
(1980) 07 BOM CK 0016

In the Bombay High Court

Case No : Special Civil Application No. 242 of 1973 with C.A. No. 3293 of 1978

Dinkar S. Vaidya

APPELLANT

Vs

Ganpat S. Gore and Others

RESPONDENT

Date of Decision : 15-07-1980

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12, 12(1), 12(2), 12(3), 13
Constitution of India, 1950 — Article 227
Easements Act, 1882 — Section 60
Transfer of Property Act, 1882 — Section 105, 108, 114, 3

Citation : AIR 1981 Bom 190

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : H.G. Advani and M.A. Rane, for the Appellant; M.V. Paranjpe, D.K. Ghaisas, S.G. Mandrekar, D.S. Marathe and S.M. Mhamane, for the Respondent

Judgement

1. This is an unfortunate piece of litigation. The petitioner before me was the plaintiff in the trial Court. He got a decree for possession in his favour. The decree was set aside by the appellate Court. As will be seen from the final order, the petitioner is succeeding so far as the present petition is concerned. However, as to when the present petitioner will reap the fruits of this decree is anybody's guess.

2. The facts of the case are as follows :--

(a) This litigation arises out of the Bombay Rents, Hotel and Lodging House Rates (Control) Act 1947, (hereinafter referred to as the "Rent Act"). The property in question is part of final plot Nos. 606/A and 606/B, numbered as C.I.5. Nos. 1225/A-I 1225/1/B2. The property in dispute originally admeasured 11,000 sq. feet situated at a very prestigious road called Ferguson Road in Poona. The property originally belonged to one Trimbak Hari Awate. On 28-4-1947, the said Awate executed a simple mortgage in respect of the entire property in favour Of one Mr. Vaidya. The mortgage amount was Rs. 20,000/-.

(b) The Rent Act came into force on 13-2-1948. On 7-7-1948, a lease-deed was executed by said Awate in favour of present defendant No. 1 Shankar Godajt Gore. It appears that defendant No. 1 was a building contractor. The lease-deed is Ex. 183, in the trial Court. The purpose of the lease was mentioned as residence and shops. Defendant No. 1 was to construct structure upon the open land and was to let out the structure or a part of it. The period of lease was 25 years and the agreed rent was Rs. 1500/- per annum. However, the rent was to be paid at the rate of Rupees 125 per month. This fact is relevant with the question as to whether the rent was payable per month or not. The lease-deed contains a stipulation that if the lessees committed default in the matter of payment of rent for a period of three years, the lease was to be forfeited, and the lessor was entitled to re-enter.

(c) There was no clause in the deed prohibiting assignment or Sub-lease as such. Having regard to the provisions of the Act, therefore, it could be said that the assignment or subletting was not specifically prohibited by the lease-deed. As to what would be the effect of the provisions of Section 15 of the Rent Act, which came into force on 13-2-1948, will have to be considered later.

(d) On 17-2-1949, defendant No. 1 Gore executed a registered Sub-lease in respect of the entire land in favour of Sulochanabai Anandrao Thakur and Krishnabai Balasaheb Sarde, defendants Nos. 2 and 3 respectively. This sublease was for a period of 99 years 9 months. Strangely - enough, the rent agreed was Rs. 50/- per month. Incidentally it may be mentioned that both defendants Nos. 2 and 3 were the near relations of defendant No. 1. Defendant No. 3 Krishnabai appears to be the daughter of defendant No. 1 Gore and defendant No. 2 Sulochanabai is also a very near relation.

(e) Defendants Nos. 2 and 3 constructed 14 shops on a portion of the land, which was the subject-matter of the lease-deed. Ex. 183. Some of these shops were let out to various persons. In this petition, we are not concerned with the precise details etc. of those various lettings. Suffice here it is to know that after constructing the said shops they came to be let out to various persons. Those persons in their turn assigned their right, title and interest to others. All the persons who are having some interest in those shops have been impleaded in this litigation as party defendants.

(f) On 7-11-1949, an area of 4000/-sq. feet was sublet by defendants Numbers 2 and 3 to Sardar Bhiwalkar, who was original defendant No. 4 in these proceedings. The rent agreed was Rs. 135/- per month and the period of lease was 67 years. The lease in question is Ex. 185 in the lower Court. It appears that on the same day defendants Nos. 2 and 3 also sold 7 out of the 14 shops to self-same defendant No. 4. It appears further that the 7 shops were constructed on that portion of the land which formed part of lease Ex. 185, which was in respect of 4000 sq. feet of land.

(g) On 6-12-1956, defendants Nos. 2 and 3 executed a deed of assignment in

respect of all the rights, title and interest in the suit land in favour of Bay-jabai Ganpal Gore. Sunderabai Babasaheb Gore and Yeshodabai Balasaheb Gore, defendants Nos. 6, 7 and 8 respectively. It is evident that even these transferees were close relations of defendant No. 1 himself.

(h) At this stage it may be mentioned that the above mentioned mortgage Shri Vaidya had filed a suit against Awate, being Spl. Civil Suit No. 89 of 1952. It may be mentioned here that to that suit the present defendants Nos. 1 to 4 were made parties. In the said mortgage suit preliminary as well as final decree was passed in favour of the mortgage and in execution of the said final decree the entire suit land admeasuring 11000 sq. feet was purchased by the mortgage Shri Vaidya. The sale was confirmed on 19-12-1957 and the symbolical possession of the land in question was taken over by the auction-purchaser on 2-3-1960.

(i) It may be stated here that before me all the above facts are not in dispute at all. Likewise, it is not in dispute before me that the auction-purchaser became entitled to receive rent in respect of the suit property with effect from 1-10-1957 at the rate of Rs. 1500/- per year or Rs. 125/- per month and further that he has not received any rent from any of the defendants from that date. It is no doubt the contention of the various defendants that they had paid rent to their own landlords, but the fact remains that so far as the person who became owner of the property with effect from 1-10-1957 (viz. the auction-purchaser) was concerned, he did not receive any rent in respect of the suit property or any portion thereof for the period beginning from 1-10-1957.

(j) It needs to be stated here further that original mortgage Shri Vaidya had been declared a lunatic sometime during the pendency of this litigation. It appears that even when the property was purchased in execution of the mortgage decree the Nazar of the Court was appointed as the Manager of the property. In fact the property was purchased in the auction by the Nazar on behalf of the original mortgage,

(k) On 14-9-1960, the Nazar on behalf of the auction-purchaser gave notice (Ex. 188) to defendant No. 1 calling upon him to pay all the arrears of rent due from 1-10-1957. This notice was received by defendant No. 1 on 17-9-1960, but neither any reply was given to the notice nor any payment made by him in pursuance of the said notice. Hence on 30-11-1961, a notice was given again by the Nazar on behalf of the auction-purchaser addressed to defendants Nos. 1 to 8 terminating the tenancy of all the persons who were the tenants. A copy of the said notice was served upon all the defendants. It may be mentioned here that defendant No. 5 was the Collector of Kulaba. who was acting as the Court of Ward for the estate of Sardar Bilwalkar, original defendant No. 4. The notice D/- 30-11-61 is Ex. 190 in these proceedings. In spite of this on 18-7-1963, original defendant No. 1 assigned his right, title and interest in the shop situate upon the suit land to defendants Nos. 19 and 20. Likewise on 27-8-1963 defendant No. 5 assigned his right, title and interest in the shop situate on the suit land in favour of defendant No. 21.

(1) The present suit was filed by the Nazar of the Court on behalf of the said lunatic Shri Vaidya on 3-4-1965, for possession of the suit property which consists of land only. The prayer was that the relevant defendants should remove the structure from the land in question and should hand over vacant and peaceful possession of the land to the plaintiff. The grounds for eviction were:

(a) default by the defendants or tenants concerned in the matter of payment of rent with effect from 1-10-1957. that is to say, for a period exceeding six months:

(b) unlawful subletting, and

(c) profiteering.

3. By his written statement, Ex. 102, defendant No. 1 contended that the structure built upon the suit land belonged to Thakur & Co. The fact that he had not paid the rent to the owner of the land since the year 1957. was admitted by him, but he contended that his tenants of the land had become direct tenants of the plaintiff. He also contended that the agreed rent was excessive and prayed for fixation of standard rent. He died during the pendency of the suit His heirs were brought on record. They did not file any separate written statement but adopted the original written statement of defendant No. 1.

(i) Defendant No. 2 did not contest the suit at all and hence was proceeded ex parte.

(ii) Defendant No. 3 filed a written statement at Ex. 135 and raised various pleas. It is not necessary to refer to all the pleas raised by her. Her contention material for the purpose of this petition is the one that the transactions effected by Awate and defendant No. 1, as also by herself, are binding upon the plaintiff and that, hence, the plaintiff cannot claim possession of the suit-property. She also disputed the validity of the quit notice given to her.

(iii) So far as defendant No. 4 is concerned it may be stated here that the plaintiff's dispute with regard to defendant No. 4 has been settled in the lower Court itself. Hence it is not necessary to refer to the case sought to be made out by him in his written statement. Incidentally it may be pointed out that defendant No. 4 died during the pendency of the suit. But even during his lifetime his estate was in the management of the Collector of Kulaba and the Court of Wards. Hence the Collector was impleaded as defendant No. 5 in the original suit. From what is stated above, it follows that even defendant No. 5 has no subsisting dispute with the plaintiff.

(iv) Defendants Nos. 6, 7 and 8 are the real contesting defendants in these proceedings. They had filed a written statement in the trial Court at Ex. 74. Initially they had denied the fact that the plaintiff had become owner of the suit property with effect from 1-10-1957. They admitted that defendants Nos. 3 and 3 took the land on lease from defendant No. 1 but contended that they themselves had acquired right, title and interest of defendants Nos. 2 and 3 in the suit land and that, hence, they had become the Sub-tenants in respect of the

suit land. They further contended that they had become direct tenants of the plaintiffs in view of the fact that they were Sub-tenants of the plaintiffs since 6-12-1956. They also raised the plea of the rent charged by the plaintiff being excessive and prayed for fixation of standard rent. They denied the fact that defendant No. 1 had committed any default in the matter of payment of rent.

(v) So far as the remaining defendants were concerned it was contended on their behalf that they were the tenants in respect of the structures and that they had paid the rent due by them to defendants Nos. 6 to 8. They, therefore, contended that the plaintiff was not entitled to recover possession of the suit land by eviction of these defendants from the structures on the land.

3A. Upon these pleadings, issues were framed by the learned trial Judge and after considering and examining the evidence led by the parties in that behalf, he held that the plaintiff had made good his case for recovery of possession of the suit premises on the ground :

(a) that the relevant defendants had committed default in the matter of payment of rent so as to attract the provisions of Section 12(3)(a) of the Rent Act;

(b) that defendants Nos. 1 to 3 had unlawfully sublet or assigned their right, title and interest in the suit premises and that the subletting or assignment was not permitted or saved by the Ordinance amending the Rent Act with effect from 21-5-1959.

The contention regarding excessive character of rent set up by the defendants was negated by the learned Judge. The contention regarding validity of the notice was likewise negated by him and, hence, by his judgment and decree dated 27th November, 19158, he ordered that heirs of defendants No. 1 should pay to the plaintiff a sum of Rs. 9,000/-being the arrears of rent. He also passed a decree directing the relevant defendants to remove the structures on the suit land and to hand over vacant possession of the same to the plaintiff within three months from the date of the decree.

4. Against the said decree four appeals came to be filed to the District Court. Appeal No. 265/69 was filed by original defendant No. 4. Since the dispute between defendants Nos. 4 and 5 on the one hand and the plaintiff on the other was settled between the parties, the said appeal, it appears was not prosecuted by the appellant.

5. Appeal No. 279/69 was filed by original defendants Nos. 3 and 6 to 8 and defendants Nos. 9 to 13 and 21. Appeal No, 280/69 was filed by original defendants Nos. 16 and 17. Appeal No. 354 of 1969 was filed by original defendant No. 22. All the above mentioned three appeals (Appeals Nos. 279/69, 280/69 and 354/69) were heard together and were disposed of by the Appellate Court by a common judgment. Differing from the view expressed by the trial court, the learned Appellate Judge took the view that the original defendants Nos. 6 to 8 had become direct tenants of the plaintiff in view of the provisions of

Section 14 of the Bombay Rent Act read with Section 14 thereof, and that original defendants Nos. 9 to 13, 16 and 17 and 21 and 22 had likewise become the direct tenants of the plaintiff in relation to the portion of the suit premises that were in their occupation. He also held that in spite of three years' default committed by defendants Nos. 1 to 8 no decree for eviction could be passed against any of the defendants. By his decree dated 31st July, 1972, therefore, he allowed the above mentioned three appeals. The decree passed by the trial Court in relation to the delivery of possession of the suit premises was set aside by the learned Judge. So far as the decree for payment of rent was concerned no separate order has been passed by him. It is against - this judgment and decree denying the plaintiff's main relief as is prayed for in the suit that the present Special Civil Application has been filed by the original plaintiff under Article 227 of the Constitution of India.

6. The petition was argued by Mr. M. A. Rane as also by his learned counsel Mr. H. G. Advani on his behalf. For original defendants Nos. 6, 7 and 8 Mr. M. V. Paranjpe appeared as counsel with Mr. D. K. Ghaisas at one stage. However, at the time when the petition was effectively heard, the petition had to be argued by Mr. Ghaisas only on behalf of his clients, original defendants Nos. 6 to 8. Mr. D. S. Marathe appeared for respondents Nos. 14 to 16 i.e. original defendants Nos. 9 to 11; whereas Mr. Mhamane appeared for respondents Nos. 17, 18, 21, 22, 26 and 37, i.e. original defendants Nos. 12, 13, 16, 17, 21 and 22. Mr. P. J. Vaidya had originally filed his appearance on behalf of respondents Nos. 17 and 20 i.e. original defendants Nos. 12 and 14, but so far as respondent No. 17 was concerned, as stated above, Mr. Mhamane also had filed his appearance. So far as respondent No. 20 was concerned Mr. Vaidya did not appear at all and no arguments were advanced on his behalf at the time of the final hearing of this petition.

7. The contentions advanced on behalf of the petitioner by his learned counsel and Advocate may be conveniently summarised as follows :--

(i) That defendant No. 1 had made himself liable for eviction on two grounds:--

(a) default in the payment of rent, and

(b) unlawful subletting of the suit premises.

(ii) That there was already decree passed against defendant No. 1 for eviction and the remaining defendants after all claim only through defendant No. 1. Defendant No. 1 had not filed any appeal against that decree, hence, the decree for eviction had become final and conclusive even against the remaining defendants.

(iii) That even assuming that the decree passed against defendant No. 1 was not binding on defendants Nos. 2 & 3, for the above reasons the decree for possession would be passed even as also against defendants Nos. 6 to 8 because the Sub-lease by defendant No. 1 in favour of defendants Nos. 2 and 3 could not

be said, to be in the least protected by the Ordinance which came into effect on -21st May, 1959. The said Ordinance purported to protect those Sub-tenants who were in possession of the suit premises on the date of the coming into operation of the Ordinance, that is to say, on 21st May, 1959. Admittedly on 6-12-1956 long before the Ordinance came into force, defendants Nos. 2 and 3 had not only transferred their right, title and interest in the suit premises but had even parted with the possession of the same in favour of defendants Nos. 6 to 8. Such Sub-tenants were not protected by the Ordinance in question. The provisions of the Ordinance, therefore, could not be availed of by any of the contesting defendants as a shield for or protection from a decree of eviction. Even assuming that defendants Nos. 1 to 8 incurred no liability on the ground of subletting, they could not escape the liability for eviction under the provisions of Section 12(3)(a) of the Rent Act. If at all defendants Nos. 6, 7 and 8 had become direct tenants of the plaintiff, it could not be said that their direct tenancy started only from 30-11-61, that is to say, the date of termination of tenancy. Defendants Nos. 2 and 3 had already assigned their right, title and interest in the suit premises to defendants Nos. 6, 7 and 8 as early as on 6-12-1956. Since none of them had made the payment of rent, all had incurred the liability for eviction u/s 12(3)(a) of the Rent Act.

8. As against this contention, Mr. Ghaisas, appearing for respondents Nos. 6, 7 and 8 contends that in the instant case under the original rent note, Ex. 183, the rent was not payable by month. It was a case of yearly tenancy and the fact that the rent was allowed to be paid at the rate of Rs. 125/- per month meant only that there was a facility given to the tenant to pay the rent per month. The contention, therefore, was that the provisions of the Rent Act would not come into operation at all. Secondly, he contended that in view of the above position original defendants Nos. 6, 7 and 8 would be entitled to relief against forfeiture independent of the provisions of the Rent Act. So far as the plea of Sub -tenancy was concerned, he contended that the Ordinance dated 21-5-1959 was given retrospective effect. The result of this legal position was that though subletting was prohibited by virtue of Section 15 of the Rent Act as it stood on 13-2-1948, the sub tenancy became permissible, if there was a contract to the" contrary between the landlord on the one hand and the tenant on the other. The contention was that the conduct of the parties subsequent to the date of the original lease was such that a contract contemplated by Section 15(2) of the Rent Act could be easily and readily spelt out. If, therefore, there was a permission given by the landlord to the tenant to Sub-let the suit premises and if the suit premises were accordingly Sub-let by the tenant, the tenant would incur no liability for eviction under the Rent Act, even assuming that his own Sub-tenant had parted with possession of the suit premises on 21-5-1959. In such a case the provisions of Section 15(2) of the Rent Act did not come into operation at all. Hence not only the Sub-tenant was protected but even an assignee of Sub-tenant was equally protected.

9. Mr. Marathe appearing for the original defendants Nos. 9 to 11 sought to place

reliance upon the amendment to the Bombay Rent Act, which came into force with effect from 1st February, 1973, As per the relevant provision of Section 15 of the Rent Act which has been so amended, even the licensees of the premises as contradistinguished from tenants of the premises got protection of the Rent Act. Mr. Marathe contended that his clients were admittedly licensees in respect of the land upon which the structure was standing. Hence they became tenants or rather Sub-tenants of the land with effect from 1-2-1973. His contention, therefore, was that the decree which could have been passed against his client before 1-2-1973, could not be passed against them by virtue of the advent of the said amendment of the "Rent Act which became effective from 1-2-1973.

10. Mr. Mhamane, appearing for some of the respondents as mentioned above, who were the tenants only in respect of the structure, contended that his clients had paid all the rent that were due from them to their own owners-landlords and hence no decree for eviction could be passed against them.

10A. Before dealing with the various contentions raised before me, I may briefly refer to the findings arrived at by the learned trial Judge in the suit as also by the learned Assistant Judge in the appeal. At the outset it may be stated that as many as 56 issues were framed by the learned trial Judge. Most of them were necessitated by virtue of prolixity in the pleadings of the various defendants. But even apart from this cause, I find a good many issues either did not arise or were nothing but duplication. Fortunately the dispute has been narrowed down before me in this writ petition and the issues that are relevant are only those which are related to the above mentioned points formulated by Mr. Rane. The first point raised by Mr. Rane consists of two parts:

(a) liability of the defendants for a decree for eviction on the ground of default on their part for payment of rent for a period exceeding six months,

(b) unlawful subletting by defendant No. 1 to defendants Nos. 2 and 3 and thereafter unlawful assignment by defendants Nos. 2 and 3 in favour of defendants Nos. 6, 7 and 8.

Out of the above contentions, contention (a) is a subject-matter of issues Nos. 4, 5, 15, 16, 18, 22 and 24. If we read all the issues together we find that there is a clear finding recorded by the learned Judge that no rent was paid by any of the defendants to the plaintiff, though to their knowledge the plaintiff had become owner in respect of the suit premises with effect from 1-10-1957. There is a finding recorded by the learned Judge that the plaintiff gave notices to all the defendants Nos. 1 to 8 calling upon them to pay the rent but none of them paid anything towards the arrears. In para 36 of his judgment the learned Judge has found that notices were issued by the plaintiff even to other defendants as early as in the month of May 1962 or before. Some of the defendants even gave replies to the same but even then none of them paid the rent that was justly receivable by the plaintiff. The reasoning by which the learned Judge has arrived at the conclusion namely that on this account the defendants had become liable

to a decree for eviction is, however, not something which is warranted by the provisions of the Rent Act. He observed that all the defendants claimed through defendant No. 1, that defendant No. 1 agreed to put Awate in possession of the open site after removing the structures thereon in case he fell in arrears for more than 3 years, and that defendant No. 1 admittedly committed default for payment of rent for three years. From these facts the learned Judge arrived at the conclusion that the defendants had exposed themselves to the liability for an eviction decree.

10B. I do not think that this reasoning of the learned Judge is quite correct. The category of grounds upon which an eviction decree can be obtained against a tenant are exhausted by the provisions of the Rent Act. Under the Rent Act some of the provisions of the T. P. Act for eviction of the tenants are no doubt adopted by the Act itself. For instance u/s 13(1)(a) of the Rent Act a decree for eviction can be passed against a tenant, if he commits any acts contrary to Section 108(o) of the T. P. Act. It can be seen that such a decree can be passed against a tenant even under the T. P. Act under the provisions of Section 111(g) of that Act. But on that account it cannot be held that the provisions of Section 111(g) of the T. P. Act should be read into the provisions of the Rent Act. So far as the grounds for the eviction of the tenant are concerned, Sections 12 and 13 of the Rent Act are exhaustive in their amplitude. No tenant can be evicted from the premises rented to him, unless his acts fall either u/s 12 and 13 of the Rent Act. Section 12 deals with the liability of the tenant for eviction, if he commits default in the matter of payment of rent; but before such a decree can be obtained, it is incumbent upon the landlord to give a statutory notice to the tenant u/s 12(2) of the Rent Act giving him locus penitential to pay all the arrears of rent then due within one month from the date of the receipt of the notice and, if the tenant pays all the rent within the said one month, then notwithstanding the default committed by the tenant under the instrument of lease, the Court cannot pass a decree for eviction against the tenant. Evidently, therefore, the provisions in the lease-deed dated 7-7-1949 to the effect that three years' default on the part of the tenant would make him liable for eviction must be deemed to have been superseded by the provisions of the Rent Act. The learned Judge could not have a justification for passing a decree for eviction by relying upon the default clause contained in the lease-deed, Ex. 183.

10C. I will, however, point out that in the light of the facts of the case it may be mentioned that the result may not be otherwise. The plaintiff had actually given notice to all the contesting defendants-tenants as required by Section 12(2) of the Rent Act and none of them had paid rent due to the plaintiff within one month from the receipt of the notice. Whosoever was the tenant of the plaintiff, either in fact or in the eye of law, on the date when he received the notice demanding the arrears of rent had to pay that amount within one month from the date of the receipt of the notice. If he was the tenant of the plaintiff and if he did not pay the requisite rent within the requisite period he could have no answer to the claim for his eviction.

11. So far as contention (b) above urged by Mr. Rane and Mr. Advani is concerned, the relevant issues framed by the learned Judge are issues Nos. 7, 12, 13, 19, 37 and 38. The total effect of the findings on these issues is that, according to the learned Judge, defendant No. 1 had no right under the original lease-deed, Ex. 183, dated 7-7-1948 either to sublet the suit premises to defendants Nos. 2 and 3 or to assign the rights under the lease to anyone else. The learned Judge has held that such a sublease was prohibited even under the provisions of Section 15 of the Rent Act as it then stood. However, the learned Judge has found that the Sub-tenancy of defendants Nos. 2 and 3 and consequently of defendants Nos. 6 to 8 is protected by virtue of the Ordinance which came into effect on 21-5-1959. To issue No. 38, therefore, the learned Judge has recorded a finding that with effect from 7-7-1962 when the tenancy of defendant No. 1 was terminated by the plaintiff, defendants Nos. 6 to 8, who were assignees from defendants Nos. 2 and 3, became direct tenants of the landlord-plaintiff. It is nobody's case that subsequent to this date any notice of demand was sent by the plaintiff to these defendants, who had allegedly become his direct tenants with effect from this date, calling upon them to pay all the arrears of rent. However, the learned Judge has passed a decree for eviction even against these Sub-tenants. It is not quite easy to reconcile his ultimate decree with the reasoning on which the same is based.

12. Coming to the reasoning of the learned Assistant Judge regarding both the above mentioned aspects, it may be stated here that the learned Judge has devoted large portion of his judgment for consideration of the question as to whether defendants Nos. 2 to 8 had become direct tenants of the plaintiff-landlord. He has also devoted substantial portion of his judgment for considering whether the remaining defendants were tenants in respect of the structure and had any right of Sub-tenancy with regard to the suit premises, viz., the land on which the structures were standing. The learned Judge has come to the conclusion that by virtue of the amending Ordinance, which came into effect on 21-5-1959, the Sub-tenants who got a Sub-tenancy before that date were protected. He further held that the assignees from the said Sub-tenants, viz., defendants Nos. 6 to 8, were equally protected. He, therefore, held that no decree for eviction could be passed against them on this ground. So far as the remaining defendants who were the tenants only of the structures were concerned, he held that the plaintiff had admittedly no concern with these structures. All the same he held that in the eye of law the tenants of the structures must be deemed to be the Sub-tenants of the plaintiff in respect of the land on which the structures stood. As a logical consequence of this reasoning he further held that upon the determination of tenancy of defendants Nos. 1 to 3 and 6 to 8 the remaining defendants had become direct tenants of the plaintiff. He felt that notice u/s 12(2) of the Rent Act was given by the plaintiff to these defendants after they became the direct tenants of the plaintiff. Hence he held that no decree for eviction be passed even against them u/s 12(2) of the Rent Act.

13. I will now proceed to examine the contention urged by Mr. Rane and Mr. Advani in support of their above mentioned contentions (a) and (b). I will first deal with the contention (b) which relates to unlawful subletting. In this connection Mr. Rane relied heavily upon the provisions of the amending Act itself. Sub-section (2) which was added to Section 15 runs as follows:--

"(2) The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in Sub-section (1) shall, subject to the provisions of this Sub-section, be deemed to have had no effect before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959, in any area in which this Act was in operation before such commencement, and accordingly, notwithstanding anything contained in any contract or in the judgment, decree, or order of a Court, any such sub-lease, assignment or transfer or any such purported-sub-lease, assignment or transfer in favour of any person who has entered into possession despite the prohibition in Sub-section (1), as a purported sub lessee, assignee or transferee and has continued in possession at the commencement of the said Ordinance, shall be deemed to be valid and effectual for all purposes, and any tenant who has sublet any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under Clause (e) of Sub-section (1) of Section 13."

Mr. Rane made a pointed reference to that portion of this sub-section which provides that the protection is extended to sub-tenant who has not only entered into possession despite the prohibition in Sub-section (1) against subletting, but has also continued to be in possession at the commencement of the said Ordinance, that is to say, on 21-5-1959. Mr. Rane contends that unless this last requirement was satisfied by the person claiming to be the sub-tenant he gets no protection under the amendment whatsoever. In this connection Mr. Rane sought to place reliance firstly on the judgment in Balkrishna Maruti Devgaonkar Vs. Saidanna Sayanna Billampalli, The facts of that case were similar to the case before me. Defendant No. 1 in that case was the original tenant of the landlord who had sublet the suit premises to defendant No. 2 who in his turn had sublet it to defendant No. 5. This transaction after (of?) sub-lease had taken place before 21-5-1959. Question then arose whether defendant No. 5 was entitled to claim protection of Section 15(2) of the Rent Act and this Court held that the protection could be available only to the sub-tenant of defendant No. 1, original tenant, if such tenant was in actual possession of the suit premises on the date when the amending Ordinance came into force. Since admittedly defendant No. 2, first sub-tenant was not in possession of the suit premises on that date, it was held that there was no question of his having protection under the Act. It was further held that the protection which was afforded to the first sub-tenant from the original tenant was not extended to the sub-tenant of the sub-tenant or the assignee of the sub-tenant.

14. The next authority that Mr. Rane has relied upon is a Division Bench judgment of this Court in N.M. Nayak Vs. Chhotalal Hari Ram and Others, . This is what the Court held in that case:

"A person seeking to claim protection afforded by the provisions contained in the notification issued by the State Government under the proviso to Section 15(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, must establish that his transferor was a "lessee" of the premises transferred or assigned. In other words, the only persons who are entitled to transfer or assign the interest in the premises must satisfy the character of a "lessee" as defined in Section 105 of the Transfer of Property Act, 1882, viz. the transferee of an interest in immovable property. The assignee of a lessee cannot be termed as "lessee" as defined by the Transfer of Property Act."

"Section 15(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947," validates the subletting, transfer and assignment by tenants and not further subletting or further derivative transfer or assignment by such Sub-lessees, transferees or assignees. The protection conferred by the Ordinance referred to in the section can be availed of by only those persons who can be described as Sub-lessees, assignees or transferees from the contractual tenants."

15. Mr. Advani appearing for the petitioner-plaintiff at one stage, placed heavy reliance upon the judgment of the Supreme Court reported in Jaisingh Morarji and Others Vs. Sovani Pvt. Ltd. and Others, There the Supreme Court was required to consider the correctness of the above mentioned judgment of the Division Bench of this Court, and this is what the Supreme Court observed in para 18 of its judgment:--

"The Bombay High Court in a Bench decision in N.M. Nayak Vs. Chhotalal Hari Ram and Others, rightly held that Section 15(2) of the Act validated only subletting, transfer and assignments by tenants and no further subletting or further derivative transfer or assignment by such Sub-lessees, transferees, assignees."

The Supreme Court further observed in para 19 of the judgment as follows:--

"The word "tenant" in Section 15 of the Bombay Act means the contractual tenant. In Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others, this Court said that the expression "tenant" in Section 15(1) of the Act means the contractual tenant and not the statutory tenant. The legislature by the Ordinance of 1959 intended to confer protection on subtenants of contractual tenants. The Ordinance did not confer any protection on further transfer or further subletting by Sub-lessees of the contractual tenants."

Relying upon these authorities Mr. Rane and Mr. Advani very strongly urged that defendants Nos. 2 and 3 could not claim any validated Sub-tenancy at all. It is and admitted fact that on the date when the Amending Ordinance came into operation, that is to say, on 21-5-1959, defendants Nos. 2 and 3 had wholly

divested themselves of all their right, title and interest in the suit premises, including possession of every part of the suit premises, by their deed of assignment dated 6-12-1956, Ex. 187. It is nobody's case that defendants Nos. 2 and 3 continued to be in possession of any part of the suit premises at any time after 6-12-1956. The Sub-tenancy in favour of defendants Nos. 2 and 3 thus got no protection whatsoever from the amending Ordinance. "Defendants Nos. 6 to 8, as assignees of defendants Nos. 2 and 3 do not get any "protection under the amending Ordinance dated 21-5-1959 at all. If defendants Nos. 2 and 3 and 6 to 8 are not valid Sub-tenants no question arises of their having been the direct tenants of the landlord-plaintiff. The plain reading of Section 15(2) as also that of the above-mentioned authorities leaves no scope for doubt that the person intended to be protected by the said amending Ordinance is the Sub-tenant of the original contractual tenant and not a subtenant of a Sub-tenant or an assignee of Sub-tenant. It may be that on the date when the Ordinance came into force the Sub-tenant of the Subtenant or an assignee of the Sub-tenant was in possession of the suit premises, but such a Sub-tenant of a Sub-tenant or such an assignee gets no protection whatsoever u/s 15(2) of the Act. This appears to be the plain reading of the statutory provisions and of the judicial pronouncements. A decree against respondents Nos. 1 to 8 u/s 13(1)(e) of the Rent Act on the ground of unlawful subletting the suit premises, therefore, appears to be inevitable.

16. Mr. Ghaisas appearing for defendants Nos. 6 to 8 was hard pressed to give reply to this aspect of the matter. I have already set out briefly the contentions raised by him in reply to this position. I will now deal with each of them in details. His first contention was that before we could consider the effect of the provisions of Section 15(2) of the Rent Act, it was necessary for us to consider whether there was any liability incurred by defendant No. 1 or defendants Nos. 2 and 3 or defendants Nos. 6 to 8 for the matter of that for eviction on the ground of unlawful subletting by defendant No. 1 in favour of defendants Nos. 2 and 3. He pointed out that Section 15(1) as it originally stood no doubt purported to impose a blanket prohibition against subletting or assignment of tenancy rights as such. But the amendment which was brought into effect on 21-5-1959 brought about another position retrospectively. The position was that if there was any agreement to the contrary between the landlord and (tenant by virtue of which the tenant was allowed to sublet or assign the tenancy rights, the prohibition contained in Section 15(1) of the Rent Act was of no legal consequence. Mr. Ghaisas contends that in the instant case, we find that there was an agreement to the contrary existing between Awate on the one hand and defendant No. 1 on the other by virtue of which it could be said that defendant No. 1 could sublet or assign his right under the lease-deed, Ex. 183, to others. For this purpose Mr. Ghaisas invited my attention in the first instance to the fact that there was no specific prohibition contained in the said lease deed, Ex. 183. Mr. Ghaisas contended that under the Transfer of Property Act the general rule is that there is no prohibition against transfer at all. As a matter of fact no transfer

can be effected by any person with a condition that the transferee shall not further transfer the same. One of the exceptions to this rule is to be found in the right of the landlord to prohibit his "tenant from either subletting or transferring the tenancy. Mr. Ghaisas contends, and with quite some justification, that such a prohibition has got to be express or must be spelt out by necessary implication. To the extent to which there was no express prohibition in the instant case, that is to say, in the lease-deed, Ex. 183, it could be held that there was an agreement to the contrary between Awate and defendant No. 1 by virtue of which defendant No. 1 was at liberty to sublet or assign his tenancy rights. I am afraid it is not possible for me to agree with Mr. Ghaisas on this point. The lease-deed, Ex. 183, mentions cases in which the tenant would be entitled to effect assignment or Sub-lease. Such an assignment or Sub-lease is restricted only to the structure or a part of the structure constructed by defendant No. 1 upon the open site. This necessarily means that the open site itself is not capable of being Sub-leased or assigned by defendant No. 1. Such a prohibition against sublease or assignment follows by necessary implication from Ex. 183. This ground urged by Mr. Ghaisas for spelling out an agreement to the contrary must, therefore, be rejected.

17. The second ground urged by Mr. Ghaisas for spelling out the requisite agreement to the contrary is the one of Awate. Mr. Ghaisas contends that the Sub-lease effected by defendant No. 1 in Ex. 184 dated 17-2-1949 in favour of defendants Nos. 2 and 3 was a registered document. The particulars of the same were entered in the property register. This means that Awate had notice about this transaction. Mr. Ghaisas contends that there is nothing on record to show that Awate moved (even) his little finger to protest against the transaction. This means, contends Mr. Ghaisas, that the said Mr. Awate has unequivocally acquiesced in this transaction. Such an acquiescence must spell out an agreement by conduct between the parties within the contemplation of Section 15(1) of the Rent Act.

18. Apparently this is an attractive argument; but on closer scrutiny it must be held that the plea of Mr. Ghaisas in this behalf cannot be sustained. The registration of a document has the effect of notice to the world at large in respect of transaction relating to the property, but this -doctrine of notice can have effect in a limited ambit only, the ambit being the one provided by the Transfer of Property Act. If a person wants to enter into a transaction in respect of the property, he has to be wary and circumspect. He has to make inquiries about the legal encumbrances subsisting over the property and if he has notice of these encumbrances he would be bound by the same. Registration of a document would amount to such a notice and, hence, the person would be bound by such encumbrances which are registered encumbrances. But all this is before a party has occasion to deal with the property. Once a property has been dealt with, whatever happens subsequently to the property could not affect the person who had already dealt with the property. To translate this abstract statement into concrete illustration, in the instant case Awate had already leased the property to

defendant No. 1. II defendant No. 1 effected even registered sale deed in respect of the property, it would be having no effect whatsoever upon Awate. In the instant case what has been done by defendant No. 1 is to effect registered lease-deed. But such a registration of lease-deed would be of no effect whatsoever so far as Awate is concerned.

19. But more important than that is that there is nothing on the record to show that Awate had done anything whereby he accepted or acquiesced or consented to the Sub-tenancy of defendants Nos. 2 and 3; There is not a title of evidence on record to show that Awate ever accepted rent either from defendant No. 1 or defendants Nos. 2 and 3 subsequent to illegal Sub-lease by defendant No. 1 to defendants Nos. 2 and 3. I gave enough opportunity to Mr. Ghaisas to invite my attention to anything in the entire evidence on record to show that even rent was accepted by Awate from defendant No. 1 or defendants Nos. 2 and 3 subsequent to the said Sub-lease. The admitted position that in fact emerged, however, was that not only no rent was accepted by Awate but defendants Nos. 2 and 3 have not paid any rent to him at all. It may be that defendants Nos. 2 and 3 were close relations of defendant No. 1 and hence defendants Nos. 2 and 3 constructed shops on the open site in question. For ought we know Awate might have been under the impression that defendants Nos. 2 and 3 were tenants in respect of only shops. Nothing is brought to my notice to show that any notice was given by defendant No. 1 or by defendants Nos. 2 and 3 or by any of them to Awate informing him about the sublease. Nothing is brought on record to show why Awate should have gone to the Registrar of Properties and should have made enquiries as to under what capacity defendants Nos. 2 and 3 were in occupation of the suit land. Under the lease, Ex 183, defendant No. 1 was specifically allowed to construct structures upon the land and to sublet the structures or part of the same. Assuming that Awate had ever seen defendants Nos. 2 and 3 constructing shops upon the suit site there is no reason why he should arrive at a conclusion that they were the Sub-tenants in respect of the lease. Having regard to all these facts there is no conduct on the part of Awate brought on record by the contesting defendants which would show that Awate had either acquiesced in or consented to or agreed to defendant No. 1 subletting the land to defendants Nos. 2 and 3. The second contention of Mr. Ghaisas in this behalf, therefore, must be rejected.

20. Nextly Mr. Ghaisas contends that in Spl. Civil Suit No. 89 of 1962 filed by Vaidya against Awate, he had himself impleaded defendants Nos. 1 to 4 as parties to the mortgage suit. He, therefore, contends that they could not have been impleaded unless they were recognised to be the Sub-tenants in respect of the land. He further contends that at least when defendants Nos. 1 to 4 had been impleaded in the mortgage suit along with him, Awate had every reason to know that defendants Nos. 2 to 4 were the Sub-tenants on the land. The fact that no steps were taken by Awate against these defendants even thereafter is, according to Mr. Ghaisas, an unmistakable pointer to the fact that Awate at all times was aware about the legal status of defendants Nos. 2 and 3 on the land.

21. Unfortunately for Mr. Ghaisas this contention is being raised before me in this writ petition for the first time. I am rejecting this contention on the ground that there is no basis in the evidence for arriving at the conclusion, which he wants, to arrive. The plaint in the mortgage suit is not on the record. The circumstances in which defendants Nos. 1 to 4 were impleaded in the mortgage suit are not brought on the record. It is, therefore, impossible for me to say for certain that Awate could know the legal status of defendants Nos. 2 and 3 because they were impleaded in the mortgage suit. Even assuming, therefore, that this is a piece of conduct which spells a contract to the contrary, though I am quite doubtful about this also, there is no basis for holding that Awate had become aware of the status of defendants Nos. 2 and 3 on the land merely by virtue of their having been added as co-defendants in the said suit.

22. Nextly Mr. Ghaisas contended that the legality of the transaction of subletting by defendant No. 1 to defendants Nos. 2 and 3 must be deemed to have been accepted by the plaintiff, if we peruse the contents of paras 7 and 8 of the notice dated 30-11-1961 given by the plaintiff to the relevant defendants terminating the tenancy. At the end of para No. 7 of the said notice it is stated as follows:--

"Nos. 6, 7 and 8 out of you have entered into a transaction of purchase with Nos. 2 and 3 out of you on 6-12-1956. The said transaction was entered into while the Special Darkhast No. 89/52 was pending. It appears that Nos. 2, 3, 4, 5, 6, 7 and 8 out of you have acquired the right of Sub-tenant of No. 1 of you."

In paragraph 8 of the said notice it is stated again that rights acquired by Nos. 2, 3, 4, 5, 6, 7 and 8 of you as subtenants or assignees of defendant No. 1 have been extinguished. From these averments in the notice inference is sought to be drawn by Mr. Ghaisas that the Sub-tenancy of these defendants Nos. 2 and 3 and assignment in favour of defendants Nos. 6, 7 and 8 has been accepted or acquiesced in by the plaintiff himself. Unfortunately for Mr. Ghaisas there is no basis for such a contention either in the pleadings or in the issues. It is nobody's case that if Awate had not recognised defendants Nos. 2 and 3 as his valid and lawful Sub-tenants, the plaintiff had accepted them" as such lawful Sub-tenants. In this connection we have to bear in mind the position of the person who was actually dealing with the property on behalf of the plaintiff. It is to be noted that plaintiff Vaidya had become a lunatic and the Nazir of the Court was appointed to look after his property by the Court of Ward. Mr. Rane contends, with quite some force, that this Nazir could have no personal information about the nature of the rights of defendants inter se, far less could he know the rights of the defendants vis-a-vis Awate. A correct statement is made in para 7 of the notice that defendants Nos. 2 to 8 "appear" to have become the Sub-tenants of defendant No. 1. Such a statement cannot be spelt out to be an admission or acquiescence on the part of the plaintiff. As a matter of fact in the self-same notice it is stated that all the said transactions of subletting are not binding upon the plaintiff. In paras 3 to 5 of the said notice reference is made to the various transactions of Sub-lease, assignment etc. amongst the defendants inter se and

in para 6 of the notice, it is specifically made clear that the transactions mentioned in paras 3 to 5 above are not binding upon the plaintiff. Mr. Rane was right in contending that in view of this specific averment and in view of the fact that such a contention is being raised for the first time in these proceedings in this Court, the contending respondents are not entitled to urge the same before this Court.

23. It may be mentioned here that in paragraph 9 of the plaint, the plaintiff has specifically averred that the transactions of Sub-lease entered into by defendant No. 1 were illegal. It is significant that in reply to this averment in the plaint, it is not contended by any of the contesting defendants that the plaintiff had himself accepted the said subtenants as lawful Sub-tenants in respect of the suit premises.

24. I have already referred to the contention of Mr. Ghaisas relating to the conduct of Awate in conniving at or acquiescing in the Sub-tenancy of defendants Nos. 2 and 3. In furtherance of the said contention Mr. Ghaisas contended that the plaintiff who claims through Awate was estopped from questioning the legality of the Sub-tenancy of defendants Nos. 2 and 3 or of defendants Nos. 6 to 8. In support of his contention Mr. Ghaisas placed reliance upon para 15 of the written statement of defendants Nos. 6 to 8, Ex. 74. A contention was raised in the said paragraph that the plaintiff is raising this dispute after the defendants had constructed structures on the suit site in good faith and that too after a lapse of a number of years. This was held out to be the basis for plea of estoppel. It is noteworthy that as many as 56 effective issues have been framed by the learned trial Judge and even then no issue on this scantily founded plea of estoppel is invited by any of the defendants.

25. But apart from this objection, even on merits it is very difficult to find any basis for any such plea of estoppel. Mr. Ghaisas sought to place reliance in this behalf on the judgment of the Appeal Court in *Norman v. Simpson*, (1946) 1 KB 158. It has been observed there as follows:

"Where, therefore, a tenant, in breach of the terms of his tenancy, sublet premises to which the Act applied without first obtaining the consent of the landlord who, however, continued to accept rent with knowledge of the breach and so waived his right to forfeit the lease, and the Sub-tenant, on determination of the head-lease by due notice, accepted by the headtenant, claimed the right to hold over as statutory tenant:--

Held that there being no right of reentry in the landlord, at the time of the determination of the head-tenancy, the Sub-tenant was entitled to the protection of Sub-section (3) of Section 15".

I have already pointed out that far from there being any evidence of acceptance of rent by Awate from defendant No. 1 after the transaction of the Sub-lease, the evidence on record shows that no rent was paid by defendant No. 1 to Awate at all. The very basis of this ruling, therefore, precludes Mr. Ghaisas in the instant

case from invoking the plea of estoppel. This contention of Mr. Ghaisas must, therefore, fail.

26. Mr. Ghaisas thereafter sought to place reliance upon the evidence of Shankar Awate son of the original lessor, who was the Power of Attorney Holder of his father and he was examined as a witness on behalf of the plaintiff. However, nothing in his evidence could be elicited to show that Awate, the father of the witness, had entered into an agreement to the contrary with defendant No. 1 on the strength of which defendant No. 1 could sublet the suit premises to defendants Nos. 2 to 3. As a matter of fact the said witness Shankar states that defendant No. 1 himself constructed the shops on the suit site. It, therefore, follows that he does not even know that defendants Nos. 2 and 3 were the Sub-tenants. Admittedly defendants Nos. 2 and 3 had constructed the shops in question on the open site. But this witness does not even know that defendants Nos. 2 and 3 had constructed the shops. He says that defendant No. 1 had himself constructed the shops. This shows that Awate was all the time in the dark about the legal position of defendants Nos. 2 and 3. Further it has come from his evidence that defendant No. 1 never paid rent to Awate. The inference about acquiescence by acceptance of rent must, therefore, be ruled out. Reliance was sought to be placed upon some stray sentences of the said witness Shankar, that rent was accepted by the witness from defendant No. 4, who also was a Sub-tenant of defendant No. 2. But Mr. Rane pointed out that this defendant No. 4 was a tenant in respect of the same premises before the year 1949, that is to say, even before the lease, Ex. 183, was executed by Awate in favour of defendant No. 1. Evidently reference to acceptance of rent by Awate from defendant No. 4 is the reference to the rent payable by defendant No. 4 to Awate before the transaction of the lease, Ex. 183. In any event, there is a settlement between the plaintiff on the one hand and defendants Nos. 4 and 5 on the other so far as the portion in occupation of defendant No. 4 is concerned. Defendants Nos. 2, 3 and 6 to 8 and also defendants Nos. 9 and 11 have not even cross-examined this witness when he stated that he did not know defendants Nos. 2 and 3 as Sub-tenants and that no rent was paid by defendant No. 1 to Awate. In this view of things, the stray sentences from the evidence of this witness Shankar could be of no avail to the contesting defendants.

27. Nextly Mr. Ghaisas invited my attention to certain statements made by the said witness Shankar Awate in his examination-in-chief. The said witness Shankar stated in his examination-in-chief that defendant No. 1 had sublet a part of the suit property to defendants Nos. 2 and 3. Reliance is sought to be placed upon this statement by Mr. Ghaisas to contend that this Sub-tenancy was created by defendant No. 1 in favour of defendants Nos. 2 and 3 with the knowledge and consent of Awate. I am afraid there is no basis for such a contention in the evidence of Awate. The witness has not been cross-examined by any of the contesting defendants to elicit from him an admission either that this Sub-tenancy was known to Awate during his lifetime or further that he had consented to the same, or even that he had no objection to the same. We have seen that

none of them was paying any rent to Awate at all. He had very good reason to file a suit against defendant No. 1 and the persons in occupation through defendant No. 1. But there was a mortgage suit pending against him and that was the reason why, presumably, he had no interest in the suit premises. As a matter of fact, the suit premises were subsequently sold and they were purchased by the mortgage himself, in all these circumstances it is difficult to hold that there is any positive evidence on record showing that Awate had consented to defendant No. 1 having sublet the premises to defendants Nos. 2 and 3.

28. The last contention raised on behalf of the contesting defendants in reply to the plea of unlawful subletting is that the cause of action for eviction of defendants Nos. 2 to 8 arose before the present plaintiff became the owner in respect of the suit property on 1-10-1957. The unlawful Sub-tenancy had been executed by defendant No. 1 in favour of defendants Nos. 2 and 3 long before that date. The unlawful assignment by defendants Nos. 2 and 3 in favour of defendants Nos. 6 to 8 had been completed and possession had been parted with long before that date. Relying upon the judgment of this Court in *Shantinath S. Ghongade Vs. Rajmal Uttamchand Gugale*, it was contended that the plaintiff was not entitled to get eviction decree against any of the defendants on the ground of unlawful Sub-tenancy. This is what is stated by the learned single Judge of this Court while delivering the said judgment:--

"There is nothing in the Rent Act which would indicate that the legislature intended that in cases where a cause of action, which was never taken advantage of by the landlord, could ensure to the benefit of the purchaser and the purchaser should be able to base an action for ejectment on the basis of the alleged violation of the provisions of Section 13(1) before the premises were transferred by the original landlord to the purchaser".

Relying upon these observations it 19 contended that the cause of action for obtaining eviction decree against these defendants accrued in favour of said Awate long before 1-10-1958, then the property was purchased by the present plaintiff. If the cause of action is anterior to that date, it cannot ensure to the benefit of the present plaintiff. Hence the suit for eviction on the cause of action on the ground of unlawful Sub-tenancy is not maintainable at the instance of the present plaintiff. This is the sum and substance of the contention that is being urged on behalf of the contending respondents.

29. In answer to this plea Mr. Rana contended that there were a number of aspects of this question which have remained unexamined by this Court while delivering the said judgment, Mr. Rane contended that the entire judgment proceeds upon the assumption that as per the definition of the word "landlord" contained in the Rent Act, the successor-in-interest of the landlord is not included in the concept of landlord. Mr. Rane invited my attention to the following observations in *Shantinath's* case (*supra*)

"The question which arises is whether a cause of action which has accrued in favour of the predecessor-in-title of a landlord for the time being can be availed of by the purchaser of the suit property. The definition of the word "landlord" is not framed as an inclusive definition so as to include the successor-in-interest of a landlord. On the other hand, the definition used the words "for the time being."

Mr. Rane invited my attention to the definition of the word "landlord" contained in Section 5 Sub-section (3) of the Rent Act and pointed out that "landlord" means not only any person who is for the time being, receiving or entitled to receive rent, but "includes any person not being a tenant who from time to time derives title under the landlord". Relying upon this provision, Mr. Rane contends that if this portion of the definition of "landlord" was brought to the notice of the Court, the Court might not have taken the view which it has taken while delivering the judgment. Mr. Rane also invited my attention to certain other authorities which indicated that a contrary view would be a better view. I cannot but feel that there is quite some substance in the argument of Mr. Rane and if this petition could not be decided without resolving this question, I would certainly have referred this matter to a Division Bench. Fortunately, however, the next line of argument adopted by Mr. Rane in this behalf obviates the necessity of referring this matter to a Division Bench. Mr. Rane pointed out that assuming that there was no subsisting cause of action for the plaintiff to file a suit against defendant No. 1 who, after all, is the main person who has incurred the liability u/s 13(1)(e) of the Act, that fact would not confer any valid title of lawful Sub-tenancy upon defendants Nos. 2 and 3. In any event that fact would not make the present assignees Nos. 6 to 8 valid assignees within the contemplation of the Rent Act. The fact that the plaintiff could not avail of cause of action available against defendant No. 1 u/s 13(1)(e) of the Rent Act does not mean that vis-a-vis the plaintiff, defendants Nos. 2 to 8 were not just trespassers. The illegal Sub-tenancy or assignment held by defendants Nos. 2 and 3 or defendants Nos. 6 to 8 does not convert itself into a lawful Sub-tenancy or lawful assignment merely because the plaintiff's cause of action against the original tenant, defendant No. 1 had vanished. If Awate himself had filed a suit against defendants Nos. 2 to 8 for possession, it would be a suit on the evident basis that defendants Nos. 2 to 8 were rank trespassers so far as he was concerned. In this connection it is noteworthy that defendant No. 1 himself is not at all in possession of the land. Even defendants Nos. 2 and 3 are not in possession. Persons in possession are defendants Nos. 6 to 8 and other defendants who are tenants in respect of the structure on the suit site. The fact that the cause of action against defendant No. 1 has vanished; is, therefore, of no legal consequence so far as the plaintiff's case against defendants Nos. 2 to 8 is concerned. This objection raised on behalf of the contending respondents must, therefore, also be rejected.

30. The next contention of Mr. Rane which needs to be examined is contention (a) mentioned above. He contended that all the defendants had committed default in payment of rent which was for a period exceeding six months, the rent was payable by month and hence the provisions of Section 12(3)(a) of the Rent

Act came into play. A decree for possession on the ground of non-payment of rent u/s 12(3)(a) against all the defendants must follow. In this connection he invited my attention to the fact that the requisite notice u/s 12(2) of the Rent Act was given by the plaintiff to all the defendants.

31. I must mention here that if Mr. Rane is raising this contention as an alternative contention independent of the contention regarding unlawful Sub-tenancy, it may be possible to hold that the contention is not correct. It appears that the view of the lower Appellate Court in this connection is based upon irrefutable logic. When it is contended that this point is independent of the first point, what is postulated is that defendants Nos. 2 to 8 were lawful Sub-tenants of defendant No. 1. If that was so, under the provisions of Section 14 of the Rent Act upon the determination of the tenancy of defendant No. 1, defendants Nos. 2 to 8 or such of them as were in possession of the suit premises would become direct tenants of the plaintiffs. The question is what is the point of time from which they would become such direct tenants. If they became direct tenants after the notice of demand made by the plaintiff dated 30-11-1961, then obviously a further notice u/s 12(2) of the Rent Act would be necessary before a suit for eviction could be filed against them on the ground of non-payment of rent. Admittedly no such notice has been given by the plaintiff to any of the defendants after 30-11-1961. Hence, in case the relevant defendants had become direct tenants after 30-11-1961 the plaintiff can be said to be having no cause of action to file a "suit against them u/s 12(3)(a) of the Rent Act.

32. On the other hand, if this defendant No. 2 onwards had become direct tenant in respect of the suit premises of the plaintiff before 30-11-1961, evidently the notice dated 30-11-1961, would constitute the requisite notice contemplated by Section 12(2) of the Rent Act. In that event the present suit against them for eviction on the ground of nonpayment of rent would be perfectly competent u/s 12(3)(a) of the Rent Act. The point of time as to when defendant No. 2 onwards became direct tenants of the plaintiff is, therefore, of crucial importance, so far as this aspect of the matter is concerned.

33. Unfortunately for Mr. Rane this question is no longer *res integra*. It has been held by the Supreme Court in *Hiralal Vallabhram Vs. Kastorbhai Lalbhai and Others*, that merely upon the termination of the contractual tenancy of tenant, his tenancy cannot be said to have been determined within the contemplation of Section 14 of the Rent Act. This is what the Supreme Court has observed in this connection:

"The interest of a tenant who for purposes of Section 14 is a contractual tenant comes to an end completely only when he is not only no longer a contractual tenant but also when he has lost the right to remain in possession which Section 12 has given to him and is no longer even a statutory tenant. In other words, Section 14 would come into play in favour of the Sub-tenant only after the tenancy of the contractual tenants has been determined by notice and the contractual tenant has been ordered to be ejected u/s 28 on any of the grounds

in Section 12 or Section 13. Till that event happens or till he gives up the tenancy himself the interest of a tenant who may be contractual tenant, for purposes of Section 14, cannot be said to have determined i. e., come to an end completely in order to give rise to a tenancy between the pre-existing Sub-tenant and the landlord."

But Mr. Rane contended that defendant No. 1 was not in possession of the suit premises at all and hence the above mentioned Supreme Court ruling would not apply. I am afraid this would be over-simplification of the question. The fact that defendant No. 1 is not in possession, in the sense that the possession is that of his Sub-tenant, does not mean that his tenancy stands determined within the contemplation of the dictum of law laid down by the Supreme Court. In this view of things it follows that until the decree was passed by the Civil Court in the present suit, no question arose for tenancy of defendant No. 1, being effectively determined within the contemplation of the Rent Act, it is only on determination thereof that the Sub-tenants would become direct tenants and it is only after that the landlord can give them a notice u/s 12(2) of the Rent Act calling upon them to pay all the arrears of rent. No cause of action would accrue in favour of the plaintiff before such an eventuality. Suit by the plaintiff against defendant No. 2 onwards on the ground of arrears of rent is, therefore, misconceived.

34. This brings me to Mr. Rane's second contention. He contends that defendant No. 1 has not filed any appeal against the decree passed against him. Defendants Nos, 2 to 22 claim through him. Hence they had no locus to file the appeals which were entertained and allowed by the lower Court.

34A. To my mind this argument is misconceived. Defendants No. 6 onwards have not come on the suit premises subsequent to the filing of the suit. Whatever right they had vis-a-vis the suit premises was a right anterior to the present lis. They contend that they were in lawful possession. If so they are entitled to protect their possession. Defendants Nos, 2 and 3 are not in possession at all. No question therefore arises about they wanting to protect their possession or interest by filing an appeal. But their failure to file an appeal could not result in such a position that the persons in possession are required to be visited with the penalty on that account. This contention of Mr. Rane, therefore, must fail.

35. I have dealt above with the arguments of Mr. Ghaisas. They were part of his first line of reasoning. His second line of reasoning was that the lease in question was not governed by the Rent Act at all. He contended that it was governed by the T. P. Act. He particularly relied upon the provisions in the lease-deed, Ex. 183, providing that :

(a) the rent agreed was Rs. 1500/-per annum,

(b) there was a default clause in the event of tenant having committed default in the payment of rent for three years. Having regard to these provisions Mr, Ghaisas contends that it was necessary for the Court to comply with the provisions of Section 114 of the T. P. Act and to give an opportunity to the tenant

to get relief against forfeiture under the said Section 114.

36. In the first place such a contention is no answer to the plea relating to unlawful subletting. A relief against forfeiture on the ground of non-payment of rent may or may not be available to him when the tenant pays rent in the Court. But his act of unlawful sub tenancy cannot be undone by payment of rent. But apart from this position. it is to be noted that there is manifest conflict between the provisions of Section 12(3)(a) of the Rent Act and Section 114 of the Transfer of Property Act. It can hardly be doubted that the rent was payable by month. Mr. Ghaisas made a faint attempt to contend that the rent was not payable by month, that it was payable by year but that it was only a facility afforded to the tenant to pay by installment every month. In the first instant, I may mention that Mr, Paranjpe, who appeared for these respondents at one stage, specifically contended before me that the rent was payable by month. But apart from such concession, the plain reading of lease-deed, Ex. 183, puts it beyond any pale of doubt that under the agreement between the parties rent was payable by month and not per year. Condition No. 2 in said lease-deed is quite unequivocal in this behalf. It states as follows :--

"The rent of the suit premises Rupees 1500/- per year will be paid at the rate of Rs. 125/- per month and will be paid month by month, and we will take receipt for the same."

Even the learned trial Judge has recorded an unequivocal finding in this behalf that the rent was payable per month. There is no dispute before me that the rent was in fact payable by month and that rent fell in arrears exceeding six months. The provision of Section 12(3)(a), therefore, directly applies and the said Section 12(a) makes it clear that in the event when the rent is in arrears for a period exceeding six months, a decree for eviction shall be passed against the tenant. . There can hardly be two opinions on the question that between the Transfer of Property Act and the Rent Act, the Rent Act is the specific legislation and when there is a conflict between general statute and specific statute, the specific statute must prevail. It is, therefore, inarguable that the provisions of Section 12(3)(a) have an overriding effect on the provisions of Section 114 of the Transfer of Property Act. The contention of Mr. Ghaisas in this connection must, therefore, also fail.

37. The only question then that remains is the one relating to the liability of defendant No. 9 onwards for a decree for eviction in favour of the plaintiff. The trial Court had taken the view that a decree passed against defendant No. 1 was automatically executable against all the defendants. The view no doubt is an extreme view not justified by the provisions of the Rent Act. The view taken by the learned Assistant Judge is that all the remaining defendants, i. e., defendants Nos. 9 to 22, who are tenants or owners in respect of the structures only, must be deemed to" be the Sub-tenants in respect of the land. He has held that upon determination of the tenancy of defendant No. 1 they have become the direct tenants of the plaintiff-landlord and since no notice u/s 12(2) is received by them

from the plaintiff-landlord demanding all the arrears of rent no decree for eviction against them can be passed directing them to remove the structures and to hand over vacant and peaceful possession of the land to the plaintiff.

37A. I may mention here that no arguments were advanced on behalf of any of the defendants to support the said view and reasoning of the learned Judge. All the same, since I am setting aside the judgment of the Court below, it is necessary for me to state the reasons why I cannot accept his reasoning in this behalf.

37B. To my mind the conclusion arrived at by the learned Judge cannot be sustained. No doubt the learned Judge has relied upon the judgment of the learned single Judge of this Court (Bhasme, J.) dated 10th March, 1970, given in Spl. C. A. No. 1191 of 1967 in support of his reasoning. But as against the reasoning adopted by Bhasme, J., in his judgment I have before me a judgment of another learned single Judge of this Court (Vaidya, J.) in Vasant Ramchandra Sharma Vs. Narayanibai Mulchand Agrawal and Others, , in which it has been held that tenants of the structure belonging to a tenant of the land do not automatically become Sub-tenants of the owner of the land. While delivering this judgment Vaidya, J., has in fact relied upon a judgment of a Division Bench of this Court consisting of Patel and K. K. Desai, JJ. D/- 21st November, 1962, in C. R. A. No. 1511 of 1960.

37C. I may mention here that the above mentioned judgment of Bhasme, J., refers to the said judgment of the Division Bench. I have found it rather difficult to see as to how the said judgment of the Bench could have been distinguished by the learned single Judge, and as to how he could have held that any tenant of the super-structure belonging to the tenant of the land automatically becomes the Sub-tenant of the owner of the land, in spite of the said Division Bench judgment. The Division Bench judgment has clearly held that the doctrine of dual ownership has been recognised in India and that in every case where the owner of the land leases the same to another person who constructs structure upon the land and lets it out to his own tenants, the tenants of the structure do not automatically become the Sub-tenants of the owner of the land, but must be deemed to have been given licence in respect of the land. As observed by Vaidya, J. in the said Vasant Ramchandra Sharma Vs. Narayanibai Mulchand Agrawal and Others, , the said Division Bench ruling cannot but be binding upon a single Judge of this Court.

38. But apart from this position regarding judicial discipline. I must state with great respect to the learned Judge that on principles I am unable to agree with the reasoning of Bhasme, J. finding place in his said judgment.

38A. In normal circumstances I would have referred this question to a Division Bench, but this litigation is pending hearing in this court for a very long time. Parties are numerous and the financial position at least of the present petitioner has become extremely precarious. The original plaintiff was a lunatic. The suit

had to be filed by the Nazir of the Court. It has undergone a number of vicissitudes. Even in this Court after the writ petition was admitted and Rule was issued, the petition went before a number of Courts for final hearing; but for some reason or the other it remained undecided. I am told that even after the hearing went on for quite some time the learned Judge hearing it had to adjourn the same with a direction that it should not be treated as a part heard matter. In this view of things and in view of the fact that my view on this aspect of the law is fortified by a judgment of the Division Bench of this Court, I feel justified in examining the correctness of the view of Bhasme, J.

39. At first blush the question appears to be quite simple; but it has got to be answered in the context of two legal positions:

(i) that the doctrine of dual ownership is recognised in India meaning thereby that there is no presumption that the owner of the land is also the owner of the structure standing on the land. "A" is the owner of the land. He may let out the same to "B". "B" may construct a structure on the same and let out the same to "C". "A" the owner of the land does not automatically become the owner of the structure constructed by "B"; and that there are rent restriction laws in India, most of which prohibit tenant subletting the premises let out to him. In any event this is the position which obtains in the cities of Maharashtra under the Bombay Rent Act.

40. The answer to the question as to whether "C" who is the tenant of the structure, automatically becomes tenant of "A", the owner of the land, has got to be decided in the context of these two legal positions.

The question can be decided :

- (a) in the light of authorities, and
- (b) by discussion of first principles.

40A. Firstly I will deal with the authorities having bearing upon this question. The first authority is the Judgment of the Division Bench decided by Patel and K. K. Desai, JJ., in *S. R. Shetty v. P. N. Kulabawala*, C. R. A. No. 1511 of 1960, decided on 21-11-1962, as mentioned above. The facts of that case may be briefly stated as follows :--

40B. One Kolabawala was the owner of an open plot of land which he let out to one Gangawal. Gangawal constructed structures on the same, which structures were let out by him to S. R. Shetty, proprietor of Popular Covering Works. Kolabawala filed a suit against Gangawal for recovery of possession of the plot of land after removal of the structures and a decree for recovery of possession was passed in that suit against the said Gangawal. When Kolabawala tried to execute that decree, S. R. Shetty, the tenant of the structure, obstructed. the contention of the obstructionist was that though he was a tenant in respect of the superstructure, he was the subtenant in respect of the land beneath the superstructure. He further contended that upon the eviction decree having been

passed against Gangawal, he, S. R. Shetty, had become direct tenant of Kolabawala by virtue of the provisions of Section 14 of the Rent Act. This contention was negated by the trial Court and the decree of the trial Court was confirmed by the Division Bench. In support of the said contention of the obstructionist the ruling of the Supreme Court in *Mrs. Dossibai N.B. Jeejeebhoy Vs. Khemchand Gorumal and Others*, was relied upon. While dealing with this argument and contention, the Division Bench of this Court held that as per the ruling of the Supreme Court what is held is that the Rent Act applies as between a landlord and a tenant where the land is let for the purposes of a structure, since, ultimately, that structure is intended to be used either for residence, business or trade etc. But this Court held that merely because the Rent Act applies to a lease in respect of an open plot of land it did not mean that the tenant of "the structure ipso facto became the Sub-tenant in respect of the same. This is what the Division Bench observed in that behalf :

"It does not, however, decide that it after a structure is built and a tenant has been let into it by the original tenant, who built the structure, the tenant of the structure becomes, only for this reason, a Sub-tenant of a portion of the land. It is almost impossible to accept the suggestion and for obvious reasons. In the present case, the structure consists only of a ground floor. However, there may be cases where the structure may consist of several floors, and if there are several tenants, one sitting on top of another, it will be impossible by any amount of ingenuity for any Court to say of what portion of the land a particular tenant is a Sub-tenant. In our view, therefore, the learned trial Judge was justified in the conclusion to which he reached":

The practical difficulty quite unnecessarily invited by holding that the tenant of the structure became automatically Sub-tenant of the land beneath the structure is, therefore, fully highlighted by the said judgment of the Division Bench.

41. The next authority is the unreported judgment of another learned single Judge of this Court. That was the Judgment of Bal, J., given while deciding Spl. C. A. No. 1 of 1966 of 2nd March, 1966. The facts of the case were as follows .-

One Rambhai was the owner of a plot of land. He let out the said plot of land to one Kavarana. Kavarana constructed structures on the said plot and those structures were let out to various persons for business. Rambhai obtained a decree against Kavarana for the purpose of open plot of land but when he tried to execute the decree, the seven petitioners who were the tenants in respect of the structures obstructed. They contended inter alia that even though they were tenants only in respect of the structure, they must be deemed to be the Sub-tenants in respect of the land and they contended that they had become direct tenants of Rambhai, the decree-holder, upon final determination of the tenancy of Kavarana. Their contention was negated by the Executing Court and hence each of them filed suit against Rambhai for a declaration, inter alia, that they had become the tenants of Rambhai as per the provisions of Section 14 of the Rent Act and that they were entitled to claim protection under the provisions of the

said Act. All their contentions were negated by the Courts below. In the Writ Petition filed in this Court, the above contentions were reiterated and in support of the contentions reliance was placed upon two Judgments of this Court: Ram Bhagwandas Vs. Municipal Corporation of the City of Bombay, and Vinayak Gopal Limaye Vs. Laxman Kashinath Athavale, In connection with the first of the above cases reliance was placed upon the following observations of Chagla, C. J.

"We find it rather difficult to conceive how a structure can be transferred divorced from the land on which it stands....."

"Now a tenant or a lessee has the right to enjoy property and what Tyaballi leased to the appellant was not merely the right to enjoy the structures but also the right to enjoy the land on which the structures stood."

"The structures would not have been very stable if there was no land underneath on which they could have stood and it is clearly a fantastic proposition to put forward that a tenant can have the right to enjoy a structure as it were in vacuo without necessarily having the right to enjoy the land on which the structure stands."

So far as the second authority was concerned, the following observations of the Division Bench were relied upon : --

"The right of residence is exercised both in regard to the building and with regard to the open plot on which the building stands. In a sense, the open plot and the building constructed on it are so inextricably joined together, that it would be idle to contend that it is only the building which is used as residence and not the open plot. The premises which are let for residence to the actual occupants would, therefore, include not only the building, but also the land on which the building stands." The examination of the said two authorities would readily show that those observations were made by this Court in a totally different context. As a matter of fact, Bal, J. has observed in his own judgment as follows:--

"It is true that the question with which we are concerned had not arisen in any of these cases." In spite of this observation, however, the learned Judge seems to have been persuaded to take the view that the above two judgments indicated that if the structure was let out the land beneath the structure must be deemed to have been "let" out and not merely "permitted to be used". This is what the learned Judge observed:

"In the absence of evidence to the contrary the reasonable conclusion would be that the transaction was of the same nature in respect of both." In other words, the learned Judge was of the view that if the tenant of the land let out the structure then the presumption must be that the land below the structure must be deemed to have been let out by him. This inference was sought to be reinforced by him with particular reference to the facts before him. In this connection he observed as follows:--

"In the present case there is a further circumstance that the evidence of the

petitioners has remained unchallenged."

In this view of the matter, Bal, J. was of the view that the tenant of the structures must have been the Sub-tenant in respect of the land beneath the structures. Presumably in the light of the facts peculiar to that case, it was not necessary for him to consider whether such a Sub-tenant was hit by the provisions of Section 15 of the Rent Act. He held that they were the lawful subtenants in respect of the land and that, hence, they had become the direct tenants of Rambhai u/s 14 of the Rent Act.

42. The next judgment is the one delivered by Bhaime, J. dated 10th Mar. 1970 in Special C. A. No. 1191 of 1967 *Dina Mody v. Malshi Bharmal* upon which reliance is placed by the Court below. The facts of that case were as follows:

The two plaintiffs were the owners in respect of an open plot of land which they had leased on 29-11-1954 to one Khambata for a period of 20 years. Khambata put up superstructure on the land and let out various portions of the same to different tenants. The plaintiffs terminated the tenancy of Khambata and filed an eviction suit against him on various grounds. In that suit, which was filed in the year 1960, a consent decree was passed in the year 1962. Under the terms of the consent decree Khambata relinquished his rights upon the superstructure erected by him. The ownership of the superstructure vested in the plaintiffs as decree-holders. When the decree-holders started execution proceedings for taking possession of the suit land after removal of the superstructure, the various tenants of the superstructures obstructed. In the obstructionist proceedings the obstructionist contended that they were lawful Sub-tenants in respect of the land, upon which the structures were standing and that, upon the final determination of the tenancy of Khambata, they had become the direct tenants of the decree-holders. They claimed that their Sub-tenancy were protected by virtue of the amending Ordinance, which amended Section 15 of the Rent Act with effect from 21-5-1959. In this manner they claimed protection of their right to continue in possession of the structure itself.

The learned Judge of the Executing Court came to the conclusion that the opponents who were tenants of the structure were Sub-tenants in respect of the land beneath the structure and that they had become direct tenants of the decree-holder, in view of the decree passed against Khambata.

In appeal the Appellate Bench held that in the absence of evidence to the contrary, it must be presumed that Khambata had let out not only the structure on the land to the tenants but even the land beneath the structure to them. In the eye of law, therefore, the opponents had become direct tenants of the plaintiffs decree-holders. The Appellate Bench also took the view that as per the consent decree obtained by the decree-holders against Khambata the decree-holders had become the owners of the structure. The Appellate Bench, therefore, held that the decree-holders were the landlords even of the structures of which the opponents were the tenants and that, hence the opponents could not be

made to give up possession of the structures. The appeal filed by the decree-holders was, therefore, dismissed by the Appellate Bench.

In the Spl. C. A. Bhasme, J. disagreed with the view of the Appellate Bench that merely because the decree-holders had become owners of the structures by operation of law, the tenants of the structures automatically became the tenants of the decree-holders.

This necessitated the consideration of the question as to whether the tenants of the structures were in the eye of law, Sub-tenants in respect of the land below the structure. The effect of the above mentioned ruling of the Supreme Court in Mrs. Dossibai N.B. Jeejeebhoy Vs. Khemchand Gorumal and Others, was also considered by Bhasme, J. The above mentioned judgment of Bal, J. was also considered by him. The learned Judge considered the effect of the definition of the word "lease" in Section 105 of the T. P. Act and also of the words "immovable property" in Section 3 of the same. Considering the total effect of all these provisions, Bhasme, J. observed that:

"A building apart from the land on which it stands can never be considered to be immovable property."

According to Bhasme, J. when building was let out, immovable property was let out and from the very concept of "immovable property" illuminated by the definition of the said words in the Transfer of Property Act, it follows that building could never be let out as immovable property unless the letting out was accompanied by land below the building. It was argued before him that various tenants of the building and of the various superstructures could be considered to be the licensees in respect of the land. This contention was negated by the learned Judge by observing as follows:--

"It is not possible in the absence of any evidence to break up the transaction in the manner in which Mr. Andhyarujina suggests that it should be done. It is not possible to hold that the several occupants were licensees in respect of the land and tenants in respect of the structure. In fact it is possible to hold in the reverse order. The various occupants can be the Sub-tenants in respect of the land with the right to occupy the structure. In other words, in law they can be licensees of the structure and Sub-tenants in respect of the open land. In my view, the lower Courts have reached a correct conclusion although on different grounds."

Taking this view, Bhasme, J. held that the tenants of the structures had become direct tenants of the decree-holders owners of the land, and were entitled to protection of the Rent Act. The decision to that effect given by the lower Courts were, therefore, confirmed by him.

43. The last judgment relevant on this point is the judgment of Vaidya, J. in Vasant Ramchandra Sharma Vs. Narayanibai Mulchand Agrawal and Others, It is unnecessary to set out the facts of the case because they are similar as those obtaining in the earlier three cases mentioned above. Owner of the plot of land

let out the same to a tenant who constructed structures on the same which structures were let out to various other persons. The owner of the plot filed suit against the tenant for eviction and in that suit the tenants of the structures were impleaded. The tenants of the structure contended that they were the Sub-tenants of the land, that the Sub-tenancy was permitted by the owner of the land and that upon the termination of the tenancy of the original tenant, all of them had become the direct tenants of the landowner u/s 14 of the Rent Act.

44. This contention of the tenants of the structure was negated by Vaidya, J. No doubt the learned Judge relied mainly upon the judgment of the Division Bench mentioned above. He held that he was bound by the judgment. Both the above mentioned judgments of Bal, J. and Bhasme, J. were brought to his notice; but he felt that it was unnecessary for him to consider the correctness of the said judgments in view of the fact that he was bound by the view taken by the Division Bench. However, the learned Judge considered the effect of the provisions of Section 60 (a) of the Easements Act, though in somewhat different context. He held that when the tenant of the land lets out the structure to his own tenant he grants licence to his own tenant for user of the land and since the licence was coupled with the transfer, the licence was irrevocable under the provisions of Section 60 (a) of the Easements Act. In other words, he held that the tenants of the structures held an irrevocable licence in connection with the land from the owner of the structure. For the reasons with which I am not directly concerned in this judgment, the learned Judge also held that even granting of such licence by the tenant of the land to his own tenants of the structure resulted in the tenant incurring a liability for eviction u/s 13(1)(e) of the Rent Act.

45. We have to consider the aggregate effect of all the above mentioned authorities for examining the legal position in this behalf.

Before weighing and examining the above authorities, it will be convenient at this stage to examine the first principles to which the question, in the ultimate analysis, relates. It is a matter of first principles that in India the doctrine of dual ownership is recognised. This doctrine means that the owner of the land is not necessarily presumed to be the owner of the structure standing upon it. In this respect Indian Law is at variance with English Law. In England the doctrine of superficies solo edit is recognised, meaning thereby that there is a presumption that the owner of the land is the owner of the structure on the land as well. This question becomes relevant in the context of the fact that in India the owner of the structure is frequently a lessee in respect of the land and the owner of the land has no interest whatsoever in the structure at all. The owner of the structure lets out the structure to his own tenants. The question then arises as to what is the right of the tenant of the structure vis-a-vis the land.

It will be noticed that this question is not peculiar to India alone. Even in England similar question arose very often. This is so because even though there is a presumption under the English common law that the owner of the structure is

the owner of the land as well, it was only a rebuttable presumption. Quite often the lessee of the land constructed a structure which under the agreement with the lessor was not to belong to him (lessor). Quite frequently provisions were and are made in the relevant lease-deed that after the expiry of the period of lease of the land, the lessee, who was the owner of the structure, would remove the structure and restore vacant possession of the land to the lessor. Question then arose in England as well as in India: what was the right of the tenant of the structure vis-a-vis the land upon which the structure stands?

Evidently unless the tenants of the structure had some kind of right vis-a-vis the land, they could not enjoy their tenancy in the structure at all. Quite frequently land admeasures say 100 sq. meters and the structure is constructed only upon say 75 sq. metres, but the remaining 25 sq. metres of vacant land is necessary for the tenants of the structure at least for having access to the structure if not for any other purpose. Moreover when the structure is enjoyed by its tenants, evidently the land below it is also enjoyed by him. This is one of the illustrations as to how a structure cannot be enjoyed in the absence of some kind of right vis-a-vis the land. There are many other easily conceivable reasons for which it is just impossible to enjoy the structure in the absence of some kind of right vis-a-vis the land.

Question is, must that right be of an implied tenancy or could it be an implied licence? Answer to this question could be legitimately found in the expedient hit upon by the English law as well as by the law in India. That expedient is to be found in Section 60 of the Easements Act and in the common law principle that finds place in the corpus juris of England. The English common law principle is to be found in the leading authority on this point. *Wood v. Lead bitter*, (1645) 13 M & W 838. In the said leading case the following passage from *Thomas v. Sorrel*, (1694) Vau rep 330, has been quoted with approval and has been accepted as correct exposition of law. It runs as follows:--

"A dispensation or licence property passed no interests, nor alters, or transfers property in anything, but only makes an action lawful which without it would be unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house are only actions which without the licence had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use are licences as to the act of hunting and cutting the tree but as to the carrying away of the deer killed and trees cut down are grants."

Licence coupled with grant is a class of licence, thus conceived of by the English Courts and licences of that class are held to be irrevocable. A tenant of the structure would become a licensee in respect of the land on which a structure stands and since the licence is coupled with the grant, viz. tenancy, the licence would be irrevocable so long as the grant is subsisting. This is the sum and substance of English Law which is devised by the common law courts with a view to provide for the situation mentioned above.

46. The Indian Law in this behalf is located in Section 60 (a) of the Indian Easements Act. The said Section 60 (a) provides as follows:

"60 Licence may be revoked by the grantor, unless -

(a) it is coupled with a transfer of property and such a transfer is in force:

(b) ,"

We are here not concerned with Clause (b) of the said Section 60. The principle involved in Section 60 (a) in the abstract form may be explained in concrete terms with reference to the facts of our present case.

47. The plaintiff is the owner of the land, the land is let out to defendants Nos. 1 to 8, defendants Nos. 1 to 8 constructed structures upon the same and let out those structures to defendants Nos. 9 to 22. The lease by defendants Nos. 1 to 8 in respect of the structure is transfer of property within the meaning of the said Section 60 (a) of the Easements Act. From the very nature of things defendants Nos. 9 to 22 could not; enjoy the structure in the absence of some kind of right pertaining to the land below the structure. We have seen that under the lease given by Awate to defendant No. 1, there was no right given to defendant No. 1 to sub-let the land, to anyone. But the structure could not be enjoyed by anyone unless some right was had by them vis-a-vis the land Awate has never prohibited licence to be given to anyone in respect of the land. It is, therefore, reasonable nay imperative, to presume that tenants of the structure were given licence by defendants Nos. 1 to 8 in respect of the land below the structure. Evidently the licence is coupled with transfer of the property, viz. the structure, because lease of the structure was transfer of property. The licence is, therefore, coupled with transfer of property within the contemplation of Section 60 (a) of the Easements Act. The licence in respect of the land thus became irrevocable meaning thereby that defendants Nos. 1 to 8 could not revoke the licence given to the tenants of the structure, defendants Nos. 9 to 22, so long as their tenancy in respect of the structure was in force, that is to say, was subsisting.

So long as the structures were in existence the tenants of the structure would have complete protection under the Rent Act vis-a-vis the structures and would have complete protection regarding the use of the land as licensees by virtue of Section 60 of the Easements Act. If the structures were demolished for some reason or the other, it may be that the rights of the tenants of the structure would extinguish.

This would mean that once the transfer in their favour, that is to say, the lease in their favour ceased to be in force, the licence would vanish.

48. Viewed in the context of this very rational arrangement finding place in the body of our general law, it will be perceived that it is not only unnecessary to invoke the principle of implied subtenancy in such cases, it will be found to be dangerous invention.

This is so because under the general law sub-tenancy cannot be created without the implied or express consent of the head lessor. In the instant case itself we have seen that there was an implied embargo upon defendant No. 1 from subletting the land which was the subject-matter of his lease. Under the lease he was allowed to construct upon the land and to let out the structure. By reason of the implication subletting of the land below the structure was prohibited. This apart, it is common knowledge that frequently the lessor leaves the land with a permission to construct upon the same but with specific prohibition against subletting the land. Could it mean in such a case that when the tenant of the land constructed a multistoreyed building on the same, he would not be entitled to let out or sell the portion of the multistoreyed building to various tenants? If the tenants of the structure were deemed to be the sub-tenants in respect of the land such position would be clearly illegal and recognition of dual ownership in our country would, be meaningless and futile. If on the other hand it is recognised that the tenants of the structure were only the licensees in respect of the land below the structure, they would get the necessary protection u/s 60 of the Easements Act and the entire legal question would be rationally solved. It, therefore, follows that invoking the principle of sub-tenancy is deleterious and harmful; whereas sticking to the principle of irrevocable licence furnishes a clue for solution, to the entire problem.

49. On first principles, therefore, the preferable view would be that the tenants of the structure enjoy irrevocable licence in respect of the land, below the structure; but their right vis-a-vis the land is co-extensive only with their right vis-a-vis the structure. If, for any reason their, right pertaining to the structure vanishes, their right pertaining to the land will cease to exist.

50. A note needs to be added to the above discussion. The grant of irrevocability of the licence is a matter exclusively between the tenant of the land on the one hand? and the tenant of the structure on the other. It is the tenant of the land, who is the licensor and it is the tenant of the structure who enjoys the irrevocability of the licence under the general law, it is well settled, that there is neither a privity of contract nor a privity of estate between the owner of the land on the one hand and the tenant of the structure on the other. This is so for two reasons. Even under the general law, there is neither a privity of contract nor a privity of estate between the head landlord on the one hand and the sub-tenant on the other. This is so even in respect of cases when the premises which are the subject matter of the lease by the head landlord to his tenant and by the tenant to his sub-tenant is one and the same. But in the case such as the present one, the absence of privity is all the more highlighted. The premises let out by the owner of the land to the tenant of the land is something different from the premises let out by the tenant of the land to the tenant of the structure. This follows by virtue of recognition of doctrine of dual ownership in India.

51. A few words by way of checking up this view in the light of the recognised principle of dual ownership and the provisions and the scheme of the Bombay

Rent Act will not be out of place here. As stated above, under the general law there exists a jural relationship between the owner of land and his tenant. The relationship results from privity of contract but it results into privity of estate. There exists a similar jural relationship between a tenant of the land and his own sub-tenant. But there exists no jural relationship whatsoever, neither privity of contract nor privity of estate between the owner of the land on the one hand and the sub-tenant of his tenant on the other. This is the position under the general law in respect of the same premises. It will be all the more so in the case of premises which are distinct when owner of the land lets out to a tenant and the tenant constructs a structure upon the same. The land and the structures are two distinct premises and distinct ownership vested in two distinct persons. If it was to be held that under the general law the tenant of the structure was sub-tenant of the land, it would be irrational anomaly transplanted upon our basic juridical concept.

52. The Rent Act to certain extent thus makes an inroad upon the established juridical concept mentioned above. There is neither privity of contract nor privity of estate between the head landlord on the one hand and the sub-tenant on the other. Section 14 of the Rent Act carves an exception to this rule on the happening of certain events. Upon complete determination of the tenancy of the main tenant the sub-tenant becomes a direct tenant of the landlord. But it is to be noted that even this exception does not come into play at all until the tenancy has come to an end completely, that is to say, until a decree for possession against him has been passed by the Courts. It is to be noted that till that time there exists no juridical relationship whatsoever between the landlord on the one hand and the sub-tenant on the other, even though the subject-matter of the tenancy are the self-same premises. u/s 14 there is no mention at all that a tenant of an entirely different premises of the structure, is to become sub-tenant in respect of the land merely because upon the land the structure stands. Under the general law the tenant of the structure would no doubt be a licensee only in respect of the land. There is nothing in the Rent Act which has changed this position.

53. After having considered the question in the light of first principles, let me turn to the examination of the authorities mentioned above. The earliest is the judgment delivered by the Division Bench. The judgment has quite succinctly summarised and laid down the legal position. Apart from the fact that it is a Division Bench judgment and, hence, it is fully binding on me, with great respect, I am of the opinion that the principles laid down by the authority is one with which I am in complete agreement. Unfortunately it has not been followed by the two subsequent decisions of the two learned single Judges. I will, therefore, briefly examine the two decisions with a view to point out that the effect of the provisions of Section 60 (a) of the Easements Act was not brought to the notice of the learned Judges when the question was argued before the Court, which is the reason why the two learned Judges have struck a path at variance with the Division Bench judgment.

The decision of Bal, J. is first in point of time. To my mind he has held that the presumption should be that the tenant of the structure was given the tenancy right also in respect of the land below the structure. I find it difficult to agree with this reasoning. It is now well settled that even an open place of land is "premises" within the meaning of Section 6 of the Bombay Rent Act. If there is a presumption that the tenant of the structure is made sub-tenant in respect of the land eventually it may mean that the tenant of the land is unlawfully subletting the premises let out to him, viz. the land, and the result would be that he would incur liability for eviction u/s 13(1)(e) of the Bombay Rent Act. The presumption should always be that the party intended to act according to law, not in contravention of it. The presumption should be that if a thing can be achieved by two methods -- one a legal and another an illegal -- the parties will be presumed to have intended to follow the legal method. In the absence of positive indication to show that the intention of the tenant was to sublet the land to the tenant of the structure the presumption should be that he intended to give only a licence to the latter and such an intended licence will be irrevocable at his instance by virtue of the operation of Section 60 (a) of the Easements Act.

54. For the purpose of taking a view that there is a presumption of subtenancy in respect of the land, Bal, J. has been influenced by the two decisions of this Court, viz. (i) Ram Bhagwandas Vs. Municipal Corporation of the City of Bombay, , and (ii) Vinayak Gopal Limaye Vs. Laxman Kashinath Athavale, . But as observed by himself the question in those cases and the observations made in those cases which have been relied upon by Bal, J. in his judgment were made in a totally different context. The question there was as to whether the land upon which a structure was constructed which structure was to be used for the purpose of residence could be considered to be "Premises" within the meaning of Section 6 of the Bombay Rent Act. It was in that context that Chagla, C. J. observed that a structure could not be enjoyed without the land and if the purpose of the structure was residence the purpose of lease of the land must also be considered to be residence. The question as regards the nature of the rights of the tenant of the structure was not even remotely in the contemplation of this Court in both the said cases. To arrive at a presumption of sub-tenancy in respect of the land in favour of the tenant of the structure on the basis of the said two authorities cannot, with great respect, be said to be justified.

55. However, it must be said that in the light of the evidence before the Court in the case before Bal, J., legitimate inference could have been drawn that the tenants of the structure were given rights of sub-tenancy in respect of the land below the structure. I have already extracted the relevant portion in the said judgment from which it is clear that there was evidence led in that case by the tenants of the structure to prove that they were given rights of subtenancy in respect of the land below the structure and that evidence had gone unchallenged. For the decision given in that case, therefore, the presumption of sub-tenancy in favour of the tenant of the structure was not necessary at all. In that sense it can be said that the observation of Bal, J. to the effect that there

was a presumption of sub-tenancy in respect of the land in favour of the tenant of the structure was an obiter dictum.

56. Next in point of time is the judgment of Bhasme, J. which is relied upon by the lower Court. On a careful examination of the judgment it will be seen that the effect and implication of Section 60 (a) of the Easements Act was not brought to the notice of the Court at all in that case. Moreover, it appears that, according to the learned Judge, the tenants of the structure could not enjoy even the structure if there was a presumption of sub-tenancy in respect of the land in their favour. The learned Judge proceeded to hold that the structure would cease to be immovable property if it did not rest upon the land. It, therefore, appears that the same fear which weighed upon Bal, J. viz. that a structure cannot stand in the air, weighed upon Bhasme, J. The fact is that the structure need not stand in the air at all. It rests very much on the land; but in view of the provisions of Section 60 (a) of the Easements Act it is not at all necessary to assume that the tenant of the structure, which are distinct premises, is a sub-tenant of the land below the structure.

It is further observed in the said judgment as follows:--

"It is not possible in the absence of any evidence to break up the transaction in the manner in which Mr. Andhyarujina suggests that it should be done. It is not possible to hold that the several occupants were licensees in respect of the land and tenants in respect of the structure. In fact it is possible to hold in the reverse order. The various occupants can be the sub-tenants in respect of the land with the right to occupy the structure. In other words, in law they can be licensees of the structure and subtenants in respect of the open land. In my view, the lower Courts have reached a correct conclusion although on different grounds,"

With great respect I cannot agree. It is every day occurrence that a licence is presumed in favour of person. A man walks into a shop for making purchases, a person goes to a theatre for witnessing a show, a man walks into a hotel for refreshment. A licence is readily assumed in favour of all these persons. An entry which is initially lawful, gives rise to such licence which is presumed in the eye of law. It is not at all necessary to infer a tenancy in such case. The tenancy is the result of certain intendment between the parties. The licence may result independently of any such intendment. In the instant case the tenants of the structure lawfully enjoyed the structure. There can be readily assumed a lawful licence in their favour in connection with the land below the structure.

Bhasme, J. felt that no licence could be inferred in favour of so many tenants of the structure. As a matter of fact it is exactly the other way round. As pointed out by the Division Bench in the first judgment referred to above, it would be an extremely complex question of sub-tenancy, if a multi-storeyed building is constructed on a piece of land; a tenant of the first floor will be deemed to be a sub-tenant in respect of the land below the building. If there are two tenants on the first floor both of them will be having sub-tenancies in respect of the land.

The tenants on the second floor will be deemed to be the sub-tenants not only in respect of the land but also of the first floor. Now, if the upper floors are sold by the owner of the structure on ownership basis, this will mean that the owner of the second floor is the tenant of the owner of the first floor, when the owner of the first floor never intended to create any such tenancy in his favour. The situation brought about by concept of sub-tenancy will thus lead to anomalous results. The entire difficulty can be readily solved by invoking the principle of licence and by invoking the provisions of Section 60 (a) of the Easements Act as regards irrevocability of it.

This will be also in consonance with the provisions as well as the entire scheme of the Bombay Rent Act. This will also be in consonance with the well-recognised principle of dual ownership which is firmly established in India by law.

57. The last authority which is a judgment of Vaidya, J. need not detain us very long. The view taken by Vaidya, J, is the same one which is being taken by me, although the learned Judge has taken the view simply by following the Division Bench judgment as mentioned above. However, I must make a short reference to the reason why he has held that even creation of irrevocable licence amounts to creating an interest "in any other manner" in the land in question. According to him, creation of irrevocable licence amounts to creation of some interest in the premises in some manner other than by way of assignment or subletting and, according to him, creation of any such interest is as much proscribed by Section 13(1)(e) of the Rent Act as assignment or subletting of the premises. This question does not arise directly for my consideration in this appeal. No argument was advanced before me in connection with the same. No argument was advanced that grant of irrevocable licence would equally be proscribed. I have my own doubts regarding the correctness of the approach when it is held that the creation of an irrevocable; licence amounts to creation of interest in the premises. However, I express no opinion on the same since no arguments in that behalf have been advanced before me.

58. The conclusion, therefore, is that the view of the lower appellate Court based upon the judgment of Bhasme, J. referred to above to the effect that defendants Nos. 9 to 22 had a sub-lease in their favour in respect of the plot of land in question and that their sub-tenancy is protected by the Ordinance of the year 1959 cannot be sustained. The decree based upon the same dismissing the plaintiff's suit for possession also, therefore, cannot be sustained. It must be held that the plaintiff has made good his case against defendants Nos. 1 to 3 and 6 to 8 on the ground of unlawful subletting and hence the decree for possession has got to be passed against them. A decree for possession will have to be passed against respondents Nos. 9 to 22 because they cannot be said to be having any right vis-a-vis the plot of land in question, once a decree for eviction is passed against their own landlords, viz. defendants Nos. 1 to 3 and 6 to 8. The decree passed by the lower Appellate Court will have to be set aside and the decree passed by the trial Court shall have to be restored.

59. I now turn to the contentions actually urged on behalf of defendants Nos. 9 to 22 in support of the decree passed by the learned Assistant Judge.

Mr. Marathe appearing for some of the occupants of the shops sought to place reliance upon the provisions of the Amendment of the Rent Act which came into force with effect from 1st February, 1973. By the said amended Section 15A was added to the Rent Act. Mr. Marathe contends that even assuming that defendants Nos. 9 to 22 were mere licensees still they have become mere licensees on the date of the suit filed by the plaintiff. Their status as licensee had converted into that of the tenant u/s 15A of the Rent Act. He, therefore, says that no decree can be passed against defendants Nos. 9 to 22 having regard to the said provision of Section 15A.

60. To my mind this contention is wholly misconceived. The licensees contemplated by Section 15A are those whose licence is in respect of a structure such as a room. A licensee of a land only is not made a protected licensee or a deemed tenant by the provisions of Section 15A of the Rent Act read with Section 5(11) of the same. But the point is that defendants Nos. 9 to 22 were only licensees in respect of the land. If they were the licensees in respect of any room on the land presumably perhaps they would have been governed by the said Section 15A of the Rent Act. It is difficult to hold that a licensee in respect of a mere piece of land and that too not exclusively but jointly with others has been made a protected licensee by the Rent Act.

But apart from this fact, the more important aspect is that the provisions of Section 15A or Section 5(11) do not have any retrospective operation. There is nothing in the Act by virtue of which pending proceedings are affected by this provision. As a matter of fact, it could be said that the licensee who is protected under the said Section 15A read with the other provisions of the Act is the one who has got subsisting licence and not one whose licence is terminated. When the plaintiff filed the suit against defendants Nos. 9 to 22 and asked for possession from them evidently he had purported to terminate the licence and in the eye of law their licence stood terminated. The said contention of Mr. Marathe, therefore, cannot be sustained.

61. The contention raised by Mr. Bhasme should really raise no difficulty at all. His contention is that his clients respondents Nos. 17, 18, 21, 22, 26 and 27, who are tenants in respect of some of the shops have paid the rent to their own landlords and, hence they are protected by virtue of general provisions of Section 12(1) of the Rent Act. Difficulty is that his clients did not see to it that the rent that was payable by their own landlords to the plaintiff was duly paid by them. Whatever that may be defendants Nos. 9 to 22 cannot have any right independent of defendants Nos. 2 to 8. They are mere licensees in respect of the land of which defendants Nos. 1 to 8 were unlawful sub-tenants. They must swim or sail with their own licensors. Decree passed against defendants Nos. 1 to 8 must, therefore, automatically bind defendants Nos. 9 to 22.

62. In this view of things I have no other alternative but to hold that the decree passed by the lower Court dismissing the plaintiff's suit for possession was erroneous and illegal. The decree has, therefore, got to be set aside and the decree passed by the trial Court has got to be restored.

63. I order accordingly. Rule earlier issued is made absolute, but in the circumstances of the case there shall be no order as to costs.

64. I, however, cannot part with this judgment without recording my deepest sympathy, particularly for defendants Nos. 9 to 22, who appeared to be unwary purchasers or tenants in respect of the structure on the land. Suggestions for compromise were made on a number of occasions and respondents Nos. 6 to 22 had come out with suggestions which appeared to be quite reasonable and in particular in the interest of the present petitioners who are the heirs of the original plaintiff. I am sorry that those proposals could not find favour with the Counsel for the plaintiff. I hope that better counsel would prevail at least hereafter.

65. Order accordingly.