2026:BHC-AS:37423

eeta Sawant

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7067 OF 2003

Navina Dinesh Shetty **...Petitioner**

V/s.

Shaikh Ayub Rehman **...Respondent**

WITH

WRIT PETITION NO.7068 OF 2003

Navina Dinesh Shetty **...Petitioner**

V/s.

Shaikh Ayub Rehman and Anr. **...Respondents**

Mr. Rohit D. Joshi for the Petitioner.

Mr. Pradeep Thorat i/b Ms. Anu R. Khanna for Respondent No.1.

CORAM: SANDEEP V. MARNE, J.

RESERVED ON: 28 AUGUST 2026

PRONOUNCED ON: 10 SEPTEMBER 2026

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Judgment:

1) These two Petitions are filed by the Petitioner challenging the judgment and decree dated 10 September 2003 passed by the Additional District Judge, Thane, allowing Appeal Nos.51 and 52 of 2002 and setting aside two judgments and orders of the Trial Court, both dated 22 January 2002 passed in cross suits filed by parties bearing Regular Civil Suit No.553 of 1997 and Regular Civil Suit No.61 of 1998.

2) Regular Civil Suit No.553 of 1997 was filed by the Petitioner seeking declaration of tenancy in respect of the suit premises, which was decreed by the Trial Court. Regular Civil Suit No.61 of 1998 was filed by the Respondent seeking recovery of possession of the suit premises terming Petitioner/Plaintiff as mere licensee in respect of the suit premises. The Trial Court had dismissed Regular Civil Suit No.61 of 1998. The Respondent filed Appeal Nos. 51 and 52 of 2002 before the District Court and by the impugned common judgment and order dated 10 September 2003, the Appellate Court had allowed both the Appeals of the Respondent and has dismissed Petitioner's Suit while decreeing the Suit of the Respondent. Accordingly, the Petitioner is directed to handover possession of the suit premises to the Respondent with further direction to pay Rs. 2,000/- per month from 14 August 1996 till delivery of possession. Aggrieved by the common judgment and order dated 10 September 2003 passed by the Appellate Court, Petitioner has filed the present Petitions.

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3) Gala No.9, Plot No.50, APMC Market Sector 19, Vashi, Navi Mumbai (**suit premises**), is owned by the Respondent-Mr. Shaikh Ayub Rehman. A Caretaker Agreement dated 12 October 1994 was executed by the Respondent in the name of Petitioner's husband- K. Dinesh J. Shetty, inducting him in the suit premises for a tenure of 11 months from 15 October 1994 to 14 September 1995. Second Agreement dated 15 September 1995 was executed in favour of the Petitioner putting her in possession of the suit premises for a tenure of 11 months from 15 September 1995 to 14 August 1996. The Petitioner claims that what is created in her favour is tenancy rights in respect of the suit premises.

4) The Petitioner filed Regular Civil Suit No.553 of 1997 before the Civil Judge Junior Division, Vashi, seeking a declaration that she is a tenant in respect of the suit premises and seeking injunction against the Respondent from dispossessing her without following due process of law. On the other hand, the Respondent filed Regular Civil Suit No.61 of 1998 in the Court of Civil Judge Junior Division, Vashi, seeking recovery of possession of suit premises on the ground that the licence period had expired. The Trial Court decided both the Suits on 22 January 2002, but by two separate judgments. The Petitioner's Suit No.553 of 1997 was decreed declaring that she is a tenant in respect of the suit premises and granting perpetual injunction against the Respondent from dispossessing her without following due process of law. Consequently, Regular Civil Suit No.61 of 1998 filed by the Respondent seeking recovery of suit premises was dismissed.

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5) The Respondent filed Civil Appeal Nos. 51 and 52 of 2002 challenging both the decrees of the Trial Court dated 22 January 2002. The Appellate Court has allowed both the Appeals of Respondent by common judgment and order dated 10 September 2003. The Appellate Court has dismissed Petitioner's Suit being Regular Civil Suit No.553 of 1997 holding her to be a mere licensee in respect of the suit premises. Consequently, declaration made by the Trial Court about she being a tenant in respect of the suit premises is set aside. Since the Petitioner is held to be a mere licensee, suit filed by the Respondent is decreed and Petitioner is directed to handover possession of the suit premises to the Respondent within a period of two months. Additionally, the Appellate Court has also directed the Petitioner to pay to the Respondent an amount of Rs.2,000/- per month from 14 August 1996 till delivery of possession. Aggrieved by the common judgment and order dated 10 September 2003 passed by the Appellate Court, the Petitioner has filed these two Petitions.

6) By order dated 6 November 2003, both the Petitions have been admitted. In Writ Petition No.7067 of 2003, interim order is granted thereby staying the decree of the Appellate Court in Civil Appeal No.51 of 2002. It appears that during pendency of the Petition, Petitioner has deposited an amount of Rs.2,000/- per month for a period upto September 2012 before the Trial Court. Thereafter the Petitioner has apparently failed to make deposit of any amount. The Petitions are called out for final hearing.

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7) Mr. Joshi, the learned counsel appearing for the Petitioner submits that the Appellate Court has grossly erred in reversing the well-considered judgments of the Trial Court. That perusal of the two Agreements executed in favour of the Petitioner and her husband makes it clear that intention of the parties was always to create tenancy in respect of the suit premises. That clause 5 of both the Agreements clearly provide that relationship between the parties would be that of landlord and tenant. Additionally, the word 'rent' appears throughout the Agreement on multiple occasions. That, therefore, it cannot be contended by any stretch of imagination that there is any typographical error in clause 5 of the Agreement. That both the Agreements have receipts appended to them acknowledging payment of rent by the Petitioner. That the Trial Court has correctly interpreted both the Agreements as creation of tenancy rights in favour of the Petitioner.

8) Mr. Joshi further submits that under Section 105 of the Transfer of Property Act, 1882, transfer of interest in premises amounts to lease if three requirements are fulfilled viz. (i) transfer of right to enjoy immovable property, (ii) transfer for specified time and (iii) transfer for valuable consideration. In the present case, since all the three conditions are fully satisfied, the Trial Court correctly interpreted arrangement between the parties a lease and not a mere license. That the Petitioner was put in possession of the premises and the Respondent never demanded possession after expiry of tenure of arrangement with the Petitioner. Thus, possession remained with the Petitioner and her husband even after expiry of the first agreement.

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9) Mr. Joshi submits that the Respondent was conscious of the fact that the Petitioner and her husband had intended to run a hotel in the suit premises, which itself signifies use of the premises for longer duration and belying the theory of license. He relies on judgment of this Court in ***Sardar Pruthisingh vs. Kanchanlal Purshottamdas Desai***[1] in support of his contention that when premises are taken up for establishment of a business, the arrangement becomes inconsistent with a mere license. That in the present case, the Petitioner is the owner of Gala No.10 which is located at back side of the suit premises and the suit premises are taken over for expanding the business. He therefore submits that in such a situation, parties could have never intended creation of a mere license and there was always an intention for creation of tenancy between the parties. He accordingly prays for setting aside the decree passed by the Appellate Court.

10) Mr. Thorat, the learned counsel appearing for the Respondent, opposes the Petition submitting that the Appellate Court has rightly appreciated the arrangement of license between the parties. He takes me through both the Caretaker Agreements to demonstrate as to how there is repeated reference to creation of license. He submits that intention of the parties to create a mere license and not to create tenancy is more than apparent from the stipulations of the Agreement. He submits that there is a specific covenant in the Agreement for non-creation of tenancy. He submits that mere use of the term '*rent*' in the Agreements is inconsequential and the same does not mean that the parties intended creation of tenancy. In support, he relies on judgment

[1] 2001 (2) MhLJ 948

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of the Apex Court in ***Suhas Yeshwant Chopde V/s. Sachhidanand D. Purekar***[2] and of this Court in ***Rajendra B. Nair V/s. Suresh D. Dyanmothe and Anr.***[3] Mr. Thorat accordingly submits that the decree of the Appellate Court be upheld without interfering in the direction for handing over possession of the suit premises. Mr. Thorat submits that though the suit premises were granted on license for only 11+11=22 months, the Petitioner has been squatting on the same for the last 32 long years. Mr. Thorat submits that even the amount of Rs.2,000/- determined by the Appellate Court is not deposited by the Petitioner after September 2012. That the Petitioner is thus enjoying the premises of the Respondent free of costs. He therefore submits that while dismissing the Petition, the Respondent be awarded *mesne* profits for illegally possessing the suit premises by the Petitioner. He submits that it is not necessary for him to challenge the decree of the Appellate Court for the purpose of claiming *mesne* profits. He submits that this Court is empowered to grant the same under Order XLI Rule 33 of the Code of Civil Procedure, 1908 (**Code**). He submits that whenever possession of immovable property is held to be illegal, the higher Court must necessarily make an order for payment of *mesne* profits. In support, he relies on judgment of the Apex Court in ***Narayanrao (dead) through LRs and Ors. Vs. Sudarshan***[4] and of this Court in ***Sattarsha Dibarsha and Ors. Vs. Ajizabi Dilbarsha and Ors.***[5]

2 (1999) 5 SCC 721
3 2002 (4) MhLJ 93
4 1995 Supp (4) SCC 463
5 2017 SCC OnLine Bom 6745

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11) Mr. Thorat further submits that this Court can exercise powers under Order XLI Rule 33 even while exercising jurisdiction under Article 227 of the Constitution of India. He submits that the present Petition is required to be filed under Article 227 of the Constitution of India on account of provisions of Section 7 of the Code, which makes provisions of Section 115 of the Code inapplicable in relation to orders passed by Provincial Small Cause Courts, 1887. Otherwise, according to Mr. Thorat, the correct remedy for the Petitioner is to file a revision under Section 115 of the Code, in which case this Court could easily exercise powers under Order XLI Rule 33 of the Code. He, however, submits that even though the Petition is filed under Article 227 of Constitution of India, this Court can still exercise all powers under the Code. In support of his contention, he relies on judgment of this Court in ***M/s. Musaji Mohamadali Master and Sons & Anr. V/s. Gulamali Dadabhai Amreliwala and Anr.***[6] He relies on judgment of the Apex Court in ***Puran Singh and Ors. Vs. State of Punjab and Ors.***[7] in support of his contention that powers under Order XX of the Code are held to be exercisable by the High Court while dealing with Petition under Article 226 of the Constitution of India. Mr. Thorat also relies on judgment of Division Bench of this Court in ***Prabhulal Chhogalal vs. Bastiram Himatram and Anr.***[8] in support of his contention that while interpreting provisions of Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 **(Bombay Rent Act)** as amended by Maharashtra Act XVIII of 1987 **(Amending Act)**, this Court held that word 'proceeding' appearing in Section 25 of the Amending Act would also

6 2004 SCC OnLine Bom 1169
7 (1996) 2 SCC 205
8 1989 SCC OnLine Bom 213

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include a petition filed under Article 227 of the Constitution of India. He therefore submits that present Petition be treated as 'proceedings' for the purpose of application of provisions of Order XLI Rule 33 of the Code.

12) Mr. Thorat submits that the Respondent is deprived of the valuable rights in respect of the premises on account of unauthorised occupation thereof since 14 August 1996. He submits that though the Appellate Court has adjudicated the prayer for recovery of amount of Rs.4,000/- per month raised in the Plaint and has reduced the same to Rs.2,000/- per month, Respondent is entitled to seek modification of relevant directions of the Appellate Court and substitute the same with an order for enquiry into the *mesne* profits. Mr. Thorat would accordingly submit that while dismissing the Petitions, this Court may direct enquiry into *mesne* profits w.e.f. 14 August 1996.

13) In rejoinder, Mr. Joshi would submit that it would be impermissible to grant any relief in favour of the Respondent under Order XLI Rule 33 of the Code. He submits that the Respondent raised a specific prayer for recovery of amount of Rs.4,000/- per month. His prayer is adjudicated by the Appellate Court and is partially declined. That the Appellate Court has made a decree for only Rs.2,000/- per month. If the Respondent was aggrieved by the said quantification, he ought to have challenged the order of the Appellate Court. That there is adjudication on the issue of quantum of monthly charges to be paid and since the Respondent has accepted the said quantification, it is no longer open for him to now turn around and raise a prayer for *mesne* profits.

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14) Rival contentions urged on behalf of the parties now fall for my consideration.

15) Petitioner is aggrieved by the common judgment delivered by the Appellate Court which reverses the finding of the Trial Court and decrees the suit filed by the Respondent directing eviction of the Petitioner from the suit premises. The issue whether Petitioner can be directed to vacate the suit premises hinges on the issue as to whether Petitioner is a tenant or a mere licensee in respect of the suit premises. The Trial Court held that Petitioner was inducted as a tenant in respect of the suit premises by virtue of Agreements dated 12 October 1994 and 15 September 1995 and granted her protection from eviction. The Appellate Court, on the other hand, has held that Agreements dated 12 October 1994 and 15 September 1995 merely created a license in favour of the Petitioner and that possession of the premises post expiry of license from 14 August 1996 was unlawful.

16) Thus, there is a difference of opinion between the Trial and the Appellate Courts on the issue as to whether induction of the Petitioner into the suit premises is as a 'tenant' or as a 'licensee'. To decide as to which of the opinions is correct, it would be necessary to look into the covenants of the two Agreements dated 12 October 1994 and 15 September 1995.

17) Respondent owns the suit premises bearing Shop/Gala No.9 situated at Plot no.50, APMC Market, Sector 19, Vashi. It is the case of

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the Petitioner that she and her husband operate a Restaurant/Hotel in another premises bearing Shop No.10 and they desired expansion of the business and for such expansion, the arrangement for taking over the suit premises was made.

18) The first agreement was executed on 12 October 1994 in the name of Petitioner's husband, Shri. K. Dinesh J. Shetty. The Agreement is titled 'Caretaker Agreement'. The recital to the Agreement clearly envisages creation of license and reads thus:

> WHEREAS the Shop Owner is seized and possessed of or otherwise and sufficiently entitled to a Shop/Gala bearing No.9, Plot No.50, A.P.M.C. Market, Sector-19, Vashi, New Bombay, (hereinafter referred to as "The said Premises") which is in his exclusive possession and whereas the Caretaker being in acute need of commercial place has requested the shop owner to grant the caretaker his **permission and licence** for use of the said premises as hereunder described which the shop owner has agreed top up on the terms and conditions hereinafter contained.
>
> *(emphasis and underling supplied)*

19) Under Clause-1 of the Caretaker Agreement dated 12 October 1994, Respondent granted permission and license to use the premises to the husband of the Petitioner for a period of 11 months from 15 October 1994 to 14 September 1995. Clause-1 reads thus:

> 1. The Shop Owner hereby grants unto the Caretaker his **permission and license** to use from 15/10/1994 for the period of eleven months upto the 14/9/1995, the said premises together with all fixtures, fittings in the said premises.
>
> *(emphasis and underling supplied)*

20) Under Clause 3 again, there is a specific reference to grant of license and the clause reads thus:

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> 3. In consideration of the **licence and permission** to and use the said premises hereby granted to the caretaker the Caretaker has paid to the Shop Owner by way of monthly compensation an amount of Rs. 1800/- (Rupees One thousand eight hundred only) upon the execution of this Agreement. The total **rent** of Rs.19,800/- (Rupees Nineteen Thousand Eight Hundred only) i.e. the **rent** of Eleven months, paid by the Caretaker to the Shop owner, on the execution of this Agreement.
>
> *(emphasis and underling supplied)*

Thus, while using the words 'license and permission', the Agreement also used the word 'rent' twice in clause 3.

21) Under Clause-4(b), the word used is 'permission' and Petitioner's husband undertook to remove himself from the suit premises at the end of 11 months. Clause-4(b) reads thus:

> 4(b) To quit, remove himself his family, servants and their belonging from the said premises at the end of eleven months or upon the earlier termination of the **permission** and with the fixtures, fittings, therein and proper conditions usual wear and tear expected.
>
> *(emphasis and underling supplied)*

22) Under Clause 4(c), it was agreed that possession of the suit premises shall always remain with the Respondent and that Petitioner's husband could not be construed to be in exclusive possession or use of the premises. Clause 4(c) reads thus:

> 4(c) To permit the shop owner and his agents at all time to enter for inspection of the said premises, i**t being agreed that the shop owner shall be at all times in control dominion and possession of the said premises shall not be in the exclusive possession or use of the caretaker.**
>
> *(emphasis supplied)*

23) Clause 5 of the Caretaker Agreement creates some confusion and reads thus:

> 5. It is hereby expressly agreed and declared that *neither this Agreement nor anything contained herein shall be deemed to create any interest or estate as*

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> *tenant* or otherwise it being the express intention of the parties that **the relationship between the shop owner and the caretaker shall always be landlord and tenant.**
>
> *(emphasis and underling supplied)*

24) Under first part of clause 5, it was agreed between the parties that the Agreement did not create any interest or estate as a 'tenant' in the premises. However, in the second part of clause 5, it was agreed that it was the express intention of the parties that their relationship shall always be of 'landlord-tenant'.

25) Clause 6 contemplated revocation of the license and the permission by issuance of notice and stipulated thus:

> 6. Notwithstanding anything contained herein, it shall be lawful for the shop owner in the even of any breach by the caretaker any of the terms and conditions of the said agreement, **revoke the license and permission** granted by giving to the caretaker four weeks, previous notice by in writing and if such notice is given the caretaker shall handover the possession of the four weeks notice period and the caretaker shall not claim any rights in respect of the said shop for the rest of the period.
>
> *(emphasis and underling supplied)*

26) At the end of the Agreement, there is a receipt in respect of the amount of Rs.19,800/- in which the word 'rent' is used. The receipt is as under:

> RECEIPT
>
> RECEIVED with thanks a sum of Rs.19,800/- (Rupees Nineteen thousand eight hundred only) as a Eleven months **rent**, from the withinnamed 'CARETAKER' i.e. the party of the Second Part, SHRI. K. DINESH SHETTY, as aforesaid in the Agreement.
>
> *(emphasis and underling supplied)*

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27) The arrangement under the Caretaker Agreement dated 12 October 1994 expired on 14 September 1995. Therefore, on 15 September 1995, a fresh Caretaker Agreement was executed, this time in the name of the Petitioner. The recital and clauses of the Caretaker Agreement dated 15 September 1995 are identical to the earlier Agreement dated 12 October 1994. The only difference was in respect of the name of the caretaker and the period agreed under clause 1, which is as under:

> 1. The Shop Owner hereby grants unto the Caretaker his **permission and license** to use from 15th of September, 1995 for the period of eleven months upto the 14/8/1996, the said premises together with all fixtures, fittings in the said premises.
>
> *(emphasis and underling supplied)*

28) In my view, except use of the word '*rent*' at three places in the Caretaker Agreements and the apparent inconsistency in the latter part of clause 5 envisaging creation of relationship between the parties as landlord-tenant, there is absolutely nothing in both the agreements which can create an impression that the parties intended to create tenancy in favour of the Petitioner or her husband. This is a clear case of grant of license for a period of 11 months. Petitioner's case that there was intention to create tenancy is belied by her own conduct in entering into second Caretaker Agreement dated 15 September 1995. As observed above, the contractual stipulations of both the Agreements were identical. In that sense, if Caretaker Agreement dated 15 September 1995 is claimed to have created tenancy in the name of Petitioner, on a similar analogy, earlier Caretaker Agreement dated 12 October 1994 would also create tenancy in the name of Petitioner's husband. If

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Petitioner's husband was already a tenant in respect of the suit premises by virtue of Agreement dated 12 October 1994, why he vacated the premises at the end of 11 months by treating himself as a mere licensee and why the Petitioner approached the Respondent for execution of second Caretaker Agreement dated 15 September 1995 has not been explained in any manner. On the contrary, the very fact that Petitioner was required to secure another license on 15 September 1995 upon expiry of previous license on 14 September 1995 would clearly indicate that the parties always intended to create a mere license and not tenancy in favour of the Petitioner. Thus Petitioner's own conduct of entering into the second Caretaker Agreement (*with identical terms*) after expiry of tenure of license executed with her husband leaves no manner of doubt that what was secured by the Petitioner was also a license and not tenancy rights.

29) Use of the word '*rent'* at few places in the Agreement would not *ipso facto* create tenancy in favour of the Petitioner. The intention between the parties is to be gathered from the holistic reading of the document instead of concentrating on use of a particular word. In common parlance and practice, parties do informally use the word '*rent'* to describe license fees/monthly compensation payable under a license. Therefore, mere use of the word '*rent'* in the Agreement does not create tenancy in favour of the licensee. The law in this regard is well settled in ***Suhas Yeshwant Chopde*** (supra). The Apex Court in para-8 of the judgment has held as under:

> 8. The learned trial Judge and the High Court have given more importance to the word "rent" used in the abovesaid agreement and in some subsequent

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receipts signed by the respondent. In our view, they are not conclusive of the question. In view of the delay, the appellant had filed a separate suit on the basis that the respondent was a tenant under the Rent Control Act. But that suit was filed expressly stating that it was without prejudice to his contentions in the appeal then pending in the High Court. We are of the view that the decision in the appeal before us arising out of the suit of 1987 for possession should conclude the issue irrespective of the decision in any other proceedings.

30) Similarly, in ***Rajendra B. Nair*** (supra), this Court has held in para-11 of the judgment as under:

11. The first agreement of Leave and Licence was entered into on 10th July 1991 and expired on 10th June 1992. The agreement which was entered into between the parties on 9th September 1992 which is the second agreement, expressly provides that what was being agreed upon between the parties was that the licensor would allow the licensee to use and occupy the premises purely on a temporary basis on leave and licence, for a period of three months. Clause 1 expressly provides that the licensor grants a licence to the licensee. It is true that the word "rent" has been used in clause 2 while referring to the payment of compensation fixed at Rs. 3500/- per month. That in my view would not make any difference because it is a well settled principle of law that the mere use of words such as "rent" or for that matter "compensation" would not be dispositive of the legal relationship between the parties. Clause 8 of the agreement gives free access to the premises to the licensor at all reasonable times for inspection. Clause 10 recognises that the possession of the licensee would be non-exclusive and would be only temporary. Clause 11 provides that the licence could be revoked. Finally, clause 14 expressly stipulates that the licence would not create any tenancy. Therefore, the mere reference in clause 12 to the fact that the licensee will not let or sublet the premises, cannot be construed to mean that a right of tenancy was created in favour of the licensee. The agreement is one by which a licence pure and simple was created in favour of the respondent. Explanation (b) to section 13-A2 must be given effect and its consequence is that the parties are shut out from leading evidence for the purpose of demonstrating that the agreement was not a leave and licence agreement. The provisions of the agreement which have been adverted to above clearly establish that the agreement was in fact and in law what it purported to be namely, an agreement by which a licence to occupy the premises was given to the respondent for a temporary period of three months. This needs emphasis, because quite apart from the provisions of Explanation (b) which would have the effect of shutting out oral evidence to the contrary, the plain terms of the agreement show that it was one of leave and licence.

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31) Therefore, mere use of the word '*rent*' in the Caretaker Agreement does not elevate the status of the Petitioner from a mere licensee to that of a tenant.

32) Coming to the second factor of contractual stipulation under clause 5 of the Agreements, in my view, clause 5 again does not amount to creation of tenancy in favour of the Petitioner. As observed above, the document has to be read as a whole. If intention between the parties was to create tenancy, they would not have agreed for an arrangement for retention of control, dominion and possession of the premises with the Respondent or non-exclusivity of possession or use of the Caretakers. If there was any intention to create tenancy, the same would not be for a limited period of 11 months. More importantly, parties would not have used the words 'Caretaker Agreement', 'license', 'licensee' etc. They would have used the words 'tenancy', 'tenant' etc. Therefore, there clearly appears to be a typographical error in clause 5 of both the Agreements. Instead of typing that the relationship shall '*not*' be as landlord-tenant, it is inadvertently typed that the relationship shall always be of landlord-tenant. Petitioner cannot be permitted to take undue advantage of this typographical error for claiming status of a tenant in respect of the suit premises.

33) In my view therefore, holistic reading of both the Caretaker Agreements coupled with conduct of the Petitioner in securing another arrangement after expiry of earlier arrangement of 11 months with her husband leaves no manner of doubt that parties always intended to

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create a mere license in favour of the Petitioner vide Caretaker Agreement dated 15 September 1995.

34) Perusal of the findings recorded by the Trial Court would indicate that it completely misdirected itself in treating the arrangement between the parties as tenancy. The three tests taken up for consideration by the Trial Court for determining the nature of arrangement were itself faulty. The Trial Court held that merely because there was right to enjoy immovable property, specific time agreed for such enjoyment, and valuable consideration for such transfer, the necessary inference of tenancy must be drawn. In my view, the Trial Court has faltered in holding that the first test of 'transfer' is fulfilled. In the present case, there is no transfer of any interest in the suit premises in favour of the Petitioner. What is granted is mere permission to enter upon and use the premises for agreed tenure. No transfer of interest in the property as such has occurred. Even the possessory rights are not transferred and were retained by the Respondent, who had authority to enter upon the suit premises even during currency of the Agreement. There is no transfer of any interest in the property in case of a mere license. By granting a license, the licensee is merely permitted to enter upon the premises and use the same. The possession of the premises always remains with the licensor. The licensee never acquires exclusive possession of the premises licensed. In the present case, it was clearly agreed between the parties that the control, dominion and possession of the suit premises shall always remain with the Respondent. Since the first condition of 'transfer of interest' itself is not satisfied, the transaction between the parties cannot be treated as that of a lease.

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35) Reliance by Mr. Joshi on the provisions of Section 105 of the Transfer of Property Act does not cut any ice. Section 105 defines the term 'lease' as under:

> **105. Lease defined.—**
>
> A lease of immoveable premises is a transfer of a right to enjoy such premises, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.
>
> **Lessor, lessee, premium and rent defined.—**
> The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

36) On the other hand, the term 'license' is defined under Section 52 of the Indian Easements Act, 1882 as under:

> **52. License defined**
>
> Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.

37) Thus, the first condition of lease is that there has to be transfer of right to enjoy the premises. Thus, creation of lease envisages transfer of right to enjoy the premises. On the other hand, license does not involve creation of any interest in the property. When a license is granted, the licensor retains legal possession, and licensee secures merely a right to enter upon the premises and to use the same, without involving transfer of any interest in the property. Since the first condition of '*transfer of right to enjoy such premises*' under Section 105 of

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the Transfer of Property Act is not fulfilled in the present case, whereas the condition of grant of right to use the premises is fulfilled, what is created is a mere license and not a lease.

38) In my view, the Trial Court had egregiously erred in branding the arrangement between the parties as a tenancy. It is unfortunate that the Trial Court did not read a simple document of license and proceeded to erroneously treat the same as creation of tenancy. The Trial Court ought to have appreciated that an owner of the premises would never lose possessory right in the premises only on mere monthly fees of Rs.2,000/-. The Trial Court ought to have appreciated that under the provisions of the Bombay Rent Act and now under the provisions of Maharashtra Rent Control Act, 1999 **(MRC Act),** a protected tenant cannot be evicted unless one of the enumerated grounds for eviction is made out. The Trial Court therefore ought to have made enquiry as to whether the Respondent ever intended to induct Petitioner as a statutory tenant in the suit premises at the time of execution of the Caretaker Agreement.

39) The approach of the Trial Court in the present case in converting a mere license for 11 months into statutory tenancy is disquieting. Such approach would discourage the home owners from permitting the home seekers to use the premises on license. The approach is dangerous to the interests of both the home owners as well as the home seekers. The leave and license arrangement ensures release of housing stock for persons who do not desire to or are unable to purchase houses/properties. Any reservation by property

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owners/licensors to create licenses (*on account of fear of license being treated as a tenancy*) would shrink the housing stock affecting the interests of licensees. The license regime enforced in the State instills confidence in the mind of the property owners that the user would return the property at the end of the license term. If there is breach of terms of license, Section 24 of the MRC Act provides swifter, faster and cheaper remedy for eviction of licensees. There is also a provision for recovery of double the amount of license fees as a deterrent for licensees who retain possession of the premises beyond the agreed license period. This arrangement instills confidence in the minds of the property owners, who become ready to allow their properties to be used by the needly users. If the approach of the Trial Court in the present case is not disapproved and persons like the Petitioner are permitted to occupy licensed premises forever, the same would disturb the very fabric of licensor-licensee arrangement. If the property owners are made to litigate for years together for recovery of possession of properties owned by them, they would be discouraged to give the premises on license. In my view therefore, the egregious approach on the part of the Trial Court in the present case deserves a stern criticism.

40) The Appellate Court has rightly reversed the erroneous findings on the part of the Trial Court. I am in agreement with the findings recorded by the Appellate Court that the arrangement between the parties as well as their intention was always to create a mere licence in respect of the suit premises. Therefore, there is no warrant for interference in the part of the decree directing Petitioner to handover possession of the suit premises to the Respondent.

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41) The matter however does not end here. Petitioner came into the suit premises initially through her husband on 12 October 1994. Later she secured a license in her own name. She is apparently running her restaurant/hotel business in the suit premises. She is squatting on the suit premises for the last 32 long years. Respondent would have never imagined in his wildest dreams that creation of licence for 22 months in favour of the Shetty couple would make him go through the ordeal of litigation for over three decades. The licence arrangement envisages payment of license fees of only Rs.2,000/- per month in respect of a shop located in the busy APMC market in Vashi. Petitioner has been enjoying possession of the shop for the last 32 years on a paltry sum of Rs.2,000/- per month. She has discontinued paying even this paltry sum of Rs.2,000/- per month after September 2012 and she is occupying the suit premises free of cost for the last 14 years.

42) The Appellate Court ordered Petitioner to pay Rs.2000/- per month from 14 August 1996 till recovery of possession of the suit premises. By order passed by this Court, the said amount of Rs.2,000/- per month was directed to be deposited in the Trial Court. Accordingly, Petitioner has deposited amount of Rs.2,000/- per month till September 2012 and thereafter has stopped making any deposit. Thus, the Petitioner is enjoying possession of the suit premises for the last 14 long years without even making any payment/deposit.

43) It is this conduct of the Petitioner which makes Mr. Thorat raise a plea for exercise of powers by this Court under Order XLI Rule 33

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of the Code for the purpose of making an order for conduct of enquiry into *mesne* profits in respect of the suit premises. On the other hand, it is contended by Mr. Joshi that the suit contained a prayer for recovery of amount of Rs. 4,000 per month (*double the agreed amount of license fees*) and that the Appellate Court has adjudicated the said prayer, but has granted only partial relief in favour of the Respondent. In para-33 of its judgment, the Appellate Court has held as under:

> 33. The appellant has claimed the compensation at the rate of Rs.4000/- p.m. after the expiry of the term of the license. However, there is no evidence on record to show that the suit premises would have fetched the rent at a rate of Rs.4000/- p.m. at the relevant time and the appellant is entitled for the compensation at the rate of Rs.4000/- p.m. Admittedly the agreed licence fee was Rs.2000/- It appears that some of the amount was also paid by the respondent during the pendency of the appeal and therefore, appellant is entitled for the compensation at the rate of Rs.2000/- p.m. After the expiry of the period of the licence till the delivery of possession and the amount already deposited by the respondent needs to be adjusted.

44) Mr. Thorat would submit that merely because the Appellate Court went into the aspect of liability of the Petitioner to make payment post expiry of license, the same would not preclude this Court from directing enquiry into *mesne* profits.

45) Under Order XLI Rule 33 of the Code, the Appellate Court has powers to pass any decree and make any order which ought to have been passed or made as well as to pass or make such further order or decree as the case may require and this power can be exercised by the Appellate Court notwithstanding that the respondents may not have filed any appeal/cross-objections. Order XLI Rule 33 of the Code reads thus:

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33. Power of Court of Appeal.—

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

46) Thus, mere absence of filing of formal appeal or cross-objection by a respondent, does not preclude the Appellate Court from passing any order or making any decree which circumstances of the case warrant and which ought to have been passed or made in the facts and circumstances of each case. Mr. Thorat contends that in the facts and circumstances of the case, the Appellate Court ought to have made an order for enquiry into *mesne* profits after it was found that possession of the suit premises by the Petitioner was unauthorised beyond 14 August 1996.

47) There can be no dispute to the position that Petitioner's possession of the suit premises post 14 August 1996 is unauthorised. No doubt, Respondent raised a prayer in the plaint for recovery of amount of Rs.4,000/- per month in respect of the period of unauthorised possession. However, the suit instituted by the Respondent for recovery of possession of suit premises on 23 June 1998 was decided after a period of 4 years on 22 January 2002. Respondent was required to file an appeal in which he finally succeeded on 10 September 2003. The Respondent

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possibly did not imagine or expect that it would take such a long time for securing a decree for possession. This could be the reason why he may have restricted his prayer for recovery of amount of only Rs. 4,000/- in the plaint filed in the year 1998. Since a period of 7 long years had elapsed from the date of expiry of license, the Appellate Court could have actually directed enquiry into *mesne* profits with a view to ensure that Respondent would have secured reasonable market returns on the suit premises from the Petitioner. However, the Appellate Court has thought it prudent to not even grant the prayer for recovery of amount of Rs.4,000/-.

48) However, this Court is not exercising appellate powers over the decree passed by the District Court. The decree passed by the Appellate Court is required to be challenged by filing Petition under Article 227 of the Constitution of India on account of unique provisions of Section 7 of the Code under which provisions of Section 115 of the Code are excluded in relation to orders passed by the Courts constituted under Provincial Small Causes Courts Act, 1887. Section 7 of the Code reads thus:

> **7. Provincial Small Cause Courts.—**
>
> The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887 (9 of 1887) or under the Berar Small Cause Courts Law, 1905, or to Courts exercising the jurisdiction of a Court of Small Causes under the said Act or Law, or to Courts in any part of India to which the said Act does not extend exercising a corresponding jurisdiction that is to say,—
>
> (a) so much of the body of the Code as relates to—
>
> (i) suits excepted from the cognizance of a Court of Small Causes;
>
> (ii) the execution of decrees in such suits;

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(iii) the execution of decrees against immovable premises; and
(b) the following sections, that is to say,—
section 9,
sections 91 and 92,
sections 94 and 95 so far as they authorize or relate to—
(i) orders for the attachment of immovable premises,
(ii) injunctions,
(iii) the appointment of a receiver of immovable premises, or
(iv) the interlocutory orders referred to in clause (e) of section 94, and sections 96 to 112 and 115.

49) In the present case, the suit for declaration of tenancy as well as suit for recovery of possession of commercial premises from a licensee would ordinarily lie before Provincial Small Causes Courts. Thus, the Trial Court in the present case has exercised powers of Small Causes Court. Ordinarily, a decree passed by Presidency Small Causes Courts is revisable under Section 115 of the Code on account of provisions of Section 8 of the Code, which does not exclude applicability of provisions of Section 115 to a decree made by Presidency Small Causes Courts. It is on account of the above peculiar circumstances that the Petitioner has invoked jurisdiction of this Court under Article 227 for raising a challenge against the impugned decree passed by the Appellate Court. Had this been a decree passed by the Appellate Bench of the Small Causes Court in the city of Mumbai, the same could have been revisable under Section 115 of the Code and all other provisions of the Code including the provisions of Order XLI Rule 33 would have been attracted.

50) The issue for consideration is whether this Court is precluded from exercising the power under Order XLI Rule 33 of the Code merely because Petitioner is required to invoke the jurisdiction of this Court under Article 227 of the Constitution of India on account of

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peculiar provisions of Section 7 of the Code? The answer, to my mind, appears to be in the negative. There have been judgments which do tend to suggest that High Court exercising jurisdiction under Article 227 can exercise powers under the Code. In ***M/s. Musaji Mohamadali Master and Sons*** (supra), a coordinate bench of this Court noticed the position that there is no provision under the Rules framed by the High Court for filing of cross objections in a Petition filed under Article 227. The Court therefore considered as to whether provisions of the Code could be pressed into service in absence of enabling rules framed by the High Court for filing of a cross objection in a Petition filed under Article 227. This Court took into consideration the provisions of Section 141 of the Code and held that explanation to Section 141 of the Code excludes the Petitions filed under Article 226 from ambit of the expression 'proceedings' but the exclusion does not apply to Petition filed under Article 227. This Court therefore held that Section 141 of the Code is applicable to a Petition filed under Article 227. This Court thereafter considered the provisions of Order XLI Rule 22 of the Code enabling a party to file cross-objection and held that it is permissible to attack adverse findings of the Appellate Court in a Petition filed under Article 227 without filing a formal cross-objection. This Court relied upon judgment of the Apex Court in ***Banarsi vs. Ram Phal***[9]. Instead of discussing the facts and ratio of the judgment of the Apex Court, to which a detailed reference is already made by this Court in ***M/s. Musaji Mohamadali Master and Sons***, I take the liberty to reproduce paras-29 to 32 of the judgment, which read thus:

[9] 2003 SCC OnLine SC 229

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29. This petition is filed under art. 227 of the Constitution. Obviously, under the rules framed by the High Court for filing writ petition there is no provision for filing cross objection or cross appeal. In absence of such rules, whether the provisions contained in C.P.C. can be pressed into service and whether the cross objections are required to be filed. Useful purpose will be served if reference is made to s. 141 of the C.P.C. Section 141 reads thus:

> "141. *Miscellaneous Proceedings*.— The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.
>
> **(*Explanation*: In this section, the expression "proceedings" includes proceedings under o. IX, but does not include any proceeding under art. 226 of the Constitution.)**

By reading the provisions quoted above and considering the explanation to that section, it is clear that this petition is not filed under art. 226 of the Constitution. Therefore, the explanation is no bar from application of the C.P.C. The procedure provided by the C.P.C. is required to be followed in filing and prosecuting petition filed under art. 227 of the Constitution: as these are the proceedings in the Court having civil jurisdiction. **Therefore, in my opinion, by considering s. 141 of the C.P.C. the Code is applicable to the petition filed under art. 227 of the Constitution.**

30. Having reached this conclusion, now, I have to address myself to the provisions of o. 41, r. 22 which enables the party to file cross objection. No doubt o. 41, r. 22 deals with filing of cross objections to the adverse finding. The form and procedure is also provided in the said rule. Order 41, r. 22 reads thus:

> xxxx

31. On reading o. 41, r. 22 one gets an impression that while respondents in an appeal (present case writ petition) has to file written objection to the adverse finding. *Prima facie* reading the rules it does indicate that filing of writ petition in the shape of memorandum of appeal is required to be filed. Shri Katneshwarkar invited my attention to the judgment of the Apex Court in the case of ***Banarsi* v. *Ram Phal***, [(2003) 9 SCC 606 : AIR 2003 SC 1989 : 2003 (2) S.C.R. 22.]. The Apex Court has considered the scope of o. 41, r. 22(1) explanation and (4) and r. 33. **The Apex Court has held that it is not necessary to file written objections to the adverse finding; the respondent in a given case can challenge or support a decree or adverse finding without lodging or filing memorandum of cross objection as envisaged under o. 41, r. 22.** ..... After noticing the change the Apex Court ruled as follows:

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"9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, inspite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging the finding on ground (B) and persuade the Appellate Court to form an opinion that insplte of the finding on ground (A) being reversed to the benefit of the defendant appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in *Sahadu Gangaram Bhagade* v. *Special Dy. Collector, Ahmednagar*, [(1970) 1 SCC 685 : AIR 1971 SC 1887 : 1971 (1) S.C.R. 146 : 1971 (1) S.C.J. 717.] that the right given to a respondent in an appeal to file cross objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross objection is the exercise of the right of appeal and takes the place of cross appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross objection though certain finding may be against him. Appeal and cross objection both are filed against the decree and not against judgment and certainly not against any finding recorded in a judgment. This was the well-settled position of law under the unamended C.P.C.

10. The C.P.C. amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended o. 41, r. 22 sub-r. (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-r. (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

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(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment C.P.C. did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended C.P.C., read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection paying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-r. (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding' recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-r. (4). Inspite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended C.P.C. In the pre-amendment era. the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

32. Applying the above said principle in the case at hand, the net result is that the Lower Appellate Court has confirmed the decree of eviction passed by the Trial Court but reversed the finding on the point of default and notice in cross objection filed by the defendant. The plaintiff has sought a decree against the defendant on two grounds provided under the Rent Act *i.e.* default u/s. 12 and personal *bona fide* requirement u/s 13. As a decree of eviction was passed u/s. 13(1)(g), the defendant preferred this writ petition but as the decree was in favour of the plaintiffs there was no occasion for the plaintiff to file an independent proceeding for the finding which has been recorded on the point of default. **Applying the law declared by the Apex Court, in *Banarsi's case* (supra), I am of the view that the plaintiff can certainly attack the adverse finding without filing the cross objection**. Therefore, in my judgment, the objection raised by Shri Dixit that without filing cross objection, the respondent cannot assail the adverse finding has to be rejected and, in my judgment, it is permissible for the respondent to challenge the adverse finding without filing an objection strictly in compliance with o. 41, r. 22. It is to be noted that the right to file appeal or cross-objection is a creation of the Statute and the right has to be exercised in the manner provided under the Statute. No

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> doubt, o. 41, r. 22 gives a right to the party to file cross objections to the adverse finding in the manner as provided under that rule but considering the law declared by the Apex Court in *Banarsi's case* (supra), the aggrieved party has right to object or assail the adverse finding without filing written objection. At the cost of repetition. **I may say that this petition is filed under art. 227. That being the special jurisdiction conferred on this Court by the Constitution even otherwise this Court can permit either side to assail the adverse finding making oral submission.** Therefore, in my judgment, the learned Counsel for the respondents were right in challenging the finding recorded by both the Courts below on the point of default and the notice u/s. 12(2).
>
> *(emphasis and underlining added)*

51) Thus, in ***M/s. Musaji Mohamadali Master and Sons***, apart from recognizing the principle of applicability of provisions of Order XLI Rule 22 of the Code to a Petition filed under Article 227 of the Constitution, this Court has also concluded that the Court exercising jurisdiction under Article 227 can otherwise permit either side to assail adverse observation by making even oral submissions. Thus, the judgment of this Court in ***M/s. Musaji Mohamadali Master and Sons*** authoritatively holds that this Court, in exercise of jurisdiction under Article 227, can permit even a respondent to raise an oral objection to adverse finding recorded by the court whose order is challenged in the Petition filed by the Petitioner.

52) In ***Puran Singh*** (supra), the issue was whether High Court was bound by the provisions of Order XXII Rule 4 of the Code while permitting legal representatives to be brought on record after delay. The Apex Court held that in exercise of its extraordinary jurisdiction under Articles 226 and 227, High Court is free to adopt its own procedure which is reasonable and expeditious. It is held that provisions of the Code only serve as a guide. The Apex Court held in paras-10, 11 and 12 as under:

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10. On a plain reading, Section 141 of the Code provides that the procedure provided in the said Code in regard to suits shall be followed "as far as it can be made applicable, in all proceedings". In other words, it is open to make the procedure provided in the said Code in regard to suits applicable to any other proceeding in any court of civil jurisdiction. The explanation which was added is more or less in the nature of proviso, saying that the expression 'proceedings' shall not include any proceeding under Article 226 of the Constitution. The necessary corollary thereof shall be that it shall be open to make applicable the procedure provided in the Code to any proceeding in any court of civil jurisdiction except to proceedings under Article 226 of the Constitution. Once the proceeding under Article 226 of the Constitution has been excluded from the expression 'proceedings' occurring in Section 141 of the Code by the explanation, how on basis of Section 141 of the Code any procedure provided in the Code can be made applicable to a proceeding under Article 226 of the Constitution? In this background, how merely on basis of Writ Rule 32 the provisions of the Code shall be applicable to writ proceedings? Apart from that, Section 141 of the Code even in respect of other proceedings contemplates that the procedure provided in the Code in regard to suits shall be followed "as far as it can be made applicable". Rule 32 of Writ Rules does not specifically make provisions of Code applicable to petitions under Articles 226 and 227 of the Constitution. It simply says that in matters for which no provision has been made by those rules, the provisions of the Code shall apply mutatis mutandis insofar as they are not inconsistent with those rules. In the case of *Rokyayabi* v. *Ismail Khan* [AIR 1984 Kant 234 : (1984) 2 Kant LC 114] in view of Rule 39 of the writ proceedings rules as framed by the Karnataka High Court making the provisions of Code of Civil Procedure applicable to writ proceedings and writ appeals, it was held that the provisions of the Code were applicable to writ proceedings and writ appeals.

11. We have not been able to appreciate the anxiety on the part of the different courts in judgments referred to above to apply the provisions of the Code to writ proceedings on the basis of Section 141 of the Code. When the Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all courts and tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well-recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the

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> delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious.
>
> 12. As such even if it is held that Order 22 of the Code is not applicable to writ proceedings or writ appeals, it does not mean that the petitioner or the appellant in such writ petition or writ appeal can ignore the death of the respondent if the right to pursue remedy even after death of the respondent survives. After the death of the respondent it is incumbent on the part of the petitioner or the appellant to substitute the heirs of such respondent within a reasonable time. For purpose of holding as to what shall be a reasonable time, the High Court may take note of the period prescribed under Article 120 of the Limitation Act for substituting the heirs of the deceased defendant or the respondent. However, there is no question of automatic abatement of the writ proceedings. Even if an application is filed beyond 90 days of the death of such respondent, the Court can take into consideration the facts and circumstances of a particular case for purpose of condoning the delay in filing the application for substitution of the legal representative. This power has to be exercised on well-known and settled principles in respect of exercise of discretionary power by the High Court. If the High Court is satisfied that delay, if any, in substituting the heirs of the deceased respondent was not intentional, and sufficient cause has been shown for not taking the steps earlier, the High Court can substitute the legal representative and proceed with the hearing of the writ petition or the writ appeal, as the case may be. At the same time the High Court has to be conscious that after lapse of time a valuable right accrues to the legal representative of the deceased respondent and he should not be compelled to contest a claim which due to the inaction of the petitioner or the appellant has become final.

53) In ***Prabhulal Chhogalal*** (supra), the Division Bench of this Court was considering the issue as to whether the word 'proceedings' used in the amended provisions of Section 15 of the Bombay Rent Act would include a Petition filed under Article 227 of the Constitution of India. By amendment introduced in the year 1987, retrospective effect was given to the amendment with a view to ensure that subletting made before 1 February 1973 no longer constituted a lawful ground for eviction of a tenant. However, Section 25 of the Amending Act provides that the amendment would not authorise reopening of any suit or proceedings if

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such proceedings have been finally disposed of before commencement of the Amending Act. In light of the above, the issue before this Court was whether the word 'proceeding' used in Section 25 of the Amending Act would include a Petition filed under Article 227. Answering the Reference in the affirmative, this Court held in para-14 as under:

> 14. Therefore, if the word 'proceeding' as used in Section 25 of the Amending Act is construed with the object of the legislation, in our view a liberal construction will have to be put on the said word and so construed it will include in its import even the proceeding instituted under Article 227 of the Constitution of India and actually pending when the Amending Act came into force. If this is so, then obviously it cannot be said that the matter was finally disposed of before the commencement of the Amending Act. It is no doubt true that the latter part of the explanation, i.e. or, if the period of limitation for preferring an appeal or proceeding, as the case may be, had not expired before the commencement of this Act', was relied upon by Shri Abhyankar in support of his contention that this clearly indicates that the word 'proceeding' will take in its import only those proceedings for which a period of limitation has been prescribed. It is not possible for us to accept this contention. The last part of the explanation begins with the word 'or'. If a period of limitation is prescribed for a proceeding, then till that period expires, the proceeding has to be considered as pending in view of the explanation. But from this an inference cannot be drawn that proceedings for which no period of limitation is prescribed are left out. In the present case writ petition was filed on 13th of April, 1981, that is, even before the expiry of thirty days, from the date of appellate order. In this context Shri Divekar has drawn our attention towards the decision of the Supreme Court reported in 1989 Mah LJ 616 : (AIR 1989 SC 1477), *Lata Kamat* v. *Vilas Bhalchandra* and has contended that even for computing the period of limitation, the other provisions of the Limitation Act will have to be taken into consideration. Under Article 227 of the Constitution, though no period of limitation is prescribed, petition has to be filed without any undue and unreasonable delay. In our view, only because a reference is made to the period of limitation it cannot be held that the proceedings referred to in Section 25 are only those proceedings for which a period of limitation is prescribed. As already observed the Rent Control Legislation is a beneficial piece of legislation, meant for the protection of tenants and for restricting the rights of the landlords. The legislature wanted to regularise sub-letting which took place before the 1st day of February, 1973. The proceedings commenced by a suit for eviction of a tenant do not come to an end on the decision of the appeal or revision filed under the Bombay Rent Act. These decisions are liable to be challenged in the High Court either under Section 115 of the Code of Civil Procedure or under the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India, and, therefore, if the said proceedings

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> were actually pending, on the date of commencement of the Bombay Rent Act, then it cannot be said that the case has been finally disposed of before the commencement of the Amending Act. In the view which we have taken, it is not necessary to make a detailed reference to the various decisions cited before us.

54) In my view therefore, this Court would have the necessary power to permit Respondent to attack the findings recorded in para-33 of the judgment of the Appellate Court in absence of filing of a formal Petition raising a cross objection.

55) As observed above, Petitioner and her husband have been squatting over the suit premises for 32 long years. Under the provisions of Section 2(12) of the Code, the expression '*mesne* profits' has been defined as under:

> (12) "mesne profits" of premises means those profits which the person in wrongful possession of such premises actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession;

56) Under Order XX Rule 12(c) of the Code, while making a decree for possession in a suit for recovery of possession of the immovable property, the Court can pass a decree for directing an enquiry as to *mesne* profits. Order XX Rule 12 of the Code provides thus:

> **12. Decree for possession and mesne profits.—**
>
> (1) Where a suit is for the recovery of possession of immovable premises and for rent or mesne profits, the Court may pass a decree—
> (a) for the possession of the premises;
> (b) for the rents which have accrued on the premises during the period prior to the institution of the suit or directing an inquiry as to such rent;
> (ba) for the mesne profits or directing an inquiry as to such mesne profits;
> (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

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> (i) the delivery of possession to the decree-holder,
> (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
> (iii) the expiration of three years from the date of the decree, whichever, event first occurs.
>
> (2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

57) In the present case, there can be no doubt to the position that possession of the Petitioner after 14 August 1996 is unauthorised. A decree is made against her for handing over the possession of the suit premises to the Respondent. In these circumstances, Petitioner must be made liable to pay *mesne* profits in respect of the suit premises after her possession became unauthorised on 14 August 1996. The Apex Court in ***Narayanrao*** (supra) has dealt with a case where a suit was filed for partition and possession of the suit premises. The suit was decided without framing an issue regarding *mesne* profits. There was no prayer in the suit for *mesne* profits. The suit was decreed without framing an issue regarding *mesne* profits. The defendant filed appeal before the High Court. While dismissing the appeal, the High Court exercised power under Order XLI Rule 33 of the Code and directed enquiry into *mesne* profits. Upholding the order of the High Court, the Apex Court held thus:

> 1. The respondent-plaintiff instituted a suit for partition and possession of the suit premises. The trial court decreed the suit. Before the trial court there was no issue regarding the mesne profits nor there was any prayer for the grant of mesne profits. The trial court, therefore, did not make any order so far as the entitlement of the respondent-plaintiff for mesne profits was concerned. The appellant-defendant went in appeal before the High Court. The High Court while dismissing the appeal granted mesne profits to the respondent-plaintiff. The High Court purported to act under order XLI, Rule 33 Civil Procedure Code in granting further decree for mesne profits.

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> 2. We have heard learned counsel for the appellant. It is not necessary for us to go into the scope and interpretation of Order XLI, Rule 33 Civil Procedure Code in the facts and circumstances of this case. **The High Court invoked order XLI, Rule 33 Civil Procedure Code for doing complete justice between the parties. The High Court was of the view that it was not a case where the trial court had denied decree for mesne profits but it was a case where it omitted to raise an issue in that respect. We see no infirmity in the judgment of the High Court in granting mesne profits in the facts and circumstances of this case. The appeal is dismissed with no order as to costs throughout.**
>
> *(emphasis supplied)*

58) In ***Sattarsha*** (supra), a coordinate bench of this Court has held in para-14 as under:

> 14. From aforesaid, it can be seen that the Appellate Court is vested with wide powers to enable it to do complete justice between the parties so as to pass such decree or order as the case may require even in absence of any appeal or cross-appeal. Though it was urged on behalf of the appellants that only such relief that was prayed for in the plaint could be granted in exercise of such powers, I am not in a position to accept said submission. The exercise of these wide powers is not trammeled by the absence of any prayer being made in the plaint. This exercise of power is, however, circumscribed for being exercised only in rare cases and when the facts of such case demand its exercise. Reference may be made to the judgment of the Honourable Supreme Court in *Narayanrao (dead) through LRs.* v. *Sudarshan*, 1995 Supp (4) SCC 463. Therein, a suit for partition and separate possession was filed. The trial Court decreed the suit. In the appeal filed by the defendant, the High Court while dismissing the same granted mesne profits to the plaintiffs. **It was held that even though there was no prayer for grant of mesne profits and no issue in that regard was framed by the trial Court, the High Court rightly invoked the powers under Order XLI, Rule 33 of the Code for doing complete justice between the parties. Thus, the relief of mesne profits was granted even in absence of any prayer for the same.**
>
> *(emphasis supplied)*

59) Thus, in absence of prayer for *mesne* profits and in absence of framing of issues by the Trial Court, it is permissible for the Appellate Court to pass an order/decree for *mesne* profits. As held above, while deciding a Petition under Article 227 of Constitution, this Court can exercise powers of the Appellate Court also. In my view therefore, a

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direction needs to be issued for conduct of enquiry into *mesne* profits by substituting the order for direction for payment of Rs.2,000/- per month from 14 August 1996 made by the Appellate Court.

60) The conspectus of the above discussion is that Petitioner has failed to make out any case for interference in the decree of the Appellate Court to the extent it directs her to handover possession of the suit property to the Respondent. However, entertaining the oral objection raised by the Respondent in respect of the findings recorded by the Appellate Court in para-33 of the judgment and exercising power under Order XLI Rule 33 of the Code, it would be appropriate to set aside the operative direction No. '5' of the decree of the Appellate Court. Instead, it needs to be directed that the Trial Court shall conduct an enquiry into *mesne* profits under Order XX Rule 12(c) of the Code for ascertaining the *mesne* profits in respect of the suit premises w.e.f. 14 August 1996 and making Petitioner liable to pay the same to the Respondent.

61) I accordingly proceed to pass the following order:

(i) Both the Petitions are **dismissed.**

(ii) The Petitioner shall handover possession of the suit premises to the Respondent on or before 30 September 2026.

(iii) However, the operative direction No. 5 in the decree of the Appellate Court shall stand modified by an order directing an enquiry into *mesne* profits in respect of the

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suit premises under the provisions of Order XX Rule 12 of the Code with further direction to the Petitioner to pay such determined *mesne* profits to the Respondent w.e.f. 14 August 1996 till the date of handing over of possession of the suit premises.

62) Both the Petitions are accordingly dismissed. Considering the facts and circumstances of the case, there shall be no order as to costs.

[SANDEEP V. MARNE , J.]

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