

(1994) 02 GUJ CK 0028

In the Gujarat High Court

Case No : Civil Revision Application No. 2028 of 1980

Dudabhai alias Dadubhai Karsandas Patel and Others

APPELLANT

Vs

Sulochanaben Gopaldas Kothari

RESPONDENT

Date of Decision : 21-02-1994

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1), 15, 15(2), 29(2)
Evidence Act, 1872 — Section 101

Citation : AIR 1995 Guj 68 : (1994) 1 GLR 541

Hon'ble Judges : K.G. Shah, J

Bench : Single Bench

Advocate : M.D. Pandya, for the Appellant; S.R. Divetia, for the Respondent

Final Decision : Dismissed

Judgement

K.G. Shah, J.—This is a revision application filed u/s 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short "the Rent Act"). The respondent who is the landlady of the premises, which is a shop, sued the petitioners for a decree for possession of the suit premises on the ground that petitioner No. 1 -- the tenant -- has unlawfully sublet, assigned or transferred the suit premises to the other petitioners, i.e. petitioners Nos. 2, 3 and 4. The ground on which the respondent claimed the decree for possession of the suit premises is covered by Section 13(1)(e) of the Rent Act.

2. In the plaint, the respondent averred that the suit shop was given to petitioner No. 1 for running his ownership business in grocery therein at a monthly rent of Rs. 30/- PLUS Municipal Tax, other Cess, etc. The respondent, in the plaint averred that the suit shop was given to petitioner No. 1 only for the purpose of running his ownership business and he had no right to transfer the shop to anyone. However, petitioner No. 1 has, without any right, transferred the suit shop to petitioners Nos. 2, 3 and 4 quite illegally. The respondent thereafter issued to the petitioners a notice terminating the tenancy and demanding the

possession of the suit premises, and thereafter she filed the suit for a decree for possession of the suit premises.

3. The trial Court decreed the suit for possession. The petitioners filed an appeal before the appellate Court. Pending the appeal, the respondent amended the plaint. The petitioners also made a grievance before the appellate Court that the trial Court had not properly considered their pleading about the effect of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959 (for short "the Ordinance"). The appellate Court, therefore, raised additional issues and remitted the matter to the trial Court for recording and certifying the findings on those issues after giving the parties proper opportunity. Accordingly the trial Court gave fresh opportunity to the parties of leading further evidence and after considering the evidence on record, the trial Court certified its findings once again against the petitioners on the question of sub-letting. The appellate Court, after appreciating the entire evidentiary material, confirmed the decree for possession, passed by the trial Court, against the petitioners. Hence the petitioners have filed the present revision. application.

4. Mr. Pandya, L.A. for the petitioners raised three contentions before me. Firstly according to Mr. Pandya, petitioner No. 1 has not parted with the legal possession of the premises in favour of petitioners Nos. 2,3 and 4 and, therefore, there is no question of sub-letting. Secondly according to Mr. Pandya, even if it is assumed that petitioner No. 1 has parted with legal possession of the suit premises in favour of petitioners Nos. 2, 3 and 4, there is no evidence that such parting of legal possession by petitioner No. 1 in favour of other petitioners was for consideration. Therefore also there is no question of sub-letting as is forbidden by Section 15 of the Rent Act and would furnish a ground contemplated by Section 13(1)(e) of the Rent Act for evicting the tenant from the premises. Thirdly, according to Mr. Pandya, as the sub-letting complained of by the respondent came into existence prior to the coming into effect of the Ordinance, u/s 15(2) of the Rent Act, such a sub-letting has become legal and, regularised. Therefore also no decree for eviction could have been passed against the petitioners on the ground contemplated by Section 13(1)(e) of the Rent Act.

5. The pleadings as they stand, after their amendments, clearly spell out the case for the respondent in the plaint about the allegation that in any view of the matter, pending the suit, petitioner No. 1 has sub-let the suit shop to petitioners Nos. 2, 3 and 4, or petitioner No. 1 has, in any other manner, illegally transferred the suit shop to petitioners Nos. 2, 3 and 4. Hence the respondent is entitled to a decree for possession of the suit shop.

6. The suit was filed by the respondent on December 12, 1972. A joint written statement Exh. 13 by all the petitioners came to be filed on July 30, 1973. Thereafter on February 12, 1976, with the leave of the Court, the petitioners amended their written statement. The trial Court on December 17, 1976, passed a decree directing the eviction of the petitioners from the suit premises. The petitioners then preferred an appeal against that decree before the Appellate

Bench of the Court of Small Causes at Ahmedabad. Pending that appeal, the respondent, with the leave of the Appellate Bench amended the plaint. Thereafter the Appellate Bench raised additional issues and remitted the matter to the trial Court for giving the parties proper opportunity and recording and certifying the findings on those additional issues. The trial Court complied with the order of the Appellate Bench and certified the findings to the Appellate Bench. The Appellate Bench thereafter, on July 31, 1980 passed the decree dismissing the appeal of the petitioners.

7. As stated above, in the plaint, the respondent averred that the suit shop was given only to petitioner No. 1 for running his ownership business in grocery therein, and that he had no right to transfer that shop to anyone also, and yet, illegally he has transferred the suit shop to petitioners Nos. 2, 3 and 4. In the joint written statement Exh. 13 filed by all the petitioners, the petitioners, while denying the averments made by the respondent in the plaint, admitted that it was petitioner, alone who had taken the suit shop on lease. However, they contended that since the inception of the tenancy, in the suit shop, petitioner No. 1 has been doing grocery business in partnership in the firm name of "Patel Stores", and that business is continuing till the date of filing of the written statement. According to the petitioners, initially in that firm in the name of "Patel Stores" petitioners Nos. 1 and 2 were the partners and the partnership transaction was reduced into writing in 1950, and thereafter the firm was registered in 1959, and subsequently petitioner No. 4 was taken in as a partner in the firm. They contended that petitioner No. 3 has nothing to do with the suit shop or any rights therein and any business being carried on by the other petitioners therein. In paragraph 5 of the written statement, the petitioners, categorically stated as follows :

"The firm has nothing to do with the tenancy rights of defendant Dudabhai Karsanbhai."

(Dudabhai Karsanbhai is petitioner No. 1)

They further asserted that the tenancy rights of petitioner No. 1 are intact and those rights have not been transferred by petitioner No. 1 either to Patel Stores or to anyone else.

Thus, in the plaint, the respondent averred that the tenancy was created in favour of petitioner No. 1 alone, and that subsequently petitioner No. 1 has illegally sub-let or assigned the premises to the other petitioners. In the written statement, as originally filed, the petitioners categorically contended that the tenancy rights of petitioner No. 1 have been kept intact. The firm has nothing to do with those tenancy rights of petitioner No. 1 and that those tenancy rights have not been transferred either to Patel Stores or to anyone else.

Thereafter the petitioners, with the leave of the Court, amended the written statement and inserted therein paragraph 5(a) wherein they, in the alternative, contended that even if it is held that the tenancy rights in the suit shop have

been transferred by petitioner No. 1 to the firm, Patel Stores, the firm Patel Stores have been doing business in the suit shop since 1947; therefore, that firm is a legal sub-tenant in the suit premises and as that firm is a subtenant in the premises prior to 1959, it has become direct tenant of the respondent and the possession of the suit shop is with the firm, and not individually with petitioner No. 1, 2 or 4.

8. Pending the appeal before the Appellate Bench by amending the plaint, the respondent contended that if it was established on evidence that petitioner No. 1 has retired from the firm M/s. Patel Stores pending the suit, then in that event, petitioner No. 1 should be held to have illegally sub-let or in some other manner, transferred the suit shop to petitioners Nos. 2 to 4, and therefore, also she (the respondent) has become entitled to get the actual possession of the suit shop from the petitioners.

9. It is pertinent to note that before the additional issues were raised by the Appellate Bench, and the matter was remitted to the trial Court for certifying the findings, petitioner No. 1 had not entered the witness box. On behalf of the respondent, her son Ajay had deposed and had stated that petitioner No. 1 has transferred the suit shop to the other petitioner's without the landlord's consent. Petitioner No. 2 in his deposition stated that petitioner No. 1 is his elder brother and petitioner No. 4 is his son. He further stated that he is doing business in the name of Patel Stores, which is a partnership concern, since 1947. Petitioner No. 1 was his partner in that firm since 1947, and he and petitioner No. 1 in partnership are doing business in the suit shop since 1947. He admitted that all the rent receipts that were issued by the landlord were issued in the individual name of petitioner No. 1. ,

The record shows that the firm in the name of Patel Stores of which petitioners Nos. 1, 2 and 4 were the partners came to be dissolved under the Deed of Dissolution Exh. 85 dated November 28, 1975. The deposition of petitioner No. 2 came to be recorded before the trial Court on November 9, 1976. In his deposition, petitioner No. 2 stated as follows:

"Today, as per my say, 1 and defendant No. 4 (petitioner No. 4) are the tenants. Shri Manubhai is also one of the tenants (it may be remembered that Manubhai is the other son of petitioner No. 2). These three are the only tenants since 1975. We have become tenants. Defendant No. 1 is not a tenant. As defendant No. 1 separated from the firm he ceased to be a tenant. He is not sitting on the shop since one year. Formerly, defendant No. 1 was doing business of building contractor. This business was in the name of Patel Stores. This business is closed since 2-3- years."

Now, the aforesaid statements made by petitioner No. 2 in paragraphs 17 and 18 of his deposition, recorded on November 9, 1976, make it absolutely clear that since 1975 (and that is the year in which the firm Patel Stores came to be dissolved under the Deed of Dissolution Exh. 85), petitioner No. 1 separated

from the firm and that he is not a tenant in the suit shop. As stated by petitioner No. 2, he, his son Bhanubhai (petitioner No. 4) and his another son Manubhai (who is not a party to the proceedings) are the tenants in the suit shop since 1975. These statements made by petitioner No. 2 in his deposition, are very material for the purpose of determination of the Issues canvassed before me by Mr. Pandya the learned advocate for the petitioners.

10. The aforesaid statements made by petitioner No. 2 in his deposition, leave no room for doubt that since 1975, petitioner No. 1 has walked out from the suit shop lock, stock and barrel. Even on the plain reading of the Deed of Dissolution Exh. 85, that would be the only finding for the Deed of Dissolution Exh. 85 clearly recites that there was a firm named "Patel Stores" wherein petitioners Nos. 1, 2 and 4 were the partners, and they were doing business in foodgrains, grocery, etc. in the name of the firm in the suit shop and that business had been commenced with effect from December 29, 1959, under a Deed of Partnership of the even date. The Deed of Dissolution further recites that petitioner No. 1 has voluntarily retired from the firm with effect from November 3, 1975, leaving all the rights and liabilities in respect of the firm in favour of petitioners Nos. 2 and 4. This document clearly recites that all the benefits accrued to the firm have been given away to petitioners Nos. 2 and 4. The document further shows that at the time the firm came to be dissolved, a balance sheet of profits, losses, other accounts, credits and outstanding had been prepared and the accounts were settled, bet ween the parties to the Deed of Dissolution, and whatever was found due and payable by petitioners Nos. 2 and 4, to petitioner No. 1 was taken as the deposit of petitioner No. 1 in the firm, which came to be reconstituted with the remaining partners. At several places in this Deed of Dissolution, it has been mentioned that the business together with all the assets, rights and liabilities was given to petitioners No. 2 and 4.

11. The evidence clearly shows that the date of dissolution of the firm, petitioner No. 1 has retained no interest either in the business of the firm or in the tenancy rights he never attended the shop thereafter. He started some building construction business which has again been closed down. Even Mr. Pandya, L.A. for the petitioners could not take any exception to the finding that petitioner No. 1 has walked out of the premises lock, stock and barrel retaining no interest either in the business or in the premises.

12. However, Mr. Pandya, very strenuously contended that even on these facts, it could not be said that petitioner No. 1 has transferred legal possession of the premises to petitioners Nos. 2 and 4. I think the argument cannot be accepted. The pleadings and the evidence are clear and categorical. The pleadings show that admittedly the lease was in the individual name of petitioner No. 1. It was not in favour of any firm. It was not in favour of petitioner No. 1 jointly with petitioners Nos. 2 and 4. As categorically stated in the written statement, the firm or the other petitioners except petitioner No. 1 had nothing to do with the tenancy rights in the suit premises. The demise took place in 1947. May be, soon

after taking the shop on lease, petitioner No. 1 might have started the business in grocery and other things. Along with him, petitioner No. 2 might have been taken as a partner. But that is neither here nor there. Admittedly, the lease was in favour of petitioner No. 1 alone and with the rights flowing from that lease, the other petitioners had nothing to do. Merely because the other petitioners joined in business with petitioner No. 1 from 1947 or thereafter would not make any difference to the proposition that the tenancy rights were only in favour of petitioner No. 1. They continued to be so till the time, petitioner No. 1 left the business and the premises in 1975. He left the suit shop and the business for good, leaving it to the other petitioners being petitioners Nos. 2 and 4. The evidence clearly points to the fact that he thereafter never had any interest either in the business that was being carried on in the suit shop by the other petitioners nor had he any interest in the tenancy rights. The exclusive possession since the date of dissolution of the firm is with petitioners NOS. 2 and 4. That being the position, the finding inevitably is that petitioner No. 1 has parted with not only the physical possession of the suit shop, but also the legal possession thereof in favour of petitioners Nos. 2 and 4. The first contention of Mr. Pandya should, therefore, fail.

13. Mr. Pandya nextly submitted that even if it is held that petitioner No. 1 had parted, with both physical and legal possession of the suit shop in favour of petitioners Nos. 2 and 4, that parting is not proved to be for consideration and, therefore, there cannot be any sub-letting. This argument, in my opinion, has no merit. It is firstly required to be remembered that though petitioner No. 1 is the brother of petitioner No. 2 and petitioner No. 4 is the son of petitioner No. 2, this is not the case of a residential premises. This is the case of a shop or a business premises. Secondly, the premises were taken on lease by petitioner No. 1 in his own name. May be, thereafter, he might have started business in the firm name, and might have taken petitioner No. 2 as his partner. On the petitioners own showing, petitioner No. 4 was taken as a partner subsequently in 1959. As stated by petitioner No. 2 in his deposition, since the dissolution of the firm in 1975, not only that he and his son Bhanubhai (petitioner No. 4) are the tenants, but his other son Manubhai is also a tenant in the suit shop. This is indicative of the fact that whereas on one hand, petitioner No. 1 walked out of the firm consequent upon the dissolution thereof, petitioner No. 2 continued the business along with his two sons Bhanubhai and Manubhai in the suit shop. This is, therefore essentially a business venture, which has been carried on in the shop. This, is one aspect of the matter which is required to be borne in mind. Another aspect of the matter which is required to be borne in mind is that ordinarily the exact terms on which a tenant inducts a subtenant in the premises would not be within the knowledge of the landlord. Once it is proved that in relation to a business premises, the tenant has walked out of the premises leaving the premises to another person, (may be, that another person may be his brother) and that another person is in exclusive possession of the business premises, it would not be out of place to raise an inference that parting of possession by the tenant in

favour of that another person must be for valid consideration and the burden would be upon the tenant or the sub-tenant, as the case may be, to prove that parting of possession -- both legal and physical -- by the tenant in favour of that other person was without any valid consideration.

14. In the present case, as the Deed of Dissolution Exh. 85 shows, at the time the dissolution was made on Nov, 3, 1975, the accounts of profits and losses and other accounts including credits, outstandings and assets were examined and a balance sheet was prepared, and the accounts were settled. Now, when the accounts in this fashion are made at the time of the dissolution of the firm which is carrying on the business in a shop premises, it would not be out of place to infer that the parties to the dissolution must have taken into consideration the goodwill of the business, and the value of the tenancy rights must have been worked out. If at the time of such dissolution, no monetary consideration for parting of the tenancy rights was given by petitioners Nos. 2 and 4 to petitioner No. 1, would have been for them to have produced the accounts and balance sheet to show that at the time of dissolution, no monetary consideration had passed from petitioners Nos. 2 and 4 in favour of petitioner No. 1, in consideration of petitioner No. 1 having parted with his tenancy rights in favour of petitioners Nos. 2 and 4. The petitioners have not produced these documents though they must be supposed to be in their possession and power. That being the position, and in the peculiar relationship between the parties, the landlord will not be in a position to know as to what monetary consideration had passed from the sub-tenant to the tenant in consideration of the tenant having parted with the tenancy rights in favour of the sub-tenants. It must, therefore, be presumed that in relation to a business premises, when the tenant parts with the physical and legal possession in favour of somebody else, albeit his own brother, that parting must be for valid consideration. Of course, the tenant or the sub-tenant would be free to plead and proved by proper evidence, the fact that though it was business premises and though the tenant had parted with physical and legal possession thereof in favour of the sub-tenant, that parting has taken place without any monetary consideration having flown from, the subtenant to the tenant. In the present case, none of the petitioners has come out with a case that in 1975, when the dissolution of the firm took place and petitioner No. 1 walked out of the business premises, he did so without charging any consideration for that from petitioners Nos. 2 and 4. As said above, accounts were made up, examined and settled and balance sheet was drawn. These documents would certainly show whether, in fact, while effecting dissolution of the firm, any money value of the tenancy rights in the shop was worked out, and any consideration was passed by the petitioners Nos. 2 and 4 to petitioner No. 1, in consideration of petitioner No. 1 having parted his tenancy rights in the shop, and the exclusive possession thereof having been given in favour of petitioners Nos. 2 and 4. those documents having not been produced, the presumption as aforesaid, which I am sure is permissible on the facts of the case, cannot be said to have been rebutted by the petitioners. The argument of Mr. Pandya that there

is no evidence to show that parting of possession both physical and legal -- of the premises by petitioner No. 1 in favour of petitioners Nos. 2 and 4 is not proved to be for consideration, therefore, cannot be accepted. The same is rejected.

15. Lastly Mr. Pandya submitted that the evidence clearly shows that right from the inception of the tenancy in the year 1947, petitioner No. 1 had been doing grocery business in the suit shop in the name of Patel stores, which is a partnership firm wherein, as per the entries from the Register of Firms, produced on record, both petitioners Nos. 1 and 2 had joined as partners as early as Nov. 13, 1947. Therefore, according to Mr. Pandya, the firm, "PATEL STORES" is a sub-lessee since 1947. According to Mr. Pandya, the registration entry Exhr 28 in the register of firms has been effected on March 11, 1955 and at that point of time, there could be no intention on the part of anybody, to have a false entry made in the register of firms. I think the submission of Mr. Pandya is misconceived for the simple reason that though on the basis of the entry in the register of firms, Exh. 28, it may have to be said that the firm in the name of PATEL STORES has been registered with the Registrar of Firms by entry dated March 11, 1955, showing the fact that both petitioners Nos. 1 and 2 had joined as partners with effect from Nov. 13, 1947, but that would not tantamount to saying that neither in 1947 or even in 1955 there was sub-letting of his tenancy rights by petitioner No. 1 in favour of PATEL STORES. As categorically asserted in the joint written statement filed by all the petitioners, the tenancy rights were obtained exclusively in the name of petitioner No. 1 and the firm had nothing to do with the tenancy rights of petitioner No. 1, and that those rights are intact, and have not been transferred by petitioner No. 1 either to PATEL STORES or to anyone else". With this as the categorical assertion by the petitioners in the written statement, it has got to be said that at no point of time before Nov. 3, 1975, petitioner No. 1 had inducted either PATEL STORES or petitioners Nos. 2 and 4 as sub-tenants in the premises. There is therefore, no question of either legalising or regularising the subtenancy in favour of PATEL STORES or the partners thereof under the Ordinance issued by the government on May 21, 1959, which lifts the ban against sub-letting, assigning or transferring the premises, made before the date of the Ordinance, i.e., May 21, 1959. The sub-letting in this case occurred in 1975, when, upon dissolution of the firm, petitioner No. 1 walked out not only of the business, but also of the premises, and left the business, the premises and the tenancy rights therein to petitioners Nos. 2 and 4. The contention based upon Section 15(2) of the Rent Act, by Mr. Pandya therefore, is not available to the petitioners.

16. At the bar, on either side, several authorities were relied upon. Before parting with the judgment, I think, in fairness to the learned Advocates, I should make a reference to those judgments.

17. Mr. Pandya, L.A. for the petitioners firstly relied upon the decision rendered by P. N. Bhagwati, J. (as His Lordship then was) in Civil Revn. Appln. No. 238 of

1960, decided on January 19, 1962. That judgment is quite distinguishable on facts. There, the premises in question was a pan galla. According to the landlord, the tenant had sub-let that pan galla firstly to Yusuf Suleman and thereafter to Suleman Umarji. The tenant contended that the pan galla was a part of the restaurant, and that he had not sub-let it either to Yusuf Suleman or to Suleman Umarji, but the person who was looking after the pan galla was his employees, employed by him at the daily wages of Rs. 2/-. That the person who looked after the pan galla was the employee of the tenant was a fact which was disbelieved by the learned District Judge. Even so, the contention on behalf of the tenant before the High Court was that merely on that finding, it did not necessarily follow that the plaintiffs case of unlawful sub-letting was proved, and that it was for the plaintiff to show that the defendant had unlawfully sub-let a portion of the premises for the purpose of running a pan galla, and that the plaintiffs had failed to prove that fact. This High Court examined the evidence on the record of that case, and said that all that the evidence on record established was that Yusuf Suleman, and after him Suleman Umarji, was running pan galla, in a portion of the premises, as the owner of the pan galla. However, the evidence did not show that, any rent was being paid either by Yusuf Suleman or by "Suleman Umarji to the defendant. The evidence also did not show whether Yusuf Suleman or Suleman Umarji was entitled to exclusive possession and enjoyment of the portion of the premises occupied by pan galla, nor did the evidence show that Yusuf Suleman or Suleman Umarji" was, in fact, in exclusive possession and enjoyment of the portion of the premises occupied by the pan galla. The evidence on the contrary established that there was an outer door in the premises which could be opened only by the defendant, and without passing through which no access can be obtained to the pan galla. The High Court said that on those facts, it could be seen that not only that there was no evidence that the legal possession of the portion of the premises occupied by the pan galla was given by the defendant to Yusuf Suleman Umarji, entitling Yusuf Suleman or Suleman Umarji to exclusive possession and enjoyment of that portion of the premises, but the evidence actually established that Yusuf Suleman or Suleman Umarji could not have access to the pan galla unless the outer door of the premises was opened by the defendant, and that the ultimate control over the possession and enjoyment of the premises occupied by the pan galla remained with the defendant. On those facts, the High Court said that it could not see how it can be said that Yusuf Suleman or Suleman Umarji was a sub-lessee of the defendant.

Now, the facts of the aforesaid case are quite different from the facts of the case before me. In that case, the premises were, but the part of a larger premises, which was a restaurant. Access to the pan galla was only through the restaurant. The evidence did not show that exclusive possession of the pan galla was with either Yusuf Suleman or Suleman Umarji. However, in the case before me, it is now clear on the admissions made by Petitioner No. 2 that he and his two sons Bhanubhai -- Petitioner No. 4 and Mahu"bhai (who is not a party to these

proceedings) are now the tenants of the premises, and Petitioner No. 1 is not a tenant of the premises. The evidence shows that since the date of dissolution of the firm, i.e. from Nov. 3, 1975, as stated by petitioner No. 2, petitioner No. 1 has ceased to be the tenant in the premises. He is not sitting on the shop since about one year prior to the deposition of petitioner No. 2 which was recorded in Nov. 1976. Petitioner No. 1 had started the business of building contractor, and that has also been closed down since some time past. These facts are quite distinguishable from the facts of the case decided by Bhagwati J. in CRA No. 238 of 1960. The judgment in that case, therefore, has nothing to assist the contention raised on behalf of the petitioners in the present case before me.

18. Mr. Pandya nextly relied upon the decision in Civil Revn. Appln. No. 891 of 1976, rendered by P.O. Desai, (as His Lordship then was) on October, 6, 1977. He also relied upon another decision in Civil Revn. Appln. No. 1188 of 1974, again rendered by P.D. Desai J. (as His Lordship ; then was) on Sept. 7/8, 1977. Both these judgments are again distinguishable on facts. ", Firstly, it is required to be noticed that the premises in question in those two matters were residential premises. In CRA Number 891/76, the facts were that the petitioners before the High Court were the real brothers. The first petitioner was a tenant of the suit premises in his individual capacity and he had not obtained the lease for the benefit of the joint family. The first petitioner took the suit premises on lease some time in 1962, and that at that point of time, he alone was residing in the said premises, and the second petitioner was residing elsewhere. The second petitioner came to reside in the suit premises sometime later. Both the petitioners were married and they were separately occupying one room each in the two room tenment (the suit premises). The possession of each of the petitioners of the room in his occupation was exclusive possession. Both the petitioners had independent sources of income, and they were separate in business and messing, and there was no evidence about the payment of rent by the second petitioner to the first petitioner. But, on examining the evidence as a whole, it was possible to infer that the second petitioner must be contributing towards the rent, and must be paying some amount to the first petitioner. The lower appellate Court in that case, recorded a clear finding that there was no evidence whatsoever on the record of that case to prove that the exclusive possession, if any, of the suit premises by the second petitioner was for valuable consideration. However, the lower appellate court had drawn an inference regarding valuable consideration. The lower appellate court, for that purpose, took into consideration the circumstances, viz. (i) separate kitchen, (ii) independent income, and (iii) the second petitioner came to reside in the premises at a later point of time.

The High Court said that these circumstances relied upon by the lower appellate court for the purpose of drawing an inference about valuable consideration having passed from the second petitioner to the first petitioner for parting in his favour of the exclusive possession of the portion of the premises, by the first petitioner, cannot necessarily and reasonably, lead to such a conclusion having

regard to the close relations between the parties. The High Court considered that petitioner No. 2 was the brother of petitioner No. 1, and that fact cannot be lost sight of. Petitioner No. 2 was not a stranger to petitioner No. 1. Therefore, inference as to sub-tenancy would not be readily made under such circumstances, more so when the brother who is the tenant not altogether left possession of the suit premises, and continued to reside in a portion thereof. The facts of this case are clearly distinguishable. Firstly, as said above, it was a case in relation to a residential premises. Secondly petitioner No. 1 had not left the possession of the suit premises altogether he had continued to reside in a portion thereof. In the case before me, now, as the evidence shows, petitioner No. 1 has walked out of the premises lock, stock and barrel, retaining no interest either in the business of PATEL STORES or in the premises, and as deposed by petitioner No. 2 not even in the tenancy rights, for as stated by petitioner No. 2, he and his two sons Bhunabhai (petitioner No. 4) and Manubhai (who is not a party to these proceedings) are the only tenants of the premises. Under these circumstances, this decision in CRA No. 891 of 1976, so heavily relied upon by Mr. Pandya, is quite distinguishable on facts.

19. Similarly, the decision in CRA No. 1188/74 is again distinguishable on facts. In that case, the findings of facts were that the petitioner was the tenant of the suit premises in his individual capacity, he himself left the suit premises upon his transfer to Ahmedabad in 1964; his wife and son also left the suit premises in June, 1969; from that time onwards the suit premises were in possession of the brother and nephews of the petitioner, and their possession of the suit premises was exclusive. On these findings, it was at first observed that merely because the suit premises were in the exclusive possession of the brother and nephews of the petitioner, it cannot be said that there was no sub-letting. However, the question that cropped up for consideration was, whether on the basis of the finding as aforesaid, a decree on the basis of the sub-letting could have been passed u/s 13(1)(e) of the Rent Act. The High Court in that context said that in the first place, if sub-letting is alleged as per the settled legal position, it must be proved that the exclusive possession, if any, of the suit premises was for valuable consideration, and on this prima facie evidence being led, the onus would shift to the defendant to prove otherwise. For the aforesaid proposition of law, the High Court relied upon the decision in the case of Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh, , and some other judgments, including the judgment of Bhagwati J. (supra). The High Court took note of the fact that it was undisputed in that case that there was no evidence whatsoever on record to prove that the exclusive possession, if any, of the suit premises by the alleged sub-tenants was for valuable consideration. The High Court also took note of the fact that it cannot be overlooked that the alleged subtenancy in that case was in favour of the brother of the petitioner, and it was not a case where a stranger had been inducted into the suit premises. On this basis, the High Court said that an inference as to sub-tenancy would not be readily made under such circumstances merely because at a given point of time, the brother was

occupying the rented premises and the petitioner had been required to live in a different town on account of exigencies of service. In the last place, the High Court noticed that it was significant that one of the nephews of the petitioner was already staying with him in or about 1954 and thereafter, for the purpose of prosecuting his studies, and though the petitioner was transferred to Ahmedabad sometime in 1964, his wife continued to occupy the suit premises till June, 1969. The suit was filed in December, 1969, that is to say, within a few months of the wife of the petitioner leaving the suit premises and going to Ahmedabad to stay with the petitioner. There was also evidence to show that sometime in 1970; the wife of the petitioner went back to reside in the suit premises.

20. The facts of the last mentioned case are quite different from the facts of the case before me. "Firstly, it was a case of residential premises. Secondly, one of the nephews of the petitioner-tenant was residing with the petitioner in the suit premises for prosecuting his studies since 1954, and later on his brother came to reside with him in the suit premises. Though the petitioner, on his transfer from Surat to Ahmedabad, came to reside at Ahmedabad in 1964, his wife continued to reside in the suit premises till as late as June, 1969, i.e. till only six months prior to the filing of the suit, and there was also evidence to show that in 1970, once again the petitioner's wife went back to Surat, and started residing in the suit premises. I fail to see now the facts of that case can have any parallel to the fact, of the case before me. As admitted by the petitioner No. 2 in the present case, since 1975, he and his two sons Bhunubhai (Petitioner No. 4) and Manubhai (who is not a party to these proceedings), are the only tenants and petitioner No. 1 is not a tenant in the suit premises. Petitioner No. 1 is not sitting on the suit shop. Petitioner No. 1 started his construction business, and that has also been closed down. In this view of the facts situation, the decision in CRA No. 1188/74, has no assistance to render to the submission of Mr. Paridya, on behalf of the petitioners.

21. Mr. Pandya, L.A. for the petitioners nextly relied upon the decision in the case of Manchharam Sobhrai and Others Vs. Jamnadas Mulchand and Another, . After having read that judgment carefully, I think instead of helping the cause of the petitioners, that judgment helps the cause of the Respondent. This judgment was relied upon by Mr. Pandya for canvassing that merely because a tenant has taken another as partner in his business which was being carried on in the demised premises, he does not render himself liable to be evicted u/s 13(1)(e) of the Rent Act. That proposition was not disputable, nor was it disputed by Mr. Divetia, L.A. for the Respondent. However, this judgment clearly posits:

"..... if a tenant has parted with possession of his premises and put his another partner in exclusive possession thereof, it will amount to an act of unlawful sub-letting because such an act connotes a transfer of legal interest in the premises from the tenant to someone else."

22. Now, the above proposition of law, which has been approved by the High Court as the correct proposition of law in the aforesaid case, clearly helps the

Respondent in the present case for, petitioner No. 1 has parted with possession of the suit premises in favour of petitioners Nos. 2 and 4. As slated by petitioner No. 2 in his deposition, he and his two sons are in exclusive possession of the suit premises. Merely because petitioner No. 2 is the brother of petitioner No. 1, and petitioner No. 4 is the son of petitioner No. 2, that hardly makes any difference to the legal position as enunciated in *Manchharam Sobhrai and Others Vs. Jamnadas Mulchand and Another*, . The judgment in *Manchharam's* case relied upon by Mr. Paridya, helps the Respondent is another aspect of the matter as well. In *Manchharam's* case, the learned single Judge (S.H. Sheth, J.) approved the proposition of law made by Thakkar, J. of this court in *Mehta Jagjivan Vanechand Vs. Doshi Vanechand Harakhchand and Others*, , to the effect that "sub-letting postulates two distinct persons -- the head-tenant and the sub-tenant -- and that the rights and obligations of these two persons are different. One cannot be one's own sub-tenant. If the transaction of taking in partners constitutes sub-letting, the tenant will be the head tenant and he himself along with his two partners will be the sub-tenant. This is not a sound legal proposition. A tenant by no stretch of imagination can be his own sub-tenant. Unless it can be posited that the original tenant's entire interest is extinguished and that of someone else to the exclusion of the original tenant is created, it cannot be contended that there has been an assignment. A tenant cannot split up the interest, retain a part of it and transfer the remainder to his parnters. Merely because a tenant continues to carry on the business in the same shop in which he had been done earlier, but takes in two partners, the legal possession of the shop does not change hands. Legal possession is a concept which must be distinguished from the concept of physcial occupation or user. One who occupies or uses a premises is not necessarily in legal possession of the premises. Even if the partners of the firm attend the shop and do business along with the tenant, it cannot be said that they are in legal possession of the shop"

23. The aforesaid proposition of law made by Thakkar, J. in AIR 1972 Gujarat p 6 have been completely agreed to by Sheth, J. in *Manchharam Sobhrai and Others Vs. Jamnadas Mulchand and Another*, . Now, the last lines of the aforesaid proposition would make it clear that even if, on evidence, it were to be held that since 1947, petitioner No. 2 was In partnership with ;; petitioner No. f,doingbusinessingrocery,in the suit shop, it cannot be said that the legal possession of the suit shop had been transferred by petitioner No. 1 either to himself and petitioner No. 2 since 1947, or even to the firm PATEL STORES in 1947. The legal possession came to be transferred by petitioner No. 1 to petitioners Nos. 2 and 4 only on and from Nov. 3, 1975 -- the date of dissolution of the firm under Exh. 85. Therefore, the alternative contention of the petitioners, based on the Ordinance u/s 15(2), of the Rent Act, cannot be accepted.

Mr. Pandya, nextly relied upon the decision in the case of *Dahiben Lakhabhai v. The Administrative Officer*, (1980) 21 Guj LR 90. That case has nothing to render any assistance to the case before me for, in that case the suit premises were

transferred from the Taluka Panchayat to the Municipality, and there was no consideration passed from the Taluka Panchayat to the Municipality in relation to the transfer. That case, in my opinion, cannot be pressed into service by the petitioners.

24. As pointed out hereinabove by me, in relation to business premises the matter would stand differently as compared to the residential premises, where the transfer has taken place amongst near relative. As it appears from the two judgments of P.O. Desai, J. relied upon by Mr. Pandya, it may not be possible to draw an inference of passing of consideration between sub-tenant and original tenant, both being brothers, in case of residential premises, if the fact situation warrants, not to raise such inference. In case of business premises -- a shop, which was taken on lease by one of the brothers in his individual name, but he took his brothers as partners thereafter, and then by a deed of dissolution, he walked out of the premises, it would not be out of place to draw an inference that at the time of dissolution, the brothers must have taken into consideration the value of the tenancy rights and adjusted that value in the matter of accounting. Here in the present case, as the evidence shows, accounts were settled and the balance sheet was drawn, and yet those documents have not been produced. Those documents and the contents thereof would be within the exclusive knowledge of the petitioners, and the respondent would have no access to those documents, if the petitioners wanted to contend that petitioner No. 1 went out of the partnership on dissolution without charging any amount from the other petitioners, in considerations, of he having handed over his tenancy rights to other petitioners, it was for the petitioners to have produced evidence in that regard by producing the account books, balance sheet and other records. That has not been done in this case. Even petitioner No. 1 who deposed in the case at a later stage, has not said that he has not charged any consideration for the tenancy rights from the other petitioners. Such is not the case of the other petitioners as well. Therefore, the presumption of passing of valuable consideration has not been rebutted.

25. Mr. Pandya nextly relied upon the decision in the case of Shalimar Tar Products Ltd. v. H. C. Sharma, AIR 1988 SC 145. The proposition laid down therein, viz. "In order to constitute sub-letting there must be parting of the legal possession by the lessee. Parting of legal possession means, possession with the right to include and also right to exclude other" is undisputable. But when that is applied to the facts of the present case, it becomes clear that, now since November 3, 1975, petitioners Nos. 2 and 4 and Manubhai -- the other son of petitioner No. 2 -- claim exclusive tenancy rights. They can certainly exclude petitioner No. 1 from entering the suit premises. In that view of the matter, the judgment in the case of M/s. Shalimar Tar Products Ltd. (supra) also does not help the petitioners.

26. Lastly Mr. Pandya relied upon the decision in the case of Nidamarti Maheshkumar Vs. State of Maharashtra and Others, . The principle laid down

therein, viz. "It is well settled that parting with possession means giving possession to persons other than those to whom possession had been given by the lease. But the parting with possession must have been by the tenant; user by other person is not parting with possession so long as the tenant retains the legal possession himself or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession, and so long as the tenant retains the right to possession there is no parting with possession in terms of Clause (b) of Section 14(1) "is undisputable. But again, when applied to the facts of the present case, now since November 3, 1975, petitioner No. 1 has not retained any possession or any interest in the suit shop or any tenancy rights.

27. On the other hand, Mr. S. R. Divetia, L.A. for the Respondent firstly relied upon the decision in the case of Niranjana Kumar and Others Vs. Dhyana Singh and Another, . The Appellate Bench has; relied upon this judgment, and has said that this judgment applies to the facts of the instant case on all fours. I think, the view of the Appellate Bench is unexceptionable. In that case, Respondent No. 1 gave a shop on rent to Respondent No. 2, Sat Prakash. A partnership firm called M/s. Sat Prakash Single and Brothers of which Respondent No. 2, and three of his brothers were partners occupied the shop, evidently on the authority of the rent note, executed by respondent No. 2. On March 31, 1968. Respondent No. 2 retired from the firm, under a deed of dissolution and two other brothers of his joined the reconstituted partnership firm. This firm also did its business in the suit premises. On these facts, the landlord filed an application for possession of the suit premises on the ground of sub-letting of the premises by respondent No. 2 to his brothers. That application was dismissed by the Rent Controller. In appeal, the learned District Judge reversed the finding of the Rent Controller holding that the shop was let out to Respondent No. 2 in his personal capacity, and after his retirement from the firm, the partners were in possession of the premises as his sub-tenants. On this finding, the learned District Judge granted the decree for possession in favour of the landlord. The revision petition to the High Court against that judgment failed. The matter was carried by the tenants to the Supreme Court. Just as in this case, before the additional issues were remanded to the trial court by the first Appellate Bench, for certifying the findings thereon, petitioner No. 1 had not entered the witness box in that case, before the Supreme Court also, respondent No. 2 -- the tenant, who was a party to the rent note, and who negotiated with the lessor -- Respondent No. 1, though he was an important witness, was not examined in the case. Respondent No. 2 in that case had retired from the business on March 31, 1968, under a deed of dissolution. But the document was not produced by the appellants, some of whom were existing partners of the firm, and some of whom joined the firm on the retirement of Respondent No. 2. Their Lordships of the Supreme Court, in the case said (at p. 2403 of AIR) :

"The deed of dissolution might have shown how the assets were divided and whether the tenancy rights of the shop were treated as belonging to the firm.

The account books of the firm were produced but the cash-book entry which was made in the firm's books in 1963 when the shop was taken on rent was not produced. Respondent No. 1 received a sum of Rs. 500/- by way of advance rent contemporaneously with the letting out of the shop but that receipt was also not produced."

On these facts, while confirming the decree for possession passed by the District Court and confirmed by the High Court, their Lordships of the Supreme Court, dismissed the appeal.

28. The facts of that case are, in a large measure, similar to the facts of the case of before me. In the case before me also, as repeatedly said by me above, neither "the account books, not the balance sheet has been produced, to show that when petitioner No. 1 walked out of the firm under the document Exh. 85 he had not charged any consideration from petitioners Nos. 2 and 4, for having left the shop and the tenancy rights therein to them. In this view of the matter, I think the learned Judges of the Appellate Bench were perfectly justified in relying upon the aforesaid judgment in the case of Niranjana Kumar and Others Vs. Dhyana Singh and Another, .

29. Mr. Divetta, nextly relied upon the judgment in the case of Bhagwati Spinning and Weaving Works Vs. The Ahmedabad New Cotton Mills Co. Ltd., . That Judgment clearly lays down as follows :

"In view of Section 13(1)(e) of the Bombay Rent Control Act, so far as the valuable consideration is concerned, there is no doubt about the proposition that there cannot be a sub-tenancy between a tenant and a subtenant except for valuable consideration. In such a case the question of proving whether they were occupying for valuable consideration assumes a great importance."

In this judgment, it has further been posited as follows (at p. 24 of AIR)

"A fact may be proved expressly or it may be inferred from other facts. Though the existence of valuable consideration can be expressly proved by evidence it is extremely difficult for a landlord to show that there was valuable consideration between the tenant and the sub-tenant, particularly when the act of sub-letting produces the serious consequence under the Act. Therefore, where in a given case the existence of valuable consideration cannot be proved expressly, it can certainly be inferred from other circumstances. It may be a proof by inference."

Of course, in that case, the alleged sub-tenant was a stranger to the tenant, and not his relative. In the case before the sub-tenants -- petitioners Nos. 2 and 4 are the brother and nephews respectively of petitioner No. 1. But that, as I understand from the facts and circumstances of the case, is a matter of no consequence for it would be too much to infer that petitioner No. 1 did not charge any consideration for tenancy right from petitioners Nos. 2 and 4, at the time of dissolution of the firm under Exh. 85, especially when the evidence clearly shows that initially it was he, who took the premises on lease in his own

name; all throughout the rent receipts have been issued in his name; at first, around 1947, as per the entry in the Register of Firms, it was petitioner No. 2 alone who joined petitioner No. 1 as partner and it was sometime in December, 1959 that Bhanubhai, petitioner No. 4, joined the firm as a partner. Thus, the partners of the firm went on changing and at the time of dissolution of the firm in 1975, accounts were settled. All rights, liabilities, assets, etc. of the firm were taken over by petitioners Nos. 2 and 4. All benefits accruing to the firm were taken over by them. Nothing was left to petitioner No. 1 so far as the business in the name of Patel Stores was concerned. The amount which was worked out as due by petitioners Nos. 2 and 4 to petitioner No. 1 was credited in the accounts of the firm as a deposit made by petitioner No. 1. On these facts, it would be wholly an unrealistic view of the matter to take and say that petitioner No. 1 did not charge any consideration from petitioners Nos. 2 and 4 in lieu of his having surrendered or handed over the tenancy rights in the suit shop to petitioners Nos. 2 and 4. Such an unrealistic approach", I think, on the facts of the case, is not warranted, even in face of the judgments of Justice P. D. Dessi, relied upon by Mr. Pandya, which as explained by me herein-above, are quite distinguishable on facts.

30. As held in the case of Bhagwati Spinning and Weaving Works Vs. The Ahmedabad New Cotton Mills Co. Ltd., , it would be extremely difficult for the landlord to show that there was valuable consideration between the tenant and the sub-tenant in the matter of the tenant having parted with the legal possession of the premises in favour of the sub-tenant. Even otherwise, under the Law of Evidence, a fact which is within the special knowledge of the parties, has to be established by that party. Here in the case before me, if no consideration had been charged by petitioner No. 1 from petitioners Nos. 2 and 4, that fact would be within their personal knowledge, to the exclusion of the Respondent. That fact was capable of being proved by producing account books and balance sheet, to which a reference has been made in the Deed of Dissolution Exh. 85.

31. Mr. Divetia, nextly-relied upon the decision in the case of Shah Chatrabhuj Narshi v. Nensibhai Shayanjibhai Gohil (1980) 21 Guj LR 377, for the purpose of combating the argument of Mr. Pandya that in view of the Ordinance, u/s 15(2) of the Rent Act. sub-tenancy complained of by the Respondent has been legalised or regularised. The judgment in the case of Shah Chatrabhuj (supra) clearly posits that Section 13(1)(e) of the Rent Act would be attracted in a case like this only if the tenancy rights are thrown, into partnership assets or interest created in partnership. As discussed herein-above, prior to 19/5, it is not even the case of the petitioners that petitioner No. 1 had thrown his tenancy rights into the partnership, and made those rights the partnership assets. On the contrary, as categorically contended in the written statement, the firm had nothing to do with the tenancy rights of petitioner No. 1.

32. Lastly, Mr. Divetia relied upon the decision in the case of Rajbir Kaur and

Another Vs. S. Chokesiri and Co., , where it has been held (Para 23):

"In a suit for eviction on ground of sub-letting if exclusive possession is established, and the version of the tenant as to the particulars and the incidents of the transaction is found unacceptable in the particular facts and circumstances of the case, it may not be impermissible for the Court to draw an inference that the transaction was entered into with monetary consideration in mind. It is open to the tenant to, rebut this."

In the present case, the petitioners have not come forward with any explanation on this question of passing of monetary consideration by petitioners Nos. 2 and 4 in favour of petitioner No. 1 and the facts as discussed by me hereinabove, would certainly make it permissible for the court to draw an inference that parting of possession and putting petitioners Nos. 2 and 4 in exclusive possession of the shop by petitioner No. 1 must have taken place for sortie valuable consideration, which is not stated or disclosed by the petitioners.

33. In view of the aforesaid judgments relied upon by Mr. Divetia, L.A. for the Respondent, and in the view of the matter that I have expressed upon the judgments relied upon by Mr. Pandya, L.A. for the petitioners, I think, the judgment and decree of the trial court confirmed by the Appellate Bench, cannot be said to be otherwise than in accordance with law. The Revision Application has, therefore, no merit. The same is hereby dismissed with costs. Rule is discharged. Interim relief vacated.

ORDER

34. At this stage, Mr. Pandya, L.A. for the petitioners requests for stay of the execution of the decree for sometime, with a view to enabling the petitioners to take remedy before the higher forum. Having heard Mr. Divetia, L.A. for the Respondent, it is ordered that the decree for possession against the petitioners shall not be executed for EIGHT WEEKS from now.