
(1980) 01 BOM CK 0029

In the Bombay High Court

Case No : Spl. Civil Application No. 537 of 1975 with C.R.A. No. 62 of 1975

Zenna Sorabji and Others

APPELLANT

Vs

Mirabelle Hotel Co. (Pvt.) Ltd. and Others

RESPONDENT

Date of Decision : 14-01-1980

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1), 15, 15(1), 15(2)
Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 133(3), 227
Evidence Act, 1872 — Section 102, 105, 106, 34, 5

Citation : AIR 1981 Bom 446

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : M.A. Rane, in Spl. C.A. No. 537/75 and M.N. More, for the Appellant; A.C. Agarwal, instructed by Bachubhai Munia and Co. and M.A. Rane in C.R.A. No. 62/75, for the Respondent

Judgement

1. These two petitions arise out of the judgment of the Bench of the Court of Small Causes in Appeal No. 343 of 1973 and Appeal No. 316 of 1973. These two appeals in their turn arose out of the R.A.R. Suit No. 510/4293 of 1963 filed by the Trustees of the Lotus Trust, Bombay. The suit was filed by the Trust for eviction of the various defendants. The suit was decreed by the trial Court against all the relevant defendants. Appeal No. 316 of 1973 was, therefore, filed by the original defendant No. 2 and Appeal No. 343 of 1973 is filed by the original defendant No. 3. The appeal of original defendant No. 2 was dismissed by the Bench of the Small Causes Court (hereinafter, the "Bench"); whereas Appeal No. 343 of 1973 was allowed by the Bench. Hence Spl. C. A. No. 537 of 1975 has been filed by the Trust against the decree in Appeal No. 343 of 1973; whereas Civil Revision Application No. 62 of 1975 has been filed by the original defendant No. 2 against the decree in Appeal No. 316 of 1963.

2. The facts out of which the present proceedings arose may be briefly stated as

under:--

(i) Lotus Trust is a Public Charitable Trust under the relevant statute. The Trust is the owner of Lotus House at Marine Lines. For the sake of convenience the premises in dispute are hereinafter referred to as the "suit premises", which consist of the portion of ground floor, the entire first floor and two garages.

(ii) By a registered lease-deed dated 30th July, 1958 the Lotus Trust (hereinafter, the "plaintiffs") leased the premises to M/s. Cathay Theatres Pvt. Ltd. (hereinafter, "defendant No. 1"). The period for the lease was ten years. The lease was to take effect from 1st July, 1958. The rent agreed for month was Rs. 2,550/-. Clause (m) of the said lease-deed is somewhat significant. By the said Clause (m) it is provided that the tenant-defendant shall not sublet, relet or give on leave and licence the suit premises without the previous consent of the landlords.

(iii) On 18th June, 1963 the plaintiffs served upon defendant No. 1 a notice informing that defendant No. 1 had committed breach of the conditions of the tenancy inter alia contained in the said Clause (m) of the lease-deed, in that, they had unlawfully sublet a portion of the suit premises to M/s Hirachand & Co. (hereinafter, defendant No. 2). By the said notice defendant No. 1 was, therefore, called upon to remedy the said breach and it was slated in the said notice that in default the plaintiffs would exercise their option of forfeiting the lease and or re-entering the suit premises.

(iv) There was no reply whatsoever to the said notice and, hence a reminder dated 10-8-1963 was sent by the plaintiffs. In the said reminder it was specifically mentioned that if the breach was not remedied before 17th August, 1963, the plaintiffs would re-enter the premises on 17th August, 1963. This reminder also drew blank. It is contended that on 17th August, 1963 an attempt was made on behalf of the plaintiffs to re-enter the suit premises but they were obstructed. Hence, on 21-8-1963 a further notice was sent by the plaintiffs to defendant No. 1 and on 11-9-1963 the present suit was filed for eviction of defendant No. 1 on the ground of violation of the said Clause (m) of the lease-deed, read with Section 13(1)(e) and Section 15 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (hereinafter, the "Rent Act").

3. Initially defendant No. 1 M/s. Cathay Theatres Pvt. Ltd. were the sole defendants in the said suit. They filed their written statement on 11-3-1964. Their written statement is delightfully laconic. They did not deny subletting as such. At least there is no specific or unequivocal denial of subletting as such. What they have stated by way of denial is as follows:--

"These defendants deny that in breach of the covenant the defendants have either sublet, relet and/or give on leave and licence the demised premises without obtaining any written consent of the plaintiffs as alleged."

4. However, on 11-5-1965 defendant No. 1 surrendered their rights under the

lease in favour of the plaintiffs. The deed of surrender was executed in that behalf. It is common ground that the deed was filed by the plaintiffs in the trial Court. Thereafter on 24-8-1965 the plaintiffs amended the plaint by which amendment defendants Nos. 2 to 6 were added as party defendants to the suit. By the said amendment the plaintiffs contended that defendants Nos. 2 and 3 were unlawfully inducted on the suit premises by the first defendants as unlawful sub-tenants of parts thereof. The plaintiffs, therefore, contended that they were entitled to a decree for eviction against all the said contesting defendants. It may be mentioned here that defendants Nos. 2 and 3 are the real contesting defendants. The other defendants, viz. defendants Nos. 4 to 6, have been imploded because they were servants or agents of defendants No. 2 or defendant No. 3.

4-A. Defendant No. 2 filed their written statement and raised various contentions by way of defence to the suit for eviction. The only defence relevant for the purpose of this judgment, however, is the one that part of the premises were sublet to them by defendant No. 1, but that the sub-letting had taken place before 21-5-1959 and not after that date. Evidently, therefore, the defendants' contention was that though they were unlawful sub-tenants inducted on the suit premises before 21-5-1959, they were protected by virtue of the amendment of the Rent Act which came into force with effect from 21st May, 1959. Similar written statement was filed by defendant No. 3 also. It was also contended by defendants Nos. 2 and 3 that the plaintiffs had waived their right under the said Clause (m) of the lease-deed. The contention was that the sub-letting had taken place in good time before 21st May, 1959 and that the plaintiffs were aware of the subletting all these days till notice dated 18-7-1963 was served by the plaintiffs upon defendant No. 1 and even thereafter till the date of the filing of the suit on 11-9-1963. Such action, or rather the want of action on the part of the plaintiffs, contended the defendants, must be construed as waiver on their part of their rights, if any, arising out of the said forfeiture clause.

5. On these pleadings issues were framed by the learned trial judge on 4-3-1968. Relevant issues are issues Nos. 13 and 16. They are as under:--

"13. Whether defendant No. 1 unlawfully sublet or relet or created leave and licence in respect of premises in suit as alleged in para No. 10 of the plaint thereafter ?

16. Whether defendants Nos. 2 and 3 are lawful sub-tenants of the defendant No. 1 and if so, whether they are protected under Bombay Rent Act?"

I am told by both the learned Advocates that the issues were recast in the year 1970; but it is common ground that nothing turns upon the fact of recasting. It is further common ground that on 1-4-1971 an order was passed by the trial Court casting the onus regarding issue No. 16 upon defendants Nos. 2 and 3. A revision application was filed by both the defendants to a Bench of the Court of Small Causes. It is common ground that the Revision Application was dismissed

by the said Bench.

6. Thereafter the trial of the suit started and evidence was led by the parties. In support of their contention that they have been inducted on the premises before 21-5-1959 as sub-tenants, defendant No. 3 examined their servant one Tarachand. Said Tarachand admitted that he came to the employment of defendant No. 3 in the year 1961. However, he tried to depose to certain facts of some anterior dates. He also produced a ledger in which certain entries were allegedly made showing that defendant No. 3 had become liable to pay compensation to defendant No. 1 not only in the month of July and August, 1958 but also for a part of the month of June, 1958. He also produced certain bills issued by defendant No. 1 alleging that they were bills regarding the compensation payable by defendant No. 3 to defendant No. 1 for occupation of the suit premises as sub-tenant from June, 1958 onwards. No other evidence was led by defendant No. 3 in support of their case of sub-tenancy having been brought about on a date prior to 21st May, 1959.

7. On 19-1-1973 the trial Court gave judgment in the said suit. The contentions of defendants Nos. 2 and 3 were wholly rejected by the learned Judge. He held that Tarachand could have no personal knowledge regarding the nature of rights of defendant No. 3 vis-a-vis defendant No. 1 at the relevant time, that is to say, before 21st May, 1959. He also held that the entries made in the so-called ledger were no evidence at all in the eyes of law or it had no evidentiary value whatsoever. He, therefore, decreed the plaintiff's entire suit with costs against defendants Nos. 2 and 3.

8. As stated above, Appeal No. 316 of 1973 was filed by defendant No. 2 Hirachand and Sons against the said decree, whereas Appeal No. 343 of 1973 was filed by defendant No. 3 Mirabelle Hotel against the said judgment. The appeals were disposed of by the Bench by their judgment dated 31st Oct., 1974. So far as Appeal No. 316 of 1963 was concerned, it was dismissed by the said Bench and thus the decree passed by the trial Court was confirmed by the Bench. So far as the appeal tiled by Mirabelle Hotel, defendant No. 3 (Appeal No. 343 of 1973) was concerned, the Bench disagreed with the inferences drawn by and the conclusions arrived at by the trial Court. The appellate Court no doubt noted that witness Tarachand, the only witness for defendant No. 3, had come into the service of defendant No. 3 as late as in the year 1960. However, the Court held that the said Tarachand could have and did have personal knowledge regarding the nature of defendant No. 3's right in the suit premises, which had allegedly shaped in the year 1958. The bench, therefore, held that the evidence of the said witness Tarachand could not be said to be of merely hearsay character. The Bench further held that though the evidence of witness Tarachand was interested evidence and that the same could not be relied upon without sufficient corroboration by some other reliable evidence the Bench was of the view that the bunch of bills and the ledger for 1958 produced by witness Tarachand could be legitimately used for corroboration of the evidence of the said

witness Tarachand. According to the Bench, the said bills and the ledger entries disclosed that defendant No. 3 were in the occupation of the portion of the suit premises right from the month of June 1958. The Bench further held that the evidence of Tarachand was fully and sufficiently corroborated by the said documentary evidence. The Bench, therefore, proceeded to negative the trial Court's finding and held that defendant No. 3 had been inducted on the particular portion of the suit premises since a date prior to 21st May, 1959. In this view of things the Bench was of the view that no decree could be passed against defendant No. 3 having regard to the amendment of the Rent Act which came into force with effect from 21st May, 1959. The decree passed against defendant No. 3 was, therefore, set aside by the Bench.

9. As stated above, Spl. C. A. No. 537 of 1975 has been filed by the original plaintiffs against the decree of the Bench in Appeal No. 343 of 1973. Rule was issued by my learned brother Savant, J. on the said petition on 25-2-1975.

10. Original defendant No. 2, who was similarly aggrieved by the judgment of the Bench also approached this Court for suitable relief. Strangely enough, he chose to file no Special Civil Application under Article 227 of the Constitution of India but chose to file or was advised to file a Civil Revision Application u/s 115 of the Code of Civil Procedure. The revision application was filed on 10-2-1975. Rule was issued thereon by Vaidya, J. on 11-2-1975. Mr. M.N. Morje appeared for the petitioner at the time of the Rule. As will be presently pointed out, I waited for Mr. Morje to explain to me the reasons which persuaded him to file a Revision Application only u/s 115 of the CPC instead of Special Civil Application under Article 227 of the Constitution. I, however, did not have the benefit of his assistance in this behalf for my enlightenment because Mr. Morje has chosen to remain absent on each occasion when the petition came up for final hearing and even though the petition was heard before me for the last two days I could not have the benefit of any assistance from him in this behalf.

11. It may be mentioned here that the petition had reached hearing at various times before the various Courts. I am told at the Bar that suggestions were made for amicable settlement but ultimately no settlement could take place and the Spl. C. A. No. 537 of 1975 was finally argued before me fully by the learned Counsel for both the sides. As stated above, I had no benefit of any assistance from any Counsel for the decision of Civil Revision Application No. 62 of 1975.

12. Mr. Rane, appearing for the plaintiffs, has contended that the finding recorded by the lower Court regarding the sub-letting by defendant. No. 1 in favour of defendant No. 3 in respect of a portion of the suit premises on a date prior to 21-5-1959 is a perverse finding in that, it is supported by no legal evidence at all. In this connection Mr. Rane has invited my attention to the unequivocal observations of the lower Court in para. 19 of its judgment. The lower Court has observed that Tarachand was not in the employment of defendant No. 3 before the year 1956. Till the year 1960 he was admittedly in the employment of Prakash Cotton Co. belonging to Jalan Group of Industries.

The lower Court further observed that the majority shares of defendant No. 3 company were purchased by Jalan Group of Industries in the year 1960. In this context the lower Court observed as follows:

"If so, it is certain that someone must have taken part in the negotiations that were carried on prior to the purchase of the shares, and when Tarachand says that it was he who did it, it is not improbable. The fact, however, remains that as he is a representative of the appellants, his evidence is naturally interested, and cannot be believed unless it is corroborated by other reliable evidence." In fact the lower Court has observed in the concluding portion of paragraph 19 of the judgment as follows :--

"What is necessary is, as observed by us earlier, to see whether this oral evidence is corroborated by any independent and reliable evidence."

Relying upon those observations and statements, Mr. Rane forcefully contends that even according to the lower Court the evidence of Tarachand was by itself not found by the lower Court to be sufficient at all. Mr. Rane pointed out that the corroboration for the interested evidence of Tarachand is found by the lower Court in the ledger entries, Ex. 4, and the bills at Ex. 3. Mr. Rane says that the lower Court has fallen in a two-fold error by adopting this kind of reasoning. He says that in the first place the evidence of Tarachand must be discarded in toto as a wholly hearsay piece of evidence. He contends that it is not only unreliable evidence but wholly inadmissible piece of evidence. Secondly, he contends that even assuming that the evidence of the said witness Tarachand was admissible in evidence still on the lower Court's own finding it could not be accepted without corroboration by other independent reliable evidence. Mr. Rane says that the so called ledger, Exhibit 4, and the so called bills, Ex. 3, are sham and bogus documents and no Court could ever come to (he conclusion that they could be serviceable as reliable corroborative pieces of evidence. The entire evidence of Tarachand including the evidence of the documents produced by him, contends Mr. Rane, is no evidence at all. There being no other evidence to support, the plea of defendant No. 3 that they were inducted on the particular portion of the suit premises before 21-5-1959, the entire claim of defendant No. 3 regarding protection of the Rent Act, contends Mr. Rane, must fail.

13. Mr. Rane also invited my attention to the fact that the evidence led by defendant No. 3, taken at its highest, may perhaps mean that defendant No. 1 had allowed defendant No. 3 to occupy a portion of the suit premises on the basis of leave and licence; there was, however, no evidence about exclusive possession having been given by defendant No. 1 to defendant No. 3 of any portion of the suit premises. This means that in any event no sub-tenancy was intended to be created by defendant No. 1 in favour of defendant No. 3 at any time before 21-5-1959. Moreover, without admitting the possession of defendant No. 3 of the suit premises at any time prior to 21-5-1959, Mr. Rane contends that if both the inferences were possible regarding the nature of possession of defendant No. 3 at the said time, possession of a licensee or possession of a sub-

tenant, the onus in this behalf, contends Mr. Rane, was exclusively upon defendant No. 3. They have not discharged the said onus in the slightest possible manner. In this connection Mr. Rane also contends that before 21-5-1959 sub-tenancy was completely prohibited by the statute. But even apart from the statutory prohibition, there was the emphatic prohibition incorporated in Clause (m) of the lease-deed dated 30-7-1958. Mr. Rane, therefore, contends that it is inconceivable that defendant No. 1 who had covenanted in Clause (m) of the lease-deed on 30th July, 1958 not to sublet any portion of the suit premises to anyone else without the written permission of the plaintiffs, would induct any person on a portion of the suit premises as sub-lessee and that too just at the time when the lease was being executed. Taking into account the statutory and contractual prohibition, contends Mr. Rane, an intendment on the part of defendant No. 1 to create a sublease at the exact time of the lease would have to be ruled out.

14. In this connection Mr. Rane invited my attention to the observations made by the lower Court in the concluding portion of paragraph 23 of the judgment in which it has been observed that the plaintiffs had not made out a case that defendant No. 3 were not in exclusive possession of the premises and that no evidence has been led by them on this point. Mr. Rane contends that the onus of proof was upon defendant No. 3. It was so put upon defendant No. 3 by the Court itself and the decision of the Court on that behalf was even affirmed by the Bench. In these circumstances, contends Mr. Rane, this approach of the lower Court is manifestly and basically erroneous.

15. To my mind, these contentions of Mr. Rane regarding basic error pertaining to onus of proof are not without force. However, I think that it will be better to decide the present petition on the main point urged by Mr. Rane. I make it clear that I express no opinion on this point of onus raised by Mr. Rane.

16. Coming to the main point urged by Mr. Rane, however, I do find that there is not only considerable force in the argument advanced by him, but to my mind the point appears to be unanswerable. In this connection Mr. Rane has taken me painstakingly through the judgments of both the Courts below as also through the evidence of Tarachand and the said two documents, Bills and Ledger entries, Exs. 3 and 4, relied upon by the lower Court. Having had a look at the said evidence, conclusion is inescapable that the so-called reliable piece of evidence, which found favour with the trial Court as corroborative piece of evidence, is no legal evidence at all or at any rate it is a piece of evidence which is wholly devoid of any evidentiary value. This evidence needs to be discarded in toto. I will examine this evidence presently, but before that I must refer to the submissions made by Mr. Rane regarding the hearsay character of the evidence of the said witness Tarachand. Mr. Rane contended that if the evidence of Tarachand was itself discarded no amount of corroboration of that piece of evidence would be of any avail for defendant No. 3, even assuming that the said corroborative piece of evidence was "evidence" in the eyes of law. In this view of

things Mr. Rane took me carefully through the evidence of Tarachand.

17. In his evidence Tarachand has admitted that he was not in the employment of defendant No. 3 Company till the year 1960. But he contends that the portion of the suit premises "was given to defendant No. 3" in the year 1958. Mr. Rane also invited my attention to the subsequent portion of the short evidence of the said witness Tarachand. Tarachand has stated as follows :--

"Since then they were in our possession till we have given them to our conductor." It is noteworthy that defendants Nos. 4 to 6 are the licensees of defendant No. 2 and/or defendant No. 3. It is nobody's case that they were the sub-tenants of defendant No. 3. Mr. Rane, therefore, invites my attention to the significance of the word "given" used by the witness. In the subsequent part of the examination-in-chief, which incidentally is very short one, the witness has only produced the so-called bills and the so-called ledger. The witness has deposed nothing regarding the circumstances in which the bills were written. He has not even stated as to whether he had personal knowledge about the bills as such. Similar is the case of the so-called ledger. He has just produced the bills and the ledger of the year 1958 and when the plaintiffs consented to both the said documents being exhibited, the bills were exhibited at Ex. 3 (Collectively) and the ledger for the year 1958-59 at Ex. 4. As regards the ledger entry, the witness has made a significant deposition. He has stated that the ledger entries "are" made from the bills and not very (?) cash books and that they were adjustment entries. The exact words of this witness in this behalf may" be set out. They are as follows:

"Ledger entries are made from the bills and not from cash book and these are adjustment entries as we had other dealings with Habib Hussein." In the cross-examination the witness admitted that the Jalan Group of Industries, had majority of shares in defendant No. 3, i.e. Mirabelle Hotel, since 1960 only. He admitted that before 1960 he was working with Prakash Cotton Mills. He has further stated that before 1960 Habib Hussein was managing hotel Mirabelle and that he used to go to Habib Hussein. He has admitted that prior to 1960 he was not concerned with the payment of bills or writing of account of hotel Mirabelle, defendant No. 3, but he has made significant addition as follows:--

"As I was negotiating to hold the shares I am aware of the circumstances in which defendant No. 3 came to occupy the premises."

Since what time and as regards what terms the witness was negotiating are all matters about which the witness has been significantly reticent. Later on he has stated as under :--

"The defendant No. 1 became the tenant of the suit premises sometime in July, 1958. I do not remember the date on which defendant No. 3 came to occupy the portion of the suit premises. It may be in July or August, 1958. I do not know whether resolutions were passed by both the Companies to permit defendant No. 3 to occupy portion of the suit premises."

The witness has produced bills at Ex. 3. The bill for the period August 1958 purported to show that some compensation was being paid by defendant No. 3 to defendant No. 1. The amount of compensation for that period from July 1958 is Rs. 714/- per month; but strangely enough the compensation for the month of June is also charged. There is some significant erasure at the relevant place on the bill in question which is dated 2nd August, 1958 and the word part is overwritten by way of correction. The amount shown is Rs. 307/- for part of June 1958. In the written statement defendant No. 3 has stated that the monthly rent paid by them to defendant No. 1 was Rs. 330/-. However, we find from the so-called bills for the period till May 1959 that the amount charged as compensation was Rs. 714/- per month. From June 1959 we find that the amount charged is Rs. 733.50. At that time there is a retrospective increase in the monthly rent at the rate of Rs. 39/- per month and there is a bill issued for Rs. 733/- for the month of June 1959 and Rs. 39/- for the increase in the month of April and May 1959. Thereafter for the month of July 1959 the amount purports to have been charged at Rs. 733.50. For August 1959 the amount charged as compensation is Rs. 322.50 and this position continues till November 1962. From December 1962 the amount is charged at the rate of Rs. 328/- per month. A bill for the month of February 1963 is produced where it is shown that the amount charged is Rs. 328/- per month.

18. It is stated above that as per the witness the Ledger entries were made not from any journal or from any day book or from any cash book or from Rojmel as such but that they were made directly from the bills. The witness was confronted with the entries in the relevant portion of the ledger. The relevant page of the ledger shows that compensation account is opened. It is opened at page 37-A of the ledger, rather significant fact, the significance of which will be discussed by me presently. In the ledger it is shown that from the month of September 1958 the compensation was mentioned to be Rs. 714/- per month and that was so till May 1959. In June 1959, all of a sudden, the compensation is shown to be Rs. 772.50. The witness was confronted with this entry and he could not explain as to how it was that the monthly compensation came to Rs. 772.50. He could not explain this position and he wanted to refer to the bills. Looking at the bills he stated that the amount of Rs. 735/- included the payment for the period of June 1958. No such reference is to be found in the ledger entry itself. But what is more significant is that the witness had not explained as to how defendant No. 3 purported to pay compensation to defendant No. 1 for enjoyment of part of the suit premises in the month of June 1958 when the lease itself was taken by defendant No. 1 from the plaintiff with effect from 1st July, 1958. The witness had no explanation to give even as regards the averment in the written statement that the monthly rent paid by defendant No. 3 to defendant No. 1 was Rs. 330/-.

19. From the abovementioned evidence, Mr. Rane contends that the lower Court should have held agreeing with the trial Court that the evidence of this witness Tarachand was wholly hearsay evidence. The witness has admitted that rent

receipts used to be sent to defendant No. 3 and they used to be signed sometimes by Habib Hussein and sometimes by Perin Hussein. It has been stated by the witness that Habib Hussein is dead but it is nobody's case that Perin Hussein is also dead. He was very much alive at that time. If that was so, there is no reason why he could not have been examined by defendant No. 3. Keeping him back and examining witness Tarachand who could speak nothing about the relevant state of affairs prior to the year 1960 is highly objectionable, says Mr. Rane. Mr. Rane contends that in fact a piece of evidence which is essentially hearsay evidence is sought to be given the facade of evidence of a person having personal knowledge. Mr. Rane says that from the deposition of witness no Court could have believed that the said Tarachand could have any personal knowledge about the state of affairs prior to 1960.

20. I do feel that there is substantial force in the contention of Mr. Rane. Mr. Agarwal appearing for defendant No. 3, however, contends that all this amounts really to appreciation of evidence, a branch of judicial activity in which this Court sitting in its jurisdiction under Article 227 of the Constitution cannot indulge.

21. I am not quite sure that this contention of Mr. Agarwal is so very correct as to wholly unanswerable. In view of the fact, however, that the petitioner is entitled to succeed on the other point relating to the evidentiary value of the so called corroborative evidence, which is predominantly a question of law, I do not think it necessary to consider the question whether the evidence of the witness ought to be discarded as hearsay evidence or not. No doubt to my mind Tarachand could have deposed to whatever was stated to him by Habib Hussein in a specific manner and not in the vague manner as he has done. All the same, for my subsequent discussion I will assume that the evidence of Tarachand was not hearsay evidence and that the statements made by him relating to the state of affairs from July 1958 were made from his personal knowledge.

22. Coming then to the most important point in this petition, it is urged by Mr. Rane that even according to the learned Judges of the Bench the evidence of Tarachand was by itself wholly insufficient for the purpose of vindication of the case of defendant No. 3 that it was inducted on the suit premises as sub-tenant before 21st May, 1959. The portion of the judgment of the lower Courts relevant in this behalf, has been set out by me hereinabove and it becomes clear from the same that even according to the learned Judge the evidence of Tarachand had to be corroborated by some reliable evidence. Mr. Rane contends that what the lower Court construed as reliable evidence is not only wholly unreliable but is also wholly inadmissible piece of evidence. He contends that at any rate it is wholly devoid of any evidentiary value. For this purpose Mr. Rane invited my attention to the following facts:

(a) The so called ledger is not a book-containing accounts at all. It is only a bundle of sheets which could be loosened at any convenient time, any sheet could be taken out just for the asking and could be replaced by any other convenient sheet. It is not a bound book at all.

(b) The ledger by itself is only a secondary piece of evidence. Entries are always made first either in the Rojmel or in the cash book or in the day book as the case may be, and they are posted periodically into the ledger subsequently. As a matter of fact it is evident from what is produced as a ledger before me that the posting has been done on June 30, 1959 at one sitting, in respect of compensation which had allegedly become payable to defendant No. 1 from July 1958 till 30th June, 1959. This is evidently a secondary piece of evidence. The primary evidence would have been the cash book, or the day book or the rojmel whatever was being maintained. As a matter of fact, defendant No. 3 had made an affidavit of documents upon which they would rely. That affidavit was dated 22-11-1966. In that affidavit cash book for the period 1958 to 1963 has been referred to. The cash book, however, was never produced before the Court.

(c) That the compensation account finding place in the so called ledger is on page 37-A. The bundle of sheets produced as Ledger have an index. Under alphabet "C" there are various accounts mentioned. Compensation account is the last account mentioned and. it is at page 37-A. The word "compensation" as well as page 37-A are written, in ink and in handwriting which are manifestly different from the ink and handwriting in which the other earlier 8 items are made. Going through the bundle of the various sheets called Ledger, we find that whenever a new account is opened it is opened on an independent sheet. The Compensation Account, however is opened at the back of the sheet on which rent account is written.

(d) In the ledger there is no cross reference for compensation in respect of each month. There is one reference only in the column "Folio No." which refers to G-57 and G-62. But to what book the reference refers is anybody's guess. No book from which the cross reference could be tallied has been produced.

(e) The Compensation Account shows only debit entries. There is no credit entry whatsoever. No other books of account were produced. The result is that the veracity of none of the entries could be subjected to checks and cross-checks.

(f) A bill dated 8th May, 1959 is produced which shows that on 1st May, 1959 a cheque for Rs. 714/- was received on account That purports to be in connection with the monthly compensation itself. Strangely enough we do not find any credit entry in the relevant khata in the ledger produced at Ex- 4. This shows that what is sought to be proved as ledger entries are nothing but scribbling of amounts or items wholly unconnected with the process of accounting as such.

Relying upon the above circumstances Mr. Rane contends that:

(a) The so called ledger is not a book of account at all and is not admissible in evidence at all.

(b) Even if it is admissible in evidence it is a sham document and it has no evidentiary value whatsoever.

As regards the circumstance at (a) above Mr. Rane further contends that the so

called ledger by itself cannot prove any particular entry, it being only a secondary piece of evidence. The entries in a ledger only reflect the entries that are made elsewhere in ledger initially in books such as the Rojmel the cash book or the day book etc. The primary account books, therefore, are the Rojmel, the cash book or the day book etc. Mr. Rane points out that in the so called "ledger" some kind of book is mentioned for cross reference in the column meant for folio number. That book would have thrown some light upon the state of affairs and that book could have been the primary evidence and that would be the real relevant document. In the absence of such relevant book, the ledger is not admissible in evidence at all. Mr. Rane further contends that even assuming that the "ledger" by itself was of some evidentiary value, the manner in which the book is maintained shows that it is not a book of account in the real sense of that term. In this connection Mr. Rane strongly relies upon the judgment of the Nagpur High Court in *Mukundram v. Dayaram* AIR 1914 Nag 44. The ratio of the case is to be found sufficiently in the headnote, which runs as follows:

"An entry to be admissible in evidence u/s 34, Evidence Act, must be shown to be in a book, that book must be a book of accounts and that account must be one regularly kept in the course of business.

The term book may properly be taken to signify ordinarily a collection of sheets of paper bound together with the intention that such binding shall be permanent and the papers used collectively in one volume.

A book which merely contains entries of items of which no account is made at any time, is not a book of account for the purpose of Section 34. The legislature did not intend to include in that category any record in which there is no process of reckoning.

The fact of regular maintenance and general accuracy of account books, if not maintained, must be formally proved by the evidence of some person competent to speak to the facts.

The evidential value of account books will of course depend upon their formality and the checks against fraud secured by the method of keeping them but that is not to be confused with admissibility. As regards admissibility Section 34 makes no difference between the cash books and ledgers of a large bank, and the day book of a housekeeper. The difference lies in the weight to be given to the entries therein."

Relying upon this authority, it is contended by Mr. Rane that what is to be found from the ledger entries at Ex. 4 is only some enumeration of some entries without any facility for check and cross-check, without there being any evidence that it is maintained in the regular course of business and without even being shown that the total of debit entries were properly balanced by the total of corresponding credit entries in other books and other accounts. Such a document is not a book of account at all. Mr. Rane contends that the learned Judges of the lower Court have relied upon these entries as books of account with a firm belief

that those were the books of account regularly maintained in the course of business and were of great evidentiary value. This basic misconception relating to maintenance of books of accounts regularly in the course of business contends, Mr. Rane, has vitiated the judgment of the Bench.

23. I do feel that Mr. Rane's contention in this behalf is Unassailable. A mere look at the entries in the so called ledger read with the index are enough to show that they could be brought into existence at any time. The numerous characteristic features of the entries are already enumerated by me above while summarising Mr. Rane's argument. What Mr. Rane has stated in that behalf could not be denied by Mr. Agarwal, appearing for defendant No. 3. He no doubt vehemently questioned the correctness of the inferences to be drawn from those facts, but he had no explanation as to the state of the so called book of accounts, viz. ledger which is nothing but a bundle of sheets separable conveniently each sheet being removable at the owner's sweet pleasure. The ledger bears the hall-mark of a sham document on the face of it. The position is in no way improved by production of the so called bills which are produced at Ex. 3 (collectively). The bills are also a bundle of documents conveniently collected in a file. If the bills were issued from Cathay Theatres Pvt. Ltd. defendant No. 1, they would perhaps have had some evidentiary value if the counterfoils finding place in a bound book were produced as evidence. Such a bound book of the counterfoils would, contain not only the counterfoils of bills issued to defendant No. 3 but also those issued to other parties and hence it could furnish intrinsic facility for checks and counter-checks. As the position stands, loose bills have been produced which could be brought into existence and produced cheap for the dozens by defendant No. 3, till the year 1965. It is obvious that till the year 1965 when defendant No. 1 surrendered the tenancy to the plaintiffs, defendant No. 1 and defendant No. 3 were acting in patent collusion with each other. Significantly enough the bills are produced only for the period till January 1963. It is evident that at least till that time defendants Nos. 1 and 3 were hand in glove with each - other. The kind of bills which are produced at Ex. 3 (collectively) could have been fabricated by defendant No. 1 for the sake of defendant No. 3 at any point of time and no cross-check could have been possible.

24. But we find intrinsic evidence in the bills themselves, which show that the bills could have no reference to the compensation that was allegedly payable by defendant No. 3 to defendant No. 1 from July 1958. The first bill for compensation of Rs. 714/- is for the months a part of June 1958, July 1958 and August 1958. Now, it is nobody's case that defendant No. 1 was inducted on the premises by the plaintiffs before 1st of July, 1958. No such plea is taken in the written statement either by defendant No. 1 or defendant No. 3. The lease-deed which is produced in Court is dated 30th July, 1958, but it states that the lease is effective from 1st of July, 1958. If at all defendant No. 3 was inducted by the plaintiffs in June 1958 or at any rate prior thereto it is inconceivable that the lease-deed would have mentioned that the period of lease would commence from July 1958. It is, therefore, inconceivable that defendant No, 1 itself get

possession of the premises before 30th July, 1958. If defendant No. 1 itself got possession of the premises in July 1958, it is wholly inconceivable that defendant No. 3 get possession from defendant No. 1 at a time earlier than 1st July, 1958. The mention in the bills that compensation was payable for the particular portion of the suit premises by defendant No. 3 to defendant No. 1 in the month of June 1958 is, therefore, palpably false and misleading.

25. Moreover in the written statement the contention is that the monthly rent was Rs. 330/-. In none of the bills produced in evidence it is to be found that the monthly compensation was Rs. 330/-. Initially the compensation that is shown to be paid is Rs. 714/- per month. Very strangely enough it is reduced at subsequent stage. In what circumstances it came to be reduced is anybody's guess.

26. All these facts are an unmistakable pointer to the conclusion that the so called bills produced at Ex. 4 are brought into existence subsequently, at some convenient time, long after the year 1959. For aught we know, there was some payment to be made by Hotel Mirabelle to the defendant No. 1. The description of the amount is changed by fabricating new bills and by describing the amount as compensation for the use and occupation of a part of the suit premises. The manner in which the bills are produced does indicate that such a thing could be done at any time by defendant No. 1. The stake for defendant No. 1 was very high. By virtue of subletting done in favour of defendant No. 3 after 21-5-1959, defendant No. 1 was likely to lose the entire premises which were the subject-matter of lease-deed dated 30th July, 1958. The interests of defendant No. 3 and defendant No. 1 were, therefore, identical. The bills could as well have been brought into existence in order to subserve their common interest. In any event there is nothing in the books of account produced before the Court which supplies checks and counter-checks for verification of the genuineness or veracity of the bills sought to be relied upon by defendant No. 3. Both the documents, the ledger and the bills are, therefore, of no legal value or of evidentiary value in the context of the provisions of Section 34 of the Evidence Act.

27. I also find no difficulty in agreeing with Mr. Rane that the ledger which is sought to be produced and relied upon is not a book of account in the real sense of the term as contemplated by Section 34 of the Evidence Act. In order that a document could be relied upon as a book of account, it must have the characteristic of being fool-proof. A bundle of sheets detachable and replaceable at a moment's pleasure can hardly be characterised as a book of account. Moreover what Section 34 of the Evidence Act demands is a book of account regularly maintained in the course of business. A ledger by itself could not be a book of account of the character contemplated by the said Section 34. Even assuming that the book of account produced was a duly bound book of account, unless the other books for checks and cross-checks were made available and unless the primary books of account are produced, the ledger by itself could have no evidentiary value. But taken this fact in conjunction with the fact that what is

produced by defendant No. 3 in the Court is a bundle of sheets and nothing else, the so called book of account loses all its evidentiary value. It loses its evidentiary value on both the counts. Firstly, on account of the fact -that it is not a book of account at all and secondly, on account of the fact that it is a sham document. I, therefore, agree with Mr. Rane and hold that what is relied upon by the lower Court as corroborative piece of evidence cannot be characterised even as a piece of legal evidence. In any event, to my mind, the evidentiary value of the same is nil. If this is the position, it can hardly be argued that the oral evidence of Tarachand has been corroborated by any legal evidence at all, let alone by any reliable evidence. I must reiterate that even according to the learned Judges of the lower Court, if the evidence of Tarachand was not corroborated, the lower Court would not have interfered with the finding arrived at by the trial Court. I find that as a matter of fact what is sought to be relied upon by the lower Court as corroborative piece of evidence is no piece of evidence at all. If this is so, the finding recorded by the trial Court is unimpeachable. I, therefore, have no hesitation in coming to the conclusion that the finding recorded by the lower Court in this behalf is supported by no evidence. The judgment of the lower Court in that behalf must, therefore, be set aside.

28. Mr. Agarwal, the learned Counsel for the defendant No. 3, however, raised the following contentions before me in defence of the judgment of the lower Court. Firstly, he contended that the question was really one of appreciation of evidence. He says that the lower Court has in fact believed witness Tarachand. He says that there was evidence on record by virtue of which the Court could have either believed or disbelieved the said witness. If the lower Court has proceeded to believe the witness, the finding is essentially one of fact and hence this Court sitting in its writ jurisdiction will not be justified in interfering with the finding. Secondly, Mr. Agarwal contends that both the two exhibits, viz. the bills, Ex. 3 (collectively) and the ledger, entries Ex. 4, have gone in evidence by consent. He says that once a document has gone in consent the contents of the document must be deemed to have been admitted, and if the contents are admitted, it would not lie in the mouth of the plaintiffs to contend now that the documentary evidence by the said entries is not true. Thirdly, Mr. Agarwal submits that there was no suggestion put to witness Tarachand that the documents were fabricated documents. He, therefore, contends that it is not open for the plaintiffs now to contend that the entries were not admissible in evidence for any reason. Fourthly, it is the contention of Mr. Agarwal that the onus of proof was wrongly placed by the lower Courts upon defendant No. 3 to prove that defendant No. 3 was inducted on the suit premises by defendant No. 1 after 21-5-1959. Lastly, it is the contention of Mr. Agarwal, which is really the quintessence of his contention, that the question sought to be agitated by the petitioners before me is really one of appreciation of evidence, is in fact something which is really a finding of fact, pure and simple and that this Court has no jurisdiction to tinker with the said finding in its jurisdiction under Article

227 of the Constitution.

29. Coming to the first contention of Mr. Agarwal, what he contends is that witness Tarachand in fact had personal knowledge about the relevant facts. He says that there is evidence in that behalf which is to be found in the depositions of the said witness and that part of the evidence in fact has been believed by the lower Court. He says that the witness is really speaking believed by the learned Judges of the lower Court but it was just by way of abundant caution that they looked around for further corroboration.

30. Now, to my mind, this contention is unacceptable on the face of it. The learned Judges of the lower Court have stated in so many words that they could not rely upon the uncorroborated testimony of the said witness Tarachand and the portion of the judgment in that behalf has been quoted by me hereinabove. This contention must, therefore, be rejected as being wholly devoid of any substance.

31. Coming to the second limb of Mr. Agarwal's argument I must consider the effect of the fact that the two exhibits, viz, the bills, Ex. 3 (collectively) and the ledger entries Ex. 4, have gone in evidence by consent. It is the contention of Mr. Agarwal that the act of the plaintiffs in allowing the documents to go on record by consent spells an admission as regards : (a) the proof of the document, (b) the contents of the document, and (c) the evidentiary value of the document.

32. Mr. Agarwal argues that a contrary view would result in defendant No. 3 being subjected and exposed to unwarranted and unjustified handicap. He says that because the documents Exs. 3 and 4, were allowed to go in evidence by consent defendant No. 3 did not think it necessary to produce the other documents which would have gone to support the said two documents exhibited in evidence. By resorting to this process, contends Mr. Agarwal, the plaintiffs have incapacitated defendant No. 3 from producing the other evidence.

33. Now, we have to consider the legal effect of documents going in evidence by consent. When a document is to be proved and relied upon in evidence, there are three aspects to be considered by the Court, viz. (i) the proof of the execution of the document, (ii) proof of the contents of the document, and (iii) the evidentiary value of the document as a whole. When the plaintiffs consented to the document being exhibited, all that can be imputed to him of having admitted is the proof of the execution. In the instant case, I am even prepared to assume that the contents of the documents are admitted. I will analyse this position further. Supposing the plaintiffs had not consented to the exhibition of the said two documents, what was it that defendant No. 3 would have been required to bring on record ? He would have been required to examine the person who had written the said accounts and signed the said bills. Now, so far as the bills were concerned they were signed by Habib Hussein. Habib Hussein is dead. This means that some secondary evidence would have been required to be given as regards the signature of Habib Hussein. In the instant case the signature of

Habib Hussein could be proved by Tarachand himself. But, likewise, any other person who could identify the signature of Habib Hussein, but was wholly unacquainted with any relevant facts of the case, could have proved it and that much would be enough for the document going on record. Nothing could be elicited from such witness in cross-examination as regards the contents of the documents. Can such document by itself have any evidentiary value merely because it has gone on record as an exhibit? Could the document have evidentiary value merely because the fact that its execution is proved, even though the document was sham on the face of it? In other words, does the proof of its execution invest the document with any probative or evidentiary value if otherwise it has none? The answer to these questions must be in the negative. A -proof of a document is something which is independent from the evidentiary value of the document.

34. Moreover by consent, proof of the document may be dispensed with, but if the document is intrinsically inadmissible in evidence, no amount of consent by any party can confer the status of admissibility upon the said document. If an authority is necessary for this proposition, it is to be found from the judgment of the Madras High Court in *Kamulammal Avergal v. Athinkari Sangali Subha Pillai* (1918) 35 Mad LJ 11 : AIR 1919 Mad 758 (of Mad LJ) : at p. 760 of AIR of the said judgment, the learned Judges state as follows :--

"Mr. Justice Benson and Mr. Justice Sundaram Aiyar after reviewing all the authorities on the question point out in *Shri Rajah Prakasaramanim Garu v. Venkata Rao* ILR (1912) Mad 160 "consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant".

The ledger book which is sought to be produced becomes relevant only under the provisions of Section 34 of the Evidence Act and if the document does not qualify as relevant document within the contemplation of the said section, then the document is wholly irrelevant and any amount of consent by the plaintiffs would not convert the irrelevancy into relevancy.

35. We can analyse this aspect even further. If the ledger was accompanied by *Rojmel* or cash book or day book and if defendant No. 3 had facilitated the crosschecks and cross verification, for ought I know, the document could have got relevance. I must hasten to add that, in the facts of this particular case it might have or might not have been still open for the plaintiffs to contend that the ledger was a sham document. The point, however, is that even when a duly bound ledger book, incapable of being tampered with, that is to say, of a foolproof character was produced, all by itself, without production of the corresponding journal or *Rojmel* or day-book, the ledger would not by itself be admissible in evidence as a relevant document. It would become relevant only in conjunction with the cash book, *rojm*el or day book. If any authority is needed, it is to be found in *Chandi Ram v. Jamini Kanta* AIR 1952 Gu 92. In that case a Division Bench of the Assam High Court was dealing with the question whether the repayment claimed by the defendant could be proved by the account books

relied upon by him. This is what the learned Judges have observed in that connection (Para 6):

"In order to be relevant, they must be kept regularly in the course of business. They must be in conformity with some known system of accounting, The books produced in this case do not fulfil these requirements. They are not supported by any day book or roznamcha. They do not contain entries of transactions as they take place. There is no daily opening or closing balance in the ledger accounts. What has been shown from these books is that there was plaintiff's account and in that account entries were made. These entries could all have been made on any one day. These books, therefore, cannot be regarded as relevant u/s 34 of the Evidence Act."

36. With respect, I am in full agreement with the observations made by and the law laid down by the learned Judges of the Assam High Court. Following the same, I find that the so called ledger entries do not become relevant or admissible because the plaintiffs consented to their being accepted in evidence. The same is the case regarding bills. In this connection I must mention that even the bills were to be held proved and were found reliable still the defect of the judgment of the lower Court would not have been cured. If substantial piece of evidence which is wholly inadmissible or irrelevant has been relied upon by the lower Court, its judgment would stand vitiated and even this Court sitting in its writ jurisdiction under Article 227 of the Constitution can consider as to whether the final conclusion arrived at by the lower Court could be supported by some flimsy evidence which is claimed to have been technically proved. If oral evidence of witness Tarachand was to find corroboration from some documents having the value of some legal evidence, I could have no hesitation in accepting the same. However, I find that neither the bills nor the ledger serve as corroborative piece of evidence. There is no evidence on record to show as to when the bills were sent by defendant No. 3 to defendant No. 1. Not a single witness has been examined by defendant No. 3 to say as to when the bills were received by defendant No. 3. Even witness Tarachand does not as much as murmur about this position. All that we find, therefore, is that there were some bills sent by defendant No. 1 to defendant No. 3 sometimes and straight from the bills some entries were scribbled on Ex. 3, the bundle of sheets called ledger. Moreover, there is intrinsic evidence in the bills themselves, which falsifies the ledger entries. As for instance the bill for the month of May 1959 shows that a cheque for Rs. 714/- was sent by defendant No. 3 to defendant No. 1 on 1st of May, 1959. No credit in that behalf is to be found from the khata in the ledger at page 37-A. In these circumstances even assuming that the bills were "proved" and that even the contents thereof are proved, still the evidentiary value of the same is nil, to use the most euphemistic expression. It is very difficult to resist the temptation of saying that such bills could be prepared cheap for the dozens and so could the sheets which form part of the bundle described as "ledger". These documents cannot have any evidentiary value. Their giving any corroboration to the interested testimony of witness Tarachand is, therefore,

inconceivable.

37. Mr. Agarwal then contends that no suggestion was made to defendant No. 3 that bills or accounts were fabricated documents. In other words, it is his contention that if the documents are manifestly unreliable, the Court should shut its eyes to that situation, merely because the plaintiffs have chosen not to object their going in as exhibits and merely because the witness has had the cheek to solemnly produce the documents before the Court. I do not think that this is the correct position in law. This is so particularly because in the instant case the onus of proof was heavily upon defendant No. 3 himself. It is stated above that by its order dated 1-4-1971 the trial Court had put the onus of proof regarding issue No. 16, which is the relevant issue in this connection upon defendants Nos. 2 and 3. Defendant No. 3 has filed a revision application to the Bench who confirmed the order passed by the trial Court. So far as the issue of date of sub-tenancy was concerned, therefore, defendant No. 3 was in the position of a plaintiff. This meant that it was he, who, in the first instance, had to prove that he became a sub-tenant before 21-5-1959. It was he who had to produce all the documents which were necessary for the purpose of making good his case and he had to see to it that if any defect, or shortcoming, or illegality was found in the document relied upon by him, evidence was led to explain those shortcomings etc. His failure in this behalf is dismal.

38. Mr. Agarwal's next contention is that because the documents have been allowed to go in by consent and because there were no suggestions of fabrication of those documents, his client has been handicapped in that, in effect he was prevented from producing other evidence which would have supplemented the ledger entries and the bills. Now, here comes the question of drawing adverse inference. As stated above so far as issue No. 16 is concerned, defendant No. 3 is in the place of a plaintiff. He has to produce all these documents necessary for establishing his case. If he does not produce any necessary document then the adverse inference must follow. The fact that some documents have gone in by consent is no insurance against such adverse inference. In the instant case it was incumbent upon the lower Court to draw adverse inference against defendant No. 3 because defendant No. 3 had failed to produce the primary evidence, viz. rojmel, daybook, cash book etc. from which a check and counter-check of the ledger entries could have been rendered possible. In this view of things the above contention of Mr. Agarwal must also fail.

38-A. Mr. Agarwal then contends that the onus of proving that the sub-tenancy had come into existence prior to 21-5-1959 was put wrongly upon defendant No. 3. I have my doubts as to whether it is open for Mr. Agarwal to urge that point at this stage. It may perhaps be possible for the plaintiffs to contend that defendant No. 3 had filed revision application to the Bench of two Judges against the order of the trial Court casting the onus upon defendant No. 3. There is nothing to show as to on what grounds the revision application was dismissed by the Bench. I am, however, prepared to assume in favour of Mr. Agarwal that the revision

application was. rejected only on the ground that it was against an interlocutory order. I am even prepared to hold further that so far as this Court is concerned, the question about the onus is not res judicata. However, on the merits I find it very difficult to agree with Mr. Agarwal. To my mind the onus of proof as regards issue No. 16 was rightly put upon defendant No. 3. This is so firstly because under the Bombay Rent Act prohibition against sub-tenancy is the rule; whereas permission to sub-tenancy is only an exception carved out of the rule by Sub-section (2) of Section 15 as also by the contract to the contrary referred to in Sub-section (1) of Section 15. Defendant No. 3 is relying upon this exception and hence the circumstances which entitled him to avail of the exception must be proved by himself. This principle is analogous to the one contemplated by Section 105 of the Evidence Act.

39. Moreover, the provisions of Section 106 of the Evidence Act give rise to the same position. After all, the exact date of the sub-tenancy was a fact which could be within the exclusive knowledge of defendant No. 3 only. From the very nature of things that the plaintiff Trust could have no knowledge about the same, the onus of proving the date of the sub-tenancy must, therefore, lie upon defendant No. 3 only. Similar conclusion could be arrived at also by relying upon Section 102 of the Evidence Act. We find that in the instant case the parties have come out with the pleadings. The plaintiffs have alleged subletting by one in favour of defendant No. 3. Defendant No. 3 had admitted subletting, but has contended that the subletting was done before 21-5-1959. Under the provisions of Section 102 of the Evidence Act, we shall have to apply the test regarding the onus by assuming that no evidence was led by either side. In the instant case if neither defendant No. 3 nor the plaintiffs led any evidence, defendant No. 3's case that sub-tenancy took place before 21-5-1959, therefore, could be deemed to have gone unproved. Moreover, it is defendant No. 3, who have been claiming a legal right regarding valid sub-tenancy in respect of the suit premises. That legal right can exist only if his sub-tenancy originated before 21-5-1959. It is, therefore, difficult to see as to how he could escape the onus of proving his legal right.

49. Mr. Agarwal contends that the plaintiffs are having their office in the building in which the suit premises are situate and, hence, there is no reason to hold that the factum of sub-tenancy was within the exclusive knowledge of defendant No. 3. I have nothing with me on record to hold that the plaintiffs were occupying any portion of the suit house as the office of the plaintiffs trust. But even assuming that the plaintiff's office was situate in the same building, still it is impossible to hold that the plaintiffs would be knowing the date of the sub-tenancy created by defendant No. 1 in favour of defendant No. 3.

41. In this connection it is rather significant that a plea of waiver was raised by defendant No. 3 in their written statement. It was open for defendant No. 3 to lead evidence that plaintiffs were aware about the fact of subletting immediately from the date of subletting. No such evidence was led or is to be found from the record. There is nothing on the record to show that the plaintiffs were or could

be aware of the date of the inception of defendant No. 3's subtenancy. That date is, therefore, exclusively within the knowledge of defendant No. 3. u/s 106 it was, therefore, upon defendant No. 3 to prove that the subtenancy had been taken at a time prior to 21-5-1959. Whatever view we may take, the onus of proving a valid sub-tenancy of defendant No. 3 was heavily upon defendant No. 3. If that was so, the further conclusion is inescapable that the kind of evidence led by defendant No. 3 does not result in the discharge of the onus to the slightest extent.

42. Lastly, Mr. Agarwal contends that the entire question which was agitated before this Court by the petitioners-plaintiffs is essentially one of fact and one of appreciation of evidence. He contends that this Court exercising its jurisdiction under Article 227 of the Constitution is loath to disturb the finding arrived at by the lower Court by appreciation of the evidence.

43. I have given my careful consideration to this aspect of the matter. I, however, regret to hold that it was not possible for Mr. Agarwal to persuade me to agree with his contention. I have pointed out above the real question in the case as regards the legality of the legal effect of the evidence upon which reliance is sought to be placed by the learned Judges of the Court below. I have pointed out that the learned Judges were themselves not prepared to accept the highly interested testimony of witness Tarachand. Their mistake, however, lay in fact that the kind of evidence they have sought corroboration in was either no evidence at all or was a sham piece of evidence. If a substantial portion of the evidence which is relied upon by the Courts below is found to be inadmissible or of no evidentiary value, it would be open for this Court even in its jurisdiction under Article 227 of the Constitution to have a second look at the finding arrived at by the Courts below even though there was some other small evidence, which went to support the ultimate finding. This is so because in such a case it could not be said that the lower Court could have arrived at the same conclusion on the basis of limited quantity of evidence. In the instant case the conclusion is inescapable that there exists no corroborative piece of evidence for accepting the evidence of witness Tarachand and the learned Judges of the Court below have made their mind clear that in the absence of any piece of corroborative evidence they were not inclined to accept the evidence of Tarachand at all. To my mind, therefore, the question is not at all a question of fact but is certainly pure question of law. In these circumstances I have no other option but to hold that it is necessary for me to exercise my jurisdiction under Article 227 of the Constitution to quash the finding recorded by the Court below regarding the validity of the sub-tenancy claimed by defendant No. 3.

44. Having regard to all these aspects of the matter mentioned above, I think that the judgment of the lower Court holding that the sub-tenancy of defendant No. 3 was valid is a finding erroneous in the eyes of law. The decree passed by the lower Court must, therefore, be set aside and the decree passed by the trial Court must be restored. Rule earlier issued in Spl. C. A. No. 537 of 1975 is,

therefore, made absolute. The decree passed by the Bench of the two Judges of the Small Causes Court in Appeal No. 343 of 1973 is hereby set aside and the decree passed by the trial Court in R. A. E. Suit No. 510/4293 of 1963 is hereby restored. The stay granted by the order of this Court dated 25-2-1975 stands vacated.

45. In the circumstances of the case there shall be no order as to costs.

46. Mr. Agarwal appearing for defendant No. 3 has made an oral application for a certificate to appeal to the Supreme Court. The Constitution gives me no scope or jurisdiction in that behalf. Article 133(3) of the Constitution is quite unequivocal. Hence I have no other option but to reject the said application.

47. After the judgment in Spl. C. A. No. 537 of 1975 was completed Mr. Morje, learned Advocate for defendant No. 3, appeared before me and wanted to argue the Civil Revision Application. He had no explanation to give for his absence all these days. He did not even try to explain as to why a revision application u/s 115, C. P. C. was filed instead of Spl. Civil Application under Article 227 of the Constitution. He was asked as to whether in similar other matters he had filed revision applications. He had to admit that in several similar other matters he had filed Spl. Civil Applications. He had no explanation as to why a revision application was filed in this matter, although he knows that this question has been set at rest by the Supreme Court in Vora Abbasbhai Alimahomed Vs. Haji Gulamnabi Haji Safibhai, as early as on 22nd Oct., 1963 and that in view of that judgment and similar other subsequent judgments of the Supreme Court no revision application is normally filed by the Advocate or entertained by this Court in matters such as the present one. If any of the parties to the proceedings in the lower Courts, arising out of the Rent Act, is aggrieved by any decision of the said Courts, he invokes the jurisdiction of this Court under Article 227 of the Constitution, a position of which Mr. Morje is fully aware. All the same no reason was even whispered as to why a revision application was filed in the instant case.

49. Mr. Morje just prayed that the revision application may be permitted to be converted into a Special Civil Application. I wanted him to satisfy me about the bona fides of such an application for conversion. Not a word was said in that behalf by him. Significantly enough even after having taken time to argue on merits and even though he has taken time for argument and has in fact thereafter argued the same at length, he has not even cared to comply with the technical requirements of conversion of a revision application into a Spl. Civil Application under Article 227 of the Constitution. It is true that normally this Court allows such conversion as a matter of course. But that is so because it sees that the original mistake of invoking a wrong jurisdiction of this Court was a bona fide mistake. When, however, the bona fides are very much suspect, the matter assumes a different complexion.

49. When the petition was last heard on 10-1-1980 Mr. Morje asked for time till today for effecting compromise. However, he has not found it possible to remain

present in the Court to-day nor has he found it necessary to inform a simple demand of common courtesy to the Court, as to what happened to his promise of compromise for Which purpose in fact he took an adjournment till to-day. Mr. Naik appearing for the respondents-landlords says that there has been no settlement.

50. In these circumstances I have no other option but to proceed with this judgment. It is needless to say that since the petitioners' counsel has not found it necessary to take the elementary precaution to do the needful for converting the revision application into a Special Civil Application by payment of requisite Court-fees and by making a suitable application in that behalf, I shall have to deal with the present petition only as one u/s 115 of the Code of Civil Procedure.

51. The facts out of which the present revision application arises are simple. It has been the contention of the respondents-landlords that suit premises were let out to M/s. Cathay Theatres Pvt. Ltd. with effect from 1st July, 1958, that there was a specific condition of prohibition against subtenancy and that the said condition was violated by the said M/s. Cathay Theatres Pvt. Ltd. after 21-5-1959. The contention of the landlords, therefore, was that M/s. Cathay Theatres had exposed themselves to the liability of eviction u/s 13(1)(e) of the Rent Act read with Section 15 of the same. The contention of the revision-petitioners was that a portion of the suit premises was let to them by M/s. Cathay Theatres as sub-tenants, but that sub-tenancy had come into existence before 21-5-1959. The entire question therefore turns upon the question as to whether the revision petitioners' occupation of the portion of the suit premises as sub-tenant started before or after 21-5-1959. Now, both the Courts below have recorded a concurrent finding of fact that the occupation of the revision-petitioners started from August, 1959. For this purpose the Courts below have relied upon the revision-petitioners' own letter dated 27-7-1959, Ext. B, addressed to M/s. Cathay Theatres. The letter contains an unequivocal admission on the part of the present revision-petitioners that their occupation of the portion of the suit premises was to commence from 1-8-1959. Relying upon this averment with other evidence on record both the Courts below have come to the conclusion that the present revision-petitioners were inducted by M/s. Cathay Theatres on the suit premises as sub-tenants after 21-5-1959. This is a pure finding of fact amply supported by evidence on record. It is impossible to see as to what question of jurisdiction could arise in such a matter. If that was so, interference by this Court in such a finding u/s 115 of C.P.C. would be extremely unwarranted.

52. Even if, for the sake of argument, it was to be held that the case should be construed to be one under Article 227 of the Constitution, I find that no sufficient reasons are brought to my notice to justify my interference with the concurrent findings of the Courts below. This apart, the petitioners' conduct referred to hereinabove, wholly disentitles them to seek any relief from this Court in the exercise of its jurisdiction under Article 227 of the Constitution. In these

circumstances the revision application must fail.

53. Rule earlier issued in the application is discharged. The petitioners shall pay the respondents costs of this petition.

54. Order accordingly.