

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 523 OF 2022

WITH

INTERIM APPLICATION NO. 19993 OF 2022

Divyesh Jaykant Sheth & Anr.

...Applicants

: **VERSUS** :

Smt. Sushila H. Bhatia (deleted since deceased)

Mrs. Veena Harkishin Bhatia

....Respondent

Mr. Mehul Shah *with Ms. Vrushali Parab, for the Applicant.***Mr. Kunal Bhanage** *with Mr. Vasim Siddiqui I.b. Mr. Akshay Pawar, for the Respondent.*

CORAM : SANDEEP V. MARNE, J.

JUDGMENT RESD. ON: 8 April 2026.

JUDGMENT PRON. ON : 24 April 2026.

JUDGMENT:

1) The Applicants have invoked revisionary jurisdiction of this Court under Section 115 of the Code of Civil Procedure, 1908 (**the Code**) for challenging the judgment and order dated 3 October 2022 passed by the Appellate Bench of the Small Causes Court partly allowing Appeal No.59 of 2011 and setting aside the findings of the Trial Court on the issue of unlawful sub-letting and decreeing the suit thereby directing the Applicants/Defendants to handover possession of the suit premises to the Plaintiff. The Trial Court had dismissed R.A.E. Suit No.1225 /3700 of 1985

by rejecting the grounds of unlawful sub-letting and commission of acts contrary to the provisions of the Transfer of Property Act, 1882 (**the TP Act**). While partly allowing the appeal, the Appellate Court has reversed the finding of the Trial Court on the issue of unlawful sub-letting. The Appellate Court has accordingly decreed the Suit by directing eviction of the Defendant on the ground of unlawful sub-letting.

2) Plaintiff-Sushila Bhatia was the owner and landlord of Flat No.7, Bozo Building, Kamla Nehru Cross Road No.1 Kandivali (W) Mumbai 400 067, which are the '**suit premises**'. Defendant No.1 -Jaykant Sheth (**Jaykant**) was inducted as tenant in respect of the suit premises. His wife is a tenant in respect of adjoining flat No.8. Defendant No.1 is the brother-in-law of Defendant No.2-Padmakant Parikh (**Padmakant**). Jaykant is married to the sister of Padmakant, who was single and unmarried. Padmakant claimed that he exclusively occupied suit premises being Flat No.7 and that adjoining Flat No.8 was in the possession of Jaykant and his wife. The rent receipt in respect of Flat No. 7 is however in the name of Defendant No.1-Jaykant.

3) Padmakant therefore filed R.A.D Suit No.2434 of 1985 in the Court of Small Causes, against Jaykant and his wife Chandrakanta seeking a declaration that he was the real tenant of the suit premises bearing Flat No.7. The Suit was resisted by Jaykant and Chandrakanta by filing written statement. After learning that Padmakant was claiming right and exclusive possession in respect of the suit premises bearing Flat No.7, Plaintiff Sushila instituted R.A.E. Suit No.1225/3700 of 1985 in the Court \

of Small Causes against Jaykant and Padmakant seeking their eviction from the suit premises bearing Flat No.7. The Plaintiff alleged that Jaykant had unlawfully sub-let the suit premises to Padmakant.

4) After Plaintiff-Sushila filed R.A.E. Suit No.1225/3700 of 1985, Padmakant's R.A.D. Suit No.2434 of 1985 was withdrawn on 9 April 1986. During pendency of R.A.E. Suit No.1225/3700 of 1985, Padmakant passed away and it appears that his sister Chandrakanta and sister's son-Divyesh were brought on record as his legal heirs. The Suit took long time of 26 years three months and 17 days for decision. By judgment and order dated 5 May 2011, the Trial Court proceeded to dismiss the Suit by rejecting the ground of unlawful sub-letting. The Trial Court also rejected the ground of commission of act contrary to provisions of Section 108 (o) of the TP Act. The Trial Court held that the Plaintiff could not prove that Defendant No.2-Padmakant was in exclusive possession of the suit premises and accordingly the ground of unlawful sub-letting was rejected. The Suit was accordingly dismissed vide judgment and decree dated 5 May 2011. Aggrieved by the Trial Court's decree, Plaintiff preferred Appeal No.59 of 2011 before the Appellate Bench of the Small Causes Court. During pendency of the Appeal, Defendant No.1-Jaykant also passed away and his legal heirs were brought on record. By judgment and order dated 3 October 2022, the Appellate Court has proceeded to partly allow the Appeal by accepting the ground of sub-letting. The Appellate Court has accordingly reversed the findings of the Trial Court on the issue of unlawful sub-letting and has decreed the Suit under Section 13(1)(e) of

the Bombay Rents, Hotels and Lodging House Rates Control Act,1974 (**Bombay Rent Act**). The Defendants are directed to handover possession of the suit premises to the Plaintiffs. Aggrieved by the Appellate Court's judgment and order dated 3 October 2022, the legal heirs of Defendant No.1-Jaykant have filed the present Revision Application.

5) During pendency of the Revision Application, Plaintiff-Sushila has passed away and accordingly her legal heirs are brought on record. The Revision Application was heard by this Court for admission on 25 November 2022 and by a detailed order, the Revision Application has been admitted and execution of Appellate Court's decree has been stayed. Though the *Rule* was issued on interim relief for determining quantum of interim compensation, it appears that the interim compensation has not been fixed. The Respondents/ Plaintiff challenged the order passed by this Court on 25 November 2022 before the Hon'ble Supreme Court by filing Special Leave Petition (c) Diary No.25387 of 2023. By order dated 1 December 2023, the Supreme Court refused to interfere with the interim order of stay, but requested this Court to finally decide the Revision Application at the earliest. Accordingly, the Revision Application is taken up for final hearing.

6) Mr. Mehul Shah, the learned counsel appearing for the Applicants submits that the Appellate Court has erred in reversing well considered decision of the Trial Court. That the Appellate Court has perversely held the ground of unlawful sub-letting to be proved. That the case involves occupation of suit premises jointly by a family member, who

was real brother of wife of the original tenant. He was not a stranger or unrelated third party. That suit premises consists of one bedroom, hall and kitchen, which was used for sleeping and storage purposes with adjoining Flat No.8 consisting of one room and a kitchen. That the kitchen in Flat No.8 was being used for servicing both the flats. That therefore there is no question of Padmakant exclusively possessing the suit premises. That there was no arrangement for payment of rent charges by Padmakant in respect of the suit premises, which is an essential ingredient for proving the act of sub-letting. In support of his contention, Mr. Shah relies on judgment of this Court in *Surendra M. Wagh and another Versus. Manohar Krishna Kale and another*¹ and of the Apex Court in *Delhi Stationers and Printers Versus. Rajendra Kumar*²,

7) Mr. Shah further submits that mere sharing of premises with family members cannot be treated as an act of unlawful sub-letting. That Padmakant always resided in the suit premises with the original tenant as a family member. That mere differences among the family members cannot be a reason for believing that Padmakant occupied the suit premises exclusively in capacity as unlawful sub-tenant. He submits that the Appellate Court has grossly erred in relying on proceedings of R.A.D. Suit No. 2434 of 1985. Taking me through the plaint in that suit, Mr. Shah submits that Padmakant never raised a plea of being a sub-tenant under Defendant No.1. His misconceived case was that the tenancy was erroneously created in favour of Defendant No.1, who was a mere

1 2006 (5) Mh.L.J. 70

2 (1990) 2 SCC 331

benamidar. That Defendant No.1 filed written statement in R.A.D. Suit No. 2434 of 1985 specifically taking a position that Padmakant was only permitted to reside in the suit premises because he was his wife's brother and a family member. That R.A.D. Suit No. 2434 of 1985 was subsequently withdrawn by Padmakant after disputes between the family members got settled. That after 1987, Padmakant never occupied the suit premises. That in the present suit, Padmakant filed written statement denying the allegation of sub-tenancy. Mr. Shah further submits that for proving the act of sub-letting, it is necessary to establish the essential ingredient of parting with legal possession, intention to create sub-tenancy and payment of consideration. That none of the ingredients are satisfied in the present case. He submits that the issue of family member occupying tenanted premises not resulting in unlawful sub-letting is fully settled by the judgment of this Court in *Vasant Mahadev Pandit & Anr. Vs. Zaibunnisa Abdul Sattar & Ors.*³ That the ratio of the judgment squarely applies to the present case.

8) Mr. Shah further submits that no admissions were given even by Padmakant in R.A.D. Suit No. 2434 of 1985. That in any case, the stand taken by Padmakant in his suit cannot amount to admission made by Defendant No.1 and Padmakant's action cannot bind Defendant No.1. That in any case, the said suit was withdrawn and settled and not decided on merits and that therefore the pleadings/alleged admissions therein are not concluded by any judgment and hence not binding on any parties. That the Trial Court had correctly appreciated this position. That the

3 2001 (3) Mh.L.J. 118

Appellate Court has wrongfully considered pleadings in the withdrawn suit as if it was a positive evidence of sub-tenancy. That beyond the pleadings in the withdrawn suit, there is no iota of evidence to infer unlawful sub-letting by Defendant No.1. Mr. Shah further submits that the suit premises are large premises comprising of 1 BHK whereas the adjoining Flat No.8 are smaller premises comprising of 1 Room Kitchen. It is incomprehensible that a single unmarried person would be permitted to occupy larger flat exclusively while family of Defendant No.1 would reside in the smaller flat. The allegation of exclusive possession of Padmakant has not be established in the facts of the present case. He prays for setting aside the order passed by the Appellate Court.

9) Mr. Bhanage the learned counsel appearing for the Respondent opposes the Revision Application. He submits that the Appellate Court has rightly appreciated the entire material on record for holding that the act of sub-letting is proved in the present case. That exclusive possession of suit premises by Padmakant is admitted by him in RAD Suit No. 2434 of 1985. The pleadings in the said suit leaves no manner of doubt that Padmakant was exclusively occupying the suit premises and wanted himself to be declared as a tenant. That therefore Padmakant cannot be treated as a family member occupying the suit premises with the original tenant. He submits that once exclusive possession is admitted, nothing is required to be established by the landlord. That Padmakant never pleaded in the previous suit that he was occupying the suit premises as a family member with the original tenant. He submits that there are judicial admissions in the said pleadings which

stand on a higher footing than evidentiary admissions. In support, he relies upon judgment of the Apex Court in *Nagindas Ramdas Versus. Dalpatram Ichharam alias Brijram and Ors.*⁴. Mr. Bhanage relies on judgment of Division Bench of this Court in *Dattatraya Shripati Mohite Versus. Shankar Ishwara Mohite*⁵ in support of his contention that admission made by a party in a pleading in previous suit would bind him

10) Mr. Bhanage further submits that it is not necessary for the landlord to prove any financial arrangement between the tenant and sub-tenant. That payment of rent/charges by the sub-tenant is not required to be proved and he relies on judgment of the Apex Court in *Prem Prakash Versus. Santosh Kumar Jain and Sons (HUF) and Ors.*⁶.

11) Mr. Bhanage further submits that the manner in which previous suit is withdrawn also speaks volumes. That the suit has not been withdrawn simplicitor on the ground that there was any misconception in the mind of the Plaintiff-Padmakant. That mere withdrawal of suit would not wipe out admissions given in the pleadings. That Padmakant had infact secured an injunction during pendency of the suit from dispossessing him from the suit premises. That the fact that the injunction was granted shows that Padmakant was in exclusive possession of the suit premises and that Defendant No.1 was prevented from entering into the suit premises.

4 (1974) 1 SCC 242

5 1959 SCC Online Bom 5

6 (2018) 12 SCC 637

12) Mr. Bhanage further submits that it has come out in evidence that Padmakant had a separate gas connection in suit premises/Flat No.7 with which Defendant No.1 did not have any concern. He submits that the Appellate Court has rightly appreciated the entire evidence on record for arriving at the conclusion of unlawful sub-letting. That no interference is warranted in findings recorded by the Appellate Court in exercise of revisionary jurisdiction by this Court. He prays for dismissal of the Revision Application.

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

14) In the present case, there are two adjoining flats bearing Flat Nos.7 and 8 in respect of which tenancies are created. Flat No.7 is a larger flat comprising of 1 BHK admeasuring about 380-400 sq.ft, which are the suit premises. The adjoining Flat No.8 is comparatively smaller flat comprising of one room and kitchen admeasuring about 330-350 sq.ft. Though the flats are situated next to each other, it is an admitted position that the flats have separate entrances and that they are not interconnected or combined in any manner. It appears that tenancy in respect of Flat No.7 (suit premise) was created in the name of Defendant No.1 whereas, tenancy in respect of Flat No.8 is in the name of his wife.

15) Defendant No.2-Padmakant is the brother of wife of Defendant No.1-Jaykant. It is the case of Jaykant that both the Flats Nos.7

and 8 are used jointly by his family. According to the Jaykant, his wife's brother-Padmakant, who was unmarried, was also permitted to reside with the family. Ordinarily, if a close family member is permitted to reside in the suit premises, such an act does not automatically become unlawful sub-letting. However, it needs to be established that the whole family resides in the premises as a one unit, without an element of exclusivity in respect of any part of the premises or in respect of a family member. Residence in unison as one family is *sine qua non* for defeating an eviction action on the ground of unlawful subletting. In ordinary circumstances therefore, it would have been difficult for the Plaintiff to prove unlawful sub-letting in the present case merely because of entry of Padmakant into the suit premises.

16) However, the task of the Plaintiff-landlord was made easy by Padmakant by filling R.A.D. Suit No. 2434 of 1985. Contrary to the tenant's version of Padmakant being permitted to reside as a family member in the suit premises, Padmakant raised an altogether different story in his suit. He pleaded that he is the real tenant of the suit premises bearing Flat No.7. He pleaded that Jaykant and his wife were residing in adjoining Flat No.8 and that Padmakant accepted tenancy in respect of Flat No. 7 in the year 1978. He pleaded that on account of cordial relations, it was agreed that the rent receipt in respect of both the flats would be prepared in the joint names of Jaykant and Padmakant, but the landlord refused to prepare rent receipt in the joint names, and this is how rent receipts were issued only in the name of Jaykant. He pleaded that he used to take meals with his sister and Jaykant till 1983 by paying

an amount of Rs.120/- which was increased to Rs.150/- per month. Padmakant pleaded that he was in exclusive use, occupation and possession of the suit premises since 1978 and that Jaykant was a simple *benamidar*. Padmakant further pleaded that after the year 1983, the relationship soured, and he stopped taking meals with his sister. He claimed that Jaykant and sister started demanding possession of the suit premises from him in collusion with the landlady. This is how Padmakant filed R.A.D. Suit No. 2434 of 1985 seeking declaration of tenancy and for transfer of tenancy receipt in his name. Padmakant also sought injunction against Jaykant and sister for restraining them from taking forceful possession of the suit premises. It would be relevant to reproduce averments in para-1, 3, 4, 6 as under:

1) Plaintiff is residing at flat No.7, Second floor, Bozo building, Kamala Nehru Cross Road No.1, Kandivali (West) Bombay 400 067 since the inception of the tenancy in 1978. Plaintiff is a real tenant of the suit premises the monthly rent whereof is Rs. 200/-.

3) Plaintiff is single and unmarried. Plaintiff's brother in law and sister i.e. defendants Nos 1 and 2 were residing in the adjoining flat being flat No.8, on the second floor of the Bozo Building. Kandivali (West) Bombay 400 067 and Plaintiff being single and unmarried rented out the adjoining flat No. 7, in the said building in the year 1978, at the request of defendants Nos 1 and 2 as the relations between the Plaintiff and the defendants Nos. 1 and 2 were very cordial. It was agreed that the rent receipt should be prepared in the joint names of the Plaintiff and the first defendant. However the owner of the premises refused to prepare the rent receipt in the two names and the first defendant informed the Plaintiff that the premises would go to landlord after and hence the rent receipt was prepared in the name of first defendant in respect of the suit premises, by the third defendant, the Plaintiff also did not take any objection as the relations between the plaintiff and the defendant nos 1 and 2 were very cordial at that time. Plaintiff also used to take his meals with the defendant nos 1 and 2 till 1983 and was initially paying as. 120/- which was subsequently raised to Es. 150/- per month.

4) Plaintiff states that he is in exclusive use, occupation, and possession and control of the suit premises in his own right since 1978 though the rent receipt stand in the name of the first defendant. Plaintiff states that he is the real tenant of the suit premises and the first defendant is simply a benamidar. Plaintiff states that whenever the first defendant went to pay the rent of his premises to the third defendant, Plaintiff also remitted the rent of the suit premises with the first defendant to the third defendant. Plaintiff states that the first defendant after paying the rent to the third defendant has kept rent receipts of the suit premises with him and inspite of several request by the Plaintiff has failed and neglected to return the rent receipts to the Plaintiff.

6) I say that i am an old and feeble person. I say that defendants nos. 1 and 2 try to take undue advantage of my helpless position. I say that have got documentary evidence such as Ration Card, Election Record, Bank Pass book in my possession to show that I am in exclusive use occupation and possession of the premises and I am the real tenant of the premises though the rent receipt of the suit premises stands in the name of the first defendant who is only a benamidar.

17) The prayers in R.A.D. Suit No. 2434 of 1985 filed by Padmakant were as under:

(a) That it may be declared that the Plaintiff is a real tenant of the suit premises and the first defendant is merely a benamidar in respect of flat No.7, second floor, Bozo Building Kamala Nehru Cross Road No. 1, Kandivali (West) Bombay 400 067.

(b) That the third defendant be ordered and decreed to transfer the rent receipt of the suit premises from the name of the first defendant to the name of the plaintiff

(c) That the defendant Hos 1 and 2 their servants and agents be restrained by an order and injunction from this Honourable Court from taking forcible possession of inducting any person in the premises or disturbing the Plaintiff's possession in any manner whatsoever without due process of law in respect of flat no.7 second floor Bozo Building Kamala Nehru Cross Road No. 1, Kandivali (West) Bombay 400 067.

(d) That the defendant No.1 and 2 and their agents and servants be restrained by an order and injunction from removing the articles and things of the Plaintiff from the suit premises.

(e) Costs of the suit be provided for;

(f) For such other and further relief as the nature of the case may require.

18) Along with his suit, Padmakant produced following list of documents:

LIST OF DOCUMENTS ON WHICH PLAINTIFF WILL RELY:

(1) Ration Card.

(2) Bank Pass book.

(3) Election Record.

(4) N.C. Complaint.

(5) Other correspondence prior to the suit.

(6) Gas connection

(7) Electric bills paid by cheque

19) Thus, Padmakant had a separate ration card, as well as gas connection in respect of the suit premises. After exclusive possession of the suit premises, Padmakant filed application for temporary injunction to restrain Jaykant and sister from disturbing his possession. By order dated 11 June 1985, the Trial Court granted *ex-parte ad-interim* injunction in terms of prayer clause (a) of the application which reads thus :

(a) The defendant No.1 and 2, their servants and agents be restrained by an order and in-junction from taking forcible possession or disturbing my possession of the suit premises in any manner whatsoever of the suit

premises namely Flat No.7, Second Floor, Bozo building, Komla Nehru Cross Road No. 1 Kandivli (West), Bombay 400 067;

20) After hearing the parties, the ad-interim injunction was made absolute on 2 September 1985. Thus, Defendant No.1-Jaykant and his wife were restrained from disturbing possession of Padmakant in respect of the suit premises. This falsifies the theory of joint occupation of Flat No.7 by Jaykant and Padmakant as one family. It also falsifies the claim of Jaykant that Padmakant was permitted to reside in the suit premises as a family member. Padmakant's possession of suit premises to the exclusion of Jaykant got proved on account of grant of temporary injunction.

21) As observed above, in ordinary circumstances, a family member permitted to occupy tenanted premises resides as a family member and not as exclusive possessor even in respect of operation of the suit premises. In the present case, the whole of the suit premises were apparently in occupation of Padmakant, in whose favour injunction was granted by the Small Causes Court. During the period when injunction operated, Jaykant and his wife were not even permitted to enter the suit premises. They resided in a separate flat bearing Flat No.8. In such circumstances, it is difficult to believe that Padmakant and Jaykant resided jointly in Flat Nos.7 and 8 as members of one family. Padmakant gave a blow to the joint family theory and raised a plea of exclusive possession of the suit premises. This act of Padmakant in raising the plea of occupying the suit premises to complete exclusion of Jaykant and his wife is fatal to the defence of Jaykant in R.A.E. Suit No. 1225/3700 of

1985. Infact, Padmakant's plea of exclusive possession gave rise to a cause of action for a landlord to institute eviction suit against the tenant.

22) In addition to Padmakant's admissions in pleadings in his RAD Suit, Jaykant and his wife also gave certain admissions in their written statement filed in R.A.D. Suit No. 2434 of 1985. Firstly, they denied that they ever served meals to Padmakant, which belied their defence in the present suit that common meals were prepared in Flat No.7 for all family members. They pleaded in para-4 of the Written statement that '*they deny that they were serving meals to the plaintiff since 1983 as alleged*'. Jaykant and his wife also admitted existence of separate gas connection and issuance of a separate ration card in the name of Padmakant which are admissions given in previous suit by Padmakant and Jaykant and would haunt them in the present suit as well.

23) Applicants have attempted to distance themselves from the admissions given in the previous suit by contending that they are irrelevant in the present suit. However, the law is to the contrary. In ***Dattatraya Shripati Mohite***, the Division Bench of this Court has held in para-3 as under:

3. It is difficult to hold that by these observations the learned Chief Justice intended to lay down the proposition that an admission on a question of fact made by a party in the course of a proceeding has in another proceeding no value whatever and cannot be regarded as a good piece of evidence relying on which the opposing party may contend that the claim made in the subsequent proceeding is unjustifiable in the light of the admissions made in the earlier proceeding. In our view, Ramabai's case 43 Bom LR 232 (AIR 1941 Bom 144) is not an authority in support of the view that the Court is not even entitled to consider admissions

solemnly made by a party in the course of proceedings in other suits relating to the same subject-matter. We are unable to agree with the observation made by the learned trial Judge in paragraphs 35, 36 and 44 of his judgment that the admissions made by defendants Nos. 1 and 2, in the proceedings in suit No. 565 of 1948 and the revenue proceedings and in the earlier suit No. 3 of 1941 have no evidentiary value.

24) More importantly, even Padmakant was a party Defendant to the present eviction suit. He was impleaded as Defendant No.2 and has filed Written Statement denying the act of unlawful sub-letting. Thus, in the present suit, Jaykant and Padmakant acted in unison and presented a joint defence denying the act of sub-letting. It appears that an additional written statement was jointly filed by Defendant No.1 and Defendant No.2a. Thus, the eviction suit was ultimately defended jointly by both the Defendants. Their defence was thus common. In that view of the matter, admissions given by Padmakant in R.A.D. suit would continue to haunt both the Defendants in their eviction suit. The admissions are not evidentiary admissions but are given in the pleadings, which becomes judicial admissions. It is well settled position that admissions given in pleadings which are judicial admissions, are fully binding on the party making them and constitute waiver of proof. Such admissions by themselves can be made the foundation of rights of the parties. It is held by the Apex Court in *Nagindas Ramdas* (supra) in para-27 of the judgment as under:

27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of

evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. **Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties.** On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.

(emphasis added)

25) Thus, all the admissions given by Padmakant would bind both Defendant Nos.1 and 2 in the eviction suit. Defendant No.1 cannot seek to selectively escape the consequences of such admissions. The Trial Court erred in glossing over such vital admissions given by Padmakant and also by Jaykant in the withdrawn suit. Merely because the suit was withdrawn, the same does not mean that the judicial admissions made in pleadings filed therein would get evaporated. Contrary to the admissions given in the previous suit, the Trial Court has perversely held that Plaintiff failed to prove that Defendant No.2 was in exclusive possession of the suit premises. The Appellate Court has rightly reversed the findings of the Trial Court by holding that pleadings made by Defendant No.2 in the previous suit would bind him. The Appellate Court has rightly held that it was not permissible for Defendant No.2 to wriggle out of the said admissions on the ground that the previous suit was filed out of a misunderstanding.

26) Even if admissions in the previous suit are to be momentarily ignored, it is seen that there are several factors which are clearly proved even in the present case, which are sufficient for inferring the act of unlawful subletting. They are:

- (i) Securing of separate gas connection in Flat No.7 by Padmakant. If Padmakant was merely permitted to stay in the suit premises as a family member, he could not have secured separate gas connection for himself. Thus, there are two separate gas connections in the names of Padmakant for Flat No.7 and Jaykant for Flat No.8 thereby destroying the theory of residence as family members.
- (ii) Padmakant has also been issued a separate ration card meaning thereby that he was a separate unit than the family of Jaykant. Thus, Padmakant's ration card was in respect of the suit premises (Flat No.7) whereas Jaykant's ration card was in respect of Flat No.8. This again signifies existence of two separate units and not joint residence as family members.
- (iii) Flat Nos.7 and 8 are not conjoint. They are having separate entrances. The factum of issuance of separate gas connection indicates existence of separate units in the two flats.

From the above factors, it can easily be inferred that the occupiers of Flat Nos.7 and 8 did not reside together as family members.

27) Though ordinarily, family members residing together in suit premises does not give rise to subletting, however mere relation with the inductee as a relative cannot be a ground for rejecting the ground of subletting in every case. In a given case, subletting can also occur in respect of family members. Mere relationship between inductor and inductee cannot quell the presumption of subletting if exclusive possession by the inductee is proved. Thus, if Defendant-tenant was in possession of only one premises and he had permitted his wife's brother to reside with him as his family member, the act of sub-letting cannot be presumed. However, in the present case, there are two separate units/premises of which tenancies were created by the landlord. The tenancy in respect of Flat No.7 (suit premises) was in the name of Defendant No.1-Jaykant and tenancy in respect of Flat No.8 is in the name of Jaykant's wife. If a tenant in possession of two premises, lets one out of the two premises to be exclusively used and occupied by his relative, the act of subletting can be inferred and the presumption of subletting cannot be dispelled merely on the strength of relationship between the parties. What is important is the factum of 'exclusive possession' by Padmakant in respect of the suit premises, which is clearly established. Apart from his pleaded case of exclusive possession, order of temporary injunction granted in favour of Padmakant on 11 June 1985, which continued till 9 April 1986, enabled him to exclusively occupy the suit premises. During this period, Jaykant and his wife were prevented from entering into the suit premises. Thus, exclusive possession of Padmakant in respect of the suit premises atleast for same time is clearly established.

28) Mr. Shah has strenuously relied on judgment of this Court in *Vasant Mahadev Pandit* (supra). In that case, the wife of the deceased brother resided with the tenant and such act was not considered as sub-letting under Section 13(1)(e) of the Bombay Rent Act. The premises were let out to Vasant Pandit for residence. He left the suit premises and permitted his brother and father-in-law of another brother to reside in the suit premises. During pendency of the suit, original defendants expired and wife of the brother-Laxman and son of Late, V.R. Salvi were brought on record as legal heirs. The Trial Court rejected the ground of sub-letting, but the Appellate Court decreed the suit. The petition was filed in this Court by the original tenant-Vasant Pandit, brother's wife-Sunanda Laxman Pandit and son of late V.R. Salvi: Mr. R.V. Salvi. In the facts of that case, this Court held in paras-9, 10, 11 and 12 as under:

9. The question that arises for consideration is whether the possession of defendants 2 and 3 of the suit premises amount to unlawful subletting of the suit premises by defendant No. 1. As mentioned above it is not in dispute that defendant No. 2 as well as defendant No. 3 are closely related to defendant No. 1. Original defendant No. 2, since deceased, was the real brother of defendant No. 1; whereas original defendant No. 3, since deceased, was the father in law of the real brother of defendant No. 1. The case made out on behalf of the defendants before the Court below was that both the defendants 2 and 3 were occupying the suit premises only as family member of defendant No. 1. It was contended on behalf of the defendants that since defendants 2 and 3 were not strangers, the onus of establishing that the premises were unlawfully sublet to defendants 2 and 3 and that the defendants No. 1 was profiteering out of the said transaction by charging sum of Rs. 50/- per month from them was very heavy on the plaintiff. No doubt the Appellate Court has recorded a finding that the plaintiff has established the case of unlawful subletting in favour of defendants 2 and 3, however, it is contended that, the said conclusion has been reached on the basis of surmises and conjectures. On the other hand the learned counsel for the

respondent No. 1- plaintiff essentially adopted the conclusions reached by the Appellate Court.

10. It is well settled that to make out a case of subletting the party has to establish that the party is in exclusive possession of the suit premises upon payment of consideration for such purpose. In the present case, on the basis of evidence on record and as analyzed by both the Courts below it is not possible to even remotely suggest that defendants 2 and 3 were in exclusive possession of the suit premises. Inasmuch as, besides defendants 2 and 3, other family members including mother of defendant No. 1 were all along staying in the suit premises. At any rate, there is absolutely no positive evidence brought on record by the plaintiff to show that defendant No. 1 was charging consideration that too a sum of Rs. 50/- per month from defendants 2 and 3. On close examination of the pleadings it would appear that vague allegation has been made that defendant No. 1 handed over exclusive possession of the suit premises to defendants 2 and 3 at the monthly rent of Rs. 50/- with or without the permission of the plaintiff. The assertion in the plaint is too vague and general, for it is not clear as to whether Rs. 50/- was being charged either from defendant No. 2 or from defendant No. 3 or from both. Be that as it may, the said assertion in the plaint was categorically denied by the defendants in their written statement. Besides denial the defendants came out with a specific case, as stated in para 7 of the written statement. Besides the specific pleading, the defendant adduced oral evidence of Vasant defendant No. 1 as well as of D.W. 2 Sunanda impleaded defendant No. 2/1 and of R.V. Salvi impleaded defendant No. 3/1. All the defendants have consistently deposed on oath that defendants 2 and 3 were staying in the suit premises as family members and there was no question of subletting the suit premises to them by defendant No. 1. The said defendants have also consistently deposed that no amount was paid either by defendant Nos. 2 or by defendant No. 3 towards consideration for occupying the suit premises as sub-tenants.

11. In the light of denial by the defendants with regard to the averments of subletting and profiteering, the onus naturally shifted on the plaintiff to adduce positive evidence to show that defendants 2 and 3 were put in exclusive possession of the suit premises and that the defendant No. 1 had in fact charged any amount either from defendant No. 2 or from defendant No. 3 or from both towards consideration of subletting. No such evidence has come on record except the bare words of the plaintiff. As a matter of fact rebuttal by the defendants of the allegations of subletting and profiteering has gone unchallenged since the plaintiff failed to adduce any positive evidence to counter the same. I have no hesitation in holding that in view of the relation between the defendants inter se it can be presumed that defendants 2 and 3 were staying only as

family members of defendant No. 1. To rebut this presumption onus was very heavy on the plaintiff to lead positive evidence and not merely his bare words.

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 defendants 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 subletting. Observations made by this Court in judgment reported in the case of Babanrao Shankarrao Chavan v. 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 comes 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."

29) The judgment in *Vasant Mahadev Pandit*, in my view, has no application to the facts of the present case. In that case, though the tenant had left the suit premises, his mother continued to reside therein. It is in the light of these peculiar facts, brother's wife and father-in-law of another brother were not treated as unlawful sub-tenants. The case did not involve existence of two separate premises and the issue of exclusive occupation of one out of the two premises by a relative. Also, the judgment in *Vasant Mahadev Pandit* was delivered in the context of the law which prevailed at that time, which required proof of payment of rent/charges, which law has subsequently undergone change and it is no longer necessary to prove the element of any payment by the sublettee. The present case has unique facts where the sublettee-Padmakant claimed exclusive possession of the suit premises while the tenant continued to reside in a separate and distinct premises being Flat No.8. Therefore, the judgment of this Court in *Vasant Mahadev Pandit* has no application to the facts of the present case.

30) Mr. Shah has strenuously contended that mere possession of the suit premises by a relative is not sufficient to presume the act of sub-

letting and Plaintiff must prove payment of some consideration/rent by the inductee to the tenant. Reliance is placed on judgment of the Apex Court in *Delhi Stationers and Printers* (supra). However, the law has developed subsequently and now it is an established position that proof of demand of rent is not a *sine-qua-non* for establishing the act of sub-letting. Sub-tenancy comes into existence when a tenant gives up possession of the suit premises wholly or in part and puts another person in exclusive possession thereof without landlord's knowledge. In such circumstances, it is neither possible nor necessary to prove existence of any financial transaction by way of direct evidence.

31) In *Prem Prakash*, (supra) the Apex Court has held that the law does not require payment of charges/rent to be proved for inferring sub-letting by evidence and the Court is permitted to draw its own inference upon facts of each case. It is held in paras-17 to 21 as under:

17. Undoubtedly, the initial burden to prove that the sub-tenant is in exclusive possession of the property is on the owner, however, the onus to prove the exclusive possession of the sub-tenant is that of preponderance of probability only and he has to prove the same prima facie only and if he succeeds then the burden to rebut the same lies on the tenant.

18. In this regard, it is appropriate to quote a decision of this Court in *Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh* wherein it was held that when eviction is sought on the ground of sub-letting, the onus to prove sub-letting is on the landlord. If the landlord prima facie shows that the occupant who was in exclusive possession of the premises let out for valuable consideration, it would then be for the tenant to rebut the evidence.

19. Again, in *Kala v. Madho Parshad Vaidya*, this Court reiterated the very same principle. It was observed that the burden of proof of sub-letting is on the landlord but once he establishes parting of possession

by the tenant to third party, the onus would shift on the tenant to explain his possession. If he is unable to discharge that onus, it is permissible for the court to raise an inference that such possession was for monetary consideration.

20. In *Vaishakhi Ram v. Sanjeev Kumar Bhatiani*, it was held as under: (SCC p. 362, para 21)

"21. It is well settled that the burden of proving sub-letting is on the landlord but if the landlord proves that the sub-tenant is in exclusive possession of the suit premises, then the onus is shifted to the tenant to prove that it was not a case of sub-letting.

Reliance can be placed on the decision of this Court in *Joginder Singh Sodhi v. Amar Kaur*. Therefore, we are in full agreement with the High Court as well as the courts below that since Appellants 2 to 4 had been in exclusive possession of the suit shop and Appellant 1 could not prove that it was not a case of sub-letting, the suit shop had been sub-let by Appellant 1 in favour of Appellants 2 to 4. Therefore, no interference can be made with the findings arrived at by the High Court as well as the courts below on the question of sub-letting."

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 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.**

(emphasis added)

32) Thus, there is no burden on the landlord to prove payment of rent/charges by inductee to the tenant. The moment the act of putting inductee in exclusive possession of whole or part of the suit premises is proved, the inference of subletting can be drawn and the onus shifts on the tenant to prove that the induction does not amount of subletting.

33) The conspectus of the above discussion is that the act of unlawful subletting is correctly held to be proved by the Appellate Court. The ground for eviction under Section 13(1) (e) of the Bombay Rent Act is thus clearly established.

34) The suit was instituted in the year 1985 which remained pending for 26 long years and was decided only in the year 2011. The Appeal thereafter remained pending for 11 long years. The present Revision Application is pending for last 4 long year. Pendency of litigation has enabled the Applicants to hold down to possession of suit premises for the last 40 long years. Time has come for the Applicants give up possession of the suit premises to the landlord/her legal heirs. It is not that upon their eviction from the suit premises, the Applicants would be rendered homeless. They would still continue to remain in possession in respect of adjoining Flat No.8.

35) In my view, therefore no interference is warranted in the eviction decree passed by the Appellate Court in exercise of revisionary jurisdiction of this Court under Section 115 of the Code. Revision Application is bereft of merits. It is accordingly dismissed without any order as to costs. The Applicants shall have time of 6 months for handing over possession of the suit premises, subject to filing of usual undertaking in this Court within 6 weeks. With dismissal of the Civil Revision Application nothing would survive in the Interim Application, the same is disposed of.

[SANDEEP V. MARNE, J.]

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