lease-Deed, under which the lessee was to pay monthly taxes, etc. It was further pleaded that the lessee (Jhaveris) is responsible for all the dues or the liabilities which they or their sub-tenants may create on the suit property. The application was essentially filed to avert auction of the suit property in pursuance of warrant of attachment. The application was resisted by Jhaveris by filing Reply, in which it was pointed out that the issue with regard to payment of water charges by NEFL to MCGM was pending in Suit No. 3626 of 1986, in which NEFL had disputed the liability to pay water charges to MCGM in respect of the water consumed by it through four connections independently and directly obtained by NEFL from MCGM for running its factory. It was pleaded that the said dues pertain to the year 1981 and the Notice of Motion taken out by MCGM for recovery of water charges was pending adjudication. Jhaveris also pleaded that NEFL is a sister concern of JD who was always aware about pendency of suit in this Court filed by NEFL against MCGM. In short, Jhaveris denied any responsibility for payment of water charges to MCGM and specifically alleged that JD was trying to transfer the liability created by its sister concern with NEFL on Jhaveris to save the skin of NEFL.

34) The application filed by JD at Exhibit-42 came to be rejected by the Small Causes Court by Order dated 13 March 2014 holding that the liability to pay taxes is of the landlord at the first instance and the same can be reimbursed only after the landlord pays them. The order passed by the Small Causes Court rejecting application at Exhibit-42 passed on 13 March 2014 reads thus :

Heard Shri Trivedi & Shri S.K.Vyas on behalf of the Plaintiff and Defendants. Gone through written Synopsis of rejoinder and argument at EXh-47 and documents at Exh-48. Ld. Counsel Shri Vyas relied upon authority and ratio laid down in Girish Gangadhar Agrawal & Hiteshkumar Hasmukha Vakaria 2009(6) Mh.L.J. Wherein it is held that the amount of taxes can be reimbursed by the land lord. Therefore liability to pay taxes, is of landlord at first instance and then only land lord can claim amount paid by him towards taxes. Thus though it is stated in rejoinder at Exh-47 that cited authority is not applicable, however and how and why it is not applicable is not mentioned hence application rejected with cost.

35) The Small Causes Court's order dated 13 March 2014 came to be set aside by this Court in Writ Petition No. 3945 of 2014 holding that the same was cryptic and unreasoned. It would be apposite to reproduce the order passed by this Court on 30 April 2015 in Writ Petition No. 3945 of 2015 which reads thus :

The Civil Application No.2918 of 2014 was placed for orders today. However, considering the controversy and the impugned order passed by consent of parties, the Writ petition itself is taken up for disposal.

2 Accordingly **Rule**, rule made returnable forthwith. Respondents waive service.

3 The Petitioner has filed R.A.E Suit No.965/1427 of 2010 against the Respondents for eviction. The premises in question are Final Plot no.268, TPSIII, Mahim, Mumbai with buildings thereon at 16 Moghul Lane, MatungaMumbai. It is the case of the Petitioner that the Respondents committed breaches of the lease deed and the property is required by the Petitioner bonafide for their own occupation. The Petitioner has prayed for a direction to the Respondents to hand over vacant and peaceful possession of the suit

property and for mesne profits and for prayer of injunction.

4 In this suit, the Petitioner took out an application on 17 October 2012 seeking a direction to the Respondents to deposit an amount of Rs.5,85,80,203/-. According to the Petitioner, as per the lease deed dated 23 December 1938, the Respondents were supposed to pay all the municipal taxes and property taxes. It was also contended that the Municipal Corporation has issued a notice on 28 June 2012 stating that the premises may be auctioned for nonpayment of property taxes. The application was opposed by the Respondents. The learned Judge, Small Causes Court by order dated 13 March 2014 rejected the application. Thereafter the present Writ petition is filed.

5 The learned counsel for the parties have sought to raise various contentions as regards the liability to pay the taxes. Various factual and legal propositions have been advanced. However, the manner in which the application has been decided has to be taken note of. The application is rejected by the learned Judge, Small Causes Court, by the following order

“Heard Shri Trivedi & Shri S.K.Vyas on behalf of Plaintiff and Defendants. Gone through written Synopsis of rejoinder and argument at Exh47 and documents at Exh 48. Ld. Counsel Shri Vyas relied upon authority and ratio laid down in *Girish Gangadhar Agarwal & Hiteshkumar Hasmukha Vakaria 2009(6) Mh.L.J.* Wherein it is held that the amount of taxes can be reimbursed by the land lord. Therefore liability to pay taxes, is of landlord at first instance and then only land lord can claim, amount paid by him towards taxes. Thus though it is stated in rejoinder at Exh47 that cited authority is not applicable, however how and why it is not applicable is not mentioned hence application rejected with cost”.

The perusal of the order shows that the learned Judge has solely relied upon decision of the learned Single Judge of this Court in the case of **Girish Gangadhar Agrawal Vs Jiteshkumar Hasmukha Vakhariya –2009(6) Mh.L.J. Page 875**. This decision arose in completely different context. Even the observations in this decision, which have been relied upon by the learned Judge, are in respect of service charges, wherein this Court had observed that where services are not offered, service charges will not be recoverable. Not only the proposition which the learned Judge has culled out from this decision is not discernible, it certainly could not have been made foundation for such a cryptic order, without discussing the rival contentions. The order being completely without reasons is liable to be set aside on that ground alone and it is accordingly set aside.

6 The petition is allowed by quashing and setting aside the order dated 13 March 2014. The application filed by the Petitioner on 17 October 2012 stands restored to file. The learned Judge, Small Causes Court will take up the application on priority basis, in view of the notice issued by the Municipal Corporation, and decide the application latest by 30 June 2015. All contentions of both the parties are expressly kept open to be agitated on merits.

7 Rule is made absolute in above terms. In view of the disposal of the Writ petition, the Civil Application does not survive and is accordingly disposed of.

36) Thus, right from the date of filing of application at Exhibit-42 on 17 October 2012 till remand thereof for fresh decision by this Court on 30 April 2015, neither of the parties nor any of the Courts made any reference to the provisions of Order XV-A of the Code. Thus, neither JD nor Small Causes Court nor this Court treated JD's application at Exhibit-42 as the one filed under the provisions of Order XV-A of the Code. It is only when the application was taken up for decision afresh after remand by this Court, that the same was treated as the one filed under the provisions of Order XV-A of the Code by the Small Causes Court while allowing the same by Order dated 15 July 2015. I do not wish to be too technical in not treating the application filed by JD at Exhibit-42 to be the one filed under Order XV-A of the Code only on account JD's failure to refer to provisions of Order XV-A. At the same time, the above chronology is narrated to indicate that neither parties nor Courts have treated JD's application as the one filed under Order XV-A of the Code till the same was entertained after remand by the Small Causes Court on 15 July 2015. The Small Causes Court partly allowed the application at Exhibit-42. It rejected JD's demand for deposit of amount of property taxes of Rs.9,34,350/- but directed Jhaveris to deposit the amount of Rs.5,85,80,203/- towards the arrears of 'water taxes' and Rs.100/- towards warrant cost. The reasons recorded by the Small Causes Court for rejecting the demand for property taxes of Rs.9,34,350/- are as under :

14. So far as amount of taxes due and outstanding against property taxes amounting to Rs.9,34,350/- as shown in the Warrant of Attachment annexed as per Exh.'A' to present application is concerned, it is not clear as to for which period said amount is claimed by the Corporation. The yearwise break-up of taxes levied and taxes due is not given in the said Warrant of Attachment. Learned Advocate for the defendant relied upon the copy of registered Agreement of Leave and Licence dated 06.01.2009 executed between M/s. New Era Fabrics Ltd. and present plaintiff. The copy of said agreement is filed with application at Exh.66 It appears from the said agreement that part of the suit premises wherein M/s. New Era Fabrics Ltd. is running its Textile Processing Industry was taken by present plaintiff on licence basis from M/s. New Era Fabrics to run the said factory. It further appears from the said agreement that the plaintiff herein was liable to pay future taxes for the same and in view of this, it appears that on this building of processing unit run by M/s. New Era Fabrics Ltd., plaintiff was in possession. Learned Counsel for the defendant further filed on record the copy of Sale Deed/Conveyance Deed pertaining to conveyance of entire suit premises executed by original owner in favour of plaintiff herein. It appears that this Conveyance, Deed was executed on 06.11.2009. Learned Advocate for the plaintiff failed to satisfy as to whether they occupied the building which was subject matter of agreement of Leave and Licence dated 06.01.2009 and if it is occupied by them, when they handed over the possession of the same as both the Learned Advocates made the statement across the bar that as present entire premises is occupied by M/s. New Era Fabrics Ltd. In these circumstances of the case and since Warrant of Attachment at Exh. A1 do not reflect about the period of property tax due and since plaintiff itself appears to have acquired the building under registered Agreement of Leave and Licence and as the plaintiff being occupant of that premises, though assumed for certain period, is liable to pay property tax to some extent. Thus, it cannot be said at this stage and in this regard that though the plaintiff is liable to pay this much property tax, the defendant is equally liable to pay entire property tax as claimed by Corporation. In absence of any details in this regard, it would not be proper to direct the defendant to deposit the property tax as sought. Point No.3 is answered accordingly in the negative.

37) Thus, the main reason why the Small Causes Court rejected JD's prayer for deposit of property taxes is lack of clarity about the period for which the taxes were demanded coupled with JD's acquisition of part of the premises on leave and license and its occupation for certain period.

38) However, when it came to deposit of 'water charges' (erroneously assumed by the Small Causes Court as 'water taxes'), the Small Causes Court held that there was no privity of contract between JD and NEFL and that the covenant of the lease did not require the lessor to first pay the water taxes and then recover the same from Jhaveris.

39) The order of the Small Causes Court dated 15 July 2015 was upheld by the Appellate Bench on 29 September 2015 and both the parties agreed before this Court for remand of the Revision Application No. 237 of 2015 to the Appellate Bench in Writ Petition No. 11530 of 2015 decided on 3 February 2016. Upon remand, the Appellate Bench has confirmed the order of the Small Causes Court dated 15 July 2015 by dismissing Revision Application No. 237 of 2015 filed by the Jhaveris. Perusal of the Order of the Appellate Court would once again indicate that the dues towards 'water charges' are once again confused as 'water taxes' by the Appellate Bench. Thus, both the Small Causes Court as well as its Appellate Bench have treated the amounts demanded by MCGM towards 'water charges' as 'water taxes'.

40) Before dealing with the distinction between 'water taxes' and 'water charges' under the provisions of the MMC Act, 1888, it would be apposite to refer to the intervening events that occurred during the pendency of the Revision before the Appellate Bench after remand order by this Court. NEFL's Suit No. 3626 of 1986 filed against MCGM questioning the liability to pay water charges came to be dismissed for default on 29 January 2013 after its transfer to the City Civil Court. After dismissal of its suit, NEFL was apparently corresponding with MCGM for reduction of amount of water charges and apparently a meeting took place between the municipal officials and NEFL on 9 December 2016. The Hydraulic Engineer agreed that the outstanding water charges pertaining to his department would be revised and the revised charges would be intimated to the office of Assessor

and Collector. On account of such promise given by the Hydraulic Engineer, the warrant of attachment was withdrawn by MCGM. In the meantime, the amount of property tax was escalated to Rs.2,31,18,660/- and the warrant of attachment was agreed to be withdrawn subject to payment of property taxes by NEFL. However, subsequently on 21 September 2018, the Hydraulic Engineer's Department referred to dismissal of Suit No. 3626 Of 1986 and stated that the water charges bills were not required to be amended and called upon NEFL to pay the outstanding water charges bills. NEFL has made some correspondence with the Legal Department of MCGM for reduction of water charges and letters dated 4 June 2018 and 14 August 2018 addressed by NEFL are placed on record. From the above events, it is clear that NEFL was pursuing with MCGM for reduction of amount of water charges and the Hydraulic Engineering Department had initially agreed for effecting such reduction. However, the position after the year 2018 on the issue of exact liability to the payment of water charges is not clear as of now.

41) Coming back to the issue of distinction between the concept of 'water taxes' and 'water charges', it would be necessary to first clarify that the remit of enquiry in the present case is not to determine the liability of exact entity to pay the water charges demanded by MCGM. The issue is discussed only from the point of determining liability of Jhaveris to deposit the amount of water charges under Order XV-A of the Code. To consider the distinction, it would be necessary to make a reference to the relevant provisions of the MMC Act, 1888. Under Section 139A of the Act, property taxes leviable on buildings and lands include water tax, water benefit tax, sewerage tax, sewerage benefit tax, general tax, education cess, street tax and betterment charges. Sub-section (1) of Section 139A reads thus:

139A. Property taxes what to consist.

(1) Property taxes leviable on buildings and lands in Brihan Mumbai under this Act shall include water tax, water benefit tax, sewerage

tax, sewerage benefit tax, general tax, education cess, street tax and betterment charges.

42) Section 169 clarifies distinction between 'water tax' and 'water charges' and provides thus :

169. Rules for water taxes and charges.—

(1) Notwithstanding anything contained in section 128, the Standing Committee shall, from time to time, make such rules as shall be necessary for supply of water and for charging for the supply of water and for any fittings, fixtures or services rendered by the Corporation under Chapter X and shall by such rules determine—

(i) the charges for the supply of water by a water-tax and a water benefit tax levied under section 140 of a percentage of the rateable value or the capital value, as the case may be of any property provided with a supply of water ; or

(ii) a water charge in lieu of a water-tax, based on a measurement or estimated measurement of the quality of water supplied; or

(iii) combined charges under clauses (i) and (ii); or

(iv) a compounded charge in lieu of charges under clauses (i) and (ii).

(2) A person who is charged for supply of water under clause (ii) or (iv) of sub-section (1) shall not be liable for payment of the water-tax, but any sum payable by him and not paid when it becomes due shall be recoverable by the Commissioner as if it were an arrear of property tax due.

[(3) Notwithstanding anything contained in section 146, the water taxes and charges shall be primarily recoverable from person or persons actually occupying the premises.

43) Thus under Section 169, the Standing Committee of the Municipal Corporation is empowered to make rules, under which it can levy water tax and water benefit tax by fixing percentage of rateable value or the capital value of the property which is provided with supply of water. Alternatively, it can levy water charges in lieu of water tax, based on quantum of water supplied. Alternatively, it can levy combined charges

towards water charges and water taxes or it can levy compounded charge in lieu of water charges and water taxes. Sub-section (2) of Section 169 provides that a person who is charged for supply of water (who pays water charges) is not liable to pay water tax. Thus, under the provisions of the MMC Act, 1888, 'water taxes' and 'water charges' are two separate levies. What is demanded in the present case are not 'water taxes'. The Municipal Corporation has demanded charges for water actually consumed by NEFL for its factory. Both the Small Causes Court as well as its Appellate Bench have completely glossed over this fine distinction between water charges and water taxes leviable under the provisions of MMC Act.

44) The distinction between water charges and water taxes is dealt with by the Apex Court in **Municipal Corporation of Greater Mumbai V/s. Harish Lamba** (supra) wherein the Apex Court in paras-22, 23, 24 and 26 has held as under :

22. If it is a compulsory imposition, the fact that the water is de facto utilised by the occupants or the owners of the building becomes insignificant. It is not a tax on income where the levy is linked to income. We are concerned with property tax, which becomes payable in respect of specified property. Water Tax or Water Benefit Tax, in law, is a property tax and described by the legislature as being one of the component of property tax. That becomes payable as soon as the owner/occupant of the premises is in a position to avail of water connection to his premises in the prescribed manner. That liability is inevitable in terms of Section 141 of the Act, even if the water supply/water meter is later on disconnected.

23. Indeed, in case of disconnection of water supply/water meter the corporation cannot recover water charges under Section 169 of the Act. For, the water charges can be recovered commensurate to the quantity of water actually supplied and consumed from the connection of communication pipes or municipal water works to the premises concerned.

24. Reverting to the view taken by the High Court, we agree with the appellant that the High Court has palpably misapplied the decision in *Nagpal Printing Mills* (supra) by erroneously assuming that the present case was also a case of levy of 'water charges' referable to Section 169 of the Act. The High Court completely glossed over the distinction between the concept of property tax in the form of water benefit tax on the one hand; and water charges in respect of the

quantity of water actually consumed on the other hand. In the former case, being a property tax, it is a compulsory imposition and liability to pay the same accrues irrespective of the quantity of water supplied and consumed in the premises concerned. That liability flows from Sections 139 read with 140 and 141 of the Act. The quantum of tax payable is specified by the standing committee from time to time on the basis of per centum of rateable value of premises or its capital value. The impugned demand notices, ex facie, are ascribable to Section 141 of the Act. The same in no manner can be construed as having been issued under Section 169 of the Act.

26. Having said this, we must conclude that the High Court misread the impugned demand notices as being under Section 169 of the Act, when in fact the same were for recovery of property tax in the form of water benefit tax under Section 139 read with Sections 140 and 141 of the Act. The liability to pay such tax arises irrespective of disconnection of water supply/water meter including due to non-payment of taxes, being a compulsory imposition. **However, if the owner/occupant of the premises were to utilise the water supply facility made available to the premises through connection by means of communication pipes or municipal water works, as the case may be, the liability would be to pay only water charges on the basis of the quantity of water actually consumed, in lieu of property tax in the form of water tax or water benefit tax by virtue of Section 169 of the Act and in particular subsection (2) thereof.**

(emphasis supplied)

45) Having dealt with the fine distinction between ‘water charges’ and ‘water taxes’, it would be necessary to deal with the debate between the parties about the primary responsibility of a person for payment of water charges. As observed above, water taxes form part of property taxes under the provisions of Section 139A of the Act. Section 146 of the Act deals with primary responsibility for payment of property taxes and reads thus :

146. Primary responsibility for property taxes on whom to rest.—

(1) Property-taxes shall be leviable primarily from the actual occupier of the premises upon which the said taxes are assessed, if such occupier holds the said premises immediately from the Government or from the corporation or from a fazendar.

Provided that the property-taxes due in respect of any premises owned by or vested in the Government and occupied by a government servant or any other person on behalf of the government for residential purposes shall be leviable primarily from the Government and not the occupier thereof.

(2) Otherwise the said taxes shall be primarily leviable as follows, namely :—

- (a) if the premises are let, from the lessor ;
- (b) if the premises are sub-let, from the superior lessor ;
- (c) if the premises are unlet, from the person in whom the right to let the same vests ;
- (d) if the premises are held or occupied by a person who is not the owner and the whereabouts of the owner of the premises cannot be ascertained, from the holder or occupier ; and
- (e) if the premises are held or developed by a developer or an attorney or any person in whatever capacity, such person may be holding the premises and in each of whom the right to sell the same exists or is acquired, from such holder, developer, attorney or person, as the case may be :

Provided that, such holder, developer, attorney or person shall be liable until actual sale is effected.

(3) But if any land has been let for any term exceeding one year to a tenant, and such tenant or any person deriving title howsoever from such tenant has built upon the land, the property taxes assessed upon the said land and upon the building erected thereon shall be leviable primarily from the said tenant or such person, whether or not the premises be in the occupation of the said tenant or such person.

46) However, sub-section 3 of Section 169 makes an exception to Section 146 by use of the words “*notwithstanding anything contained in Section 146*”. It then provides that the water taxes and charges shall be primarily recoverable from person or persons actually occupying the premises. Mr. Vashi, has placed reliance on sub-section (2) of Section 169 in support of his contention that even water charges or water taxes are recoverable as if they are arrears of property tax dues. Though Mr. Vashi is not entirely wrong in contending so, sub-section (3) of Section 169 makes an exception to Section 146 under which even though the liability to pay property taxes may rest on the lessor or superior lessor in respect of the premises let, the responsibility to pay water taxes and water charges is actually on persons who actually occupy the premises.

47) As observed above, the scope of enquiry in the present petition is not to decide the exact entity who is liable to pay the water charges to MCGM. The remit of enquiry is restricted to the issue as to whether Jhaveris can be made to deposit the amount of water charges demanded by MCGM from NEFL under the provisions of Order XV-A of the Code. *Prima-facie*, the provisions of Section 169(3) of MMC Act coupled with repeated acceptance of liability by NEFL to pay water charges should be sufficient, in the facts and circumstances of the present case, to infer that the primary liability to pay water charges is of NEFL.

48) The next issue is whether Jhaveris can be made to deposit the amount of water charges for which primary responsibility is on NEFL. Since NEFL is not only in actual occupation of the suit property, but it is NEFL who has actually consumed the water charges which are demanded by MCGM. Order XV-A has been introduced in the Code under the Bombay High Court Amendment and the provision reads thus:

ORDER XV-A

STRIKING OFF DEFENCE IN A SUIT BY A LESSOR

(1) In any suit by a lessor or a licensor against a lessee or a licensee, as the case may be, for his eviction with or without the arrears of rent or licence fee and future *mesne profits* from him, the defendant shall deposit such amount as the Court may direct on account of arrears up to the date of the order (within such time as the Court may fix) and thereafter continue to deposit in each succeeding month the rent or license fee claimed in the suit as the Court may direct. The defendant shall, unless otherwise directed, continue to deposit such amount till the decision of the suit. In the event of any default in making the deposits, as aforesaid, the Court may subject to the provisions of sub-rule (2) strike-off the defence.

(2) Before passing an order for striking off the defence, the Court shall serve notice on the defendant or his Advocate to show cause as to why the defence should not be struck off, and the Court shall consider any such cause, if shown in order to decide as to whether the defendant should be relieved from an order striking off the defence.

(3) The amount deposited under this rule shall be paid to the plaintiff lessor or licensor or his Advocate and the receipt of such amount shall not have the effect of prejudicing the claim of the plaintiff and it shall not also be treated as a waiver of notice of termination.

Explanation.—The suit for eviction shall include suit for mandatory injunction seeking removal of licensee from the premises for the purpose of this rule.

49) The objective behind introducing Order XV-A in the Code appears to ensure that a lessee or licensee who is facing suit for eviction (with or without arrears of rent or license fees) and for future mesne profits should not be permitted to occupy the premises without paying the arrears of rent/license fees. The debate amongst the parties in the present petition is whether the amount of water charges demanded by MCGM forms part of 'rent' payable by Jhaveris to the landowners (JD). The provisions of Order XV-A are drastic in nature as failure on the part of the lessee to deposit the amount directed by the Court may result in striking off the defence of lessee or licensee. Infact in the present case, the Small Causes Court appears to have passed an order striking off the defence of Jhaveris on account of their failure to deposit the amount as directed in the order dated 15 July 2015.

50) Mr. Vashi has contended that the amount of water charges demanded by MCGM forms part of rent payable under the Lease Deed dated 23 December 1938. It would be necessary to refer to some of the covenants of the Lease-Deed. Clauses-1, 8 and 11 of the Lease Deed read thus:

1. During the said term of 999 (nine hundred and ninety nine) years to pay the rent hereinbefore reserved upon the days and in manner aforesaid and to pay all existing and future rates taxes charges outgoings and – assessments either local Municipal Provincial or Imperial whatsoever for the time being payable either by the – landlord or the tenant in respect of the said pieces of land and all buildings for the time being standing --- thereon or any part thereof PROVIDED that in the event of the Lessees failing to pay the rent within 15 --- (fifteen) days after the same shall have become due – the

should pay interest thereon at 9 (nine) per cent per annum till payment PROVIDED FURTHER that in the --- event of the lessees failing to pay to the Lessors the amounts of such rates taxes charges outgoings or --- assessments (in case the same shall have been paid by the Lessors) or any costs charges expenses or other --- moneys payable to the Lessors under the terms of these presents on the day on which the same shall be payable the Lessees shall pay to the Lessors the amount of such rates charges outgoings and assessments or costs charges expenses or other monies payable to the Lessors as the case may be with interest thereon at the aforesaid rate of nine per cent per annum from the respective dates on which the same shall otherwise be payable to the – Lessors until payment PROVIDED that the stipulations in this clause shall be without prejudice to the Lessors’—right of entry and their other rights under these presents or by law.

8. Not to assign, under-let or otherwise transfer or alienate the demised premises or any part thereof without the previous consent in writing of the Lessors to such – assignment under-letting transfer or alienation PROVIDED that such consent shall not be unreasonably withheld – PROVIDED FURTHER that the Lessees shall be entitled to let any portion of the demised premises for a term not exceeding a year without any renewal.

11. To indemnify and at all times keep indemnified the Lessors against all actions proceedings costs damages claims demands and liabilities for or in respect of any breach committed during the said term of any of the covenants conditions agreements and provisions of these – presents and which are to be observed and performed by the Lessees.

51) Thus, under the Lease-Deed, Jhaveris agreed to pay the rent as well as ‘*all existing and future rates, taxes, charges, outgoings and assessments either local, municipal, provincial or imperial which are payable either by the landlord or by the tenant in respect of the demised lands.*’ It is Mr. Vashi’s contention that everything that was payable either by the landlord or tenant in respect of the demised premises is the responsibility of Jhaveris under the Lease-Deed dated 23 December 1938. On the contrary, it is Mr. Ankhad’s contention that water charges are consumable in nature, the same are not covered by Clause-1 of the Lease-Deed. I have already held that the water charges demanded by MCGM are distinct from the property taxes and in view of the provisions of Section 169(3) of the MMC Act,

coupled with NEFL's repeated acceptance of liability to pay water charges, the primary liability to pay the amount of water charges to MCGM is of NEFL.

52) Mr. Vashi would then contend that since the problem of subletting of premises to NEFL is created by Jhaveris, it is Jhaveris alone who are responsible for payment of water charges in the event of non-payment thereof by their sub-tenant. To this, Mr. Ankhad is quick enough to point out that JD and NEFL are sister concerns and that both are controlled by same members of Agarwal family and that NEFL's liability is deliberately being used by JD to corner Jhaveris with a view to ensure Jhaveris ouster from the suit premises. Considering the limited remit of enquiry in the present petition, I do not consider it necessary to delve any deeper into the factual dispute about JD and NEFL being sister concerns of Agarwal family. Infact, Mr. Vashi has raised an alternate submission that even if JD and NEFL are assumed to be sister concerns or group companies, the same cannot absolve Jhaveris of the responsibility to pay dues of their sub-tenants since such sub-tenancy of NEFL is accepted and admitted by Jhaveris.

53) Mr. Vashi has relied upon provisions of Section 12 of the Maharashtra Rent Control Act, under which landlord is made entitled to increase rent in respect of premises where he is required to pay to any Government or Local/Statutory Authority any fresh rate, sales, charges, tax, land assets, ground rent of land or any other levy on the lands and buildings. Section 12 (1) of the Rent Act reads thus:

12. Increase in rent on account of payment of rates, etc.

(1) Where a landlord is required to pay to Government or to any local authority or statutory authority in respect of any premises any fresh rate, cess, charges, tax, land assessment, ground rent of land or any other levy on lands and building, or increase in rate, cess, charges, tax, land assessment, ground rent of land or any other levy on lands and buildings, he shall,

notwithstanding anything contained in any other provisions of this Act but save as otherwise expressly provided in any other law for the time being in force, be entitled to make an increase in the rent of such premises:

Provided that, the increase in rent shall not exceed the amount of any such rate, cess, charges, tax, land assessment, ground rent of land or any other levy on lands and buildings, as the case may be.

54) Mr. Vashi would harp upon use of the word "charges" in Section 12(1) of the Rent Act and would submit that imposition of charges by local authority is a ground for landlord to increase rent in respect of the premises and therefore water charges levied by MCGM in the present case would clearly be covered by the expression "rent" used in Order XV-A of the Code. In my view, this submission of Mr. Vashi cannot be accepted because levy of water charges depend on quantum of water consumed each month. It is like payment of charges for consumption of electricity. The amount of water charges levied by Municipal Corporation on the basis of quantum of water consumed by a tenant or sub-tenant therefore cannot be static and would vary from month to month depending on utilization of quantum of water. Therefore, demand of water charges by Municipal Corporation cannot be treated as part of rent either within the meaning of Section 12(1) of the Rent Act or Order XV-A of the Code.

55) Both Mr. Vashi and Mr. Ankhad have relied upon judgments in support of their contention as to whether water charges can be treated part of rent or not. Mr. Vashi has relied upon Judgment of the Single Judge of this Court in ***Rajesh Niranjan Singhania*** (supra) wherein the MOU entered between the parties fixed rent at Rs.8,000/- per month bifurcated in three parts i.e. Rs.3,000/- for use and occupation of premises, Rs.2,500/- facility of well and Corporation water and Rs.2,500/- for service charges towards fittings and fixtures. The Defendants therein had paid rent at the rate of Rs.8,000/- up to 31 March 1998 and as per agreement, there was increase of 5% with effect from 1 April 1998 whereafter the Defendant paid only Rs.3,150/- per month towards use and occupation of premises, but failed to

pay water charges and service charges. Water supply was disconnected and therefore the liability to pay water charges got terminated. However, liability to pay service charges continued. In the light of this factual background, the issue before this Court was whether the decree of eviction passed by the Trial Court due to non-payment of service charges was sustainable or not. This Court held in para 23 as under:

23. In *P.L.Kureel Talib Mankab vs. Beni Prasad and anr.*, AIR 1976 Allahabad 362, it was held that rent includes all payments agreed by the defendant to be paid to his landlords for the use and occupation not only of the building but also of furnishing, electric installation and other amenities. In *Seva International Rashions vs. Smt.Suman Kathpalia and ors.*, AIR 2000 Delhi 69, it was held that rent includes all payments by tenant to be paid to his landlord for not only what is originally described as rent in agreement between landlord and tenant but also those payments which are made for amenities provided by landlord under the agreement between them. Same view appears to have been taken by this court in *Muktabai Gangadhar Kadam vs. Smt.Muktabai Laxman Palwankar*, 1971 Mh.L.J. Notes of cases No.72. I fully agree with the above propositions made in Allahabad and Delhi High Court (supra) and in my considered opinion, in view of contract between the parties in the present case, the service charges in respect of fittings and fixtures were part of the rent and non-payment of it entails the liability of eviction. In view of this, I am unable to accept the contentions of the learned counsel for the petitioner that the rent should be treated to be Rs.3000/- or Rs.3150/- only because that much amount was shown as rent in the returns submitted to the Municipal Corporation for the purpose of property tax. The property tax may be charged only on the rent payable for the use and occupation of the premises and not on the other charges levied for the purpose of use of amenities, which are provided by the landlord, but still they are included within the definition of the rent as stated above.

56) In *Rajesh Niranjana Singhania*, the MOU executed between the parties contained a specific covenant that Rs.2,500/- payable towards service charges would form part of total rent of Rs.8,000/-. It is on account of such peculiar covenant that this Court held that even service charges formed part of rent. So far as water charges are concerned, there was no controversy on account of recording of finding that water connection was disconnected and this Court was not concerned with the issue of non-payment of water charges. Therefore, the judgment of this Court in *Rajesh Niranjana Singhania* does not assist in determination of issue involved in the present case about treatment of water charges as part of rent.

57) On the other hand, Mr. Ankhad has relied upon judgment of the Apex Court in *Hotel Kings* (supra) in which the principal issue before the Apex Court was about difference in periodicity of payment of rates and taxes and payment of rent. The Apex Court held in para 36 and 37 as under:

36. The argument advanced on behalf of the lessee that notwithstanding the said stipulation, since the lessee was required to pay the rates and taxes which formed part of the permitted increase and was, therefore, a part of the rent payable, does not appeal to us. The consequential submission made in this regard that since the rates and taxes were payable either annually or after every six months, and the same formed part of the rent, it must be held that the rents were payable not each month but after every six months, does not also appeal to us.

37. Notwithstanding the decisions in the *Bombay Municipal Corpn. case* and *Raju Kakara Shetty* (supra), the views expressed therein are distinguishable on facts with the facts of these two appeals. Both the said judgments deal with payment of education cess under the Maharashtra Education (Cess) Act, 1962, under which the landlord is liable to pay such cess annually but has the right to recover the amount so paid by him from the tenant in addition to the standard rent as a part of the rent itself. By operation of law education cess has been made a component of the rent payable by the tenant in respect of the tenanted premises. In such a case, the concept of “permitted increase” would include the cess payable as part of the rent itself. **In the instant case, however, the lessee is required to pay the rates and taxes and other outgoings for the demised premises in respect whereof the landlord has been given the right to effect permitted increase equivalent to the amount paid towards rates and taxes. The same does not, in our view, makes such payment a part of the rent though it may be a consideration for the grant of lease.** The “permitted increase” in the instant case serves as a yardstick for the landlord to increase the rents on account of payment of rates and taxes by the landlord.

(emphasis supplied)

58) The Apex Court held in *Hotel Kings* that mere entitlement of landlord to effect permitted increase on account of payments made by him towards rates and taxes, did not make such payment part of rent. Mr. Vashi seeks to distinguish the judgment in *Hotel Kings* by contending that the Lease Deed in that case specifically provided that rates and taxes and other outgoings were to be treated as separate liability of tenant. In my view, even the judgment in *Hotel Kings* is not useful in arriving at a definitive conclusion as to whether water charges can be treated as part of rent. However, the judgment does deal with the argument of Mr. Vashi about interpretation of Section 12 of the Rent Act. Mr. Vashi has sought to

contend that under Section 12 of Rent Act, since landlord is entitled to increase the rent on account of payment of taxes, charges etc. such taxes, charges etc. are required to be treated as part of rent. In *Hotel Kings* the Apex Court has rejected the said contention and has held that mere entitlement of the landlord to effect permitted increase on account of payment of taxes and other charges did not make such taxes or other charges part of rent.

59) Mr. Ankhad has relied upon judgment of Apex Court in *Shri. Chhote Lal* (supra) in which the issue was whether electric charges could be treated as part of rent. The Apex Court held in para 3 as under:

3. The agreement to pay the electric charges was, thus, separately mentioned. In Urdu, the language in which the rent note was scribed, the word which has been translated as charges was "Kiraya". It is because of the use of this word that the High Court seems to have held that the electric charges payable were part of the rent. It failed to notice that the clause itself said that this amount in respect of electric charges was to be paid separately. Further, this was not rent for electric fittings, but was the amount payable in respect of actual electric energy consumed in each month. The amount due for consumption of electricity each month could only be known at the end of that month, while, under the earlier clause of the agreement, the rent had to be paid in advance. On the face of it, therefore, the electric charges for a month could not possibly be paid with the rent. These electric charges could not, consequently form part of the rent. The charges were further variable and would depend on the amount of electricity consumed. No fixed amount was payable in respect of electricity charges. If electric charges were to be held to be part of the rent, it would lead to the inference that even the rent of the building was variable and was different each month. In view of these circumstances, it is clear that the District Judge and the High Court went wrong in proceeding on the basis that the electric charges formed part of the rent and that non-payment of electric charges due amounted to non-payment of arrears of rent.

60) Thus in *Shri. Chhote Lal* (supra) electric charges was not treated as part of rent as charges were variable in nature and depended on amount of electricity consumed. Applying the same logic in the present case as well, since levy of water charges depend on the quantum of water consumed it is difficult to treat the same as part of rent. Unlike water taxes, which can be a fixed amount as a percentage of ratable value/capital value,

the water charges are demanded based on measurement of quantity of water supply under Section 169(1) of the MMC Act. It is therefore difficult to hold, in the facts of the present case, that water charges demanded by MCGM from NEFL can be treated as part of rent within the meaning of Order XV-A of the Code.

61) In the present case a huge amount is demanded by Municipal Corporation for consumption of water by NEFL upto the year 1981 through 4 separate water connections procured directly by NEFL for carrying out its operations in its factory within the suit premises. Such water charges cannot be treated as part of 'rent' within the meaning of Order XV-A of the Code in the unique facts and circumstances of the present case. True it is that under provisions of Section 169 (2) of the MMC Act, the water charges are recoverable by the Municipal Commissioner as if they are arrears of property tax due. However, at the same time unlike property taxes, the primary responsibility of payment of water charges is fixed on the actual occupier and not on the lessor or principal lessor in cases where the property is let out. Thus, it is the primary responsibility of NEFL, who not only occupies the premises but also consumed the water till the year 1980-81 for operation of its factory. Considering the limited scope of enquiry involved in the present petition, it cannot be stated that an order for deposit of such water charges must be made in the present case under provisions of Order XV-A of the Code. This view is taken in the light of unique facts and circumstances of the present case and it cannot be construed to mean that in every case, Court shall not pass an Order for deposit of water tax or water charge under the provisions of Order XV-A of the Code.

62) Another factor which makes an exception in the present case from compulsory deposit of water charges by Jhaveris is use of the word "may" in Rule 1 of Order XV-A. The conscious use of the word "may" under Rule 1 of Order XV-A by the Legislature is to give some flexibility to

the Court considering unique facts and circumstances of the case, where the Court can make a departure and not direct deposit of sum levied, which landlord seeks to treat as part of rent payable by the tenant. Mr. Vashi has strenuously contended that the word "may" used in Rule 1 of Order XV-A is required to be treated as "shall" considering the broad objective of incorporation of provisions of Order XV-A. He has relied upon judgment of this Court in ***Shantaram Janu Raut*** (supra) to demonstrate as to why Order XV-A has been incorporated in the Code. However apart from the issue before Single Judge of this Court (*F. I. Rebello, J.*) being different i.e. whether Courts other than Small Causes Court can direct deposit of rent under Order XV-A, observations made by the learned judge in para 12 of the judgment clearly goes against the point sought to be canvassed by Mr. Vashi. In para 12 of the judgment, this Court has held:

"No doubt it is the Court which will direct the tenant to deposit such amount as the Court may prima facie come to the conclusion that requires to be deposited. **The power therefore in the Court in its discretion to fix the quantum which has to be deposited.**"

(emphasis supplied)

Thus, in ***Shantaram Janu Raut*** Single Judge of this Court has recognised principle that discretion is conferred on the Court while making an Order of deposit of rent under Order XV-A.

63) Mr. Vashi has relied upon the Judgment of the Apex Court in ***Bhaiya Punjalal Bhagwanddin*** (supra) in support of his contention that the word "may" used in Order XV-A of the Code is required to be read as "shall". The Apex Court held in para 23 as under:

23. The second contention that, the appellant's having paid the arrears of rent within 2 months of the institution of the suit, there would be no forfeiture of the tenancy has no force in view of the provisions of Section 12 of the Act. Sub-section (2) permits the landlord to institute a suit for the eviction of a tenant on the ground of non-payment of rent after the expiration of one month from the service of the notice demanding the arrears of rent, and clause (a) of sub-section (3) empowers the Court to pass a decree in case the rent had been payable by the

month, there was no dispute about the amount of standard rent, the arrears of rent, had been for a period of six months and the tenant had neglected to make the payment within a month of the service of the notice of demand. The tenant's paying the arrears of rent after the institution of the suit therefore does not affect his liability to eviction and the Court's power to pass a decree for eviction. It is true that the expression used in clause (a) of sub-section (3) "is the Court may pass a decree for eviction in any such suit for recovery of possession", but this does not mean as contended for the appellant, that the Court has discretion to pass or not to pass a decree for eviction in case the other conditions mentioned in that clause are satisfied. The landlord became entitled to recover possession when the tenant failed to pay rent and this right in him is not taken away by any other provision in the Act. The Court is therefore bound in law to pass the decree when the requirements of sub-section (2) of Section 12 are satisfied. This is also clear from a comparison of the language used in clause (a) with the language used in clause (b) of sub-section (3) which deals with a suit for eviction which does not come within clause (a) and provides that no decree for eviction shall be passed in such a suit if on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in court the standard rent then due and thereafter continues to pay or tender in Court regularly such rent till the suit is finally decided and also pays costs of the suit as directed by the Court. It is clear that where the legislature intended to give some benefit to the tenant on account of the payment of the arrears during the pendency of the suit, it made a specific provision. In the circumstances, we are of opinion that the Court has no discretion and has to pass a decree for eviction if the other conditions of sub-section (2) of Section 12 of the Act are satisfied.

64) The issue before the Apex Court in *Bhaiya Punjalal Bhagwanddin* (supra) was entirely different. The issue was whether a Court has discretion to pass a decree for eviction when a clear case of non-payment of rent under provisions of Section 12 (3) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (**Rent Act 1947**) is made out. The Apex Court has held that once all the ingredients of Section 12(2) of the Rent Act 1947 are satisfied, the Court is bound in law to pass a decree of eviction. The Apex Court has held that the Court has no discretion but to pass decree for eviction upon satisfaction of conditions under Section 12(2) of the Act despite use of the word "may" in Section 12 (3) (a) of the Act, on account of peculiar language implied in the provisions. However, when it comes to Order XV-A of the Code, the word "may" has been deliberately and consciously used with a view to invest some degree of discretion in the Court, both in the matter of passing of Order of deposit as well as quantum of rent to be deposited. Mr. Vashi is not entirely wrong in contending that the objective behind incorporation of Order XV-A is to curb the tendency

of tenants enjoying rented premises without payment of rent and that therefore in ordinary course, wherever the tenant is in arrears of rent, the Court must necessarily pass Order for deposit of arrears of rent. However in a case where there is dispute as to whether a particular levy forms part of the rent or whether the tenant whose eviction is sought is liable to make that payment or not, in my view, some degree of discretion is required to be read into the provision of Order XV-A so that a situation is not created where the Court is bound to pass an Order of deposit of levy, even in cases where there are serious disputes about tenant's liability to pay such levy or whether such levy forms part of rent. In my view, this is a perfect case where such discretion ought to have been exercised by the Small Causes Court on both counts viz. (i) levy of water charges by MCGM for quantity of water consumed by NEFL may not strictly be covered by the expression "rent" and (ii) primary responsibility of paying water charges is on NEFL.

65) Mr. Ankhad has relied upon judgment of Single Judge of this Court in ***Krishnakumar Hariprasad Pandit & Ors.*** (supra) in which this Court has held that Order XV-A does not refer to municipal taxes or water bills and that therefore Order XV-A cannot be made applicable in respect of arrears of Municipal taxes or water bills. This Court held in para 15 as under:

15. In the facts of this case, Mr. Patil's reliance on Order XV-A of the CPC would not be of much assistance as rent has already been deposited in advance. Further, what is observed from Order XV-A of the CPC is that it is only in the event of default in making the deposit of rent that the defence can be struck off, which is not the case here. Nowhere the provision refers to Municipal taxes or water bills and therefore, the said provision would not be applicable to the case of the Petitioners. Also, the reliance, therefore, by the learned Counsel for the Petitioners on the decisions in the case of *Balgopal Maheshwari and Others vs. Sanjeev Kumar Gupta* (supra) and *Bhimrao Laxmanrao Nihare vs. Natwarlal Ratansi Thakkar* (supra) would not be of any assistance in the facts of this case as the said decisions are clearly distinguishable.

Thus the view taken by Single Judge by this Court in ***Krishnakumar Hariprasad Pandit & Ors.*** (supra) does seem to suggest that arrears of water

charges cannot be directed to be deposited under Order XV-A of the Code.

66) In *Radheshyam* (supra) Single Judge of this Court (V.R. Kingaonkar, J.) has held in para 9 of the judgment as under:

9. A plain reading of the aforesaid provision would make it manifest that for application of the Order XV-A, it must be a suit by a lessor or a licensor against a lessee or a licensee. In the present case, the respondents did not approach the trial Court with a case that they are lessors. They did not state the rate of rent agreed between the parties. They did not assert that the tenancy of the petitioner was attorned in their favour. They are the purchasers of the house property and as such the earlier existing tenancy would stand attorned if the appropriate communication is made to the tenant. The case of the respondents is that the petitioner has encroached over one of the room and had occupied another room by consent of the previous owner. The provision of Order XV-A would come into play only when there is prima facie evidence to show that the rent or licence fees was agreed between the parties and a particular sum could be charged as a liability. The next significant aspect is that the learned trial Court further passed order of striking off the defence of the petitioner on account of non-compliance of the impugned order. For this purpose, Sub-rule (2) of Order XV-A is required to be considered. It is conspicuous that before passing order for striking off the defence, the Court shall serve notice on the defendant or his Advocate to show cause as to why the defence should not be struck off, and the Court shall consider any such cause shown in order to decide as to whether the defendant should be relieved from the order striking off the defence. Thus, the legislature has offered second opportunity to the defendant before striking off the defence and has afforded right of hearing. Such a person can show cause as to why the order could not be complied with and in that case, after application of judicial mind, the Court has discretion to relieve such a person from such an order of striking off the defence. Needless to say, the striking off the defence is not automatic only because of non depositing of the amount as directed by the Court. The defence cannot be so lightly struck off as has been done in the present case.

Mr. Vashi has sought to distinguish the judgment in *Radheshyam* by contending the Plaintiff in that case had not approached the Trial Court with a case that he was a lessor. Be that as it may. The judgment in *Radheshyam* is more on drastic nature of provisions of Order XV-A and Rules that the defence cannot be lightly struck off.

67) It is also relevant to note that JD's right to recover water charges from Jhaveris is also doubtful in the light of provisions of Section 109 of the Transfer of Property Act, 1882.

109. Rights of lessor's transferee.—

If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

(emphasis supplied)

68) In the present case the period during which NEFL consumed water and incurred liability to pay water charges pertain to the year 1980-81, when Barias were the lessors. JD claims to have purchased the land and building from Barias vide Conveyance executed on 10 November 2009. Therefore, under Section 109 of Transfer of Property Act, JD is not entitled to recover arrears of rent from lessee prior to the date of execution of conveyance. Therefore even if water charges are to be treated as part of 'rent', entitlement of JD to recover the same from Jhaveris is questionable. This is yet another factor why an order for deposit of water charges under Order XV-A of the Code was not warranted in the facts of the present case.

69) Mr. Vashi has alternatively contended that even if the power of Court under Order XV-A to direct deposit of arrears of rent is treated as discretionary, discretion has been exercised by the Small Causes Court and its Appellate Bench and after exercise of discretion, the order for deposit has been made. According to Mr. Vashi since there is no perversity or patent

illegality in exercise of discretion by the Small Causes Court, this Court would be loath in interfering in exercise of discretion. Reliance is placed on judgment of the Apex Court in *Ganpat Ladha, Garment Craft* and *L. Hirday Narain* (supra). There can be no dispute to the proposition that in exercise of supervisory jurisdiction under Article 227 of the Constitution of India, this Court does not act as a court of first appeal to re-appreciate, re-weigh evidence or facts and that every error of fact or even a legal flaw cannot be corrected in exercise of supervisory jurisdiction. However, in the present case, I am of the view that the Small Causes Court and Appellate Bench have mechanically passed the Order for deposit of water charges by Jhaveris by confusing water charges with water taxes and without appreciating to position that it is not Jhaveris' primary responsibility to pay the water charges to the Municipal Corporation. The exercise of discretion by the Small Causes Court and its Appellate Bench does not appear to be sound. Their orders suffer from manifest error of law and of facts and therefore this Court would be justified in exercising the supervisory jurisdiction under Article 227 of Constitution of India to correct such manifest error, which otherwise results in drastic Order striking off defence of Jhaveris.

E. CONCLUSION

70) After considering the overall conspectus of the case, in my view, the order for deposit of water charges by Jhaveris under Order XV-A of the Code who was not justified, and the Small Causes Court has erred in passing such an order for deposit against Jhaveris. The Appellate Bench has failed to correct the error in exercise of revisionary jurisdiction. The orders passed by the Small Causes Court and Appellate Court are thus indefensible and are liable to be set aside.

F. ORDER

71) Writ Petition accordingly succeeds. Order dated 15 July 2015 passed by Small Causes Court on Application at Exhibit 42 as well as Judgment and Order dated 12 July 2021 passed by the Appellate Bench of Small Causes Court in Revision Application No.237 of 2015 are set aside. Application filed by Plaintiff at Exhibit 42 stands dismissed. The Writ Petition is allowed in above terms. Rule is made absolute. There shall be no orders as to costs.

[SANDEEP V. MARNE J.]