



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 69 OF 2017

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| 1. | Mr. Baburao Tukaram Patil
Since deceased through his
legal heirs and representatives. |]
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| 1A. | Smt. Gayabai Baburao Patil,
Age. 85 Years, Occ. R/at. Patil Galli,
Lasalgaon, Tal. Niphad,
Dist. Nashik. 422306. |]
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| 1B. | Sou. Tara Shankarrao Adsare,
Age.65 Years, Occ. R/at.68,
Snehal Vardhini Society, Tikde Colony,
Trimbak Road, Nashik.422202. |]
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| 1C. | Sou. Vijaya Manoharrao Patil,
Age.63 Years, Occ.
R/at. Plot No.01, Plot No.36,
Sector-G, Surya Building, N-5,
Town Center, Cidco Colony,
Aurangabad- 431005. |]
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| 1D. | Sou. Alka Sahebrao Patil,
Age.61 Years, Occ. R/at. D-601,
August Homes, Garkheda,
Oria Ulkanagari, Aurangabad – 431005. |]
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| 1E. | Sou. Savita Bhaskarrao Kharde,
Age.59 years, Occ. R/at. Bhagwati
Hospital, Post. Kolhar, Tal. Rahta,
Dist. Ahmednagar- 431005. |]
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| 1F. | Shri. Nandkumar Baburao Patil,
Age.58 years, Occ.
R/at. House No.282, Patil Galli,
At Post- Lasalgaon, Tal. Niphad,
Dist. Nashik – 422 302. |]
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| 2. | Mr. Sahu Tukaram Patil,
Age: 76 years, Occ: Agriculturist. |]
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| 3. | Mr. Madhukar Tukaram Patil,
Age : 74 years, Occ: Agriculturist. |]
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] |
| 4. | Mr. Prabhakar Tukaram Patil,
Since deceased through his
legal heirs and representatives. |]
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] |
| 4A. | Smt. Ratnamala Prabhakar Patil,
Age. Adult, Occu. |]
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] |
| 4B. | Shri. Prashant Prabhakar Patil,
Age. Adult, Occu. |]
]
] |
| 4C. | Shri. Dnyaneshwar Prabhakar Patil,
Age. Adult Occu. |]
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] |
| 4D. | Sou. Vandana Nitin Thakare,
Age. Adult, Occu.
(All 4A to 4D r/at.: Lasalgaon,
Tal. Niphad, Dist. Nashik). |]
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]
] |
- ...Appellants.**

Versus

1. Mr. Suresh Bhikaji Jadhav,
Age: 55 years, Occ: Business,
R/at: Jadhav Gas Agency, Lasalgaon,
Tal. Niphad, Dist. Nashik.
2. Mr. Jayawant Bhikaji Jadhav,
Age: 55 years, Occ: Business,
R/at: Muktamani, Plot No.11,
Opp. LIC Gadkari Chowk, Nashik.
3. Sau. Shila Appasaheb Zavare,
Age:60 years, Occ. Housework,
R/at: Chitali Station, Tal. Shrirampur,
Dist. Ahmadnagar.

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| 4. | Sau. Snehalata Omprakash Chorisya, |] |
| | Age: 58 Years, Occ. House work, |] |
| | R/at: Kishorchandra Co-op. Hsg. Society, |] |
| | Flat No.2, Behind Aher Studio, Canada |] |
| | Corner, Nashik. |] |
| | |] |
| 5. | Sau. Madhuri Vijay Patil, |] |
| | Age: 56 yeas, Occ. House work, |] |
| | R/at: Patil Park, Opp. Vasant Market, |] |
| | Building No.4, Flat No. 6, Nashik. |] |
- ...Respondents.**

Mr. P. K. Dhakephalkar, Senior Advocate along with Mr. Sachin Dhakephalkar for the appellant.

Mr. Girish R. Agrawal and Mr. Shubham Jangam for respondent no. 1.

Mr. Sachin Gite for respondent no. 2.

Coram : Sharmila U. Deshmukh, J.

Reserved on : February 29, 2024.

Pronounced on : March 20, 2024.

Judgment :

1. By order dated 1st November 2017, the second appeal was admitted by this Court. The appellant before this Court is the Plaintiff aggrieved by the concurrent findings of the Trial Court and Appellate Court dismissing his suit seeking eviction of the Defendant.

Proceedings Before The Trial Court:

Plaint:

2. RCS No. 82 of 2010 was filed by the plaintiff seeking eviction of defendants from the suit property described as part of non

agricultural land bearing Gat No.395 (part) admeasuring 50 x 45, 30 x 25 feet open plot. The open plot of land was let out to Bhikaji Laxman Rao Jadhav- the predecessor of defendants for the purpose of business on monthly rent of Rs.75/-. The original tenant Bhikaji expired in January 2010 and defendant nos.1 to 6 are the legal heirs of original defendant. On the open land the original tenant had constructed a temporary shed. RCS No.43 of 2081 was filed by Bhikaji seeking injunction against the plaintiff which was dismissed by the trial Court as against which the appeal preferred was also dismissed. As the suit property was required for the bonafide use of plaintiff, RCS No.10 of 2008 was filed seeking eviction of deceased Bhikaji which was withdrawn on 4th March 2010 with the permission of Court. The tenancy of the defendant was terminated by issuing notice dated 31st March, 2010 under Section 106 of the Transfer of Property Act, 1882, (TP Act, 1882) which was duly received by the defendants. As the defendants declined to handover possession of the tenanted property, the suit was filed.

Written Statement:

3. Written statement was filed by defendant no. 2-Suresh. It was admitted that the plaintiff was the owner of open land which was let out to the original tenant Bhikaji for business purpose on yearly rent

of Rs.900/-. The original tenant Bhikaji was tenant in respect of area admeasuring 100 x 45 feet and subsequently, Bhikaji constructed a permanent shed on the said property out of his own funds in which Bhikaji was carrying out business of hardware and machinery. The business is thereafter being carried out by the present Defendants. The issuance of notice dated 31st March 2010 issued under section 106 of Transfer of Property Act, 1882 was admitted as also the reply dated 13th April 2010. Earlier RCS no.10 of 2008 filed under the provisions of rent control legislation was withdrawn and as such the present suit was liable to be dismissed. There is no bonafide requirement of plaintiff and as the suit property is required by the plaintiff for the purpose of development, the plaintiff is liable to make temporary arrangement for the defendants and handover the possession of premises in the newly constructed building on the earlier agreed yearly rent of Rs.900/-.

Findings of Trial Court:

4. The plaintiff examined himself and defendant no.2 examined himself and deposed as per the contents of their respective pleadings. The Trial Court held that the suit is not maintainable under the provisions of Transfer of Property Act, 1882 and is barred by the principles of *res judicata* and estoppel and the tenancy not

being validly terminated, the plaintiff is not entitled to the recovery of possession and dismissed the suit.

Findings of Appellate Court:

5. The Appellate Court framed and answered the points for determination as under :

Sr. No.	Points.	Findings.
1.	Whether the appellants / plaintiffs prove that they have legally terminated the tenancy of the defendants / respondents and they are entitled for possession of the suit land by obtaining a decree of eviction and also, they are entitled for other consequential relief as prayed by them ?	In negative.
2.	Whether the judgment and decree passed by the learned trial Court in R.C.S. No. 82/2010 dated 15-04-2013 requires interference at the hands of this Court ?	In negative.
3.	What order ?	Appeal is dismissed with costs as per final order.

6. The findings of the Appellate Court can be broadly summarized as under:

- a) The premises let out to the defendant was open space over which shed is constructed by the defendants in which business of hardware shop and machinery is carried out by the Defendants i.e. commercial or business purpose.

b) The shed constructed is still in existence and thus the premises is governed by section 7(9) of the Maharashtra Rent Control Act 1999 [for short "the Rent Act of 1999"] and the suit was required to be filed under provisions of Rent Act of 1999.

c) For seeking eviction it is necessary for the plaintiff to establish and prove the grounds for eviction as prescribed under section 16 of the Rent Act of 1999, which is not satisfied by the Plaintiff.

d) There is dispute about the tenancy being yearly or monthly and the burden was upon the Plaintiff to prove that the the tenancy was monthly tenancy which the Plaintiff has failed to prove.

Substantial Question Of Law Framed:

The second appeal was admitted on the following substantial question of law :

"Whether it was legal and proper on the part of the Courts below in not considering the admitted fact that the suit land is the open land and therefore, the provisions of Transfer of Property Act are applicable as on the date of lease the land let out to defendant was an open land and therefore the provisions of Maharashtra

Rent Control Act, 1999 will not apply to the present proceedings.”

Submissions:

7. Heard Mr. Dhakephalkar, learned Senior Advocate appearing for the appellant, Mr. Girish Agrawal, learned counsel appearing for respondent no.1 and Mr. Gite, learned counsel appearing for respondent no.2.

8. Mr. Dhakephalkar has taken this Court to the pleadings in plaint and written statement to contend that what was let out to the predecessor of defendants was an open land. He submits that upon repeal of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 [for short “Rent Act of 1947”], the protection available to the tenant of open land was withdrawn by virtue of the amended definition of “premises” under section 7(9) of the Maharashtra Rent Control Act, 1999 [for short “Rent Act of 1999”] and hence the tenancy can be terminated by issuing notice as contemplated under section 106 of the Transfer of Property Act, 1882 [for short, “TP Act”]. He submits that as the tenancy was a monthly tenancy the same was validly terminated by notice dated 31st March 2010. He submits that construction of shed subsequent to the open land being let out to the defendant is of no consequence as the original tenant

was not a tenant in respect of the shed but only in respect of the open land. According to him, the subject matter of letting was the open land and admittedly no rent was being paid in respect of the shed. He submits that in the absence of any landlord tenant relationship *qua* the shed constructed by tenant, the tenanted property will not fall within the purview of “premises” under Section 7(9) of Rent Act of 1999. He relies upon following decisions :

- [a] ***Krishnapasuba Rao Kaudapur v. Dattatraya Krishnaji Karani [AIR 1966 SC 1024];***
- [b] ***Kamla Devi v. Laxmi Devi [AIR 2000 SC 1640];***
- [c] ***M/s. Auto Hirers v. Commerce Society Ltd [Bombay High Court in CRA 358 of 2015, dtd 8th January 2018];***
- [d] ***Savitribai V. Vaske v. Faruk A. Patel [Bombay High Court in FA 2274 of 2008, dtd. 24th June 2010];***

9. *Per Contra* Mr. Agrawal learned counsel for respondent no.1 has not canvassed any submissions on issue of *res judicata* and would confine his submissions only on the aspect of maintainability of proceedings under the Transfer of Property Act, 1882. He would submit that plaint pleads about the construction of temporary shed by the original tenant. He submits that in the earlier round of litigation between the original tenant seeking a decree of perpetual

injunction, it was specifically pleaded that the original tenant had constructed shed with the permission of gram panchayat and at the relevant time the plaintiff was Sarpanch of gram panchayat. He submits that the finding on permission has not been disturbed in the earlier round of litigation and the shed was thus constructed with the permission of landlord and therefore the suit was covered by the definition of premises under section 7(9) of the Rent Act of 1999. He would further submit that status of the premises on the date of seeking relief of eviction will have to be taken into consideration and at the time when the suit was filed seeking eviction of defendant, the suit property was not open plot of land but there was a shed on the said property which shed has been constructed with the permission of landlord. In support of his submissions, he relies upon following decisions :

- [a] ***Nalanikant Ramadas Gujjar v. Tulsibai [(1996) 5 SCC 394;***
- [b] ***Govindram Bros. Pvt. Ltd v. Alexander Benedict Joseph Pereira [1995(1) Mh.L.J. 115];***
- [c] ***Narendra Harilal Jethwa v. Shri Bholadasji Mandir [2019(6) Mh.L.J. 885];***
- [d] ***Subhash Shriram Basthe v. Chandrakant Daulatrao Nalawade [Bombay High Court in SA No. o of 2018, dtd. 19th March 2021].***

10. Mr. Gite, learned counsel appearing for respondent no.2-original defendant no.3 would adopt the submission of Mr. Agrawal. He would further supplement the arguments by submitting that the notice of termination issued by the plaintiff was not valid notice as it was the specific case of defendant no.2 that the tenancy was yearly tenancy. He would submit that as there was no written contract for the purpose of lease for agricultural or manufacturing purpose, the notice period contemplated under section 106 of Transfer of Property Act, 1882 is 6 months. He submits that the notice of termination is issued on 31st March 2010 and the suit is filed on 11th June 2010.

11. In rejoinder, Mr. Dhakephalkar, learned Senior Advocate appearing for the appellant would distinguish the judgment of Constitution bench of Apex Court in the case of ***Nalanikant Ramadas Gujjar (supra)*** and would submit that in the said decision, the Apex Court was considering the definition of premises under Section 5(8) of the Rent Act of 1947. He submits that it is in that context, the Apex Court interpreted the words “not being used” and submits that what was considered was the user of land as on the date when the eviction was sought. He submits that the said decision is inapplicable to the facts of present case as it is not the user of

premises which is in question over here. He submits that it is an admitted position that there is no payment of rent in respect of the shed and no landlord tenant relationship in respect of the shed. He submits that the Apex Court in the case of ***Krishnapasuba Rao Kaudapur (supra)*** was dealing with the identical fact situation and the Apex Court had held that building which was constructed by the tenant belongs to the tenant and was not the subject matter of letting. He submits that the submissions which are raised before this Court on the aspect of shed being the premises for the purpose of section 7(9) of the Rent Act of 1999 was not raised before the trial Court. He would further submit that the present respondent no. 2 that is the original defendant no. 3 had not appeared before the trial Court and as such the suit has proceeded ex parte against him. He submits that the submission about the validity of notice is *de hors* any pleadings and the burden was upon defendant no. 3 to plead and prove that the tenancy was for agricultural or manufacturing purposes. He would further submit that the plaintiff has come with a specific case of monthly lease and if any contrary stand is taken, burden is upon the defendants to prove the same. He submits that even in the written statement filed by defendant no.2 it has not been stated that the tenancy was for agricultural or manufacturing purpose and the pleading is that the premises were let out for the

business purpose.

Analysis And Reasons:

12. The issue to be considered is whether the construction of shed subsequent to the open land being let out by the plaintiff to the original tenant would have the effect of tenanted property being covered by the definition of premises under section 7(9) of the Rent Act of 1999. The admitted position as demonstrated from the record is that the subject matter of letting out in the year 1963-1964 was open land. Subsequently, there was a structure constructed by the original tenant.

13. Before proceeding further it will be apposite to have a look at the definitions of “premises” as contained in section 5(8) of the Rent Act of 1947 and as contained in section 7(9) of the Rent Act of 1999.

Definition of premises under the Rent Act of 1947 is as under :

(8) “premises” means-

- (a) any land not being used for agricultural purposes;
- (b) any building or part of a building let separately (other than a farm building) including-
 - (i) the garden, grounds, garages and out-houses, if any, appurtenant to such building or part of a building;
 - (ii) any furniture supplied by the landlord for use in such building or part of a building;
 - (iii) any fittings affixed to such building or part of a

building for the more beneficial enjoyment thereof;

but does not include a room or other accommodation in a hotel or lodging house;"

Definition of premises under the Rent Act of 1999 is as under :

"(9) "premises" means any building or part of a building let or given on licence separately (other than a farm building) including,-

(i) the gardens, grounds, garages and out-houses, if any, appurtenant to such building or part of a building,

(ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof,

but does not include a room or other accommodation in a hotel or lodging house;"

14. Upon the repeal of Rent Act of 1947, the protection which was available to the tenant of open land is withdrawn by virtue of the amended definition of premises under section 7(9) of the Rent Act of 1999. If the tenanted property is an open land then the tenancy is terminable by notice to quit issued under section 106 of the Transfer of Property Act, 1882 and the suit is maintainable under the provisions of Transfer of Property Act, 1882.

15. The decision in the case of ***Krishnapasuba Rao Kaudapur (supra)*** relied upon by Mr. Dhakephalkar dealt with an identical fact situation where the tenant was a lessee of open land on which the tenant had constructed a building and carried on business. The Apex Court considered the definition of premises under the Rent Act of

1947 and held that the building constructed by the tenant belongs to the tenant and was not the subject matter of letting. Similar issue was under consideration of the Apex Court in the case of ***Kamla Devi (supra)*** in the context of Delhi Rent Control Act where the definition of the premises is *pari materia* with the definition of premises under section 7(9) of the Rent Act of 1999. In an identical fact situation where the open plot of land was let out on which the tenant had unauthorisedly constructed a latrine, the Apex Court held that it is immaterial whether the tenant raised structure before the creation of tenancy or after he was let in as tenant. The Apex Court held that it is only the open plot of land which was let out which does not fall within the definition of premises.

16. In the present case the shed was constructed by the tenant after the open land was let out to him by the plaintiff. Section 7(3) of Rent Act of 1999 defines “landlord” as any person who is for the time being receiving or entitled to receive, rent in respect of any premises and tenant is defined under Section 7(15) as any person by whom or on whose account rent is payable for any premises. To constitute a landlord tenant relationship in respect of premises claimed to be tenanted premises, the payment of rent forms an inseparable ingredient. It is nobody’s case that after the construction of the shed,

there was any enhancement of rent on account of occupation of the shed. Thus what remained as the subject matter of letting out even after the construction of shed was the open land. The shed was constructed by the original tenant was at his own cost and did not belong to the landlord and no rent was paid in respect of the shed. As such on the date of inception of tenancy and what continued to be the subject matter of tenancy was the open land. In order to hold that the shed constructed subsequently also constituted the tenanted premises, it is necessary to show that the landlord had proprietary rights in the structure constructed, rent was being paid to the landlord and the tenant landlord relationship existed in respect of the constructed shed. The submission of learned counsel appearing for the defendant no.2 that the shed was constructed with the permission of gram panchayat and at the relevant time the plaintiff was Sarpanch of gram panchayat is too far fetched to conclude that the permission was given by the plaintiff in his capacity as a landlord to the construction of shed and that the relationship between the parties was that of landlord and tenant *qua* the shed. Considering the facts of the present case, I am of the opinion that the lease was demise of open land and not of the land alongwith the shed constructed and tenanted property was not covered by the definition of "premises" under Section 7(9) of Rent Act of 1999.

17. In the case of ***Savitribai V. Vaske (supra)***, learned Single Judge of this Court has held that the position which emerges is that with effect from 1st April, 2000 the Bombay Rent Act stood repealed by the Maharashtra Rent Control Act, 1999 and the Maharashtra Rent Control Act, 1999 is applicable. However, by virtue of Section 7(9) of the Maharashtra Rent Control Act, 1999, the said Act is not applicable to the open land and the parties are governed by the provisions of Transfer of Property Act, 1882.

18. Mr. Agrawal would attempt to salvage the situation by relying upon the Constitution bench decision of the Apex Court in the case of ***Nalanikant Ramadas Gujjar (supra)*** to contend that the status of premises on date of seeking relief of eviction will have to be considered. In that case, the suit was filed for eviction under the provisions of Rent Act of 1947. The lease was in respect of the open land and the tenant had taken the lease for making construction to set up a ginning and processing machine and for godowns. The contention of defendant therein was that as initially the lease has been granted in respect of the vacant land, the provisions of Rent Act of 1947 was not applicable. The Apex Court considered Section 5(8) (a) of the Rent Act of 1947 and held that lease was granted for installing the ginning and processing machine subsequent to which

building and godown was constructed. The Apex Court held that once a piece of land which was agricultural in nature is put to a non agricultural use, it shall be covered by the definition of premises under section 5(8) of the Rent Act of 1947. In that case, as on the date on which eviction was sought, the land was being used for non agricultural purposes, the Apex Court interpreted the definition of Section 5(8)(a) of Rent Act of 1947 to hold that the words "not being used" are significant. It was held that framers of the Act for applying the provisions of the said Act in the definition of "premises" indicated that the crucial date shall be the date when the right conferred by the Act is sought to be exercised.

19. Considering the precise words of Section 5(8)(a), the Apex Court has held that the words "not being used" is referable to the date when right is sought to be exercised. The words "not being used" incorporated in Section 5(8)(a) makes a world of difference which is certainly not the case here. In the instant case, what is required to be considered is whether the construction of shed over open land which was tenanted property would amount to bringing the property within the definition of premises under Section 7(9) of Act of 1999 and the decision is clearly distinguishable on facts and inapplicable to the present case.

20. Similarly, in the case of ***Govindram Bros. Pvt. Ltd (supra)*** what was under consideration was the definition of premises under Section 5(8)(a) and as such what was considered was user of land on the date when relief was sought.

21. Mr. Agrawal would also point out the decision of learned Single Judge of this Court in the case of ***Narendra Harilal Jethwa (supra)*** where the learned Single Judge had considered the lease was of open plot of land and the lessee was permitted to raise construction on the suit property and was obligated to remove it on the expiry of lease, lessee not having removed the construction, the suit property does not assume the character of premises under section 7(9) of the Rent Act of 1999. He submits that subsequently the learned Single Judge in a subsequent decision has thereafter admitted the second appeal against the concurrent findings of the Courts as the tenancy was in respect of open plot of land, it was not premises. He submits that in that decision, one of the questions of law on which the appeal was admitted was whether the shed constructed on the land was covered within the meaning of accession under section 108 of the Transfer of Property Act, 1882 and consequently the same was protected under the provisions of the Rent Control Act. Apart from the fact that no such case was put forth by the defendants, the issue

in that respect has not yet been adjudicated and hence cannot assist the defendants. In the present case, there is no such substantial question of law framed at the time of admission.

22. As regards the contention of Mr. Gite that the tenancy was yearly tenancy and as such for the purpose of termination of lease, which was granted for agricultural or manufacturing purpose, the notice of 6 months was required, the admitted position is that defendant no.3 had not filed his written statement and the suit has proceeded *ex-parte* against him. It is at appellate stage that defendant no.3 caused his appearance and made submission as regards the validity of notice under section 106 of the Transfer of Property Act, 1882. The plaintiff had come with the specific case of lease being month to month and in case the defense raised was that the lease was yearly lease given for agricultural or manufacturing purpose, the burden was upon defendant no.3 to plead and establish the same. In the absence of any pleadings or proof, mere pleading in the written statement of defendant no.2 that the same was yearly tenancy on annual rent of Rs.900/- would not invalidate the notice. There is no evidence brought on record to show that the lease was yearly lease given for agricultural or manufacturing purposes. On the contrary, the specific case of plaintiff is that open

plot of land was let out to the tenant for business purpose. Under the provisions of section 106 of the Transfer of Property Act, 1882 in the absence of a contract to the contrary, a lease of immovable property for agricultural or manufacturing purpose shall be deemed to be a lease from year to year terminable by 6 months notice. For the deeming fiction to arise it must firstly be shown that the lease was for agricultural or manufacturing purpose. In the present case, upon perusal of the written statement filed by defendant no.2, there is no such defence raised that the lease was for agricultural or manufacturing purposes. All it states is that the yearly rent was Rs.900/- and nothing further. In the absence of any evidence on record it cannot be said that notice issued under section 106 of the Transfer of Property Act, 1882 was invalid.

23. The evidence on record establishes that lease was a demise of open land and the subsequent construction of shed by the tenant was not the subject matter of letting. The construction of shed would not have the effect of converting the tenancy of an open plot of land into the tenancy in respect of land as well as shed so as to bring the suit land within the definition of premises under section 7(9) of the Rent Act of 1999. The tenancy has not been pleaded or proved to be a yearly tenancy and the lease was validly terminated by issuance of

notice dated 31st March, 2010 under Section 106 of Transfer of Property Act, 1882. The suit was, thus, tenable under the provisions of Transfer of Property Act, 1882. The Trial Court and the 1st Appellate Court have committed an error in law by construing the lease as demise of land and the shed constructed thereon. The substantial question of law is answered accordingly.

24. The appeal succeeds. The impugned judgment of appellate Court dated 29th August 2016 in Regular Civil Appeal No.92 of 2013 is quashed and set aside. Resultantly, RCS No.82 of 2010 is decreed. Decree be drawn up accordingly.

25. In view of the disposal of second appeal, civil/interim application(s) taken out in this appeal does not survive and the same is disposed of.

[Sharmila U. Deshmukh, J.]