IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.516 OF 2019

1 Anil Joginder Sachdev
Age 59 years, Occ. Business

2 Rajeev Joginder Sachdev
Age 54 years, Occ. Business

Both above r/o 545, Sadashiv Peth,
Laxmi Road,
Near Kulkarni Petrol Pump, Pune ....Applicants

-Versus-

1 Balasaheb Hiralal Zad
Age 70 years, Occ. Business

2 Chandrakala Balasaheb Zad
Age 68 years, Occ. Business

Both r/o 416/8, Raghuveer CHS,
Mukundnagar, Pune. ....Respondents

Mr. S.M. Gorwadkar, Senior Advocate i/b Mr. Niranjan A. Mogre *for Applicants*.

Mr. G.S. Godbole, Senior Advocate with Ms. Aishwarya Bapat i/b Mr. S.C. Wakankar, *for Respondents*.

CORAM : SANDEEP V. MARNE, J.
Reserved On : 27 August 2024.
Pronounced On : 13 September 2024.

JUDGMENT :

1) Applicants-tenants have invoked revisionary jurisdiction of this Court under Section 115 of the Code of Civil Procedure, 1908 **(Code)** challenging the judgment and decree dated 1 January 2018 passed by District Court, Pune in Regular Civil Appeal No. 720 of 2011 confirming the judgment and decree dated 29 September 2011 passed by Additional Small Causes Court, Pune in Regular Civil Suit No.668 of 1999. The suit filed by the Plaintiffs-landlords has been decreed on the ground of arrears of rent, destruction/injury to the suit premises and erection of permanent structure inside and outside the suit premises. The decree has been confirmed by the Appellate Court.

A. FACTS

2) Shop admeasuring 150 square feet situated on ground floor of the building at CTS No.545 Sadashiv Peth, Laxmi Road, Pune, are the '**suit premises**'. The house property bearing No. 545 was originally owned by Shri Sarjerao Jadhav, who had inducted Defendants' father as a tenant in respect of the suit premises. Plaintiffs-landlords purchased the house property No. 545 from the previous owner on 17 December 1979 and became landlord of Defendants. Defendants operate business in the name of 'Dev Sport' in the suit premises. Defendants had filed Miscellaneous Application No. 610 of 1988 in Small Causes Court, Pune for fixation of standard rent in respect of the suit premises. By order dated 3 February 1992, the Small Causes Court fixed Rs. 88.30/- as

standard rent in respect of the suit premises. According to Plaintiffs-landlords, in addition to the standard rent of Rs.88.30/-, Defendants are also liable to pay other permitted increases and education cess.

3) Plaintiffs-landlords filed Suit No.558 of 1999 seeking eviction of Defendants, which was withdrawn on 6 October 1999 with liberty to file a fresh suit. It appears that Plaintiffs-landlords dispatched Notice dated 25 October 1999 on Defendants alleging arrears of rent from 1 January 1991. However before completion of period of 30 days from the date of service of Notice, Plaintiffs-landlords filed Regular Civil Suit No.668 of 1999 on 3 November 1999 under the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 **(Bombay Rent Act, 1947)** on the grounds of (i) commission of breach of tenancy under section 108(o) of the Transfer of Property Act read with section 13(1)(a) (ii) erection of permanent structure without written consent of the Plaintiffs-landlords under section 13(1)(b) and (iii) *bonafide* requirement. Defendants resisted the suit by filing Written Statement contesting the claims of Plaintiffs-landlords. The Plaint was amended in the year 2004 and Plaintiffs-landlords added the ground of arrears of rent in the plaint. Defendants filed additional written statement contesting the claim of default of payment of rent. Both the sides led evidence in support of their respective cases. After considering the pleadings, documentary and oral evidence, the Small Causes Court delivered judgment and order dated 26 September 2011 rejecting the ground of *bonafide* requirement of Plaintiffs-landlords. However, the ground of default in payment of rent under section 12 of the Bombay Rent Act was accepted. The Trial Court held that the Defendants failed to

deposit the arrears of rent within the meaning of section 12(3) of the Bombay Rent Act. Accordingly, the issue of default in payment of rent was answered in affirmative. The Trial Court also accepted the ground of commission of breach under section 108(o) of the Transfer of Property Act read with section 13(1)(a) of the Bombay Rent Act. The Trial Court also answered the issue of raising of permanent structure inside and outside the suit premises without the consent of a landlord. The suit was accordingly decreed directing Defendants to handover possession of the suit premises to the Plaintiffs-landlords with further direction to pay arrears of rent of Rs. 22,510/- alongwith interest. Plaintiffs-landlords are also held entitled for mesne profits from the date of termination notice on 25 October 1999.

4) Defendants challenged the decree of the Trial Court by filing Regular Civil Appeal No.720 of 2011. The Plaintiffs-landlords filed cross-objection to the extent of rejection of ground of *bonafide* requirement. By judgment and decree dated 1 January 2018, the Appellate Court has dismissed the Appeal as well as Cross-Objection and has confirmed the decree of the Trial Court. Aggrieved by the decisions of Trial and the Appellate Court, the Revision Applicants have filed the present Civil Revision Application.

B. SUBMISSIONS

5) Mr. Gorwadkar, the learned counsel appearing for the Revision Applicants would submit that the Trial and the Appellate Court

have erroneously accepted the ground of default in payment of rent. That the demand notice purportedly issued on 25 October 1999 under Section 12(2) of the Bombay Rent Act was issued by the landlord to the Applicants demanding rent for a period of 106 months from 1 January 1991 on 31 October 1999 @ Rs. 88.30/- plus education cess and permitted increases. That the Notice did not specify the exact amount of education cess or permitted increases. That therefore it was not a valid notice of demand atleast *qua* the demand for education cess and permitted increases. That within nine days of issuance of notice, Plaintiffs proceeded to file Civil Suit No. 668 of 1999 on various grounds by consciously not raising the ground of default. That thus the ground of default was consciously omitted by the Plaintiffs, when the suit was originally filed and therefore the demand notice dated 25 October 1999 no longer remained valid so far as ground of default is concerned. That in any case, the Defendants deposited Rs.12,500/- in the Court towards the arrears of rent though the amount demanded in the notice was only Rs.9359.80/-. That the Plaint was subsequently amended on 6 December 2004 incorporating the ground of default in payment of rent. That by the time the suit was amended, the Defendants had deposited Rs.14,015/- in the Court and after incorporation of the amendment, Defendants deposited further amount of Rs.1160/- in the Court (total amount of Rs.15,173/-). That the amount due towards rent for 36 months from the filing of the suit till March 2005 was only Rs.8918/- + Rs. 5,285.34/- (interest) = Rs.14,203.64/-. That thus there were no arrears of rent on the part of the Defendants.

6) Mr. Gorwadkar would further submit that the amendment of pleadings relates back to the date of filing of the suit and the doctrine of relation back generally governs amendment of the pleadings, unless the Court excludes the applicability of the doctrine in a given case. In support of his contentions, Mr. Gorwadkar would rely upon the following judgments:

(i) Siddalingamma and Anr. Versus. Mamtha Shenoy[1],

(ii) All India Reporter Ltd., Bombay with Branch Office at Nagpur and Anr. Versus. Ramchandra Dhondo Datar[2],

(iii)Radheshyam G. Garg Versus. Smt. Safiyabai Ibrahim Lightwalla[3].

7) Mr. Gorwadkar would submit that the Trial Court in the present case has not recorded any reasons for excluding the doctrine of relation back and therefore the ground of alleged default in payment of arrears of rent is deemed to have been taken by the Plaintiff on 3 November 1999 itself when plaint was presented in the Court. That therefore the suit *qua* the ground of default in payment of rent would be decided under Section 12(2) of the Bombay Rent Act. That since the suit was not instituted after waiting for one month after receipt of demand notice dated 25 October 1999, the suit itself was not maintainable and liable to be rejected on that ground alone. In support, he would rely upon judgments of this Court in ***Digambar Hari Sonpatki Versus.***

1 (2001) 8 SCC 561.
2 AIR 1961 Bombay 292 (Nagpur Bench).
3 AIR 1988 Bombay 361.

Kishnichand Nerumal Parwani[4] and of Nagpur Bench in ***Jeetendra Vasantrao Nagarkar Versus. Mohanlal Maluramji Agrawal***[5]**.** That provisions of Section 15(2) of the Maharashtra Rent Control Act, 1999 (MRC) would have no application to the present case. Since the suit is governed by Section 12(2) of the Bombay Rent Act, it was necessary to examine the exact rent due from the tenant on the first day of hearing of the suit. However, such exercise is not done by the Court on the first date of hearing. That in ***Gurudev Singh Versus. Surinder Kumar Sharma and others***[6], the Apex Court has held that the first date of hearing is the date of effective hearing i.e. the date of chief-examination of the Plaintiff. That since the demand notice itself was invalid, the tenants were liable for eviction under Section 12(2) of the Bombay Rent Act. In support, he would rely upon judgment of this Court in ***Buvaji Shamrao Kamble Versus. Sau.Girijabai Shankarrao Kadam and others***[7]**.**

8) Alternatively, Mr. Gorwadkar would submit even if the suit is to be treated under Section 15(2) of the MRC Act, the period of 90 days would be over on 6 March 2005 and the Defendants had deposited excess amount of rent as on 2 March 2005. Therefore, in either of the cases, Defendants/tenants cannot be accused of committing default in payment of rent so as to maintain the suit for recovery of possession. That therefore the decree of eviction on the ground of willful default by the Applicants/Defendants deserves to be set aside.

4 1994 Mh.L.J. 290.
5 2016 (6) Mh.L.J. 797.
6 1990 (Supp) SCC 78
7 1998 SCC OnLine Bom 429

9) So far as the ground under Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act as well as Section 13(1)(b) of the Bombay Rent Act is concerned, Mr. Gorwadkar would submit that the suit itself was not within limitation. That under Article 66 of the Limitation Act, 1963, (**Limitation Act**), the limitation for filing of the suit was 12 years. That in the averments in paragraphs-5(b) to 5(f) of the plaint, the Plaintiff did not indicate the exact dates on which the alleged act of forfeiture by erecting the alleged permanent construction or alleged breach of conditions were committed by the tenants. That the *Ota* (platform) and signboard existed at the time the premises were taken on rent from the previous owner Sarjerao Jadhav in the year 1960. That the cupboards and furniture were made in the year 1984. He would therefore submit that the suit filed in the year 1999 was clearly barred by limitation under Article 66 of the Limitation Act. In support, he would rely upon judgment of this Court in ***Shashikant Yeshwant Limaye and another Versus. Chintaman Vinayak Kolhatkar and others***[8] and the judgment of the Apex Court in ***Ganpat Ram Sharma and others Versus. Gayatri Devi***[9]. That the Plaintiff erroneously pleaded in the plaint that the suit is governed by Article 67 of the Limitation Act so that Plaintiff could file suit within 12 years from termination of tenancy. That the Trial Court has erred in not framing the issue of limitation on the basis of erroneous pleadings made by the Plaintiff. Since the issue of limitation pertains to issue of jurisdiction of the Court, the same ought to have been framed in absence of framing of the same, that this Court would be justified in deciding the same in exercise of revisionary jurisdiction and held that the Apex Court

8 2010 (5) Mh.L.J. 527.

9 (1987) 3 SCC 576.

in ***Pandurang Dhondi Chougule and Ors. Versus. Maruti Hari Jadhav and Ors.***[10].

10) Mr. Gorwadkar would further submit that damage to the suit property was not proved nor attracted Section 108(o) of the Transfer of Property Act. In support of his contention that the acts such as putting up of rolling shutter, fixing of additional racks, putting up of new showcase by drilling holes into the wall will not amount to damaging the building nor will it amount to permanent construction on the suit premises, he would rely upon the judgment of the Apex Court in ***G. Raghunathan Versus. K.V. Varghese***[11]. That since the suit premises were let out for carrying out trade in an important locality in the City, the signboards were fixed to attract customers. In support of his contention that putting up of signboards and installation of racks do not amount to putting of permanent construction, Mr. Gorwadkar would rely upon ***Hari Rao Versus. N. Govindachari and Anr.***[12] Mr. Gorwadkar would further submit that installation of furniture does not amount to making of construction of permanent nature within the meaning of Section 13(1)(b) of the Bombay Rent Act. That all furniture and fixtures were removable in nature and in support he would rely upon judgment of this Court in ***Manoramabai Vishwanath Limaye & Ors. Versus. Pramila Vijay Phansalkar***[13]. He would submit that carrying out minor repairs for better enjoyment and use of the premises does not amount to permanent structure within the meaning of Section 13(1)(b) of the Bombay Rent Act and would rely upon judgment of this

10 AIR 1966 SC 153.
11 AIR 2005 SC 3680
12 AIR 2005 SC 3389
13 2011 (6) Bom.C.R. 389

Court in ***Somnath Krishnaji Gangal Versus. Moreshwar Krishnaji Kale***[14]. Mr. Gorwadkar would submit that damage or injury to the property is essential before the landlord can rely upon act as the one in contravention of Section 108(o) of the Transfer of Property Act within the meaning of Section 13(1)(a) of the Bombay Rent Act and would rely upon judgment of this Court ***Keshavji Ramji Sanghavi Versus. Smt. Sulochanabai Ramkrishna Mirwankar***[15].

11) Relying on ***Parvati Kevalram Moorjani Versus. Madanlal Anraj Porwal and Others***[16], Mr. Gorwadkar would submit that the constructions erected for *bonafide* enjoyment of the property for commercial use and which are removable in nature does not amount to construction of permanent structure within the meaning of Section 13(1)(b) of the Bombay Rent Act. He would rely upon judgment of the Apex Court in ***Om Pal Versus. Anand Swarup (Dead) by Legal Heirs***[17] in support of his contention that in absence of demonstration of value of the building being diminished, material alteration to the suit premises cannot be inferred. On the above submissions, Mr. Gorwadkar would submit that all the three grounds of delay in payment of rent, injury/destruction of the suit premises under Section 108(o) of the Transfer of Property Act and erection of permanent structure have not been proved in the present case. The eviction decree passed by the Trial Court and confirmed by the Appellate Court thus suffers from serious error warranting interference by this Court in

14 1995 (1) Mh.L.J. 675
15 AIR 1977 Bom 7
16 1987 Mh.L.J. 917
17 (1988) 4 SCC 545.

revisionary jurisdiction under Section 115 of the Code. He would therefore pray for setting aside the decree for eviction.

12) Mr. Godbole, the learned senior advocate appearing for the Plaintiffs-landlords would oppose the Revision Application submitting that concurrent findings recorded by the Trial and the Appellate Court on all the three issues do not warrant any interference by this Court in exercise of revisionary jurisdiction of this Court. So far as the ground of default in payment of rent is concerned, Mr. Godbole would submit that since the suit is amended in the year 2004, the same is required to be treated as having been filed under the provisions of Section 15(2) of the MRC Act. That any ground incorporated in a pending suit after coming into effect of the MRC Act would necessarily arise out of that Act and the same cannot be treated as a ground arising out of the Bombay Rent Act. If this is not done, in a pending suit, the Plaintiff would seek to add the grounds of acquisition of alternate premises by the tenant though the said ground is no longer available under the MRC Act. That the demand notice issued by the Plaintiffs on 25 October 1999 continues to remain in force and that there is nothing in law which prescribes any outer period of limitation for filing Suit based on a demand notice. That the restriction is only for inner period of limitation within which time the suit cannot be filed. That therefore the ground of default is linked to the demand notice dated 25 October 1999 and the ground of default is incorporated under Section 15(2) of the M.R.C. Act.

13) Mr. Godbole would further submit that the demand notice dated 25 October 1999 clearly specified demand for rent at the rate of Rs. 88.30/- plus education cess and permitted increases. That if any doubt remained in the mind of the Defendant, the amount of education cess and permitted increases of Rs. 1123.08/- and Rs.2649/- as on 30 October 1999 was specified in the amended plaint. That it was necessary for the Defendants to deposit in the Court, the entire amount of rent due after the amendment was incorporated on 6 December 2004. That the entire amount of rent due together with interest and costs of the suit were not deposited by the Defendant under Section 15(3) of the M.R.C. Act. He would rely upon judgment of Full Bench of this Court in ***Babulal Fakirchand Agrawal Versus. Suresh Kedarnath Malpani & Ors.***[18] in support of his contention that the ground of eviction under Section 15(3) of the M.R.C. Act is independent one and that even if the tenant complies with the demand notice, nothing prevents the Court from passing the decree in the event it is found that the Defendant has not complied with the provisions of Section 15(3) of the MRC Act. Relying upon the judgment of the Apex Court in ***Jaywant S. Kulkarni & Ors. Versus. Minochar Dosabhai Shroff & Ors.***[19], Mr. Godbole would submit that the statutory period provided for either under Section 12(3)(b) of the Bombay Rent Act or Section 15(3) of the MRC Act cannot be extended by use of judicial discretion. Mr. Godbole would therefore submit that the ground of default accepted by the Trial and the Appellate Court does not warrant any interference.

18 2017 4 All M.R.356
19 (1988) 4 SCC 108

14) So far as the ground under Section 13(1)(a) and 13(1)(b) of the Bombay Rent Act is concerned, Mr. Godbole would take me through the Plan prepared by the Plaintiff's witness to demonstrate both destruction/injury to the suit premises, as well as erection of permanent structure. He would submit that the ***Ota*** (platform)admeasuring 15' x 6.5' x 7.0' with height of 5'' has been constructed by the Defendants on the road setback area, which does not form part of the tenanted premises. Additionally, the Defendant has constructed two showcases outside the shop. That 9'' thick brick wall is demolished and replaced by showcase inside the suit shop. That the wooden door of the suit premises is found to be replaced by rolling shutter. He would take me through the evidence of Mr. Manohar M. Paranjape, Architect examined at the behest of the Plaintiff. He would also take me through the evidence of Mr. Anil Joginder Sachdev (D.W.1) to demonstrate admission that the concerned platform was not let out to the Defendants but the same was being treated as part of the tenanted premises by them. He would submit that that there is sufficient evidence available on record to infer damage and injury to the suit premises amounting to breach within the meaning of Section 108(o) of the Transfer of Property Act read with Section 13(1)(a) of the Bombay Rent Act. That the ground of erection of permanent structure is also attracted under Section 13(1)(b) of the Bombay Rent Act. In support of his contention that replacement of wooden door by iron shutter amounts to erection of permanent structure, Mr. Godbole would rely upon judgment of this Court in ***Dr. C.C.Yi Versus. Smt. Jankidevi Anantlal Gupta***[20]. In support of his contention that act of tenant in carrying out unauthorised construction outside the suit

20 2001 3 ALL MR 324

premises which he believes to be let out to him attracts the provisions of Section 13(1)(a) and 13(1)(b) of the Bombay Rent Act, Mr. Godbole would rely on judgement of this Court in ***Impex (India) Pvt. Ltd. Versus. Dinasah Jal Daruwala***[21]. He would submit that the Appellate Court has rightly considered the ratio of the judgment in ***V.L.G. Pitti Versus. Bridge Brothers***[22]. Mr. Godbole would pray for dismissal of the Revision Application.

C. REASONS AND ANALYSIS

15) The suit has been decreed and the decree has been confirmed on three grounds of (i) default in payment of rent, (ii) injury and destruction to the suit premises under Section 108(o) of the Transfer of Property Act read with Section 13(1)(a) of Bombay Rent Act and (iii) erection of permanent structure without landlord's consent in writing under Section 13(1)(b) of the Bombay Rent Act. I proceed to examine correctness of findings recorded by Trial and Appellate Court on each of the grounds.

C.1 DEFAULT IN PAYMENT OF RENT

16) To examine correctness of ground of default in payment of rent, the controversy about applicability of exact enactment needs to be first resolved. While Mr. Gorwadkar for Defendants-Tenants has contended that the ground of default in payment of rent was raised and

21 2024 SCCOnline Bom 999
22 (1987) 3 SCC 558

has been decided as per the provisions of the Bombay Rent Act, it is Mr. Godbole's contention that the said ground is referable to the provisions of MRC Act, since the ground has been introduced after coming into effect of the MRC Act.

17) The suit was instituted on 3 November 1999 and at that time, the Bombay Rent Act was in force. The suit as originally filed on 3 November 1999 did not contain ground under Section 12 of the Bombay Rent Act for recovery of possession on the ground of default in payment of rent. Plaintiff had dispatched notice claiming default in payment of rent on 25 October 1999. In the notice, Plaintiff claimed that the rent in respect of the suit premises was fixed at Rs. 88.30/- plus education cess plus permitted increased by order passed by the Small Causes Court dated 3 February 1990 in Misc. Application No.610/1988. Plaintiff claimed that the Defendants were in arrears of rent from 1 January 1991. In addition to the rent, Plaintiff claimed that education cess and permitted increases were also not paid by Defendants from 1 January 1991. Plaintiff assessed the amount of arrears of standard rent for 106 months from 1 January 1991 to 31 October 1999 at Rs. 9359.80/- and while claiming the said amount of Rs.9359.80/- also demanded additional unspecified amount towards education cess as per law as well as other permitted increases. There is no dispute to the position that the notice dated 25 October 1999 has been received by the Defendant. However, within 9 days from the date of dispatch of notice dated 25 October 1999, Plaintiff lodged Regular Civil Suit No. 668 of 1999 on 3 November 1999. Under sub-section (2) of Section 12 of the Bombay Rent Act, no such suit for recovery of possession can be instituted by the

landlord on the ground of non-payment of rent until expiration of one month after the notice in writing for the demand of rent is served on the tenant. Thus, if Plaintiff was to seek recovery of possession on the ground of non-payment of rent and /or permitted increases, he ought to have waited for a period of 30 days after date of service of notice. However, Plaintiffs consciously did not include the ground of default in payment of rent in the plaint filed in Regular Civil Suit No. 668 of 1999. Copy of the original unamended plaint has been placed on record which shows that the suit was filed on the grounds of breach of terms of tenancy by causing injury and destruction to the suit premises under Section 108(o) of the Transfer of Property Act read with Section 13(1)(a) of the Bombay Rent Act, erection of permanent structure within the meaning of Section 13(1)(b) of the Bombay Rent Act and *bonafide* requirement of the landlord under Section 13(1)(g) of the Bombay Rent Act.

18) The ground of default in payment of rent under Section 12(2) of the Bombay Rent Act came to be incorporated for the first time by filing application for amendment on 24 August 2004 which was allowed on 29 November 2004 and the amendment was carried out on 6 December 2004.

19) Thus, the case presents a unique conundrum where the suit was originally filed under the provisions of the Bombay Rent Act and by the time the ground of default in payment of rent was sought to be incorporated in the plaint, MRC Act had come into force w.e.f. 31 March 2000. This is the reason why there is debate between the parties about

the exact enactment under which the ground of default is to be considered.

20) Contrary to Mr. Godbole's contention that the ground of default in payment of rent was under MRC Act, Plaintiffs themselves pleaded in amended para-9A of the Plaint that the ground of default was raised under the provisions of Section 12(3) of the Bombay Rent Act.

21) The contention of Mr. Gorwadkar about the ground of default being governed by the provisions of the Bombay Rent Act is premised on the doctrine of relation back. According to him, the amendment would relate back to the date of institution of the suit and that therefore the amendment would also have to be considered as on the date of filing of the suit. Mr. Gorwadkar has relied upon the judgment of the Apex Court in ***Siddhalingappa*** (supra). In case before the Apex Court, the issue was about effect of amended plaint on the *bonafide* requirement of the landlord. The Apex Court held in para-10 as under:

> 10. …… An application for amendment under Order 6 Rule 17 of the CPC was moved and the deficiency in the pleadings stood removed by the amendment permitted by the Trial Court in exercise of its discretionary jurisdiction to do so. The order permitting the amendment was not put in issue promptly. Even the High Court in its impugned order has not found fault with the order of the Trial Court permitting the amendment nor has it expressed an opinion that leave granted by the Trial Court for amendment in the eviction petition suffered from any error of jurisdiction or discretion. **On the doctrine of relation back, which generally governs amendment of pleadings unless for reasons the Court excludes the applicability of the doctrine in a given case, the petition for eviction as amended would be deemed to have been filed originally as such and the evidence shall have to be appreciated in the light of the averments made in the amended petition.** ……
>
> *(emphasis added)*

22) In ***All India Reporter Ltd.*** (supra), the Division Bench of this Court was considering the issue of defect in the plaint in not properly signing and verifying the same and the date of institution of the suit remaining the same even after resigning or re-verifying the same by way of amendment. The Division Bench has held in para-28 as under:

> 28. Holding that it was only on 24-4-51 that the plaint was properly signed and verified, the trial Court held that the date of the filing of the suit must be taken to be 24-4-51. As already pointed out, the general consensus of authority of the Bombay High Court and other High Courts is in favour of the view that defects and irregularities in the matter of signing, verifying or presenting plaints are mere irregularities of procedure which do not make the suit ineffective, inoperative, or void. The existence of such defects does not mean that the suit had not been filed. Even when the plaint is amended after it is properly instituted, the amendment relates back to the date of the original plaint unless the amendment adds new parties or new properties. That is why leave to amend a plaint has ordinarily to be refused, except in very exceptional cases, if the effect of the proposed amendment is to take away from the defendant the legal right which accrued to him by lapse of time. See Charan Das v. Amir Khan AIR 1921 PC 50 : 47 Ind App 255. If the amendment is allowed, it relates back to the date of the original plaint. **If is not a case of the amendment taking effect from the date of amendment and of condoning the bar of limitation. If the amendment of the plaint is allowed, the question of limitation cannot be reserved.** It is not a case of allowing the amendment of the plaint and reserving the question whether or not to condone the delay and the bar of limitation. If the Court feels that the bar of limitation should not be avoided, it must refuse the amendment of the plaint. **After allowing the amendment the Court cannot say that the amendment takes effect from the date of the amendment.** Similarly, when a defective plaint is rectified and re-signed and re-verified on a subsequent date, the re-signing or the reverification of the plaint relates back to the original date.
>
> *(emphasis added)*

23) In ***Radheshyam G. Garg*** (supra), Single Judge of this Court dealt with a case where the suit notice did not demand arrears of rent nor the plaint contained the ground of default in claiming possession. The subsequent amendment to the plaint apparently added

the ground of default. In the facts of that case, this Court held that amendment of the plaint related back to the date of filing of the suit on which day, there were no arrears. This Court held in paras-11 and 12 as under:

> 11. Mr. Raghuwanshi, learned Advocate appearing in support of the petition, firstly submitted that the plaintiff would not be entitled to urge the ground of default for claiming possession. He pointed out that in the suit notice dt. 21st Aug, 1975 there was no demand towards arrears of rent inasmuch as there were no arrears on that date. Similarly in the suit filed on 2nd Oct., 1975 there was no ground of default set up for claiming possession. The plaintiff was not entitled to rely upon her subsequent notice dt. 14th April 1977 for claiming possession by amending the plaint on 26th Oct., 1977. **The amendment of the plaint related back to the date of the filing of the suit on which date there were no arrears.** Mr. Raghuwanshi relied upon the case of All India Reporter Ltd. v. Ramchandra, reported in AIR 1961 Bom 292, in support of his contention that the amendment in this case would relate back to the date of the suit i.e. 2nd Oct., 1975. The plaintiff was not thus justified in taking advantage of the alleged arrears subsequent to the filing of the suit and claim decree for possession on the ground of default by amendment of the plaint. The said subsequent default could at best give a fresh cause of action to the plaintiff and the plaintiff can claim possession on that cause of action only by filing a fresh suit and not by amending the present plaint.
>
> 12. I find considerable substance in the aforesaid submission of Mr. Raghuwanshi. Sub-Sec. (2) of Section 12 of the Bombay Rent Act provides that no suit for recovery of possession shall be instituted by landlord on the ground of non-payment of rent until expiration of one month next after a notice in writing of the demand of rent has been served upon the tenant. In my judgment, the condition precedent for filing a suit for possession on the ground of non-payment of rent is issuance of aforesaid notice under Section 12(2) of the Rent Act and it is only when the tenant fails to pay the rent demanded in the said notice within one month after service of the said notice that a cause of action can be said to have accrued in favour of the plaintiff to file a suit for possession on the ground of non-payment of rent. In this view of the matter **I hold that the claim of the plaintiff for possession on the ground of default in payment of rent set up by amendment of the plaint cannot give a valid ground for eviction under Section 12(3)(a) or 12(3)(b) of the Bombay Rent Act.**

(emphasis added)

24) It is by relying on the judgment of the Apex Court in ***Sidhalingappa*** and of this Court in ***All India Reporter Ltd. and Radheshaym G. Garg,*** that Mr. Gorwadkar has submitted that the ground of default in payment of rent would relate back to the date of institution of the suit, on which date, period of 30 days from the date of receipt of notice, as required under Section 12(2) of the Bombay Rent Act, has not expired.

25) I however find slight hesitation in accepting the submission of Mr. Gorwadkar about every ground introduced by way of amendment relating back to the date of institution of the suit. Under the MRC Act, the ground of acquisition of suitable alternate premises is no longer available for seeking recovery of possession of tenanted premises. If the doctrine of relation back is applied, the landlord will introduce the ground of acquisition of suitable alternate premises in a pending suit instituted before 31 March 2000, by amending the same say in the year 2005 by citing the doctrine of relation back. In my view, the key is the date on which the ground becomes available for the Plaintiff for being incorporated in the plaint. Thus, if the ground became available during the time when the Bombay Rent Act was in operation and due to inadvertence, such ground was not incorporated in the plaint filed before 31 March 2000, Plaintiff would be in a position to incorporate that ground even after coming into effect of the MRC Act subject to the objection of limitation and in such case, doctrine of relation back would apply for application of the enactment. To illustrate, if suitable alternate accommodation is acquired by the Plaintiff on 1 January 2000 and the suit is filed on 1 February 2000 without incorporating the ground of

acquisition of suitable alternate accommodation, Plaintiff can surely raise the said ground for amending the plaint on 1 January 2002. The only defence that can be raised in such case would be of limitation. Thus, the key is not the date on which amendment is applied for or granted for incorporation of a ground. The key is the date on which cause of action arose for incorporation of ground in the plaint.

26) In the present case, the cause of action for default in payment of rent was available to the Plaintiffs as on 3 November 1999 when the suit was instituted. However, the suit on the ground of arrears of rent could not be filed on 3 November 1999 on account of non-expiration of period of 30 days from the date of receipt of notice dated 25 October 1999. Therefore, the suit on the ground of arrears of rent could not be instituted on 3 November 1999 and was rightly not instituted based on the demand notice dated 25 October 1999. The cause of action for filing suit on ground of non-payment of rent, being continuous and concurrent in nature, can arise even during pendency of the suit and can always be independently raised in a pending suit. Thus, Plaintiffs were not precluded from either filing an independent suit on the ground of default in payment of rent or incorporating the said ground in the pending suit even in respect of default after 3 November 1999. However, unlike the other ground like acquisition of suitable alternate premises, the grounds of default in payment of rent can be in respect of series of events if the default continues during the period before and after filing of the suit. This is exactly what has happened in the present case. The default in payment of rent started from 1 January 1991 and it continued till the date of institution of the suit on 3 November 1999. It appears that

after appearing in the suit, the Defendants made first deposit of Rs.12,500/- on 19 July 2001. Plaintiffs had consciously given up the claim for default in payment of rent when the suit was instituted on 3 November 1999 and rent till July 2001 came to be deposited in the Court by the Defendants on 19 July 2011. Thus, after 19 July 2001, the ground of default in payment of rent was no longer available to the Plaintiffs. The second deposit was made by the Defendants on 23 August 2002 of Rs.1513/- and the same was in respect of rent upto August 2002. The next deposit is made by the Defendants on 2 March 2005 of Rs.1860/- for rent upto February 2005. Thus, when the suit was amended by filing application on 24 August 2004, the rent upto August 2002 had already been deposited in the Court. If Plaintiffs believed that there was default in payment of rent from September 2002 onwards till August 2004 when amendment was applied for and if they desired either filing of fresh suit or amending the pending suit on the basis of subsequent default from September 2002, Plaintiffs ought to have issued notice under Section 15(2) of the M.R.C. Act before instituting such fresh suit or before incorporating an amendment in the pending suit. Plaintiffs did not do so possibly because they desired incorporation of amendment with reference to events that took place before institution of the suit. This appears to be the reason why Plaintiffs made following pleading in the amended plaint:

> अशा परिस्थितीत मुंबई भाडे नियंत्रण कायद्याच्या कलम १२ (३) नुसार वादीस प्रतिवादीकडून दावा मिळकतीचा ताबा मागण्याचा कायदेशीर अधिकार प्राप्त झालेला आहे.

27) Apart from specific pleading that right to recover possession arose in favour of Plaintiff under Section 12(3) of the Bombay Rent Act, the averments relating to valuation of the suit again leaves no manner of doubt that the ground of default was relatable only to the events prior to institution of the suit. Para-13 of the plaint before amendment reads thus:

> १३) दाव्याची आकारणी कोर्ट फी करिता बारा महिन्याचे भाडे रुपये १,०५९ -०० इतकेवर केली असून त्यावर योग्य तो कोर्ट फी स्टॅम्प भरला आहे.

28) After amendment, para-13 of the plaint reads thus:

> १३) दाव्याची आकारणी कोर्ट फी करिता बारा महिन्याचे भाडे रुपये १,०५८.०० इतकेवर केली असून त्यावर योग्य तो कोर्ट फी स्टॅम्प भरला आहे. भाडेबाकीच्या मागणीसाठी वादीने दाव्याची आकारणी रुपये २२,५१०/- एवढी केलेली आहे. त्याबाबतचा तपशील-पुढे दिलेला आहे.

अ.क्र. रुपये	तपशील (दिनांक)
०१) ९,३५९.००	दिनांक ०१/०१/१९९१ ते ३१/१०/१९९९ पर्यंतची भाडेबाकीची रक्कम.
०२) १,१२३.०८	दिनांक ०१/०१/१९९१ ते ३१/१०/१९९९ पर्यंतची शिक्षण करांची होणारी रक्कम.
०३) २,६४९.००	दिनांक ०१/०१/१९९१ ते ३१/१०/१९९९ पर्यंतची इतर करांची देय होणारी रक्कम.
०४) ६,१८०.२०	मुदतीबाहेर गेलेली रक्कम.
०५) ३,१७८.८०	३६ महिन्यांची दरमहा रुपये ८८.३० पैसे या दराने होणारी रक्कम.

29) Thus, no event relating to default after date of institution of the suit is incorporated in the plaint. Para-9A again makes it clear that the default in payment of rent is restricted only till 31 October 1999. Considering the above factual position, I am unable to accept Mr. Godbole's contention that the ground of default incorporated by way of amendment in the year 2004 will have to be considered under the provisions of the M.R.C. Act. In fact, Mr. Godbole is forced to take this

stand contrary to Plaintiffs' own pleading in para-9A of the plaint with a view to save the suit from being barred under the provisions of Section 12(2) of the Bombay Rent Act. Strenuous attempts made by Mr. Godbole to do so would however not assist in getting over Plaintiffs' pleaded case that the suit is filed under Section 12(3) of the Bombay Rent Act.

30) Once it is held that the ground of default was only in respect of the period prior to filing of the suit and that the said ground was raised under Section 12 of the Bombay Rent Act, the said ground becomes not maintainable on account of provisions of sub-section 2 of Section 12 of the Bombay Rent Act. Plaintiffs did not show patience of waiting for 30 days after receipt of notice dated 25 October 1999 by Defendants and hurriedly instituted the suit on 3 November 1993. They must face the consequences of their hurried action. In fact, Plaintiffs were aware that they could not seek recovery of possession on the ground of default in payment of rent on account of provisions of Section 12(2) of the Bombay Rent Act and therefore consciously omitted to incorporate the ground of default in the plaint filed on 3 November 1999. Plaintiffs were apparently confident of securing possession on other grounds and therefore made conscious decision of omitting the ground of default in payment of rent though they had addressed notice dated 25 October 1999 to the Defendants alleging default in payment of rent. Having made a conscious choice of dropping the ground of default in payment of rent in the suit as originally instituted, Plaintiffs cannot now be permitted to take a *volte-face* and contend that the ground of default must be considered in the light of provisions of Section 15(2) of the M.R.C. Act with a view to use the notice dated 25 October 1999 for amended ground

of default incorporated in the year 2004.

31) In my view therefore, the ground of default in payment of rent was not available to the Plaintiffs in the light on non-expiration of period of 30 days from the date of service of notice dated 25 October 1999 as amended under Section 12(2) of the Bombay Rent Act. Reliance of Mr. Gorwadkar on judgments of this Court in ***Digambar Hari Sonpatki, Jeetendra Vasantrao Nagarkar*** and ***Buvaji Shamrao Kamble*** (supra) in support of his contention about non-maintainability of suit in absence of valid demand notice therefore appears to be apposite. The Trial and the Appellate Court have completely glossed over this important aspect and have erroneously accepted the ground of default by totally ignoring the provisions of Section 12 (2) of the Bombay Rent Act.

32) So far as the provisions of Section 12(3) of the Bombay Rent Act is concerned, the Defendants were required to pay or tender standard rent and permitted increases 'then due' together with simple interest at the rate of 9% on the first date of hearing of the suit. By now, it is settled position of law that the first day of hearing of the suit is the date on which the issues are framed. Though Mr. Gorwadkar has relied on short order of the Apex Court in ***Gurdev Singh*** (supra) in support of his contention that the first date of hearing means the first date of effective hearing, the law in this regard is settled by the judgment of the Apex Court in the case of ***Vasant Ganesh Damle Versus. Shrikant Trimbak Datar & Ors.***[23]

23 (2002) 4 SCC 183

33) In the present case, by the time the ground of default in payment of rent was added in the plaint, the Defendants had already made two deposits viz. Rs.12,500/-on 19 July 2001 and Rs.1513/- on 23 August 2002. The next deposit was made on 2 March 2005 of Rs. 1860/- and Rs.3,720/- on 15 November 2006. Mr. Godbole has not been able to point out the exact date on which the additional issue relating to default in payment of rent was framed and whether there were any arrears of rent on the date of framing of issues. Therefore, no case is made out to indicate failure on the part of the Defendants to deposit the rent alongwith interest before the date of framing of issues under the provisions of Section 12(3) of the Bombay Rent Act. Therefore, reliance by Mr. Godbole on the judgment of Full Bench of this Court in ***Babulal Fakirchand Agrawal*** (supra), has no relevance to the present case. The said judgment is relied upon by Mr. Godbole in support of his contention that the ground of failure to deposit arrears of rent then due as well as to regularly pay the rent during pendency of the suit under Section 15(3) of the MRC Act is independently available to the Plaintiff irrespective of demand in the suit notice being met. However, even if the said analogy is applied to the *pari materia* provision under Section 12(3) of the Bombay Rent Act, there is nothing on record to indicate as to whether any amount of rent was due or payable on the date of framing of issues and whether there was failure on the part of the Defendants to deposit the rent regularly during pendency of the suit.

34) In my view, the Trial Court and the Appellate Court have erroneously accepted the ground of default in payment of rent while decreeing the suit of the Plaintiffs.

C.2 INJURY/DESTRUCTION TO SUIT PREMISES AND ERECTING PERMANENT CONSTRUCTION

35) The ground of injury and destruction to the suit premises under Section 108(o) of the Transfer of Property Act read with Section 13(1)(a) of the Bombay Rent Act is decided by the Trial Court together with the ground of erecting permanent structure under Section 13(1)(b) of the Act. The Appellate Court has committed an error by mixing the issues of default in payment of rent (Issue No.1) and raising of permanent construction (Issue No.2) and answering the same together. Be that as it may. Perusal of the pleadings in the plaint would indicate that Plaintiffs listed various constructions allegedly carried out by the Defendant in para-5 of the Plaint as under :

> ५) वादी यांनी यापूर्वी नमूद केलेप्रमाणे प्रतिवादी यांने फिर्याद कलम १ मध्ये वर्णन केलेल्या दुकान जागे व्यतिरिक्त इतर कोणतीही जागा भाडयाने अगर वापरण्यास दिलेली नाही. अशी वस्तुस्थिती असतांना प्रतिवादी यांनी दावा दुकानालगत उत्तरेला मिळकतीचे बाहेर पूर्णपणे बेकायदेशीरपणे खालील प्रमाणे कामे केलेली आहेत.
>
> अ) प्रतिवादी यांना दाबा दुकान मिळकतीचे उत्तर वाजूस म्हणजे लक्ष्मी रोडचे बाजूला सेट बँकचे क्षेत्रात ६ फूट रुंद, १६ फूट लांब व ५ इंच उंच इतक्या क्षेत्रफळाचे ओटयाचे कायमस्वरुपी काम केले व तो ओटा स्वत:चे धंद्यासाठी वापर करण्यात सुरुवात केली. सदरील बांधकाम प्रतिवादी यांनी सुमारे ४ वर्षापूर्वी केले.
>
> ब) सदरील कलम (अ) मध्ये वर्णन केलेली जागा ही प्रतिवादी दुकानाचा वापर म्हणून करीत आहे. त्यासाठी प्रतिवादी यांनी विनाअधिकार दोन शोकेस उभ्या केल्या असून त्यामध्ये प्रतिवादी यांनी विकावयाच्या वस्तू ठेवल्या आहेत.
>
> क) प्रतिवादी यांनी त्यांचे धंद्याचे दुकानाची बॉक्स टाईप पाटी ही सेट बँकचे क्षेत्रात लावली असून त्या पाटीचा आकार सुमारे १६ फूट बाय ५ फूट असून त्याची खोली (डेप्स) ५ फूट इतकी आहे.
>
> ड) प्रतिवादी यांनी ताब्यातील दुकानापासून सुमारे ३ फूट दूरवर सिटी बैंक कार्ड या नावाचा बोर्ड लावला असून त्याचे प्रोजेक्यान हे सेट बैंक मधील क्षेत्रात आहे.
>
> इ) तसेच मूळ जी बॉक्स टाईप पाटी लावली आहे त्याचे वरती दर्शनी भागात प्रतिवादी यांनी नवीन निऑन/डिस्प्ले बोर्ड लावला असून सर बोर्डाचे प्रोजेक्शन हे

सुध्दा सेट बँकचे भागात येत आहे. त्या बोर्डाचा आकार १६ फूट बाय ५ फूट इतका असून त्याची खोली म्हणजे डेप्स सुमारे एक फूटाची आहे.

ई) सदरील कलम (क) यामध्ये वर्णन केलेल्या बॉक्स टाईप पाटी व त्यावरील शेडचे स्ट्रक्चर दावा दुकानाचे छताचे हद्दीचे बाहेर वरील बाजूस वाढवून दावा इमारतीचे पहिल्या मजल्याचे हद्दीत तीन फूट दावा दुकानाचे हद्दी व्यतिरिक्त जादा उभारले आहे.

(फ) प्रतिवादी यांनी त्यांचे दुकानाला जी दोन वजनदार लोखंडी शटर लावली आहेत ती सेट बॅकचे भागात काढली.

36) Additionally, the pleadings in support of ground of breach of conditions of tenancy are to be found in paras-6 and 7 of the plaint which reads thus :

६) वर कलम (५) मध्ये नमूद केलेले, वर्णन केलेले प्रतिवादी यांचे कृत्य लक्षात घेता प्रतिवादी त्यांना जी दुकान जागा भाडयाने दिलेली होती, त्याचेपेक्षा इतर जागेचा सदर प्रमाणे वहिवाट व वापर करुन भाडे शर्तीच्या महत्वाच्या अटीचा भंग केलेला आहे. प्रतिवादी यांचे दुकानापुढील जो भाग आहे तो वादीचे मालकीचा असून तो पुणे महानगरपालिकेचे जे संबंधीत नियम आहेत, त्यानुसार सेट बॅकचे जागा आहे. त्या जागेमधये म्हणजे सेट बॅकचे जागेमध्ये नियमानुसार कोणतेही बांधकाम अगर धंद्यासाठी वापर अगर कोणतेही प्रकारचे प्रोजेक्शन काढावयास मनाई आहे. सबब प्रतिवादी यांना सदर सेट बॅकची जागा कधीही वापरावयाची परवानगी देण्याचा प्रश्न उद्भवत नाही आणि सबब यापूर्वी नमूद केलेप्रमाणे दुकानाचीच जागा वापरावयाची व इतर अन्य कोणतीही नाही ही कायदेशीर शर्त सुध्दा आहे. प्रतिवादी यांनी सदर मूलभूत शर्तीचा भंग केलेला आहे हे उघड आहे. सबब वादी यांना प्रतिवादी यांनी भाडे शर्तीचा भंग केला यास्तव दावा मिळकतीचा ताबा मिळणे आवश्यक आहे. वादी प्रस्तुत दाव्याचे कामी त्याप्रमाणे मागणी करीत आहे.

७) वादी यांचे असेही म्हणणे आहे की, प्रतिवादी यांनी सदर फिर्यादी कलम (५) मध्ये जे वर्णन केलेआहे त्याप्रमाणे जी दुकान जागा भाडयाने दिलेली होती त्या व्यतिरिक्त दावा दुकान लगतच्या सेट बॅक जागेवर अतिक्रमण केलेले आहे. प्रतिवादी यांची सदरील वागणूक म्हणजे अतिक्रमण करुन वादी यांची जी जागा भाडयाने दिलेली नाही त्याचा वापर स्वत: आणि वादीचे इमारत मिळकतीशी संबंधित नसलेल्या तिन्हाईत इसमाचे व्यवसायाचे जाहिरातीचे बोर्ड लावून वापर करणे व वादी यांना त्याची सदरील जागा वापरण्यास मज्जाव व प्रतिबंध करणे व त्यावर बेकायदा बांधकाम करणे हे वर्तन कायदा व वस्तुस्थिती याचा विचार करता न्युसन्स व अनॉयन्स स्वरुपाचे आहे. प्रतिवादी यांची सदर प्रमाणे वागणूक ही वादी यांना सतत मानसिक क्लेश देणारी आहे. सबब वादी यांना या कारणस्तव वादी यांचेकडून ताबा मिळणे जरुरीचे आहे आणि वादी त्याप्रमाणे प्रस्तुत दाव्याचे कामी त्याप्रमाणे मागणी करीत आहे.

37) Additionally, the Plaint contained pleadings relating to causing damage to the building in which the suit premises are situated, in para-9 of the plaint which reads thus :

> वादी यांचे असे म्हणणे आहे की, प्रतिवादीयांनी नुकताच जो निऑन सायीन डिस्प्ले बोर्ड लावला त्यासाठी लोखंडी फॅब्रिकेटड ग्रिलचा वापर केला. सदर फॅब्रिकेटड हेवी स्ट्रक्चरसाठी लोखंडी अंगलमध्ये बनवलेल्या फ्रेम्सचे सहा मोठमोठ्या ब्रॅकेट्स भिंतीमध्ये कायमस्वरूपी गुंतविण्यासाठी प्रतिवादी यांनी वादीचे मिळकतीचे उत्तरबाजुकडील म्हणजे लक्ष्मी रोड रस्त्याचे बाजूकडील भिंतीस भोक पाडून त्याची फोडतोड करून व वेल्डिंग करुन कायम स्वरुपी फिक्स केले आणि सदर ग्रीलचे वजन ही त्या भिंतीवर टाकले आहे. सदर डिस्प्ले बोर्डाचा आकार, ग्रीलचा आकार व बॉक्स टाईप बोर्डाचा वजन याचा विचार करता प्रतिवादींनी इमारतीचे लाईफचा विचार करण्याऐवजी स्वत:चे जादा फायद्यासाठी सदर भिंतीवर विनाकारण व त्याचा बोजा वाढवला आहे. दावा इमारत ही सुमारे ५५ ६० वर्षाची जुनी आहे. प्रतिवादींनी लक्ष्मी रोड कडील दावा दुकानाची पश्चिमेकडील गोलाईची पक्क्या विटांची, बंदिस्त भिंत फोडून त्या ठिकाणी ६ फूट बाय ६ फूट साईजचा ओपन गाळा पाडून तेथे कायमस्वरुपी आरपार काचेची शोकेस बसवून डिस्प्ले केले व सदर ६ फूट बाय ५ फूट गाळयाबाहेर कायम स्वरुपी वजनदार लोखंडी शटर बसविले. प्रतिवादीचे सदरील काम हे पूर्णपणे बेकायदेशीर असून प्रतिवादीनी दावा दुकानाचे सदर भागाची पक्क्या विटांची भिंत फोडल्यामुळे इमारतीचा सदर भाग कमकुवत होवून त्यावर वजनदार लोखंडी रोलिंग शटरचा बोजा टाकला आहे व इमारतीला कायमस्वरुपी धोका निर्माण केला आहे. सदर प्रमाणे काम करताना प्रतिवादी यांनी वादीची आणि पुणे महानगरपालिकेची लेखी परवानगी घेतली नाही. वादी यांनी प्रतिवादी यांना अशा प्रकारची परवानगी कधीही दिली नव्हती व अशा प्रकारे परवानगी देण्याचा प्रश्नच उद्भवत नाही. सबब याही कारणास्तव वादीचा दावा मिळकतीचा ताबा मिळणे आवश्यक आहे व वादी त्याप्रमाणे दाव्याचे कामी मागणी करीत आहे.

38) By way of amendment, paras-8A, 8B and 8C came to be incorporated, which relate to events occurring during pendency of the suit and which reads thus :

> ८) वादी यांचे यापूर्वी केलेल्या विधानास बाधा नयेता असे म्हणणे आहे की, प्रतिवादी यांनी फिर्याद कलम (५) मध्ये जे कायम स्वरुपी बांधकाम केले आहे आणि बदल केलेला आहे त्यासाठी वादी अगर पुणे महानगरपालिका यांची कदापी परवानगी घेतलेली नाही. त्यामुळे सदरील सर्व बांधकाम हे पूर्णपणे बेकायदेशीरपणे आहे.
>
> ८अ) हा दावा प्रलंबित असतांना प्रतिवादी यांनी दावा मिळकतीच्या १० फूट भिंतीच्या आधारे दुकानातील माल ठेवण्यासाठी कपाटे तयार केलेली आहेत. सदरील कपाटे तीन टप्प्यात (तळ लगतचा टप्पा, मधला टप्पा व छतालगतचा टप्पा) बसविलेली आहेत. वादी यांचे असे म्हणणे आहे की, सदरील कपाटे भिंतीमध्ये कायमस्वरुपी बसविलेले आहेत. त्याचप्रमाणे सदरील कपाटांना काचेचे दरवाजे आहेत त्यामुळे काचेचे दरवाजे, कपाटांचा व त्यातील सर्व मालाचा बोजा भिंतीवर व पर्यायाने इमारतीवर पडत असून सदरचे प्रतिवादींचे बेकायदेशीर कृत्य हे

दावा दुकान व दावा इमारतीचे नुकसान व इजा पोहोचविणारे व धोका निर्माण करणारे आहे. वादी यांनी दावा मिळकतीतील परिस्थिती दर्शविणारे फोटोग्राफ्स दाखल केलेले आहेत.

८ब) त्याचप्रमाणे प्रतिवादी यांनी दावा मिळकतीतील छतास बोजा होईल असे छतास समांतर अशी कपाटे बसविलेले आहेत व त्यामध्ये दुकानातील विक्रीचा माल साठविलेला आहे. छतास आधांतरी केलेली कायमस्वरुपी बसविण्यात आलेली कपाटे हे प्रतिवादीचे बेकायदेशीर कृत्य दावा दुकान व दावा इमारतीचे नुकसान व इजा पोहोचविणारे व धोका निर्माण करणारे आहे त्यामुळे दावा मिळकतीचा ताबा बादीस मिळण्याचा हक्क निर्माण झालेला आहे.

८क) वादी यांचे असे म्हणणे आहे की, प्रतिवादी यांनी वर नमूद केलेले बदल करण्यासाठी बादी यांची कधीही परवानगी घेतलेली नाही."

39) Plaintiffs led evidence of Mr. Manohar M. Paranjape, Architect, who had prepared two maps in respect of the suit premises and which have been admitted in evidence. Perusal of the map at Exhibit-137 would indicate construction of platform (*Ota*) admeasuring 14.5’ in length and varying width of 5.2’ and 7’ in front of the suit premises. It appears that between the footpath abutting Laxmi Road and the boundary of the building, there is open space, which is described as road set back area. Construction of *Ota* has been carried out in this vacant road set back space. Defendants do not dispute existence of the said platform but claimed in the written statement that the original owner, Sarjerao Jadhav had created tenancy in respect of the suit premises together with vacant space in front of the shop and that the tenancy covered the platform also. However, in the Written Statement, Defendants are silent about the exact point of time when the said platform was constructed. In the Affidavit of Evidence, Defendants’ witness has virtually copied the contents of the Written statement with regard to existence of the platform. However, the evidence also shows renovation of the suit

premises by the Defendants in the year 1984. When the witness was subjected to cross-examination, he gave a clear admission that, '*It is correct to say that though the platform is not let out to us, we are claiming the said platform as part and parcel of the tenanted premises*'. Thus, there is a specific admission by the Defendants that the platform does not form part of the tenanted premises. However, the factum of Defendants using the said platform is clearly admitted. Mr. Gorwadkar would attempt to salvage this situation by contending that the location of the platform is such that it is impossible to enter the suit premises without making use of the platform. While Mr. Gorwadkar is not entirely wrong in saying so, considering the fact that the platform is located between the road and the suit shop, the defence would have been accepted if the platform was being used only for ingress and egress. However, it has been proved by the Plaintiffs that the Defendants have constructed two showcases on the said platform which are being used for display of goods. The Map prepared by the Architect would indicate presence of two glass showcases outside the shop. Additionally, the signboards put up by the Defendants also protrude into and cover the entire area of platform on the top of the shop. It is thus conclusively proved that the platform, not forming part of the suit premises, is encroached upon by the Defendants by carrying out construction thereon.

40) After considering the evidence on record, it is conclusively proved that following constructions have been carried out within and outside the suit shop:

(i)*Ota*/platform admeasuring 15'x 5'.2"x7'.0" in front of the suit premises and in the road set back area.

(ii)two showcases which rest on the above *ota*/platform on road facing external walls of the suit shop.

(iii)large box type signboard protruding into and covering the entire road set back area admeasuring 66'' x 47''.

(iv)an additional box type display below the main display.

(v)additional signboard display on which advertisement of City Bank Card is seen in the photographs.

(vi)removal of 9'' thick brick wall admeasuring 42'' x 53'' and replacing it with glass showcase for display of goods in the front portion of the shop.

(vii)installation of two rolling shutters, one by replacing the main wooden door of the shop and the other one to shut the display showcase created by removal of brick wall admeasuring 43'' x 53''.

41) It is sought to be contended by Mr. Gorwadkar that all the structures are removable in nature and are incapable of causing nor have actually caused any damage, destruction or injury to the structure. I am unable to agree. The work of removal of brick wall admeasuring 45'' x 53'' on the front portion of the suit shop and replacement thereof by showcase that display glass is not disputed by the Defendant. In para-19 of the Affidavit of Evidence, the Defendant's witness has stated that '*I*

say that the cupboards and furniture are constructed by the Defendant since 1984'. Thus, construction of the said showcase is not disputed by the Defendant. Nowhere in the Affidavit of Evidence it is stated that the space at which the said showcase admeasuring 44'' x 53'' is erected was vacant/void. It therefore has to be inferred that the Defendant broke the brick wall and plaster on the front portion of the shop and replaced the same by a showcase for display of goods from the front portion of the shop. These structures cannot be treated as either temporary or removable in nature. It therefore can easily be construed that the act of the Defendant in breaking the brick wall and replacing the same with glass showcase has caused injury and destruction to the suit premises. In my view, the test for determining cause of destruction or injury to the tenanted premises is simple. When the tenant vacates the suit premises by removing the articles, fixture and furniture, whether the landlord would get possession thereof in the same condition as they were first let ? Ofcourse, few minor changes, furnitures etc. which can easily be removed can be permitted so as to bring back the tenanted premises to their original state. However, when the tenant breaks a brick wall of tenanted premises that too on outer portion thereof, upon vacation of the suit premises by him and after removal of the said glass showcase, can it be said that the tenanted premises would stand restored to its original position ? The answer to this question, to my mind, appears to be emphatically in the negative. Removal of concerned showcase would result in a void on account of breaking of the brick wall. Therefore, the cause of injury and destruction to the tenanted premises has to be inferred on account of act of the Defendant in breaking the brick wall and replacing it with a showcase.

42) Mr. Gorwadkar does not dispute the position that construction relating to *Ota*/platform is of permanent nature and cannot be treated as a removable structure not causing damage or destruction to the suit property. However, Defendants have raised a plea that the *Ota* has not been constructed by them. In the Written Statement, Defendants have vaguely contended that they were allowed to use the vacant space by the erstwhile landlord, which formed part of tenanted premises. It is therefore vaguely contended in the Written Statement that between the suit shop and footpath, there is a small platform which also forms part of the tenanted premises. This defence is proved to be false on account of specific admission by the Defendant's witness, as discussed above. In the Written Statement, the words used are '*lahansa ota*' (small platform). Thus, what is sought to be conveyed in the Written Statement is that a small platform existed at the time of creation of tenancy which also formed part of the tenanted premises. However, the Architect's evidence shows that platform which exists at the site today admeasures 14' 5'' in length and 5' 2'' width at one side and 7' width on another side. Thus, the area of the *ota*/platform is approximately 85 sq.ft. and on being compared with the total size of the suit shop of 180 sq.ft, it cannot be contended that the same is '*lahansa*' (small), by any stretch of imagination. Therefore, even if the defence of the Defendants about existence of small platform at the time of creation of tenancy is accepted, it is difficult to believe that what exists today at the site is a small platform. The Defendants have either increased the size of platform or constructed an altogether new platform admeasuring approximately 85 sq.ft. Plaintiff is specific, both in pleadings as well as in evidence, that the platform has been constructed 3/4 years before the date of filing of the

suit. As against this, the Defendant is vague about the date of construction of platform as it stands today at the site. Therefore, the act of the Defendants in either constructing or expanding the platform, as it stands today at the site, would again tantamount to erection of permanent structure within the meaning of Section 13(1)(b) of the Bombay Rent Act. It is not Defendant's case, and rightly not canvassed by Mr. Gorwadkar, that activity of construction outside the suit premises cannot attract the provisions of Section 13(1)(b). This Court in ***Impex (India) Limited*** (supra) has held that if a tenant carries on construction outside the tenanted premises under a belief that the portion in which construction is carried out is also a part of the tenanted premises, the folly under Section 13(1)(b) would be deemed to have been committed by the tenant.

43) So far as three display boards constructed by the Defendants outside the suit shop are concerned, the main display board is a box type structure having massive size admeasuring 15' 6'' x 4' 6'' which admeasures area of approximately 70 sq.ft. Below the main display board, there is another display board admeasuring 15' 6'' x 1' 6'' which again admeasures about 24 sq.ft. There is third display board clearly visible in the photographs on which advertisement of City Bank cards is displayed. Thus in the matter of display boards also, Defendants/tenants have undertaken massive construction/addition. Defendant's witness has admitted that for installation of the said display boards, iron frame has been fixed into the wall which is supported both from the floor and at the top. There is thus embedment of a rod/pillar in the platform to support the massive sized main display board. It is Plaintiffs' case that

the height at which the main display board is constructed exceeds the height of the suit shop.

44) Coming to the erection of two showcases outside the suit shop, it is Plaintiff's case that the said erection was carried out during pendency of the suit. That the said showcases comprise of three parts abutting the ground, ceiling and wall which are permanently fixed at the said three places thereby adding weight to the building and wall endangering its life.

45) Defendants are also accused of construction of two rolling shutters at the suit premises. It appears that one rolling shutter is erected at the main entrance by replacing the wooden board. The second rolling shutter is to shut the display showcase erected by breaking open the 9" brick wall admeasuring 45'' x 53''.

46) Plaintiffs have also proved construction of several storage units inside the suit shop by drilling holes in walls and ceiling.

47) Plaintiff has stated in his cross-examination that for making various additions and construction at the site, Defendants have used about 500 screws by drilling holes into the walls.

48) The Defendant himself has admitted in evidence that he did not seek permission of the landlord while carrying out the above changes. The relevant statement in the cross-examination of Defendant's

witness reads thus :

> *'It is true that right from beginning I have not sought any permission in writing from the landlord to carry out any repairs of the suit premises'.*

Thus absence of permission in writing for erecting above structures is an admitted position.

49) Thus a bouquet of activities are carried out by Defendants/tenants at the suit shop. To my mind, some of the activities might fall in the category of 'permissible activities' since premises are used for running a shop by Defendants. It is sought to be contended by Mr. Gorwadkar that tenant doing business in a shop is entitled to make minor changes required for convenience of trade. Thus the activities of putting up a display board or construction of storage units inside the shop, or display units on external walls of the shop may not, replacement of wooden door with rolling shutter, may not, in strict sense, constitute material alterations so as to infer destruction or injury to the structure in which the premises are located. However, there are other activities like construction of platform, breaking the external wall for replacement by glass display unit, putting up additional rolling shutter at that display unit, etc which may not fit into the category of 'removable' changes.

50) Having considered the nature of constructions put up by Defendants/tenants at the site, it would be apposite to consider the law expounded in various judgments on effect of such constructions on the rights of the tenant to continue the tenancy. It would also be necessary to

reproduce the relevant provisions of Bombay Rent Act and Transfer of Property Act. Sections 13(1) (a) and (b) of the Bombay Rent Act provides thus:

> **13. When landlord may recover possession**
>
> (1) Notwithstanding anything contained in this Act but subject to the provisions of sections 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied:_
>
> (a) that the tenant as committed any act contrary to the provision of clause (o) of section 108 of the Transfer of Property Act, 1882; or
>
> (b) that the tenant has, without the landlord's consent given in writing, erected on the premises any permanent structure,
>
> Explanation.— For the purposes of this clause, the expression "permanent structure" does not include the carrying out of any work with the permission, wherever necessary, of the local authority, for providing a wooden partition, standing cooking platform in kitchen, door, lattice work or opening of a window necessary for ventilation, a false ceiling, installation of air-conditioner, an exhaust outlet or a smoke chimney;

Since Section 13(1)(a) of the Bombay Rent Act refers to clause (o) of Section 108 of the Transfer of Property Act, it would be relevant to reproduce that provision as well:

> **108. Rights and liabilities of lessor and lessee**.— In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—
>
> (B) Rights and Liabilities of the Lessee
>
> **(o)** the lessee may use the property and its products if any as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

51) Thus, for the purpose of present Suit, what needed to be established for attracting the ground under Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act is 'commission any act which is destructive or permanently injurious' to the suit premises.

52) Mr. Gorwadkar has contended that since destruction or permanent injury to the premises is not proved, provisions of Section 108(o) of the Transfer of Property Act are not attracted. According to him, since the suit shop is being used for conduct of trade, making necessary changes for convenience of trade cannot attract provisions of Section 108(o) of the Transfer of Property Act or Section 13(1)(b) of the Bombay Rent Act. He would rely upon judgment of the Apex Court in ***G. Raghunathan*** (supra) in which the Apex Court has held in paras-5, 10, 11 and 12 as under:

> 5. The Rent Controller found that the rent note was inadmissible in evidence. It was a tenancy from month to month. He found that the tenant had defaulted payment of rent. An order for eviction under Section 11(2) of the Act was liable to be passed. The fact that he had deposited the entire rent during the pendency of the proceedings, was relevant only for the purpose of Section 11(2)(c) of the Act. He found that the question of material alteration had to be approached from the angle of the landlord. **From that angle, it was clear that by the closing of the windows and the door, the amenity to the room had been destroyed by the tenant. The fact that such closing of the door and the windows was necessary to secure the jewellery of the tenant was not relevant. What had been done amounted to material alteration within the meaning of Section 11(4)(ii) of the Act.** The tenant was liable to be evicted. He, thus, ordered eviction on both grounds.
>
> 11. This Court had considered the scope of the analogous provision in sister enactments. The U.P. Cantonments (Control of Rent and Eviction) Act was involved in Manmohan Das Vs. Bishun Das (1967

(1) SCR 836). **Even if the alterations did not cause any damage to the premises or did not substantially diminish its value, the alterations were material alterations**. On that basis alone, the landlord was entitled to evict the tenant. That was in the context of the provision which enabled a landlord to get an order for eviction, if the tenant had, without the permission of the landlord, made any construction which has materially altered the accommodation. **Eviction could also be ordered even if that construction or alteration was likely to substantially diminish the value of the building.** The difference with the Kerala Act is that the two requirements were disjunctive. It was enough to satisfy either one of them. It was clarified that although the expression "material alteration" was not defined, the question would depend on the facts of each case. In that case the acts of the tenant were held to amount to material alterations. In Om Prakash Vs. Amar Singh (AIR 1987 SC 617) interpreting the same provision, it was held that the question whether a construction materially altered the accommodation was a mixed question of fact and law. The dictionary meaning of the expression "materially" and "alter" were considered. It was held to mean "a substantial change in the character, form and the structure of the building without destroying its identity". **It had to be seen whether the constructions were substantial in nature and they altered the form, front and structure of the accommodation. No exhaustive list of constructions that constitute material alteration could be given.** The determination of that question depended on the facts of each case. On facts, it was held that there was no material alteration. It was also laid down that the construction of a temporary shed in the premises which could easily be removed did not come within the mischief of the section. Brijendra Nath Vs. Harsh Wardhan 1988 (2) SCR 124) held that the construction of a wooden balcony in the showroom did not amount to material alteration. **Replacing of wooden plank on the front door of the building by a rolling shutter was held to be not an alteration that caused any damage to the building** and that was held not to provide a ground for eviction in Arunachalam (died) through L.Rs. and another Vs. Thondarperienambi and another (AIR 1992 SC 977). In Vipin Kumar vs. Roshan Lal Anand (1993 (2) SCC 614) a claim under Section 13(2) (iii) of the East Punjab Urban Rent Restriction Act, 1949, it was held that the impairment of the value or utility of the building was from the point of the landlord and not of the tenant. It had to be shown that there was impairment of the building due to acts of the tenant and, secondly, it had to be shown that the utility or value of the building had been materially impaired. The Court went on to say that the statute on proof of facts gave discretion to the Court to order eviction. The wording of the provision was "if the tenant has committed such acts as are likely to impair the value or utility of the building or rented land". The Rent Controller had to independently consider and exercise the discretion vested in him keeping in view

the proved facts to decree ejectment. It was for the landlord to prove such facts which warrant the Controller to order eviction in his favour. In Waryam Singh Vs. Baldev Singh (2003 (1) SCC 59) construing the same provision, it was held that enclosing a verandah by constructing walls and placing a rolling shutter in front, did not justify an inference that the value or utility of the building had been impaired, in the absence of evidence led by the landlord to prove that the value or utility had been affected. So an order of eviction could not be granted.

12. From the above, it is clear that the question depends on the facts of the case. The nature of the building, the purpose of the letting, the terms of the contract and the nature of the interference with the structure by the tenant, are all relevant. The destruction or damage has to be adjudged from the standpoint of the landlord. Let us look at the facts in the present case. The building is 75 years old. According to the tenant, it is 80 years old. The difference is not of any significance. It is the northern room in a building consisting of a number of rooms. It is let out for 15 years for a jewellery trade. The term has, of course, not come into effect for want of registration of the deed. The door in the western wall has been bricked up. The windows on the northern, western and southern walls have also been bricked up. Obviously, the bricked up portions can be removed and the doors and windows restored without weakening the structure. But more importantly, the level of the floor was lowered, the rafters cut, two concrete pillars erected and a rolling shutter fixed. The lowering of the floor and the tampering with of the roof, is of some significance. They could lead to impairment of the value or utility of the building, materially and permanently. That again has to be judged in the light of the surrounding circumstances. **But a rolling shutter has been fixed. That provides more security to the premises.** The height of the floor can be restored without impairment to the structure. Here, we find that the landlord has not even pleaded that the alterations made by the tenant have destroyed or reduced the value or utility of the building materially and permanently. No doubt, he has stated so in his evidence. But the tenant has stated that, considering that it was a jewellery business that was being started, these things had to be done. Securing of the premises was essential. He had given to the landlord Rs. 85,000/- as security to be returned, when he vacated the building. The value of the building, if at all, has only been enhanced. In this state of the record, it is not possible to infer that the acts of the tenant have materially and permanently destroyed or reduced the value or utility of the building. The age of the building cannot be ignored. The purpose of the letting cannot be ignored.

(emphasis and underlining added)

53) Relying on judgment in ***G. Raghunathan*** (supra), Mr. Gorwadkar has contended that alteration did not cause any damage to the suit premises, nor did it substantially diminish its value and therefore alterations cannot be true as material alterations. In that case, the Apex Court has held that fixing of rolling shutter did not amount to cause of destruction or damage to the property. According to him, the Apex Court has held that fixing of rolling shutters provides mere security to the premises. However, in para-12 of the judgment in ***G. Raghunathan,*** the Apex Court has observed that the landlord in that case did not even plead that the alterations made by the tenant had destroyed or reduced the value or utility of the building materially and permanently. In the present case, there is specific pleading of causing damage to the building in the plaint.

54) Mr. Gorwadkar has also relied upon judgment of the Apex Court in ***Hari Rao*** (supra), in which the allegation was about fixing of signboard, racks and taking of independent three phase electric connection by drilling holes for that purpose and whether such acts amounted to commission of waste in the building attracting provisions of Section 10(2)(ii)(b) of the Tamil Nadu Buildings (Lease and Rent Control), 1960. The Apex Court has held in para-9 as under :

9. In support of his claim for eviction under Section 10(2)(iii) of the Act, what the **landlord pleaded was that his tenant had put up new sign-boards and fixed two additional racks by drilling holes in the wall and in the beam and had taken an independent electric connection for which holes have been drilled in the floor and the wall, and all this amounted to commission of acts of waste as are likely to impair materially the value and utility of the building.** He also pleaded that the tenant had damaged the building while converting the shop for selling readymade dresses. **He had installed additional show-cases on the walls of the building by making holes therein**. He had increased the consumption of electricity by fixing up more lights and fans. He had increased the electric load, causing constant blowing out of the fuse in the building and causing damage to the electric service connection to the whole building and the entire building may catch fire at any moment. He also put up a big name board outside, damaging the building and had also drawn heavy electrical lines and taken service connection to the name board, with a heavy load of electricity. **The tenant admitted the putting up of sign-boards and the fixing up of racks but he denied that he had caused any damage.** Whatever he had done was with the consent of the landlord and the claim put forward by the landlord was only an attempt to gain the sympathy of the Court. The Engineer, P.W. 2 noted that new racks were fixed by making holes in floor walls and also in the beams. **Two new massive sign boards were fixed in the front and side. Holes were made in the parapet wall of the first floor and angle irons supporting the sign boards were fixed.** The parapet wall was only 2" thick and it could not take the weight of the huge sign boards and the parapet wall may collapse at any time. New electric connection has been given by making holes in the foundation and the wall in front and a new meter board had been fixed. This report of P.W.2 was not sought to be corroborated by any other material to show that there was any danger because of the taking of a new electric connection or by the increase in load. **It is true that for the purpose of his trade, the tenant fixed new racks by making holes in the floor, the walls and in the beams.** But, in the absence of any other material, it cannot be said to be the commission of acts of waste as are likely to impair materially the value and utility of the building. We must say that there is hardly any evidence on the side of the landlord to show that there was material impairment, either in the value or the utility of the building by the acts of the tenant. **The mere fixing of sign-boards outside the shop by taking support from the parapet wall, cannot be considered to be an act of waste which is likely to impair materially the value or utility of the building.** The report of the Engineer, P.W.2, merely asserts that the parapet wall will collapse at any time. There is no supporting evidence in respect of that assertion. Ex. B1-letter of the landlord giving permission to the tenant to fix boards, cannot also be ignored in this context. **Moreover, when a trade is carried on in a premises, that too in an important locality in a city, it is obvious that the tenant would have to fix sign-boards outside, to attract customers. These**

are days of fierce competition and unless the premises is made attractive by lighting and other means, a trader would not be in a position to attract customers or survive in the trade. Therefore, the acts of the tenant established, are merely acts which are consistent with the needs of the tenant who has taken the premises on rent for the purpose of a trade in leather goods and shoes and in furtherance of the prospects of that trade. **The fixing of racks inside the premises even by drilling holes in the walls or beams cannot be said to be acts which are themselves acts of waste as are likely to impair materially the value and utility of the building.** Broadly, a structural alteration however slight, should be involved to attract Section 10 (2) (iii) of the Act. In fact, we see hardly any pleading or evidence in this case which would justify a conclusion that the acts of the tenant amount to such acts of waste as are likely to impair materially the value and utility of the building. In G. Arunachalam (died) through L.Rs. and anr. Vs. Thondarperienambi and anr. [AIR 1992 SC 977] dealing with the same provision, this Court held that the fixing of rolling shutters by the tenant in place of the wooden plank of the front door by itself did not amount to a structural alteration that impaired the value of the building and no eviction could be ordered under Section 10(2)(iii) of the Act. Of course, in that case, there was also a report by an Engineer that the structural alteration made for fixing the rolling shutter, did not impair the value of the building. In the context of the Kerala statute which spoke of impairment in the value or utility of the building materially and permanently, **this Court has recently held in G. Raghunathan Vs. K.V. Varghese [2005 (6) SCALE 675] that the fixing up of rolling shutter and doing of the allied acts referred to in that decision, would not amount to user that materially and permanently impairs the value or utility of the building.** The Act here, only speaks of acts of waste as are likely to impair materially the value and utility of the building. The impairment need not be permanent. But even then, it appears to us that it must really be a material impairment in the value or utility of the building. In British Motor Car Co. Vs. Madan Lal Saggi (Dead) and anr. [(2005) 1 SCC 8], this Court considered the aspect of material alteration or damage in the context of Section 13(2)(iii) of the East Punjab Urban Rent Restriction Act, 1949. In the lease deed in that case, there was a covenant that the lessee will not make any addition or alteration or change in the building during the period of the tenancy. This Court referred to Om Prakash Vs. Amar Singh [(1987) 1 SCC 458], Om Pal Vs. Anand Swarup [(1988) 4 SCC 545], Waryam Singh Vs. Baldev Singh [(2003) 1 SCC 59], Gurbachan Singh Vs. Shivalak Rubber Industries [(1996) 2 SCC 626], Vipin Kumar Vs. Roshan Lal Anand [(1993) 2 SCC 614] and held, 'When a construction is alleged to have materially impaired the value and utility of the premises, the construction should be of such a nature as to substantially diminish the value of the building either from the commercial and monetary point of view or from the utilitarian aspect of the building.' There is hardly any material in the present case on the basis of which the Court could come to the conclusion that the act of the tenant here has amounted to

> commission of such acts of waste as are likely to impair materially the value and utility of the building. The Rent Controller and the High Court have not properly applied their minds to the relevant aspects in the context of the statute and have acted without jurisdiction in passing an order of eviction under Section 10 (2) (iii) of the Act. The Appellate Authority was justified in denying an order of eviction to the landlord on this ground.
>
> *(emphasis added)*

55) In ***Venkatlal G. Pitte*** (supra), the Apex Court has held that the issue as to whether the structure is permanent or not is a mixed question of law and fact. Mr. Gorwadkar has relied upon the judgment in ***Venkatlal G. Pitte,*** in support of his contention that the landlord accepting rent and continuing tenancy despite full knowledge of the additions to the structure since 1984 disentitled him to seek decree for eviction. He has also relied upon the said judgment in support of his contention that if the structure is found to be easily removable, without causing serious damage to the premises, the same would not amount to permanent structure leading to forfeiture. The Trial Court has relied upon the judgment in ***Venkatlal G. Pitte*** for considering the parameters for determining the nature of the structure. In ***Venkatlal G. Pitte***, the Apex Court held in paras-18, 19 and 22 as under :

> 18. In this connection reference may be made to a decision of the Special Bench of the Calcutta High Court in the case Surya Properties Private Ltd. and others v. Bimalendu Nath Sarkar and others. A.I.R. 1964 Calcutta p. 1 which dealt with clause (p) of section 108 of the Transfer of Property Act, 1882 and held that this question was dependent on the facts of each case and no hard and fast rule can be laid down with regard to this matter. In the absence of any relevant materials, therefore, the Full Bench found that no answer could be given. in a slightly different context, before Calcutta High Court in the case of M/s Suraya Properties Private Ltd. v. Bimalendu Nath Sarkar. A.I.R. 1965 Calcutta page 408, Chatterjee, J., one of the judges of the Division Bench observed that the phrase 'permanent structure' for purposes of clause (p) of section 108 of the Transfer of Property Act meant a structure which

was capable of lasting till the term of the lease and which was constructed in the view of being built up as was a building. In that context the learned judge observed that a reservoir was not, however, a permanent structure for purposes of clause (p) of section 108 of the Transfer of Property Act. Sen, J. of the same Bench was of the view that no hard and fast tests could be laid down for determining the question whether a particular structure by the tenant was a permanent structure for the purpose of clause (p) of section 108 of the Transfer of Property Act. The answer to the question depended on the facts of each case. Chatterjee, J., however, took the view that where the tenant created a permanent structure in the premises leased to him, as the lease continued in spite of the disputed structure and the landlord continued to receive rent till the determining of the lease by notice to quit or thereafter till the passing of the decree for eviction and the fact that he accepted rent with full knowledge of the disputed structure did not disentitle him to a decree for eviction.

19. In Khureshi Ibrahim Ahmed v. Ahmed Haji Khanmahomad. A.I.R. 1.965 Gujarat, 152, in connection with section 13(1)(b) of the Rent Act, Gujarat High Court held that the permanent structure must be one which was a lasting structure and that would depend upon the nature of structure. The permanent or temporary character of the structure would have to be determined having regard to the nature of the structure and the nature of the materials used in the making of the structure and the manner in which the structure was erected and not on the basis of how long the tenant intended to make use of the structure. As a matter of fact, the Court observed, the nature of the structure itself would reflect whether the tenant intended that it should exist and be available for use for a temporary period or for an indefinite period of time. The test provided by the Legislature was thus an objective test and not a subjective one and once it was shown that the structure erected by the tenant was of such a nature as to be lasting in duration lasting of course according to ordinary notions of mankind the tenant cannot come forward and say that it was erected for temporary purpose.

22. Judged in the aforesaid light on an analysis of the evidence the trial court as well as the appellate court had held that the structures were permanent. The High Court observed that in judging whether the structures were permanent or not, the following factors should be taken into consideration referring to an unreported decision of Malvankar J. in special civil application No. 121 of 1968. These were (1) intention of the party who put up the structure; (2) this intention was to be gathered from the mode and degree of annexation; (3) if the structure cannot be removed without doing irreparable damage to the demised premises then that would be certainly one of the

> circumstances to be considered while deciding the question of intention. Like- wise, dimensions of the structure and (4) its removability had to be taken into consideration. But these were not the sole tests. (5) the purpose of erecting the structure is another relevant factor. (6) the nature of the materials used for the structure and (7) lastly the durability of the structure. These were the broad tests. The High Court applied these tests. So had the Trial Court as well as the appellate bench of Court of Small causes.

56) Mr. Gorwadkar has relied upon judgment of Single Judge of this Court in ***Somnath Krishnaji Gangal*** (supra) concluding certain principles on the issue of permanent nature of structure in para-21 of the judgment as under :

> 21. In view of the decisions of the Hon'ble Supreme Court and of this Court, my conclusions are as under :
>
> (i) In deciding the question as to what is a "permanent structure", it is necessary to consider the mode and degree of annexation as also the intention of the party putting up the structure. The creation of such a work or addition thereof in order to amount to a permanent structure must cause and bring about a substantial improvement and change in the nature and form of accommodation.
>
> (ii) If what has been done it by way of minor repairs for the better enjoyment and use of the premises, it cannot be regarded as a permanent structure. Similarly, if the object and purpose of annexation was only to better the mode of enjoyment of the demised premises as in the case of construction of the kitchen platform, it does not amount to a permanent structure within the meaning of section 13(1)(b) of the said Rent Act.
>
> (iii) The essential element which needs consideration is as to whether the construction is substantial in nature and whether it alters the form, front and structure of the accommodation.
>
> (iv) If what the tenant does in large scale renovation like replacement of the entire roof, covering it with marble tiles, without obtaining permission of the landlord, it may amount to permanent structure within the meaning of section 13(1)(b) of the Rent Act.

> (v) Similarly, if the tenant constructs a bathroom in the gallery which puts additional burden in the gallery which is harmful to the structure of the building, it would amount to a permanent structure.

57) Mr. Gorwadkar, has also relied upon judgment of Single Judge of this Court in ***Manoramabai Vishnu Limaye*** (supra), in support of his contention that if the construction is removable and made on temporary basis, not causing any harm to the structure, decree for eviction cannot be passed. This Court held in para-9 as under:

> "9. In the aforesaid cases, the courts have laid down the points and matter to be considered for deciding whether a construction is a permanent construction or that it amounts to an alteration in the suit premises. One of the tests laid down is to consider whether the alleged permanent construction tends to make changes in the accommodation on a permanent basis. A temporary construction made on a temporary basis that does not ordinarily harm a structure of the building and can be easily removed without causing damage to the building is not regarded as a permanent structure or an offending alteration. Intention of the party is also relevant. Whether the party intended to make a construction of a permanent nature or not is also relevant. Counsel for the tenant calling upon me to follow these tests submitted that on a complaint being made by the landlady, the Municipal Authorities had removed the commode on 24th June, 1985. In the process of removal no damage was caused to the property and the commode could be removed easily without causing any damage to the property. Taking this into consideration the decision of the two courts below that the construction was not a permanent construction, in my opinion, is a possible view and does not require any interference in exercise of an extra ordinary jurisdiction under Article 227 of the Constitution of India.

58) The judgment of the Apex Court in ***Om Pal*** (supra) is relied upon in support of the contention that temporary construction not substantially diminishing value of the building from commercial or monetary point of view would not result in forfeiture of tenancy. The

Apex Court held in para-9 as under :

> 9. In the light of these decisions, if we examine the present case we find that the Rent Controller and the Appellate Authority as well as the High Court have obviously failed to construe Section 13(2)(iii) in its proper perspective and they have failed to apply the correct legal tests for judging the nature o the constructions made by the appellant. As has been repeated pointed out in several decisions it is not every construction or alteration that would result in material impairment to the value or the utility of the building. In order to attract Section 13(2)9ii) the construction must not only be one affecting or diminishing the value or utility of the building but such impairment must be of a material nature i.e. of a substantial and significant nature. It was pointed out in *Om Prakash v. Amar Singh* (at SCC p.463) that the legislature had intended that only those constructions which brought about a substantial change in the front and structure of the building that would provide a ground for the tenant's eviction and hence it had taken care to use the word 'materially altered the accommodation" and as such the construction of a chabutra, almirah, opening of window or closing a verandah by temporary structure or replacing of a leaking roof or placing partition in a room or making minor alterations for the convenient use of the accommodation would not materially alter the building. It would therefore follow that when a construction is alleged to materially impair the value or utility of a building, the construction should be of such a nature as to substantially diminish the value of the building either from the commercial and monetary point of view or from the utilitarian aspect of the building.

59) The judgment of this Court ***Keshavji Ramji Sanghavi*** (supra) is relied upon in support of the contention that damage or injury to the property leased is essential before the landlord can rely upon contravention of Section 108(o) of the Transfer of Property Act. This Court held in paras-4 and 9 as under :

> 4. I do not think that if a termite affected beam is replaced with a new one and is removed, it can be said to be an act of imprudence on the part of the tenant. By no stretch of words, can it be said that removing such a old and hazardous beam and putting a new beam is an act contrary to provisions of Cl.(o) of S.108 of the Transfer of Property Act, 1882.

> 9….The damage or injury to the property leased is, therefore, essential before the landlord can rely on the act as one in contravention of Section 108(o) of the Transfer of Property Act within the meaning of Section 13(1)(a) of the Bombay Rent Act….

60) From the above quoted judgments, the broad principles that can be culled out are as under:

> (i) the structure must be permanent in nature, which is incapable of being removed.
>
> (ii) a temporary structure which can easily be removed without causing damage to the building/structure would not attract forfeiture of tenancy.
>
> (iii) substantial damage to the structure/building must be proved in addition to diminishing its value.
>
> (iv) minor changes made for convenience of trade would not amount to material alterations in the tenanted premises.

61) In the present case, as observed above, there are numerous additions and alterations inside and outside the suit premises. Though each of those additions or alterations may not amount to destruction or permanent injury to the suit premises within the meaning of Section 108(o) of Transfer of Property Act or a permanent structure within the meaning of Section 13(1)(b) of the Bombay Rent Act, couple of them, in my view do conform to the said statutory provisions. Construction/ extension of platform would definitely amount to erecting of permanent structure. Breaking open of outside brick wall and installing of glass showcase by covering the same with rolling shutter would clearly

amount to cause of permanent injury and destruction of the premises. Though putting of a signboard to attract customers *per se* may not strictly amount to permanent injury or destruction of premises or erecting of permanent structure. However the tenants could have simply put up one large display board to attract customers to their shop. What is however done is construction of three signboards, two for display of its own name and third one for profiteering by displaying advertisement of City Bank. Installation of the main massive sized board required construction of large iron fabrication frame with support from side, top and bottom. A rod is embedded in the platform to support the sign board. Therefore though in ordinary course, putting up of a mere signboard may not *ipso facto* attract Section 108(o) or 13(1)(b), in the present case, the manner and purpose for which the three signboards are put up would lead to inference of permanent injury and destruction of suit premises.

62) Turning to the aspect of rolling shutter, it appears that the Single Judge of this Court (*V.C. Daga, J.*) has held in ***Dr. C.C. Yi*** (supra) that removal of door and replacement thereof by rolling shutter amounts to change in the permanent structure. This Court held in para-25 as under:

> 25. The second item of construction i.e. removal of wooden doors and replacement thereof by plywood doors, even if considered separately, the result cannot be different. Once the door is fitted to the permanent structure, it becomes part of the immovable property, viz. Building. It does not remain a movable item or a distinct item of furniture. Therefore, removal of door or replacement thereof is nothing but a change in the permanent structure. The judicial note can always be taken of the fact that durability of wooden doors is much more from than that of the plywood doors. Life of the plywood doors cannot match with that of wooden doors. Thus, this act of tenant has also

> been prejudicial to the interest of the landlord and has diminished the value and life of the doors and consequently of the suit premises. As such, the act of replacement of the wooden doors with that of plywood doors that too without written permission of the landlords has rightly been treated as an act in violation of Section 13(1)(b) of the Act by both the courts below.

63) However, Mr. Gowadkar has relied upon judgment of the Apex Court in ***G. Raghunathan,*** in which it is held that fixation of rolling shutter provides more security to the premises. In my view, mere replacement of old door by installation of rolling shutter in relation to a commercial shop would not, in every case, constitute material change in the tenanted structure. It would depend on the facts and circumstances on each case. It would be too conservative to expect that the tenant should continue to use the same old wooden door when most of the shops in the cities are protected by way of rolling shutters, which not only provide convenience but also generates a sense of security. Therefore, mere replacement of front door of the suit premises with rolling shutter, in my view, would not amount to erection of any permanent structure or commission of an act injurious or destructive to the tenanted premises. However, in the present case, in addition to replacement of the wooden door with rolling shutter, the Defendants have installed additional rolling shutter at the portion where 9'' thick brick wall and plaster is broken and replaced with a glass showcase. The portion at which the glass showcase is installed is being shut by another separate and independent rolling shutter. This act, in my view, was quite unnecessary. As held above, the main act of breaking upon the outside brick wall and replacing it with showcase itself amounts to material change in the tenanted premises. Putting of a rolling shutter at that

portion adds premium to the illegal act already committed. Therefore, the action of installation of rolling shutter to the limited extent of the second small rolling shutter at display board is found to be violative of Section 13(1)(a) and 13(1)(b) of the Bombay Rent Act.

64) Considering the nature of activity undertaken by the Defendants, it is difficult to hold that every structure erected by the Defendants is temporary or removable in nature or has not caused any material change in the tenanted premises or has not caused any injury or destruction thereof.

65) In my view, therefore the Trial and the Appellate Court have correctly upheld the grounds under Section 13(1)(a) read with Section 108(o) of the Transfer of Property Act and Section 13(1)(b) of the Bombay Rent Act.

66) Mr. Gorwadkar has raised the issue of limitation in filing the suit relating to the grounds of Section 13(1)(a) and 13(1)(b) of the Bombay Rent Act. According to him, the renovation in the building is carried out in the year 1984 and that therefore the suit ought to have been brought within 12 years of such renovation under Article 66 of the Limitation Act. Mr. Gorwadkar has relied upon judgment of this Court in ***Shashikant Yeshwant Limaye and another Versus. Chintaman Vinayak Kolhatkar and others***[24] and the judgment of the Apex Court in ***Ganpat Ram Sharma and others Versus. Gayatri Devi***[25] in support of his contention about applicability of

24 2010 (5) Mh.L.J. 527.
25 (1987) 3 SCC 576.

Article 66 of the Limitation Act. There can be no dispute about the proposition that Article 66 of the Limitation Act would apply and not Article 67 as erroneously pleaded by Plaintiffs in the plaint.

67) However, the Plaintiffs pleaded the case that the construction and erections were effected 3/4 years prior to the date of filing of the suit. In the light of this assertion on the part of the Plaintiff, it was incumbent for the Defendant to prove that the concerned construction took place in the year 1984. However, no evidence is produced by the Defendants to prove carrying out of constructions in the year 1984. In fact, some of the constructions are allegedly carried out during pendency of the suit. I am therefore unable to uphold the ground of limitation sought to be urged by Mr. Gorwadkar.

68) Plaintiffs have thus established the grounds of (i) destruction and permanent injury to premises under section 13(1)(a) read with Section 108(o) of Transfer of Property Act as well as (ii) erecting permanent structure without landlord's consent in writing.

D. ORDER

69) After considering the overall conspectus of the case, though it is held that the Trial Court and the Appellate Court have committed an error in accepting the ground of default in payment of rent, the decree is still required to be sustained on the grounds of Section 13(1)(a) (destruction and permanent injury to premises) and 13(1)(b) (erecting permanent structure) of the Bombay Rent Act. The impugned decree is

thus unexceptional not warranting any interference in concurrent findings recorded on those grounds by both the Courts in exercise of revisionary jurisdiction of this Court under Section 115 of the Code. The Civil Revision Application is accordingly dismissed with costs.

70) Considering the facts and circumstances of the present case, the Defendant shall vacate the suit premises on/or before 31 December 2024 without affecting the right of the Plaintiff to claim mesne profits.

(SANDEEP V. MARNE, J.)