

(2005) 07 BOM CK 0033

In the Bombay High Court

Case No : W. P. No's. 1593 of 1988 and 56 of 1989 with C.A. No's. 589 of 1992 and 101 of 1996

Ramchandra Madhav Darunkar (died) by his LRs. Kalwati Darunkar and Others

APPELLANT

Vs

Abdul Sattar Ismail (deceased) through his LRs. Banubai Abdul Sattar and Others

RESPONDENT

Date of Decision : 20-07-2005

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(3), 13(1), 5(11), 5(11)(c), 5(8)

Constitution of India, 1950 — Article 226, 227

Partnership Act, 1932 — Section 4, 6

Citation : (2006) 1 ALLMR 724 : (2006) 2 BomCR 205 : (2006) 1 MhLj 41

Hon'ble Judges : A.B. Naik, J

Bench : Single Bench

Advocate : R.N. Dhorde, instructed by V.S. Bedre, in W.P. 1593 of 1988 and V.J. Dixit, in W.P. 56 of 1989, for the Appellant; V.J. Dixit, for respondents 1(a-i), 1-a(ii) and 1-c, 2-a, 3(a) to 3(g) and 4 in W.P. 1593 of 1989 and R.N. Dhorde, instructed by V.S. Bedre, for respondents No. 1-A, 2, 3A to 3C, 4 and 5 in W.P. 56 of 1989, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Naik, J.—These two Writ Petitions filed by the defendant and plaintiff respectively, feeling aggrieved by the judgment and order dated 30th June, 1988 passed by the learned 3rd Additional District Judge, Ahmednagar in Regular Civil Appeal No. 415/1986. The appeal arose out of the judgment and decree dated 4-8-1986 passed by the 4th Joint. Civil Judge. J.D. Ahmednagar in RCS No. 662/1976, which arose on the following facts.

2. The petitioner No. 1A is the heir of deceased defendant in Writ Petition No. 1593/1988 whereas the petitioner Nos. 2 to 5 are original defendants Nos. 2 to 5. They will be referred to as their original status as "defendants". The

petitioners in Writ Petition No. 56/1989 are the heirs of original plaintiff. They will be referred to as "the plaintiff. The plaintiff is the owner of House bearing No. 2418; City Survey No. 1146 situated at Ahmednagar (proper) (hereinafter referred to as "the suit premises"). It is the case of the plaintiff that the suit house was let out to defendant No. 1 on a monthly rent of Rs. 26/- which started according to English calender. It is averred by the plaintiff that there was an agreement between the defendant and plaintiff to pay the rent every month regularly and, failure to do so, the defendant should vacate the suit house and hand over the possession of the same to the plaintiff. It was contended that the defendant No. 1 committed default and stopped payment of rent since January, 1968. After 31st August, 1985, the accumulate rent was Rs. 2,392/-. Thereafter the rent was demanded by the plaintiff, however, the defendant on false pretext delayed the payment and ultimately refused to pay the same. It is further contended that the defendant No. 1 is not using the premises for the same purpose for which it was let out. It was contended that defendant No. 1 has sublet the premises to defendant No. 2 to 4 and recovering exorbitant rent from them, thereby making profit out of it. It is further claimed by the plaintiff that the defendant No. 1 has many premises of his own, at Ahmednagar for carrying on his business but, without vacating the suit house, he continued to occupy the same and thus, the defendant committed breach of the agreement and law and, as such, he has no right to remain in possession of the suit house. It was contended by the plaintiff that his sons are grown up and educated but are unemployed and the suit house is required for them to start the business of their own and thereby to earn livelihood. As such, the suit premises is required by the plaintiff for bona fide use. It is contended that the plaintiff and his family members are residing in rented house which is not sufficient to meet their need. It is contended that if eviction of defendant is ordered. No prejudice or hardship will be caused to him; however, if the decree is denied, it will cause greater hardship to the plaintiff.

3. It is also contended that the defendant has erected a structure on the suit premises, that too without prior permission or consent of the plaintiff. The defendant has illegally constructed on the premises and that construction portion is being used as godown. It was contended that prior to erecting of the structure, no prior permission was sought from the plaintiff nor from the Municipal Council. It was contended that the Municipal Council filed a case against the defendant for unauthorized construction. It was also averred that the conduct of defendant is troublesome, his behaviour is not proper due to which his occupying the suit premises, has become a great nuisance to the plaintiff.

4. The plaintiff, on 4th September, 1975 gave a notice to the defendant terminating the tenancy and demanded possession from him with effect from 30th September, 1975 and called upon him to pay the arrears of rent. In spite of notice being served, the defendant did not hand over the vacant possession nor remitted the rent as such. Therefore, the plaintiff on 12th October, 1976 filed the suit for eviction of defendant claiming possession of the suit house and an

amount of Rs. 337/- as against the arrears of rent, and also claimed damages/ compensation for use and occupation of the premises from the defendant, from the date of suit till the date of possession.

5. On receipt of the plaint, the learned Civil Judge issued summons to the defendant, who appeared in pursuance of the same. The defendant No. 1 filed his written statement (Exh.10) and denied all adverse contentions which are raised by the plaintiff. He contended that he has obtained the suit premises on a monthly rent of Rs. 26/-. The rent which is being paid, being an excess rent and it is not a standard rent. He contended that a bona fide dispute regarding standard rent is raised. He contended that from time to time he paid the rent and, as such, he is not in arrears of rent. He contended that he is ready and willing to pay the rent to the plaintiff. He denied the claim of the plaintiff that he is not using the suit premises. He denied that he has sub-let the suit premises and inducted subtenants on the same. He contended that there was partnership with other defendants since long and as the partners of the firm, other defendants are occupying the suit premises. He denied the claim put forth by the plaintiff that the defendant has inducted sub-tenants. He denied the claim put forth by the plaintiff for possession of the house on the ground of personal bona fide requirement. He contended that the plaintiff is in possession of residential and commercial premises and the premises which are in his possession, are more than sufficient. He contended that the suit house is not required by the plaintiff for the business of his sons. He contended that the bona fide need of the plaintiff being illusory, and created only to obtain possession from the defendant. He contended that the suit premises is situated within the market area and defendant No. 1 being old tenant, it will not be possible for him to secure another premises as there is acute shortage of premises in the area where the suit premises is situate. He contended that if the decree is passed greater hardship will be caused to the defendant than the plaintiff.

6. As regards illegal construction, he contended that the construction which is alleged is made many years back and that construction is not of permanent nature, as alleged.

7. The other defendants though not filed separate written statement, but they filed pursis (Exh.11) thereby adopting the written statement of defendant No. 1.

8. On the basis of the rival pleadings, the learned Civil Judge on 28th June, 1979, has framed as many as 12 issues which read as follows :

- (1) What is the standard rent of the suit premises?
- (2) Do plaintiffs prove that defendant No. 1 has neglected to pay rent for more than six months from 1-1-1968?
- (3) Does defendant No. 1 prove that he was ready and willing to pay the standard rent to the plaintiffs?
- (4) Do plaintiffs prove that defendant No. 1 has sub-let the suit premises to

defendant No. 1 to 5 without their consent?

(5) Do plaintiffs prove that they bona fide and reasonably require the suit premises for personal use and occupation?

(6) To whom greater hardship will be caused by passing the decree of eviction than by refusing to pass the same?

(7) Do plaintiffs prove that defendant No. 1 has made permanent construction in the suit premises without their consent?

(8) Do plaintiffs prove that the defendant No. 1 is guilty of causing nuisance annoyance?

(9) Whether the suit notice dated 4-9-1975 is valid?

(10) Are plaintiffs entitled to get possession?

(11) What is due to the plaintiffs from defendants?

(12) What order and decree?

9. The plaintiff, in support of his claim to seek eviction from the defendant, has examined as many as 11 witnesses and produced documentary evidence, in addition. However, in sharp contrast, the defendant No. 1 himself stepped into the witness box and examined himself as the witness for the defendant. Number of documents were produced by the parties which include the sale deed, the earlier decree etc. In all the plaintiff produced 30 documents; whereas the defendant has produced eight documents.

10. The learned Civil Judge, having considered the pleadings, the evidence laid and the contentions canvassed, instead of answering the each issue separately, took up all the issues together and decided the suit, by answering the issues. He determined standard rent of the suit premises at Rs. 26/-. So far as default in payment of rent by the tenant is concerned, the learned trial Judge held in favour of the plaintiff, inasmuch as he held that the defendant is not ready and willing to pay the standard rent. On the point of subletting the trial Judge accepted the claim of the plaintiff and held that the defendant No. 1 has subletted the premises to other defendants, without consent of the plaintiff. The learned trial Judge also recorded the finding that the plaintiff has established that he requires the suit premises for personal bona fide requirement for his personal use and occupation. As regards, finding on bona fide requirement, the learned trial Judge proceeded to consider the question of hardship and recorded a finding that if decree is refused, then greater hardship will be caused to the plaintiff. The learned trial Judge also accepted the contention of the plaintiff that the defendant has erected permanent structure, without prior permission of the plaintiff. He also accepted the claim of the plaintiff about the nuisance caused by the defendant and by recording abovesaid findings, he held that the plaintiff is entitled for possession of the suit house, and directed the defendants to hand over the vacant possession of the suit premises and also directed the plaintiff to

recover the arrears of rent from the defendant. Accordingly, the learned trial Judge by his judgment and order dated 4th August, 1986 decreed the suit.

11. Before proceeding the other aspects of the matter, one aspect is to be noted, at this stage, after judgment and order dated 4th August, 1986, the defendant No. 1 died on 22nd September, 1986, and the appeal against the judgment and decree came to be filed on 20th October, 1986. Along with the Application (Exh.7) for bringing heirs of deceased defendant No. 1 on record as the defendant No. 1 died after the decree and before filing of the appeal, application i.e. (Exh.7) was filed by the widow of deceased defendant No. 1, showing her as heir and legal representative of deceased defendant No. 1. On perusing the record and proceedings of the Appellate Court, it is revealed that the learned Appellate Court did not call any say from the plaintiff on Exh.7 and entertained the appeal filed by the heir of defendant No. 1 and other defendants and ordered to issue notice to the plaintiff on 25th October, 1986. The reason for stating this fact at this stage is that the learned Counsel Shri V.J. Dixit, appearing for the plaintiff, has raised a contention that as the suit premises was let out for business purpose, the widow of defendant No. 1 is not carrying on business and, as such, she is not entitled to continue the proceedings and to occupy the premises as tenants i.e. heirs of original tenant. This contention is raised for the first time in the petition. This contention will be considered by me, at the appropriate stage after I consider the other contentions of the learned Counsel including the contention raised by Shri R.N. Dhorde, learned Advocate by Shri V.S. Bedre, for the defendant, regarding maintainability of the suit in the present form.

12. Reverting back to the narration of facts, the appeal was heard by the learned 3rd Addl. District Judge, Ahmednagar (for short "ADJ") on the basis of the contentions advanced before him by the respective Counsel. The learned ADJ framed following points for his consideration which read thus :

(1) Do plaintiffs prove that defendant No. 1 has illegally and unlawfully sub-leased the suit premises to defendants 2 to 5?

(2) Do plaintiffs prove that the suit premises are bona fide and reasonably required by the plaintiffs for their residence and business?

(3) If yes, whether greater hardship is likely to be caused to tenants by passing a decree of eviction than the hardship which is likely to be caused to plaintiffs by refusing to pass the decree for eviction?

(4) Do plaintiffs prove that without their consent the defendant No. 1 has erected on the premises permanent structure?

(5) Do plaintiffs prove that defendant No. 1 is a defaulter in paying rent and as such they are entitled to get possession on the ground of Section 12(3)(a) of the Bombay Rent Act?

(6) Do plaintiffs prove that the conduct of defendant No. 1 is amounting to

nuisance and annoyance?

13. The ADJ accepted the case of the plaintiff on the point of unlawful subletting and confirmed the finding recorded by the trial Court. On the point of construction, the ADJ accepted the case of the plaintiff and concurred with the finding recorded by the trial Court and held that the defendant No. 1 has erected a permanent structure without consent of the plaintiff. So far as the finding recorded by the trial Court on the point of default, personal bona fide requirement and nuisance, the ADJ, differed from the finding recorded by the trial Court and rejected the claim of the plaintiff to that extent. However, as the ADJ accepted the case of the plaintiff on the ground of subletting and unlawful construction, he confirmed the decree passed by the trial Court; but differed with the finding recorded by the trial Court, on default and bona fide requirement. The net result was that the appeal came to be dismissed. The learned ADJ further directed the defendant Nos. 1 to 5 to handover the vacant possession after removing the structure standing thereon, within one month from the date of the decree.

14. Feeling aggrieved by the dismissal of appeal, the defendants have preferred independent Writ Petition; and being aggrieved and dissatisfied with the finding recorded by the appellate Court qua the bona fide requirement, nuisance and default, the plaintiff has filed independent petition.

15. In support of respective petitions, I heard S/shri Dhorde and Dixit, learned Counsel, at great length. The learned Advocates during the course of their submissions, have taken me through the findings of the courts below and the evidence that is produced on record. They also took me through the pleadings of the parties to substantiate their contention and make out a ground to interfere in the order passed by the ADJ.

16. At the outset, I would observe that both these petitions are filed under Article 227 of the Constitution of India, 1950 (for short "the Constitution") and as such, I have to keep in mind the scope and jurisdiction of this Court in hearing the Writ Petition filed under Article 227 of the Constitution, within the parameters, scope and ambit in jurisdiction under Article 227, as indicated in several judicial pronouncements of the Apex Court, right from AIR 1975 1297 (SC) , Bahhutmal Oswal v. Laxmibai Tarte; Ouseph Mathai and Others Vs. M. Abdul Khadir, and the recent judgment of the Apex Court in the case of Ranjeet Singh Vs. Ravi Prakash, . The jurisdiction conferred on this Court by Article 227 of the Constitution which gives a right of superintendence over all Courts and Tribunals throughout the territory in relation to which this Court exercised the jurisdiction but not corresponding right as conferred upon the litigant to invoke the jurisdiction under this Article as a matter of right. The power conferred on this Court by virtue of Article 227 cast a duty upon this Court to keep inferior Courts and Tribunals within the limits of their authority and jurisdiction and to see that they do not cross the limits, ensure performance of duties by such Courts and Tribunals in accordance with law, conferring the power within the

ambit of the enactment creating such Court and Tribunal. Only wrong decision may not be ground for exercise of jurisdiction under this Article, unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate Court and the Tribunal resulting in grave injustice to the party. In *Babhutmal Oswal* (supra) the Apex Court has observed that the High Court cannot in the guise of exercising its jurisdiction under Article 227 convert itself into the Court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate Court or Tribunal final of facts. The Apex Court observed :

The High Court acted beyond the limit of its jurisdiction under Article 227 in interfering with the finding of fact reached by the District Court even if the Special Civil application has been made under Article 226 that would have made no difference and the High Court would still had no jurisdiction to disturb this finding of fact.

The Apex Court has ruled that writ or order or certiorari could be issued by the High Court only if there was an error of law howsoever apparent on the face of the record and no error of fact apparent on the face of the record could be a ground for interference by the Court exercising writ jurisdiction.

(emphasis supplied)

17. Keeping these parameters laid down by the Apex Court in mind, I have to consider whether the finding which has been recorded by both the Courts below falls within the extent, as observed by the Apex Court i.e. whether that finding amounts to an error appearing on the face of the record. Both the learned Counsel made elaborate submissions on the findings recorded by both the Courts below. On the point of subletting and erection of the construction by the tenant without prior consent of the landlord, the trial Court as well as Appellate Court have concurred with each other. Therefore, I will advert to contentions of Shri Dhorde, about the correctness of the finding. In my judgment, the question of illegal and unlawful creation of sub-tenancy and erection of construction unauthorisedly are essentially the findings of facts and if both the Courts below on the basis of material produced on record by the respective parties, records the findings, then unless that finding is perverse or as a result of an error apparent on the face of the record, then only this Court will have to interfere in the order. Otherwise this Court has to confirm the order of eviction passed by the trial Court which was confirmed by the Appellate Court.

18. Let me take first point raised by Shri Dhorde, learned Advocate about subletting. Insofar subletting part is concerned, the plaintiff made the averments in para No. 3 of the plaint. Para 3 says that the defendant No. 1 is not using the suit premises for the purpose for which it was allotted. The defendant has subletted the suit premises to one Uttamchand Ramchand Lunkad and Shriram Trading Co. This contention is denied by the defendant in para No. 9 of the written statement by contending that he has not kept sub-tenant or sub-lessee

by allowing Shri Uttamchand Lunkad and Shriram Trading Co. He contended that the business is being carried out in partnership with those defendants and they being partners, there is no question of sub-letting arise. The plaintiff, thus, came with a specific case that the defendant has inducted sub-tenants on the land. On the basis of the pleadings, the trial Court has framed Issue No. 4. In accepting the plea of the plaintiff about the subletting, the trial Court has recorded the following finding :

25. ... The plaintiffs brought on record the licence of defendants No. 2 to 5 and applications of getting telephones show that the defendant No. 1 has sub-let the suit premises to defendant Nos. 2 to 5 and has prepared fictitious partnership deed only. There is no evidence adduced by the defendant No. 1 that he sought consent of plaintiff to sub-let. The activities of the defendant No. 1 are highly influential. The defendant No. 1 has only showing the partnership with the according to the activities and influenced person, he has sub-let the suit premises to the defendant Nos. 2 to 5 without the consent of the plaintiffs." This finding, in my judgment, is based on the evidence.

19. The Appellate Court also framed Point No. 1 in para No. 10 of the judgment. The ADJ, in fact, has considered combined two aspects in this paragraph about personal bona fide requirement and sub-letting. The ADJ has appreciated the evidence and made this observation :

Plaintiff has come out with a specific case that defendant No. 1 is not at all partner in abovementioned two firms and if at all there is any partnership, the same is a bogus, and sham and it has been created only with a view to avoid the decree of eviction."

20. After recording this finding, the ADJ has referred to the partnership deed dated 14-11-1974. The ADJ appreciated this document though, in my judgment, this document was not exhibited and I find that this document is placed in file "D" of the record, which indicates that the document is not exhibited and proved in accordance with law. Be that as it may. The Id. ADJ having considered this document recorded the following finding :

... So having regard to all this evidence, I have no hesitation to hold that defendant No. 1 has sub-leased the suit premises to defendant Nos. 1 to 5 as stated by the plaintiff in his deposition and the defendant No. 2 is a partnership firm in which the defendant No. 3 is shown as a partner while defendant No. 4 is a partnership firm in which defendant No. 5 is shown as a partner. It has also come on record that at present the defendant No. 1 is not at all attending the above mentioned two business and he is on the contrary attending his own rationing shop situated at Ahmednagar. Having regard to all this evidence, I have no hesitation to hold that the defendant has sub-leased the suit premises as alleged by the plaintiffs."

21. In my judgment, the finding which has been recorded by both the Courts below on the point of subletting, since is finding of fact, which cannot be

interfered with by this Court in the instant petition. The learned trial Judge as well as lower Appellate Court have recorded the finding that the defendant No. 1 has sub-leased the premises without consent of the plaintiff and that too in fictitious firm which is created or brought up by defendant No. 1 to avoid the eviction.

22. Shri Dhorde, submitted that if the tenant entered into partnership and allowed the petitioners to carry on the business in the demised premises it cannot be called as an unlawful sub-letting. He submitted that both the Courts below have proceeded on wrong assumption as if the structure was let out. He pointed out relying on Exhs.40 and 43 i.e. decree in earlier suit and sale deed to impress upon this Court that open space was let out and on that open space, the defendant has created a structure and, in that premises, the defendant Nos. 2 to 5 are carrying on business, of which the defendant No. 1 is a partner. It is very difficult for me to accept this contention. There are more than one reason to reject this contention. On the point of subletting whatever evidence which was produced on record (worth naming) both the Courts below have appreciated the same and rejected the contention. From the pleadings and the issues that are framed by the trial Court and the points for determination framed by the Appellate Court considered as it is, in my judgment, no dispute was raised by the defendant No. 1 that he has obtained the open space and after erecting the structure on it, the partnership formed and defendant Nos. 2 to 5 are enjoying possession as the partners of the firm. Shri Dhorde, brought to my notice the judgment of Gujarat High Court in the case of Suthar Kanubhal Mohanbhai v. Mahendrabhai Desai reported in AIR 1983 Guj. 141. The Gujarat High Court was dealing with a case which arose out of Bombay Rents, Hotels, and Lodging House Rates Control Act, 1947, and was considering the provisions of Section 13(1)(a) of the Act. The Gujarat High Court on the facts which were brought on record held that :

Where the lease is in respect of open plot of land only and a lessee-builder of the land lets out the structure erected by him on the demised land to a tenant without anything more he does not thereby let and for that matter sub-let his right or interest in the land also but is presumed to grant merely a right to support the land for the superstructure. And therefore, the lessee cannot be evicted on the ground of sub-letting."

23. In my judgment, looking to the facts which were recorded in the judgment of the Gujarat High Court and the facts in the present case, I am of the view that the judgment of the Gujarat High Court is of no help. If the defendant No. 1 obtained the lease of the open space, then he could have come with a definite case before disclosing his stand. It is to be noted that defendant Nos. 2 to 5 have not filed any separate written statement but they have filed a pursis (Exh. 11) adopting the written statement filed by the defendant No. 1. Furthermore, none of the defendants 2 to 5 have produced any evidence to support the claim of defendant No. 1. On the other hand, the evidence which was produced by the

plaintiff was appreciated by the learned trial Judge who has positively recorded a finding that the firm is a fictitious firm and only created by the defendants to save the eviction from the suit house. For ascertaining what was the plea taken by the defendant and what property was let out, in fact there should have been some evidence produced by the defendants to show that what nature of property was sub-let. The plaintiff in para No. 1 of the plaint has given description of the suit property which reads thus :

House No. 2418 : City Survey No. 1146 within the Ahmednagar Sub-District Ahmednagar at Dalmandi area : two shops facing south and behind that on northern side open space surrounded by East Lane Waste Chandmal Sanjmal Talhold's house, South road, North Mehmood Khan Damdewala's house.

24. In written statement, in reply to Para No. 1 it has been stated that the description of the property in para No. 1 is not true and correct and not as per the situation. In Para No. 1 he accepted that the suit property described in para No. 1 is obtained on a rent of Rs. 26/- per month. In entire written statement, the defendant No. 1 has nowhere stated that he has obtained the open space on rent and on that plot he has erected the premises or structure and in that portion the other defendants are carrying on the business. With these averments in the pleadings and finding which has been recorded by both the Courts below, in my judgment, it is very difficult for this Court to endorse the contention of Shri Dhorde and upset the finding. If I have to appreciate this contention then I have to appreciate the evidence as an Appellate Court. If I do so, then I have to convert the jurisdiction under Article 227 of the Constitution into the jurisdiction of Court of appeal and then minutely dissect/scan the evidence to find out the nature of the property which was let out to the parties. In my judgment, before the trial Court and for that purpose the Appellate Court, there was no issue as to what was the property which was let out either open plot or constructed premises by the tenant. In my judgment, therefore, on the basis of the pleadings, the evidence and the submissions made, both the Courts below have concurrently recorded a finding that the firm is a fictitious firm and brought into existence by defendant No. 1 to avoid eviction.

25. Shri Dhorde, then brought to my notice the judgment of the Apex Court in the case of Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others, . This judgment was cited by the learned Counsel to contend that as there was partnership firm of which the defendant No. 1 was a tenant and that firm was carrying on business as such, the carrying on business of partnership of the said firm, would not amount to subletting. The case before the Apex Court arise out of the Rent Act. The appellant before the Apex Court was a tenant in respect of two premises which are adjacent to each other; out of which one was subject-matter of appeal before the Apex Court. The respondent is the landlord of the two premises. The respondent has alleged in the suit that the appellant was his tenant in suit premises which were leased out to him before him, his father for conducting business in the name of firm Ahmedabad Fine and Weaving Works.

According to terms of tender the suit premises were leased out for manufacturing cloth in the name of Ahmedabad Fine and Weaving Works. The respondent has alleged that the tenant has closed the business and he was not using the said premises for the purpose for which it was let to him. It was the case of the appellant/tenant that in respect of the suit premises he was carrying on his business with respondents 2, 4 and 5 in the name of respondent No. 2 i.e. M/s Bharat Neon Signs. It was not disputed that the premises being used by M/s Bharat Neon Signs firm i.e. defendant No. 2. At the institution of the suit, the defendant Nos. 1 to 5 were admittedly partners; the tenant who was defendant in the suit claimed to be partners. The main claim in the suit and the controversy was whether the tenant has sub-let the premises to defendant No. 2 i.e. Bharat Neon Signs or whether he being a partner of the said firm had permitted the said firm to use the premises in question. The Apex Court noted from the evidence which was brought on record that there were several changes in the partnership firm. The Apex Court in para No. 8 of its judgment has made the following observation :

8. Whether there was a partnership or not may in certain cases be a mixed question of law and fact, in the sense that whether the ingredients of partnership as embodied in the law of partnership were there or not in a particular case must be judged in the light of the principles applicable to partnership. The first question, therefore, is what is a partnership. That has to be found in Section 4 of the Partnership Act, 1932, it says "Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all" (Emphasis supplied). Section 6 of the said Act reiterates that in determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be held to the real relation between the parties, as shown by all relevant facts taken together. The following important elements must be there in order to establish partnership (1) there must be an agreement entered into by all parties concerned, (2) the agreement must be to share profits of business, and (3) the business must be carried on by all or any of the persons concerned acting for all. The partnership deeds were there entitling the petitioner to share in the partnership. It is true that in the partnership deeds the bank accounts were not to be operated by the appellant, and further that irrespective of the profit the clause of the partnership deed provided that there should be a fixed percentage of profit to be given to the partner appellant No. 1. The appellant was not to share the losses. But there is nothing illegal about it. The appellant was to bring his asset being the tenancy of the premises in question for the use of the partnership. All these tests were borne in mind by the Court of Small Causes, Bombay in the appeal from the decision of the learned trial Judge. The Appellate Court had considered the partnership deeds. One point was emphasized by Mr. Mehta, learned Counsel appearing for the respondents, that the original first partnership deed did not mention the appellant or his father was a partner. It was in the second partnership deed that the appellant and his father joined the firm. The firm

started as emphasized by Mr. Mehta on 4th of October, 1960 and it was only on the 24th October, 1960 the second partnership deed was executed. Therefore, it was emphasized that there was a gap of time when there was user by the partnership firm of the premises in question when the appellant was not a member of the firm. It was emphasized that this aspect was not considered by the Court of Small Causes and the High Court, therefore, was justified in interfering with the findings of the Court of Small Causes. We are unable to agree. These deeds were there, the partners were cross-examined, there was no specific evidence as to from what date the firm started functioning from the particular premises in question. Secondly, it was emphasized by Mr. Mehta that the partnership deed was a camouflage. It is evident from the sale tax registration and other registration certificates and licences under the Shops and Establishments Act that the partnership was registered in the name of the appellant and the appellant was also indicated as a partner. It was so in the Income Tax returns and assessments. Therefore, it was submitted that the Court of Small Causes committed an error of law resulting in miscarriage of justice. It was submitted by Mr. Mehta that once it was accepted that the partnership deed was a mere camouflage of the other subsequent acts and conducted were merely ancillary and were put in formal way. But the question is from the three deeds itself which were examined in detail by the Court of Small Causes and which were re-examined by the High Court could it be said unequivocally that there was no partnership. The deeds gave the appellant the right to share the profits and made him agent for certain limited purposes of the firm and there was evidence that the partnership deeds were acted upon. There was evidence of suit of dissolution of the partnership where none of the partners took the plea that it was a false or a fictitious document. Though the decree in the dissolution suit was not binding in these proceedings, inter se, between the partners as partners, it is a piece of evidence which cannot be wholly ignored. All these factors were present before the Court of Small Causes. These were reappraised by the High Court. One point was emphasized by Mr. Mehta that in the partnership deed which is not necessary to recite the terms, the petitioner was completely excluded in operating the bank accounts etc. There is nothing inherently, illegal or improbable making a provision of such a type. In the eye of law, such a clause is really non-sequitur or neutral proving neither the existence or non-existence of a genuine firm.

26. Looking to the above quoted observations of the Apex Court and the finding recorded by both the Courts below in the present proceeding whereby it is categorically recorded that the firm was fictitious and the defendant No. 1 was not carrying on any business in the premises but, on the other hand, defendant No. 1 was carrying on the business of ration shop in the other premises. Therefore, in my judgment, considering the law declared by the Apex Court qua the scope of jurisdiction of this Court under Article 227 of the Constitution vis-a-vis the finding recorded by both the Courts below, it will be very difficult for me to accept the contention of Shri Dhorde that there was no subletting and,

therefore, no decree could have been passed. It is to be noted that the burden was on the defendant to establish that there was genuine partnership and he should have produced evidence to that effect. The partnership has to be formed as required by the Indian Partnership Act and the partnership must be registered partnership. If there was real genuine partnership, the defendant No. 1 or defendant Nos. 2 to 5 should have brought evidence of the same on record. Whatever evidence that was brought on record by the plaintiff was properly and meticulously appreciated by both the Courts below and they have recorded finding that the so-called partnership was fictitious partnership and thus, they have not accepted that the defendant No. 1 was partner in the firm. In my judgment, this finding recorded by both the Courts below are required to be accepted. Therefore, the said findings are accepted. In my judgment, both the Courts below have not committed any error whatsoever in recording the finding recorded on the point of sub-letting. It is worthwhile to note that the lower Appellate Court while considering the issue of subletting has recorded the following finding.

It has also come on record at present the defendant No. 1 is not at all attending the above-mentioned two businesses and he is on the contrary attending his own ration shop situated at Ahmednagar."

27. This fact which has been recorded by the Appellate Court is not disputed before this Court probably after the judgment and decree of the trial Court the defendant died and his widow was brought on record. Therefore, looking to the finding recorded by the Appellate Court in para No. 11 in my judgment, the contention of Shri Dhorde, is required to be rejected.

28. Coming to the next aspect of the matter regarding illegal construction and/or unauthorized construction.

The Appellate Court, to some extent, advert itself to the question about the lease premises though I had already stated that there was no specific issue framed on this point, but, it appears that the submission was advanced before the Appellate Court and on the basis of record, the Appellate Court recorded the finding "I have absolutely no hesitation to hold that the suit premises which should have been leased out to the defendant is open space and not the structure or constructed portion". "An argument was advanced before the ADJ by the Advocate of the plaintiff that from the conduct of the defendant, it appears that they have admitted the position that though structure is standing on the premises it has been constructed by him at his own cost and he has agreed it should be treated as that of landlord". With this submission, the learned Judge observed that "in order to show this possession there is absolutely no iota of evidence on record". "On the contrary, it can be said that all along the defendant No. 1 has made it clear that the construction standing on the suit premises is in his ownership. But what is alleged by the plaintiff is that defendant No. 1 has not at all sub-let the suit premises to defendant Nos. 2 to 5; but as the defendant No. 1 is doing different business in different partnership firm and he is one of the

partners in the firm Shriram Trading Co. and Uttamchand Ramchand Lunkad Co., the tenant has allowed the particular partnership firm of which he is partner in the tenanted premises and, thus, it cannot be said that he has sub-leased the premises." This contention has been negated by the Courts below to which I am agreeable and the finding is already approved by me.

29. The next contention advanced before the lower Appellate Court was that superstructure was erected by the tenant and on that premises the other defendants are occupying the same as the partners of the firm but once it is accepted that the partnership was fictitious then, this contention of the defendant is not available. The Appellate Court appreciated this fact in para No. 12 of its judgment and concluded that :

In the instant case, it must be noted that admittedly there was no contract by virtue of which the defendant was prompted to sub-lease the property. Even we assume for the sake of argument that he was allowed to erect superstructure that does not necessarily mean that he was also authorized to let out the same. Had it been so it could have been argued that the tenant had not unlawfully sub-leased the suit premises. Under the circumstances of the case, it must be held that the defendant- tenant has sub-leased the suit premises and is liable to be punished as per the provisions of Section 13(1)(e) of the Act."

30. The abovesaid position can be looked from another angle. Accepting for time being that it is case of the defendant that only open space was let out, and in such situation he must further establish that he was permitted to construct on the said plot by the plaintiff, then something could be said in his favour but, without the permission and consent of the landlord/plaintiff, the structure was erected, as the finding recorded goes to show that such contention is not even raised. If for the sake of arguments, it is assumed that though open space was let out to defendant and the defendant was permitted by the plaintiff to erect the structure on it, then the present defence is available to him but defendant had not raised this contention before the Courts below. If on such contention the suit is defended then the position could have been different and one could have applied the law declared by the Apex Court and the Gujarat High Court (supra) but having noticed the stand taken defendant in his written statement. Therefore, in my judgment, the finding as recorded by both the Courts below holding that the case falls u/s 13(1)(e) of the Act requires no interference. As this was the only contention advanced by Shri Dhorde, to support his contention, in my judgment, considering the finding recorded by both the Courts below as defendant has failed to establish the two important aspects of the matter i.e. (i) that he has erected the construction with permission of the plaintiff; (ii) he has inducted defendant Nos. 2 to 5 as his sub-tenants with consent or permission of the landlord/plaintiff. To prove both these points, a heavy burden lies on the defendant No. 1 to which he utterly failed to prove. Therefore, the finding so recorded by the Appellate Court and the trial Court requires to be confirmed. -

31. Viewed the problem from another angle considering the finding which has

been recorded by the Appellate Court about the demised premises if the open space was leased out which admittedly belong to the plaintiff, there must be an agreement between the parties to the lease permitting the lessee to erect a structure on the open space. As the premises has been defined u/s 5 Sub-section (8) which includes open land which is not used for agricultural purpose. Therefore, presuming and accepting the finding of the Appellate Court that open plot was allotted; but there is nothing on record to show that the plaintiff has allowed the defendant to erect the superstructure. Both the Courts below have recorded the finding that the defendant No. 1 has erected the superstructure without permission of the plaintiff and allowed the defendants 2 to 5 occupying premises. Therefore, in my judgment, both the acts of defendant No. 1 thus, are illegal and sufficient to pass decree of eviction on both counts i.e. unlawful subletting and erecting structure without permission consent of the landlord. Both the Courts below have concurrently recorded the finding that the defendants have failed to establish that they have obtained permission from the plaintiff i.e. for construction and sub-letting. Therefore, in my judgment, once this position is accepted, then, the judgment and decree passed by both the Courts below are to be sustained and need to be confirmed.

32. Shri Dhorde, Id. Adv. next, submission is about the maintainability of the suit. He took me through the plaint minutely to substantiate this contention that the suit in present form is not maintainable. He further contended that the Appellate Court has passed a decree which was not even prayed. He read the prayer clause in the plaint to show that the plaintiff has not prayed for demolition of the superstructure and then to award the possession. Looking to the prayers of the plaint, the grievance of the learned Counsel is somewhat justified but looking to the findings that were recorded by the Courts below then, in my judgment, direction issued by the Appellate Court can be sustained. The appeal which was filed was heard by the Appellate Court which was regular Appellate Court and the procedure, power and jurisdiction of the Appellate Court has been referred in Order 41 of the Code. The power to pass such a decree by the Appellate Court can be traced out from Rule 33 of Order 41. When the trial Court and the Appellate Court recorded the positive findings on the above-referred two points then, in my judgment, issuing of such direction of the pulling down the structure cannot be faulted. In my judgment, the Appellate Court has jurisdiction to entertain the contention and to pass an order by giving further direction. Therefore, in my judgment the contention of Shri Dhorde has no substance.

33. So far as the maintainability of the suit is concerned, it was incumbent on the defendant to raise this contention before the trial Court initially and then to the Appellate Court. At the cost of repetition, I may say that in both the Courts below such contention is not advanced and if such contention is accepted then this Court will be deciding the Writ Petition contrary to law laid down by the Apex Court in Babhutmal Oswal's case (supra). If the defendants were serious about the question of maintainability of suit, they should have raised such point at the threshold and should not have waited till the final conclusion of the litigation.

Before both the Courts below, no issue about maintainability of the suit was framed, instead the parties went to the trial on the issues which were framed, but the defendant did not even made an application to the trial Court to frame the additional issue about maintainability of the suit. In my judgment, this was necessary for the defendants to raise this contention at the threshold and sought finding on it. If such plea would have been taken at the initial-stage the plaintiff would have sought permission of the Court to withdraw the suit with permission to file fresh suit and/or would have amended the plaint to cure out the deficiencies pointed out but not doing so, in my judgment, the defendants are now estopped from raising the contention about maintainability of the suit at the stage of the Writ Petition. Therefore, this contention is also required to be rejected and accordingly rejected.

34. To consider the submissions of Shri Dhorde and to find out correctness of the finding that has been recorded by both the Courts below, I have to appreciate the evidence and if I venture to do so, then I will be ignoring the law declared by the Apex Court in Babhutmal's case, more particularly the observations in Para Nos. 4, 6 and 8. I would have certainly reproduced the observations made by the Apex Court but in my judgment, it would unnecessarily burden my judgment. Suffice it to say that having considered the observations made by the Apex Court in Babhutmal's case in para Nos. 4, 6 and 8 it is not permissible for this Court to re-appreciate entire evidence as an Appellate Court. The Apex Court has observed that the jurisdiction of the High Court under Article 227 cannot be exercised as the cloak of an appeal in disguise. Petition does not lie in order to bring up an order or decision for rehearing of the issues raised in the proceedings. If I had to differ from the findings of the Courts below, I have to reconsider the evidence, which is not permissible. All the findings recorded by the Courts below are well-supported by the evidence on record, I am of the view that in recording the findings on the issues of unlawful sub-letting and construction being valid and proper, required to be confirmed. In my judgment, petition filed by the tenant is required to be rejected as it has no substance. Accordingly, Rule discharged. No order as to costs.

35. Coming to the Petition filed by the plaintiff challenging the finding recorded by the Appellate Court as the Appellate Court has reversed the finding of trial Court, with regard to bona fide requirement. Shri Dixit, learned Counsel submitted that the lower Appellate Court on erroneous assumption has refused the decree of eviction on the point of bona fide requirement. Shri Dixit submitted that the plaintiff in the plaint more particularly in para Nos. 4 and 5 has spelt out the need for bona fide requirement. The Trial Court did accept the claim put forth by the plaintiff but the Appellate Court considering that the plaintiff sought eviction on the ground that referred to u/s 13(1)(d) of the Act. Shri Dixit, pointed out referring to para No. 14 of the judgment as if the plaintiff has sought eviction of the tenant u/s 13(1)(d) of the Act. He contended that the ADJ has made out a new case for the tenant and recorded a finding contrary to the pleadings in holding that as the case falls u/s 13(1)(b) and not to mention by

Section 13(1)(g). In my judgment, having confirmed the finding recorded by the Appellate Court, on the point of sub-letting and accepting the finding that open premises was let out. The Appellate Court in order to appreciate the contention of the landlord, has considered the evidence, in particular the evidence of Hifzur Rehman, the son of the plaintiff, vide Exh. 105, who in his evidence has stated as quoted by the learned Appellate Court in the judgment that he has completed Wireman's course and is carrying on said business and he needed the premises in occupation of tenant. He has also stated that in order to have good business, it is necessary to have some shop on Main road, so that he can carry on his business in the shop which are in possession of the tenant. What is emerged from the evidence of Hifzur Rehman, the Appellate Court recorded, "that it is very clear that the plaintiffs are, in fact, in need of some premises for starting business and their family members Hifzur Rehman and Khuli Rehman. The plaintiffs and his sons have stated that they would carry on the business in the shop situated in the southern portion. So this shows that they have based their claim assuming that constructed portion of the shops have been leased out to defendant and they would be getting the same shops."

36. The above observation indicates that the plaintiff has based the claim on assumption that the constructed shops have been leased out to defendant and they would be getting the same. In my judgment, this finding of the learned Judge of the Appellate Court is in consonance with the evidence adduced by the parties. Once the Appellate Court records finding that the open space was let out and defendant No. 1 has constructed on the said premises without permission of the landlord and leased it out, then the plaintiff cannot base his claim on Section 13(1)(g), but he has to base his claim only u/s 13(1)(1). Therefore, in my judgment, the ADJ was right in refusing the decree on account of personal bona fide requirement u/s 13(1)(g). Thus, the finding of the trial Court has been rightly interfered with by the Appellate Court, so far as the question of bona fide requirement is concerned. Therefore, in my judgment, there is no substance in the contention of Shri Dixit that the case falls u/s 13(1)(g) of the Act.

37. With this backdrop of the finding recorded by the Appellate Court regarding unlawful construction by the tenant, I have to consider the submission of Shri Dixit on the point of personal bona fide requirement. In my judgment looking to the plaint, the plaintiff has tried to make out a case which falls within Section 13(1)(g) but however, as it is established and accepted by the lower Appellate Court that the open space was let out to the defendant and the defendant has erected construction over it, that too without obtaining permission of the plaintiff and further without consent of the landlord he has inducted the defendant Nos. 1 to 5 on the said constructed portion. Therefore, considering this aspect of the matter, in my judgment, the contention raised by Shri Dixit that the case falls u/s 13(1)(g) cannot be accepted. Therefore, the learned ADJ was right in refusing to pass a decree in favour of the plaintiff on ground of personal bona fide requirement. There is no substance in the contention of Shri Dixit.

38. Coming to the point which I have quoted at the beginning of the judgment, requires some deliberations. It is true that immediately after the judgment and decree by the trial Court, the defendant No. 1 died and his widow claimed to be heir of deceased defendant No. 1 got impleaded in the appeal; an application was filed at Exh.7 in the appeal. Unfortunately, the ADJ has not passed any order either allowing or rejecting that application but proceeded to hear the application on merit. What was urged by Mr. Dixit before me, is that undisputedly, the premises was let out to deceased defendant No. 1 for carrying on business. He submitted that the parties were ad-idem that the suit premises was let out for the business purpose. He, therefore, submitted, looking to the provisions of Section 5(11)(c)(i) and (ii) which provide for succession of tenancy. He submitted that the present case falls in Sub-clause (ii) of Sub-section (2)(c) of Section 5(11). He submitted that the widow who filed an application for bringing herself on record as the heir should have stated two aspects : (a) that she was carrying on business with the tenant at the time of his death; and, (b) after his demise she carried on the said business in that premises. This contention is required to be considered on the findings by the Appellate Court. It will be repetition but it has to be stated again as the point was raised in this Court for the first time which goes to the root of the matter. The Appellate Court, while accepting the case of sub-lessee has recorded a finding that defendant No. 1 was not carrying on any business in the suit premises but he was, in fact, on his own running a ration shop in some other premises. (See Para 11 of the Appellate Court's judgment). If this finding is accepted then, in my judgment, the question whether the widow of the defendant No. 1 can succeed to the interests of the tenancy in the suit premises became important. Both the learned Advocates have made elaborate submissions by placing reliance on the judgment of the Apex Court in the case of Ganpat Ladha's and Gian Devi's cases, to which I will make a reference later on.

39. Sub-clause (c) of Section 5(11) has two sub-clauses. In the present case I am concerned with Sub-clause (ii). Sub-clause (ii) deals with the premises let out for the purpose of education, business, trade or storage, in such case what will happen to the tenancy when the original tenant dies. If the tenant obtained the premises for this purpose (referred to in this section) and dies then any member of tenant's family using the premises for the purpose of education or carrying on business or storage in the premises with the tenant at the time of his death can be a tenant, on succession.

(underline by me).

40. In the present case there was no occasion for the plaintiff or defendant to agitate this point at the trial stage as the death of defendant No. 1 occurred after the trial Court had passed the decree but before filing of the appeal. As I have noted from the record that Exh. 7 was filed by widow of the defendant No. 1, claiming herself to be heir of the tenant, therefore, the learned Judge without hearing other side entertained the application straightway and proceeded to

bring her on record and allowed her to file the appeal. In fact the learned Appellate Court should have noticed the parties on the application Exh.7 as the lis was in respect of business premises and to succeed to that tenancy the heir has to establish that he was carrying on the business with the deceased tenant at the time of his death. But, unfortunately, this aspect was missed by the Appellate Court. Now I look at the statutory provisions.

Section 5(11)(c) was substituted by the Maharashtra Act No. 22/1978. The statement of objects and reasons of the said Act will be required to be considered before proceeding to consider the judgment of the Apex Court relied on by both the Courts below.

STATEMENT OF OBJECTS AND REASONS :

"Section 5(11)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 provides that the expression "tenant" includes any member of the tenant's family residing with him at the time of his death, as may be decided in default of agreement by the Court. Till recently, the view taken by the Bombay High Court was that this provision also applied to the premises let for purposes of education, business, trade or storage (See Smt. Shantabai Vishnumal (since deceased by her legal representative Shashikant Vishnu Shinde) v. Ganpat Ladha and Ors., Special Civil Application No. 334/1970 decided on the 29th August, 1975, 1976 Mh.L.J. 332 (Bom 6. But, now the Supreme Court has decided on the 21st February, 1978 Ganpat Ladha v. Shashikant Vishnu Shinde, Unreported Judgments (Supreme Court) 1978 at page 218, that the provision of Section 5(11)(c) apply to residential premises only; and do not apply to non-residential premises. As a result of this decision, a large number of persons who have shops or business premises are adversely affected. If unfortunately the tenant dies, his family members will be at the mercy of the landlord and will be deprived of the tenancy and their source of maintenance by not being able to carry on the business in the premises. In view of the acute shortage of accommodation, a grave socio-economic problem has arisen and it has become necessary to take steps to amend the law to save such persons from being evicted and from losing their source of livelihood suddenly. It has also become necessary to save persons against whom decrees for eviction have already been passed, but who are still in possession of the premises, so that they may also get benefit of the amended law.

41. Ganpat Ladha Vs. Sashikant Vishnu Shinde, came to be decided by the Apex Court on 29th August, 1975. The Act No. 22/1978 came into force on 23rd October, 1978 i.e. after the Apex Court delivered the judgment of the Ganpat Ladha. The Apex Court in Ganpat's case was considering the provisions of Section 5(11)(c) of the Act as then stood. The Apex Court reversing the judgment of this Court has held that the original tenant died on December 9, 1973 and the respondent his son is impleaded but he could not have claimed to be a tenant u/s 5(11)(c). The language of Section 5(11)(c) says that the intention of the Legislature in giving protection to a member of the family of the

tenant residing with him at the time of his death was to secure that on the date of the tenant, the member of his family residing with him at the time of his death would be thrown out. This protection would be necessary only in case of residential house whereas the tenant in occupation of the business premises, as in the present there will not be no question of protection against the dispossession of member of tenant's family residing with him at the time of his death. When Section 5(11)(i) had amended in State of Gujarat the Legislature had made it clear that the protection in respect of business premises was intended to be given not to member of tenant's family at the time of his death but member of tenant that carrying on business. Ganpat Ladha's judgment was considered by the Constitution Bench of the Apex Court in the case of *Gian Devi Anant v. Jeevan Kumar and Ors.*, (1985) 2 SCC 682, which arose out of the proceedings under the Delhi Rent Control Act, 1958. The Apex Court in *Gian Devi's* case has overruled the judgment of the Ganpat Ladha (*supra*). When it was pointed out that the judgment was overruled by the Apex Court, then Shri Dixit took me to the entire judgment of the Apex Court in *Gian Devi's* case (*supra*) and relied on the following dicta recorded by the Apex Court in Para No. 34 of the judgment which reads thus :

34. It may be noticed that the Legislature itself reads commercial tenancy differently from residential tenancy in the matter of eviction of the tenant in the Delhi Rent Act and also in various other Rent Acts. All the grounds for eviction of a tenant of residential premises are not made grounds for eviction of a tenant in respect of commercial premises. Section 14(1)(d) of the Delhi Rent Act provides that non-user of the residential premises by the tenant for a period of six months immediately before the filing of the application for the recovery of possession of the premises will be good ground for eviction, though in case of a commercial premises no such provision is made. Similarly, Section 14(1)(e) which makes bona fide require of the landlord of the premises let out to the tenant for residential purposes a ground for eviction of the tenant, is not made applicable to commercial premises. A tenant of any commercial premises has necessarily to use the premises for business purposes. Business carried on by a tenant of any commercial premises may be and often is, his only occupation and the source of livelihood of the tenant and his family. Out of the income earned by the tenant from his business in the commercial premises, the tenant maintains himself and his family; and the tenant, if he is residing in tenanted house, may also be paying his rent out of the said income. Even if a tenant is evicted from his residential premises, he may with the earnings out of the business be in a position to arrange for some other accommodation for his residence with his family. When, however, a tenant is thrown out of the commercial premises, his business which enables him to maintain himself and his family comes to a standstill. It is common knowledge that it is much more difficult to find suitable business premises than to find suitable premises for residence. It is no secret that for securing commercial accommodation, large sums of money by way of salami, even though not legally payable, may have to be paid and rents of

commercial premises are usually very high. Besides, a business which has been carried on for years at a particular place has its own goodwill and other distinct advantages. The death of the person who happens to be the tenant of the commercial premises and who has running the business out of the income of which the family used to be maintained, is itself a great loss to the members of the family to whom the death, naturally, comes as a great blow. Usually, on the death of the person who runs the business and maintains his family out of the income of the business, the other member of the family who suffer the bereavement have necessarily to carry on the business for the maintenance and support of the family. A running business is indeed a very valuable asset and often a great source of comfort to the family as the business keeps the family going. So long as the contractual tenancy of a tenant who carried on the business continues, there can be no question of the heirs of the deceased tenant not only inheriting the tenancy but also inheriting the business and they are entitled to run and enjoy the same. We have earlier held that mere termination of the contractual tenancy does not bring about any change in the status of the tenant and the tenant by virtue of the definition of the "tenant" in the Act and the other Rent Acts continues to enjoy the same status and position, unless there be any provisions in the Rent Acts which indicate to the contrary. The mere fact that in the Act no provision has been made with regard to the heirs of tenants in respect of commercial tenancies on the death of the tenant after termination of the tenancy, as has been done in the case of heirs of the tenants of residential premises, does not indicate that the Legislature intended that the heirs of the tenants of commercial premises will cease to enjoy the protection afforded to the tenant under the Act. The Legislature could never have probably intended that with the death of a tenant of the commercial premises, the business carried on by the tenant, however flourishing it may be and even if the same constituted the source of livelihood of the members of the family, must necessarily come to an end on the death of the tenant, only because the tenant died after the contractual tenancy had been terminated. It could never have been the intention of the Legislature that the entire family of a tenant depending upon the business carried on by the tenant will be completely stranded and the business carried on for years in the premises which had been let out to the tenant must stop functioning at the premises which the heirs of the deceased tenant must necessarily vacate, as they are afforded no protection under the Act. We are of the opinion that in case of commercial premises governed by the Delhi Act, the Legislature has not thought it fit in the light of the situation at Delhi to place any kind of restriction on the ordinary law of inheritance with regard to succession. It may also be borne in mind that in case of commercial premises the heirs of the deceased tenant not only succeed to the tenancy rights in the premises but they succeed to the business as a whole. It might have been open to the Legislature to limit or restrict the right of inheritance with regard to the tenancy as the Legislature had done in the case of the tenancies with regard to the residential houses but it would not have been open to the Legislature to alter under the Rent Act, the law of succession regarding the business which is a valuable

heritable right and which must necessarily devolve on all the heirs in accordance with law. The absence of any provision restricting the heritability of the tenancy in respect of the commercial premises only establishes that commercial tenancies notwithstanding the determination of the contractual tenancies will devolve on the heirs in accordance with law and the heirs who step into the position of the deceased-tenant will continue to enjoy the protection afforded by the Act and they can only be evicted in accordance with the provisions of the Act. There is another significant consideration which, in our opinion, lends support to the view that we are taking. Commercial premises are let out not only to individuals but also to companies, Corporations and other statutory bodies having a juristic personality. In fact, tenancies in respect of commercial premises are usually taken by Companies and Corporations, when the tenant is a Company or a Corporation or anybody with juristic personality, question of death of the tenant will not arise. Despite the termination of the tenancy, the Company or the Corporation or such juristic personalities, however, will go on enjoying the protection afforded to the tenant under the Act. It can hardly be conceived that the Legislature would intend to deny to one class of tenants, namely, individuals the protection which will be enjoyed by the other class, namely, the Corporations and Companies and other bodies with juristic personality under the Act. If it be held that commercial tenancies after the termination of the contractual tenancy of the tenant are not heritable on the death of the tenant and the heirs of the tenant are not entitled to enjoy the protection under the Act, an irreparable mischief which the Legislature could never have intended is likely to be caused. Any time after the creation of the contractual tenancy, the landlord may determine the contractual tenancy, allowing the tenant to continue to remain in possession of the premises, hoping for an early death of the tenant, so that on the death of a tenant he can immediately proceed to institute the proceeding for recovery and recover possession of the premises as a matter of course, because the heirs would not have any right to remain in occupation and would not enjoy the protection of the Act. This could never have been intended by the Legislature while framing the Rent Acts for affording protection to the tenant against eviction that the landlord would be entitled to recover possession, even if no grounds for eviction as prescribed in the Rent Acts are made out."

42. Thus, the Apex Court held that, "the tenant in substance to mean a tenant who continues to remain in possession even after termination of the contractual tenancy till decree for eviction against him is passed, the tenant even after determination of tenancy continues to have an estate or interest in the tenanted premises and the tenancy rights both in respect of residential premises and commercial premises are heritable".

43. In view of this aspect of the matter I have to consider the provisions of Section 5(11)(c)(ii) which requires that the person who claims as successor of tenant should be person who is carrying on education, business trade or storage in the premises. In my judgment, before the learned Judge could consider the appeal on merit he should apprise himself to the legal position then exist as the

trial Court decreed the suit of the plaintiff vide judgment and order dated 4th August, 1986 on that day the law as amended by Act No. 22/1978 was in operation. The learned Judge should have called upon the widow of the defendant No. 1 to prove this aspect as the plaintiff has come to the Court on the ground of sub-letting and the trial Court and Appellate Court have recorded the finding that the defendant has illegally sub-let the premises and he was not occupying the premises but he was carrying on business of ration shop, somewhere else. This finding assumes importance in the present case, to judge the status of the widow of the deceased tenant. No doubt, by amendment introduced by Act No. 22/1978 and the judgment of the Apex Court in Gian Devi's case (supra) it is clear that the tenancy is heritable in both type of tenancies provided it complies with the statutory condition i.e. carrying on business with him at the time of death of tenant. Therefore, it was all necessary for the learned Judge to consider this aspect but as there was no occasion for the learned Judge to advert himself to this aspect of the matter, I considered this submission though raised for the first time, considering the finding which has been recorded by both the Courts below, on the point of sub-letting and original defendant No. 1 not occupying the premises at the time of his death, thus, it has to be held that the widow of the defendant No. 1 cannot succeed as tenant. As I confirmed the decree passed by the trial Court, accepting the finding recorded by both the Courts below on the point of sub-letting and unauthorized construction, above finding has been recorded by me on the basis of submission advanced by the learned Counsel though nothing will turn on this aspect in the instant case as the decree of eviction is passed and that the principal tenant was not in occupation of the premises in question the defendant Nos. 2 to 5 thus are not entitled to continue to enjoy the possession of the premises. Therefore, decrees passed by both the Courts below stands confirmed. Both the petitions are dismissed. Rule discharged. No order as to costs.

44. Civil Applications are disposed of.