

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1940 OF 1996

1. Smt. Taralakshmi Maneklal Thanawalla (since deceased)		
2. Smt. Vinodkanta Kantilal Thanawalla since deceased by her heirs and legal representatives :		
Satish Kantilal Shah & Ors.	..	Petitioners
VS.		
Shantilal Makanji Dave & Ors.	..	Respondents

Mr. P. G. Karande for Petitioners.

Mr. Rajesh Datar with Mr. Rohan Dharandale for Respondents.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 16 July 2015

Date of Pronouncing the Judgment : 24 July 2015

JUDGMENT :-

1] This petition is directed against the orders 17 March 1989 and 7 October 1995 dismissing petitioners suit seeking eviction of the respondents from the suit premises i.e. gala admeasuring 37' x 10' at Station Road, Thane.

2] The petitioners are the owners of municipal house no. 17381 at Station Road, Thane. On the ground floor, there are, in all, four galas, out of which one of the galas was let out by the petitioners to Shri Shantilal Dave ('Dave') for monthly rent of Rs.22.79. On each side of the suit premises, are the galas owned and possessed

by the petitioners. In the year 1974, Shantilal Makanji Dave assigned tenancy rights in respect of the suit premises to Prabhulal Khimji Thakkar ('Thakkar'). This led to the petitioner instituting a suit against Dave and Thakkar alleging unlawful assignment. The suit was however dismissed. On the basis of evidence led in the present proceedings as well as the statement made by the petitioner before the appeal Court, it is safe to proceed upon the premise that the petitioner accepted that Thakkar is presently the tenant in respect of the suit premises.

3] The petitioner instituted regular civil suit no. 1349 of 1981 in the Court of Civil Judge, Senior Division at Thane (trial Court) seeking eviction of Dave, Thakkar as also Arora and Shah (sub tenants) on the grounds of default in payment of rents, unlawful subletting and reasonable and bonafide requirement. The suit was dismissed by judgment and order dated 17 March 1989. The appeal against the same was also dismissed by the District Judge, Thane (appeal Court) on 7 October 1995. Hence the present petition.

4] Mr. Karande, the learned counsel for the petitioners submitted that material evidence has been ignored both on the aspect of bonafide and reasonable requirement as well as unlawful subletting. Besides, the legal position concerning both the aspects

has also been ignored. As a result, the two Courts have applied incorrect tests in determining the issue of unlawful subletting and bonafide requirement. For all these reasons, Mr. Karande submitted that there is error of jurisdiction and perversity in the making of the impugned orders. Mr. Karande, referred to several decisions, some of which shall be considered in the course of this judgment.

5] Mr. Datar, the learned counsel for the respondents, at the outset submitted that there are concurrent findings of fact recorded by the two Courts and there is no perversity in the record of the same. Mr. Datar submitted that the petitioners have several other business premises, including three adjacent to the suit premises. Accordingly, the need of the petitioners can neither be reasonable nor bonafide. On the aspect of unlawful subletting, Mr. Datar submitted that Thakkar, whilst retaining the possession of the suit premises had merely entered into partnership for carrying on business through the suit premises. As per the law laid down by the Apex Court in the case of *Helper Girdharbhai vs. Saiyed Mohmad Mirasaheb Kadri & Ors.*¹, such arrangement, does not amount to subletting. Accordingly, Mr. Datar urged the dismissal of this petition.

6] Rival contentions now fall for determination.

7] At the outset, Mr. Karande made it clear that the ground of

1 (1987) 3 SCC 538

default in payment of rent was not being pressed. Further, Mr. Karande conceded that the matter will have to proceed on the basis that Thakkar had been accepted as the tenant in respect of the suit premises, in place of Dave. Even apart from such concession, Mr. Vinod Shah (son of the original petitioner Taralakshmi) deposed on 6 October 1987 that from 1974, Thakkar is a tenant of the suit premises. In the appeal Court, Mr. M. R. Patkar, appearing for the petitioners also made a submission that Thakkar was accepted as a tenant by the petitioners and there is no longer any dispute on that score. In these circumstances, what falls for determination is whether Thakkar has, in the year 1981 unlawfully sublet the suit premises to Arora and Shah (original defendant nos. 3 and 4).

8] This Court, while exercising jurisdiction under Article 227 of the Constitution of India, is not exercising any appellate jurisdiction. The scope of interference is therefore, limited. Unless therefore, it is established that the findings of fact recorded by the two Courts are vitiated by perversity or non application of mind, there is no warrant to interfere with the same. In this case, Mr. Karande submits that there is complete failure to assess relevant evidence on record in the light of well settled tests for determining whether the partnership pleaded by Thakkar was genuine, or whether the same was merely a cloak to conceal the real transaction of subletting. For this limited purpose, reference can be made to the deeds and documents on

basis of which partnership was pleaded as well as some admissions in the deposition of both Thakkar as well as Shah.

9] Both Shah (DW 1) and Thakkar (DW 2) admitted to the execution of deed of partnership dated 19 February 1981 (Exhibit 98) and stated that this was the document which governed the business relations between Thakkar, Shah and Arora (defendant nos. 2, 3, and 4) undertaken in the suit premises. Certain clauses from the deed (as per accepted translation) read as follows:

“(1) Our partnership business is to be carried in the name of “Bade Saab Apparels” at Taralaxmibai Chawl, Opposite Laxminarayan Temple, Station Road, Thane.

(2)

(3) Capital for said business shall be deposited by party of the First Part and party of the second part. Similarly in future extra capital for said business shall be provided by parties of the First Part and Second Part. The Party of the Third Part shall not pay any share in said capital. But the party of the third part shall give earlier mentioned premises admeasuring 10' x 40' along with all articles fixtures (list of all articles is enclosed) same will be treated as capital of the Party of the Third Part.

(4) The parties of First and Second part shall look after entire business of said partnership firm. The parties of First and Second part shall bear entire expenses of articles – baggage, municipal permission, servants – workers, electricity charges and incidental expenses. The party of the Third Part because of his other business activities, will not look in manner in conduct of said partnership business. Similarly, the party of the Third Part shall not be liable for any type of responsibility of said business.

(5) As party of the First and Second part shall look after said business of partnership, they alone shall be entitled to all profit arising from said business. Similarly if there is any loss in said business parties of the First and Second part shall be entirely responsible for the same and the parties of the First and Second part shall bear such entire loss.

(6) In lieu of making available his above mentioned

premises admeasuring about 10' x40', the party of the Third Part shall take for himself a sum of Rs.800/- (Rupees Eight Hundred only) per month from income of said partnership business. The parties of the First and Second part shall bear responsibility to pay every month Rs.800/- (Rupees Eight Hundred Only) to the party of the Third Part. If said partnership business earns profit or loss in any manner, even then the parties of the First and Second part shall pay every month Rs.800/- to the party of the Third Part.

(7)
(8) The Party of the Third Part shall have right to take back in his possession above described premises admeasuring about 10' x 40' along with articles therein, if for any of above reasons whatsoever or by any legal procedure said business of partnership is dissolved and the parties of the First and Second Part shall not obstruct in any manner to such right.
[Emphasis supplied]

10] There is on record yet another deed of retirement cum continuation of partnership dated 3 September 1986. This is entered into between Dinesh Amrutlal Shah and Thakkar and Sailesh Shah. The said Dinesh is described as 'continuing partner' in the context of partnership constituted by the deed dated 19 February 1981 (Exhibit 98). Sailesh Shah is described as 'retiring partner'. This deed records the retirement of Sailesh Shah and continuance of Dinesh Shah as the partners in the partnership firm of 'M/s. Bade Saab Apparels' constituted by deed dated 19 February 1981. Clause (8) of this document, reads thus:

“8. The Profit or loss arising of the business of the partnership firm shall be divided amongst the partners in the following proportions:

		Profit	Loss
1	Shri Dinesh A. Shah	90%	100.00%
2	Shri Prabhulal K. Thakkar	10%	NIL

11] The suit in the present case was instituted by the petitioners on 16 October 1981. The deed of partnership between Thakkar, Arora and Sailesh Shah is dated 19 February 1981 i.e. prior to the institution of the suit. The deed of retirement cum continuation of partnership is executed on 3 September 1986 i.e. almost five years after the institution of the suit. The deed dated 3 September 1986 is not clear as to when Dinesh Shah was in fact inducted as a partner in the firm. However, Sailesh Shah (DW 1) has deposed that in the year 1982-83, Arora (defendant no. 3) retired and in his place, Dinesh Shah was admitted.

12] The appeal Court, in exercise of powers under Order 41 Rule 27 of CPC permitted additional evidence, which includes extract of entry dated 17 September 1981 from the register maintained by the Registrar of Firms in the context of partnership firm M/s. Bade Saab Apparels. The same, reads thus:

<i>"FIRM NO. M-65581</i>			
<i>Name : M/S. BADESAB APPARELS.</i>			
<i>Business : TAILORING BUSINESS.</i>			
<i>NO. of Entry</i>	<i>Date of Entry</i>	<i>Nature of entry</i>	<i>Remarks</i>
1	17 th 1981	Sept, Name : M/s. Badesab Apparels. Principal Place: Opp. Laxmi Narayan Temple, Station Rd; Dist : Thane.	

*Partners addresses**& date of Joining:**1. Shah Sailesh Amrutlal**joined on 19.2.1981**2. Dinesh Amrutlal Shah**Joined on 19.2.1981**3. Prabhulal Khimji Thakkar.**Tembi Naka, Thane. Opp: Civil**Hospital, Dist: Thane. Joined**on 19.2.1981.**Add. of No. 1 & 2 :Sai Prasad Bldg.,**Raz-Maruti Road, Thane**Duration : At Will**From date : 27th Aug. 1981**Sd/- N. A. Karnik. Adv.**Sd/- S.B. Shinde**Registrar of firms, Bombay”**[Emphasis supplied]*

13] On basis of the above extract, Mr. Karande submitted that the deed on basis of which the partnership was registered, was not the deed dated 19 February 1981 (Exhibit 98) and that said deed which was presented for registration of the firm, has been suppressed by Thakkar and Shah. This submission was made in the context of the entry that Dinesh Amrutlal Shah had joined the firm on 19 February 1981, when in fact, the deed dated 19 February 1981 (Exhibit 98) makes no reference to Dinesh Shah, but rather makes reference to Arora. There is some merit in the contention of Mr. Karande, particularly in the context of deposition of Sailesh Shah and the extract from the Registrar of Firms. However, this circumstance, might at the highest lead to drawal of some adverse inference, that, if the actual deed of partnership, which was presented for registration to the Registrar of Firms were to be produced, the same

might contain some material adverse to the interest of the respondents. There is however, no necessity to base any finding on the basis of adverse inference, because, in my judgment, the other material on record itself supports the conclusion that the so-called partnership was nothing but a camouflage to conceal the real transaction of unlawful subletting by Thakkar.

14] In order to prove mischief of subletting as a ground for eviction under the Rent Control laws, two ingredients have to be appreciated, (1) parting with possession of tenancy or part of it by the tenant in favour of a third party with exclusive right of possession, and (2) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent. Inducting a partner or partners in the business by a tenant, by itself does not amount to subletting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of subletting, the Court may tear the veil of partnership to find out the real nature of the transaction entered into by the tenant. The existence of deed of partnership between the tenant and the alleged sub tenant or the ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of subletting or parting with

possession in the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession. The initial burden of proving sub-letting is on the landlord. But once he is able to establish that the third party is in exclusive possession of the premises and that the tenant has no legal possession of the tenanted premises, the onus shifts upon the tenant to prove the nature of occupation of such third party and that he still continues to hold legal possession of the tenanted premises. In other words, initial burden lying upon the landlord would stand discharged by adducing *prima facie* proof of the fact that the party other than the tenant was in exclusive possession of the premises. A presumption of subletting may then be raised and would amount to proof unless rebutted.²

15] As noticed earlier, there is discrepancy between the document at Exhibit 98 i.e. the deed of partnership dated 19 February 1981 and the entry dated 17 September 1981 in the extract of registration obtained from the Registrar of Firms. There is no clarity as to the precise deed or document produced by Thakkar at the stage of registration with the Registrar of Firms. However, even if the contention of Thakkar and others that deed of partnership dated 19 February 1981 was the document which was produced is to be accepted, the contents thereof establish that the

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real transaction between Thakkar and the so-called partners was of subletting. There is no dispute that no consent whether in writing or otherwise was obtained by Thakkar from the petitioners.

16] Clause 3 of the partnership deed states that no capital whatsoever shall be contributed by Thakkar, whether at the stage of entering into partnership or in future. However, it is stated that Thakkar '*shall give earlier mentioned premises admeasuring 10' x 40' along with all articles fixtures (list of all articles is enclosed)*'. Thakkar in his deposition (cross-examination) has admitted that when he entered into the partnership in 1981, his business was not that of tailoring. Further, that the list of articles mentioned in the agreement at Exhibit 98 was not attached to it. Thakkar has also admitted that he has no knowledge of tailoring work. Similarly Sailesh Shah (defendant no. 4) in his deposition has admitted that Thakkar had no knowledge of tailoring business or sale of clothes. It is also admitted by Sailesh Shah that Thakkar never took part in the management of the partnership business. The expression '*give earlier mentioned premises*' In clause 3 of Exhibit 98, in said context means and implies that Thakkar parted with the possession of the suit premises in favour of Sailesh Shah and Arora in the guise of entering into partnership with them. This is clear from the rest of the clauses as well as oral evidence on record.

17] Clause 4 of the partnership deed at Exhibit 98 provides that Sailesh Shah and Arora shall manage the entire business of the firm, bear all expenses towards articles, baggage, municipal permissions, employees, electricity charges and incidental expenses. Thakkar is exempted from taking part in the business activities of the firm and is also exempted from any liability or responsibility of any type concerning the business of the firm. Clearly therefore, this is not a case where Thakkar, as a partner, has agreed to carry on the business of the firm together with other partners.

18] Clause 5 of the partnership deed at Exhibit 98, in terms provides that since the entire business of the firm is to be carried on by Sailesh Shah and Arora, only they shall be entitled to all the profits arising from the said business and similarly only they shall be entirely responsible for the losses. One of the essential ingredients in the matter of constitution of a partnership is that the partners agree to carry on business in partnership with each other and to share the profits of such business. The element of sharing of profits is clearly absent in this projected partnership. It is possible that there is a dormant partner, who does not take part in the day to day activities or the business of the firm. It is also possible that a partner does not bear the share of losses. However, the share in profits, is one of the vital ingredients in the constitution of a partnership firm.

Such vital ingredient is absent in the partnership or the projected partnership.

19] Section 4 of the Indian Partnership Act, 1932 (Partnership Act) defines '*partnership*' as 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. From the definition itself, it is clear that one of essential elements necessary for determining the existence of partnership is that there must be an agreement to share the profits of business. Section 6 of the Partnership Act provides for mode of determining existence partnership. This section provides 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 have to the real relation between the parties, as shown by all relevant facts taken together. The first explanation to this section provides that sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property, does not of itself make such persons partners. The second explanation provides that the receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of the profits or varying with the profits earned by a business, does not itself make him a partner with a person carrying on the business. This means that regard has to be had to the real intention between the parties, as shown by all relevant facts taken together.

The receipt by a person of the share of the profits of a business is an important element and strong evidence of the existence of partnership between him and the persons carrying on business. It is, however, not conclusive. The crucial test is whether such participation in profits constitutes the relationship between the principal and agent between the persons taking profits and those actually carrying on the business. In this case the element of sharing the profits is absent.

20] Clause 6, again, in terms, provides that Thakkar, *'in lieu of making available his above mentioned premises shall take for himself a sum of Rs.800/- (Rupees Eight Hundred only) per month from income of said partnership business.'* This clause further goes on to state that even if the firm makes losses, Sailesh Shah and Arora shall pay every month Rs.800/- to Thakkar. Clause 8 then provides that Thakkar *'shall have right to take back in his possession above described premisesif the business of partnership is dissolved.'*

21] A conjoint reading of clauses 3, 6 and 8 leave no manner of doubt that Thakkar, in lieu of consideration of Rs.800/- per month has parted with his possession of the suit premises in favour of Sailesh Shah and Arora. In clause 3 there is reference to the giving of the suit premises to Shah and Arora. In clause 6 there is

reference to making available the suit premises to Arora and Shah. In clause 8, Thakkar has reserved unto himself the right to take back in his possession the suit premises. All this is sufficient to establish that Thakkar has parted with the exclusive possession of the suit premises in favour of Sailesh Shah and Arora in the year 1981 and thereafter, in place of Arora, to Dinesh Amrutlal Shah. The deed at Exhibit 98, without anything further, discharges the initial burden which the law casts upon the petitioners.

22] In the case of *Celina Coelho Pereira* (supra), the Apex Court has held that the initial burden of proving subletting is upon the landlord, but once he is able to establish that the third party has no exclusive possession of the premises, the onus shifts upon the tenant. It is further held that the initial burden lying on the landlord would stand discharged by adducing *prima facie* proof of the fact that the party other than the tenant was in exclusive possession of the suit premises. A presumption of subletting may then be raised and would amount to proof unless rebutted. If reference is made to the deposition of Sailesh Shah and Thakkar, it will be evident that Thakkar has failed to discharge the onus. Rather, the deposition of Sailesh Shah and Thakkar establish that the so-called partnership was merely a cloak to conceal the real transaction of sub-letting.

23] In the case of *Helper Girdharbhai* (supra), the Apex Court

has held that the issue whether a genuine partnership existed of which the tenant claims to be a partner, is a mixed issue of law and fact. It has been further held that the mere fact that tenant partner was entitled to a fixed percentage of the profit of the firm only and not to share its losses, was not by itself a consideration to hold that such partnership was not a genuine one and the tenant had merely sublet the premises to the so-called partners. This position, is distinguishable and will not apply to the facts and circumstances of the present case. Even in the case of *Helper Girdharbhai* (supra) the element of sharing of profits was present, although, the tenant partner was entitled to a fixed percentage of the profit of the firm. In the present case, as noted earlier, clause 5 of the deed at Exhibit 98 in terms provides that only Sailesh Shah and Arora will be entitled to the profit arising from the business. Thus, in the present case there is no element of sharing of profit whatsoever, as between Thakkar and the remaining partners. Clause 6 of the document at Exhibit 98 merely provides that Thakkar shall, in lieu of making available the suit premises, take for himself a fixed sum of Rs.800/- per month from the income of the partnership business. This clause further provides that Sailesh Shah and Arora shall pay this fixed amount of Rs.800/- per month to Thakkar irrespective of whether or not the partnership business earns profits or makes losses. Clearly this was not the fact situation in the case of *Helper Girdharbhai* (supra).

Again, in the said decision, there were several other factors, which were noticed by the Apex Court to uphold the conclusion that the partnership was genuine and not merely ostensible transaction to conceal the real transaction of subletting.

24] In this case, if the tests summarised by the Apex Court in the case of *Celina Coelho Pereira* (supra) are applied, it is evident that the real transaction between the parties is one of subletting. Thakkar, has clearly parted with the possession of the suit premises for consideration of Rs.800/- per month. Thakkar is not at all actively associated with the partnership business, rather is exempted from association with the partnership business. In the evidence, it has come on record that the partnership business is dealing in tailoring, sale of clothes, etc. and Thakkar, has neither any knowledge nor experience of this kind of business. This is not a case where Thakkar can be said to have retained any control over the suit premises. Thakkar, has only retained unto himself the right to take back in his possession the suit premises if the partnership firm is dissolved. Sailesh Shah in his deposition has at one place admitted that it is true that Thakkar has given the suit premises to Sailesh Shah and Arora "*as sub tenants*". Mr, Datar, however submitted that this admission appears to be a typographical error and on the basis of a stray statement in the deposition, the effect of the rest of the deposition cannot be whittled down.

25] Even if, the aforesaid categorical admission is excluded from consideration, there is other material in the deposition of Sailesh Shah and Thakkar, which establishes the case of sub-letting. There are admissions that Thakkar had no knowledge of tailoring business of sale of clothes. There are admissions that Thakkar never took any part in the management of the partnership business. There are admissions that there was no list of articles like sewing machines, cupboard etc. attached to the deed of partnership at Exhibit 98. There is evidence that no such articles were supplied by Thakkar to the remaining partners. All this coupled with the categoric provisions in the deed of partnership, to the effect that Thakkar was not entitled to any share in the profits of the firm, make it very clear that the entire transaction, in reality, was one of sub-letting and not partnership, as it was projected to be. In such a situation, the two Courts have failed in their duty to perice the veil of partnership and determine the real nature of transaction between Thakkar and others who claim to be the partners.

26] There is evidence on record that the firm commenced its business from the suit premises in the year 1981 and invitation cards were printed for the inaugural. Upon such invitation cards even the name of Thakkar did not appear. True, as contended by Mr. Datar, this by itself, is not a relevant circumstance. However, if such several circumstances are considered cumulatively, it is clear

that the partnership in the present case was only ostensible and a cloak to disguise the real transaction of subletting.

27] Mr. Datar however submitted that in terms of the deed of retirement cum continuation of partnership dated 3 September 1986 which was admitted in evidence before the appeal Court, Thakkar was granted a 10% share in the profits of the firm. As noted earlier, this is recorded in the deed dated 3 September 1986. However, this is, by no means sufficient to rebut the presumption of subletting arising out of parting with exclusive possession. Further, this is also not sufficient to whittle down the effect of various clauses in the deed of partnership dated 19 February 1981, which continue to govern the relation between so-called partners. No serious credence can be given to the 10% profit clause, particularly because the deed dated 3 September 1986 is entered into almost five years after the institution of the suit seeking decree of eviction on the ground of unlawful subletting. The deed dated 3 September 1986, is nothing but self serving document, made, perhaps realising the effect of clause 5 of the deed of partnership dated 19 February 1981 which had provided that Thakkar will have no share in the profits of the firm. Accordingly on the basis of deed dated 3 September 1986, it is not possible to accept Mr. Datar's contention that this was a case of genuine partnership and not merely an ostensible transaction.

28] Besides, the basic principle in such matters is that the rights of the parties should be determined on the basis of date of the institution of the suit. Thus, if the plaintiff has no cause of action on the date of the filing of the suit, *ordinarily* he will not be allowed to take advantage of the cause of action arising subsequent to the filing of the suit. Conversely, no relief will *normally* be denied to the plaintiff by reason of any subsequent event if at the date of the institution of the suit, he has the substantive right to claim such relief. Therefore, the unilateral and self-serving act, on the part of the respondents in executing Deed dated 3 September 1986, almost five years after the date of the institution of the suit, is really not an event, which can make any dent upon the rights accrued in favour of the petitioners on the date of the filing of the suit.

29] In case of *Carona Ltd. Vs. Parvathi Swaminthan & Sons*³, the suit was instituted against a company having paid up share capital of Rs.8.20 Crores seeking its eviction from the suit premises. Under the provisions of Section 3(1)(b) of the Maharashtra Rent Control Act, 1999, a company having paid up share capital of more than Rupees One Crore is not entitled to protection of the Rent Act. After the institution of the suit, the company through its Board of Directors resolved to the reduction of the share capital from Rs.8.20 Crores to Rs.41 Lacs (less than Rupees One Crore). On such basis, the

3 (2007) 8 Supreme Court Cases 559

company urged that it was out of the clutches of section 3(1)(b) and consequently entitled to protection of the Rent Act. The Supreme Court negated such contention and the relevant observations at paragraphs 42 and 43 read thus:

“42. In our judgment, the law is fairly settled. The basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit. Thus, if the plaintiff has no cause of action on the date of the filing of the suit, ordinarily, he will not be allowed to take advantage of the cause of action arising subsequent to the filing of the suit. Conversely, no relief will normally be denied to the plaintiff by reason of any subsequent event if at the date of the institution of the suit, he has a substantive right to claim such relief.

43. In the instant case, in our opinion, the courts below were right in holding that the date on which tenancy was determined, the right in favour of the landlord got accrued. Such right could not have been set at naught by the tenant by unilateral act by passing a resolution to reduce 'paid up share capital' of the Company.”

30] In the appeal Court, leave was granted to produce certain other documents, including sales tax registration documents. Such documents indicate the name of Sailesh Shah against the business of M/s. Bade Saab Apparels being carried out from the suit premises. The registration is in the name of M/s. Samet Traders. This material has been rejected by the appeal Court by observing that the petitioners case was that Thakkar had sublet the suit premises to the firm M/s. Bade Saab Apparels and the sales tax documents make out a case of M/s. Samet Traders, a proprietary concern of Sailesh Shah carrying on business from the suit

premises. The appeal Court has observed that since there can be no variance between pleadings and proof, such material cannot be taken into consideration. The approach the appeal Court, to say the least is not at all proper. The petitioners have claimed that Thakkar has unlawfully sublet the suit premises in favour of Sailesh Shah and Arora. The capacity in which Sailesh Shah and Arora carry on business in the suit premises is something, which the said two persons should have explained. This is not a case of any variance between pleadings and proof.

31] The trial Court and the appeal Court have not addressed themselves to relevant and vital material in the form of deed of partnership dated 19 February 1981 as also several admissions in the depositions of Sailesh Shah and Thakkar. Besides, the two Courts have not at all adverted to the legal position in the matter of unlawful sub-letting, when the tenant raises a defence that he has genuinely entered into partnership with some other parties for the purposes of carrying on business in the suit premises. In case, the two Courts were to adverted to the correct legal principles and assess the material on record in the light of such legal principles, then the conclusion, of unlawful subletting was almost inescapable.

32] Perversity in the record of findings of fact can arise where vital and relevant material on record is excluded from consideration.

Besides, Mr. Datar is not right in his submission that this is not a case of '*no evidence*' and therefore, this Court ought not to interfere in the matter. The expression '*no evidence*' should not be construed literally, and in a pedantic manner, meaning thereby that there is no evidence at all or total dearth of evidence. The expression takes within its sweep and includes cases of evidence which may not reasonably support the main conclusion. Where finding is on the basis of evidence, which taken as a whole, is not reasonably capable of supporting the finding, or the finding is based upon conjectures or surmises, it can well be said to be a perverse finding or a finding based on *no evidence* and therefore capable of correction by a certiorari. Again, if in the matter of assessment of the evidence, the Courts have not been alive to the legal position in such matters or apply incorrect tests or rather fail to apply the correct tests then, the resultant decision is capable of being corrected by certiorari.

33] Applying the aforesaid principles, the impugned orders are liable to be interfered with, as the material on record very clearly makes out a case of unlawful subletting by Thakkar without the consent of the petitioners.

34] On the aspect of reasonable and bonafide requirement, again, the two Courts have failed to apply the correct tests. In fact,

both the Courts have hardly considered the material on record in its proper perspective. The record indicates that the petitioner has three sons. The record indicates that the suit premises are in between three other premises on the ground floor of the building owned by the petitioners. The record indicates that the petitioners are already into the electronic goods business and that they desire to set up a departmental store or a Philips showroom, for which they require all the four premises in a row so as to admeasure about 1200 sq. ft. or thereabouts. In the course of cross-examination, the respondents were unable to bring out any circumstances which make any dent upon the reasonableness or bonafides of the requirement.

35] The two Courts have held that the petitioners have tenanted premises in Girgaon apart from three other premises adjacent to the suit premises. The premises in Girgaon are admittedly tenanted. The three premises, the petitioners have demonstrated are not sufficient for the purposes of the business which they propose to carry on either by starting a departmental store or a Philips showroom. Accordingly, the issue of comparative hardship is required to be decided in favour of the landlord. The tenant Thakkar has already unlawfully sublet the suit premises. The provisions contained in section 13(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 do not oblige the Court to take into

consideration the issue of hardship, if any, that may occasion to unlawful sub tenants or any other persons who may be carrying on business from the suit premises. Thakkar, from the material on record appears to be content with some fixed amount or in any case 10% profits from out of the business being carried out from the suit premises. In such circumstances, it can never be the case of Thakkar that the issue of comparative hardship be decided in his favour and against the landlords.

36] The petitioners had taken out a civil application no. 2569 of 2012 seeking leave to produce certain additional documents, which includes electricity bills in respect of the suit premises. Mr. Karande pointed out that for a long time the suit premises are closed and this is evident from the electricity bills which indicate nil consumption. However, it is noticed that civil application no. 2569 of 2012 was dismissed for non prosecution. In such circumstances, it is not possible to accede to the request of Mr. Karande that the documents accompanying the civil application no. 2569 of 2012 be taken into consideration, at this stage.

37] For all the aforesaid reasons, this petition is allowed. The impugned orders dated 17 March 1989 and 7 October 1995 are set aside. The petitioners' suit is decreed in terms of prayer clause (i) and (iii) of the plaint. The respondents are ordered to be evicted

from the suit premises. The respondents to hand over possession of the suit premises to the petitioners within a period of three months from today. This period of three months to vacate, is subject to the respondents filing the usual undertaking in this Court within a period of two weeks from today. Copy of such undertaking to be furnished to the learned counsel appearing for the petitioners. Further, the matter is remanded to the Court of Civil Judge, Senior Division at Thane for the limited purpose of enquiry / determination of mesne profits. The Civil Court to determine mesne profits in accordance with law after afford of opportunity to all parties.

38] Rule is made absolute to the aforesaid extent. There shall be no order to costs.

(M. S. SONAK, J.)

39] At this stage, the learned Counsel for respondents seeks a stay for implementation of this Judgment and Order for a period of eight weeks. There is no necessity to grant any stay for a period of eight weeks, since already, the respondents have been granted time up to twelve weeks to hand over vacant possession of the suit premises.