

(2014) 04 BOM CK 0192

In the Bombay High Court

Case No : Originating Summons No. 1112 of 2009 in Suit No. 1772 of 2009

Century Textiles and Industries Ltd.

APPELLANT

Vs

Nusli Neville Wadia

RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 22, 36, 37(1), 41A, 41E
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 15A, 28, 28(1), 5, 5(4A)
Civil Procedure Code, 1908 (CPC) — Section 10, 129, 9
Easements Act, 1882 — Section 52
Maharashtra Rent Control Act, 1999 — Section 33
Presidency Small Cause Courts Act, 1882 — Section 41, 41(1), 41(i), 42
Specific Relief Act, 1963 — Section 6

Citation : (2014) 3 ABR 753 : (2015) 3 BomCR 79

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Iqbal Chagla, Senior Advocate a/w Mr. Janak Dwarkadas, Senior Advocate a/w Mr. D.D. Madan, Senior Advocate a/w Mr. Bomi Patel, Ms. Namrata Parikh, Mehraasp Mistry, i/b M/s. Mulla and Mulla and Craigie Blunt and Caroe, Advocate for the Appellant; Rafiq Dada, Senior Advocate a/w Mr. Zal Andhyarujina a/w Mr. S.V. Doijode, Mr. P.A. Kapadi, Ms. Mrinalini Rajpal, i/b M/s. Doijode Associates, Advocate for the Respondent

Judgement

R.D. Dhanuka, J.—By an order dated 8th February 2010 passed by this Court, this Court framed the following preliminary issue:

Whether this Court has jurisdiction to decide the originating summons which has been taken out by the plaintiff in view of the suit being filed in the Small Causes Court u/s 41 of the said Act after the originating summons was filed ?

2. Learned counsel appearing for both the parties have accordingly addressed this Court on the preliminary issue framed by this Court. None of the parties have led oral evidence on the preliminary issue. Since the issue of jurisdiction is raised by the defendant, learned senior counsel appearing for the defendant

addressed this Court first followed by the learned senior counsel appearing for the plaintiffs. Some of the relevant facts for the purpose of deciding this preliminary issue are as under:-

3. Defendant is a lessor of a large piece of land admeasuring 48057 sq. yards described in paragraph 1 of the plaint. By an Indenture of Lease dated 18th July 1898, executed between Mr. Nawrosji Nusserwanjee Wadia on one part and the plaintiffs on the other part, the said Nawrosjee Nusserwanjee Wadia leased to the plaintiffs the suit property for a period of 999 years commencing from 1st December 1897 on the terms and condition contained therein. After obtaining possession of the suit land, the plaintiffs constructed a Mill Building, an Engine House, other buildings, drains, sewages, conveniences and appliances etc. and also constructed further structures on the land. It is the case of the plaintiffs that the plaintiffs were operating a textile mill known as Century Mill on the said properties for over a period of 100 years. The operations of the said mill was suspended from January 2007. By an order dated 11th January 2008, the Government of Maharashtra granted permission to the plaintiffs to close the mill and accordingly the plaintiffs closed the said mill.

4. By letter dated 31st January 2007, addressed to the plaintiffs the defendant contended that the user of the land and premises could not be changed from that of a Cotton Textile Mill and that any change of user from the Cotton Textile Mill would be contrary to the provisions of the Lease Deed. It is stated that the use of land and premises other than the use as a Cotton Textile Mill would require prior approval in writing of the defendant. Defendant requested the plaintiffs to furnish plans if any for the development of the land and premises together with any approvals/permissions required to be obtained from the Government or the Municipal Corporation. By letter dated 6th June 07, defendant recorded that in the meeting held on 2nd April 2007, the representatives of the defendant had stated that the plaintiffs had decided to close the mill and were not going to restart or operate the mill. The defendant recorded that at the said meeting the plaintiffs had confirmed that no plans had been finalized nor any application made to any authority for development of the said property. Defendant requested the plaintiffs to send a proposal in advance prior to finalizing any plans or making any application to any authority.

5. By letter dated 8th June 2007, the plaintiffs informed the defendant that the manufacturing operation at the textile mill in Mumbai had almost ceased in view of the fact that large number of workers were opting for retirement under the Voluntary Retirement Scheme. In the said letter the plaintiffs recorded that they had at the said meeting requested the representatives of the defendant to submit a proposal with regard to what the defendant would like the plaintiffs to do after official closure of the textile mill. The plaintiffs requested a meeting with the defendant. Defendant by letter through his representative sent a letter dated 18th June 2007 stating that the defendant was currently travelling and would respond to the said letter on his return. By letter dated 26th July 2007, the

plaintiffs inquired as to whether defendant had returned and requested for a meeting with the defendant.

6. By letter dated 1st August 2007, the defendant requested the plaintiffs to submit a proposal to the defendant. By letter dated 6th August 2007, the plaintiffs stated that at the meeting held on 2nd April 2007 the plaintiffs had requested the representative of the defendant to submit a proposal. Defendant by his letter dated 7th August 2007 stated that he owned the property which was leased to the plaintiffs and it was the understanding of the defendant that the plaintiffs were proposing to develop the suit property and requested the plaintiffs to provide the defendant with a development proposal in order for the defendant to consider the same. Defendant stated that the defendant did not have any proposal for the development of the said land.

7. By letter dated 14th February 2008, the defendant stated that by the Indenture of Lease, the land had been leased to the plaintiffs for the purposes of establishing and running a Textile Mill and therefore the suit land could not be used for any purpose other than running a Textile Mill and any attempt on the part of the plaintiffs to change the user of the land would tantamount to a breach of the lease and entitle the defendant to give a notice of re-entry. Defendant contended that the Indenture of Lease prohibited the plaintiffs from assigning the demised land or premises or any part thereof without the prior written consent of the defendant. Plaintiffs could not sell or alienate any building constructed on the land or any part thereof. Without prejudice to the rights and contention, defendant requested the plaintiffs to submit a proposal for development of the land to the defendant in order to enable the defendant to consider the same.

8. The plaintiffs by letter dated 5th March 2008 denied that the demised land could not be used for any purpose other than a textile mill and denied the contention of the defendant that any attempt to change the user of land would tantamount to a breach of lease. The plaintiffs however informed the defendant that at that time they did not have any plan for the development of the said land. By letter dated 3rd July 2008 plaintiffs requested the defendant for a meeting.

9. By letter dated 16th July 2008, the defendant referred to a public notice issued by the plaintiffs in certain newspaper inviting tenders for sale of its textile machines, equipments, accessories etc. The defendant reiterated that the plaintiffs could not change the user of the land nor develop the said land and was required to maintain the Mill Building, Engine House and other appurtenances. Without prejudice to his rights, defendant stated that he was ready and willing to consider any proposal for development of the said land which the plaintiffs may submit to him.

10. By letter dated 31st July 2008, the plaintiffs stated that they were within their right to develop the said land and denied the contention of the defendant that the plaintiffs had no right to develop/re-develop/change the user of the suit land. Plaintiff issued fresh cheques towards rent for the period April 2000 to July

2008. By his letter dated 22nd August 2008, the defendant denied that the plaintiffs had the right to develop/re-develop/change the user of the demised land or could not assign the demised land or any building standing on the suit land. Defendant stated that if the plaintiff committed the breach of the terms of the Indenture of Lease, the defendant would take such action as may be advised. The plaintiffs by letter dated 8th September 2008, denied the contentions raised by the defendant in his letter dated 22nd August 2008.

11. Defendant by his letter 8th April 2009 alleged that the plaintiffs had commenced demolition of the buildings and structures and asked for a confirmation that none of the structures standing on the leasehold land would be and had been demolished. By letter dated 15th April 2009, the plaintiffs denied that any of the buildings and structures on the leasehold land had been demolished and contended that it was within their right to do so.

12. By letter dated 27th April 2009, the defendant denied the contentions of the plaintiffs in letter dated 15th April 2009. By letter dated 29th April 2009, the defendant asked to view the condition of the leasehold land and buildings thereon and desired to depute his representative to visit the leasehold land on 5th May 2009 during the day time. The visit took place on 11th May 2009 when the representatives of the defendant visited the demised land and reviewed the same. By letter dated 12th May 2009, the plaintiffs recorded about the visit of the representatives of the defendant to the demised premises and that such representatives were given opportunity to view the same. By letter dated 20th May 2009, the defendant recorded that five buildings as set out in the letter and standing on the leasehold land had been demolished and asked the plaintiffs to rebuild and reinstate the same for textile user within three calendar months from the date of receipt of the said letter clarifying that in case of such failure, the same would be deemed to be a violation/breach of the covenants mentioned in the lease deed.

13. By letter dated 25th June 2009, the plaintiffs stated that the five buildings stated to have been demolished were not existing on the leasehold land but on the freehold land of the plaintiffs which is adjacent to the leasehold land. Without prejudice to the rights, plaintiffs stated that they were required to maintain buildings of the value of Rs. 1,50,000/- only on the lease hold land. Plaintiffs denied that there was any breach of the lease.

14. On 25th June 2009 the plaintiffs filed a suit (1772/09) raising various questions for determination of this Court which are formulated in paragraph 27 of the plaint. Plaintiffs prayed for true and proper construction of the lease and submitted that the matter could be determined by this Court under an originating summons under Chapter XVII of the High Court (Original Side) Rules. It is stated in the plaint that the land is situated in Mumbai, the Indenture of Lease was executed in Mumbai and this Court has therefore jurisdiction to entertain and try this suit. In the said suit, the plaintiffs have filed originating summons on 16th July 2009 for determination of various questions. Defendant has filed detailed

affidavit in reply raising various issues. Plaintiffs have filed rejoinder to the said affidavit in reply.

15. Mr. R.A. Dada, learned senior counsel appearing for the defendant submits that this court has no jurisdiction to try this suit in view of the exclusive jurisdiction of the Small Causes Court to try, entertain and adjudicate upon the reliefs sought by the plaintiffs in this suit which in fact is a suit relating to recovery of possession by the lessee against the lessor. Learned senior counsel submits that defendant has already filed a suit (TE Suit No. 115/158 of 2009) in the Small Causes Court on 30th July, 2009 inter alia praying for eviction of the plaintiffs and for other reliefs, possession of the suit land and structures against the plaintiffs which suit is pending. In the said suit, defendants had filed an application for interim reliefs against the plaintiffs herein. By an order dated 22nd December, 2010 the Small Causes Court has disposed of the said application and has held that the demised land was let out to the plaintiffs herein to establish and run a textile mill. The Small Causes Court has granted injunction against the plaintiffs herein in the said suit. Learned senior counsel submits that application for stay of the operation dated 22nd December, 2010 sought by the plaintiffs herein is rejected by the Small Causes Court. Plaintiffs herein filed an appeal against the said order and judgment dated 22nd December, 2010 which is pending. Plaintiffs did not apply for stay of the order and judgment dated 22nd December 2010 before the appeal court. My attention is invited to various prima facie findings of the Small Causes Court in the interim application filed by the defendant herein in the said suit. It is submitted by the learned senior counsel that the suit filed by the defendant herein is pending before the competent court having jurisdiction which jurisdiction exclusively vest in that court. It is submitted that since jurisdictional court is seized of the matter u/s 41 of the Presidency Small Causes Court Act, this court has no jurisdiction to entertain and try this suit.

16. Mr. Dada, learned senior counsel placed reliance on the judgment of this court in case of Charu K. Mehta Vs. Lilavati Kirtilal Mehta Medical Trust and Others, in support of his submission that since the Small Causes Court has exclusive jurisdiction to entertain and try the dispute between the landlord and tenant in respect of recovery of possession, no such relief can be granted by this court in originating summons. Learned senior counsel placed reliance on paragraphs 6, 8, 9, 11, 20, 22 to 24, 46, 47, 48, 51, 60 and 67 of the said judgment which read thus:-

6. The Originating Summons has been instituted on the ground that the interpretation of the Trust Deed with respect to the appointment of the trustees, the powers of individual trustees and the mode of administration of the Trust has led to litigation between the trustees.

8. On this foundation, the Plaintiff has framed the following questions for the determination of this Court in the Originating Summons:

- a) Whether the expression "not less than five trustees" as appearing in Clause 20 of the Trust Deed dated 05.07.1978 of the Lilavati Kirtilal Mehta Medical Trust means or implies the power to appoint upto a maximum of five trustees, who will act as trustees for a period of 5 years;
- b) Whether the Permanent Trustees named under Clause 16 of the Trust Deed are Permanent Trustees for lifetime and are not susceptible to any disqualification to which the trustees appointed otherwise are, except such disqualification which may render them inherently incapable of executing the trust;
- c) Whether an appointment for the time being of a person in place of a Trustee suffering from any disqualification under Clause 14 of the Trust Deed dated 05.07.1978, is an appointment only for such time that the disqualification continues, subject, however to the unexpired term of the disqualified Trustee;
- d) Whether the power under Clause 11(j) for appointment of additional/new Trustees can be resorted to till such time as such an appointment is capable of being done under Clause 17 or Clause 20 of the Trust Deed;
- e) Whether Clause 11(j) of the Trust Deed permits that appointment of Permanent Trustee/s, which is a specific power as provided under Clause 17 of the said Deed of Trust;
- f) Whether the powers and authorities of the Trustees listed in sub-clauses (a) to (zi) under Clause 11 of the Deed of Trust are expressly conferred on the "trustees", i.e., the collective body of the Board of Trustees of the Trust or on individual Trustees;
- g) Whether the appointment of a power of attorney holder under clause 11(h) or a proxy under clause 11(k) of the Trust Deed can be done only by the collective body of the Board of Trustees or whether the same can be done by an individual trustee;
- h) Whether a power of attorney holder appointed under Clause 11(h) or a proxy appointed under Clause 11(k) of the Trust Deed can be delegated discretionary duties or powers of a trustee including, but not restricted to, the power to attend/discuss/participate/vote/pass a resolution/constitute a quorum in a meeting of the Board of Trustees of the said trust, or whether such power of attorney holder or proxy can be delegated purely ministerial acts only.

The judgment in appeal:

9. The Learned Single Judge by a judgment and order dated 5 March 2012 came to the conclusion that the Originating Summons was maintainable. Four preliminary issues were raised, having regard to the defence of the Defendants, these being:

(I) Whether the jurisdiction of the Court to interpret the clauses of the trust deed is barred by virtue of clause 11(v) thereof;

(II) Whether this Court lacks inherent jurisdiction to entertain and try this Originating Summons in view of Section 80 of the Bombay Public Trusts Act, 1950;

(III) Whether the Originating Summons is not maintainable as the Plaintiff had not obtained the permission of the Charity Commissioner u/s 51 of the BPT Act to file it; and

(IV) Whether the Originating Summons is barred by limitation.

The Learned Single Judge held that: (i) The power which is conferred upon the trustees in Clause 11(v) of the Deed of Trust to decide all questions arising in the administration of the Trusts, including all questions relating to the interpretation of its provisions did not bar the jurisdiction of the Court to interpret the provisions of the Deed; (ii) While Section 80 of the Bombay Public Trusts Act, 1950 bars the jurisdiction of the Civil Court to decide or deal with any question which is to be decided or dealt with by any officer or authority under the Act and in respect of which the decision of such officer or authority is made final and conclusive, the Assistant Charity Commissioner has no power akin to Rule 238 of the High Court Original Side Rules to decide the construction of a deed simpliciter; (iii) What is made final and conclusive in Section 22 is whether a change should be effected or not but the findings on the issues which may be required to be dealt with while arriving at this decision are not made final. In other words, what is made final and conclusive is an amendment in the entries pursuant to a decision u/s 22 and not a finding on the basis of which those entries are arrived at; (iv) The Originating Summons was not barred by Section 50 since the direction and interpretation which the Plaintiff seeks did not fall within the ambit of that provision; and (v) In an Originating Summons, the question of a right to sue does not arise, there being no lis between the parties and since the Plaintiff only seeks an interpretation of the provisions of the Deed of Trust. The right under Rule 238 was held to be a continuing right.

(iii) The position in India:

20. The decisions in India on the scope of an Originating Summons emphasize that while this procedure does not per se forbid a determination of a question of fact, but where a dispute on facts involves a degree of complexity, an Originating Summons would not be appropriate.

22. The rules in regard to Originating Summons indicate that this was a simple and expeditious procedure of initiating proceedings by applying for the issuance of an Originating Summons before the Judge in Chambers. The persons at whose behest an Originating Summons could be issued and the nature of the relief that could be granted are specified in the rules. A summary procedure is envisaged. But the summons remains a species of the original civil jurisdiction in a suit, commencing with a plaint under Rule 248 and ending with the pronouncement of a judgment and the drawing up of a decree under Rule 259. The judge is empowered to issue directions for the carriage and execution of the decree (Rule

260). Since the procedure envisaged is summary, the Judge retains control over the proceedings and has the discretion as to whether an Originating Summons should be entertained. Once accepted, the plaint is numbered as an ordinary suit with the letters O.S.

23. Essentially an Originating Summons has been regarded as an appropriate remedy where a question of interpretation arises that does not depend for its resolution upon an appreciation of evidence or determination of disputed factual matter of some complexity. This principle has been emphasized in the rules framed by the Chartered High Courts in India among them those of this Court on the Original Side. Fundamentally, the rules confer a wholesome discretion on the Court or the Judge in Chambers on whether a question of construction should or should not be determined on an Originating Summons. Rule 246 emphasizes that the Court shall not be bound to determine such a question if it is of the opinion that it ought not to be determined on an Originating Summons. The plaint in an Originating Summons is a plaint without a prayer Rule 249 and there is no obligation on the defendant to file a written statement or affidavit in answer to the plaint unless the Court otherwise directs. Rule 253 Similarly, if the parties are not agreed as to the correctness of the facts set forth in the plaint, the Judge has a discretion to order the summons to be supported by such evidence as he may think necessary. Rule 254 A Judge hearing the Summons is empowered to adjourn it into Court. If the Judge considers that the matter in respect of which relief is sought cannot be conveniently and properly disposed of on an Originating Summons, he may dismiss the summons and refer the parties to a suit in the ordinary course. (Rule 255)

24. These provisions indicate that a Judge is not bound to entertain an Originating Summons or to adjudicate upon the issues which are sought to be raised. Whether and to what extent evidence should be allowed to be adduced is again a matter which is in the discretion of the Court. Ultimately, a judicial discretion is conferred on whether an Originating Summons should be entertained. The provisions in Chapter XVII of the Rules on the Original Side which embody the procedure for an Originating Summons have to be interpreted broadly and liberally. However, it must be emphasized that the procedure envisages a summary remedy which is available to determine issues of construction or interpretation. Though a determination of a factual issue is not barred on an Originating Summons, conventional learning in this area is that where complexities of evidence and of fact arise, parties should be relegated to the remedy of a suit in the ordinary course. Perhaps an illustration of the nature of the issues that are apposite for determination in an Originating Summons is the case before the Division Bench in *Mazda Theaters Ltd. vs. Gordhandas Tribhuvandas Mangaldas*, in which under a lease deed, the lessee had undertaken an obligation to give complimentary passes to the lessor and to reserve one box for the use of the lessor and his family and friends in every show at a theatre. When the Government decided to levy entertainment duty, the lessee wanted a determination of the question as to whether under the terms of the lease, the

liability to entertainment duty had to be borne by the lessor. This Court held that an Originating Summons was precisely intended to cover a case like that where a lessor and a lessee were disputing their mutual rights and the question of those rights could be determined effectively and finally by the Court construing the relevant provision of the lease and deciding what the rights of the parties were. Similarly, in the RWITC case (*supra*), Mr. Justice Madon observed that the case involved a pure question of construction of the Rules of the Jackpot of the Turf Club; there were no disputed questions of fact, all facts being admitted in the pleadings or at the hearing of the summons. The liability on the part of the Defendants to make payment was admitted and the only dispute between the parties was as regards the mode of payment which turned on a construction of the Rules. We have referred to these cases purely as illustrative of a simple dispute of interpretation that can be conveniently resolved in an Originating Summons. The factual situations in Mazda Theatre or in RWITC are not exhaustive of what can be determined in an Originating Summons. But, these are reflective of the fundamental principle that this procedure was intended to resolve questions of construction of deeds and documents which do not involve a complicated enquiry into disputed questions of fact.

46. The rules framed by this Court to govern proceedings on the Original Side are relatable to the power vested in the Chartered High Court under Clause 37 of the Letters Patent. Section 129 of the CPC has empowered the High Court to frame rules to regulate its own procedure in the exercise of its Original Civil Jurisdiction notwithstanding anything in the Code, but in a manner that such rules are not inconsistent with the Letters Patent. In relation to the CPC 1908 which constitutes a general law providing the procedure applicable to all Civil Courts, the Letters Patent constitutes a special law under which the High Court derives its powers. As a special law, the Letters Patent would prevail over a general law which the CPC is. Section 129 recognises this position by the non-obstante provision by which it is prefaced.

47. The rules which have been framed in relation to an Originating Summons in Chapter XVII of the Original Side Rules cover diverse and broad categories. Under Rule 238 diverse categories of persons may apply before the Judge in chambers on an Originating Summons. These persons are: (i) the executors or administrators of a deceased person; (ii) the trustees under any deed or instrument; and (iii) any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative or as a beneficiary under the trusts of any deed or instrument, or claiming by assignment or otherwise under any such creditor or other person as aforesaid. Clauses (a) to (g) of Rule 238 specify the nature of the determination that can be sought before the Judge in chambers in respect of the questions or matters described therein. Rule 238 covers a determination in respect of an estate or trust of the questions and matters referred to in clauses (a) to (g). A comparison of the clauses of Rule 238 with the provisions of the Bombay Public Trusts Act, 1950 would show that the Act has made comprehensive provisions in respect thereof. For instance, Rule

238(c) covers the furnishing of any particular accounts by the trustees and the vouching of such accounts. Clauses (b) and (c) of Section 37(1) confer an express power on the Charity Commissioner, the Deputy or Assistant Charity Commissioner and any officer authorised to call for and inspect any book of accounts and to call for any return, statement, account or report from the trustees. Section 41A empowers the Charity Commissioner to issue directions to any trustee of a public trust to ensure that the trust is properly administered and the income is properly accounted for. Clause (d) covers the payment into Court of any moneys in the hands of trustees. Apart from Section 41A, which has been noted above, Section 41E confers wide powers on the Charity Commissioner and the other authorities to prevent the waste, damage or improper alienation of trust property. Clause (f) of Rule 238 provides for the approval of any sale, purchase, compromise or other transaction. Section 36 of the Act provides for the previous sanction of the Charity Commissioner before any sale, exchange or gift of immovable property or a lease for a stipulated period can be entered into. This comparison would indicate that a comprehensive machinery has been provided in the Bombay Public Trusts Act, 1950 for the regulation of public trusts. The Bombay Public Trusts Act 1950, as the Supreme Court has held in the *Church of North India* is a self contained code and is a special law enacted by the State legislature in public interest to provide for the proper administration of public and religious trusts in the State. The Act provides, as the Supreme Court held, a complete machinery for a person interested in a trust to put forward his claim before the Charity Commissioner who is vested with the power to conduct an enquiry and to render an adjudication. The bar of jurisdiction u/s 80 is on every civil Court exercising jurisdiction to decide or deal with any question which under the Act has to be decided or dealt with by an officer or an authority under the Act and in respect of which his decision or order has been made final and conclusive. The rules on the Original Side regulate proceedings in civil cases brought before the High Court and governs the procedure which is to be followed on the invocation of the jurisdiction. The Bombay Public Trusts Act 1950 is a special law enacted by the State legislature to provide a comprehensive machinery to deal with the administration of public religious and charitable trusts in the State. The explicit bar in Section 80 would consequently apply to a suit on the Original Side in which the questions to be decided fall within the ambit of the bar created by the statute. The bar u/s 80 would extend to the procedure of an Originating Summons on the Original Side. Where a question is required to be decided or dealt with by an officer or authority under the Bombay Public Trusts Act 1950 and in respect of which his determination has been made final and conclusive, the procedure envisaged on an Originating Summons would be subject to the bar created by Section 80 of the Bombay Public Trusts Act 1950. The bar u/s 80 extends to every civil court.

The question raised in the Originating Summons:

48. Several suits or proceedings have been instituted by the Plaintiff and/or the Second Defendant and their group in which the interpretation of diverse clauses

of the Deed of Trust-as in the Originating Summons-was placed in issue:

Exercise of discretion

51. Rule 246 of the High Court (Original Side) Rules makes it clear that the Court or the judge in chambers shall not be bound to determine any such question of construction if in its or his opinion it ought not to be determined on an Originating Summons. The Learned Single Judge has held that the questions sought to be raised cannot appropriately be addressed in an Originating Summons and in the circumstances, came to the conclusion that this was not a fit and proper case for the exercise of the discretion. Since we have come to the conclusion that the bar u/s 80 was attracted, the question as to whether discretion should or should not be exercised to entertain the Originating Summons would not survive. However, since the Learned Single Judge has expressed a view on this and for completeness, we are dealing also with that aspect.

60. In the view which we have taken, we have come to the conclusion that (i) The bar under the provisions of Section 80 of the Bombay Public Trusts Act 1950 was attracted and the Learned Single Judge was in error in holding to the contrary; (ii) In any event this is not a fit and proper case for the entertainment of an Originating Summons and the Learned Single Judge was justified in declining to exercise his discretion. Before concluding we may also note that before the learned Single Judge, the provisions of Section 50 of the Bombay Public Trusts Act 1950 were sought to be pressed in aid in defence to the maintainability of the Originating Summons. Section 50, it may be noted, applies to a suit of a specified nature in any case which attracts the provisions of Clauses (i) to (iv) thereof. Section 50 requires the consent of the Charity Commissioner to institute a suit for reliefs of a specified nature. The Learned Single judge was, in our view, correct in holding that Section 50 was not attracted to the facts of the present case since the Originating Summons did not meet the description as referred to in Section 50.

67. In the present case, the Learned Single Judge has proceeded on the hypothesis that the Originating Summons taken out by the Plaintiff was for interpretation of the Deed of Trust. It was on that hypothesis that the Learned Single Judge came to the conclusion that the bar u/s 80 would not apply in view of his finding that the Assistant Charity Commissioner does not have the power to interpret a Deed of Trust simpliciter. The same reasoning has been extended by the Learned Single Judge to the issue of limitation while holding that a pure question of interpretation does not involve a lis and there being no accrual of the right to sue, limitation would not be attracted. We have, in the earlier part of this judgment, come to the conclusion that the Originating Summons in the present case, does not raise a pure issue of interpretation. The real object and purpose of the Originating Summons was to bring before this Court for adjudication, matters arising before the Assistant Charity Commissioner in change reports in which the interpretation of the Deed of Trust is directly in question. There are live disputes

between the parties which are pending before the Assistant Charity Commissioner, some even at an advanced stage where the affidavit of evidence has been filed and cross examination is to take place. Having regard to this position, it would have been necessary for this Court, if it were to come to the conclusion that the bar u/s 80 was not to apply to direct a fresh consideration of the entire issue of limitation by the Learned Single Judge. Since we have come to the conclusion that the Originating Summons is barred by the provisions of Section 80 of the Bombay Public Trusts Act, 1950, it is not necessary so to do since the Originating Summons is liable to be dismissed in view of the bar of jurisdiction. After having considered the submissions on the issue of limitation, we are of the view that it would not be appropriate for this Court to render a final or conclusive determination on that aspect, in view of the finding on the absence of jurisdiction due to the bar u/s 80.

17. Based on the above referred judgment learned senior counsel submits that considering section 80 of the Bombay Public Trust Act which prohibits court from entertaining certain suits has been interpreted by the Division Bench of this court and in view of such bar has refused to entertain the originating summons filed by the plaintiffs for interpretation of the trust deed. It is submitted that the same analogy shall apply in so far as this case is concerned. The issues raised in the originating summons can be decided exclusively by the Small Causes Court in the pending suit. My attention is invited to various averments made in the written statement filed by the plaintiffs herein in the Small Causes Court. It is pleaded by the plaintiffs herein in the said written statement that reliefs claimed in this originating summons and the reliefs claimed by the plaintiffs in the suit before the Small Causes Court are overlapping and on that ground the plaintiffs herein had applied for stay of the said proceedings.

18. Mr. Dada, learned senior placed reliance on the judgment delivered by full bench of this court in case of Prabhudas Damodar Kotecha and Another Vs. Smt. Manharbala Jeram Damodar and Others, and in particular paragraphs 28 to 30, 34, 36, 40 to 42 and 62 in support of his submission that the reliefs claimed by the plaintiffs herein in this originating summons is in the nature of disputes relating to recovery of possession and such disputes can be exclusively tried only by Small Causes Court u/s 41(i) of the Presidency Small Causes Court Act. It is submitted that the lessee is trying to protect recovery of possession by this originating summons from this court which has no jurisdiction. It is submitted that the originating summons is nothing but the dispute relating to recovery of possession which this court cannot grant having no jurisdiction. Paragraphs 28 to 30, 34, 40 to 42 and 62 of the said judgment read thus:-

28. In order to address the questions posed for our consideration it would be appropriate to note the relevant statutory provisions of Section 41 of the Presidency Small Cause Courts Act, 1882 (for short "PSCC Act") having bearing on these questions. Section 41 of PSCC Act reads thus:

Section 41(1) Notwithstanding anything contained elsewhere in this Act or in any

other law for the time being in force, but subject to the provisions of Sub-section (2), the Court of the Small Cause shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of any license fee or charges or rent therefore, irrespective of the value of the subject-matter of such suits or proceedings.

(2) Nothing contained in Sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of license fee or charges or rent thereof, to which the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the Bombay Government Premises (Eviction) Act, 1955, the Bombay Municipal Corporation Act, the Maharashtra Housing and Area Development Act, 1976 or any other law for the time being in force, apply].

29. This provision begins with non obstante clause conferring over-riding jurisdiction to the Court of Small Cause to entertain and try a suit which falls within the sweep of Section 41(1). A mere look at this provision, as observed by the Supreme Court in *Mansukhlal Dhanraj Jain v. Eknath Vithal Ogale* would show that Section 41(1) applies only when the following conditions stand satisfied: (a) It must be a suit or proceeding between the licensee and licensor; or (b) between a landlord and a tenant; (c) such suit or proceedings must relate to the recovery of possession of any property situated in Greater Bombay; or (d) relating to the recovery of license fee or charges or rent thereof. Keeping in view the questions that fall for our consideration, in the present case, we are principally concerned with the conditions (a) and (c) though there could be a suit relating to recovery of license fee also as stated in condition (d). If both these conditions stand satisfied, the Court of Small Cause will have a jurisdiction to entertain the present suit provided we also hold that the expression "licensee" means and includes "gratuitous licensee" also. Therefore, the question whether the term "licensee" in this section also covers "gratuitous licensee" and/or the expression "licensee" in Section 41(1) of PSCC Act could only be interpreted to mean the "licensee" within the meaning of Subsection (4A) of Section 5 of Rent Act will have to be addressed. It may also be noted that u/s 41(1) the Court of Small Cause shall have jurisdiction to entertain and try "all suits and proceeding" between licensor and licensee. The expressions "all suits and proceedings" means and includes "all suits" against "Licensee" either relating to recovery of possession of any immovable property or relating to the recovery of any license fee or both. Apparently, this provision does not make any distinction between the "licensee" with and without material consideration.

30. Sub-section (2) of Section 41 of PSCC Act states that nothing contained in Sub-section (1) shall apply to suits or proceedings for the recovery of possession of any immovable property, or of license fee or charges or rent thereof, to which the provisions of Bombay Rent Act apply. We are not concerned with other two

statutes referred to in Sub-section (2). A plain reading of this Sub-section makes it clear that the provisions of Sub-section (1) shall not apply to the suits or proceedings for recovery of possession of any immovable property or license fee to which the provisions of Rent Act apply which may also mean if the provisions of Sub-section (4-A) and Sub-section (11) of Section 5 read with Section 15A of the Rent Act are attracted the provisions of Sub-section (1) of Section 41 of PSCC Act cannot be taken recourse to institute a suit and proceeding between the "licensor and licensee" relating to recovery of possession of any immovable property or relating to the recovery of license fee. Apparently, this provision makes a distinction between the expression "licensee" in Sub-section (1) of Section 41 of PSCC Act and the expression "licensee" occurring in Section 5(4A), of the Rent Act. For instance, if the "licensee" is covered by Section 15A read with Section 5(4A) of the Rent Act the suit u/s 41(1) would not be maintainable.

34. In the present case, in our opinion, Sub-section (1) of Section 41 of PSCC Act is clear and unambiguous. The use of conjunctive, as aforesaid, in the marginal note appears to be an accidental slip. The disjunctive "or" in Sub-section (1) cannot be overlooked while interpreting the provisions of Section 41. The disjunctive "or" clearly indicates that the Court of Small Cause shall have a jurisdiction to entertain and try all suits and proceedings between the licensor and licensee relating to the recovery of possession of any immovable property situated in Greater Bombay and it is not necessary that such suit should also be for recovery of any license fee. There could be a suit against licensee relating only to recovery of possession of any immovable property. The Legislature has not used the conjunctive "and" in Sub-section (1) of Section 41 purposely thereby, in our opinion, making its intention clear that there could be a suit only relating to the recovery of possession of immovable property against the licensee.

40. The Supreme Court in *Mansukhlal Dhanraj Jain's* case (supra) has dealt with the question "whether the suit filed by the plaintiff claiming the right to possess the suit premises as a licensee, against defendant alleged licensor, who is said to be threatening to disturb the possession of the plaintiff-licensee, without following due process of law, is cognizable by the Court of Small Causes, Bombay as per Section 41(1) of PSCC Act or whether it is cognizable by the City Civil Court Bombay?" The Supreme Court, while dealing with this question and holding that the Court of Small Cause shall have a jurisdiction has observed that in Section 41(1) of PSCC Act and Section 28 of the Bombay Rent Act, 1947 *pari materia* words are used about nature of the suits in both these provisions for conferring exclusive jurisdiction on Small Cause Courts. This judgment, (in *Mansukhlal Dhanraj Jain's* case), does not state that the PSCC Act and the Rent Act are cognate *pari materia* statutes. It is clear from the observations made by the Supreme Court in paragraphs 17 and 18 of the judgment that some expressions in Section 28 of the Rent Act only are *pari materia* with the expressions employed in Section 41(1) of the Small Cause Court Act. We are unable to agree with the observations made by the Division Bench in *Ramesh Dwarkadas Mehra's* case in respect of this judgment. It is apparent from the

observations made in this case that the Supreme Court considered the similar words used in jurisdictional provision in two different Acts, namely the Rent Act and PSCC Act. The Supreme Court was concerned with the interpretation of the words "relating to recovery of possession". That phrase occurs both, in Section 41 of PSCC Act and Section 28 of the Rent Act. In view thereof, the Supreme Court observed that *pari materia* words are used in both the Acts and interpretation on that phrase in one Act would also be useful in interpreting identical phrase in another Act. It is clear that the Supreme Court was not concerned with the provision dealing with substantive rights in one Act as contrasted to a procedural provision in another Act. Neither Section 28 of the Rent Act nor Section 41 of PSCC Act confer any substantive rights on the parties. The Supreme Court has nowhere stated that PSCC Act and the Rent Act are cognate *pari materia* statutes.

41. The Division Bench in Ramesh Dwarkadas Mehra's case in paragraph 38 has observed that "the Rent Act and the Chapter VII of PSCC Act are *pari materia*, is incontrovertible in view of the specific provision made in Section 51 of the Rent Act". We are unable to agree with this observation. A glance at Section 51 of the Rent Act would show that it provides for the removal of doubt as regards proceedings under Chapter VII of PSCC Act. It states that for removal of doubt, it is declared that, unless there is anything repugnant in the subject or context references to suits or proceedings in this Act, shall include references to proceedings under Chapter VII of PSCC Act and references to decrees in this Act shall include references to final orders in such proceedings. The Division Bench in Ramesh Dwarkadas Mehra's case finds support from this provision in coming to the conclusion that it should be guided by the provisions of the Rent Act while interpreting the word "licensee" in Chapter VII of PSCC Act. In our opinion, Section 51 of the Rent Act will have to be read with Section 50. On the date when the Rent Act came into force, there were two different kinds of proceedings for recovery of possession pending in two different Courts in the city of Mumbai. There were proceedings under Chapter VII pending in the Small Causes Court while there were suits pending on the original side of this Court. Section 50 provides that suits pending in any Court, which also includes the High Court, shall be transferred to and continued before the Courts which would have jurisdiction to try such suits or proceedings under the Rent Act and shall be continued in such Courts as the case may be and all provisions of the Rent Act and the Rules made thereunder shall apply to all such suits and proceedings. In short, this means the suits pending in the High Court will be transferred to the Small Cause Court and will be heard and tried there and all the provisions of the Rent Act and the Rules made thereunder shall apply to such suits. It further provides that all proceedings pending in the Court of Small Cause under Chapter VII shall be continued in that Court and all provisions of the Rent Act and the Rules made thereunder shall apply to such proceedings. Thus, pending proceedings under Chapter VII were to be continued as proceedings under the Rent Act and all provisions and the Rules under the Rent Act were to apply to

such proceedings. It was in this context that Section 51 states that references to suits or proceedings under the Rent Act shall include references to proceedings under Chapter VII of PSCC Act and references to decrees in the Rent Act shall include references to final order in such proceedings. It will have to be noticed that against the decree for eviction an appeal is provided under the Rent Act. Since the proceedings under Chapter VII were to continue even after coming into force of the Rent Act and since there were no decrees to be based in such proceedings, but only final orders, as unsuccessful litigants could be deprived of a right of an appeal as the appeals were provided only against decrees. Hence, Section 51 was added by Bombay 3 of 1949. This purpose of Section 51 of the Rent Act cannot be overlooked.

42. The PSCC Act does not define expression "licensor" and "licensee". Both these expressions find a place in Section 41(1) of PSCC Act. Under this provision the Court of Small Cause is conferred with the jurisdiction to entertain and try all the suits and proceedings between a "licensor" and a "licensee" relating to recovery of possession of any immovable property or relating to recovery of license fee. Section 5(4A) of the Rent Act defines the term "licensee" while Section 52 of the Indian Easement Act, 1882 defines the term "license". A mere look at both these provisions would show that Sub-section (4A) of Section 5 of the Bombay Rent Act clearly provides that the "licensee" means a person who is in occupation of the premises or such part as the case may be, under a subsisting agreement for license given for a "license fee or charge". The definition of "licensee" under Sub-section (4A) of Section 5 is very exhaustive and is inclusive and exclusive in character. However, it would suffice to note that the licensee under Subsection (4A) must be a licensee whose license is supported by material consideration. In other words, a gratuitous licensee is not covered under the definition of licensee under Sub-section (4A) of Section 5 of the Rent Act.

62. Thus, looking at the controversy raised in these petitions from all points of view, we answer the questions formulated by us as follows: The expression "licensee" used in Section 41(1) of PSCC Act does not derive its meaning from the expression "licensee" as used in Sub-section (4A) of Section 5 of the Rent Act. The expression licensee used in Section 41(1) is a term of wider import so as to mean and include a "gratuitous licensee" also. In view of this, we hold that a suit by a licensor against a gratuitous licensee is tenable before the Presidency Small Cause Court u/s 41 of PSCC Act.

19. Mr. Dada, learned senior counsel placed reliance on the judgment of the Supreme Court in case of Mansukhlal Dhanraj Jain and Others Vs. Eknath Vithal Ogale, and in particular paragraphs 2 to 4, 14 to 16 and 18 to 24 in support of his submission that the reliefs claimed in the originating summons is directly or indirectly is relating to recovery of possession u/s 41(1) of the Small Causes Court Act. Paragraphs 2 to 4, 14, 16 and 18 to 24 read thus:-

2. The High Court by the impugned judgment in these appeals has taken the

view that such a suit is not maintainable before the City Civil Court and should be filed in the Small Causes Court, Bombay, u/s 41(1) of the Small Causes Courts Act. The learned Counsel for the appellants contended before us that the said view is not correct. Learned Counsel for the respondents on the other hand has supported the same view.

3. Before we consider the aforesaid question, a few relevant facts leading to both these appeal deserve to be noted at the outset.

FACTS IN C.A. No. 4913 OF 1989

4. The appellant-plaintiffs filed suit No. 1290 of 1984 in the Bombay City Civil Court against the respondent-defendant for permanent injunction on the ground that the appellants are in possession of the suit shop. That the respondent-defendant is tenant of the suit premises being Shop No. 4, Meghji Vallabhdas Trust Building, Bhavanishankar Road, Dadar, Bombay. That the defendant took the same premises in December, 1974 on rent and put the appellants into possession thereof under an irrevocable licence/tenancy agreement. It was agreed that Plaintiff No. 1 had to pay licence fee to the defendant or to the landlord. The plaintiff further averred that due to some difference of opinion between the parties, the defendant started threatening the appellants that he would physically throw them out of the suit premises and hence the suit for permanent injunction restraining the respondent-licensor from disturbing the possession of the plaintiff-licensees of the suit premises.

14. So far as the first condition is concerned, a comprehensive reading of the relevant averments in the plaints in both these cases leaves no room for doubt that the plaintiffs claim relief on the basis that they are licensees on monetary consideration and the defendants are the licensor. The first condition is clearly satisfied. Then remains the question whether the third condition, namely that the suits must relate to the recovery of possession of immovable property situated in Greater Bombay is satisfied or not. It is not in dispute that the suit properties are immovable properties situated in Greater Bombay but the controversy is around the question whether these suits relate to recovery of possession of such immovable properties. The appellants contended that these are suits for injunction simpliciter for protecting their possession from the illegal threatened acts of respondents-defendants. Relying on a series of decision of this Court and the Bombay High Court, Guttal, J., Pendse, J. and Daud, J. had taken the view that such injunction suits can be said to be relating to the possession of the immovable property. Sawant, J. has taken a contrary view. We shall deal with these relevant decisions at a later stage of this judgment. However, on the clear language of the section in our view it cannot be said that these suits are not relating to the possession of the immovable property. It is pertinent to note that Section 41(1) does not employ words "suits and proceedings for recovery of possession of immovable property". There is a good deal of difference between the words "relating to the recovery of possession" on the one hand and the terminology "for recovery of possession of any immovable property". The words

"relating to" are of wide import and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegally recover possession from the plaintiff-licensee. Suits for protecting such possession of immovable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the plaintiff, can clearly get covered by the widest weep of the words "relating to recovery of possession" as employed by Section 41(i). In this connection, we may refer to Blacks' Law Dictionary Super Deluxe 5th Edition. At page 1158 of the said Dictionary, the term "relate" is defined as under:

to stand in some relation, to have bearing or concern, to pertain, refer, to bring into association with or connection with.

It cannot be seriously disputed that when a plaintiff-licensee seeks permanent injunction against the defendant-licensor restraining the defendant from recovering the possession of the suit property by forcible means from the plaintiff, such a suit does have a bearing on or a concern with the recovery of possession of such property: In the case of Renusagar Power Co. Ltd. Vs. General Electric Company and Another, , a Division Bench of this Court had to consider the connotation of the term "relating to", Tulzapukar, J. at Page 471 of the report has called out propositions emerging from the consideration of the relevant authorities. At page 471 proposition No. 2 has been mentioned as under:

Expressions such as "arising out of or "in respect of or "in connection with" or "in relation to" or "in consequence of or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

16. It is, therefore, obvious that the phrase "relating; to recovery of possession" as found in Section 41(1) of the Small Causes Court Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee plaintiff would squarely be covered by the wide sweep of the said phrase. Consequently in the light of the averments in the plaints under consideration and the prayers sought for therein, on the clear language of Section 41(1), the conclusion is inevitable that these suits could lie within the exclusive jurisdiction of Small Causes Court, Bombay and the City Civil Court would have no jurisdiction to entertain such suits.

18. When Section 41(1) of the Small Causes Courts Act is read in juxtaposition with the aforesaid Section 28 of the Bombay Rent Act, it becomes clear that *pari materia* words are used about nature of suits, in both these provision for conferring exclusive jurisdiction on Small Causes Court, namely, they alone can entertain such suits or proceedings relating to recovery of possession of premises. It is of course true that Section 41 of the Small Causes Courts Act deals with such suits between the licensee and licensor while Section 28 of the

Bombay Rent Act deals with suits between landlord and tenant. But the nature of such suits as contemplated by both these sections is the same, namely, it should be the suit relating to the recovery of possession of premises. Interpreting the phrase "relating to recovery of possession" as found in Section 28 of the Bombay Rent Act, a Bench of three learned Judges of this Court in the case of Babulal Bhuramal and Another Vs. Nandram Shivram and Others, , held that a suit for declaration that one of the plaintiffs was the tenant of the defendant landlord and the other plaintiffs were his sub-tenants and they were entitled to be protected from evidence squarely falls within the exclusive jurisdiction of the Small Causes Court, Bombay, u/s 28 of the Bombay Rent Act and jurisdiction of the City Civil Court for entertaining such a suit is excluded. Imam, J. Speaking for the three-Judge Bench in that case observed at page 374 of the report as under:

The present suit filed in the City Civil Court raised in substance a claim to the effect that the plaintiffs were the tenants of the premises within the meaning of the Act. Such a claim was one which arose out of the Act or any of its provisions. The suit related to possession of the premises and the right of the landlord to evict any of the plaintiffs was denied on the ground that the first plaintiff was a tenant within the meaning of the Act and the premises had been lawfully sublet by him to the second and third plaintiffs. The City Civil Court was thus called upon to decide whether the first plaintiff was a tenant of the premises within the meaning of the Act and whether he had lawfully sublet the same to the second and third plaintiffs. The City Civil Court, therefore, had to determine whether the plaintiffs had established their claim to be in possession of the premises in accordance with the provisions of the Act.

19. The situation in the present case is almost parallel. The plaintiffs-licensees claim their right as licensees to protect possession of the suit premises from licensors by invoking the help of the Court. Such suits obviously would have to be styled as suits relating to recovery of possession, on a party of reasoning which appealed to the three-Judge Bench of this Court in Babulal's case (supra).

20. The same phraseology employed by Section 28 of the Bombay Rent Act, namely, "suits relating to recovery of possession" also came up for consideration before a three-Judge Bench of this Court in the case of Natraj Studios (P) Ltd. Vs. Navrang Studios and another, . In that case the facts were that there was a lease and licence agreement between the parties. By virtue of Section 15A of the Bombay Rent Act, a licensee in occupation on 1.2.1973 became a deemed tenant. The appellant-licensee filed a declaratory suit praying for a declaration that the plaintiff-appellant was a monthly tenant of the two studios and all other structures and open land covered by the agreement. It was submitted by counsel for the appellant that the essence of the dispute between the parties was the right to possession of the two studios. This Court, speaking through Chinnappa Reddy, J., held at page 477 as follows:

We may now proceed to consider the submission that the Court of Small Causes alone has exclusive jurisdiction to resolve the dispute between the parties.

Section 28(l) of the Bombay Rent Act, positively confers jurisdiction on the Court of Small Causes to entertain and try any suit or proceeding between landlord and tenant relating to the recovery of rent or possession of any premises or between a licensor and a licensee relating to the recovery of license fee or charge and to decide any application made under the Act and to deal with any claim or question arising out of the Act or any of its proceedings, and negatively it excludes the jurisdiction of any other Court from entertaining any such suit, proceeding or application or dealing with such claim or question: After analysing the previous decisions of this Court in Babulal Bhuramal, Raizada Topandas etc., this Court held at page 483B as follows:

The relationship between the parties being that of licensor-landlord and licensee-tenant and the dispute between them relating to the possession of the licensed-demised premises, there is no help from the conclusion that the Court of Small Causes alone has the jurisdiction and the Arbitrator has none to adjudicate upon the dispute between the parties.

21. It was submitted by learned Counsel for the respondents that in these two cases plaintiffs had prayed for declaration of their status. While in the present cases on such declaration is sought. In our view this will make no difference. Even in the present cases before getting interim injunction or perpetual injunction, plaintiff will have to show that he is a licensee on monetary consideration as claimed by him and the defendant is licensor and that he has threatened to illegally disturb his possession of the suit premises. It is the substance of the relief which matters and not its form.

22. In view of the aforesaid decisions of this Court, it must be held that the impugned judgments under appeal were rightly decided by the High Court and call for no interference in these appeals.

23. Before parting with these cases, we may mention that the Gujarat High Court in the case of Dhagad Ambalal Bhailalbhai and Another Vs. Bai Narmada, has taken the view that a suit where plaintiff claims that he is entitled to possession and seeks a permanent injunction restraining the respondent-landlord for recovering possession, would fall u/s 28 of the Bombay Rent Act. The very same view was taken by a Division Bench of the Bombay High Court in the case of Ramkishore Pandit Vs. Vijayabahadursingh Jagtapsingh, . A full Bench of the Bombay High Court in the case of Dattatraya Krishna Jangam Vs. Jairam Ganesh Gore, which held that suits for injunction against defendant-landlords restraining them from forcibly evicting the plaintiff-tenants from possession of the suit premises would lie within the exclusive jurisdiction of the Small Causes Court, Bombay as such suits will be suits relating to recovery of possession of premises. In our view the aforesaid decisions lay down correct law on the point. Swant, J. in the impugned judgment under appeal in Civil Appeal No. 4913 of 1989 was inclined to take a contrary view on the ground that the plaintiff had not prayed for a declaration about his licence and all that he was claiming was to protect his possession against threats of unlawful eviction and the Court had not

to decide the status of the plaintiff. With respect, on the clear recitals and prayers in the plaint such a view is not sustainable. It is easy to visualise that before getting injunction whether temporary or permanent the plaintiff has to establish a legal right for the said relief, as seen earlier. Once the plaintiff contends that he is a licensee of the suit premises and the defendant is a licensor and on that basis he wants the assistance of the Court to protect his possession, it would be a suit between a licensee and licensor relating to the recovery of possession.

24. Analogy drawn by Sawant, J. from cases u/s 6 of the Specific Relief Act, 1963 on the clear averments in the plaints in present cases is also not apposite. It is trite to say that Section 6 of the Specific Relief Act given a summary remedy to the plaintiff to seek restoration of possession from the defendant within six months of illegal recovery of possession by the defendant, without referring to the title of the plaintiff and defendant. It is purely a possessory suit wherein status of the party is irrelevant. In such type of suits the plaintiff is not required to prove his title or a superior right to possession as compared to the defendant and has only to show that he was in possession of the suit immovable property and he was illegally dispossessed within a period of six months prior to the date of the suit. Once the plaintiff proves this case, he becomes entitled to succeed and can get status quo ante and restoration of possession of the suit premises through the assistance of the Court. In given cases, even injunction suits purely based on previous peaceful possession and subsequent threatened dispossession may stand on an entirely different footing and might not attract the sweep of Section 41(1) of the Small Causes Courts or for that matter Section 28 of the Bombay Rent Act. But the present suits are not of that type. They are suits clearly based on the allegation that the plaintiffs are licensees on monetary considerations and they apprehend to be dispossessed, not in accordance with law, at the hands of defendant-licensors. Such suits as we have discussed earlier, clearly attract the applicability of Section 41 of the Small Causes Courts Act as both the conditions for its applicability, namely, that they are suits between licensees and licensors and they relate to recovery of possession of immovable properties situated in Greater Bombay are complied with. Consequently the conclusion is inevitable that the aforesaid suits as filed by the appellants were not cognizable by the City Civil Court, Bombay and they could be entertained only by the Small Causes Court, Bombay, and fall within the exclusive jurisdiction of the latter court.

20. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of Natraj Studios (P) Ltd. Vs. Navrang Studios and another, in support of the same proposition.

21. Learned senior counsel submits that the manner in which the originating summons is filed and the reliefs purported to be sought is a clever drafting of the draftsman. Court has to consider the entire plaint and not only the prayers sought to ascertain the intention and purpose of filing such proceedings. Learned

senior counsel placed reliance on the judgment of this court delivered on 22nd August, 2005 in case of Siemens Limited vs. Captech Online Pvt. Ltd. and others in Arbitration Petition No. 99 of 2004 and in particular paragraph 8 in support of his submission that if a suit is by and between the landlord and tenant for recovery of possession exclusive jurisdiction vest with the Small Causes Court in view of section 41 of the Act. Relevant portion of paragraph 8 of the said judgment reads thus:-

8. Therefore, to find out whether the issue referred to arbitration was arbitrable or not, an inquiry has to be made to find out whether Section 41 confers exclusive jurisdiction on the court of Small Causes to entertain the suit between the licensor and licensee relating to recovery of possession and for recovery of licence fee. It is true that the judgment of the Supreme Court in the case of Mansukhlal Jain and the judgment of the Division Bench of this court in the case of Nagin Mansukhlal Dagli holding that the Small Causes Court u/s 41 has exclusive jurisdiction to try the suit between the licensor and licensee relating to recovery of possession and recovery of licence fee relies mainly on non obstante clause that was contained in Section 41. In my opinion, however, mere deletion of non obstante clause from Section 41 will not make much difference. Because of the non-obstante clause contained in Section 41, the jurisdiction of the civil court to entertain the suit between the licensee and licensor for recovery of possession and for recovery of licence fee was expressly barred. But perusal of the provisions of Section 9 of the CPC shows that the jurisdiction of the civil court to entertain the suit can be expressly barred and it also can be barred by necessary implication. It can now be taken as a settled law that when the legislature creates special forum for adjudication of disputes of a particular nature then by necessary implication, jurisdiction of the court of original civil jurisdiction to entertain those disputes is barred by necessary implication. The legislature by enacting section 41 created a special forum for adjudication of dispute between the licensor and licensee in relation to recovery of licence fee and recovery of possession. Section 42 also created forum for filing an appeal against the decision of Small Causes Court. Thus, as the legislature has created a special forum for adjudication of dispute between the licensee and licensor in relation to recovery of possession and licence fee, the jurisdiction of the court of original civil jurisdiction will be ousted by necessary implication and therefore applying the law laid down by the Supreme Court in Natraj Studios, the reference to arbitration of the question which falls for decision before the Small Causes Court suit u/s 41, cannot be possible. The Division Bench of this court in its judgment in the case of Ramesh Dwarkadas Mehra & ors. v/s. Indravati Dwarkadas Mehra & ors, 2001(4) Bom.C.R. 417 was considering the question whether a suit by or against the gratuitous licensee is maintainable before the civil court. The court held that a gratuitous licensee is not a licensee within the meaning of the Bombay Rent Act and therefore, a suit by a gratuitous licensee is maintainable before the civil court of original jurisdiction. While considering that question, the Division Bench has also considered the jurisdiction of the Small

Causes Court u/s 41 of the Presidency Small Cause Courts Act.

22. Mr. Dada, learned senior counsel appearing for the defendant submits that this court has no jurisdiction to try this originating summons as it raises claims and questions which fall within the exclusive jurisdiction of the Small Causes Court. It is submitted that this Originating summons involves disputed questions of facts which would involve considerable amount of oral evidence. Learned Senior counsel submits that the defendant has already forfeited the lease and therefore, question of any interpretation of the lease deed by this court did not arise.

23. Mr. Chagla, learned senior counsel appearing on behalf of the plaintiffs on the other hand submits that various submissions are advanced by the learned senior counsel appearing for the defendant on merits of the matter which are not relevant for the purpose of deciding the issue of jurisdiction framed by this court. It is submitted that the originating summons is filed only for interpretation of the lease deed entered into between the parties. Learned senior counsel submits that whether evidence is required or not is not relevant for the purpose of deciding the issue of jurisdiction of this court. It is submitted that even if principles of section 10 of CPC is made applicable, originating summons having been filed first by the plaintiffs herein, this proceedings will have to be heard first and no stay of such proceedings can be granted.

24. Learned senior counsel submits that every suit between the landlord and tenant relating to lease is not barred from being tried by a Civil Court. Court has to examine whether this proceeding is relating to recovery of possession of the property or not. No such relief for recovery of possession of the leasehold property is sought by the plaintiffs in this originating summons. Learned senior counsel invited my attention to various provisions of High court (Original Side) Rules which apply to the proceedings of originating summons. Learned senior counsel placed reliance on the judgment of this court in case of Mazda Theatres Limited Vs. Gordhandas Tribhuvandas Mangaldas, in support of his submission that originating summons for interpretation of the lease document can be made by the High Court under the provisions of Bombay High Court Rules. Reliance is placed on relevant paragraph at page 1082 and 1083 which read thus:

1. This is an appeal against a judgment of Mr. Justice Coyajee by which he held that he had no jurisdiction to maintain an originating summons by reason of the provisions of Rule 241 of the High Court Rules.

2. The plaintiffs, who took out the originating summons, are the lessees and what they wanted was the proper construction of Clause 2(r) of the indenture of lease dated November 21, 1927, and they took out the summons against the lessor, who is the defendant. The parties were agreed on having this clause construed by means of an originating summons and the plaintiffs had agreed to pay the costs of the summons. The question that arose for construction was whether the defendant was entitled to use the complimentary pass issued to him

by the lessees free from the liability to pay entertainment duty. Under Clause 2(r) the lessees had undertaken the obligation to give a complimentary pass to the lessor and reserve one box of six seats for the use of the lessor and his family and friends in every show on every day. Now, this obligation was a fairly light obligation till the Government decided to levy entertainment duty even on complimentary tickets. When the Entertainment Tax Act was amended and when the lessees became liable to pay entertainment tax on the complimentary tickets which they had to give to the lessor, the obligation became a very heavy one and therefore the lessees wanted it to be determined by the Court whether the entertainment duty had to be paid by the lessor or by the lessees. This is the question they wanted to be decided by the Court on an originating summons.

3. Now, the rule in question is Rule 241 and that provides:-

Any person claiming to be interested under a deed, will, or written instrument, may apply in Chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested.

The only two conditions which are required are that there must be a written instrument and what should be required to be done by the Court is the declaration of the rights of the person interested under the written instrument. In this case, there is a lease: undoubtedly it is a written instrument, and what the plaintiffs seek is the declaration of their rights or the declaration of the rights of the defendant. The view that the learned Judge seems to have taken is that this rule does not apply when on a broad construction of a contract the question to be decided is whether there is or there is no liability on one party or the other under the contract. Now, with very great respect to the learned Judge, he seems to have overlooked the fact that, if you declare a right under an instrument in favour of a party, it necessarily follows that there is a corresponding liability upon someone else. If in this case the lessees have the right not to pay the entertainment duty on the complimentary tickets to be given to the defendant, obviously there is a liability upon the defendant to pay the entertainment duty. Conversely, if there is a right in the defendant to have the complimentary tickets without paying the entertainment duty, then there is an obligation or liability upon the plaintiffs to pay the entertainment duty. Therefore, it is not correct to say that what the plaintiffs wanted to determine was a declaration of liability. The learned Judge also seems to have been under the impression that contractual rights cannot be determined under Rule 241. That again, with respect, is a misapprehension. Rule 241 must be very broadly and liberally interpreted. The right contemplated by that rule is any right, and the whole object of that rule is to make a procedure available to parties which is both cheap and expeditious for determination of disputes as to construction of a written instrument, which dispute could be settled by the Court interpreting the instrument and determining what the rights of the parties are. One would have thought that Rule 241 was precisely intended to cover a case like this where a lessor and a lessee

are disputing their mutual rights and the question of those rights can be determined effectively and finally by the Court construing the relevant provision of the lease and deciding what the rights of the parties are. It is perhaps not necessary to point out that our rule is based on the English Rule 1 of Order LIVA, and the view consistently taken by the English Courts is that the word "instrument" used in the rule was meant to receive a wide construction and applied to any written document under which any right or liability, whether legal or equitable, existed; and there are innumerable cases in the books where a lease has been construed and the rights of the lessor and the lessee determined. We should like to point out that the learned Judge has not exercised the discretion conferred upon him under Rule 242. If he had exercised the discretion, the matter might have been different and we would have been very loath to interfere with that discretion. The view taken by the learned Judge is that he had no jurisdiction to entertain this originating summons under Rule 241. With respect, we think that the view is erroneous and therefore we must set aside the order passed by the learned Judge.

4. The result is, the appeal will be allowed and the order of dismissal passed by the learned Judge is set aside. The originating summons is sent back for trial on merits.

5. With regard to the costs of this appeal, Mr. Laud has argued that the plaintiffs agreed to pay the costs of this proceeding and that this appeal is part of the proceeding and the appeal has been rendered necessary because of the view taken by the learned Judge. Now, it is clear that the proceedings contemplated by the parties were the originating summons and not an appeal arising from the originating summons. As the parties had agreed to abide by the decision of the Court, an appeal could never have been contemplated by the parties. It is because the learned Judge took the view that the originating summons was not maintainable that this appeal has become necessary. It appears clearly from the record that it was only the counsel for the plaintiffs who had to struggle with the view taken by the learned Judge that the originating summons was not maintainable. Counsel for the defendant seems to have played more the part of a satisfied spectator than anything else. If both the parties had agreed to have this matter tried by an originating summons, it was equally the duty of the counsel for the defendant to have pointed out to the learned Judge that under Rule 241 he had jurisdiction to try this originating summons. Under the circumstances, we think the fairest order to make will be that there will be no order as to costs of the appeal.

25. Mr. Chagla learned senior counsel also placed reliance on the judgment of Chancery Division in case of *British Glass Manufacturers Confederation Versus University of Sheffield* 2004 I & I R 14 in support of his submission that in case of a long term lease like in this case, the lessee was not under any obligation to use the leasehold land for the same purpose forever. Learned senior counsel submits that the plaintiffs are already in physical possession of the suit land. This

court has to only consider the plaint to ascertain the jurisdiction of this court and not the written statement and/or affidavits filed in the Small Causes Court or in this proceedings for the purpose of deciding the jurisdiction issue.

26. Mr. Chagla learned senior counsel made an attempt to distinguish the judgment of the Supreme Court in case of Mansukhlal Jain (supra) on the ground that the Supreme Court in that matter had found that the suit was relating to recovery of possession and accordingly had held that such suit could be tried exclusively by Small Causes Court whereas in this proceedings the plaintiffs have not sought any relief for recovery of possession of the land and thus the judgment of supreme Court in case of Mansukhlal Jain (supra) is not applicable to the facts of this case.

27. Learned senior counsel placed reliance on the judgment of this court in case of Vishnu Dutt Vashisth and Another Vs. Maharashtra Watch and Gramophone Company and Others, in support of his submission that the reliefs claimed in the originating summons are not relating to recovery of possession and thus there is no bar against this court from interpreting the terms of this lease deed. Paragraphs 9, 13, 16 and 22 of the said judgment read thus:

9. Now the question which arises in interpreting the second part of the second condition is whether the suit must relate to the "recovery of possession" or whether it is sufficient that it relates merely to "possession". It is argued by Mr. Gandhi, who appears on behalf of the petitioners, that the words of the second condition are "recovery of rent or possession" and therefore, it is not right to read this phrase to mean recovery of rent or recovery of possession. I am unable to accept this contention. If what was contemplated was a suit or proceeding relating to possession merely, it would have been easy for the Legislature to say that a suit between a landlord and tenant "relating to possession or to the recovery of rent" shall lie in the Courts of exclusive jurisdiction mentioned in Cls. (a), (aa) and (b) of Section 28(1). The phrase "recovery of rent" has been accorded a precedence with the obvious intention that the word "recovery" must govern both "rent" and "possession". There is an additional reason why, in my opinion, it is difficult to accept Mr. Gandhi's submission. By providing that suits "relating to" the recovery of rent or possession shall be tried by Courts of exclusive jurisdiction, the Legislature had already widened the scope of Section 28. The words "relating to" the recovery of rent or possession have a wider amplitude than the words "for recovery of rent or possession" and therefore, by use of the former expression, the scope of matters falling within the exclusive jurisdiction of certain Courts was intended as far as the Legislature wanted to extend it. By reading the second condition to mean that even if a suit or proceeding merely related to possession but did not relate to recovery of possession, it must go before the Court of exclusive jurisdiction, one would be extending the scope of Section 28 beyond what is justified by the plain language of the section.

13. It is urged by Mr. Gandhi that the plaintiffs are trying to protect their

possession of the passage or to secure the possession of the passage and therefore, the suit is one relating to possession. The plaint, according to Mr. Gandhi, is drafted ingeniously so as to disguise the real object of the suit, namely, to obtain possession of the passage. In the view I have expressed above as regards the requirement of the second condition, it is unnecessary to find whether the suit relates to possession. I might, however, add that I do not agree that the suit relates to possession. True, that one must look at the plaint as a whole in order to ascertain the nature of the suit and the real relief which the plaintiff is seeking. But considering the various averments in the plaint and having regard to the relief which the plaintiffs are seeking, I am unable to hold that the suit, directly or substantially, relates to possession.

16. These averments in the plaint and the particular reliefs which I have set out above leave no doubt that the plaintiffs are not attempting directly or indirectly to secure or obtain the possession of the passage but that they want an order preventing the defendants from permitting the formation of queues in the passage in a manner which will obstruct the access to the shops.

22. None of these reliefs strikes me as a back door method to obtain possession of any part of the premises included or alleged to be included in the lease of the plaintiffs. If these reliefs are considered in the context of the plaint as a whole, it would be clear and though the suit is between a landlord and tenant, it neither relates to recovery of possession nor does it raise a claim or question arising out of the Act or any of its provisions. The suit is, therefore, within the competence of the City Civil Court and the learned Judge was right in taking the view he has taken on the preliminary issue of jurisdiction.

28. Learned senior counsel appearing for plaintiffs also placed reliance on the judgment of this court in case of Navyug Co-op. Housing Society Ltd. and Another Vs. Vile Parle Kelavani Mandal and Another, in support of his submission that after adverting to the judgment of the Supreme Court in case of Mansukhlal Dhanraj Jain (supra), this court has held that suit merely relating to possession is not exclusively triable by the Small Causes Court but the suit relating to recovery of possession is exclusively triable by the Small Causes Court. Relying upon this judgment, learned senior counsel submits that in no circumstances this originating summons can be considered as a suit for possession or relating to recovery of possession of the suit land. Reliance is placed on paragraphs 1 to 4 and 6 which read thus:

1. In this suit, by order dated 3rd February, 2005 two preliminary issues have been framed in accordance with the provisions of Section 9A of Civil Procedure Code, which read as under:-

(i) Does defendant No. 1 prove that this Court does not have the jurisdiction to entertain the suit in view of the Maharashtra Rent Control Act and Presidency Small Causes Court Act?

(ii) Does defendant No. 1 prove that the suit as framed and filed is not

maintainable in this Court in view of the provisions of Sections 50 and 51 of the Bombay Public Trust Act?

Both the parties stated that they do not want to lead oral evidence in relation to these issues. Therefore, on the basis of pleadings and the documents produced by both the parties, I have heard learned Counsel for the plaintiffs and defendant No. 1.

2. Now first taking up the Issue No. 1, the learned Counsel for defendant No. 1 submits that the jurisdiction of this Court to entertain the suit is barred by the provisions of Section 33 of The Maharashtra Rent Control Act. He submitted that by this suit, a decree for the specific performance of the obligations imposed on the defendant No. 1 as a lessee in the lease deed, is sought. He submitted that this suit relates to the possession of the demised premises by the defendant No. 1, therefore, the jurisdiction of this Court to entertain the suit is barred. He relies on the judgments of the learned Single Judge of this Court in the case of (i) R.J. Mehta, President Engineering Majdoor Sabha and Another Vs. Govind Ramchandra Nadkarni, , (ii) Eknath Vithal Ogale Vs. Mansukhlal Dhanraj Jain, .

3. On the other hand, the learned Counsel for plaintiffs submits that unless the suit relates to the recovery of possession of the demised premises, the jurisdiction of this Court to entertain the suit will not be barred by the provisions of Section 33 of the Maharashtra Rent Control Act. The learned Counsel in support of his case relies on the judgment of the learned Single Judge of this Court in the case Vishnu Dutt Vashisth and Another Vs. Maharashtra Watch and Gramophone Company and Others, ; and the judgment of the Supreme Court in the case of Mansukhlal Dhanraj Jain and Others Vs. Eknath Vithal Ogale, .

4. Now in order to appreciate the contentions of the learned Counsel for both the sides, it is necessary to refer to the provisions of Subsection (1) of Section 33 of the Maharashtra Rent Control Act, 1999, which reads as under:-

Section 33. Jurisdiction of courts:

(1) Notwithstanding anything contained in, any law for the time being in force, but subject to the provisions of Chapter VIII, and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction,-

(a) in Brihan Mumbai, the Court of Small Causes, Mumbai,

(b) in any area for which, a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887 (IX of 1887), such Court, and

(c) elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge, the Court of the Civil Judge (Senior Division) having Ordinary Jurisdiction, shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises and to

decide any application made under this Act (other than the applications which are to be decided by the State Government or an officer authorised by it or the Competent Authority); and subject to the provisions of Subsection (2), no other Court shall have jurisdiction to entertain any such suit, proceeding, or application or to deal with such claim or question.

For the present purpose, the words in that section which are relevant are "relating to the recovery of rent or possession of any premises." So far as the present suit is concerned, the prayer Clauses (a), (b), (c) and (d) are relevant, which read as under:-

(a) for a judgment and decree directing defendant No. 1 to specifically perform their obligations under the said Indenture of Lease dated 5-11-1962, 20-7-1965 and 19-3-1981 being Exhibits "C", "E" and "I" hereto including, inter alia, by granting preferential admission to children of members of the first plaintiff society to course offered by educational institutions of defendant No. 1 and in this behalf to publish a list of the students from whom applications are received and a list of the students who are admitted in the Management Quota of the courses offered by the institutions managed by defendant No. 1;

(b) for a perpetual order and injunction restraining defendant No. 1 from putting the said plots of land more particularly described in Exhibits "B", "D" and "H" hereto and/or any structures thereon to any commercial use or to any other use not directly related to the purpose of education;

(c) for a judgment and decree directing defendant No. 1 to pay to the plaintiffs an amount of Rs. 1,00,000/- by way of damage as per particulars of claim (Exhibit "V" hereto);

(d) for a judgment and decree directing defendant No. 1 to admit the said Jigar Jhaveri, being the son of plaintiff No. 2 to the Junior College Course (Commerce) of A.J. College of Commerce or in the alternative N.M. College of Commerce.

Perusal of the above prayer clauses show that none of these prayer clause is relating to the recovery of the possession of the demised premises.

6. The judgment of the Supreme Court in the case of Mansukhlal Dhanraj Jain and Others Vs. Eknath Vithal Ogale, , shows that the Supreme Court has also taken the same view. In my opinion, the observations of the Supreme Court from paragraph 16 and some observations from paragraph 18 are relevant which read as under:-

16. It is therefore, obvious that the phrase "relating to recovery of possession" as found in Section 41(1) of the Small Cause Courts Act is comprehensive in nature and takes in its sweep all types of suits and proceedings which are concerned with the recovery of possession of suit property from the licensee and, therefore, suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase.

18. When Section 41(1) of the Small Cause Courts Act is read in juxtaposition with the aforesaid Section 28 of the Bombay Rent Act, it becomes clear that *pari materia* words are used about nature of suits in both these provisions for conferring exclusive jurisdiction on Small Cause Courts, namely, they alone can entertain such suits or proceedings relating to recovery of possession of premises. It is of course true that Section 41 of the Small Cause Courts Act deals with such suits between the licensee and licensor while Section 28 of the Bombay Rent Act deals with suits between landlord and tenant. But the nature of such suits as contemplated by both these sections is the same, namely, it should be the suit relating to the recovery of possession of premises. Interpreting the phrase "relating to recovery of possession" as found in Section 28 of the Bombay Rent Act, a Bench of three learned Judge of this Court in the case of Babulal Bhuramal and Another Vs. Nandram Shivram and Others, held that a suit for declaration that one of the plaintiffs was the tenant of the defendant landlord and the other plaintiffs were his sub-tenants and they were entitled to be protected from eviction squarely falls within the exclusive jurisdiction of the Small Cause Court, Bombay u/s 28 of the Bombay Rent Act and jurisdiction of the City Civil Court for entertaining such a suit is excluded.

It is thus clear that the suit merely relating to the possession is not exclusively triable by the Small Cause Court, but the suit relating to recovery of the possession is exclusively triable by the Small Cause Courts. In so far as the present suit is concerned, though it may relate to the possession of the premises by the defendant, it does not relate to recovery of possession, and therefore, in my opinion, the jurisdiction of this Court to try this suit is not ousted because of the provisions of Section 33 of the Maharashtra Rent Control Act.

Relying on the aforesaid judgment, it is submitted that since plaintiffs are already in possession of the suit plot, suit is not for recovery of possession and thus even if this originating summons is construed as suit for possession, it would not fall within the jurisdiction of Small causes court u/s 41 of Presidency Small Causes Court Act, 1882.

29. Mr. Dada, learned senior counsel appearing for the defendant in rejoinder submits that court has to see the substance in the plaint and not the form in which it is filed. It is submitted that even if this court peruses the averments in the plaint, which refers to various correspondence, it clearly demonstrates that the purpose of filing this originating summons relates to recovery of possession of suit property. It is submitted that as there was threat of recovery of possession from the defendant to the plaintiffs, this originating summons has been filed by the plaintiffs. Learned senior counsel invited my attention to the averments made in the written statement filed by the plaintiffs in the suit filed by the defendant against the plaintiffs in the Small Causes Court contending that issue raised in that suit are pending before this court in this originating summons. Learned counsel submits that the dispute had already arisen relating to recovery of possession and thus jurisdiction of this court is barred to entertain

and try this originating summons.

30. In so far as judgment of this court in case of Mazda Theaters Limited (supra) relied upon by Mr. Chagla, learned senior counsel for plaintiffs is concerned, it is submitted that in case of Mazda Theaters (supra) both the parties had applied for interpretation of the lease deed before this court in the originating summons and such order was based on the consent of both the parties. It is submitted that that judgment therefore, does not decide whether interpretation of the lease deed is permissible contrary to bar u/s 41 of the Presidency Small Causes Court Act, 1882.

31. Mr. Dada, learned senior counsel submits that the judgment of Supreme Court in case of Mansukhlal Jain (supra) squarely applies to the facts of this case. The jurisdiction of small causes court u/s 41 of the Presidency Small Causes Court Act, is very wide and such provision contemplates various types of disputes. The concept of "recovery of possession" has been interpreted by the Supreme court which would include a situation of this nature arising in this suit.

32. Learned counsel also distinguished the judgment of this court in case of Vishnudatta Vashista (supra) and in case of Navyug Coop. CHS Ltd. (supra) on the ground that facts of both these matters were totally different. Learned senior counsel placed reliance on paragraph 2 and 6 of the judgment of this court in case of Navyug CHS (supra) to show that the issues involved in that suit are totally different. Learned counsel placed reliance on paragraph 13 and 16 of the judgment of this court in case of Vishnudatta (supra) so as to distinguish the said judgment on the facts of that case.

33. Mr. Dada learned senior counsel appearing for the defendant placed reliance on the judgment of Supreme Court in case of Prabhudas Damodar Kotecha and Others Vs. Manhabala Jeram Damodar and Another, by which judgment the Supreme Court has upheld the view taken by full bench of this court reported in 2007 (5) Mah. Law Journal 341. The reliance is placed on paragraphs 50 to 51 in support of the submission that all suits between the landlord and tenant and the licensor and licensee have to be tried by Small Causes Court under one umbrella, whether under the Rent Act or under the Presidency Small Causes Court Act. Paragraphs 50 to 52 of the said judgment read thus:

50. We are of the considered view that the High Court has correctly noticed that the clubbing of the expression "licensor and licensee" with "landlord and tenant" in Section 41(1) of the PSCC Act and clubbing of causes relating to recovery of licence fee is only with a view to bring all suits between the "landlord and tenant" and the "licensor and licensee" under one umbrella to avoid unnecessary delay, expenses and hardship. The act of the legislature was to bring all suits between "landlord and tenant" and "licensor and licensee" whether under the Rent Act or under the PSCC Act under one roof. We find it difficult to accept the proposition that the legislature after having conferred exclusive jurisdiction in one Court in all the suits between licensee and licensor should have carved out any exception

to keep gratuitous licensee alone outside its jurisdiction. The various amendments made to Rent Act as well the Objects and Reasons of the Maharashtra Act XIX of 1976 would clearly indicate that the intention of the legislature was to avoid unnecessary delay, expense and hardship to the suitor or else they have to move from the one court to the other not only on the question of jurisdiction but also getting reliefs.

51. We are of the view that in such a situation the court also should give a liberal construction and attempt should be to achieve the purpose and object of the legislature and not to frustrate it. In such circumstances, we are of the considered opinion that the expression licensee employed in Section 41 is used in general sense of term as defined in Section 52 of the Indian Easement Act.

52. We have elaborately discussed the various legal principles and indicated that the expression "licensee" in Section 41(1) of the PSCC Act would take a gratuitous licensee as well. The reason for such an interpretation has been elaborately discussed in the earlier part of the judgment. Looking from all angles in our view the expression "licensee" used in the PSCC Act does not derive its meaning from the expression "licensee" as used in Sub-section (4A) of Section 5 of the Rent Act and that the expression "licensee" used in Section 41(1) is a term of wider import intended to bring in a gratuitous licensee as well.

34. Mr. Dada learned senior counsel also placed reliance on the judgment of Division Bench of this Court in case of Carona Limited Vs. Sumangal Holdings, in support of the submission that the suit between the landlord and the tenant relating to the possession of immovable property has to be tried exclusively by Small Causes Court and there is a clear bar under the provisions of Presidency Small Causes Court Act and in particular Section 41(1) from any other Court entertaining such suits. Reliance is placed on paragraphs 7, 8 and 10 of the said judgment which read thus:

7. Sub-section (1) of Section 41 as it stands now commences with a non-obstante provision which operates qua anything contained elsewhere in the Act. The Court of Small Causes, subject to subsection (2) has the conferred with the jurisdiction to entertain and try all suits and proceedings between a licensor and licensee or a landlord and tenant relating to recovery of possession of immovable property or the recovery of licence fees, charges or rent in Greater Mumbai. However, by Sub-section (2), the legislature has mandated that the provisions of Sub-section (1) shall not apply to suits for the recovery of possession or of licence fee, charges or rent to which Bombay Rent Act, certain other Acts stipulated therein or any other law for the time being in force apply. Prior to the amendment of Subsection (1) of Section 41 by Maharashtra Act 24 of 1984, the words "notwithstanding anything contained in elsewhere in this Act" in Sub-section (1) were followed by the words "or in any other law for the time being in force". The legislative history underlying the amendment of Section 41 is instructive and consistent with the well settled position in law is a legitimate interpretative aid for understanding the circumstances in which the amendment

was brought about by the legislature. The Statement of objects and reasons accompanying the Bill notes that on the recommendations of the Law Commission of India in its Fourteenth Report, the Presidency Small Cause Courts Act, 1882 was amended by the Presidency Small Cause Courts (Amendment) Act (19 of 1976) by which a new Chapter VII was inserted in the principal Act to provide for conferment of exclusive jurisdiction on the Court of Small Causes, Greater Bombay to try suits between licensors and licensees for the recovery of possession of immovable property and of licence fees to which the Rent Act and some of the other laws did not apply, irrespective of the value of the subject matter of the suit. The object of the amendment was stated to be thus:

The object of that amendment was to avoid multiplicity of proceedings in different courts, waste of public time and money, unnecessary delays and hardships to litigants etc. and also to make supplementary provisions in the principal Act, so that all suits and proceedings between a landlord and a tenant or a licensor and a licensee for recovery of possession of premises or for recovery of rent or licence fee, irrespective of the value of the subject matter, should go to and shall be disposed of by the Court of Small Causes either under that Act or under the Rent Control Act.

The Statement of objects and reasons further records that the State legislature had considered it appropriate to monitor the working of the newly inserted Chapter VII before similar amendments were made to the Provincial Small Cause Courts Act, 1887 which operate outside Greater Mumbai. The experience in regard to Chapter VII was found to be satisfactory by the Legislature and the amendments of 1984 were, therefore, brought about made so as to make similar provisions in the Provincial Small Causes Court Act, 1887:

Since these amendments were of drastic nature, it was considered desirable to watch the working of the new Chapter VII inserted in the Presidency Small Cause Courts Act, 1882, before similar amendments are made in the Provincial Small Cause Courts Act, 1887, which is in force outside the area of Greater Bombay. The experience regarding the working of the new Chapter VII inserted in the Presidency Small Cause Courts Act, 1882, is found to be most satisfactory to the litigants, Judges and members of the Bar. It is necessary to make similar provisions in the Provincial Small Cause Courts Act, 1887. It is, therefore, proposed to insert in the said Act a new Chapter IV-A1 before Chapter IV-A on the lines of the new Chapter VII of the Presidency Small Cause Courts Act, 1882, with necessary modifications. Consequently it is also proposed to delete Clauses (4), (8), (25) and (26) and amend Clauses (13) and (38) in the Second Schedule to the Provincial Small Cause Courts Act, 1887, so as to bring the suits covered by these clauses under the jurisdiction of Small Cause Court as recommended by the Law Commission of India in Chapter 13 of its 14th Report.

8. In so far as the amendment to Section 41 of the Presidency Small Cause Courts Act, 1882 is concerned, the Legislature noted that "it has been noticed that there is a minor inconsistency in Subsections (1) and (2) of Section 41".

Hence, it was "therefore, proposed to amend Section 41 of that Act to remove inconsistency". The Statement of objects and reasons discloses that far from intending to obliterate the exclusive jurisdiction that was conferred upon the Presidency Small Cause Court to entertain and try suits relating to licensors and licensees or landlords and tenants relating to the recovery of possession, licence fee, charges or rent, the Legislature had considered it appropriate in view of the satisfactory working of the provisions to incorporate a similar provision into the Provincial Small Causes Courts Act, 1887 as well. The minor inconsistency which the Legislature noted between Sub-sections (1) and (2) of Section 41 of the Presidency Small Cause Courts Act, 1882, however, was this. Sub-section (1) on the one hand gave overriding force and effect, notwithstanding anything contained in any other law for the time being in force. At the same time, the effect of Sub-section (2) was that Sub-section (1) shall not apply to suits or proceedings for the recovery of possession, licence fee, charges or rent to which the Bombay Rent Act of 1947 and the other Acts spelt out therein applied. For instance, where the Bombay Rent Act, 1947 applied, then the provisions for jurisdiction were to be traceable to the statutory provisions contained in that Act. That is why Sub-section (1) of Section 41 was required to be made subject to Sub-section (2). By the Amending Act of 1984, the Legislature noted a "minor inconsistency" between Sub-sections (1) and (2), if Sub-section (1) were to contain a non-obstante provision overriding any other law for the time being in force. That inconsistency was sought to be removed by the Amending Act. By the Amending Act of 1984, Sub-section (2) was also amended so as to substitute the Maharashtra Housing and Area Development Act, 1976 for the Bombay Housing Board Act, 1948 and to incorporate a reference to any other law for the time being in force.

10. On the contrary, the Court would have due regard to the fact that the Legislature had a stated object-conceived in the public interest-in conferring exclusive jurisdiction to deal with matters between licensors and licensees or between landlords and tenants on the Small Causes Court. Rent Control Legislation constitutes a statutory regulation of the relationship between landlords and tenants and between Licensors and licensees in the public interest and as a matter of protecting public welfare. The question whether the Small Causes Court has exclusive jurisdiction must be understood in the backdrop of the object which the legislature intended to subscribe. A comprehensive remedy has been provided. Sub-section (1) of Section 42 provides an appeal from a decree or order made by the Court of Small Causes exercising jurisdiction u/s 41 to a Bench of two Judges of the Court. In *Natraj Studio Pvt. Ltd. v. Navrang Studio*, (supra), the Supreme Court had occasion to consider the question as to whether an arbitration agreement could operate in respect of a dispute as to the possession of premises where the Court of Small Causes had jurisdiction u/s 28(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Sub-section (1) of Section 28 of the Rent Act provided that notwithstanding anything contained in any law, in Greater Bombay, the Court of Small Causes,

Bombay, and in any area for which a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and elsewhere the Court of Civil Judge, Senior Division, shall have jurisdiction to entertain and try suits or proceedings between landlords and tenants relating to the recovery of rent or possession or between licensors and licensees relating to the recovery of licence fee or charges. The Supreme Court held that both on the basis of the non-obstante provision as well as the object of the legislation the exclusive jurisdiction would vest in the Courts stipulated by the Legislature and an arbitration agreement cannot be recognised in the field:

The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain Courts is pursuant to the social objective at which the legislation aims. Public policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognised by a Court of law.

11. These observations would apply in construing the provisions of Section 41 of the Presidency Small Cause Courts Act, 1882. The object of the legislation deals with a matter of public interest and the ground which weighed with the Supreme Court in *Natraj Studio* in excluding the applicability of an arbitration agreement in the field would apply here as well. In his judgment in *Siemens* (supra) Mr. Justice D.K. Deshmukh held that the mere deletion of the non-obstante clause in Section 41 would not make any difference. The Learned Single Judge held that the Legislature having created a special forum for adjudication of disputes of a particular nature by necessary implication, the jurisdiction of the other Civil Courts would also stand excluded. The Learned Judge observed thus:

In my opinion, however, mere deletion of non obstante clause from Section 41 will not make much difference. Because of the non-obstante clause contained in Section 41, the jurisdiction of the civil court to entertain the suit between the licensee and licensor for recovery of possession and for recovery of licence fee was expressly barred. But perusal of the provisions of Section 9 of the CPC shows that the jurisdiction of the civil court to entertain the suit can be expressly barred and it also can be barred by necessary implication. It can now be taken as a settled law that when the legislature creates special forum for adjudication of disputes of a particular nature then by necessary implication, jurisdiction of the Court of original civil jurisdiction to entertain those disputes is barred by necessary implication. The legislature by enacting Section 41 created a special forum for adjudication of disputes between the licensor and licensee in relation to recovery of licence fee and recovery of possession. Section 41 also

created forum for filing an appeal against the decision of Small Causes Court. Thus, as the legislature has created a special forum for adjudication of disputes between the licensee and licensor in relation to recovery of possession and licence fee, the jurisdiction of the court of original civil jurisdiction will be ousted by necessary implication and, therefore, applying the law laid down by the Supreme Court in Natraj Studios, the reference to arbitration of the question which falls for decision before the Small Causes Court suit u/s 41, cannot be possible.

12. We are in respectful agreement with the view expressed in the judgment of the Learned Single Judge.

REASONS AND CONCLUSION

35. For the purpose of deciding the issue of jurisdiction framed by this court, it would be appropriate to refer to section 9 of the Code of Civil Procedure, 1908, section 41 of the Presidency Small Causes Courts Act, 1882, Rules 245, 246, 249, 250, 254, 255, 258 and 259 of the Bombay High Court (Original Side) rules and Section 9 of CPC and Section 41 of Presidency Small Causes Court Act which are extracted as under:-

Rules 245, 246, 249, 250, 254, 255, 258 and 259 of the Bombay High Court (Original Side) rules:-

245. Person interested under deed etc. may apply for issue of originating summons.- Any person claiming to be interested under a deed, will or other written instrument, may apply for the issue of an Originating Summons returnable before the Judge in Chambers for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested.

246. Court not bound to determine question of construction.- The Court or the Judge in chambers shall not be bound to determine any such question of construction if in its or his opinion it ought not to be determined on Originating summons.

249. Complaint to be filed. - An Originating summons shall be in form No. 23 and shall specify the relief sought and shall be signed by the Prothonotary and Senior Master before being issued. The person entitled to apply shall present with it to the Prothonotary and Senior Master a complaint without a prayer setting forth concisely the facts upon which the relief sought by the summons is founded. The complaint shall specify at the end but not in the form of a prayer the relief which is sought by the summons. No documents shall be annexed to the complaint, unless greater brevity or clearness would be gained by reference to annexed documents as opposed to setting out in the complaint itself the contents of documents which are not annexed thereto.

250. Complaint to be numbered with letters O.S. - The complaint when accepted shall be filed and numbered as an ordinary suit and entered in the Register of Suits, but

after the serial number the letter "O.S." shall be placed to distinguish it from plaints filed in ordinary suits.

254. When originating summons may be supported by evidence. - On the hearing of the Originating Summons if the parties thereto do not agree as to the correctness of the facts set forth in the plaint, the Judge may order the summons to be supported by such evidence as he may think necessary and may give such directions as he may think just for the trial of any questions arising thereout. The Judge may direct such amendment to be made in the plaint and summons as may seem to him to be necessary to make them accord with the existing state of facts, so as properly to raise the questions in issue between the parties.

255. What may be done on hearing originating summons. - The Judge hearing an Originating Summons may, if he thinks fit, adjourn the summons into Court. If the Judge considers that the matters in respect of which relief is sought cannot conveniently and properly be disposed of on an Originating Summons, he may refuse to pass any order on the summons, may dismiss the same and refer the parties to a suit in the ordinary course, and in such case may make such order as to costs already incurred as may seem to him to be just.

258. Order made on originating summons to be drawn up as decree of Court.- If the Judge is of opinion that the matter is fit to be dealt with on an Originating Summons, he may pronounce such judgment as the nature of the case shall require, and any order made by him shall be drawn up as a decree of the Court, provided that if the Judge dismisses the summons under rule 255, it shall be sufficient for him to make an order to that effect which shall be filed in the proceedings.

259. Directions as to carriage or execution of decree.- The Judge may give any directions touching the carriage or execution of such decree or the service thereof upon persons not parties, as he may think fit.

Section 41 of Presidency Small Causes Court Act

41- Summons against person occupying property without leave-When any person has had possession of any immovable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rack-rent does not exceed {Substituted by Act 9 of 1912, section 2, for "one"} [two] thousand rupees, as the tenant, or by permission, of another person, or of some person through whom such other person claims,

and such tenancy or permission has determined or been withdrawn,

and such tenant or occupier or any person holding under or by assignment from him (hereinafter called the occupant) refuses to deliver up such property in compliance with a request made to him in this behalf by such other person,

such other person (hereinafter called the applicant) may apply to the Small Cause Court for a summons against the occupant, calling upon him to show

cause, on a day therein appointed, why he should not be compelled to deliver up the property.

Section 9 of Code of Civil Procedure, 1908

9. Courts to try all civil suits unless barred.

The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

[Explanation I].- A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

[Explanation II].- For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.].

36. A perusal of the plaint in this originating summons alongwith correspondence annexed thereto indicates that it is the case of the plaintiffs that the plaintiffs constructed a mill building, an engine house, other buildings as required by the said lease and constructed various structures which textile mill was operated on the said property for more than 100 years. The operations of the said mill was suspended from January 2007. State of Maharashtra granted permission to the plaintiffs to close the said mill and accordingly the said mill is closed. There are correspondence on record which indicates that a dispute had arisen between the parties about the alleged change of user by the plaintiffs from a cotton textile mill to other use. The defendant has contended that the indenture of lease prohibited the plaintiffs from assigning the demised land or premises or any part thereof without prior written consent of the defendant. The defendant contended that there was breach of the lease whereas the plaintiffs denied such allegation. In the plaint, the plaintiffs have summarized the contention/allegation of the defendant alleging the breach of the terms on the lease and the interpretation of the plaintiffs of the provisions of the lease. In paragraph 27 of the plaint, the plaintiffs have formulated various questions which the plaintiffs seek determination in respect of those questions from this court which are extracted as under:-

27. In the circumstances, the plaintiffs submit that following questions arise for the determination of this Hon''ble Court:

1. Whether the Plaintiffs are prohibited from developing/re-developing/changing the user of the said land leased to the Plaintiffs under the Indenture of Lease dated 18th July 1998 or whether the said land has to be used only for the purpose of running a Cotton Textile Mill?

2. If the answer to Question (a) is in the negative then whether the Plaintiffs can develop the said land for residential/commercial or any other activity or use as

may be permitted by the laws, rules and regulations for the time being in force.

3. Whether any consent from the Defendant is required for development/re-development/change of user/construction on the demised land as aforesaid?

4. Whether the Plaintiffs are required to obtain the consent of the Defendant prior to assigning or sub-letting the leasehold land or the buildings standing thereon or any part thereof?

5. Whether the Plaintiffs are required to keep erected and maintained the Mill Building, Engine House and other appurtenances having a value of Rs. 1,50,000/- (Rupees one lakhs fifty thousand only) at the time when the issue arises for consideration or to keep erected and maintained at all times during the continuance of the lease and its renewals the Mill Building, Engine house and other appurtenances.

6. Can the Plaintiffs today demolish all structures on the land and keep erected and maintained structures having a present value of Rs. 1,50,000/-?

7. In the event that this Hon"ble Court holds that the Plaintiffs cannot demolish any buildings standing on the leasehold land, would the Plaintiffs be in breach of the terms of the Lease if while demolishing the buildings straddling the boundary of the leasehold land and the adjacent land owned by the Plaintiffs but falling substantially in the land owned by the Plaintiffs, the portion standing on the leasehold land is also demolished?

8. What is the minimum amount for which the buildings standing on the leasehold land have to be insured?

9. Would the Plaintiffs be in breach of the Lease if they did not put the demised land and the buildings standing thereon to any use whatever?

37. It is not in dispute that the defendant had already issued a notice for termination of the lease and has filed a suit (T.E. Suit No. 115/158 of 2009) in the Court of Small Causes at Bombay against the plaintiffs herein for eviction. In the said suit, the defendant herein had filed an application for interim reliefs. The plaintiffs herein had opposed application for interim relief on various grounds. By an order dated 22nd December, 2010 the Court of Small Causes has disposed of the said interim application filed by the defendant. It is observed by the Court of Small Causes that the reliefs claimed in the suit and the interim application were revolving around the interpretation of the indenture of the lease dated 18th July 1898. In the said order, it is observed that for the purpose of proper interpretation of the terms of lease, it would require considerable oral evidence. The Court of Small Causes however took a prima facie view that there appeared breach of covenant of indenture of lease which breaches though the plaintiffs herein were called upon to rectify, plaintiffs have failed to do so. It is also observed that though the specific purpose of lease was not mentioned but the terms of lease itself speak that the demised premises was let out to establish and run the textile mill. The Court of Small Cause formed an opinion on the basis

of plain reading of terms of indenture of lease that the demised land was given for specific purpose and the lessor had rights to re-enter upon the breach of its terms. The Small Causes Court has granted interim reliefs in favour of the defendant herein and against the plaintiffs herein. The Small Causes Court rejected the application for stay of the operation of the order dated 22nd December, 2010 made by the plaintiffs herein. The plaintiffs herein have filed an appeal against the said order in the Small Causes Court which is pending. The plaintiffs herein had not made any application for stay of the said order and judgment dated 22nd December 2010 before the appeal court.

38. On 21st April, 2010 the plaintiffs herein filed an application for stay of the hearing of the said interim application and the eviction suit till the hearing and final disposal of this originating summons inter alia on the ground of avoiding multiplicity of proceedings. By order dated 21st June, 2010, the Small Causes Court has rejected the said application for stay of the said proceedings. It is held by the Small Causes Court that the originating summons is not a suit and therefore no relief can be granted u/s 10 of the Code of Civil Procedure, 1908. The said order dated 21st June, 2010 passed by the Court of Small Causes has not been challenged by the plaintiffs herein.

39. The Small Causes Court has already framed issues in the said suit on 5th August, 2011. One of the issue framed is "whether the plaintiffs proves that under the indenture of lease dated 18th July 1898 the demised premises were leased to the defendant only for the purpose of establishing and running a textile mill?". Another issue framed is "does the plaintiff prove that the defendant has committed breaches of the terms and conditions of indenture of lease dated 18th July 1898 as alleged in the plaint including the breach by demolishing any building standing on the demised land?"

40. The plaintiffs herein have filed a written statement in the said suit filed by the defendant herein in the Court of Small Causes at Bombay. It is contended by the plaintiffs herein in the said written statement that the matter in issue in that suit is directly and substantially in issue in this suit (L) No. 1772 of 2009 (OS). It is also contended that it would be in the fitness of things that that court does not proceed with the suit filed therein until the disposal of the originating summons and any other approach would result in multiplicity of proceedings and interest of justice would be served if that suit is not proceeded with. It is also submitted that the rights and liabilities of the parties would be crystallized in the judgment and decree in the originating summons and the said suit in the Small Causes Court would thereupon become irrelevant in as much as the decision in the originating summons would dispose of all issues arising in that suit filed before small causes court. It is also contended that a judge would pronounce judgment on the originating summons and any order made by him shall be drawn up as a decree of the court and directions for execution of such decree may be given. Any judgment/decree passed on the originating summons would be binding upon parties thereto and would determine their rights. Reliance is placed on Rules 258

and 259 of the Bombay High Court (Original Side) Rules in support of that contention. In paragraph 13 of the written statement it is pleaded that the issues which are the subject matter of that suit are squarely covered by the questions asked in the originating summons.

41. Defendant herein has not made any application for stay of this proceedings u/s 10 of the Code of Civil Procedure, 1908. The Small Causes Court has already rejected the application for stay of that suit which application was filed by the plaintiffs herein holding that section 10 of the Code of Civil Procedure, 1908 was not applicable.

42. Question that arises at this stage is whether there is any express or implied bar in this court deciding this originating summons for the reliefs claimed in view of section 41 of Presidency Small Causes Courts Act and in view of the suit filed by the defendant herein in the Small Causes Court.

43. Supreme Court in case of Natraj Studios (P) Ltd. Vs. Navrang Studios and another, while dealing with section 28 of the Bombay Rents, Hotel and Lodging House Control Act, 1947 has held that the Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain courts is pursuant to the social objective at which the legislation aims. It is held that the exclusive jurisdiction is given to the Court of Small Causes and jurisdiction is denied to other courts (1) to entertain and try any suit or proceedings between a landlord and a tenant relating to recovery of rent or possession of any premises, (2) to try any suit and proceedings between a licensor or licensee relating to recovery of licence fee or charge, (3) to decide any application made under the Act and, (4) to deal with any claim or question arising out of the Act or any of its provisions. Such a suit will have to be brought in the Court of Small Causes which has been made the court of exclusive jurisdiction. If a suit is instituted in the ordinary Civil Court instead of Court of Small Causes the plaint will have to be returned irrespective the plea of the defendant.

44. Supreme Court in case of Mansukhlal Dhanraj Jain and Others Vs. Eknath Vithal Ogale, has considered the suits and proceedings which have to be heard by Court of Small Causes having exclusive jurisdiction u/s 41(1) of the Presidency Small Causes Courts Act, 1882. The plaintiff in the suit in that case had applied for permanent injunction against the defendant on the ground that he was in possession of the suit shop and in view of some difference of opinion between the parties, the defendant had started threatening the plaintiff that he would physically throw them out of the suit premises and accordingly sought a permanent injunction restraining the respondent-licensor from disturbing the possession of the plaintiff-licensees of the suit premises. The defendant raised an issue of jurisdiction of the City Civil Court from entertaining such suit or injunction. The Trial Court as well as High Court refused the reliefs in favour of

the plaintiff and held that City Civil Court has no jurisdiction to entertain the suit. Supreme court after considering the provisions of section 41(1) of the Presidency Small Causes Courts Act and various other provisions of law has held that a mere look at section 41(1) made it clear that because of non-obstante clause contained in the said section, even if a suit may otherwise lie before any other court, if such a suit falls within the sweep of 41(1), it can be entertained only by the Court of Small Causes. It is held that for the purpose of applicability of section 41(1), following conditions must be satisfied before taking the view that jurisdiction of regular competent civil court like City Civil Court is ousted.

- (i) it must be a suit or proceeding between the licensee and licensor, or
- (ii) between a landlord and a tenant;
- (iii) such suit or proceeding must relate to the recovery of possession of any property situated in Greater Bombay; or
- (iv) relating to the recovery of the licence fee or charges or rent thereof.

45. Supreme Court considered the plaint and observed that the plaintiffs had claimed reliefs on the basis that they were licensees on monetary consideration and the defendants were the licensors. Supreme Court then considered the other condition whether suit was relating to the recovery of possession of immoveable property situated in Greater Bombay is satisfied or not. It is held by the Supreme Court that section 41(1) does not employ the words "suits and proceedings for recovery of possession of any immoveable property". There is a good deal of difference between the words "for relating to the recovery of possession" on the one hand and the terminology "for recovery of possession of any immoveable property". The words "relating to" are of wide import and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegally recover possession from the plaintiff-licensee. It is held that suits for protecting such possession of immoveable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the plaintiff, can clearly get covered by the wide sweep of the words "relating to recovery of possession" as employed by section 41(1). It is held that suits for permanent injunction restraining the defendant from effecting forcible recovery of such possession from the licensee-plaintiff would squarely be covered by the wide sweep of the said phrase "Relating to recovery of possession" as found in section 41(1) of the Small Causes Courts Act. Supreme Court held that that suit could lie within the exclusive jurisdiction of Small Causes Court and Bombay and City Civil Court would have no jurisdiction to entertain such suit.

46. Supreme Court also on conjoint reading of section 41(1) of the Small Causes Courts Act with section 28 of the Bombay Rent Act held that Small Causes Court alone can entertain such suits or proceedings relating to recovery of possession of premises. It is held that nature of such suit as contemplated by section 41(1) of the Small Causes Courts Act and section 28 of the Bombay Rent Act is the same viz. it should be the suit relating to the recovery of possession of premises.

Supreme court held that the plaintiff-licencee claimed their rights as licensee to protect their possession in suit premises from licensor by involving the help of the court and such suit would have to be styled as suit relating to recovery of possession. Supreme Court in the said judgment adverted to its earlier judgment in case of Natraj Studios vs. Navrang Studios (supra).

47. Supreme Court has held that even before getting interim injunction or perpetual injunction, plaintiff will have to show that he is a licensee on monetary consideration as claimed by him and the defendant is licensor and that he has threatened to illegally disturb his possession of the suit premises. It is the substance of the relief which matters and not its form. It is held that once the plaintiffs contends that he is a licensee of the suit premises and the defendant is a licensor and on that basis he wants the assistance of the court to protect his possession, it would be a suit between a licensee and licensor relating to recovery of possession and would clearly attract the applicability of section 41 of the Small Causes Courts Act.

48. The full bench of this court in case of Prabhudas Damodar Kotecha has also considered at length the jurisdiction of Small Causes Court u/s 41(1) of the Presidency Small Causes Courts Act and has followed the judgment of supreme court in case of Mansukhlal Dhanraj Jain (supra) and has held that u/s 41(1) of the Presidency Small Causes Courts Act, the Court of Small Causes has jurisdiction to entertain and try all suits and proceedings between licensor and licensee either relating to any recovery of possession of any immoveable property or relating to the recovery of any licence fee or both.

49. Division Bench of this court in case of Charu K. Mehta and others vs. Leelavati K, Mehta Medical Trust (supra) has considered the rules of Bombay High Court (Original Side) Rules relating to originating summons and has also considered the provisions of Bombay Public Trust Act, 1950 including section 80 thereof. Division bench of this court has held that section 80 of the Bombay Public Trusts Act, 1950 contains an express bar to the jurisdiction of a Civil Court. It is held that the test u/s 80 is whether the question which is raised before the civil court is a question which is required by the Act has to be decided or dealt with by an officer or authority under the Act while exercising his power under the Act and whether such a decision is made final or conclusive under the provisions of that Act. In determining this issue, the Court has to consider the substance and not merely the form in which the claim before the civil court is made and the underlying object of seeking the real relief. It is held that if the question which is raised in that case in the originating summons is required to be determined or dealt with by an authority under the Act whose decision on such a matter is final and conclusive, the jurisdiction of the Civil Court would have to be held to have been ousted. It is held that to hold that the Assistant Charity Commissioner cannot entertain an application in the nature of an Originating Summons for construction of a deed of trust is to beg the question. The bar u/s 80 attaches to a civil court dealing with or deciding a question which the

Assistant Charity Commissioner is required to decide or deal with, and with finality. Once the two requirements of Section 80 are fulfilled, the bar is attracted.

50. It is held by the division bench that the rules on the original sides regulate the proceedings in civil cases brought before the High Court and governs the procedure which is to be followed on the invocation of the jurisdiction. The Bombay Public Trust Act, 1950 is a special law enacted by the state legislature to provide a comprehensive machinery to deal with the administration of public religious and charitable trusts in the State. The explicit bar in Section 80 would consequently apply to a suit on the Original Side in which the questions to be decided fall within the ambit of the bar created by the statute. It is held that the bar u/s 80 would extend to the procedure of an Originating Summons on the Original Side. It is held that such bar u/s 80 extends to every civil court. The division bench held that originating summons was barred by the provisions of section 80 of the Bombay Public Trust Act and is liable to be dismissed in view of bar of jurisdiction.

51. In the Judgment of Supreme Court in case of Prabhudas Damodar Kotecha (supra) it is held that the provisions u/s 28 of the Bombay Rent Act and Section 41 of the Presidency Small Causes Court Act clearly indicate that the nature of such suits are same. Supreme Court has held that the object of the Presidency Small Causes Court Act is to see that all suits and proceedings between a landlord and a tenant or a licensor and a licensee for recovery of possession of premises or for recovery of rent or license fee irrespective of the value of the subject matter should go to and be disposed of by Small Causes Court. The amendment in the year 1976 to Sec. 41(1) was to curb any mischief of unscrupulous elements using dilatory tactics in prolonging the cases for recovery of possession instituted by the landlord/licensor and to defeat their right of approaching the Court for quick relief and to avoid multiplicity of litigation with an issue of jurisdiction thereby lingering the disputes for years and years. It is held by the Supreme Court that all the suits between the landlord and a tenant and a licensor or a licensee relating to recovery of possession and license fee is brought under one umbrella i.e. under the Presidency Small Causes Court Act. It is held that it is difficult to accept the proposition that the legislature after having conferred exclusive jurisdiction in one Court in all the suits between licensee and licensor should have carved out any exception to keep gratuitous licensee alone out side its jurisdiction. By the said judgment the Supreme Court has upheld the view of the full bench of this Court and have dismissed the Special Leave Appeal filed against the said order and judgment.

52. The Division Bench of this Court in case of Carona Ltd. (supra) has considered the amendment to sub-section (1) of section 41 by Maharashtra Act 24 of 1984, the words " notwithstanding anything contained in elsewhere in this Act" in sub-section (1) were followed by the words "or in any other law for the time being in force." It is held that the minor inconsistency which the Legislature noted between sub-sections (1) and (2) of section 41 is removed by amending

the Act. It is held that the question whether the Small Causes Court has exclusive jurisdiction must be understood at the backdrop of the object which the legislature intended to subscribe. A comprehensive remedy has been provided under the said Act. The Division Bench has agreed with the views expressed by the learned single Judge of this Court in case of Siemens Ltd. Vs. Captech Online Pvt. Ltd. in which a learned single Judge has held that mere deletion of non obstante clause from section 41 would not make any difference. The legislature having created a special forum for adjudication of disputes of a particular nature by necessary implication, the jurisdiction of other civil Courts would also stand exclusively barred. I am respectfully bound by the Judgment of Division Bench in case of Carona Limited (supra) and the Judgment of Supreme Court in case of Prabhudas Damodar Kotecha (supra) which in my view, squarely apply to the facts of this case.

53. In my view, u/s 41(1) of the Presidency Small Causes Court Act, which is interpreted by the Supreme Court and this Court, if the suit is between the landlord and tenant or between the licensor and licensee relating to recovery of possession or other class of cases provided by it, the exclusive jurisdiction to entertain such suits vests with the Small Causes Court and the other Courts including civil Courts are barred from entertaining such suits.

54. In any event, u/s 9 of the Code of Civil Procedure, Courts shall have jurisdiction to try all suits of a civil nature except which are expressly or impliedly barred. I am of the view that since all the disputes between the landlord and tenant or licensor and licensee relating to recovery of possession and license fee vests exclusively with Small Causes Court under one umbrella u/s 41(1) of the Presidency Small Causes Court Act, jurisdiction of the civil Court is expressly barred. Even otherwise since jurisdiction to try such cases vests in a particular Court having special jurisdiction, jurisdiction of other Courts is impliedly barred.

55. The Division Bench of this Court in case of Charu Mehta (supra) has considered the provisions of the High Court (Original Side) Rules relating to originating summons and has considered Section 80 of Bombay Public Trusts Act and has held that proceedings which can be decided by the authorities under the said Act, cannot be decided by a civil Court including the originating summons filed under chapter VII of High Court (O.S.) Rules. It is held that such bar would also apply to such originating summons which are in the nature of a suit. Even in the matter before this court in case of Charu Mehta Vs. Lilavati Mehta Medical Trust (supra), the plaintiff had applied for interpretation of Trust Deed under Chapter VII of High Court (O.S.) Rules, which originating summons came to be dismissed by the Division Bench of this Court. In my view, Section 80 of the Bombay Public Trust Act is *pari materia* with Section 41(1) of Presidency Small Causes Act and thus the Judgment of Division Bench in case of Charu Mehta (supra) is applicable to the facts of this case. I am respectfully bound by the Judgment of Division Bench of this court in that case.

56. In so far as submission of Mr. Chagla learned senior counsel that the plaintiffs herein are not claiming any relief relating to recovery of possession but only seek interpretation of the Lease Deed is concerned, it is the case of the plaintiffs themselves in the written statement in the suit filed by the defendant herein in the Small Causes Court that the issues and reliefs claimed in the plaint in the Small Causes Court by the defendant herein and what is claimed in the originating summons by the plaintiffs herein are same and to avoid conflict of decisions, that suit shall not be heard till this originating summons is disposed off. This court cannot ignore the stand taken by the plaintiffs herein that there is similarity of issues and reliefs claimed in both the proceedings in the written statement filed by the plaintiffs in that suit filed before the Small Causes Court. Be that as it may, a perusal of the questions formulated by the plaintiffs in the originating summons which the plaintiffs seek a interpretation thereof in this Court and the averments made in the plaint clearly indicate that it is the contention of the plaintiffs that the plaintiffs under the indenture of lease is entitled to use the suit land other than for the purpose of running a cotton textile mill. From the averments made in the plaint and the annexures thereto which are referred in the plaint, it clearly indicates that there is a dispute between the parties whether plaintiffs under the indenture of lease were allowed to use a suit land for the purpose other than the purpose of running a cotton textile mill. It is contended by the defendant in the correspondence that the plaintiffs have committed breach of the terms of lease agreement which contention is disputed by the plaintiffs. The defendant has already threatened to take action against the plaintiff prior to plaintiffs filing this originating summons.

57. A perusal of the Rules particularly Rule Nos. 258 and 259 clearly indicates that the rights and liabilities of the parties would be crystallized in the judgment and decree in the originating summons. This Court may pronounce judgment on the originating summons and any order made by this Court in the originating summons shall be drawn up as a decree of the Court and can be executed as a decree and will be binding upon the parties to the originating summons and would determine the rights. The plaintiffs themselves have raised this contention in the written statement in Small Causes Court. Even during the course of argument, Mr. Chagla learned senior counsel appearing for the plaintiffs fairly stated that any interpretation as sought by the plaintiffs in this originating summons in respect of the provisions of the lease deed which is subject matter of the suit which is filed by the defendant in the Small Causes Court, such interpretation would be in the form of a judgment and would be binding on both the parties and also the Small Causes Court in the pending suit. In my view, considering the averments made in the plaint and annexures which are referred in the plaint, it is clear that the plaintiffs have raised the dispute as lessee in respect of the suit property and have filed the proceedings in view of the alleged threat of dispossession by the defendant herein.

58. In my view, merely because the plaintiffs are in physical possession of the suit land, this Court cannot accept the submission of the plaintiffs that the

present suit would not be a suit relating to recovery of possession. Supreme Court has dealt with the concept of suit relating to recovery of possession and suit relating to possession in great detail in the judgment in case of Mansukhlal Jain (supra). The relevant paragraphs of the said Judgment are already highlighted in the earlier paragraphs of the Judgment. Court has to consider the purpose object and intent of the plaintiffs to file a suit in entirety. The submissions of the learned senior counsel in my view are contrary to the Judgment of Supreme Court and are accordingly rejected.

59. A perusal of the questions formulated in the originating summons would clearly indicate that the manner in which the questions are formulated, is a clear case of ingenious drafting to disguise the real object of the suit. In my view, the reliefs as claimed if granted would be in the suit which is in the nature of the suit relating to recovery of possession of the suit land, which in my view, is clearly barred u/s 41(1) of Presidency Small Causes Court Act. In my view what reliefs cannot be claimed directly cannot be claimed and/or granted indirectly.

60. In so far as Judgment of this court in case of Navyug Co-operative Housing Society (supra) is concerned, perusal of paragraph 4 of the said Judgment in which the prayers in the suit are extracted, clearly indicates that the suit was not relating to recovery of possession of the leased property. The learned single Judge has held in the said Judgment that those prayers clearly show that none of those prayers were relating to recovery of possession of the demised premises. In my view, the said Judgment is of no assistance to the plaintiffs and in any case clearly distinguishable with the facts of this Case.

61. A perusal of the Judgment of Division Bench in case of Mazda Theatres (supra) indicates that both parties in that suit (originating summons) had applied for interpretation of document from this Court. There was no issue raised by any of the parties to that suit regarding jurisdiction of the High Court in entertaining the originating summons in view of bar u/s 41(1) of Presidency Small Causes Court Act. Division Bench of this Court has not decided that in spite of applicability of Section 41(1) of Presidency Small Causes Act, High Court can consider a dispute of similar nature in the originating summons. In my view, the said Judgment is thus not applicable to the facts of this case and is of no assistance to the plaintiffs.

62. In so far as Judgment of this Court in case of Vishnu Dutt Vashistha (supra) relied upon by Mr. Chagla learned senior counsel is concerned, a perusal of the said Judgment indicates that a finding is rendered that the averments in the plaint leave no doubt that the plaintiffs were not attempting directly or indirectly to secure or obtain the possession of the passage but the suit was filed in the City Civil Court for an injunction restraining the defendants from permitting the formation of access to the shops. The facts of that case before this Court are thus clearly distinguishable with the facts of this case and is of no assistance to the plaintiffs. I therefore pass the following order:-

(i) This court has no jurisdiction to decide the Originating Summons taken out by the plaintiffs in view of Section 41 of the Presidency Small Causes Act and in view of the filing of a suit by the defendant in the Small Causes Court. Issue is thus answered in negative. Since Originating Summons cannot be returned for presentation before proper Court having jurisdiction, Suit No. 1774 of 2009 and Originating Summons No. 1112 of 2009 are dismissed.

(ii) No order as to costs.