IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 454 OF 2024

M/s. Mathuresh Infrapro Pvt Ltd. } ….*Applicant*
(Orig. Respondent No.6/ Defendant No.6)

: Versus :

1. M/s. Chudiwala Company
2. Mr. Vikas Tolaram Chudiwala } ….*Respondents*
(Ori. Appellants/ Plaintiffs)
3. Mr. Harish Vallabh Goswami
4. Mr. Yaduraj Govind Kanodia
5. Mrs. Anju Bansal
6. Mrs. Manju Jhunjhunwala
7. Mrs. Kavita Gupta } ….*Respondents*
(Orig. Respondent Nos. 2 to 6/ Defendant Nos. 1 to 5)

Mr. G. S. Godbole, Senior Advocate with Ms. Hetal Patel, Mr. Janak Shah, Mr. Suraj Shetye, Mr. Hemanshu Vyas and Ms. Jinkal Jain, *for the Applicant.*

Mr. Nimay Dave i/b Mr. Yatin R. Shah, *for the Respondent.*

CORAM : SANDEEP V. MARNE, J.

Reserved On : 9 October 2024.

Pronounced On : 17 October 2024.

JUDGMENT :

1) Revisionary jurisdiction of this Court is invoked for setting up a challenge to the judgment and order dated 19 April 2024 passed by the Appellate Bench of the Small Causes Court, by which R. Appeal No. 316/2017 filed by the original Plaintiffs-Respondent Nos.1 and 2 has been allowed and order dated 22 October 2016 passed by the Small Causes Court has been set aside. By allowing the Appeal, the Appellate Bench has rejected application at Exhibit-38 filed by Revision Applicant-Defendant No.6 for rejection of plaint under Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 **(the Code)**. The Small Causes Court had allowed the application at Exhibit-38 filed by the Revision Applicant-Defendant No.6 and had rejected the Plaint under the provisions of Order 7 Rule 11 of the Code by order dated 22 October 2016. The Appellate Bench has reversed the decision of the Small Causes Court and has restored R.A.D. Suit No.227/2012. The Revision Applicant-Defendant No.6 is aggrieved by the order of the Appellate Bench of the Small Causes Court and has accordingly filed the present Revision Application.

2) The case involves chequered history. By registered Indenture of Lease dated 15 June 1927, the then trustees of the City of Bombay granted lease in respect of the plot of land admeasuring 6981 sq. yards situated at 40, Naigaon Estate Scheme, Naigaon, Dadar in favour of one Goswami Shri Vallabhlalji Dwarkeshwarlalji Maharaj ***(Goswami Maharaj-Original lessee)*** for a period of 999 years commencing from 30 November 1922, who constructed three buildings of ground plus first floor thereon leaving open 3975 sq.yds of open plot of land. By Registered Indenture of sub-lease dated

13 May 1967, the original Lessee-Goswami Maharaj granted sublease of the property, with the consent of the original lessors, to one Brijmohan Kanodia ***(original sub-lessee)*** which comprised of open land as well as constructed buildings for a period 98 years commencing from 1 April 1967. On 13 May 1967, original Lessee-Goswami Maharaj issued consent letter in favour of Brijmohan Kanodia to grant further sub-lease/under-lease in favour of Plaintiff-M/s. Chudiwala Company, partnership firm with Tolaram Chudiwala and Shantilal N. Jain as its partners. Plaintiff constructed building named Venu Apartments Co-operative Housing Society Limited comprising of ground plus seven floor and sold tenements to individual flat purchasers on ownership basis.

3) Original lessee-Goswami Maharaj filed R.A.E. & R. Suit No. 772/6145 of 1968 against the original sub-lessee-Brijmohan Kanodia and partners of Plaintiff-M/s. Chudiwala Company for recovery of possession of the leased property. The suit was decreed on 12 August 1976 directing the Defendants therein to handover possession of the property alongwith structures standing thereon to original lessee-Goswami Maharaj. Plaintiff as well as sub-lessee-Brijmohan Kanodia filed Appeal No.255/1977 before the Appellate Bench of the Small Causes Court challenging the decree dated 12 August 1976. During pendency of the appeal, Plaintiff and sub-lessee-Brijmohan Kanodia took out an application for stay of the decree and by order dated 4 October 1977. The Appellate Bench granted stay subject to deposit of rent at the rate of Rs.6021/- per month. The order dated 4 October 1977 was challenged before this Court by filing Special Civil Application No. 2712 of 1977, which was dismissed on 19 April 1978. Plaintiff and sub-lessee-Brijmohan Kanodia filed Special Leave

Petition (Civil) No. 2778/1978 before the Supreme Court which granted stay to the execution of the decree on the condition of deposit of Rs. 3,88,356/- being the amount of arrears of rent calculated at the rate of Rs.6,021/- per month upto 30 September 1978 and to continue to deposit the said compensation. Plaintiff did not comply with the order of the Supreme Court and therefore heir of Goswami Maharaj (Defendant No.1-Harish Vallabh Goswami) took out execution proceedings and recovered possession of the suit property on 8 January 1980.

4) On 6 November 1987, the Appellate Bench allowed Appeal No. 255/1977 filed by the Plaintiff-Brijmohan Kanodia and dismissed R.A.E. & R. Suit No.772/6145 of 1968. The original lessee filed Writ Petition No.997 of 1988 before this Court, which came to be dismissed on 19 October 2006, confirming the order of the Appellate Bench of the Small Causes Court. This Court directed Plaintiff to pay Rs.4,78,674/- being arrears of rent within 8 weeks alongwith interest at the rate of 9% to the original sub-lessee (Defendant No.1) and subject to such payment being made, this Court ordered restitution of the suit property under Section 144 of the Code. The Defendant No.1 (original lessee) challenged the order passed by this Court on 19 October 2006 before the Supreme Court by filing Special Leave Petition (Civil) No.20380/2006 which was admitted on 15 December 2006 by converting the same into Civil Appeal No.5893/2006. On 30 March 2007, Defendant No.1 took out Interlocutory Application No.2/2007 in the pending Appeal before the Supreme Court seeking stay of restitution. Plaintiff also filed separate Special Leave Petition (Civil) No.12140/2007 challenging part of the judgment and order dated 19 October 2006 directing deposit of Rs.4,78,674/- alongwith

interest at the rate of 9% p.a. as a precondition for restitution of the suit property. The said Special Leave Petition filed by the Plaintiff came to be dismissed by the Apex Court by order dated 16 July 2007. On 14 August 2007, Plaintiff filed Interlocutory Application seeking clarification/extension of time for depositing arrears of rent. Simultaneously Plaintiff filed Civil Application No. 2278 of 2008 in Writ Petition No. 997 of 1988 seeking extension of time for depositing arrears of rent. On 11 August 2008, Defendant No.1 (original lessee) withdrew Civil Appeal No.5893 of 2006 in the light of dismissal of Special Leave Petition (Civil) No.12140/2007 filed by the Plaintiff. On 17 March 2009, Interim Application filed by the Plaintiff seeking extension of time for deposit of arrears of rent was dismissed by the Supreme Court. Consequently, this Court dismissed Civil Application No.2278/2008 filed for the same purpose. Review Petition filed by the Plaintiff before the Supreme Court was also dismissed and this is how all proceedings relating to R.A.E. & R. Suit No.772/6145 of 1968 in all courts came to an end.

5) In the above background, since original lessee-Defendant No.1 had secured possession of the property in execution proceedings and since Plaintiff was denied opportunity to have restitution by deposit of arrears of rent, Defendant No. 1 assigned leasehold rights in the land alongwith buildings constructed thereon in favour of the Revision Applicants-Defendant No.6 vide Indenture dated 26 December 2011.

6) Having failed to have the possession of the property restored after dismissal of R.A.E. & R. Suit No.772/6145 of 1968, Plaintiff-M/s. Chudiwala Company was advised to file declaratory suit

being R.A.D. Suit No.227/2012 in the Court of Small Causes at Mumbai seeking a declaration that it is a tenant/sub-tenant in respect of the suit property and prayed for permission to deposit the entire arrears of rent alongwith interest at the rate of 9% p.a. The suit was initially filed only against five Defendants being the heirs of original lessee-Harish Vallabh Goswami as Defendant No.1 and heirs of Brijmohan Kanodia being Defendant Nos. 3 to 5. After Defendant No.1 filed Written Statement disclosing assignment executed in favour of the Revision Applicant, Plaintiff filed application for impleadment of the Revision Applicant and accordingly Revision Applicant has been impleaded as Defendant No.6 to the suit.

7) After its impleadment as Defendant No.6 to the suit, Revision Applicant filed application at Exhibit-38 seeking rejection of plaint under Order 7 Rule 11(d) of the Code contending that the suit is barred by the provisions of Sections 34 and 38 of the Specific Relief Act, 1963 and Section 144 of the Code on account of passing of various orders by this Court and by the Supreme Court. The application was resisted by the Plaintiff by filing reply. The learned Judge of the Small Causes Court proceeded to allow the application at Exhibit-38 filed by the Revision Applicant-Defendant No.6 and rejected the plaint under the provisions of Order 7 Rule 11(d) of the Code by order dated 22 October 2016. Plaintiff filed R. Appeal No.316/2017 before the Appellate Bench of the Small Causes Court challenging the order dated 22 October 2016. The Appellate Court has allowed Plaintiff's Appeal and set aside the order dated 22 October 2016 by rejecting Revision Applicant's application at Exhibit-36 and by restoring R.A.D. Suit No.227/2012. Revision Applicant-Defendant No.6 is aggrieved by order dated 19 April 2024 passed by the Appellate Bench of the Small

Causes Court and has accordingly filed the present Revision Application.

8) In the meantime, another development occurred where Petitioner No.2-Vikas Tolaram Chudiwala-partner of Plaintiff, filed MARJI Application No.60/2022 in R.A.E. & R. Suit No.772/6145 of 1968 under the provisions of Section 144 of the Code seeking direction for restitution of the suit property by accepting the arrears of rent of Rs.4,78,678/- together with 9% interest. The said MARJI Application has been rejected by the learned Judge of the Small Causes Court by order dated 30 April 2024. This is how attempts by Plaintiff and its partners to have possession of suit property restored by deposit of arrears of rent are unsuccessful at three hierarchical levels of Small Causes Court, this Court and Supreme Court.

9) Mr. Godbole, the learned senior advocate appearing for the Revision Applicant would submit that the Appellate Bench has erred in reversing the decision of the Trial Court, by which the plaint was rejected under the provisions of order 7 Rule 11(d) of the Code. That bar under the provisions of sub-section (2) of Section 144 of the Code is clearly attracted in the present case, since the real purpose of filing the suit is to have the property restored through the suit. That the main prayer in the suit is for deposit of arrears of rent with interest which is clearly barred on account of dismissal of Interlocutory Application filed in SLP before the Supreme Court as well as on account of dismissal of Civil Application filed for the same purpose by this Court. That all other injunctive reliefs prayed in the suit are nothing but a case of clever drafting of the plaint and are inserted with the sole object of overcoming the bar of Section 34 of

the Specific Relief Act. That the Suit ultimately and effectively is only for a declaration without seeking substantive relief of restitution of possession which is otherwise barred. That therefore the Trial Court had rightly allowed the application of the Revision Applicant by rejecting the plaint under Order 7 Rule 11(d) of the Code.

10) In support of his contentions, Mr. Godbole would rely upon judgment of Apex Court in ***Raghwendra Sharan Singh Versus. Ram Prasanna Singh (Dead) by Legal Representatives***[1] and of this Court in ***Jayesh Dinesh Kadam and another Versus. Andrew David Fernandes, through POA, Balkrishna Ashok Shelar and others***[2] and ***SNP Shipping Services Pvt. Ltd and others Versus. World Tanker Carrier Corporation***[3].

11) The Revision Application is opposed by Mr. Dave the learned counsel appearing for Respondent Nos.1 and 2-Plaintiffs. He would submit that the suit is filed for declaration of tenancy without seeking the relief of possession. That Respondent Nos.1 and 2 under the sub-lease also had a right to reconstruct and redevelop buildings apart from being tenants of the property in question, which was a crucial point which was being ignored by the Trial Court. That application of the Revision Applicant under Order 7 Rule 11 of the Code was totally misconceived and has rightly been rejected by the Appellate Court. That tenancy of Respondent Nos.1 and 2 would remain in force till either surrender or termination of decree by the Court of competent jurisdiction. That tenancy rights of Plaintiffs have been confirmed by this Court and the said order has attained finality.

[1] (2020) 16 SCC 601
[2] 2024 SCC OnLine Bom 2549
[3] 2002(2) Mh.L.J. 570

That since only averments and statements in the plaint are required to be considered under Order 7 Rule 11 of the Code, the defence of the Defendants or any aspect not pleaded in the plaint becomes irrelevant. He would rely upon judgment of the Apex Court in ***Kamala & Ors. Versus. K.T. Eshwara Sa & Ors.***[4] in support of his contention that only averments of the plaint are required to be taken into consideration and no amount of evidence or documents can be looked into at any point of time. He would also rely upon judgment of Apex Court in ***D. Ramchandran Versus. R. V. Janakiraman and others***[5] in support of his contention that if averments in the plaint disclose a cause of action or a triable issue, the plaint cannot be rejected. He would rely upon judgment of this Court in ***Prashant Raj Versus. Arunabh Kumar and others***[6] in support of his contention that once the plaint discloses a cause of action on the basis of averments, the plaint cannot be rejected. He would rely upon judgment of the Apex Court in ***Srihari Hanumandas Totala Versus. Hemant Vithal Kamat and others***[7] in support of his contention of consideration of only averments in the plaint. Mr. Dave would also rely upon following judgments in support of his contention of impermissibility to travel beyond averments in the plaint while deciding application under Order 7 Rule 11 of the Code:

(i) ***Wipro Limited & Anr. Versus. Oushadha Chandrika Ayurvedic India (P.) Ltd. & Ors.***[8]

(ii) ***Mahadeo Prasad Burnwal Versus. Atpendra Roy Choudhary & Ors.***[9]

[4] AIR 2008 SC 3174
[5] (1999) 3 SCC 267
[6] 2019(2) Mh.L.J. 311
[7] (2021) 9 SCC 99
[8] AIR 2008 Madras 165 (DB)
[9] AIR 2007 Jharkhand 88

Mr. Dave would pray for dismissal of the Revision Application.

12) Rival contentions of the parties now fall for my consideration.

13) I have already narrated the chequered history of litigation between the parties. The issue involved in the present case is about permissibility for the Plaintiffs to file a suit seeking declaration of tenancy rights by seeking permission for deposit of rent, in the light of such permission being already rejected by the Small Causes Court, this Court and Supreme Court. Rejection of Plaint is sought on twin grounds of (i) suit being barred by provisions of Section 144(2) of the Code as Plaintiffs are indirectly seeking restoration of tenancy rights, which are lost on account of rejection of prayer for restitution and (ii) suit being barred by provisions of Section 34 of the Specific Relief Act due to deliberate omission to seek relief of restoration of possession, while seeking declaration of tenancy rights and permission to deposit arrears of rent.

14) R.A.D. Suit No.227/2012 has been filed by the Plaintiff with following prayers:

> a. It be declared that the tenancy/ sub-tenancy of Plaintiff is subsisting in the suit property as more particularly described in the schedule annexed and marked as Exhibit "A" hereto and as such protected under the provisions of the Maharashtra Rent Control Act, 1999;
>
> b. The Plaintiff be permitted to deposit the entire arrears of rent with interest thereon at the rate of 9% per annum as per the Particulars of Claim annexed and marked at **Exhibit "X"** hereto and Defendant No.1 be permitted to withdraw the same on such terms and conditions as this Hon'ble Court may deem fit and proper;

c. The Defendant No.1, his servants, agents and any person claiming through and under the Defendant No.1 be restrained by an order and injunction of this Hon'ble Court for recovering lease rent/ occupation charges from Venu Apartments Co-operative Housing Society Limited as also from the tenants and occupants of the suit property in any manner whatsoever;

d. The Defendant No.1, his servants, agents and any person claiming through and under the Defendant No.1 be restrained by an order and injunction of this Hon'ble Court from transferring, assigning leasing, sub-leasing and/or parting with possession of the suit property or any part thereof and/or allowing any third person and/or persons to use and occupy the same under any agreement and/or arrangement and/or development without disclosing the tenancy rights of the Plaintiff in respect of the suit property;

e. Defendant No.1, his agent, servant and everyone claiming through him be restricted by an Order and injunction of this Hon'ble Court from selling and assigning and/or transferring and/or enter into any understanding with regard to development right in respect of the suit property to anyone on any terms and conditions and/or for any reasons whatsoever;

f. For interim and ad interim reliefs in terms of prayer clauses (c) and (d) and (e) above;

g. For costs of the Suit be provided;

h. For such further and other reliefs as the nature and circumstances of the case may require.

15) The suit is filed in the background where the original lessee-Goswami Maharaj/his heir-Harish Vallabh Goswami had instituted R.A.E. & R. Suit No.772/6145 of 1968 for recovery of possession of the suit property from the original sub-lessee-Brijmohan Kanodia and under-lessee-M/s. Chudiwala Company. The suit was initially decreed on 12 August 1972 directing the Defendants therein to handover possession of the suit property to the original lessee. However, subsequently Appeal No. 255/1977 instituted by the sub-lessee-Brijmohan Kanodia and under-lessee-M/s. Chudiwala Company, came to be allowed by the Appellate Bench of the Small

Causes Court on 6 November 1987 and R.A.E. & R. Suit No.772/6145 of 1978 was ultimately dismissed. Special Leave Petition preferred by the original lessee, which was converted into Appeal No.5893/2006, has been withdrawn on 11 August 2008 and this is how dismissal of R.A.E. & R. Suit No.772/6145 of 1968 has attained finality. Therefore, in ordinary course, tenancy rights as well as possession of the suit property of Plaintiff ought to have been protected as against the original lessee. However, on account of intervening events occurring during pendency of previous round of litigation (R.A.E. & R. Suit No. 772/6145 of 1968) has resulted in loss of possession of the suit property by sublessee-Brijmohan Kanodia and under lessee-M/s. Chudiwala Company (Plaintiff). As observed above, after the decree in R.A.E. & R. Suit No.772/6145 of 1968 was stayed by the Appellate Court, a condition was imposed for deposit of arrears of rent as well as to continue to deposit compensation at the rate of Rs.6021/- per month. This condition imposed by the Appellate Court for stay of the decree dated 12 August 1976 passed in eviction suit was not obeyed by Brijmohan Kanodia and M/s. Chudiwala Company, which led to original lessee executing the decree and recovering possession of the suit premises on 8 January 1980. This is how Plaintiff lost possession of the suit property on 8 January 1980. Though Plaintiff subsequently succeeded in Appeal No. 255/1977 leading to dismissal of eviction suit and though this Court upheld the order of the Appellate Court on 19 November 2006, this Court permitted restitution of suit property in favour of Plaintiff subject to it making payment of arrears of rent of Rs.4,78,664/- alongwith interest at the rate of 9% p.a. within 8 weeks. The relevant portion of the order passed by this Court on 6 October 2006 dismissing Writ Petition No. 997/1988 reads thus:

> At the same time, any order of restitution will have to be made subject to the condition that the successful Appellants before the Appellate Bench must pay all the arrears of rent upto the date on which the decree for eviction was executed together with interest at such rate as the Court may consider it appropriate to fix. Counsel appearing on behalf of the Respondents has stated before the Court that the total arrears for the period of 153 months between 1st April 1967 until December 1979 amounted to Rs.9,21,213/-. An amount of Rs.4,42,543/- was paid leaving a balance of Rs.4,78,674/-. Before restitution can be ordered in favour of the Respondents consequent upon the decree for eviction being set aside, it would be necessary to order and direct that the Respondents shall pay the aforesaid amount together with simple interest at the rate of 9% p.a. within eight weeks from today. The Respondents cannot be allowed restitution unless the amount which was outstanding upto the date on which the decree for eviction was executed, pending appeal, is duly paid. Interest at the rate of 9% p.a. would be a reasonable rate of interest having regard to the circumstances as they prevailed at the material point of time. In the circumstances, while confirming the judgment and order of the Appellate Bench of the Court of Small Causes, this petition shall stand disposed of in the light of the aforesaid directions. In the circumstances of the case, there shall be no order as to costs.

16) Instead of complying with the above direction of this Court dated 19 October 2006, the Plaintiff was advised to challenge the said conditional order for restitution before the Apex Court by filing Special leave Petition (C) No.12140 of 2007, which came to be dismissed by the Supreme Court on 16 July 2007 by passing following order:

> Heard learned counsel for the parties.
>
> Delay condoned.
>
> We do not find any ground to interfere with that portion of the impugned order whereby direction has been given that the landlords shall be entitled to a sum of Rs. 9,21,213/- out of which Rs. 4,42,543/- has been already paid and the balance amount of Rs. 4,78,674/-, the tenants are required to pay restitution.
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> The special leave petition is, accordingly, dismissed.

17) After dismissal of the Special Leave Petition, Plaintiff realized that it was necessary to have the property restored by paying the amount of arrears of rent along with interest. But by the time such realization was dawned on Plaintiff, the time limit for deposit of arrears of rent had expired. Therefore Plaintiff filed Interlocutory Application in the Special leave Petition (C) No.12140 of 2007 seeking extension of time for deposit of arrears of rent. To Plaintiff's dismay the said Interlocutory Application was rejected by the Supreme Court by order dated 17 March 2009 which reads thus:

> Taken on Board.
>
> Heard learned counsel for the parties.
>
> The interlocutory application is dismissed.

18) Plaintiff filed Review Petition before the Supreme Court and again sought permission to deposit the arrears of rent. The Review Petition was however dismissed by the Supreme Court by order dated 27 August 2009 which reads thus :

> We have carefully gone through the review petition and connected papers. In our view, no case is made out to review our order dated 17th March, 2009. The review petition is, accordingly, dismissed.

19) As observed above, while Plaintiff was making desperate efforts before the Supreme Court for extension of time for deposit of arrears of rent, it simultaneously filed Civil Application No. 2278 of 2008 in Writ Petition No.997 of 1988 before this Court seeking extension of time for deposit of arrears of rent. Initially, Plaintiff made strenuous attempt to secure extension of time for deposit of

arrears of rent from this Court despite pendency of its Interlocutory Application before Supreme Court for same purpose. This Court (*His Lordship Justice A. M. Khanwilkar as he then was*) however did not accept the request and decided to await the decision of the Supreme Court on pending Interlocutory Application. This Court passed following Order on 9 February 2009:

> 1. Counsel for the Respondent submits that the Petitioner had approached the Apex Court against the decision dated 19th October, 2006 which Special Leave Petition came to be dismissed on 16th July, 2007 by a speaking order. In that case, request for extension of time can be made only before the Apex Court.
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> 2. To counter this position, Counsel for the Petitioner has relied on the application filed by the Petitioner before the Apex Court dated 14th August, 2007 and the communication received from the Registry of the Apex Court dated 12th May, 2008 and dated 20th September, 2008, whereby the Petitioner has been informed that the Application as filed cannot lie before the Apex Court.
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> 3. Significantly, that application was to clarify the order dated 16th July, 2007 by permitting the Petitioner to deposit the stated amount. The basis on which that application has been filed is mentioned in paragraph-3 of the application. It is stated that the sentence that the petitioner is still allowed to deposit the amount of Rs.4,78,674/- has not been incorporated in the said order. In other words, the said grievance is in the nature of speaking to the minutes so as to correct the clerical error occurred in the said order.
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> 4. The Applicant however, is faced with a situation where the Registrar of the Apex Court has opined that the said application is not maintainable. The applicant however, is not in a position to produce any formal order passed by the Registrar, which he could have passed in exercise of delegated powers under any provision of the Supreme Court Rules enabling him to deal with the said application dated 14th August, 2007; nor any formal order passed by the concerned Court on the said application is produced. Counsel for the applicant submits that in view of the communication received from the Registrar of the Supreme Court, the application cannot be proceeded further. It is incomprehensible that if such application is lodged in the Registry, the same would be kept pending on the file without being listed before the appropriate bench for order to be passed thereon. The Registrar on his own cannot treat such application as not

> maintainable and consign the application to the record. No rule has been brought to my notice which would permit the Registrar to do so. The applicant, if so advised, may move the Apex Court for appropriate order on the pending application. It is only after appropriate direction is passed by the Apex Court, the reliefs claimed in the present application can be considered, if necessary.
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> 5. For the time being, hearing of this application is deferred till 16th March, 2009.

20) After rejection of Interlocutory Application by the Supreme Court, this Court dismissed the said Civil Application by order dated 3 April 2009 which reads thus:

> 1. Counsel for the Applicant, in all fairness, states that in view of the order passed by the Apex Court, no further relief can be considered in the present Application. Hence, Application dismissed. Affidavit dated 2nd April 2009 be filed in the Registry.

21) As observed above, all efforts made by the Plaintiff to seek restitution of the suit property in previous round of litigation have come to an end and Plaintiff is denied opportunity to deposit the arrears of rent alongwith interest so as to secure restitution of the suit property. Despite this, Plaintiff has again incorporated prayer clause (b) in R.A.D. Suit No.227/2012 as under:

> b. The Plaintiff be permitted to deposit the entire arrears of rent with interest thereon at the rate of 9% per annum as per the Particulars of Claim annexed and marked at **Exhibit "X"** hereto and Defendant No.1 be permitted to withdraw the same on such terms and conditions as this Hon'ble Court may deem fit and proper;

22) The real intention behind filing R.A.D. Suit No. 227/2012 is thus to regain possession of the suit property by depositing the arrears of rent, which is a reason why declaratory suit is filed by

Plaintiffs after being unsuccessful in their attempts to secure the same before the Supreme Court as well as before this Court. The issue here is whether such suit for seeking restitution in an indirect manner is maintainable in law? The Revision Applicant has relied on provisions of Section 144 of the Code, which provides thus :

> **144. Application for restitution .-**
> (1)Where and in so far as a decree [or an order] is [varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order] shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree [or order] or [such part thereof as has been varied, reversed, set aside or modified] and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and *mesne profits*, which are properly [consequential on such variation, reversal, setting aside or modification of the decree or order].
>
> [Explanation.-For the purposes of sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include,-
>
> (a)where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;
>
> (b)where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;
>
> (c)where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.]
>
> **(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).**
>
> *(emphasis added)*

23) Thus, under sub-section (2) of Section 144 of the Code, filing of a suit for securing restitution or other relief which can be obtained by an application under sub-section (1) is specifically prohibited. Noticing the provisions of sub-section (2) of section 144, Plaintiff has cleverly avoided prayer for restitution or restoration of possession in the declaratory suit though its real intention is to secure the same. What is more important is use of the words *'or other relief'* appearing in sub-section (2) of Section 144 which would obviously bar a fresh suit for securing any other relief in connection with restitution. In my view, therefore mere addition of prayers for injunction in clause (c), (d) and (e) of the plaint would not save Plaintiff's suit from being barred under the provisions of sub-section (2) of Section 144 of the Code.

24) Having omitted a prayer for restoration of possession of the property in the Suit, provisions of Section 34 of the Specific Relief Act would kick in. Section 34 provides thus:

> **34. Discretion of Court as to declaration of status or right.—**
> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> **Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.**
>
> *Explanation.*—A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.
>
> *(emphasis added)*

25) Thus, under proviso to Section 34, no declaration can be made by the Court where the Plaintiff, who is in position to secure further relief than mere declaration of title, omits to do so. Therefore, omission by Plaintiff to seek restitution of possession of the suit property would clearly disentitle them from seeking a mere declaration of existence of tenancy/sub-tenancy in absence of prayer for possession of the suit property. There cannot be a tenant or subtenant in law who does not possess the premises and who neither pays nor is allowed to pay rent.

26) Mr. Dave has relied on several judgments in support of his contention that while deciding application under Order 7 Rule 11 of the Code, the Court has to merely read contents of the plaint and examine whether the same discloses cause of action. He has also relied on judgment of the Apex Court in ***Kamla*** (supra) in support of his contention that the issue as to whether the suit is barred can only be examined on the basis of averments in the plaint. In para-15 of the judgment, the Apex Court has held as under:

> 15. Order VII, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order VII, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order VII, Rule 11 of the Code is the averments made in the plaint. For that purpose, there cannot be any addition or sub traction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order VII, Rule 11 of the Code is one, Order XIV, Rule 2 is another.

27) Mr. Dave has also relied upon judgment of the Apex Court in ***D. Ramachandran*** (supra) in support of his contention that if averments disclose a cause of action or triable issue than the plaint cannot be rejected. In para-8 of the judgment, the Apex Court has held as under :

> **8.** We do not consider it necessary to refer in detail to any part of the reasoning in the judgment; instead, we proceed to consider the arguments advanced before us on the basis of the pleadings contained in the election petition. It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter.

28) Mr. Dave has also relied upon judgment of the Apex Court in ***Srihari Hanumandas Totala*** (supra) in which the Apex Court has held in para-18 and has thereafter summarized the principles for deciding application under Order 7 Rule 11(d) of the Code in para-25 to 25.4 as under :

> **25.** On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(*d*) can be summarised as follows:
> **25.1.** To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to.
> **25.2.** The defence made by the defendant in the suit must not be considered while deciding the merits of the application.
> **25.3.** To determine whether a suit is barred by res judicata, it is necessary that (*i*) the "previous suit" is decided, (*ii*) the issues in the subsequent suit were directly and substantially in issue in the former suit; (*iii*) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (*iv*) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit.
> **25.4.** Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the "previous

> suit", such a plea will be beyond the scope of Order 7 Rule 11(*d*), where only the statements in the plaint will have to be perused.

29) Mr. Dave has also relied upon judgment of this Court in ***Prashant Raj*** (supra), as well as judgments of various High Courts in support of his contention that if cause of action is disclosed in the averments of the plaint, the same cannot be rejected under the provisions of Order 7 Rule 11 of the Code.

30) There can be no debate about settled position of law that while deciding application for rejection of plaint under Order 7 Rule 11 of the Code, the Court has to consider only the averments in the plaint and defence raised by the Defendant is to be ignored. Accordingly, I have considered the averments in Plaint filed in R.A.D. Suit No.227/2012, which make a detailed reference to various orders passed in the previous round of litigation. Averments in the Plaint clearly indicate that Plaintiff has been denied the relief of depositing the arrears of rent by the Supreme Court and by this Court for seeking restitution of the suit property. To infer denial of such opportunity, no other material is required to be taken into consideration as the averments in the plaint specifically reflect that position. Thus averments in the plaint reflect denial of relief of restitution to the Plaintiffs and once such denial of restitution is apparent from averments in the Plaint, sub-section (2) of Section 144 of the Code kicks in. The position is thus clear that Plaintiff is seeking the same relief which has been expressly denied to it, for which the fresh suit is barred under the provisions of Section 144(2). Furthermore, deliberate omission to seek relief of restitution of possession, which is apparent from the averments in the plaint, clearly attracts proviso to Section 34 of the Specific Relief Act. In my view, therefore bar of suit

can be easily inferred by taking into consideration only the averments in the plaint and by totally ignoring any defences sought to be raised by the Defendant.

31) Conspectus of the above discussion is that the real intention of Plaintiff in filing the present suit is to secure the same benefit which has been expressly denied to them in the previous round of litigation by the Supreme Court and by this Court. In order to get over the bar under the provisions of Section 144(2) of the Code, Plaintiffs have cleverly omitted the relief for restitution of possession of the suit property. This is thus a clear case of clever drafting with a view to avoid attraction of provisions of Order 7 Rule 11. In ***Raghwendra Sharan Singh*** (supra), the Apex Court has held that the Plaintiff cannot be permitted to circumvent the express provisions of law barring a suit by means of clever drafting by avoiding claiming a particular relief. After taking stalk of various judgments dealing with the principle of clever drafting, the Apex Court has held in paras-6.1 to 6.9, 7 and 8 as under :

> **6.1.** At the outset, it is required to be noted that the plaintiff has instituted the suit against the defendant for a declaration that the defendant has acquired no title and possession on the basis of the deed of gift dated 6-3-1981 and that the plaintiff has got title and possession in the said property. In the suit, the plaintiff has prayed for the following reliefs:
>
> "A. That on adjudication of the facts stated above, it be declared that the defendant acquired no title and possession on the basis of the said showy deed of gift dated 6-3-1981 and the plaintiff has got title and possession in the said property.
>
> B. That it be declared that the said showy deed of gift dated 6-3-1981 is not binding upon the plaintiff.
>
> C. That the possession of the plaintiff be continued over the suit property and in case if he is found out of possession, a decree for recovery of possession be passed in favour of the plaintiff.
>
> D. That the defendant be restrained by an order of ad interim injunction from transferring or encumbering or interfering with

the possession of the plaintiff over the suit land, during the pendency of the suit.

E. That the cost of the suit be awarded to the plaintiff and against the defendant.

F. Any other relief or reliefs which the Court deems fit and proper, be awarded to the plaintiff and against the defendant."

6.2. Considering the averments in the plaint, it can be seen that, as such, the plaintiff has specifically admitted that the plaintiff and his brother executed the gift deed on 6-3-1981. It is admitted that the gift deed is a registered gift deed. It also emerges from the plaint that till 2003, neither the plaintiff nor his brother (during his lifetime) challenged the gift deed dated 6-3-1981 nor, at any point of time, claimed that the gift deed dated 6-3-1981 was a showy deed of gift. In fact, it is the defendant-appellant herein who instituted the suit in the year 2001 against his brothers to which even the plaintiff was a party as Defendant 10 and that was a partition suit filed by the appellant herein-original defendant. It appears that the summon and the copy of the plaint — TS (Partition) Suit No. 203 of 2001 — was served upon the plaintiff in the year 2001 itself. Still, the plaintiff averred in the plaint that it came to the knowledge of the plaintiff with respect to the gift deed on 10-4-2003. Thus, it is borne out from the averments in the plaint that, till 2003, the plaintiff never disputed the gift deed and/or never claimed that the gift deed dated 6-3-1981 was a showy deed of gift. With the aforesaid facts and circumstances, the application submitted by the appellant-original defendant to reject the plaint in exercise of powers under Order 7 Rule 11 CPC is required to be considered.

6.3. While considering the scope and ambit of the application under Order 7 Rule 11 CPC, few decisions of this Court on Order 7 Rule 11 CPC are required to be referred to and considered.

6.4. In *T. Arivandandam* [*T. Arivandandam* v. *T.V. Satyapal*, (1977) 4 SCC 467] , while considering the very same provision i.e. Order 7 Rule 11 CPC and the decree of the trial court in considering such application, this Court in para 5 has observed and held as under: (SCC p. 470)

"*5.* We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under

Order 10 CPC. An activist Judge is the answer to irresponsible law suits."

6.5. In *Church of Christ Charitable Trust & Educational Charitable Society* [*Church of Christ Charitable Trust & Educational Charitable Society* v. *Ponniamman Educational Trust*, (2012) 8 SCC 706 : (2012) 4 SCC (Civ) 612] , this Court in para 13 has observed and held as under: (SCC p. 715)

> "*13.* While scrutinising the plaint averments, it is the bounden duty of the trial court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue."

6.6. In *ABC Laminart (P) Ltd.* v. *A.P. Agencies* [*ABC Laminart (P) Ltd.* v. *A.P. Agencies*, (1989) 2 SCC 163] , this Court explained the meaning of "cause of action" as follows: (SCC p. 170, para 12)

> "*12.* A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

6.7. In *Sopan Sukhdeo Sable* [*Sopan Sukhdeo Sable* v. *Charity Commr.*, (2004) 3 SCC 137] in paras 11 and 12, this Court has observed as under: (SCC p. 146)

> "*11.* In *ITC Ltd.* v. *Debts Recovery Appellate Tribunal* [*ITC Ltd.* v. *Debts Recovery Appellate Tribunal*, (1998) 2 SCC 70] it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.
>
> *12.* The trial court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and

meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See *T. Arivandandam* v. *T.V. Satyapal* [*T. Arivandandam* v. *T.V. Satyapal*, (1977) 4 SCC 467] .)"

6.8. In *Madanuri Sri Rama Chandra Murthy* [*Madanuri Sri Rama Chandra Murthy* v. *Syed Jalal*, (2017) 13 SCC 174 : (2017) 5 SCC (Civ) 602] , this Court has observed and held as under: (SCC pp. 178-79, para 7)

"*7.* The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7 Rule 11 CPC can be exercised by the court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

6.9. In *Ram Singh* [*Ram Singh* v. *Gram Panchayat Mehal Kalan*, (1986) 4 SCC 364] , this Court has observed and held that when the suit is barred by any law, the plaintiff cannot be allowed to circumvent that provision by means of clever drafting so as to avoid mention of those circumstances, by which the suit is barred by law of limitation.

7. Applying the law laid down by this Court in the aforesaid decisions on exercise of powers under Order 7 Rule 11 CPC to the facts of the case in hand and the averments in the plaint, we are of the opinion that both the courts below have materially erred in not rejecting the plaint in exercise of powers under Order 7 Rule 11 CPC. It is required to be noted that it is

not in dispute that the gift deed was executed by the original plaintiff himself along with his brother. The deed of gift was a registered gift deed. The execution of the gift deed is not disputed by the plaintiff. It is the case of the plaintiff that the gift deed was a showy deed of gift and therefore the same is not binding on him. However, it is required to be noted that for approximately 22 years, neither the plaintiff nor his brother (who died on 15-12-2002) claimed at any point of time that the gift deed was showy deed of gift. One of the executants of the gift deed, brother of the plaintiff during his lifetime never claimed that the gift deed was a showy deed of gift. It was the appellant herein-original defendant who filed the suit in the year 2001 for partition and the said suit was filed against his brothers to which the plaintiff was joined as Defendant 10. It appears that the summon of the suit filed by the defendant being TS (Partition) Suit No. 203 of 2001 was served upon Defendant 10-plaintiff herein in the year 2001 itself. Despite the same, he instituted the present suit in the year 2003. Even from the averments in the plaint, it appears that during these 22 years i.e. the period from 1981 till 2001/2003, the suit property was mortgaged by the appellant herein-original defendant and the mortgage deed was executed by the defendant. Therefore, considering the averments in the plaint and the bundle of facts stated in the plaint, we are of the opinion that by clever drafting the plaintiff has tried to bring the suit within the period of limitation which, otherwise, is barred by law of limitation. Therefore, considering the decisions of this Court in *T. Arivandandam* [*T. Arivandandam* v. *T.V. Satyapal*, (1977) 4 SCC 467] and others, as stated above, and as the suit is clearly barred by law of limitation, the plaint is required to be rejected in exercise of powers under Order 7 Rule 11 CPC.

8. At this stage, it is required to be noted that, as such, the plaintiff has never prayed for any declaration to set aside the gift deed. We are of the opinion that such a prayer is not asked cleverly. If such a prayer would have been asked, in that case, the suit can be said to be clearly barred by limitation considering Article 59 of the Limitation Act and, therefore, only a declaration is sought to get out of the provisions of the Limitation Act, more particularly, Article 59 of the Limitation Act. The aforesaid aspect has also not been considered by the High Court as well as the learned trial court.

32) Mr. Godbole has relied upon judgment of Single Judge of this Court in ***Jayesh Dinesh Kadam*** (supra) in which this Court has held in paras-10 and 20 as under :

10. In view of the obscure averments by the Plaintiff in the said paragraph under reference leaving to the imagination of the reader, I am inclined to accept the submission of the Applicants. Paragraph on cause of action is vague and clearly insufficient in

> this regard. There are large gaps. The gaps have been avoided deliberately to justify the cause of action. Several questions remain unanswered and unexplained. Though Dr. Chandrachud has vehemently argued and submitted that even if the plaint lacks the material particulars, Plaintiff cannot be non-suited at the threshold since the objection raised by Applicants is a triable issue and matter of evidence, and if given an opportunity Plaintiff will prove the objections of Applicant to the contrary. However on re-reading the paragraph under reference, in the absence of material particulars, I am inclined to reject the case of Plaintiff. This is because, it is not only the absence and lack of material particulars but absence of material pleadings asserted on behalf of Plaintiff in the facts of the present case and which are argued before me. Plaintiff is stoically silent about his knowledge of the impugned sale deeds, despite his presence on the Suit property itself all throughout and once that is the *prima facie* case borne out from his own pleadings, the argument advanced by Dr. Chandrachud about it being a triable issue stands completely vanquished. There cannot be any reason whatsoever for a trial on an issue or question of fact which Plaintiff has not pleaded in the suit plaint and he leaving it for the Court's imagination and presumption. Once it is an admitted position that there is no pleading pertaining to Plaintiff's quietus from 1969-1977 and 2015 to 2022, once there is no pleading about he never visiting India during 1977 to 2015, Plaintiff's case lacks *bonafides* and therefore the argument of the Plaintiff about limitation being a mixed question of law and fact in the face of his averments in the Plaint cannot be accepted. On the basis of the above observations, the plaint is clearly barred by the law of limitation on the face of record.
>
> **20.** This is a clear case where the Plaintiff by virtue of clever drafting is attempting to overcome the bar of limitation. It is not the Defendants' case that they are developing the larger Suit property just now. Development has been carried out by them over a period of time and is continuing. Hence, the filing of the Suit plaint by Plaintiff is nothing but a vexatious and extortionist claim by the Plaintiff and such claims are to be nipped in the bud at the threshold itself. If this is not done by the Court of law, litigants like the Plaintiff will end up taking the law into their hands. That is the precise reason for the existence of provisions of Order VII Rule 11 in the CPC.

33) I am therefore of the view that the present case clearly involves clever drafting on the part of the Plaintiffs so as to avoid attraction of provision of Section 144(2) of the Code by omitting a prayer for restitution of possession. So far as prayer clause (b) in the

plaint is concerned, the same has been expressly denied to the Plaintiff as is clear from the averments in the plaint.

34) I am therefore of the view that the reading of the plaint makes it clear that the suit is manifestly vexatious and meritless which is clearly barred by provisions of Section 144(2) of the Code read with Section 34 of the Specific Relief Act. The clever drafting on the part of the Plaintiff has created an illusion of cause of action and such vexatious suit must be nipped in the bud, which is the real objective behind incorporating provisions of Order 7 Rule 11 of the Code. Plaintiff has kept Defendants under litigation at three hierarchical levels of Small Causes Court, this Court and Supreme Court over the issue of restoration of possession by depositing arrears of rent and having been unsuccessful in its attempts, it cannot be permitted to engage Defendants in another round of vexatious litigation. Courts in such situation must come to the aid of Defendants in such case by throwing out such suit which is aimed at securing same relief, which has been denied to the Plaintiff and when such suit is barred under provisions of law.

35) The Appellate Court has palpably erred in not appreciating this position and has erroneously held that Plaintiffs have not filed a suit seeking restitution of possession of the suit property and that the declaration sought by them cannot be obtained under Section 144(1) of the Code. The Appellate Court ought to have appreciated this was a case involving clever drafting with a view to obviate bar under Section 144(2) of the Code. It ought to have appreciated that omission to claim relief of possession of the suit property is deliberate with a view to obviate attraction of Section

144(2) of the Code. In absence of relief for restitution of possession of the suit property, declaration sought in prayer clause (a) about subsistence of tenancy rights or prayer for payment of rent cannot be granted in view of Section 34 of the Specific Relief Act. The Appellate Court ought to have appreciated that there cannot be a declaration of tenancy in absence of possession as well as payment of rent. The suit is clearly vexatious which requires nipping in the bud by having recourse to the provisions of Order 7 Rule 11 of the Code. The Appellate Court has thus palpably erred in reversing the order passed by the Trial Court. The order passed by the Appellate Court thus suffers from jurisdictional error and material irregularity requiring this Court to exercise revisionary jurisdiction under the provisions of Section 115 of the Code.

36) Resultantly, the Revision Application succeeds and I proceed to pass the following Order:

(i) The order dated 19 April 2024 passed by the Appellate Bench of the Small Causes Court in R. Appeal No.316/2017 is set aside and the order dated 22 October 2016 passed by the Trial Court is confirmed.

(ii) Resultantly, the Plaint in R.A.D. Suit No.227/2012 is rejected under the provisions of Order 7 Rule 11 (d) of the Code.

37) With the above directions, the Writ Petition is **allowed.** In the facts and circumstances of the case, there shall be no order as to costs.

[SANDEEP V. MARNE, J.]