

(2017) 06 BOM CK 0165
In the Bombay High Court
Case No : 267 of 2017

M/s. New Era Fabrics Ltd.

APPELLANT

Vs

Smt. Bhanumati Keshrichand Jhaveri, & Ors.

RESPONDENT

Date of Decision : 07-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 115](#) - Revision
[Negotiable Instruments Act, 1881](#), [Section 138](#) - Dishonour of cheque for insufficiency, etc., of funds in the account

Citation : (2017) 06 BOM CK 0165

Hon'ble Judges : R. M. Savant

Bench : SINGLE BENCH

Advocate : M M Vashi, Gaurang Mehta, Neelam Dedhia, M P Vashi, Sharan Jagtiani, Sushma Singh, Jaydeep Thakker

Final Decision : Dismissed

Judgement

1. The revisionary jurisdiction of this Court under Section 115 of the Code of Civil Procedure is invoked against the judgment and order dated 27/02/2017 passed by the Appellate Bench of the Small Causes Court by which order the Revision Application filed by the Applicant herein i.e. the Defendant No.1 came to be dismissed and resultantly the judgment and order dated 26/03/2014 passed by the Trial Court came to be confirmed. By the impugned judgment and order dated 27/02/2017, the Applications at Exhibits 31, 32 and 55 filed by the Applicant herein also came to be rejected.

2. The facts necessary to be cited for adjudication of the above Civil Revision Application can in brief be stated thus : The Applicant herein is the original Defendant No.1 in the suit in question being TER Suit No.48/62/2009. The said suit has been filed by the Respondent Nos. 1 to 12 herein who are the original Plaintiffs. The said suit has been preceded by a Notice dated 11/02/2009, served/received by the Defendant No.1 on 14/02/2009, by which the tenancy of the Applicant herein in respect of the plot of land in question came to be terminated.

The said suit has been filed for possession of the premises. In so far as the plaint is concerned, it has been averred in the plaint that the Applicant herein is a public limited company and its share capital is over Rs.1 Crore and therefore it is not entitled to the protection of the Maharashtra Rent Control Act, 1999 (for short "the Rent Act.") In the said suit the Respondent Nos.1 to 12 herein filed an application (Exhibit 9) for interim relief.

3. To the said application, the Applicant herein i.e. the Defendant No.1 filed a reply wherein a preliminary issue as regards jurisdiction of the Trial Court to entertain and try the suit under Section 41 of the Presidency Small Causes Courts Act (for short "the PSCC Act") was raised. It was the case of the Applicant that its share capital is Rs.93,74,000/which was below Rs.1 Crore and therefore it is entitled to the protection of the Rent Act. A written statement came to be filed by the Applicant herein i.e. the Defendant No.1. In the said written statement it was averred to the following effect :

" 11(ii) That the Plaintiffs have also taken out an Application for Injunction being Ex.No.10 of 2009 to which the Defendant No.1 has filed an Affidavit in Reply dt. 6-4-2009 limited to the Preliminary Objection of Jurisdiction on the ground that the Defendant No.1 does not have a Paid Up Share Capital of Rs.One Crore or more and in support of the said contention the Defendant No.1 have annexed at ExA to the said Reply dated 6.4.2009 the Certificate of the Auditors of the Defendant No.1 showing the Paid Up Share Capital of the Defendant No.1 at Rs.93,74,000/(Rs. Ninety Three Lakhs Seventy Four Thousand only) as on 30-9-2008 with a True Copy of the Certified Auditors Report and Balance Sheet as on 31-3-2008 of the Defendant No.1."

The relevant paragraph of the said Reply dated 06/04/2009 is paragraph 2 which for the sake of ready reference is reproduced herein under :

" 2) At the outset I submit that this Hon"ble Court has no Jurisdiction to entertain, try and decide the above suit and/or that the above suit is not maintainable and liable to be dismissed on the ground that the Defendant No.1 does not have a Paid Up Share Capital of Rs.One Crore or more and consequently the provisions of the Maharashtra Rent Control Act, 1999 apply to the suit premises and therefore this Hon"ble Court has no Jurisdiction to entertain try and decide the suit under the provisions of Section 41 of the Presidency Small Causes Court Act, 1882, Hereto annexed and marked Ex A (Colly) is a copy of the Certificate of the Auditors of the Defendant No.1 showing the Paid Up Capital of the Defendant No.1 at Rs.93,74,000/(Rs. Ninety three Lakhs seventy four thousand only) as on 30-9-2008 with a True Copy of the Auditors Report and Balance Sheet as on 31-3-2008 of the Defendant No.1."

4. In view of the preliminary objection raised by the Applicant - Defendant No.1 as regards the jurisdiction of the Trial Court, the Trial Court framed a preliminary issue which was to the following effect :

" Whether this court has jurisdiction to entertain, try and decide the present

suit?"

5. The Applicant - Defendant No.1 led evidence of as many as 8 witnesses amongst whom was one of its Directors Shri R K Agarwal and one Shri S P Chugha who was the erstwhile Deputy Registrar of Companies. The Applicant - Defendant No.1 also produced a host of documents to buttress its case that on the date of termination of the tenancy i.e. on 14/02/2009 its share capital stood reduced to Rs.93,74,000/-. The said documents were interalia, a copy of the Resolution passed by the Board of Directors purportedly on 01/03/2007 not bearing any page number (Exhibit 84); receipt issued by Ministry of Corporate Affairs (Exhibit 85) for the financial year ending on 31/03/2007 and submitted on 05/04/2009; further receipts (Exhibits 86/1 and 86/2), the balance sheet submitted in requisite form (Exhibit 86/3), Form No.23 submitted to the ROC on 27/04/2009 (Exhibit 100); Minutes of the Meetings of Directors dated 02/02/2007 to amend Articles of Association (Exhibit 101), letters of Deputy Registrar of Company to Defendant No.1 (Exhibits 175 and 177) in respect of which DW2 Mr. Chugha has deposed; the correspondence exchanged between the shareholder Gautam Nemani (Exhibits 192 to 196), PAN Card copy of DW3 Gautam Nemani (Exhibit 197) and the copies of the returns filed by the Defendant No.1 to ROC by e-filing on 05/04/2009 (Exhibits 258 to 265). As indicated above the aforesaid documents were placed on record on behalf of the Defendant No.1.

6. The Trial Court in the context of the controversy viz. whether the share capital of the Applicant - Defendant No.1 on the date of the filing of the suit was below Rs.1 Crore has exhaustively considered the oral evidence which has come on record through DW 1 the Director of the Applicant herein and other witnesses. The Trial Court has considered the evidence of the said DW 1 Shri R K Agarwal. The DW 1 in his evidence accepted that the paid up share capital cannot be reduced unless the provisions of Section 77A of the Companies Act are complied with. He accepted the fact that since the year 1993 till 10/04/2007 the share capital of the Applicant was more than Rs.1 Crore. He has stated in his evidence that there are various reasons to reduce the share capital which he cannot disclose. He has further stated that in August/September 2007 the ROC intimated the Applicant to submit Ereturns and he could not give any reason why such returns were not filed from August 2007 till 05/04/2009. He stated that the statement made in the Income Tax return of the year 2007-2008 showing the share capital of the Applicant to be Rs.1 Crore was a mistake committed by Shri Deepak Warse - an employee of the Chartered Accountants of the Applicant. The DW 1 further deposed that he had not checked the details before signing the returns. He admitted that the revised Income Tax return was filed in April 2009. The next witness whose evidence was adduced in support of the case that there was a buyback of shares pursuant to the Resolution passed on 01/03/2007 was the evidence of the said Shri S P Chugha - the Deputy Registrar of Companies. Through the said witness the documents (Exhibits 175 and 177) were sought to be proved. The said document (Exhibit 175) was in reply to the letters dated

09/03/2007 and 25/03/2007 of the Applicant, which letters were in respect of the alleged intimation of the buy back of the shares to the ROC. The said witness has deposed that he is not aware that the ROC Shri Bhatt had issued a certificate dated 07/03/2012 certifying that no letters dated 09/03/2007 and 25/03/2007 (as mentioned in Exhibit 175) exists in the records of ROC. He has further deposed that nonmentioning of the inward number in the letters dated 09/03/2007 and 25/03/2007 is a clerical mistake or omission. He has further deposed that the Applicant was directed to file proper returns.

The Trial Court having regard to the evidence of the said witness opined that if his evidence is to be considered then it would have to be said that the said witness is not certain whether the Applicant has complied with the provisions of Section 77A of the Companies Act.

The next witness was one Shri Gautam Nemani who was the shareholder of the Applicant Company and who was involved in the process of buy back of shares as he has sold 18,000 shares which he held in the Applicant - Company. Through him Exhibits 192 to 195 were sought to be proved. It has come in his evidence that he was not aware of the book value of the shares of the Applicant in the year 2005 and that he did not verify the same in the year 2007. It has come in his evidence that since he was hard pressed for money, he therefore insisted upon the Applicant to make the payment in cash for the shares purchased from him.

The Trial Court having regard to his evidence opined that the book value of the shares was Rs.73.46 which fact has come in the evidence of DW1 and still the said witness Shri Gautam Nemani had sold the shares at Rs.10/per share. The Trial Court thereafter took into consideration various circumstances most important being the circumstance of the Income Tax returns of the year 2007-2008 wherein the share capital of the Applicant was mentioned as Rs.1,03,64,000/-. The second important circumstance being that the returns in respect of the buy back i.e. Exhibits 252 to 264 were filed from 05/04/2009 till 21/10/2009 when the documents were to be filed with the ROC by e-filing which was made compulsory in the year 2006. The third circumstance was the witness Shri Gautam Nemani had sold the shares whose book value was Rs.73.46 at Rs.10 per share for which he had accepted the amount in cash. The fourth circumstance was that the revised returns for the year 2007-2009 was filed on 04/04/2009 i.e. after filing of the suit. In so far as the balance sheets are concerned, on which much store was laid on behalf of the Applicant it was observed by the Trial Court that the said balance sheets being prepared by the Applicant could not be given credence to. The Trial Court also took into consideration the fact that the Director of the Applicant i.e. DW 1 had admitted that the returns were to be e-filed which in fact the Applicant had done in respect of another matter in the year 2007, but in respect of the buy back of shares there was alleged physical handing over of the letters dated 09/02/2007 and 23/02/2007 to the ROC and the e-filing which was admittedly done after filing of

the suit. The Trial Court therefore concluded that the Applicant has failed to produce on record any cogent and convincing evidence in order to support its case of buy back as alleged and the correction of the mistake in the Income Tax returns by filing the revised returns. The Trial Court therefore concluded that after scrutinizing the entire oral as well as documentary evidence on record it can be seen that on the crucial date i.e. 14/02/2009 on which day the termination of the tenancy took place the share capital of the Applicant was Rs.1,03,64,000/-. The Trial Court held that the Applicant had failed to prove and establish on record that it reduced its share capital to Rs.93,74,000/as has been sought to be proved by the Defendant No.1. The Trial Court therefore ruled that the Plaintiffs have proved that it had the jurisdiction to entertain and try the suit. The Trial Court observed that nonexistence of the fact of reduction of the share capital on the date of termination was so probable that a prudent man ought under the circumstance of the case to act upon the supposition that it does not exist. Hence the Trial Court concluded that on the preponderance of probability it would have to be held that the reduction of share capital did not take place on the crucial date i.e. 14/02/2007 and when the termination of tenancy was effected by the Plaintiffs. The Trial Court accordingly by its order dated 26/03/2014 ruled that it had the jurisdiction to entertain and try the suit.

7. The Applicant i.e. the Defendant No.1 aggrieved by the the said order dated 26/03/2014 passed by the Trial Court carried the matter by way of a Revision before the Appellate Bench of the Small Causes Court. The said Revision Application was numbered as 112 of 2014. The Appellate Bench of the Small Causes Court has adverted to the findings recorded by the Trial Court and has confirmed the said findings. The Appellate Bench of the Small Causes Court in the Revision Application observed that though most of the documents were in custody of the Applicant i.e. the Defendant No.1 however were not mentioned in the affidavit of evidence of the DW1 and were sought to be produced in the evidence of the statutory auditor. The Appellate Bench of the Small Causes Court observed that many of the documents were sought to be produced through the witnesses when it was the obligation of the DW1 to produce the said documents. Hence the case of the Plaintiffs that the said documents are doctored documents was accepted by the Appellate Bench of the Small Causes Court. The Appellate Bench of the Small Causes Court observed that though it was the duty of the DW1 to produce the said documents during his evidence. Time and again the applications were made for producing and proving the documents to the witnesses and even before the Appellate Bench of the Small Causes Court. The applications (Exhibits 31, 32 and 55) were made on the ground that the documents in the said Exhibits were not considered by the Trial Court. The Appellate Bench of the Small Causes Court expressed serious reservation in respect of the evidence of the witness Shri Gautam Nemani who had sold the shares to the Applicant - Company in the buy back. The Appellate Bench of the Small Causes Court also observed that though the e-filing was made mandatory from 16/05/2006, no explanation was given by the Applicant as to why the

returns in respect of the buy back were not efiled though in respect of the cessation of the directorship of a director of the Defendant No.1, the same was efiled on 16/02/2007 vide Exhibit 111. The Appellate Bench of the Small Causes Court also expressed its reservation about the documents (Exhibits 175 and 177) which referred to the letters dated 09/03/2007 and 25/03/2007 relating to the buy back as there was no inward number mentioned in the said letters. The Appellate Bench of the Small Causes Court further referred to the evidence of Shri Bhat ROC wherein he has stated that the said letters dated 09/03/2007 and 25/03/2007 do not exist in the record of the ROC. The Appellate Bench of the Small Causes Court observed that if the said fact does not seal the fate of the Defendant No.1's case then what more is needed. The Appellate Bench of the Small Causes Court has taken an overall view of the evidence which has come on record. The Appellate Bench of the Small Causes Court observed that though the DW1 i.e. the Director of the Applicant has stated in his evidence that there was reduction of share capital in what manner it has taken place has not been stated. The Appellate Bench of the Small Causes Court observed that the other evidence in connection with the said fact through the other witnesses in the absence of pleadings about the said fact cannot be accepted. The Appellate Bench of the Small Causes Court observed that the judgments cited on behalf of the Applicant - Defendant No.1 having regard to the facts of the instant case would not help the case of the Applicant - Defendant. The Appellate Bench of the Small Causes Court observed that the Applicant was first required to establish its case and then take the aid of the authorities cited. The Appellate Bench of the Small Causes Court accordingly confirmed the order passed by the Trial Court holding that the Trial Court had jurisdiction to entertain and try the suit under Section 41 of the Presidency Small Causes Courts Act and accordingly dismissed the Revision Application by the impugned judgment and order dated 27/02/2017. As indicated above, it is the said judgment and order dated 27/02/2017 passed by the Appellate Bench of the Small Causes Court which is taken exception to by way of the above Civil Revision Application.

8. SUBMISSIONS ON BEHALF OF THE APPLICANT BY THE LEARNED SENIOR COUNSEL SHRI M M VASHI : A] That both the Courts below have erred in proceeding on the basis that in the written statement as well as in the reply filed to the Application for Temporary Injunction there were no averments relating to the buy back of shares. Both the Courts below have not appreciated the averments made in the written statement filed on behalf of the Applicant Defendant No.1 in its proper perspective.

B] That both the Courts below have given undue importance to the returns filed in respect of the Assessment Year 2008-2009 for the Assessment Year 2007-2008 wherein the share capital is shown as Rs.1,03,64,000/.

C] That both the Courts below have failed to appreciate the fact that in the balance sheets of the Defendant No.1 the share capital has been consistently shown as Rs.93,74,000/.

D] That both the Courts below have in a manner failed to consider the various documents which were produced on behalf of the Defendant No.1 in support of its case that its share capital was Rs.93,74,000/from the year 2007.

E] That the Trial Court has applied different yardsticks whilst considering the documents produced by the Plaintiffs visavis the documents produced on behalf of the Defendant No.1, inasmuch as the documents i.e. the letters dated 09/03/2007 and 25/03/2007 though they were annexures to the documents which were exhibited were not considered whereas the certificate issued by Shri Bhatt - ROC was taken into consideration.

F] That the orders passed by the Courts below suffer from errors which are apparent on the face of the record inasmuch as they refer to some of the documents as being not exhibited when in fact they were exhibited..

G] That though the Defendant No.1 had made the applications for the documents to be taken on record and considered by the Courts below, the said applications have been rejected by both the Courts below thereby the Defendant No.1 has been deprived of the opportunity to rely upon the said documents in support of its case that its share capital on the date of the filing of the suit was Rs.93,74,000/.

H] That the Revisionary Court failed to take into consideration the fact that the Defendant No.1 had produced the documents Exhibit 115 which the Plaintiffs had called upon it to do so and therefore the said documents were required to be marked as exhibits and taken into consideration on the basis that it was admissible evidence.

I] That the impugned judgment and order passed by the Revisionary Court confirming the judgment and order passed by the Trial Court deserves interference at the hands of this Court in its revisionary jurisdiction on account of the fact that the Revisionary Court had failed to exercise its jurisdiction when required to do so.

9. SUBMISSIONS ON BEHALF OF THE RESPONDENT NOS.4 TO 6 BY THE LEARNED COUNSEL SHRI SHARAN JAGTIANI : i] That both the Courts below have taken into consideration the relevant documents and thereafter have opined negatively as regards the probability of the case of the Defendant No.1 that the share capital as on the date of filing of the suit was Rs.93,74,000/.

ii] That having regard to the pleadings in the written statement of the Defendant No.1 as also in the affidavit in reply filed to the application for temporary injunction, the finding of both the Courts below that the written statement was bereft of particulars as regards the buy back of shares could not be faulted with.

iii] That the facts which have come on record viz. The income tax returns for the Assessment Year 2007-2008 wherein the share capital has been shown as Rs.1,03,64,000/which was later on corrected by filing a revised return as also the fact that though made compulsory from the year 2006, the documents relating

to the buy back of shares were not efiled and were efiled much later in the year 2009 seriously dent the case of the Defendant No.1 as regards the theory of the buy back of shares.

iv] That the documents relating to the buy back of shares having not been produced through the DW1 were sought to be produced through other witnesses which applications have been rejected from time to time by both the Trial Court as well as the Revisionary Court.

v] That though the application for issuing witness summons for production of documents was filed for the reasons best known to the Defendant No.1, no steps were taken to summon the witness who would have been vital to the case of the Defendant No.1.

vi] That noncompliance of Section 77A of the Companies Act was sought to be got over by contending that the documents being on a nonjudicial stamp paper was not required to be efiled when the Defendant No.1 very well knew that efilings were made compulsorily from the year 2006.

vii] That filing of the balance sheets with the Excise and Sales Tax Department wherein reduction of share capital has been shown would not enure to the benefit of the Defendant No.1 as on the own showing of the Defendant No.1 there was no necessity of forwarding the said documents to the said Department.

viii] That the share capital on the date of filing of the suit is the determining factor. Reliance is placed on the judgment of the Apex Court in the matter of Carona Ltd. v/s. Parvathy Swaminathan & Sons reported in (2007) 8 SCC 559.

ix] That the finding of the Courts below on the basis of the material on record that the Defendant No.1 has utterly failed to prove its case of reduction of share capital on the date of filing of the suit cannot be found fault with.

CONSIDERATION :

10. In the context of the preliminary issue raised by the Defendant No.1 as regards the maintainability of the suit, the issue which arises for consideration is whether on the date of filing of the suit i.e. on 17/03/2009 the paid up share capital of the Defendant No.1 i.e. the Applicant herein was above Rs.1 Crore. In the said context the pleadings of the parties would have to be revisited. The Plaintiffs as indicated in the earlier part of this Judgment have averred that the Defendant No.1 is public limited company with paid up share capital of more than Rs.1 Crore and is therefore not protected under the provisions of the Rent Act, and hence the suit has been filed invoking Section 41 of the Presidency Small Causes Court Act. The Plaintiffs have therefore sought the relief that the Defendants be ordered and decreed to hand over to the Plaintiffs vacant and peaceful possession of the suit property viz. Land bearing C.S.Nos.560 and 561, final Plot No.268 T.P.S. III of Mahim Division situate at Mogul Lane, Tulsi Pipe Road, Mahim, Mumbai - 400 016.

11. In so far as the Defendant No.1 is concerned, it filed its written statement and in paragraph 11(ii) of the written statement the Defendant No.1 has averred that it does not have the paid up share capital of Rs.One Crore or more and in support of the said contention the Defendant No.1 has annexed the Certificate of Auditors of the Defendant No.1 showing the paid up share capital of the Defendant No.1 at Rs.93,74,000/as on 30/09/2008 with a true copy of the Certified Auditors Report and Balance Sheet as on 31/03/2008 of the Defendant No.1. The Plaintiffs filed application Exhibit 9 for an interim injunction for restraining the Defendant No.1 from creating any third party rights pending the suit. In response to the said Application (Exhibit9) the Defendant No.1 filed its reply dated 06/04/2009 and raised a preliminary objection as regards the jurisdiction of the Trial Court to try the suit on the ground that the suit was not maintainable under Section 41 of the Presidency Small Causes Court Act and that the paid up share capital of the Defendant No.1 was Rs.93,74,000/as on 30/09/2008.

12. A reading of the written statement and the reply filed to the Application for interim injunction (Exhibit 9) by the Defendant No.1 therefore indicates that the Defendant No.1 had only averred about its share capital being Rs.93,74,000/but had not given any details as to how the share capital was reduced from Rs.1 Crore to Rs.93,74,000/. This was necessary in the context of the fact that the Plaintiffs had positively averred that the paid up share capital of the Defendant No.1 was over Rs.1 Crore.

13. In so far as the buy back theory is concerned, it was in a way of a evolving and developing case of the Defendant No.1. The evidence of the DW-1, DW-2, DW-3 and DW-8 assumes importance and hence the gist of the evidence of the said witnesses of the Defendant No.1 is referred to herein below : In so far as DW-1 is concerned, he is Shri R K Agarwal - the Director of the Defendant No.1. Significantly the oral evidence that was sought to be adduced through the said witness does not have any basis in the pleadings either in the written statement or in the affidavit in reply filed to the application for temporary injunction (Exhibit 9). It has come in the evidence of DW1 that by a Resolution passed by the Company on 01/03/2007 the paid up share capital has been reduced to Rs.93,74,000/. It has further come in his evidence that for the Assessment Year 2007-2008 in the income tax returns the paid up share capital of the Defendant No.1 has been shown as Rs.1,03,64,000/instead of Rs.93,74,000/as on 30/03/2008. It has further come in his evidence that immediately upon discovery of the said mistake, the same was rectified by filing revised return dated 04/04/2009. It has further come in his evidence that Section 77A of the Companies Act is required to be complied with in the case of reduction in the paid up share capital of a Company. It has further come in his evidence that the amount of Rs.4500/was remitted to the ROC on 05/04/2009 which was on account of the buy back of shares. It has come in his evidence that there are various reasons to reduce the share capital which he cannot disclose. It has further come in his evidence that in August/September 2007, the ROC had

intimated the Defendant No.1 to submit Ereturns and that he could not give any reasons why such returns were not filed from August 2007 till 05/04/2009. It has further come in his evidence that the book value of the shares on 01/03/2007 was Rs.75/per share and that the offer price for buy back was Rs.10/per share. It has further come in his evidence that though the income tax returns filed for the Assessment Year 2007-2008 was corrected, however, there was no correction made in the audited balance sheet which was part of the said income tax returns.

In so far as DW2 Shri S P Chugha is concerned, he was the Deputy ROC but was not working in the office of the ROC at the time when his evidence was recorded. He has deposed in respect of the letters Exhibits 175 and 177. In so far as letter Exhibit 175 is concerned, it has been mentioned in the said letter that the ROC office has received the letters of the Defendant No.1 dated 09/03/2007 and 25/03/2007. By letter Exhibit 177 dated 08/12/2011 it is informed that the documents filed by the Defendant No.1 by letters dated 09/03/2007 and 25/03/2007 and subsequent returns are approved. It has further come in his evidence that he is not aware that the ROC Mr. Bhatt has issued a certificate dated 07/03/2012 certifying that no letters dated 09/03/2007 and 25/03/2007 exist in the records of the ROC. It has further come in his evidence that nonmentioning of the said letters dated 09/03/2007 and 25/03/2007 is a clerical mistake or omission. It has come in his evidence that he has not checked whether the letters dated 09/03/2007 and 25/03/2007 were existing in the office of the ROC. It has also come in his evidence that the ROC is only the registering authority and not concerned with the approval of the buy back. It has also come in his evidence that the ROC does not examine the correctness of the accounts filed by the company.

The next witness is DW3 Shri Gautam Nemani. The said witness was examined as he is one of the shareholders from whom the Defendant No.1 allegedly bought back the shares. The said witness deposed as regards the correspondence exchanged between him and the Company i.e. the Defendant No.1 which was marked as Exhibits 192 to 195. It has come in his evidence that he held 18000 shares of the Defendant No.1. It has also come in his evidence that he accepted the offer of the Defendant No.1 and surrendered the share certificates as mentioned in the letter Exhibit 192. He has stated in his evidence that he has received Rs.1,80,000/for 18000 shares. It has come in his evidence that he did not know the book value of the shares of the Defendant No.1 in the year 2005. It has further come in his evidence that the letters Exhibits 192 and 194 were delivered by him to Mr. Agarwal in his chamber. He has stated in his evidence that he asked for cash payment as he was hard pressed for money. His evidence discloses that when confronted with the situation that he had agreed to buy back of shares at the rate of Rs.10/per share when the book value was shown at the rate of Rs.73.46 per share his answer was not convincing. His evidence discloses that, he could not answer satisfactorily as regards return of the balance share certificates in due course when in fact he had only one share certificate for the entire 18000 shares.

The next witness is DW8 - Manisha Limaye who is a practicing Company Secretary. It has come in her evidence that she was engaged for overseeing the buy back of shares. It has come in her evidence that she never informed the ROC of supervising the buy back on behalf of the Defendant No.1. It has further come in her evidence that no buy back account was opened by the Defendant No.1. She has admitted in her evidence that since 16/09/2006 the physical filing of returns and documents with ROC is discontinued and from 26/10/2006 filing of ereturns to ROC is compulsory and that the ROC maintains the records. It has further come in her evidence that the documents relating to buy back Exhibits 258 to 264 were filed with the ROC in the year 2009 after 05/04/2009 till 20/10/2009 in the office of the ROC by efilng.

Hence if the evidence of the aforesaid witnesses i.e. DW1, DW2, DW3 and DW8 is considered cumulatively then material discrepancies can be seen in their evidence which have been brought on record through the cross examination. The said material discrepancies impinge upon the probability of the theory of buy back of shares as is sought to be propounded on behalf of the Defendant No.1 in support of its case that on 17/03/2009 i.e. on the date of filing of the suit, its paid up share capital was below Rs.1 Crore.

14. In so far as filing of income tax returns, audit reports and preparation of balance sheet of the Defendant No.1 Company is concerned, the evidence of DW4, DW5, DW6 and DW7 was adduced. In so far as DW4 Shri Vijay Khade is concerned, he is an official from the Income Tax Department. It has come in his evidence that it is possible that revised returns were filed on 04/04/2009 by the Defendant No.1 whereas the balance sheet was filed on 08/10/2008.

In so far as DW5 - Shri Ramesh Nathani is concerned, he is an internal auditor of the Defendant No.1. It has come in his evidence that before signing the balance sheet he has checked the accuracy and correctness thereof, still the said witness has stated that there was a mistake committed by his assistant Mr. Deepak Warse in preparing the Income Tax Return Exhibit 108 in respect of an important aspect of the share capital of a public limited company by showing the paid up share capital as Rs.1,03,64,000/-. It has come in his evidence that in the ordinary course of business supervision of buy back does not come under his professional duty. It has further come in his evidence that the mistake in the Income Tax Return was not detected till 04/04/2009 and that the mistake was detected by his assistant Mr. Deepak Warse.

The next witness is DW6 Shri Prakash Page who claims to have carried out the statutory audit of the books of accounts of the Defendant No.1 for the financial year 2007-2008. It has come in his evidence that the Defendant No.1 reduced its share capital by buy back of shares during the year 2007-2008. He has stated in his evidence that he has verified the shareholders register regarding buy back. It has further come in his evidence that the Defendant No.1 has bought back 99000 equity shares in the year 2007-2008 which fact is reflected in the balance sheet for the relevant period and the share capital of the Defendant No.1 at the

relevant time was Rs.93,74,000/. It has further come in his evidence that he has made all the narrations for preparing the statements on oath to the lawyer, and that the narrations in the affidavit are made without knowing the controversy involved in the suit.

The last witness is DW7 Shri Shivshankar Tiwari who was sought to be examined for showing the buy back. But he has not been examined further as a result of which the Trial Court by a separate order has ruled that his evidence is to be discarded.

Hence in so far as the aforesaid 3 witnesses i.e. DW4, DW5 and DW6 are concerned, they do not in any manner aid the Defendant No.1 in proving that there was buy back of shares in the year 2007-2008 resulting in the paid up share capital of the Defendant No.1 going below Rs.1 Crore at the time of filing of the suit.

This is in so far as the evidence adduced on behalf of the Defendant No.1 in support of its theory of buy back of shares is concerned.

15. It is required to be noted that it is the Defendant No.1 who had raised the issue of maintainability of the suit on the ground that its share capital was below Rs.1 Crore and therefore the suit could not be filed under Section 41 of the Presidency Small Causes Court Act. It was therefore for the Defendant No.1 to show that its paid up share capital has been reduced to Rs.93,74,000/on the date of filing of the suit. It was incumbent on the Defendant No.1 to prove the said fact so as to oust the jurisdiction of the Trial Court to try and entertain the suit. In so far as the documents are concerned, the said documents have the effect on the improbability of the case of the Defendant No.1 that its paid up share capital was below Rs.1 Crore on the date of filing of the suit. It is required to be noted that on and from 16/09/2006 the physical filing of returns and documents was discontinued and from 26/10/2006 and e-filing of returns was made compulsory in the office of the ROC. However, the letters dated 09/03/2007 and 25/03/2007 which can be said to be the most important documents on which the Defendant No.1 has virtually founded its case, the said letters are claimed to have been filed physically by the Defendant No.1 with the office of the ROC. Significantly the said letters do not bear any inward number which casts a serious doubt as regards whether such letters were in fact physically filed with the office of the ROC or are got up documents produced by the Defendant No.1 after filing of the suit so as to support the theory of buy back of shares and thereby impinge upon the jurisdiction of the Trial Court to try and entertain the suit.

In so far as filing of the said documents is concerned, it has come on record through the evidence of the DW8 that the said filing was done from 05/04/2009 to 21/10/2009 i.e. after filing of the suit. It was not as if that the Defendant No.1 was not aware of the requirement of e-filing the returns/documents in the office of the ROC as in respect of the cessation of the directorship of one of its directors

efiling was done by the Defendant No.1 on 01/09/2007. The Income Tax Returns for the Assessment Year 20072008 showed the paid up share capital to Rs.1,03,64,000/. However, significantly after filing of the instant suit, the revised return was filed on 04/04/2009 on the ground that the mistake was discovered in April 2009.

In so far as the Earning Per Share (EPS) is concerned, through a revised return was filed correcting the paid up share capital to Rs.93,74,000/, significantly the EPS was not corrected and it continued to show on the basis that the share capital was above Rs.1 Crore i.e. Rs.1,03,64,000/.

That there are material discrepancies in so far as the alleged buy back of shares is concerned. Though the shareholder Shri Gautam Nemani had one share certificate for all 18000 shares, he was requested to return the balance share certificates. He was also paid in cash for the said buy back which is unacceptable as the Defendant No.1 is a Public Limited Company. The buy back at Rs.10/per share when the book value was shown at Rs.73.46 per share also casts a serious doubt as regards the said transaction.

The alleged Resolution passed by the Company on 01/03/2007 was also produced by way of a sheet comprising the said Resolution. In respect of which the DW1 deposed that such sheets are available in the market. The said Resolution was not certified. The fact of producing the sheet comprising the said Resolution when the Defendant No.1 is a public limited company also casts a serious doubt as to whether any such Resolution was in fact passed on 01/03/2007.

In so far as the letters dated 09/03/2007 and 25/03/2007 are concerned, the First Appellate Authority in the office of the ROC has passed an order dated 07/03/2007 in the First Appeal filed by the Plaintiffs under the Right to Information Act. by which order the Appellants i.e. the Plaintiffs have been informed that the copies of the said letters dated 09/03/2007 and 25/03/2007 cannot be provided to the Plaintiffs as no such letters are existing in the records of the ROC. Hence the Appellate Authority under the Right to Information Act by passing an order has informed the Plaintiffs about nonexistence of the said letters dated 09/03/2007 and 25/03/2007 in the records of the ROC.

Though an elaborate procedure has been prescribed for the buy back of shares as also for reduction of the paid up share capital, the DW1 Shri R K Agarwal significantly in his evidence has not stated anything in that regard. This has prompted the Trial Court to hold that the documents which the DW1 ought to have produced through his evidence cannot be allowed to be produced as the said evidence would be without there being any pleadings in that regard.

16. It is having regard to the aforesaid material discrepancies in the case of the Defendant No.1 that the Trial Court concluded that the Defendant No.1 has failed to produce on record any cogent and convincing evidence in order to support its case of buy back of shares and of correcting the mistake in the Income Tax

Returns by filing a revised return afresh. The Trial Court observed that the procedure for buy back of shares suffers from the improbabilities as can be seen from the oral as well as documentary evidence on record. The Trial Court therefore held that nonexistence of the fact that reduction of the share capital on the date of termination is so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it does not exist meaning thereby that the case of the Defendant No.1 as regards the buy back was so improbable that no prudent man could accept it.

17. As indicated herein above the Defendant No.1 aggrieved by the order dated 26/03/2014 passed by the Trial Court ruling that it has the jurisdiction to try and entertain the suit carried the matter by way of a Revision before the Appellate Bench of the Small Causes Court. The Appellate Bench of the Small Causes Court has considered the findings which have been recorded by the Trial Court whilst deciding the preliminary issue. The Appellate Bench of the Small Causes Court observed that though the Defendant No.1 in its written statement has stated that the share capital has reduced, it has not stated that the shares were as a result of the buy back of shares and no documents in support of the buy back of shares were annexed to the written statement or filed by the Defendant No.1, and were sought to be produced through the other witnesses. The Appellate Bench of the Small Causes Court has observed that perusal of the entire record, and in the context of the documents which are sought to be produced through the other witnesses held that the said documents do not appear to be truthful. The Appellate Bench of the Small Causes Court has also adverted to the order passed by a learned Single Judge of this Court by which the learned Single Judge has confirmed the order passed by the Trial Court rejecting the application of the Defendant No.1 to produce the documents on the ground that if the documents were the records of the Company, there was no reason for the Defendant No.1 not to disclose the documents in the list of documents filed by it and to refer the said documents in its pleadings. The Appellate Bench of the Small Causes Court also adverted to the fact that though the mistake in the mentioning of paid up share capital in the Income Tax Returns for the year 2007-2008 is sought to be attributed to Shri Deepak Warse, significantly the said Shri Deepak Warse has not been examined for the reasons best known to the Defendant No.1. The Appellate Bench of the Small Causes Court observed that the evidence of the Defendant No.1 of there being a typographical error does not inspire confidence. The Appellate Bench of the Small Causes Court also referred to the evidence of Shri Gautam Nemani and the fact that he was a defaulter and was prosecuted under Section 138 of the Negotiable Instruments Act which cases are pending against him. The Appellate Bench of the Small Causes Court also referred to the fact that the said Shri Gautam Nemani was paid in cash and that he has not produced his Income Tax Returns to show the receipt of the said amount. The Appellate Bench of the Small Causes Court has therefore cast a serious aspersion as regards the receipt of the the said amount by the said Shri Gautam Nemani. The Appellate Bench of the Small Causes Court has thereafter referred to the

factum of e-filing which is made mandatory from 16/09/2006 in the office of the ROC. The Appellate Bench of the Small Causes Court has adverted to the fact that no explanation was coming forth from the Defendant No.1 as to why the returns, documents were not e-filed. The Appellate Bench of the Small Causes Court thereafter referred to the evidence of Shri S P Chugha as also the fact that he was at the time when he deposed was not working with the ROC. The Appellate Bench of the Small Causes Court has referred to the fact that the letters dated 09/03/2007 and 25/03/2007 do not bear any inward number. The Appellate Bench of the Small Causes Court has also referred to the order passed by Shri Bhatt, the First Appellate Authority under the Right to Information Act, wherein it is stated that the letters dated 17/03/2007 and 25/03/2007 do not exist in the record of the ROC. The Appellate Bench of the Small Causes Court therefore opined that if the said fact does not seal the fate of the Defendant No.1's case then what more is needed. The Appellate Bench of the Small Causes Court did not deem it appropriate to give any credence to the filing of the balance sheet with the Excise and Sales Tax Department wherein the paid up share capital of the Defendant No.1 was shown to be more than Rs.1 Crore, as such returns were not required to be filed with the said offices. The Appellate Bench of the Small Causes Court has therefore observed that the said attempt of the Defendant No.1 also fails. The Appellate Bench of the Small Causes Court has observed that the documents sought to be relied upon on behalf of the Defendant No.1 do not appear to be truthful. The Appellate Bench of the Small Causes Court has observed that the evidence in connection with the buy back in the absence of pleadings cannot be accepted. The Appellate Bench of the Small Causes Court therefore concluded that the paid up share capital of the Defendant No.1 on the date of termination of the notice i.e. 14/02/2009 was Rs.1,03,64,000/-. The Appellate Bench of the Small Causes Court therefore as can be seen though exercising the revisionary jurisdiction has considered the findings recorded by the Trial Court as also recorded its own findings on the documents which were produced on behalf of the Defendant No.1.

18. It was the submission of the learned Senior Counsel appearing on behalf of the Applicant herein Shri M M Vashi that the documents of which the production was sought by the Plaintiffs vide Exhibit 113 and which the Defendant No.1 produced vide list Exhibit 115 were required to be considered as the Plaintiffs could not dispute the said documents once having sought their production from the Defendant No.1. However, both the Trial Court as well as the Appellate Bench of the Small Causes Court have refused to read the said documents in evidence. In so far as the said documents are concerned, reliance is sought to be placed on the list at Exhibit 115 on the ground that the letters dated 09/03/2007 and 25/03/2007 are part of the annexures to the balance sheet which is mentioned in one of the said lists, which list has been numbered as Exhibit 341. In my view, no fault can be found with the Courts below in refusing to read the said documents in evidence though they were annexures to the documents which were exhibited. It is required to be noted that the said letters dated 09/03/2007

and 25/03/2007 are the annexures to one of the balance sheets which are part of the documents which have been produced vide list Exhibit 115. In so far as the letters dated 09/03/2007 and 25/03/2007 are concerned, it is required to be noted that both the Plaintiffs and the Defendant No.1 had applied for certified copies of the said documents being issued. The said applications came to be rejected by the Public Information Officer of the ROC. The Defendants accepted the order passed by the Public Information Officer of the ROC, but it is the Plaintiffs who filed a First Appeal. The ROC Shri Bhatt who was the First Appellate Authority in the First Appeal filed by the Plaintiffs has passed an order dated 07/03/2012 that since the said letters do not exist on the record of the ROC, the said office is unable to provide the certified copies of the said documents. Hence the ROC whilst exercising appellate powers under the Right to Information Act has passed the said order disposing of the Appeal filed by one of the Plaintiffs on the ground that the certified copies of the documents cannot be furnished in view of the fact that the said documents do not exist on the record of the ROC. Hence it is not the letter issued under the Right to Information Act to the Plaintiffs but is an order passed by the First Appellate Authority wherein the factum of the said letters not being on record is mentioned. In my view, therefore both the Trial Court as well as the Appellate Bench of the Small Causes Court were right in making the observation that they had made in their orders based on the order passed by the First Appellate Authority. Hence the submission of the learned Senior Counsel appearing on behalf of the Defendant No.1 that since the documents were produced pursuant to the notice of the Plaintiffs and were therefore required to be admitted and read in evidence cannot be accepted.

19. It was also the submission of the learned Senior Counsel appearing on behalf of the Applicant herein Shri M M Vashi that the judgments cited on behalf of the Defendant No.1 i.e. the Applicant herein inter alia on the aspect of the buy back of shares as also on the aspect of exhibition of documents have not been considered by the Appellate Bench of the Small Causes Court. It is required to be noted that the Trial Court has considered the judgments cited on behalf of the Defendant No.1 by dealing with each of the said judgments in an elaborate manner. The Appellate Bench of the Small Causes Court in exercise of the revisionary jurisdiction has observed that the Defendant No.1 was first required to establish its case and then to take aid of the authorities cited. But since it has utterly failed to prove its case, the said judgments would not aid the Defendant No.1. Hence it therefore cannot be said that the Appellate Bench of the Small Causes Court exercising the revisionary jurisdiction has not considered the judgments cited on behalf of the Defendant No.1 i.e. the Applicant herein.

20. In so far as the Applications (Exhibits 31, 32 and 55) are concerned, the said applications were filed by the Defendant No.1 whilst the Revision Application was pending before the Appellate Bench of the Small Causes Court. In so far as application (Exhibit 31) is concerned, the same was filed by the Defendant No.1 for being permitted to lead evidence by way of production of the certified copy of the letter dated 25/08/2007. In so far as application (Exhibit 32) is concerned,

the same was filed by the Defendant No.1 seeking dismissal of the application (Exhibit 166) filed by the Plaintiffs and to allow the application (Exhibit 233) filed by the Defendant No.1. In so far as application (Exhibit 55) is concerned, the same was filed by the Defendant No.1 seeking permission to lead evidence by way of production of certified copy of the letter dated 09/03/2007 along with annexures received by the Defendant No.1 under the Right to Information Act. All the three applications i.e. Exhibits 31, 32 and 55 have been rejected by the Appellate Bench of the Small Causes Court whilst dismissing the Revision Application. In so far as application (Exhibit 31) is concerned, the same was filed to produce the certified copy of the letter dated 25/08/2007 issued by the Government of India, Ministry of Corporate Affairs. The said letter was sought to be produced in support of the buy back theory propounded by the Defendant No.1.

In my view, the production of the said letter dated 25/08/2007 would not make any difference in the light of the fact that the basic documents i.e. the letters dated 09/03/2007 and 25/03/2007 having regard to the circumstances on record do not come out of the shadow of doubt, on account of the circumstances connected with the said letters.

In so far as application (Exhibit 32) is concerned, the said application (Exhibit 166) whose dismissal was sought vide Exhibit 32 was allowed by the Trial Court whereas the application (Exhibit 233) was rejected by the Trial Court.

In my view, the orders passed by the Trial Court allowing the application (Exhibit 166) filed by the Plaintiffs and rejecting the application (Exhibit 233) filed by the Defendants was rightly not interfered with by the Appellate Bench of the Small Causes Court in its revisionary jurisdiction.

In so far as application (Exhibit 55) is concerned, as indicated above, the same was filed by the Defendant No.1 seeking production of the certified copy of the letter dated 09/03/2007 received by the Defendant No.1 from the ROC.

In the light of the order dated 07/03/2012 passed by the ROC Shri Bhatt as the First Appellate Authority under the Right to Information Act in which order the First Appellate Authority has mentioned as regards the nonexistence of the said letters dated 09/03/2007 and 25/03/2007. The order passed on application (Exhibit 55) by the Appellate Bench of the Small Causes Court rejecting the same cannot be found fault with.

The question which arises is whether the orders passed by the Courts below merit interference in the revisionary jurisdiction of this Court under Section 115 of the Code of Civil Procedure.

21. It is well settled that in so far as the revisionary jurisdiction under Section 115 is concerned, it is constricted, and only if there is an error of jurisdiction committed by the Courts below that interference with the orders passed by the Courts below is warranted. In the instant case, as indicated above the Defendant

No.1 has failed to prove its case that on the date of filing of the suit i.e. on 17/03/2009, its paid up share capital was below Rs.1 Crore. As indicated above the circumstances on record are such that it makes the case of the Defendant No.1 highly improbable whereas the case of the Plaintiffs as pleaded in the plaint can be said to be in the realm of probability.

22. In that view of the matter the exercise of the revisionary jurisdiction of this Court is not warranted. The above Civil Revision Application is accordingly dismissed.