
(2011) 10 BOM CK 0161

In the Bombay High Court

Case No : Writ Petition No. 8355 of 2011

Depe Global Shipping Agencies Pvt. Ltd.

APPELLANT

Vs

MPIL Corporation Ltd.(formerly known as Mather and Platt
(India) Ltd.)

RESPONDENT

Date of Decision : 21-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33
Companies Act, 1956 — Section 391
Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 40, 41, 42, 43, 44
Maharashtra Rent Control Act, 1999 — Section 3(1)
Presidency Small Cause Courts Act, 1882 — Section 41, 41(1), 41(2)

Citation : (2012) 2 BomCR 326 : (2012) 2 MhLj 318

Hon'ble Judges : Girish Godbole, J

Bench : Single Bench

Advocate : Haresh Jagtiani, assisted with Mr. Yashpal Jain, Mr. Suprabh Jain, Mr. Manish Mirpuri instructed by Haresh Jagtiani and Associates, for the Appellant; D.D. Madan A/w Mikhail Bahl instructed by . Sonal Doshi and Co., for the Respondent

Final Decision : Allowed

Judgement

Girish Godbole, J.—Heard Mr. Jagtiani, Sr. Counsel for the Petitioner and Mr. Madan, Sr. Counsel for Respondent. Rule. By consent Rule made returnable forthwith and heard finally.

2. Present Writ Petition filed under Article 226 and 227 of the Constitution of India challenges the Judgment and Order dated 26/9/2011 passed by the learned Judge of the Court of Small Causes at Mumbai presiding in C.R. No. 19 thereby dismissing the Application Exh. 26 filed by the Plaintiff in TE & R Suit No. 198/211 of 2003. Brief background of the facts leading to this litigation is essential.

3. It is not in dispute that the Petitioner Plaintiff is the landlord and Respondent

Defendant is tenant in respect of the suit premises. The Maharashtra Rent Control Act, 1999 has been brought into force w.e.f. 30/3/2000. Section 3(1)(b) of the said Act provides that provisions of that Act will not apply to a limited company having a paid up share capital of Rs. One Crore or more. In so far as Mumbai is concerned, the jurisdiction to try and entertain the suit between the landlord and tenant in case where relationship is controlled by Maharashtra Rent Control Act, 1999 or not is conferred on the Court of Small Causes established under the Presidency Small Cause Courts Act, 1882. Section 41 of the said Act reads thus:

41. (1) Notwithstanding anything contained elsewhere in this Act 4[***]but subject to the. provisions of sub-section (2), the. Court of Small Causes 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 the licence 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 licence 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 II of any other law for the time being in force, apply.]

4. In this case it is not in dispute that as on 30/3/2000, share capital of Respondent Company was more than Rs. One Crore. It is also not in dispute that the Respondent Defendant thereafter filed Company Petition No. 381 of 2000 for accepting scheme of compromise and arrangement in which an order was passed by the learned Single Judge of the Company Court of this Court exercising powers under Companies Act, 1956 on 18/4/2001 and by that order, it was inter alia provided that the share capital of the Respondent Company will stand reduced to Rs. 75 Lakhs with retrospective effect w.e.f. 1/4/1999.

5. On this background, the Petitioner filed TE & R Suit No. 198/211 of 2003 on 18/7/2003 for eviction of the Respondent on the ground that the Respondent was not protected by the provisions of 1999 Act and hence, the Suit was filed expressly u/s 41 of the 1882 Act.

6. The Respondent filed its Written Statement on 20/10/2003 and in paragraph-10 of the Written Statement it is inter alia contended thus:

10. With reference to paragraphs 7 of the plaint, Defendants deny that their paid up share capital on 31st March 2000 was more than Rupees One Crore. Defendants submit on 31st March 2000 their paid up share capital was Rs. 75,60,000/-. Defendants crave leave to refer to and rely on order dated 18th April 2001 passed by the Hon,ble High Court of Judicature and certificate issued

by the ROC, Bombay in Company Petition No. 381 of 2000. Defendants deny that provisions of Maharashtra Rent Control Act are not applicable to Defendants. Defendants deny that they are not entitled to claim protection under the Maharashtra Rent Control Act, 1999. Defendants deny that they are liable to hand over vacant possession of the suit premises to Plaintiffs.

7. At this stage the Petitioner filed an application for amendment of the plaint which was numbered as interim Notice No. 222 of 2006 and sought to incorporate averments to the effect that the aforesaid Judgment and Order dated 18/4/2001 passed by the Company Judge had been fraudulently obtained by the Defendant Company solely with a view to bring itself under the protective umbrella of the provisions of the 1999 Act. This Application was opposed by the Respondent. By Judgment and Order dated 2/11/2006, the learned Judge of the Trial Court allowed the Application for amendment. It is necessary to note that while opposing the said Application for amendment, the principal contention of the Respondent Company was to the effect that the Small Causes Court does not have any jurisdiction to go into the aspect whether the Order passed by the High Court had been fraudulently obtained by the Respondent or not and on that basis the Application for amendment was opposed. While allowing the said Application on 2/11/2006, the learned Judge of the Trial Court has noticed that whether the contentions or facts which are being raised by way of proposed amendment are within the jurisdictional ambit of that Court or not can be considered at the stage of hearing. It is also necessary to note at this stage that even prior to filing of this Application the Trial Court had framed issues and as many as 9 issues had been framed on 15/3/2004. It is necessary to bear in mind that the Application for amendment was subsequently filed and allowed and, therefore, obviously the issues as framed earlier did not cover the controversy which was sought to be raised by the amendment application bearing Interim Notice No. 222 of 2006.

8. The order allowing the amendment was challenged by the Respondent Defendant by filing Writ Petition No. 213 of 2007. That Writ Petition was heard and decided by learned Single Judge (B.R. Gavai, J) by Judgment and Order dated 4/5/2011. It is necessary to note paragraphs 3, 4 and 6 of the said Judgment which read thus:

3. Shri Bharucha, learned Senior Counsel submits that the amendment, which is allowed, permits the plaintiff to raise a ground which is beyond the jurisdiction of the learned Small Causes Court. He submits, that in effect, the plaintiff by way of an amendment has sought to challenge the order passed by this Court in a Company Petition which cannot be gone into by the learned Small Causes Court. He further submits, that the amendment ought not to have been allowed by the learned Trial Court.

4. Shri Jagtiani, learned Senior Counsel on behalf of respondent ? plaintiff on the contrary submits, that the amendment only seeks to incorporate the averment that the order which was obtained by the defendant in a Company Petition, was obtained fraudulently behind the back of the plaintiff and as such the said order

is not binding on the plaintiff.

6. The learned Trial Court, upon considering the rival submissions has found that the amendment which is sought to be incorporated was with respect to the fact which was came to the notice of the plaintiff subsequent to filing of the plaint. The learned Trial Court has also found that the amendment which is sought to be incorporated cannot be said to be unconcerned with the controversy between the parties. In so far as the contention of the petitioner regarding the suit being beyond the jurisdiction of the learned Small Causes Court is concerned, the learned Trial Court has rightly found that the defendant-petitioner would have a liberty to file an additional written statement to meet the pleadings of the plaintiff and if the pleadings regarding the jurisdiction are raised by the petitioner--defendant, the same would be considered at the stage of the hearing of the suit.

9. Thereafter the Respondent Plaintiff filed a Review Petition and it is necessary to note ground No. (C) in the Review Petition which reads thus:

(C) That the Hon,ble Bombay Presidency Small Causes Court erred in not appreciating that the present Respondents had not taken any objection to the Scheme and therefore could not do so now by introducing the proposed amendments.

It was sought to be contended that the proposed amendment was barred by limitation and even in the original plaint case of unlawful reduction of share capital has been pleaded. Even this Review Petition was dismissed by learned Single Judge (B.R. Gavai, J) by order dated 25/5/2011. After dismissal of the Review Petition, the Respdent filed its additional Written Statement on 2/8/2011. Additional Written Statement clearly shows that the Defendant has dealt with all the averments in the plaint which were incorporated by the amendment and raised all possible defences in respect of the amended plaint. In paragraph 7 of the Written Statement there is a specific ground that the defendant did not have any intention to defraud the Plaintiff and it was also denied that with such malafide intention share capital of the Defendant had been shifted to another company.

10. At this stage the Petitioner Plaintiff filed an application for recasting the issues in September, 2011 and prayed that in view of the substantial amendment in the plaint and in view of the fact that the additional Written Statement had been filed, it was necessary to frame 2 additional issues.

11. This Application was opposed by the Respondent on the ground that in the Written Statement the jurisdiction of the Court of Small Causes to go into the validity or otherwise of reduction of share capital of Defendant had already been challenged and if the Plaintiff is aggrieved by the reduction, the only remedy available to the Plaintiff is to challenge the Order of the Company Court before appropriate Appellate Authority.

12. Learned Judge of the Court of Small Causes thereafter passed the impugned order which is noted herein above. The gist of the reasons of the Learned Judge can be found in paragraph-6 of the Trial Court Judgment which reads thus:

6. On perusal of the provisions of Section 42, 43 and 44, it appears that the said provisions are pertaining to the relevancy of the Judgment and decree in the proceeding. The suit is for possession of suit property under the PSCC Act and the scope of the inquiry is limited. There is a substance in the argument advanced by the Ld. Counsel for the defendants that the said order pertaining to reduction of capital was given by the Hon,ble High Court after following the procedure and the defendants cannot challenge the said order before this Court by raising the contention that the said order is obtained by the plaintiffs fraudulently. There is no doubt if any order or decree is obtained by fraud, that cannot be challenged before this Court. Therefore, there is no need to frame the additional issues as suggested by the Plaintiffs. If the Plaintiffs are aggrieved by the order of Hon,ble High Court reducing the capital of the defendants, the plaintiffs may approach the proper coram and challenge the legality and validity of the said order, but in the instant case, the suit is for possession under the PSCC Act and the plaintiffs want to evict the defendants alleging that the defendants are not protected under the Act. Thus, I pass the following order.

ORDER

The application is rejected.

It is obvious that there are some typographical errors in the Judgment as originally passed and at one place instead of the word 'plaintiffs' word 'defendants' has been written and vice versa at the other place. This is the order which is impugned in this Writ Petition.

13. Mr. Jagtiani, Learned Sr. Counsel appearing for the Petitioner submitted that since the amendment of plaint was allowed and since an additional Written Statement was filed, an issue of fact as also an issue of law has arisen and since the amendments were made after the framing of the issues, the Trial Court committed not only an error apparent on the face of the record but the Trial Court has also clearly failed to exercise the jurisdiction vested in it by law. He submitted that even this failure of the Trial Court which is also an error apparent on the face of record will not only result in delay leading to causing a lot of injustice and prejudice to the Petitioner but would also lead to unnecessary and avoidable multiplicity of judicial proceedings in as much as in the absence of an issue, the evidence on that point may not be permitted to be led even though the pleadings are allowed to be brought in by the amendment of the plaint and additional written statement. He further submitted that interference of this Court was warranted in as much as no prejudice would be caused to the Respondent and only on account of framing of an additional issue, it did not mean that the Court was bound to exercise jurisdiction in respect of the issues which were framed and that aspect will have to be determined at the time of Trial of the suit.

14. Mr. Jagtiani relied upon unreported Judgment of the Learned Single Judge (Dr. D.Y. Chandrachud, J) dated 27/1/2004 in Writ Petition No. 93 of 2003 and pointed out that if the Plaintiff in a Civil Suit raises a specific contention regarding fraudulently obtaining an order from the Company Judge u/s 391 of the Companies Act, 1956, such a fact becomes a relevant fact u/s 44 of the Indian Evidence Act, 1872.

15. On the other hand Mr. Madan, learned Sr. Counsel opposed the Writ Petition vehemently by raising 4 grounds by advancing following submissions :

(a) At the outset it was submitted that the Writ Petition is not maintainable since it was filed against an interlocutory order. Reliance was placed on paragraph-113 (3) of the Judgment of the Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, .

(b) Reliance was also placed on the Judgment of Justice Hidayatullah of Bench of 5 Judges reported in AIR 1953 Nag 89 in the case of Bhailal Jagadish vs. Additional Deputy Commissioner, Akola & Anr. and particularly on the observations in paragraphs ? 7 to 11 of the said Judgment and based on that it was submitted that the power of Superintendence conferred on the High Court is a power merely to correct the errors of the jurisdiction and it does not confer any power on High Court to hear Appeals where such Appeals do not lie nor does it give power to substitute a decision, which the High Court thinks is correct, in place of the decision of the inferior court or tribunal.

(c) Reliance was also placed on the Judgment of the Division Bench in the case of Batuk K. Vyas Vs. Surat Borough Municipality and Others, and particularly the observations in paragraph-8 to the effect that even if the Judge has committed an error, if the error is committed within confinement of the jurisdiction conferred on the Judge, the High Court cannot interfere. He submitted that the only remedy available to the Petitioner is to challenge the order in appeal which may be required to be filed in case the Judgment is delivered against the Petitioner and even if the Judgment is delivered in favour of the Petitioner but the finding on the particular controversy is against the Petitioner, the Petitioner can always raise challenge under Order 41 Rule 22 or Rule 33 of the Code of Civil Procedure, 1908; therefore, the Petitioner has an alternative and efficacious remedy which is a good ground for refusing to exercise the extraordinary jurisdiction under the Constitution of India. It was alternatively submitted that the issues as framed are sufficient and Issue Nos. 1 and 2 already cover entire controversy including the controversy arising out the amendment of the pleadings; and since issues are sufficient, no interference is warranted and at the highest refusal to frame issue would only be an error within the jurisdiction conferred on the Trial Court.

(d) It was lastly submitted that Section 44 of the Indian Evidence Act, 1872 has no application and the Judgment of the learned Single Judge (Dr. D.Y. Chandrachud, J) was sought to be distinguished by pointing out that the learned Single Judge has not considered the fact that Sections 40, 41, 42 and 44 are

attracted only in case where the Judgment is otherwise relevant under Sections 40 to 42.

16. I have carefully considered the rival submissions. In my considered opinion, the learned Judge of the Trial Court has committed an error apparent on the face of the record and if this error, which is apparent, is not corrected at an early stage of litigation, it may result in unnecessarily delaying the trial of the proceeding at subsequent stage.

17. I have already noted Section 3(1)(b) of the 1999 Act. The said Section carves out an exception against the limited company having share capital of Rs. One Crore and more. The moment limited company's share capital is reduced below Rs. One Crore, it gets protection of the Maharashtra Rent Control Act, 1999 and if the share capital rises above Rs. One Crore the protection is lost. The Suit is filed u/s 41 of the 1882 Act on the ground that the protection of the Maharashtra Rent Control Act, 1999 is not available to the Respondent/Defendant. This is an averment which has been made in the plaint so as to show the Court that the Court can exercise jurisdiction vested in it u/s 41(1) of the 1882 Act and that the case in hand is not one governed by the exceptions carved out in sub-section 2 of Section 41 of the 1882 Act.

18. In the earlier round of litigation, the Petitioner had been allowed to amend the plaint, and, precisely on the ground on which the present Application for recasting issues is opposed, the Application for amendment had also been opposed. That application was allowed and the challenge to that order has failed before this Court. Paragraph-6 of the Order of the learned Single Judge (B.R. Gavai, J) clearly shows that one of the contentions which was advanced before this Court was to the effect that such a plea regarding the fraudulent reduction of share capital by using the machinery of the Company Court in proceedings under the Indian Companies Act, 1956 can never be raised before the Court of Small Causes. This argument has been rejected. Once elaborate pleadings are allowed to be brought in by the amendment of plaint and additional Written Statement, then, obviously the parties are at issues and such issues had to be framed..

19. Order 14 of the Code of Civil Procedure, 1908 provides that issues are raised when a material proposition of fact or law is affirmed by one party and denied by the other. Rule 1(2) provides that material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Sub-rule 3 provides that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. The issues are of 2 kinds. (i) issues of fact and (ii) issues of law. In the present case there is an assertion of material proposition of fact to the effect that according to the Petitioner/Plaintiff, the Respondent/-Defendant had fraudulently procured an order in proceedings under the Indian Companies Act, 1956 for reducing share capital to Rs. 75 Lakhs solely with a view to get protection under the umbrella of the Maharashtra Rent Control Act, 1999. This material proposition of fact has been denied by the Respondent.

The amended plaint also raises the material proposition of law in as much as one of the question which would arise in such situation is : when the 1999 Act came into force on 30th March, 2000, the share capital of the Respondent was admittedly more than Rs. One Crore and, thereafter, but before the filing of the Suit the same has been reduced with retrospective effect to Rs. 75 Lakhs w.e.f. 1/4/1999. The legal effect of such a reduction has to be considered by the Trial Court and therefore even this material proposition of law gives rise to an issue of law which also arises.

20. It is not necessary that the material proposition of fact must be essentially referable to a relevant fact as contemplated by the Indian Evidence Act, 1872. However, in my opinion, this is a case where section 40 and 44 are clearly applicable. Sections 40, 42, 43 and 44 read thus:

40. Previous judgments relevant to bar a second suit or trial.-The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.-Judgments, orders or decrees other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.-Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.-Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant u/s 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

In the present case issue No. 1 as already framed is about jurisdiction of the Court. According to me, whether the Respondent/Defendant enjoys the protection of the 1999 Act or whether it 18 908.wp8355.01 does not enjoy the protection of 1999 Act is the matter which has to be decided by the Court of Small Causes, but in either cases it is the Court of Small Causes alone which has jurisdiction to try such a suit since it is a suit between landlord and tenant relating to recovery of possession of the tenanted premises. In view of this issue of jurisdiction will have to be essentially read and considered as an issue about maintainability of suit and not as a issue jurisdiction since it is not the case of the Defendants that the Court of Small Causes does not have the territorial or pecuniary or subject jurisdiction. The defence is essentially about maintainability of the suit u/s 41 of the 1882 Act by raising a contention that the Defendant

Company is covered u/s 3(1)(b) of the 1999 Act. In the back drop of the above, in my opinion, Section 40 of the Indian Evidence Act, 1872 will certainly make the disputed question of fact about fraudulently obtaining the order from the Company Court a relevant fact. The existence of the Judgment of the Company Court is not in dispute, but it is contended (as seen in paragraph-10 of the Written Statement originally filed) that on account of the said Judgment the Small Causes Court will have to presume that the share capital of the Defendant company is less than Rs. One Crore, and, therefore Small Causes Court does not have jurisdiction to entertain the suit which is filed under the provisions of Section 41 of the 1882 Act on the ground that the suit premises fall within the exceptions carved out by the sub-section 2 of the said Section. Thus, defence which is raised is a relevant fact both for the purpose of deciding whether the order of the Company Judge prevents the Court of Small Causes from taking cognizance of the suit or hold trial and the question is whether the Small Causes Court can take cognizance of the suit or hold trial with the pleadings as they have been permitted to be incorporated. If the amendment to the plaint had not been allowed it could have probably been argued by the Respondent that section 40 does not apply. Even this is a doubtful proposition since in paragraph-10 of the Written Statement as originally filed, the Defendant had already raised the contention that would ultimately make the said issue a relevant fact in issue u/s 40. However, after the amendment, the only conclusion which has to be drawn is that the case is governed by Section 40.

21. In any case, since fraud has been alleged while procuring the Judgment of the Company Court. Whether fraud is actually played or not is not a matter to be decided at this stage, and in my opinion it was necessary to frame issues which cover the amended pleadings.

22. Though Mr. Madan has contended that the Writ Petition is not maintainable and the only remedy is to challenge the order in an Appeal against final Judgment, nature of the impugned order is such that it is not an interlocutory order. It is an order which determines conclusively, at least at the stage of the trial of the Suit before the Trial Court, the question regarding whether an issue should be framed or not. The Supreme Court in the case of Shah Babulal Khimji(supra) has considered the question as to what is an intermediary and/or interlocutory Judgment. Though Mr. Madan has relied upon the observations in paragraphs-113 and 114, in my opinion, the conclusions recorded in the paragraph-115 of the said Judgment are more to the point and applicable to the facts of this case. Judgment refusing to frame issue which arises on the pleadings is a Judgment which decides the matters of moment and certainly affects vital rights of the Petitioner/Plaintiff to lead evidence in support of its claim. In the absence of such an issue an objection is bound to be raised for leading evidence. The Trial Court would be called upon to determine such objection during the process of trial. Arguments will be advanced and an order will be invited. All this is bound to delay the trial of the Suit. The Suit is filed in the year 2003 and is still pending after 8 years. The 21 908.wp8355.01

legislative intent behind amending the Code exhaustively in the year 2002 is to ensure that the trials are conducted expeditiously and even while exercising jurisdiction under the Constitution of India this Court cannot overlook such legislative intent. For the same reason, though there is no dispute about proposition of law laid down by the Judgment of the 5 Judges Bench of the Nagpur High Court in the case of Bhailal Jagadish(supra) or the Division Bench of this Court in the case of Batuk Vyas(supra), ratio of both the Judgments is not applicable to the facts of this case. On the other hand, in a situation which is more akin to the controversy in dispute, the Judgment of the learned Single Judge (Dr. D.Y. Chandrachud, J) lays down the proposition of law and a binding precedence which directly covers the controversy. The criticism of the said Judgment advanced by learned Senior Counsel Mr. Madan to the effect that Justice Dr. D.Y. Chandrachud has not considered Sections 40 to 43 of the 1872 Act, is also not correct and mere reading of that Judgment shows that the learned Judge has considered said sections. Paragraph-7 of the said Judgment of the Learned Single Judge to the extent it is relevant reads thus :

7. However there is one aspect of the matter in which, to my mind, the intervention of this Court is necessary at the present stage in order to prevent a manifest failure of justice. u/s 44 of the Evidence Act, 1872 any party to a suit or other proceeding is entitled to show that any judgment, order or decree which is relevant under Sections 40, 41 and 42 of the Act and which has been proved by the adverse party was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. The specific defence of the Petitioner is that the order passed by the High Court in proceedings u/s 391 of the Companies Act, 1956 was obtained by fraud. Counsel appearing on behalf of the Petitioner submitted that on 31st March 2000 when the Rent Control Act came into force in the State, the share capital of the Respondent was admittedly in excess of Rs. 1 crore. The Respondent was not a protected tenant upon the enforcement of the Act. The order of the Calcutta High Court was passed on 10th May 2000... Counsel for the Petitioner has relied upon the judgment of the Supreme Court in Gram Panchayat of Village Naulakha Vs. Ujagar Singh and Others, ,in which it has been held, accepting the view of the Allahabad, Calcutta, Patna and Bombay High Courts, that there is no necessity to file an independent suit for a declaration that a judgment, decree or order which has been previously obtained and which is relevant under Sections 40, 41 and 42 was obtained by fraud or collusion. The Supreme Court held that no independent suit as a condition precedent is necessary. At this stage, it is neither appropriate nor proper for the Court to comment upon the merits of the contention of the Petitioner. However, in my view, having regard to the provisions of Section 44 of the Evidence Act, it would be necessary that the Petitioner be furnished an opportunity of leading evidence in rebuttal. The Respondent has in the course of the deposition of its witness set up the order of the Calcutta High Court as a ground for urging that the protection under the Rent Act has not been lost. The Petitioner has, therefore, had no opportunity as of date to set up its plea of fraud because a

reference to the order of the Calcutta High Court came for the first time on 26th December 2001 after the Examination-in-Chief of the Petitioner was concluded.

23. In present case also the dispute is regarding reduction in the share capital and, hence, this Judgment is binding precedent directly applicable to the facts of the present case though that Petition arose out of a dispute regarding permission to argue question during the course of oral evidence. In my considered opinion, the error which has been committed by the Learned Judge of the Trial Court is not an error within jurisdiction but the learned Judge of the Trial Court has failed to exercise jurisdiction expressly conferred on him by law and if this error is not corrected, it will result in a manifest failure of justice. The Learned Judge has clearly committed an error apparent on the face of record. Hence a case for interference under article 227 of the Constitution of India is made out. Accepting Mr. Mandan's argument that the only remedy available to the Petitioner is to challenge the correctness of the order in Appeal or subsequent proceedings would clearly amount to turning Nelson's Eye to a manifest error of jurisdiction and failure to exercise jurisdiction which cannot be done. The impugned Judgment and Order clearly overlooks not only the provisions of Order 14 of the Code, Section 41 of the 1882 Act, the frame of the suit and the nature of the controversy, the amended pleadings and the provisions of sections 40 and 44 of the 1872 Act but also completely overlooks the ground on which the earlier Writ Petition being Writ Petition No. 213 of 2007 has been filed and the Judgment of the learned Single Judge (B.R. Gavai, J) dismissing the said Writ Petition. Hence this is a fit case for exercising jurisdiction as I have reached a conclusion that the learned Judge has taken a view which was impossible to take and in case where issues of both of fact and law clearly arises a refusal to frame such issues is a clear case of refusal to exercise jurisdiction and refusal to perform the statutory obligations cast upon the learned Judge of the Trial Court. The High Court, under Article 227 of the Constitution of India has the jurisdiction to ensure that all subordinate Courts act in accordance with well established principles of law and is vested with power of superintendence even in matters where no appeal or revision lies to High Court. Hence the Petition deserves to be allowed.

24. Before parting with this Judgment it is also necessary to note that, based on the date of commencement of the 1999 Act, the date of filing Company Petition for accepting scheme for compromise and arrangement, the date of the order allowing the said Petition on 18/4/2011 with retrospective effect on 1/4/1999 an issue of law also arises as to whether a company which is not governed by the provisions of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999 at the commencement of the said Act as on 31/3/2000 can cease to be governed by the said Section and claim protection of the said Act on account of subsequent reduction in the share capital prior to the filing of the Suit. Apart from this additional issue No. 2 as suggested by the Petitioner also needs to be recast. Mr. Madan alternatively submitted without prejudice to his first contention that none of the two additional issues arise from his pleadings, the issue cannot be framed so as to cast burden on the Defendant. Mr. Madan is justified in pointing out that

the issue purported to place burden on the Respondent/Defendant rather than placing the burden on the Petitioner/Plaintiff.

25. Hence I pass the following order:

(a) The impugned Judgment and Order dated 26/9/2011 is quashed and set aside. Apart from the additional issue No. 1 as suggested by the Petitioner, two more issues will have to be framed by the Trial Court. Additional issue No. 2 as suggested by the Petitioner will have to be slightly modified by placing burden on the Plaintiff and issue of law as indicated above in addition to the additional 2 issues will also have to be framed.

(b) The Additional issues will read thus:

(i) Does the plaintiff prove that the defendant has fraudulently obtained the order dated 18th April 2001 reducing the paid up capital of the defendant ?

(ii) Does the Plaintiff prove that the order dated 18th April, 2001 is not binding on the plaintiff ?

(iii) Whether a Company which is not enjoying the protection of the Maharashtra Rent Control Act, 1999 as on 31/3/2000 being the date of commencement of the Act can subsequently get protection on account of reduction of its share capital below Rs. 1 Crore and whether Section 3(1)(b) of the said Act ceases to apply on account of such reduction ?

(c) Rule made absolute in the aforesaid terms with no order as to costs.

26. At this stage, Mr. Madan prays for staying this order for a period of 6 weeks to enable the Respondent to challenge this order. Order shall remain stayed for a period of 6 weeks.