IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 343 OF 2024

WITH

INTERIM APPLICATION (ST.) NO. 20513 OF 2024

1. Shri. Narayan Damodar Thakur
2. Shri. Ram Damodar Thakur } ...Applicants (Orig. Defendants)

Versus

Shri. Madanlal Mohanlal Malpani }...Respondent (Orig. Plaintiff)

Mr. Drupad Patil a/w. Mr. Namitkumar Pansare, for the Applicants.

Mr. Pankaj Kowli with Mr. Ashok Varma i/by. Dhruva B. Jain, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

JUDGMENT RESERVED ON : 30 July 2024.

JUDGMENT PRONOUNCED ON : 7 August 2024.

JUDGMENT :

1) Applicants have filed this Revision Application challenging the decree dated 21 March 2024 passed by the District Judge-II, Panvel Raigad dismissing Regular Civil Appeal No. 189 of 2019 and confirming the decree dated 9 July 2013 passed by the Civil Judge Junior Division, Panvel in Regular Civil Suit No. 51 of 2005. The Trial Court has decreed the suit filed by Respondent-Plaintiff and has directed the Applicants-Defendants

to handover possession of the suit premises and to pay arrears of rent of Rs.11,928/-. An enquiry into mesne profits under Order 20 Rule 12 of the Civil Procedure Code, 1908 is also directed to be conducted.

2) Facts of the case, as pleaded in the Plaint, are that Plaintiff is the owner of final Plot No. 233 and building constructed thereon, named 'Indu Smruti' within the limits of Panvel Municipal Corporation. Shop No. 1 situated on ground floor of the building admeasuring 14 ft x 9 ft are the suit premises in which the First Defendant was inducted as monthly tenant on rent of Rs.300/- plus taxes of Rs.111/- [total Rs.411/-]. That the suit premises are let out to the First Defendant vide Agreements dated 13 April 1981 and 15 February 1996 for operating grocery shop therein. That the First Defendant was using the suit premises for selling grocery items. However, since June 2002, the First Defendant shut his grocery shop from the suit premises and started a shop for retail and wholesale sale of grocery items at Tapal Naka, Panvel in his own structure, named 'Thakur Palace' on the ground floor. That on the date of filing of the suit, the First Defendant was operating his shop in Thakur Palace and was not conducting any business in the suit premises. That shop adjoining the suit premises is let out to the First Defendant's brother-Defendant No.2. That Defendant No.2 was using the suit premises without the consent and permission of the landlord. That though Defendant Nos.1 and 2 are brothers, suit premises are let out to the First Defendant in his individual capacity and that therefore the Second Defendant did not have any right to use the suit premises. That the First Defendant had sublet the suit premises to the Second Defendant, from

whom he was accepting substantial rent and indulging in profiteering. That the Second Defendant had put a common signboard 'Prateek Kirana Store' on the suit premises, as well on his tenanted shop and the Second Defendant was using the suit premises for storing the goods meant to be sold in his shop. That this is how the Second Defendant was using the suit premises as a godown. That the internal door separating the two shops was shut and the same has been unauthorisedly opened by the Second Defendant for the purpose of using the suit premises. That open space in front of the suit premises was also being used by the Second Defendant to store his goods.

3) Plaintiff accordingly contended that the First Defendant-Tenant was not using the suit premises for the purpose for which the same was let and that therefore Plaintiff was entitled to seek recovery of possession of the suit premises. Plaintiff also pleaded his bonafide requirement in the Plaint. Plaintiff also contended that the First Defendant was in arrears of rent since December 2002. This is how the Plaintiff instituted Regular Civil Suit No. 51 of 2005 in the Court of Civil Judge Junior Division, Panvel seeking recovery of possession of the suit premises from the Defendants for recovery of arrears of rent of Rs.11,928/- and for recovery of rent and damages of Rs.426/- per month from the First Defendant from the date of filing of the suit.

4) First Defendant filed his Written Statement opposing the suit, *inter-alia*, contending that Plaintiff was always aware that the First Defendant wanted to use the suit premises as godown which is the reason why the rent in respect of the suit premises were fixed at Rs.300/- as

against rent of Rs.600/- in respect of Shop No.2 let out to the Second Defendant having same area. That Defendant has been using the suit premises since 1996 for godown with full knowledge of Plaintiff. First Defendant also denied carrying out any business at Thakur Palace as alleged in the Plaint. Defendant No.2 adopted the Written Statement filed by the First Defendant by filing *pursis* to that effect.

5) Plaintiff examined himself and his son as witnesses. The First Defendant examined himself in addition to examining witnesses, Mr. Ashok Shah from he purchased foodgrains, Mr. Vishwas Patil who was purchasing grocery articles from the Shop of the First Defendant. Defendant No.2 also examined himself. After considering the pleadings and oral and documentary evidence on record, the Trial Court proceeded to decree the suit by judgment and order dated 9 July 2013. The Trial Court held that First Defendant-tenant was not conducting any business or trade in the suit premises as on the date of institution of the suit and allowed Second Defendant to illegally use the suit premises. The Trial Court however rejected the ground of subletting on the ground of non-production of evidence regard payment of valuable consideration for exclusive possession by Defendant No.2. The Trial Court held that Plaintiff could not prove that the Second Defendant was using open space in front of the suit premises. The Trial Court further held that the suit premises are needed by Plaintiff for his reasonable and bonafide requirement and that Plaintiff would suffer greater hardship. Plaintiff was also held to be entitled for arrears of rent of Rs.11,928/- for 28 months from December 2002 to March 2005. This is how the Trial Court directed Defendants to

handover possession of the suit premises to Plaintiff with further direction to conduct enquiry into mesne profits under Order 20 Rule 12 of the Code.

6) Applicants-Defendants filed Regular Civil Appeal No. 189 of 2019 before the District Court, Panvel challenging Trial Court's decree dated 9 July 2013. Appellate Court answered the issue of bonafide requirement against Plaintiff and in favour of Applicants-Defendants. The Appellate Court, however held that the tenant breached the terms of tenancy by virtue of non-user of the premises for the purpose for which they were let out. The ground of subletting is also accepted by the Appellate Court. However, the ground of non-user without reasonable cause has been rejected by the Appellate Court. The Appellate Court accordingly dismissed the Appeal filed by the Applicants-Defendants by order dated 21 March 2024. Aggrieved by the decree of the Appellate Court confirming the decree of the Trial Court, Applicants have filed the present Civil Revision Application.

7) Mr. Drupad Patil would appear on behalf of Applicants and submit that the findings recorded by the Appellate Court and the Trial Court on the issue of non-use of the premises for the purpose of letting and subletting suffered from the vice of perversity and warrant interference by this Court in exercise of revisionary jurisdiction under Section 115 of the Code. He would submit that since all other grounds for eviction now stand rejected as a result of the decree of the Appellate Court, Applicants have to only deal with the findings relating to change of user and subletting. Mr. Patil would submit that the issue of subletting

was answered in favour of the Applicants and against the Plaintiff by the Trial Court and in absence of cross-objection by Plaintiff, Appellate Court could not have recorded the finding of subletting in Plaintiff's favour.

8) Mr. Patil would submit that the Trial and the First Appellate Court have completely misdirected themselves by assuming that the suit premises are not being used by the First Defendant-tenant. That it has been conclusively proved in evidence that the First Defendant has always been operating his retail and wholesale shop outside the suit premises and that he has been using the suit premises as godown for storing the goods meant to be sold in his shops. That right since inception, Plaintiff always knew the fact that the First Defendant-tenant had taken up two shops entirely and one shop in 1996 for use as godown. That use of the premises as godown is also borne out from the fact that Plaintiff agreed for only half of the rent in respect of the suit premises (Rs.300/-) as compared to the rent of Rs.600/- payable in respect of Shop No.2 by the Second Defendant, though the area of both the shops is identical. That initially tenancy agreement of 1981 itself shows that a door existed between Shop Nos.1 and 2 and the landlord thus agreed to create separate doors in favour of Defendant Nos.1 and 2 in the year 1996 with full knowledge of the fact that one tenant could enter the adjoining premises by use of internal door. Therefore, because the First Defendant kept his shutter shut and entered the suit premises from the internal door separating Shop Nos.1 and 2, the same cannot be a reason for assuming that First Defendant is not using the suit premises or that the same are being exclusively used by Second Defendant.

9) Mr. Patil would further submit that mere use of the premises as godown, which are let for use as grocery store, does not amount to change of user. That using premises let for grocery store for storing grocery items can at best be treated as mere ancillary use and, by no stretch of imagination, be treated as change of user. In support, Mr. Patil would rely upon judgment of this Court in ***Manilal Chunilal Shah Versus. Shantilal Rupchand (Golecha)***[1]. He would further submit that the Appellate Court has erred in accepting the ground of subletting in absence of concrete evidence to show that the Second Defendant exclusively possessed the suit premises to complete exclusion of the First Defendant. That even if it is assumed that the second Defendant enters the suit premises from internal door or even he stores his own articles in the suit premises, the same does not amount to subletting, so long as it is proved that the First Defendant also continued storing his own goods in the suit premises. That exclusive possession is a *sine qua non* for upholding the ground of subletting. In support he would reply upon judgment of this Court in ***Vasant Mahadeo Pandit and another Versus. Zaibunnisa Abdul Sattar and others***[2]. He would also rely upon judgment of this Court in ***Shaikh Zaffar Abid s/o Mohd. Hussain and others Versus. Ifteqar Ahmed s/o. Ehtesham Ahmed Razzaqui***[3]. Mr. Patil would criticize the Appellate Court for recording finding of availability of two storerooms in Thakur Palace building by inviting my attention to the Rent Agreement dated 15 February 1996 which reflects First Defendant's address as Thakur Palace. That this would mean that the First Defendant

1 2002(2) Mh.L.J. 478.
2 2001(3) Mh.L.J. 118.
3 Civil Revision Application No. 273 of 2013 decided on 29 November 2023. (Aurangabad Bench)

owned and possessed Thakur Palace property even on the date of execution of modified rent agreement dated 15 February 1996 and that the landlord granted tenancy in respect of the suit premises in favour of First Defendant with full knowledge of details of the property in his possession at Thakur Palace. Mr. Patil would therefore pray for setting aside the orders of trial and the appellate courts.

10) The Revision Application is opposed by Mr. Kowli, the learned counsel appearing for Respondent-Plaintiff. He would submit that change of user of the suit premises, as well as subletting thereof to the Second Defendant is conclusively and concurrently proved in the Courts below. That use of the suit premises by the Second Defendant was proved before the Trial Court itself but the Trial Court had erroneously not accepted the ground of subletting in absence of proof of payment of valuable consideration. That otherwise exclusive use of the suit premises by the Second Defendant is concurrently proved before both the Courts below. That the First Defendant specifically admitted that it is conclusively proved that the shutter of the suit premises is constantly shut and the door for entering is the internal door of Shop No.2 (let out to Defendant No.2) and that the keys of Shop No.2 are with the Second Defendant. That since the Second Defendant possessed keys of Shop No. 2, through which the suit premises can be accessed, both the Courts below have rightly inferred that possession of the suit premises is exclusively with the Second Defendant. That First Defendant does not carry any other business and his entire theory of use of suit premises for storing the goods sold in other shops is totally fallacious. That the 1996 tenancy

agreements create independent tenancies in favour of Defendant Nos.1 and 2 and the same did not entitle one tenant to transgress into tenanted premises of other tenants without the consent of landlord. That once bifurcation of tenancies of Shops Nos. 1 and 2 was effected, the Second Defendant was not entitled to enter the suit premises for any purposes. That the evidence clearly establishes that the electric connection in respect of the suit premises is taken from Shop No.2 of the Second Defendant. That thus, it is conclusively proved that the entire blocks of two shops is fully controlled by the Second Defendant. Inviting my attention to the Written Statement filed by the First Defendant, it is submitted that no stand was taken therein that the First Defendant either had another shop or that he was storing goods in the suit premises meant to be sold in some other shop. Mr. Kowli would therefore submit that since the control of the suit premises by the Second Defendant is conclusively proved, the decree for eviction is eminent. He would pray for dismissal of the Civil Revision Application.

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

12) Plaintiff constructed the building 'Indu Smruti' which comprises *inter-alia* of three shops on the ground floor. Construction Plan of the building is placed on record. Out of the said three shops, Plaintiff inducted the First Defendant as a tenant in respect of the two shops (Shop Nos.1 and 2) each admeasuring 14 ft x 9 ft, vide Agreement dated 13 April 1981. The Rent Agreement dated 13 April 1981 as well as the Plan clearly show existence of internal door in the partition walls separating Shops

Nos.1 and 2. Both the shops were supposed to be used by the First Defendant for grocery shop and the said use was not to be changed without the consent of the landlord. The rent in respect of both the shops was agreed at Rs.250/- (Rs.125/- for each shop). It is First Defendant's case in his Written Statement that his family is engaged in the business of grocery and that therefore Shop Nos.1 and 2 were taken on tenancy by him vide agreement dated 13 April 1981. Beyond this, nothing is indicated in the Written Statement about the exact purpose for which the premises were to be used by him. In this connection, relevant pleadings in the Written Statement in paras-5(a) and 5(b) read thus :

> 5. With a view to enlighten this Hon'ble Court with true and corrects facts of the case, the Defendant No.1 submits as follows:
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> a. The Defendant No.1 submits that he has engaged in his family business of Grocery;
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> b. That in year 1981, he had acquired the tenancy rights in respect two adjcent shops situate on the Ground Floor of the building known as Indu Smruti owned by the Plaintiff, under a Tenancy Agreement dated 13.04.1981 at the agreed monthly rent of Rs.250/-, and on the other terms and conditions mentioned in the said Agreement;

13) However, when the First Defendant filed his Affidavit of Evidence, he apparently improved upon his case and contended that in the year 1981 he was operating grocery business in the name of 'Ujala Trading Company' in vegetable market located at the distance of 200-250 ft. from the suit premises and that when the tenancy was created in the year 1981, both the shops were being used by him for storing goods as well as for residence. The relevant statements made in the Affidavit of Evidence of the First Defendant read thus:

> **मी कथन करतो की, मी सध्या माझे ताब्यात वादी यांचे मालकीचे भाड्याने असलेल्या गाळ्याचा उपयोग माझे किराणा मालाची साठवूक करणेसाठी सुरवातीपासूनच करत होतो व करत आहे.** *1981* मध्ये तेव्हा मी दोन गाळे भाड्याने घेतले तेव्हा भाड्याचे जागेपासून सु. *100* ते *150* पावलांवर म्हणजे सु. *200* ते *250* फुट अंतरावर असलेले भाजीमार्केटमध्ये माझा "उजाला ट्रेडिंग कं. नावाने चालू असलेला किराणा मालाचा धंदा होता. तेकामी मी उजाला ट्रेडिंग कं. या माझे धंद्याचे नोंदणीसंबंधी महाराष्ट्र दुकाने व अस्थापना नियमानुसारचे नोंदवहीतील मे. सरकारी कामगार अधिकारी यांनी जारी केलेली प्रमाणित प्रत दाखल केली आहे. त्यास निशाणी देणे न्यायाचे दृष्टीने आवश्यक आहे व ***1981*** **साली जेव्हा मी वादी यांचे दोन. गाळे भाड्याने घेतले तेव्हा मी माझे भाड्याचे दोन्ही गाळे सामानाची साठवणूक करणेकरीता व इतरत्र व <u>राहणेसाठी जागा नसलेने राहणेसाठी वापर होतो</u>.**
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> *(emphasis and underlining added)*

14) Above evidence is in absence of foundational pleadings and in fact the evidence of use of premises for residence is in fact contrary to the covenants of the tenancy agreement, under which it was agreed that the premises were to be used only for grocery shop. If tenancy was accepted for use of the premises as godown since inception as claimed in the evidence, the agreement would not have specified the use as grocery shop. The evidence of first Defendant thus appears to be contrary to the agreement and also inconsistent with the pleadings.

15) It appears that in the year 1996, first Defendant gave up his tenancy claim in respect of Shop No. 2 and it was agreed with the landlord that first Defendant's brother (Defendant No.2) would be inducted as tenant in respect of Shop No.2. Accordingly, two separate agreements came to be executed on 1 February 1996. So far as the First Defendant is concerned, he retained tenancy only in respect of Shop No.1 and what was executed on 15 February 1996 was agreement for increase in rent. In the said agreement, it was agreed that the First Defendant had

handed over possession of Shop No.2 to the Plaintiff. The original agreement dated 13 February 1991 was continued in respect of Shop No.1 and the First Defendant agreed to pay enhanced rate of Rs.300/- plus taxes of Rs.111/- (total rent of Rs.411/-). A separate tenancy agreement was executed with the Second Defendant on 1 February 1996 by which he was inducted as tenant in respect of Shop No.2 at monthly rent of Rs.600/- plus taxes of Rs.222/- (total rent of Rs.822/-). This is how two separate tenancies resulted after execution of the Agreements dated 1 February 1996 in favour of Defendant No.2 in respect of Shop No.2 and on 15 February 1996 in favour of the First Defendant in respect of Shop No.1. However, the initial agreement dated 13 April 1981 indicates existence of door separating the partition wall between Shop Nos.1 and 2. It is through this door that the First Defendant admittedly accesses Shop No.1 by making entry through Shop No.2 as the shutter of Shop No.1 is kept shut by him for safety purposes and also because Shop No.1 is being used only for storage purposes as godown.

16) Mr. Patil wants this Court to infer that the landlord was aware about use of Shop No. 1 as godown and therefore agreed to accept half the rent (Rs. 300/-) as compared to same sized Shop No. 2 let out to second Defendant for use as grocery Shop at Rs. 600/-. In my view, this inference is difficult to be drawn in the facts of the case. The arrangement between the parties needs to be appreciated. By the initial Agreement dated 13 April 1981, both Shops were let out at rent of Rs. 125/- each (Total rent of Rs. 250/-). Considering the provisions of Section 5(10)(b)(iii) of the Bombay Rent Act, 1947, Rs. 125/- became the standard rent in

respect of each shop, which the landlord was prevented from increasing. When first Defendant approached the landlord for division of tenancies, a deal could have been struck between the parties, where first Defendant retained his tenancy (rather than risking it with ground of subletting to Defendant No.2) by increasing the rent from Rs. 125/- to Rs. 300/-. As against this, for the new incoming tenant, it was possible that the landlord insisted for higher rent of Rs. 600/-. Therefore mere fact of lesser rent for Shop No. 1 as compared to Shop No. 2 could not be a reason by itself to assume that the landlord was aware about use of Shop No. 1 as godown.

17) As observed above, the Plaint proceeded on an averment that the First Defendant was using suit premises as grocery shop and shut down the same in June 2002 by shifting the shop at Thakur Palace. In his Written Statement, the First Defendant has denied the contents of para-2 of the plaint and contended that initially the First Defendant was carrying out his grocery business in both the Shops. He denied the averment that in June 2004 (*sic*) he closed down his business or that he started the same in another premises at Thakur Palace. He went to the extent of denying that he was carrying out any business at Thakur Palace. In this connection, the relevant averments in para-7(b) of the Written Statement read thus:

> With reference to para no.2 of the impugned plaint, the contents therein are false and hence denied. **It is a matter of record that initially the Defendant was carrying out his grocery business in both the premises acquired by him on tenancy basis.** However, it is false that in the month of June 2004 or thereabouts the Defendant No.1 closed down his business in the said premises and started the same in another

> premises at Thakur Palace, as is alleged. **It is denied that this Defendant carrying out any business at Thakur Palace, as alleged**. It is denied that the Defendant No.1 is not carrying out any business in the Suit Premises, as alleged. The Plaintiff be put the strict proof of such allegations.
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> *(emphasis added)*

18) The denial of the First Defendant about carrying out any business at Thakur Palace is subsequently proved to be false on account of statements made by him in the Affidavit of Evidence in which he stated that in the year 1995, construction was completed at City Survey No.1027 (Thakur Palace) and he and his wife started retail and wholesale business of grocery shop under the name and style of 'Narayan Damodar & Co'. He further deposed that the said property at CTS No.1027 was not road facing and since the suit property is in the market, it is convenient for the Defendant to procure and give delivery of goods from the suit property. The relevant averments in this regard in the Affidavit of Evidence read thus:

> 1995 मध्ये सि.स.नं. 1027 वरील घराचे बांधकाम झालेले असलेने मी माझी पत्नी सौ. निर्मला नारायण ठाकूर यांचे नांवे नारायण दामोदर अॅण्ड कं नावाने किराणा मालाचा ठोक व किरकोळ धंदा सुरू केला. त्यासाठी मी माझे नातेवाईक केशव भास्कर ठाकूर यांचेकडून हातउसनी रक्कम घेतली होती. नारायण दामोदर अॅण्ड कं. हा धंदा सुरु केलेली सि.स.नं. 1027 ही मिळकत रस्त्याला लागून नसून दावा मिळकत व मुख्य बाजारापासून आत आहे वाद मिळकत बाजारात असलेने मालाची डिलिव्हरी देणे व डिलिव्हरी घेणे सोयीचे असलेने मी माझे ताब्यात भाडचाने असलेल्या गाळ्यात दर्शनी शटर सुरक्षिततेसाठी बंद ठेऊन मधल्या दाराचा वापर करून सदर गाळ्याचा वापर साठवणूकीकामी करीत असे व करीत आहे याची माहीती वादी यांना आहे.

19) Thus, the First Defendant adopted a false defence in the written statement by denying that he was carrying out any business in

Thakur Palace premises. Thus the entire case of the first Defendant appears to be riddled with inconsistencies.

20) As observed above, the First Defendant also adopted fallacious defence of use of both Shop Nos.1 and 2 for godown since the year 1981 in his Affidavit of Evidence. This was not only contrary to the agreement, which specified use of the suit premises only for conducting grocery shop, but the averments in the Written Statement in para-5(b) did not portray the alleged case of use of the suit premises for godown since the year 1981. On the contrary, the above averments in para-7(b) clearly contains an admission that '*It is a matter of record that initially the Defendant was carrying out his grocery business in both the premises acquired by him on tenancy basis*'. Thus, the plea raised in the Affidavit of Evidence of use of the suit premises for godown since 1981 is clearly false. Since the deposition in the Affidavit of Evidence about use of Shop Nos.1 and 2 for godown since 1981 is proved to be false, and since he admitted in para 7(b) of the written statement that he was using both shops for his grocery business (not as godown), his statement in Affidavit of Evidence about storing of grocery items in both shops since 1981 for sale thereof in his shop of 'Ujala Trading Company' located in vegetable market will have to be treated as false.

21) There are no foundational pleadings in support of the contentions raised in para-4 of the Affidavit of Evidence and it is settled position of law that in absence of foundational pleadings, the parties cannot be permitted to lead evidence and even if evidence is led, the same is required to be discarded. A quick reference in this regard to

observations in the recent judgment of the Apex Court in ***Srinivas Raghavendrarao Desai vs. V. Kumar Vamanrao alias Alok & Ors***[4]. would be apposite:

> 25. There is no quarrel with the proposition of law that no evidence could be led beyond pleadings. It is not a case in which there was any error in the pleadings and the parties knowing their case fully well had led evidence to enable the Court to deal with that evidence. In the case in hand, specific amendment in the pleadings was sought by the plaintiffs with reference to 1965 partition but the same was rejected. In such a situation, the evidence with reference to 1965 partition cannot be considered.

22) In ***Biraji v. Surya Pratap***[5], it is held:

> 8. Having heard the learned counsel on both sides, we have perused the impugned orders and other material placed on record. The suit in Original Suit No. 107 of 2010 is filed for cancellation of registered adoption deed and for consequential injunction orders. In the adoption deed itself, the ceremony which had taken place on 14-11-2001 was mentioned, hence it was within the knowledge of the appellant-plaintiffs even on the date of filing of the suit. In the absence of any pleading in the suit filed by the appellants, at belated stage, after evidence is closed, the appellants have filed the application to summon the record relating to leave/service of Ramesh Chander Singh on 14-11-2001 from the Rajput Regiment Centre, Fatehgarh. **It is fairly well settled that in absence of pleading, any amount of evidence will not help the party.** When the adoption ceremony, which had taken place on 14-11-2001, is mentioned in the registered adoption deed, which was questioned in the suit, there is absolutely no reason for not raising specific plea in the suit and to file application at belated stage to summon the record to prove that the second respondent Ramesh Chander Singh was on duty as on 14-11-2001. There was an order from the High Court for expeditious disposal of the suit and the application which was filed belatedly is rightly dismissed by the trial court and confirmed by the Revisional Court and the High Court.
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> *(emphasis added)*

23) In my view therefore, such part of evidence of first Defendant, which is not supported by pleadings needs to be discarded.

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4 (2024) SCC OnLine SC 226
5 (2020) 10 SCC 729

24) Furthermore, the statements made in para-4 of the Affidavit of Evidence are clearly contradictory to the Written Statement. I am therefore inclined to accept Plaintiff's pleaded case that the First Defendant was carrying out his grocery business in the suit premises upto June 2002 and thereafter shifted the same to Thakur Palace premises. Further case of Plaintiff about Second Defendant making use of the suit premises for storing his own goods is required to be considered in conjunction with Plaintiff's proved case about shutting down the grocery business in June 2002 and shifting the same to Thakur Palace.

25) It has come in evidence that the shutter of the suit premises is always kept shut and the suit premises are accessed through the door in the partition wall between Shop Nos.1 and 2. Though Mr. Patil is right in contending that the door existed since 1981, the question is whether the Second Defendant can be permitted to enter and use the suit premises through the said door. The first Defendant has admitted in the cross-examination that the keys of shop of Second Defendant is retained by him and that he locks Shop No.2 every night. Thus, the contention of (i) shutting of access shutter of the suit premises, (ii) using the door located at partition wall dividing Shop Nos.1 and 2 to access the suit premises and (iii) Second Defendant retaining keys of Shop No.2 with himself gives rise to an inescapable conclusion that the Second Defendant is in ultimate control of both Shop Nos.1 and 2.

26) The tenancies in respect of Shop Nos.1 and 2 are separately created in favour of two distinct individuals and one of them cannot enter

or use the premises let out to another. The suit premises are let out to the First Defendant for operation of grocery store. The 1981 agreement contains a negative covenant restraining use of suit premises for any other purpose. Mr. Patil has contended that use of the premises for storing of grocery items is an ancillary use and does not amount to change of user and has relied upon judgment of this Court in ***Manilal Chunilal Shah*** (supra) in which the Defendant therein was using the suit premises for storing grocery items which was being sold from the new shop. While there can be no dispute about this proposition, the fact situation in the present case is totally different. This is not a simple case of first Defendant starting a new shop at different premises and using the suit shop for storage of goods meant to be sold in new premises. Here the allegation of change of user needs to be appreciated with the fact situation of second Defendant's admitted use of the suit premises. Therefore the ratio of judgment in ***Manilal Chunilal Shah*** would have no application to the facts of the present case.

27) Far from operating grocery store in the suit premises, the First Defendant has shut the same from outside and has let the Second Defendant to access the same through internal road dividing Shop Nos. 1 and 2. By doing so, the First Defendant has permitted Defendant No.2 to enter and use the suit premises. It is highly unbelievable that the Second Defendant, who operates his own grocery store from Shop No.2, will not use the shop premises through easy and only access available through his own premises or that the First Defendant, by accessing the suit shop through the shop of Second Defendant stores only his grocery goods in

the suit premises. In fact, there are specific admissions by the second Defendant about sale of goods by him stored in suit shop. The entire story of the Defendants about storage of goods of the First Defendant alone in the suit premises is therefore completely unbelievable. The further claim of the First Defendant that though he operates grocery shop from Thakur Palace premises, he finds it easier to procure delivery and to make delivery of goods from the suit premises is again highly unbelievable. First Defendant expects this Court to believe that the Suit Shop located in busy market with road frontage is being used by him for storage as godown whereas the Thakur Palace premises not having road frontage and located far away from market is being used as Retail Store. Also, there is no evidence on record to indicate that the First Defendant had employed or deployed any employees at the suit premises who accept or give away deliveries of grocery items to customers from the suit premises. In my view therefore entire block consisting of two rooms appears to be controlled fully, completely and absolutely by the Second Defendant.

28) Mr. Patil is at pains to point out that even it is assumed that Defendant No. 2 accesses the suit premises from the said internal door, subletting cannot be presumed in the light of execution of 1996 Agreements with a clear understanding of existence of such internal door. In fact, Mr. Patil would a go step further and contend that even if it is proved that the Second Defendant did occasionally store his own goods in the suit shop, the same would not amount to subletting. I am unable to agree. Mr. Patil has strenuously submitted that in absence of exclusive

possession of the suit premises by Second Defendant, subletting cannot be presumed. He has relied upon judgment of this Court in ***Shaikh Zaffar Abid Mohd. Hussain*** (supra) in paras-27 and 29 as under :

> 27. Learned counsel for the applicants also relied on the case of Jagan Nath (cited supra), in which it has been held that it is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant. User by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words, there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right of possession. So long as the tenant retains the right to possession, there is no parting with possession in terms of clause (b) of section 14(1) of the Delhi Rent Control Act. Further, it has been observed that where the tenanted premises were residential cum commercial and the tenant was carrying on the business with his sons, and the family was a joint Hindu family, it was difficult to presume that the tenant had parted with possession legally to attract the mischief of S.14(1) (b) of the Act. Even though the tenant had retired from the business and his sons had been looking after the business, it could not be said that the tenant had divested himself of the legal right to be in possession.
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> 29. The Courts have to appreciate the admissions in reference to the facts. The tenants and sub-tenants essentially had a defence that their father was the tenant, and on his demise, they inherited the tenancy. Hence, all brothers were running the business jointly for 20-25 years. Reading the admissions which the landlord wish to make its capital, the Court is of the view that such admissions do not prove that the tenants have parted the possession with subtenants and they had no control over the business run in the suit shop.

29) In ***Shaikh Zaffar Abid Mohd. Hussain***, tenant and subtenant were real brothers and claimed to have inherited tenancy from their father and were jointly running the business from the suit premises. It is in the light of this factual position that this Court held that the landlord

therein could not prove that the tenant had no control over the business run in the suit premises or that they had illegally inducted subtenants. In the present case, it is not the case of Defendants that they jointly operate the business.

30) Mr. Patil has also relied upon judgment of this Court in ***Vasant Mahadev Pandit*** (supra) in which the suit premises were let out to Vasant Pandit (Defendant No.1) for residence and the allegation was that he left the suit premises and inducted his brother-Laxman (Defendant No.2) and Mr. V. R. Salvi (Defendant No.3), father-in-law and another brother, Bhalchandra. In the light of this factual position, this Court held in para-12 as under:

> 12. It is not unknown in our society that brothers and the wives of the deceased brother would come and stay in case of distress. It is also not unknown that relatives in distress would take shelter with their relations. The evidence adduced on behalf of defendants would clearly go to show that defendant No. 2 was none else but the real brother of defendant No. 1. Assuming that the suit premises were let out to defendant No. 1 the fact remains that defendant No. 2 was using the suit premises only in the capacity of a family member of defendant No. 1. After Laxman expired, his wife Sunanda impleaded defendant No. 2 continued to occupy the suit premises along with her mother-in-law Yashodabai i.e. mother of defendant No. 1. The evidence which has also come on record and not seriously challenged by the plaintiff is that the defendant No. 3 was the father-in-law of the real brother of defendant No. 1. In that sense he was also related to the defendant No. 1. Although, defendant No. 3 was not a blood relation, but generally he was closely related to the brother of defendant No. 1 and therefore can be said to be a family member. Obviously because of the close relation the defendant No. 3 was accommodated in the suit premises while in distress. The evidence adduced on behalf of defendants go to show that defendant No. 3 was compelled to shift in the suit premises due to threat of demolition of his accommodation which he was occupying at Thane. In other words, the evidence would unfailingly indicate that defendant Nos. 2 and 3 were occupying the suit premises only as the

family members of defendant No. 1 and in no other capacity. If the premises are occupied by the family member, even if such member has joined the original tenant subsequently that by itself will not amount to creation of any sub-tenancy in his favour. Such interpretation cannot be countenanced at all, for even the Legislature in its wisdom has thought it appropriate to exclude family members from being licensee. If reference is made to the definition of licensee, it would be seen that a member of the family residing together with the tenant is expressly excluded from the definition of licensee. If the principle underlying this legislative intent is applied to the fact situation I have no hesitation to hold that even if a family member starts staying with the original tenant at a later stage that by itself will not attract the mischief of unlawful sub-letting. Observations made by this Court in judgment in the case of ***Babanrao Shankarrao Chavan vs. Chandrashekhar Ramchandra Shinde, 1984 (2) Bom.C.R. 671*** would be useful, which reads thus :

"9. ..... It is not unknown in our country that when a widowed sister conies to reside with her brother and when she starts residing with him *she resides not as a servant or a stranger, but resides as part and parcel of the family. This is the rule.* There may be exceptions. *But if there are exceptions, the exceptions have got to be proved by special evidence. In the absence of any such evidence to the contrary, it must be assumed that a widowed sister who comes to stay with her brother along with her, young one would be staying with him not as a stranger but as brother's family."* Likewise her younger son would be part of that very family." (emphasis supplied)

31) Thus, in ***Vasant Mahadev Pandit,*** the issue was with regard to the use of the suit premises for residence by other family members and whether such use amounted to subletting or not. The allegation of subletting to a relative needs to be considered differently in respect of premises let out for business than the one let out for residence. While deciding the issue of subletting, the ratio of a judgment relating to residential premises may not strictly apply to premises let out for conduct of a particular business. In ***Vasant Mahadev Pandit,*** one of the striking features was tenant's mother continued to reside in the suit

premises with his relatives (brother and wife of deceased brother). The judgment in my view provides little assistance for deciding the present Revision Application.

32) The Second Defendant has admitted that it is more convenient to store and take out goods in suit premises by using the outer shutter rather than routing the same through Shop No.2. Despite this admission, Defendants are expecting this Court to believe their false story that Defendant No.1 takes circuitous route for moving his goods in and out of his shop through the Shop of Defendant No.2, rather than opening shutter of his own shop.

33) What really makes the case of Defendant No. 1 worst is the admission given by the second Defendant in his cross examination that at times, he sells goods stored in the suit premises also. Mr. Patil makes an attempt to salvage this situation by contending that such an act on the part of second Defendant would still not make him the exclusive possessor of the suit premises. I once again find myself in total disagreement with Mr. Patil's submission that in every case, unless exclusive possession is proved, subletting cannot be assumed. True it is that in relation to a residential premises, exclusive possession by an outsider to tenant's complete exclusion may be required to assume the act of subletting and mere addition of an outsider in the house to reside along with the tenant may not always lead to presumption of subletting. This however may not apply to every case of commercial tenancy. In case of tenancy in respect of a shop, if tenant permits an outsider (not his employee) to use part of the shop to do business while tenant also

continues his own business, even though it is not proved that the outsider is in 'exclusive' possession of the tenanted shop, subtenancy can be presumed in a given case. To illustrate, if a tenant running stationary business in tenanted shop permits an outsider to install a photostat machine in a corner of the shop to service outsider's own customers, subletting needs to be presumed notwithstanding the fact that the outsider may not exclusively possess the tenanted shop. In metropolitan and commercial cities like Mumbai or Pune, where a tiny display space often attracts huge rent/license fees, letting use of small portion of shop of even 10 or 20 sq ft in busy locations can fetch good returns to the tenant, who can profiteer by such activity at the cost of landlord, who is paid pittance towards standard rent by the tenant. There could be cases where the tenant, who is incapable or undesirous of operating his business lets an outsider to take over his business under a clandestine arrangement, keeps all documents, bills, licenses, etc in his own name and occasionally visits the premises to disprove the allegation of subletting. Such clandestine arrangements are required to be inferred by Courts by applying the test of preponderance of probability. In every case, where it is noticed that a third person is actually using the premises, the act must be construed as breach of conditions of tenancy. The principle being, beneficial legislation like Rent Control Act is not to be misused by the tenant to the complete disadvantage of the owner. Again, while construing the rent control legislation as beneficial to tenant, the paradigm shift in the approach with passage of time must also not be completely ignored. Maharashtra Rent Control Act, 1999 offered an 'economic package' to landlords as noticed by the Apex Court in ***Leelabai***

Gajanan Pansare and others Vs. Oriental Insurance Company Limited and others[6]. The Act now excludes cash rich entities from its application, permits increase in rent every year, permits charge of premium, etc. which was not the case during Bombay Rent Act, 1947 regime. In my view therefore, in every case, where the tenant is seen attempting to take disadvantage of tenancy protection by indulging in profiteering by letting a third party actually use the premises, subletting must be inferred.

34) Thus, especially in cases of commercial tenancies, it is necessary that the tenant alone uses the entire portion of the shop and does not let any other person to use any portion thereof. Second Defendant's relation in the present case as tenant's brother would hardly make any difference as second Defendant is an independent tenant in respect of Shop No. 2 and has absolutely no business to conduct any activity inside Shop No. 1. In fact, this was the exact purpose why the tenancies were split in the year 1996. The object behind splitting the tenancies cannot be permitted to be frustrated by discreet arrangement between Defendants by letting second Defendant make use of the suit premises by accessing the same from internal door by keeping the outside shutter always closed.

35) In the present case, it is proved that the Second Defendant has been doing following acts *qua* suit premises (i) he has unhindered access to the suit premises internally through his own shop, (ii) he enters the suit premises through such access (iii) he sells goods stored in the suit

6 (2008) 9 SCC 720

premises (iv) locking of shutter of his own shop results in locking of suit premises and (v) keys of the said lock are possessed by him.

36) Coupled with the above factors, it has come in evidence that Defendant No.1 started his own grocery business at Thakur Palace premises after the year 1995. The combined effect of the above factors leads to an inescapable conclusion that Defendant No.2 is in full control of the suit premises. Therefore, the findings of subletting recorded by the Appellate Court cannot be found fault with. In fact after holding that First Defendant-tenant was not conducting any business or trade in the suit premises as on the date of institution of the suit and had allowed Second Defendant to illegally use the suit premises, the Trial Court ought to have upheld the ground of subletting. However it erroneously held that subletting could not be established only on account of absence of evidence of payment of valuable consideration by second Defendant to the first Defendant. It is not always easy to prove the clandestine arrangement between the tenant and subletee and therefore it is not necessary to prove payment of rent or consideration to prove the act of subletting. In ***Prem Prakash v. Santosh Kumar Jain & Sons (HUF)***[7], the Apex Court has held as under:

> 21. Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let

7 (2018) 12 SCC 637

> out the premises to that person nor had he allowed or consented to his entering into possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person in possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. **It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case.**
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> *(emphasis and underlining added)*

37) Thus payment of consideration in a given case can even be in kind. Both brothers are in business of sale of grocery items. It is therefore difficult to prove for Plaintiff the exact arrangement between them for letting second Defendant use the suit premises. Applying the test of preponderance of probability, it needs to be inferred in the present case that there is subletting in favour of second Defendant.

38) After considering the overall conspectus of the case, I am of the view that no serious error can be traced in the impugned orders passed by the Trial and the Appellate Court. The Civil Revision Application is devoid of merits and deserves to be dismissed. The Civil Revision Application is accordingly **dismissed** without any order as to costs. Defendant No. 1 shall hand over possession of the suit shop to Plaintiff within 8 weeks.

39) With dismissal of the Civil Revision Application, the Interim Application does not survive. The same also stands disposed of.

[SANDEEP V. MARNE, J.]