

(1989) 09 BOM CK 0027

In the Bombay High Court

Case No : Writ Petns. No's. 3569, 3570m 3575 and 3577 of 1981

Ram Sadshiv Shinde

APPELLANT

Vs

Khanderao Chintaman Panse (since Deceased by LRs) and
others

RESPONDENT

Date of Decision : 06-09-1989

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13, 5(3)
Bombay Tenancy and Agricultural Lands Act, 1958 — Section 38
Constitution of India, 1950 — Article 226

Citation : AIR 1990 Bom 262 : (1989) 3 BomCR 332 : (1989) 91 BOMLR 315 :
(1990) 1 MhLj 421

Hon'ble Judges : M.G. Chaudhari, J;C.S. Dharmadhikari, J

Bench : Division Bench

Advocate : Raja S. Bhonsale and Miss Kiran V. Gupta, for the Appellant; C.R. Dalvi and S.M. Mhamane, for the Respondent

Judgement

Chaudhari, J.—These four petitions have been referred to a larger Bench for disposal by Sharad Manohar, J., by his referring Order dated 29th March 1989, since in the opinion of the learned Judge, the questions relating to the interpretation of Section 13A-1 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereafter referred to as "Bombay Rent Act", for short), and, the right of a stranger to challenge partition in a joint Hindu family, are of great importance.

2. The petitioner-original plaintiff filed 10 suits against 10 of his tenants (original defendants-respondents) who are in occupation of different rooms in the property bearing House No. 215 situate at Shukrawar Peth, Pune, for recovery of possession of the rooms on the ground of bona fide requirement for his personal use under S. 13A-1 of the Bombay Rent Act. Additionally, he sought eviction of one of the tenants viz., Khanderao Chintaman Panse (since deceased), whose heirs are the respondents in Petition No. 3569 of 1981, under S.13(1)(k) of the Bombay Rent Act. The case of the petitioner was that the house property bearing

No. CTS 215 was the ancestral joint Hindu family property of his father, himself and his brothers. The respective respondents were the tenants in various rooms of that property. He was serving in Indian Navy. He joined Naval service on 26-11-1960. At that time, while he was in service, the joint family was the owner of the property. He retired from Naval service on 26-11-1970. Thereafter his relations with his father became strained around the year 1972 and a demand for partition was being made by him as well as his brother Shashikant. Subsequently on 26th of March 1976 mutation entries were made giving effect to a partition between the family members in which partition the portion of the house consisting the suit rooms came to be allotted to his share. Thus, he became the landlord of the suit rooms and, therefore, he became entitled to apply for possession from the tenants of the respective rooms. He bona fide required the said premises, as in the partition what he got was all the tenanted premises and he had no other place to reside and was forced to stay in a temporary shed. He had plans to get married but he was unable to marry for want of residential accommodation. Therefore, he obtained the necessary certificate u/s 13A-1 from the authorised officer and terminated the tenancies of the tenants by notice dated 8-5-1976. Thereafter he filed the suits in the Court of the 3rd Additional Small Cause Judge, Pune, on 10th of June 1976.

3. As far as tenant Panse is concerned, he sought his eviction on the additional ground that Panse had shifted his residence to the premises of his son at Police Quarters and he had kept the premises in his occupation locked for a period of more than six months and on that ground also his tenancy was sought to be terminated. Thus, the plaintiff sought recovery of possession of the rooms in occupation of the respective tenants (in all 11 rooms from 10 tenants) in the various suits. According to his case his father had retained 4 rooms for his own occupation on the first floor, his brother Shashikant was allotted a building in the rear portion of property No. 215. His two brothers Vijay and Shravan were given shares in the open space. One brother who was not mentally sound, was not given any share in the property but, instead, an amount of Rs. 7,000/- was kept in fixed deposit. According to the plaintiff he was an ex-serviceman and as all the property that had been allotted to his share was in the occupation of the tenants, he was entitled to recover possession of the same.

4. The defendants in all the suits denied the claim of the plaintiff. According to them the partition of the property set up by the plaintiff was bogus and a device to obtain possession. Further, according to them, the plaintiff was not entitled to apply as a landlord u/s 13A-1 of the Bombay Rent Act as he had not become owner of the property while he was in service. Tenant Panse denied that he had kept the premises locked for more than six months prior to the suit or that he had shifted his residence. The defendants even denied that the plaintiff was at all in service of the Navy. They contended that the plaintiff did not need any accommodation for himself and he had no dependents on him. On the other hand, if the claim of the plaintiff was allowed, they, as tenants, would suffer a great hardship. They therefore, prayed that the suits may be dismissed.

5. Since the questions arising in the suits were common and the dispute related to the premises in the same building, the trial of the suits was consolidated and the evidence was recorded in common. The learned trial Judge framed 8 Issues, the material Issues being Issues Nos. 1 and 2. After considering the evidence, the learned trial Judge held that the plaintiff was proved to be a landlord and owner of the suit premises; that he required the premises bona fide for his own occupation (for which he relied on the certificate) and that the plaintiff was entitled to possession of the premises. As far as Panse is concerned, the learned trial Judge held that the said tenant had not used the premises in his occupation for the purpose for which they were let to him for a continuous period of six months immediately preceding the date of the suit. Consequently, the learned trial Judge decreed the suits.

6. Aggrieved by the decrees of the trial Court, 9 of the tenants preferred appeals before the learned District Judge, Pune. One of the tenants did not prefer any appeal and the decree had become final as far as he is concerned. It relates to one room on the first floor. Name of that tenant is Narbekar. The learned District Judge did not agree with the findings of the trial Court and reversed the decrees in all the nine appeals that were preferred before him and dismissed the suits. The learned District Judge inter alia held that the plaintiff was not the landlord in respect of the premises of the tenants at the time of filing of the suits, that he was not landlord entitled to take advantage of the provisions of Section 13A-1 of the Bombay Rent Act, that the plaintiff had failed to prove bona fide requirement for occupation of himself and members of his family in respect of the premises concerned in the various suits and that he was required to prove his bona fide requirement independently of the certificate obtained by him u/s 13A-1(a)(i) of the Bombay Rent Act, that the plaintiff has failed to prove that tenant Panse was liable to be evicted u/s 13(1)(k) of the Bombay Rent Act and that the plaintiff was not consequently entitled to possession.

7. Against the decision of the learned District Judge allowing the appeals, the plaintiff filed nine separate writ petitions in this Court. The present petitions are from that group. The other five petitions were Writ Petition No. 3571 of 1981 (against Dattatraya Mahadeo Salvi); Writ Petition No. 3572 of 1981 (against Smt. Jankibai R. Upadhye); Writ Petition No. 3573 of 1981 (against Smt. Parvati Mahadeo Tikone); Writ Petition No. 3574 of 1981 (against Shri Kashinath Bhiku Solwadekar) and Writ Petition No. 3576 of 1981 (against Smt. Kamalabai Sakaram Shah). All these five writ petitions were withdrawn by the petitioner on 13-4-1982. As common questions of law arise in all these four matters and as they were tried together, we are inclined to dispose of all these petitions finally by this common judgment.

8. In the light of the questions indicated by the learned single Judge in his referring order and the other contentions raised before us by the learned counsel appearing for the parties, the following questions arise for our consideration : --

(1) Whether the person who is a member of the joint Hindu family while in

Explanation 2. -- For the purposes of this section, any certificate granted thereunder shall be conclusive evidence of the facts stated therein."

The essential requirements of Clause (a), therefore, are that (a) the landlord is a member of the Armed Forces of the Union or was such a member and has duly retired and (b) he bona fide requires the premises in occupation of the tenant for occupation by himself or any member of his family. Only a person satisfying these requirements is entitled to apply under these provisions. Such a person has to produce the requisite certificate also. The word "landlord" occurring in the section has to be understood with reference to the definition of that expression contained in clause (3) of Section 5 of the Bombay Rent Act (hereafter referred to as "the Act"). "Landlord", according to the said definition, means :

"(3) "landlord" means any person who is for the time being receiving, or entitled to receive rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant, and includes any person not being a tenant who from time to time derives title under a landlord; and further includes in respect of his sub-tenant, a tenant who has sub-let any premises; and also includes in respect of a licensee deemed to be a tenant by Section 15A, the licensor who has given such licence".

10. It is contended by Shri Bhonsale on behalf of the petitioner that there is no dispute that the petitioner is an ex-serviceman and that the property was joint family property. He submits that the petitioner acquired a right by birth in the said joint family property as a coparcener and thus was a landlord being a co-owner. Therefore, although after the partition effected after he retired from service he became the exclusive owner of the share in the property that was allotted to him, nevertheless he was a landlord entitled to apply u/s 13A-1 and inasmuch as he has duly obtained the requisite certificate and had terminated the tenancy of the tenants by notice, the learned trial Judge and rightly decreed the suits and the learned District Judge has committed an error in assuming that the petitioner could be regarded as having become owner of the property only after partition.

11. Shri Dalvi, the learned counsel for the tenants, has submitted that the petitioner must be deemed to have acquired title to the property in the suit only after he retired from Naval service, by partition and he was not thus a landlord within the meaning of Section 13A-1 and could not apply for recovery of possession, and, therefore, the learned District Judge has rightly dismissed his claim. The learned counsel submitted that at the time when the petitioner retired from service, it was the joint Hindu family, who was owner and landlord and the plaintiff (petitioner) cannot take advantage of that situation for the purpose of filing the suit.

12. A reference was made to certain decisions on the point. The first decision, to

which our attention is invited, is in the case of *Bhanu Aththayya v. Commdr. Kaushal* (1979) 2 Ren CJ 338. It is a Division Bench decision of this Court in which it was held that a member of the Armed Forces and who was such a member and is duly retired, will be entitled to evict the tenant u/s 13A-1, if he was a landlord as such qua the tenant at the time of retirement. Shri Dalvi argued that as the petitioner acquired title only in March 1976 under the so-called partition, he was not the landlord qua the tenants at the time of his retirement which was much earlier in 1970 and, therefore, he was not entitled to eject the tenants u/s 13A-1. Next, our attention was drawn to the decision in the case of *Sushilabai Vasudev v. M. S. Dhillon* 1979 Mah LJ 125 . That also is a Division Bench judgment of this Court to which one of us (Dharmadhikari, J.) was a party. It was held in that case that it is necessary that the relationship of landlord and tenant must be subsisting when the landlord was in the Armed Forces and after his retirement he wants to regain possession. In view of the ratio of that decision, Shri Dalvi argued that there was no relationship of landlord and tenant between the petitioner and the respondents subsisting when the petitioner was in Armed Forces, inasmuch as he became landlord after his retirement after the partition. A reference was also made to the Supreme Court Judgments in *Mrs Winifred Ross and Another Vs. Mrs Ivy Fonseca and Others*, ; and *Shivram Anand Shiroor Vs. Radhabai Shantram Kowshik and Another*, . In the first case an ex-member of the Armed Forces had acquired title to premises and had become its landlord after his retirement from the Army. After analysing the provisions of Sec. 13-A of the Bombay Rent Act the Supreme Court was pleased to observe that the essential requirement is that the person should have leased out the building while he was a member of the Armed Forces. It was held that an ex-member of the Armed Forces who has acquired title to the premises in question and became its landlord after he has retired from Army Service cannot maintain a suit for possession of the premises from the tenant under Sec. 13A-1 of the Bombay Rent Act. The decision of this Court in *Sushilabai's* case 1979 Mah LJ 125 (supra) was cited with approval. It would be necessary to state briefly the facts of that case to understand whether the aforesaid ratio would be applicable to the facts of the present case. The plaintiff in that case had retired from Military service in the year 1967. The defendant was a tenant in a portion of the property. That portion was gifted to the plaintiff by Mrs. Winfred in 1977 apparently with the object of taking advantage of S. 13A-1 of the Act. The plaintiff then applied u/s 13A-1. It was in this background that Their Lordships considered the question as to whether a person who was formerly a member of the Armed Forces can recover possession of a building which was acquired by him after he had retired from the Armed Forces under S. 13A-1 of the Bombay Rent Act for occupation by himself or any member of his family and held as above. In the instant case the question is slightly different. Here, the plaintiff admittedly was a member of the Joint Hindu Family at the time when he retired from service although the partition in the family was effected after he retired from the service. The question that has therefore to be considered here is whether as a member of the joint Hindu family at the time of his retirement, the

plaintiff was a landlord and whether the premises had been let out to the tenants on his behalf while lit was in service. In paragraph 10 of the above judgment of the Supreme Court, Their Lordships did not express any opinion on the question as to whether a member of a retired member of the Armed Forces who acquires title to a building which is already in occupation of the tenant by inheritance, partition, transfer or otherwise and thus becomes the landlord of the building while he is a member of the Armed Forces, can avail of the remedy against such tenant under Sec. 13A-1 of the Act. Precisely, therefore, it was the contention of Shri Dalvi that when the petitioner acquired title by partition after he had ceased to be a member of the Armed Forces, he could not avail of the remedy against the tenant under S. 13A-1 of the Bombay Rent Act. He submitted that it must be construed that the petitioner had acquired title for the first time after his retirement. He laid emphasis on the words used in paragraph 10 of the judgment viz., "acquires title" and "becomes landlord of the building while he is a member of the Armed Forces". In the other judgment of the Supreme Court in Shivram Anand Shiroor Vs. Radhabai Shantram Kowshik and Another, , the question that arose was whether a member or retired member of the Armed Forces can recover possession of the premises under Sec. 13A-1 even if tenancy had commenced before he became landlord by inheritance, partition or other mode of transfer. It was held by the Supreme Court that S. 13A-1 enables a member or a retired member of the Armed Forces to seek eviction of the tenant under S. 13A-1 even if the premises were already in the occupation of the tenant when he became the landlord while being a member of the Armed Forces. In the instant case the joint family had let out various rooms to different tenants. The petitioner was a member of the joint family and was a co-owner. This is not a case where premises are let out before he had become a member of the family. He being born as a member of the joint family, there was no question of his having acquired title by inheritance, partition or by any other mode after the premises had been let out. In view of the above decision of the Supreme Court he was entitled to evict the respondents. Shri Dalvi submitted that on true interpretation of the provisions of Sec. 13A-1 of the Bombay Rent Act in the light of the aforesaid decisions of the Supreme Court, it must be held that the petitioner had acquired title as landlord for the first time after his retirement and therefore he was not entitled to take advantage of the provisions of Sec. 13A-1.

6th September, 1989.

13. The learned District Judge has recorded a finding that the plaintiff acquired interest in the property in question by birth because the property was a joint Hindu family property managed by his father as Karta, although Shri Dalvi suggested that even this finding can be successfully challenged he made his submission on the assumption that the property was joint Hindu family property. Having regard to the evidence of the plaintiff and his father on this point, we agree with the finding of the learned District Judge that the property was joint Hindu family property. Moreover, the fact that a partition was effected, suggests that until then property was joint family property. That being so, the plaintiff had

interest by birth in it and he was entitled to enjoy that interest with regard to the entire property so long as his share was not separated.

14. In the Full Bench decision of this Court in Radhabai Vs. State of Maharashtra and Others, , the word

"Partition" used in Sec. 38 of the Bombay Tenancy and Agricultural Lands Act, 1958 (Vidarbha Region) was explained thus :

"The word "partition" was not used in S. 38 in any special sense, much less in the sense "to acquire a right or title for the first time" in contradistinction with the redistribution of pre-existing rights or title. On the other hand, the subsection gives the indication that barring the case of surrenders which is separately dealt with in the Act, by the use of the words "transfer" and "partition", the legislature intended to exhaust all the various means by which any person could get a right or title in a legal way.

If the word "acquire" is assigned the more generic connotation, namely, that it means to receive or to come into possession of, then in the context of transfer or partition, that word can be given its full meaning without any violence to the language used. The proper construction of the amended section should be to read the word "acquired" in a wider sense which it is capable of bearing in the context of the addition of the words "or partition", and if so read, the whole meaning of the statute becomes clear."

It, therefore, means that when a right is acquired by partition, it is not a right necessarily acquired for the first time. It is merely crystallisation of a pre-existing right. Since the petitioner had a right by birth in the property as coparcener he was a co-owner of the property and he did not acquire for the first time any new right in the property by virtue of partition. All that the partition brought about was to confer upon him the exclusive right to the share that was allotted to him. Thus, to a portion of the joint family property he had already a right as a member of the joint family and when that right was crystallised in him after partition in a specific proportion that enabled him to make an application under S. 13A-1 as landlord. Such a person would fall within the definition of the word "landlord" given in Sec. 5(3) of the Bombay Rent Act. The definition contemplates a person who is entitled to receive rent in respect of the premises let to a tenant and includes a person who for the time being is receiving or is entitled to receive rent in respect of or for the benefit of any other person. It means that landlord need not necessarily be the same person who was collecting the rent for the time being from tenant. If Karta i.e. father of the petitioner was collecting rent on behalf of the joint family, it must be presumed that he was collecting rent on behalf of the coparceners including petitioner and in that sense the petitioner could be regarded the person entitled to receive rent in proportion of his interest in the property. Hence, in our view, the petitioner would be a landlord within the meaning of S. 5(3) of the Bombay Rent Act, and, therefore, also within the meaning of S. 13A-1, of the Bombay Rent Act.

15-16. As mentioned earlier, the Supreme Court in *Mrs Winifred Ross and Another Vs. Mrs Ivy Fonseca and Others*, had (in paragraph 10) left the question open as to whether a member or a retired member of the Armed Forces who acquires title to a building which is already in occupation of a tenant by inheritance, partition, transfer or otherwise and thus becomes the landlord of the building while he is a member of the Armed Forces can avail of the remedy against such tenant under S. 13A-1 of the Bombay Rent Act. It was argued by Shri Bhonsale that this question was subsequently decided in *Shivram Anand Shiroor Vs. Radhabai Shantram Kowshik and Another*, , where it was held as follows (at p. 789 of AIR) :--

"But we find it impossible on the plain language of S. 13A-1 to further read down the provisions as enabling a member or a retired member of the armed forces to recover possession of the premises only if he had himself originally let out the premises when he was a member of the Armed Forces and not if the tenancy had commenced before he became the landlord of the premises either by inheritance, partition, or any other mode of transfer of property. To place such an interpretation would be to virtually rewrite the provision."

After referring to the statements of objects and reasons it was observed that the words "regain possession" in the context are merely meant to convey "obtain possession".

17. This decision supports our view that the plaintiff was having interest in the property as a member of joint family by birth while he was in service and merely got his share separated by partition after his retirement. That fact does not come in the way of he being regarded landlord for the purpose of Sec. 13A-1 of the Bombay Rent Act. A partition in a joint Hindu family can be effected orally. So long as the partition does not take place, co-owner is entitled to enjoy the entire property in part or entirely. In our view, therefore, since it is found by the Courts below that the property in question was belonging to the joint Hindu family of which the plaintiff was the coparcener while he was in service, he is entitled to rely on the subsequent event of partition and seek to recover possession from the respondents u/s 13A-1 as the landlord.

18. Shri Dalvi contended that even in that case the tenants are entitled to challenge the so-called partition in order to show that the plaintiff was not the landlord on the date of the filing of the suit and it was the joint family which was the landlord and since the joint family has not come forward to recover possession from the tenants, the plaintiff could not maintain his action. In our view which we have taken that the plaintiff must be deemed to be the owner of the property as member of the joint family while he was in service, it would not be open to the tenants to dispute his competency to bring the action. This is not a case where the plaintiff has acquired a right in the property for the first time after he had retired from service. We, therefore, hold that the plaintiff was landlord qua the tenants (respondents) in these suits on the date of the filing of the suits and he could maintain the action under S. 13A-1 of the Bombay Rent

Act against them.

19. Next contention of Shri Dalvi on behalf of the respondents-tenants was that the tenants were entitled not only to challenge the genuineness of the partition but even the fact of partition having taken place. One aspect of this argument in connection with the capacity of the plaintiff as landlord to file the suit has been considered above. The question which has to be considered now is whether the tenants who are strangers to the family of the plaintiff could challenge the factum of partition. In that connection a reference to the decision in Arwindlal Bhukandas Shah Vs. Khandu Jaina Patil, , may be usefully made. It was held therein that :--

"A Court including Tenancy Court is not concerned with the reasons on amount of which partition is effected. It is, therefore, not necessary for the landlord to prove that the partition was made bona fide. All that is necessary for the Tenancy Court to find is whether the partition had really taken place. However, while deciding the question of bona fides, each case must be decided having regard to the circumstances of that case one of which may be the manner in which the partition is effected."

Two passages from a decision in Jankibai v. Namu, (1959) Spl. C.A. No. 3048 of 1958, decided on 4-9-1959 (unreported) were also noted and are relevant in the present context also:

"If a partition is made only in order to enable the landlord to obtain possession of his land from the tenant, it might in certain cases reflect on his bona fides." And

"Tenancy Act does not prevent members of a joint Hindu family from effecting a partition at any time they choose to do so."

Thus, there is difference between the fact of effecting a partition irrespective of its mode or manner and the question of bona fides in the context of which the fact of partition and the manner of the partition may be examined as relevant circumstances. In the above decision it was observed that under Hindu Law partition means severance of joint status. It consists of separation of shares of each member in the joint property and actual division of the property by metes and bounds is not necessary. Once shares are recognized, the partition is complete. That decision, no doubt, was rendered under the provisions of the Bombay Tenancy and Agricultural Lands Act, and not under the Bombay Rent Act, but as both Acts are pieces of beneficial legislation intended to protect the tenants, the same principle should govern the inquiry as to the bona fides of the landlord, when he seeks to eject his tenants under the Bombay Rent Act. We are, therefore, of the opinion that the evidence has to be separately considered to find out whether the factum of partition is proved or not and separately as regards bona fides of the plaintiff to obtain possession from the tenants on the ground of personal requirement and while considering the second question, it would be relevant to consider the manner in which the partition is effected and to find out whether it was genuine or made with a view to defeat the rights of the

tenants.

20. As far as the factum of partition is concerned, the learned trial Judge held that the father of the plaintiff partitioned the property and after rejecting the contention of the defendants that there could be no oral partition, he came to the conclusion that the partition was effected and consequently the plaintiff had become the landlord of the premises. The learned District Judge took a contrary view and held that if the alleged partition was for the purpose of ulterior motive, the Court is not bound to recognise it as genuine one. In substance, he negatived the partition in order to hold that the plaintiff was not the landlord within the meaning of Sec. 13A-1 and could not file the suits. It appears to us that the learned District Judge has confused the two aspects of the matter viz., the factum of partition and its relevance for determination of bona fides and has disbelieved the partition under a wrong notion. The learned District Judge has referred to the evidence of the plaintiff and his father and the mutation entries effected on the application of the father. The plaintiff in his evidence deposed that House No. 215 was partitioned orally and the partition was effected by his father. He has spoken about the shares allotted to himself and his brothers and further stated that the father had retained four rooms for himself. An amount of Rs. 7,000/- was kept in the bank in lieu of the share amount of one of his brothers, who was a lunatic. In the cross-examination it has come out that according to him the relations between him and his father were strained since 1972, so also relations between his father and other brothers had become strained. The father of the plaintiff has also been examined and he has deposed that on 28-1-1976 an oral partition of the house property was effected by him between himself and his sons in the presence of two persons viz., Bhausaheb Dhange and Appasaheb Machale. However, none of these two persons has been examined. He further deposed that after the marriage of his son Shashikant in 1972 there were quarrels between him and Shashikant. He also deposed about the shares allotted to his sons and to himself.

21. Reliance was placed on mutation entry Exh. 73. That shows that the father of the plaintiff had applied to the City Survey Officer, Pune, for entering the names of his sons as owners in respect of their shares in the property. In the application it was stated that the partition was effected on 28-1-1976 between the family members and each one of the persons was in Vahiwat of his respective share on that day and accordingly mutation entries may be made. Evidence of the plaintiff and his father together with mutation application which was duly certified by the City Survey Office is sufficient to establish that oral partition was effected between the family members and in accordance therewith mutation was effected in the concerned records. Now it has been argued by Shri Dalvi that whereas in the application for change in mutation the father has given date of partition as 28-1-1976, in the plaint the plaintiff has given the date of partition as 22-3-1976 and that shows that there was in fact no partition effected at all. It is true that the plaintiff has mentioned the date as 22-3-1976, but the plaint shows that he has also mentioned therein that the mutation entry was effected on that date.

That means that the plaintiff is treating the date of effecting mutation as effective date of partition. That does not necessarily destroy the evidence of the father that the oral partition was effected earlier on 28-1-1976. The evidence, therefore, establishes that the partition was effected between the family members and the suit premises were allotted to the share of the plaintiff and to that extent the conclusion of the learned District Judge does not appear to be correct.

22. Shri Dalvi next raised an ingenious argument that a period of limitation for making an application under S. 13A-1(a) of the Bombay Rent Act must be implied from the provisions of Cl. (b) of the Section. That period, according to him, ought to be a period of five years. He submitted that the clauses (a) and (b) must be read together to gather this result. To appreciate this line of argument of the learned Counsel, clause (b) of S. 13A-1 requires to be extracted, which reads as below:-- "(b) Where a member of the Armed Forces of the Union dies while in service or such member is duly retired as stated above and dies within five years of his retirement, his widow, who is or becomes a landlord of any premises shall be entitled to recover possession of such premises, on the ground that the premises are bona fide required by her for occupation by herself or any member of her family (which term shall include her or her husband's parents or other relation ordinarily residing with her); and the Court shall pass a decree for eviction on such ground, if such widow, at the hearing of the suit, produces a certificate signed by the Area or Sub-Area Commander within whose jurisdiction the premises are situated to the effect that --

(i) she is a widow of a deceased member of the Armed Forces as aforesaid;

(ii) she does not possess any other suitable residence in the local area where she or the members of her family can reside."

Plain reading of the said provision shows that where a member of Armed Forces dies within a period of five years of his retirement, only his widow will be entitled to recover possession on the ground of bona fide requirement as landlord from the tenant. It is argued that if such a person does not die within a period of five years after his retirement, the widow has no right to recover possession. It is therefore submitted that the intention of the legislature was to keep open special remedy under S. 13A-1 for ex-servicemen for a period of five years after his retirement. If he survives during that period no such application would be permissible if made after a lapse of five years from the date of retirement. In the instant case it is pointed out that the plaintiff retired from service on 26-11-1970 and the notice to quit was served on the tenants on 8-5-1976 and the suits were filed on 10-6-1976 i.e. after the lapse of the period of five years after his retirement and, therefore, his suits may be held to have been barred by limitation.

23. Shri Bhonsale in reply argued that no such period of limitation can be implied in sub-section (a) as the said Section does not prescribe any period of limitation,

nor any such period of limitation can be implied from any of the provisions of the Act, and, inasmuch as clause (b) must be construed to have been incorporated for protection of widows only and none else, it has no bearing on the right of the person to apply during his lifetime. In other words his submission is that a member of the Armed Forces of the Union who has duly retired from service may make an application at any time even after lapse of period of five years after retirement if he bona fide requires the premises for his personal occupation. The question raised by Shri Dalvi undoubtedly requires consideration but we think it is not necessary to do so in the present proceedings because even if a period of limitation is to be implied, it cannot be implied retrospectively. Even where a period of limitation is prescribed ordinarily it can have application only from the date on which the provision is introduced in the Act or cause of action is afforded by the statute. Section 13A was brought on the statute book on 25-10-1975. It is not retrospective in operation. We, therefore, do not express any final opinion on this question in these proceedings. However, we do not agree with Shri Dalvi that the suits ought to be deemed to have been barred by limitation in the absence of any provision in the law prescribing a period of limitation.

24. Shri Dalvi then raised a contention which, really speaking, is in the nature of a preliminary objection. He submitted that the plaintiff had filed in all ten suits against ten different tenants in respect of eleven rooms in occupation of the respective tenants. All the suits were decreed in his favour but only nine tenants preferred appeals and the decree in respect of one room became final. Learned District Judge allowed all the nine appeals and therefore the plaintiff had filed in all nine writ petitions in this Court and five of them were withdrawn by the plaintiff. Consequently, as a matter of propriety, these (i.e. present) writ petitions also ought to be dismissed for, in the event of this Court taking a different view and reversing the decision of the learned District Judge, then there will arise a conflicting situation under which some of the tenants will face ejectment, whereas, others will not, and such a situation should be avoided. Shri Dalvi drew our attention to the decision in *Ramchandra Kashiram Neharia v. Narayanda*'s 1982 Mah LJ 354. In that decision it was said that where an earlier petition was disposed of by an order "rejected" it puts a finality to the decisions given by the lower Courts.

25. What we find, however, is that the ratio of this decision is not applicable to the present case. These are different defendants and not the same parties against whom the writ petitions were withdrawn earlier. Moreover, the question of res judicata does not arise as there was no decision on merits. Similarly those petitions were withdrawn and not rejected. The fact of withdrawal may mean that the plaintiff has acquiesced in the decree of the District Judge, so far as those matters are concerned yet he has very much kept alive the present petitions and the present respondents cannot run away from that fact. Moreover, in the absence of any speaking order having been passed as those petitions were simply withdrawn, it is difficult to say that the learned Judge was not satisfied that in the present petitions no question arose which called for consideration by

this Court. Moreover, in connection with the petitions under Article 226 of the Constitution of India the Supreme Court in *Daryao and Others Vs. The State of U.P. and Others*, , clearly held that :

"if the petition is dismissed in limine without passing a speaking order, then such dismissal cannot be treated as creating a bar of *res judicata*."

It was also observed that :

"If the petition is dismissed as withdrawn, it cannot be a bar to subsequent petition under Article 32 because in such a case there has been no decision on merits by the Court."

A similar view has been taken in the case of *P.D. Sharma Vs. State Bank of India*, , It was held therein that the order summarily dismissing the writ petition was not a speaking order hence no question of *res judicata* could arise. We are, therefore, inclined to reject the submission of *Shri Dalvi*, since, in our view, the withdrawal of the other petitions cannot be regarded as a decision on merits affecting the merits of the present case.

26. Before proceeding to consider the bona fide requirement of the plaintiff we may dispose of the additional ground on which the plaintiff sought to recover possession from the tenant *Kanderao Panse* concerned in Writ Petition No. 3569 of 1981 under S. 13(1)(k) of the *Bmbay Rent Act*. The learned trial Judge held on Issue No. 3 that the plaintiff had proved that the said defendant was not using the premises in his occupation without reasonable cause for the purpose for which the same were let to him for a continuous period of six months immediately preceding the date of the suit. For arriving at that conclusion he relied on the circumstances that since last two years there was no consumption of electricity in the suit premises as the bills were nil. Secondly, the defendant was serving in a private company and had retired and had no source of income and was, therefore, dependent on his son. The learned trial Judge believed the evidence that the said defendant was residing with his son during the period of two years at different places and consequently held that he was not using the suit premises for the purpose of his residence. The learned District Judge, however, took a contrary view and came to the conclusion that the fact that the electricity bill was nil from August, 1976 did not mean that electricity consumption was nil during six months or more before filing of the suit. He further held that even assuming that he was residing with his son, that was only a temporary shifting to the place of his son for good reason viz., that the wall of the premises had fallen down. He also expressed doubt whether the plaintiff deposed to his personal knowledge about user of the premises or otherwise by the tenant during the period of six months before the date of filing of the suit because the evidence shows that the plaintiff had come to Pune only for few months in the year 1976 and a few months in the year 1977. The learned District Judge found that the evidence on the point was not quite convincing and was insufficient to hold against the tenant. We are not inclined to interfere with this

finding of the fact recorded by the learned District Judge on appreciation of the evidence on record relating to the said question.

27. That brings us to the question of bona fide requirement of the plaintiff to recover possession of the premises in occupation of the different tenants concerned in these petitions. The learned Judge of the trial Court answered Issue No. 2 relating to the bona fide requirement of the plaintiff in the affirmative. The learned trial Judge has placed very strong reliance on the certificate Exhibit 33 produced by the plaintiff as required under S. 13A-1 duly signed by the Vice Admiral, Flag Officer Commanding-in-Chief, Western Naval Command. The certificate mentions that the plaintiff does not possess any other suitable residence in the local area where he or the members of his family can reside. The learned Judge held that the production of the certificate in compliance of the requirements of the Act is sufficient for the Court to pass a decree for possession. He treated the certificate as conclusive proof about the bona fide requirement of the plaintiff and took a view that it was not open to the tenants to challenge the said certificate. The learned trial Judge also negated the contention of the tenants that greater hardship would be caused to them by eviction than by refusal to grant relief to the plaintiff. The learned District Judge on the other hand took the view that the plaintiff had failed to prove his bona fide requirement.

28. What we find is that the findings of both the Courts below on this question are not arrived at on proper consideration of the question and the evidence in that respect. So far as the finding of the learned District Judge is concerned, as noted earlier, his approach was over-shadowed by the consideration that the partition was set up by the plaintiff as a device to evict the tenants. Although he has referred in extenso the evidence given on behalf of the plaintiff (petitioner), he has not in a convincing manner dealt with the said evidence. He has observed that there was no attempt to see that all sons got equal shares. Similarly, he stated that no share was given to the plaintiff's mother. Then he noted that the father had not taken any steps to evict the tenants if the premises were reasonably and bona fide required under S. 13(1)(g) of the Bombay Rent Act between 1970-1976 in order to secure accommodation for a family member. The factor which weighed most with the learned District Judge was that the partition was set up solely with a view to take advantage of the provisions of S. 13A-1 and oust the tenants and if that were not the motive, the whole of the building, which was in possession of the tenants would not have normally been allotted to the share of the plaintiff alone as an ex-serviceman. He also stated that it would have been quite natural for the plaintiff to say that he and his brothers are somehow residing in a limited accommodation of four rooms and he has decided to live separately and therefore he wants accommodation or a part of it which is in possession of the tenants. The learned District Judge has further observed that he was of the view that the alleged partition being only a device for the purpose of serving some ulterior motive, the Court is not bound to recognise it as genuine case. On going through the evidence we find that it is not quite correct to say

that no explanation was offered in the evidence by the plaintiff and his father as to why no share was given to the mother. Moreover, although the learned District Judge notes that the share allotted to the brother of the plaintiff, Shashikant, in another part of the building was presumably the premises in possession of the tenants, yet he proceeds on the assumption that the motive behind allotting the suit premises to the share of the plaintiff was solely to take advantage of the provisions of S. 13A-1, he being an ex-serviceman. We find that the finding of the learned Judge on this aspect, therefore, cannot be confirmed without substituting the same by reappreciation of the evidence on that aspect. Hence, we are inclined to remand the matter to the trial Court for re-examining the question of bona fides. We are also persuaded to do so because certain subsequent events have been brought to our notice on either side and some material is also pointed out to us to show that the plaintiff would be able to prove that the premises allotted to the share of Shashikant were also tenanted premises, and therefore, the partition was not a device put forth to evict the tenants. In this connection Shri Bhonsale urged that the provisions of S. 13A-1 are in the nature of an explanation to the general provisions of Sec. 13 of the Bombay Rent Act and the object of the legislature was to confer certain benefits on ex-servicemen having regard to the objects and reasons for which the said provisions were introduced in the Act. He, therefore, submitted that degree of bona fide requirement that is contemplated by Sec. 13A-1 could be nothing more than production of the certificate from the proper authority prescribed under the said provision certifying that the plaintiff was a duly retired ex-serviceman and he did not possess any other suitable residence in the local area where he or members of his family can reside. Shri Bhonsale submitted that the plaintiff has produced the certificate Exh. 33 which should be regarded as conclusive evidence in view of Explanation (ii) to S. 13A-1 to show that he has no other suitable residence coupled with the evidence that he is in fact living in a temporary shed. He submitted that there was nothing further required to be shown by him to establish his bona fide requirement. This submission is based on sub-section (a) of S. 13A-1 of the Bombay Rent Act which says --

"(a) x and the Court shall pass a decree for eviction on such ground if the landlord, at the hearing of the suit, produces a certificate signed by the Head of his Service or his Commanding Officer x as prescribed."

The learned Counsel therefore submitted that once the certificate was produced it conclusively establishes that the plaintiff is an ex-serviceman and that he does not possess any other suitable residence and no further bona fide requirement is required to be shown. As a certificate has been produced, the bona fide requirement must be held proved and no further enquiry is called for. It is, however, not possible to accept this contention because in *Shivram Anand Shiroor Vs. Radhabai Shantram Kowshik and Another*, , the Supreme Court has clearly said thus (at pp. 788-89 of AIR) :

"Notwithstanding the expressed legislative bias in favour of the tenant, the legislature itself made a serious departure from the general rule so as to lean in favour of landlords who are or were members of the armed services, and who because of the exigencies of their service were not able to occupy their own premises during the course of their service. Section 13A-1 was enacted relaxing the rigour of a Sec. 13 in favour of landlord who is or was a member of the Armed Forces. It is now provided that if he produces a certificate in the manner prescribed it shall be taken as established without further proof that he is presently a member of the Armed Forces of the Union or that he was such member and is now a retired ex-serviceman and that he does not possess any other suitable residence in the local area where he or any member of his family can reside. All that he has to further prove is that he bona fide requires the premises for occupation by himself or any member of his family. The certificate is conclusive proof that he does not possess any suitable residence in the local area, but not that he bona fide requires the same for occupation by himself or any member of his family. There may be cases where he does not possess any other suitable residence in the local area and yet he does not bona fide require the premises for occupation by himself or any member of his family, being comfortably settled elsewhere with no need to pressure to move. But so soon as he establishes that he bona fide requires the premises for occupation for his family, he is entitled to recover possession and does not have to further prove that greater hardship would be caused to him than to the tenant if a decree for possession is not granted."

It was stated across the bar by Shri Bhonsale that the plaintiff is now married and has also got a child. It must be remembered that it was the plaintiff's case at the trial that although he intended to marry, he was unable to get married for want of suitable residential accommodation and that was one of the grounds for his seeking recovery of possession of suitable premises. In this Court the plaintiff relied on an additional affidavit dt. Nov., 1988 in which he has reiterated his need for suit premises for himself and has alleged that some of the tenants have secured alternative accommodation. On their part the respondents have put in affidavits-in-reply to the said affidavit. These affidavits have been made in the year 1989. Tenant Govind has raised a contention in his affidavit that the brothers of the plaintiff have never stayed with the petitioner; the petitioner is already in occupation of two rooms in the other building in the rear which have been allotted to Shashikant in the family partition and therefore the plaintiff does not need any additional accommodation. Similarly he has stated that one of the tenants has already vacated the room and that is now available to the plaintiff. Tenant Govind in his affidavit denied that he has purchased any flat at Kothrud as alleged by the petitioner and tenant Chhagan Dhamdhare also has denied that he has acquired another accommodation. These are allegations and counter-allegations made by the parties against each other after the petitions were filed in this Court. Subsequent events however can be taken into account in order to determine the question of bona fides. (See Variety Emporium Vs. V.R.M. Mohd.

Ibrahim Naina,).

29. Since we are inclined to remand the matter for fresh trial on the issue of bona fide requirement, in the interest of justice, we allow the parties to adduce such further evidence as they may desire, after amending the pleadings to introduce subsequent events as part of their pleadings. The tenants will be entitled to rely on the circumstances as they may be able to bring before the Court to show that the partition of joint family property of the Plaintiff was sham and was not bona fide. They may also rely on the grounds on which reliance was placed at the trial as well as at the time of arguments in this Court. The Plaintiff will also be entitled to adduce such further evidence as he is advised to adduce after amending the pleadings and if necessary to introduce subsequent events in the pleadings and to rely on such of the grounds as were raised by him at the trial as well as argued before us. An Affidavit was sought to be produced on behalf of the plaintiff by his brother Shashikant to show that the premises allotted to him were also tenanted premises. The Plaintiff is at liberty to adduce evidence on that point before the trial Court. The trial Court shall bear in mind in deciding this question as to whether the space now available to the Plaintiff is sufficient for him if he is married by now, his future needs as also whether any of the tenants has secured alternative accommodation if such a plea is raised. He shall also bear in mind the observations of the Supreme Court in Shivram's case (supra) quoted above in paragraph 28 and also shall have regard to any other relevant circumstances as may be placed before him by the parties.

30. In the light of above conclusions reached by us, we find the views expressed by the learned single Judge in his referring order to be in conformity with our own views on questions 1 and 2 formulated by us. Our answers to both these questions is in the affirmative. We do not express by opinion on question No. 3. On question No. 4 our view is that where a petition is simply rejected or withdrawn, it does not bar another petition by the same party but against different opponents. On question No. 5 we are of the view that mere production of certificate u/s 13A-1 is not enough and bona fide requirement for personal occupation is still required to be independently proved, hence it is necessary to remand these matters.

31. In the result, Rules are made partly absolute in all these four Writ Petitions. The Judgements and Decrees of both the Courts below are set aside and the suits are remitted back to the trial Court for fresh trial in accordance with law and with due advertance to the observations made hereinabove in this judgment.

32. In the circumstances of the case there will be no order as to costs.

33. As the suits are of the year 1976, the learned trial Judge will dispose of the suits as expeditiously as possible.

34. Order accordingly.