

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.76 OF 2016
WITH
CIVIL APPLICATION NO.86 OF 2016

H. Vasanji & Company through Partner
Chirag Dinkar Thaker ... Applicant
Vs.
Chandrakumari Harnamsingh Chowhan (deleted)
and others ... Respondents

Mr. P. K. Dhakephalkar, Senior Advocate i/b. Mr. Jaydeep Deo for Applicant.
Mr. A. A. Kumbhakoni, Senior Advocate a/w. Mr. Vivek Kantawala and
Mr. Amey Patil i/b. M/s. Vivek Kantawala & Co. for Respondent No.1.

CORAM : R. G. KETKAR, J.
Reserved on : SEPTEMBER 26, 2016
Pronounced on: OCTOBER 13, 2016

ORDER :

Heard Mr. Dhakephalkar, learned Senior Counsel for applicant and Mr. Kumbhakoni, learned Senior Counsel for respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant No.1', has challenged the judgment and decree dated 4/5th August 2006 passed by the learned Judge, presiding over Court Room No.15 of the Court of Small Causes in R.A.E. Suit No.1041/1084 of 2001 as also the judgment and decree dated 09.12.2015 passed by the Appellate Bench of the Small Causes Court in 2(a) Appeal No.562 of 2006. By these orders, the Courts below have decreed the Suit instituted by the respondent No.1, hereinafter referred to as 'plaintiff', filed under Section 16(1)(e) of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the defendants to handover vacant and peaceful

possession of the shop, more particularly described in the plaint (hereinafter referred to as 'suit premises').

3. Plaintiffs have instituted the Suit inter alia on the ground that the defendant No.1 is the tenant in respect of the suit premises. Defendant No.1, without the consent and permission of plaintiffs in writing, had unlawfully sublet the suit premises to the respondent No.2, hereinafter referred to as 'defendant No.2' thereby committing breach of the conditions of the tenancy. The Courts below have decreed the Suit. It is against these decisions, defendant No.1 has instituted the present Civil Revision Application.

4. In support of this Application, Mr. Dhakephalkar strenuously contended that the Suit was instituted by – (1) Chandrakumari Harnamsingh Chowan and (2) Kamlesh Singh Harnamsingh Chowan against the defendants. They are the owners to the extent of 6 Anna shares. The other co-owners have objected to filing of their Suit. In fact, defendants have examined Ishwarsingh Gangarsingh Chawhan as D.W.2. D.W.2 has referred to various proceedings and has objected to filing of Suit by the plaintiffs. As the co-owners have objected to filing of the Suit by the plaintiffs as also one of the co-owners has in fact deposed against the plaintiffs, the Courts below ought to have dismissed the Suit on the ground of maintainability. In support of this proposition, he relied upon the following decisions:

- a. Decision of Madhya Pradesh High Court in ***Hafizullah Vs. Shikhar Chand Jain, Second Appeal No.813 of 1995*** decided on **12.05.1997** decided by S. C. Pandey, J.;
- b. ***M/s.India Umbrella Manufacturing Co. Vs. Bhagabandei Agarwalla, (2004) 3 SCC 178;***
- c. ***Sanat Kumar Mullick Vs. Octavious Tea & Industries Limited, (2006) 2 CHN 280;***

- d. ***Hafizullah Shekh Barkatullah Vs. Puran Chand Jain, (2014) 1 MP LJ 167***; and
- e. ***Mohinder Prasad Jain Vs. Manohar Lal Jain, (2006) 2 SCC 724***.

5. Mr. Dhakephalkar submitted that the Courts below committed serious error in decreeing the Suit on the ground of unlawful subletting as contemplated by Section 16(1)(e) of the Act. The Courts below failed to appreciate that plaintiffs have not established that defendant No.1 had given exclusive possession of loft portion to the defendant No.2. He invited my attention to paragraphs 85 to 92 of the appellate Court judgment. In paragraph 85, the appellate Court referred to the principles governing the ground of unlawful subletting. In paragraph 86, the appellate Court observed that D.W.1 Dinkar admitted that he had sublet the loft on the suit premises to the defendant No.2. It was further observed “it is clear from the admission given by D.W.1 that he had sublet the loft on the suit premises to the defendant No.2 without consent and permission of plaintiffs”. He submitted that the Courts below failed to consider that there was no separate entrance leading to the loft. No finding is recorded by either of the Court to the effect that there is separate entrance leading to the loft. In other words, defendant No.1 is in control of the suit premises. The findings recorded in paragraphs 86, 89 and 92 are based upon alleged admission of unlawful subletting by the defendant No.1. The said findings are based on conjectures and surmises and are contrary to the evidence on record. He submitted that defendant No.2 is in fact sister-concern of the defendant No.1. The Courts below have also not properly considered the Partnership Deeds dated 16.05.1990 and 02.07.1992. The Courts below held that the Partnership Deed dated 16.05.1990 is a camouflage document so as to give a go-bye to the ground of unlawful subletting. The Courts below held that the Partnership Deed dated 02.07.1992

falsifies genuineness of the partnership between defendants No.1 and 2.

6. Mr. Dhakephalkar submitted that during the pendency of the appeal, defendant No.1 filed application exhibit-21 on 27.09.2010 under Order 41, Rule 27 of C.P.C. for production of additional evidence. The appellate Court rejected the application only on the ground that along with the application, defendant No.1 had produced list of documents and the documents, which were sought to be produced, were in fact not produced. He has taken me through the evidence on record and submitted that Application requires consideration.

7. On the other hand, Mr. Kumbhakoni supported the impugned orders. He submitted that plaintiffs are the co-owners to the extent of 6 Anna shares. They are entitled to maintain the Suit regardless of objection raised by one of the co-owners, Ishwarshing Gangasingh Chawhan. In support of his submissions, he relied upon the following decisions:

- a. ***V. Prabha & Co. Pvt. Ltd. Vs. Kuljit Singh Chadha*, 2007 (2) ALL MR 352;**
- b. ***M/s. India Umbrella Manufacturing Co. (supra)*;**
- c. ***Dhannalal Vs. Kalawatibai*, AIR 2002 SC 2572;**
- d. ***Jainuddin Vs. Sitaram*, 1981 Mh.L.J. 498;**
- e. ***Sri Ram Pasricha Vs. Jagannath*, AIR 1976 SC 2335;**
- f. ***Dwarka Nath Mitter Vs. Tara Prosunna Roy*, (1890) ILR 17 Cal 160;**
- g. ***Mokshoda Debi Vs. Prem Chand Nuskur*, (1887) ILR 14 CAL 201;**

8. As far as the ground of unlawful subletting as contemplated by Section 16(1)(e) of the Act is concerned, Mr. Kumbhakoni has invited my attention to questions No.74, 98, 99, 101, 103 to 105, 114 and 121 and the answers given by D.W.1 Dinkar H. Thakkar, which are as under:

“Q.74 Shown witness Exhibit “B” rent receipt and attention is drawn on clause 3 therein. Have you abided this terms of tenancy?

Ans. No.

Q.98 Has Zameer Silk Emporium obtained necessary and separate Govt. and Municipal licenses?

Ans. They obtained Shop and establishment Licence from BMC.

Q.99 Whether the Defendant No.2 partnership has been registered?

Ans. I do not know.

Q.101 So have you recorded in writing change in nature in business of Defendant No.2?

Ans. No.

Q.103 Shown Exhibit “C” Colly. to the witness.

Who's card they are

Ans. There are the visiting cards of Defendant No.1 and Defendant No.2 respectively.

Q.104 Does this two bears the address of the suit premises?

Ans. Yes.

Q.105 Shown Exhibit E, photograph it is of the suit premises?

Ans. Yes.

Q.114 Do you have any permission in written for subletting the suit premises?

Ans. I not taken any permission in written.

Q.121 Do the partners of Defendant No.1 have any experience in the business of Agarwood and Perfumes?

Ans. No.

”

9. Mr. Kumbhakoni has taken me through the evidence on record and the findings recorded by the Courts below. He submitted that after appreciating the evidence on record, the Courts below have concurrently held that defendant No.1 has unlawfully sublet mezzanine floor to the defendant No.2. Defendant No.2 is in exclusive possession of the mezzanine floor. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of the C.P.C.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Mr. Dhakephalkar submitted that as one of the co-owners objected to the Suit instituted by other co-owners, the Courts below were not justified in decreeing the Suit. Courts below ought to have dismissed the Suit. He relied upon the decisions rendered in paragraph 4.

11. In the case of **Hafizullah** (*supra*), the learned Single Judge of Madhya Pradesh High Court referred to the decisions of the Apex Court in - a) **Smt. Kanta Goyal Vs. B. P. Pathak, AIR 1977 SC 1599**, b) **Sri Ram Pasricha** (*supra*) as also c) decision of Patna High Court in **Sharfuddin Vs. Bibi Khatija, AIR 1988 Patna 58**. In paragraph 29, the learned Single Judge held that when the shares are not determined by way of partition, it would be most dangerous to give primacy to any of the parties. Unless and until there be partition, the Court must act as a neutral umpire between all the co-owners. It cannot-pit right of one co-owner against another during the course of their jointness.

12. In that case, during the pendency of the proceedings, defendant No.5 Indra Kumar Jain purchased shares of defendant No.4 Jalaluddin, one of the sons of Shamsuddin and grandson of Sheikh Gullu and another heir Sona Begum. Defendant No.5, therefore, became co-owner along with the other plaintiffs. It is in that context, the learned Single Judge observed that as per the sale deed produced at exhibit D-13, one of the tenants became owner of a portion of the property. Unless and until there is partition amongst co-owners, there can be no defined share in possession of any of the co-owners. Plaintiffs cannot say that the respondents are the tenants of a particular premises when one of the tenants has become a co-owner.

13. That apart, the said decision was subsequently considered by the Division Bench of Madhya Pradesh High Court in the case of ***Hameeda Begam Vs. Champa Bai Jain, 2004 (1) RCJ 484 (MP)***. The Division Bench referred to the decision of Full Bench of Madhya Pradesh High Court in ***Harbans Singh vs Smt. Margrat, AIR 1990 MP 191***. In paragraph 17, the Division Bench referred to paragraph 9 of the Full Bench decision. Full Bench also recorded a finding after considering the decision in ***Sri Ram Pasricha (supra)*** and ***Kanta Goyal (supra)*** as also ***Pal Singh Vs. Sunder Singh, 1989 (1) SCC 444*** that the widow/non-applicant, who is a co-owner/landlady of the premises with some others, can initiate eviction proceedings against the tenant in the absence of other co-owners, if they do not object for the same. In paragraph 19, the Division Bench referred to paragraph 16 of the decision in ***Dhannalal (supra)***. It was observed that the landlord, one of the co-owners, can alone maintain a Suit for eviction of a tenant without joining other co-owners, if such other co-owners do not object. In paragraph 20, the Division Bench held that a co-owner cannot institute a suit or proceeding for eviction against the tenant, if other owners object. In my opinion, the said decisions do not advance the case of the defendant No.1 for the reasons to be shortly stated.

14. Mr. Dhakephalkar relied upon decision of ***India Umbrella Manufacturing Co. (supra)***, and in particular paragraph 6 thereof. The relevant portion of paragraph 6 thereof reads thus,

“...One co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. The consent of other co- owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement.”

15. He, therefore, submitted that as in the present case, one of the co-

owners has objected, plaintiff cannot maintain the Suit in the capacity of agent of the other co-owners. I do not find any merit in this submission.

16. In the case of **Mohinder Prasad Jain** (*supra*), the Apex Court referred to decisions in **India Umbrella Manufacturing Co.** (*supra*), **Ram Pasricha** (*supra*), **Dhannalal** (*supra*) and in paragraph 11, it was observed that in the event a co-owner objects for initiating eviction proceedings, the same may be a relevant fact. In my opinion, decisions in **India Umbrella Manufacturing Co.** (*supra*) and **Mohinder Prasad Jain** (*supra*) do not lay down proposition of law that if one of the co-owners object, in that event, such Suit is not maintainable. At the most, that would be a relevant circumstance.

17. Mr. Dhakephalkar relied upon Division Bench judgment of Calcutta High Court in **Sanat Kumar Mullick** (*supra*). Perusal of that decision shows that in paragraph 10 of the plaintiff asserted that as two lessors, namely, proforma defendant Nos. 2 and 3 had expressed their unwillingness to join with the plaintiff in the present suit, they have been made proforma defendants. In paragraph 9, the learned Advocate appearing on behalf of proforma defendants No.2 and 3 supported the plaintiff and contended that although defendants No.2 and 3 were not willing to join the plaintiff at the time of institution of the suit, they are now prepared to support the claim of the plaintiff. The Division Bench in paragraph 13 held that the plaint is liable to be rejected only on the ground that the plaintiff having admitted in the plaint that the other lessors than the plaintiff refused to join as co-plaintiff in the suit, a suit for eviction of a lessee in respect of the tenanted property is not maintainable at his instance. Once at the time of filing of the suit, the other co-landlords refused to join hands with the plaintiff, they cannot now after the rejection of the plaint change their mind and pray for

adding them as co-plaintiffs in the appeal where the Division Bench was called upon to decide whether the learned Trial Judge rightly passed the impugned order. With utmost respect, I am unable to subscribe to the said view. The Division Bench, after recording in paragraph 9 that the Advocate for defendants No.2 and 3 supported the plaintiff and expressed willingness to join the plaintiff, the Division Bench with utmost respect ought not to have dismissed the Suit on that score more so when in eviction suits, if the subsequent event is relevant, the Court cannot ignore the same.

18. As against this, in the case of **Jainuddin** (*supra*), the Suit was instituted under Sections 12 and 13 of the Bombay Rent Act. In that Suit, defendant no.2 was the co-owner of the plaintiff. Defendant no.2 filed his written statement contending inter alia that the notice terminating tenancy of the defendant no.1-tenant was not legal. He also opposed the plaintiff's suit for eviction on the ground of bonafide requirement. It was urged that notice of termination ought to have issued by all the owners. The learned single Judge of this Court considered the decisions of the Apex Court in (1) **Ram Pasricha** (*supra*) and (2) **Kanta Goel** (*supra*). In paragraph 12, the submissions advanced on behalf of the plaintiff were recorded. It was submitted that in a suit for eviction against the tenant by the co-owner the interest of the other co-owners cannot be affected in any way. If one of the co-owners files a suit against the tenant and obtains possession of the suit premises, the premises encumbered by induction of the tenant is removed if the plaintiff's suit succeeds. If a co-owner is not satisfied with a decree for exclusive possession in favour of one of the co-owners, his remedy is only to file a separate suit for partition and get his share demarcated. It would be dangerous proposition that in cases of this type, a co-owner as a defendant can oppose the suit of one of the co-

owners for possession of the suit premises claiming a decree for eviction of the tenant. After recording the submissions of the plaintiff, the learned Single Judge observed that there is a considerable substance in those submissions. After referring to the decision of the apex Court in **Ram Pasricha** (*supra*) and **Kanta Goel** (*supra*), it was observed that one of the co-owners can file a suit for eviction against the tenant. The landlord who had let out his premises to the tenant and heirs succeeded to his estate and one of the co-owners files a suit for eviction against the tenant on the ground of bonafide requirement for himself, his mother or married brother, such a suit shall be maintainable and decree for possession in favour of one of the co-owners shall be passed. In paragraph 13 it was observed thus:

“13. I am unable to appreciate the submission of Shri Rane that in case where the co-owners does not give his consent for institution of the suit by one of the co-owners and resists such a suit, if filed, no decree on the ground of bona fide requirement for use and occupation can be passed. In my view, having regard to the observations made by the Supreme Court in the cases referred to above, the co-owner may be added as a party but he cannot be considered a necessary party to the suit by one of the co-owners. He cannot resist the suit of the co-owner and contend that no decree can be passed in favour of the co-owner on any of the grounds given in the Rent Act. Take for instance, the tenant is damaging the suit premises, causing waste to it, sub-letting the premises or demolishing the same and without the permission of the landlord altering the structure or constructing a permanent structure and if a co-owner files a suit on the grounds mentioned above against the tenant for eviction, how the co-owner can oppose such a suit? If one of the co-owners is trying to remove the encumbrance on the tenanted premises within the ambit of the provisions of the Rent Act, then the decree for eviction in any way will not be inconsistent with, or contrary to the interest of the co-owners. In such a suit if a co-owner is added as a party, no relief can be asked against him. If the co-owner obtains possession in pursuance of the decree passed in his favour by the competent Court, his possession will be deemed to be the possession on behalf of all the co-owners. And if the co-owner is not happy with possession of the other co-owners, his remedy is only to file a separate suit for partition and possession and get his share in a proper proceedings demarcated. Shri Rane has not disputed that the co-owners can file a suit for bona fide requirement for his use and occupation of the suit premises for himself or for any member of

his family. However his grievance is that if a co-owner opposes such suit, no decree for exclusive possession in favour of one of the co-owners can be passed. It is rather not possible to accept this submission of Shri Rane. Because in such a suit filed by one of the co-owners for eviction, it cannot be detrimental to the interest of the other co-owners. Take a case where the tenant does not pay arrears of rent and a suit is filed for recovery of arrears of rent making the co-owners as party defendant, can he oppose the said suit on the round that the rent should not be paid to the co-owners. Take a case, where a suit for eviction is opposed on the ground of causing damage to the building let out to a tenant, or causing waste of some kind, can the co-owners join the hands with the tenant to oppose the suit contending that the decree should not be passed in favour of co-owners. It will be dangerous proposition to allow the co-owners to oppose such a suit for a eviction by another co-owners or any grounds whatsoever, joining the hands with recalcitrant tenant and refuse to give consent for institution of the suit. In these circumstances and having regard to the observations made by the Supreme Court in the two cases referred to above, the contention of Shri Rane cannot be accepted.”

19. The decision in **Jainuddin's case** (*supra*) was subsequently followed by the learned Single Judge in **Rahimtulla Abdul Rahiman Vs. Chandrakant**, AIR 1982 BOMBAY 282, and in particular paragraph 7. The decision of the learned Single Judge in **Jainuddin's case** (*supra*) was quoted with the approval by the Division Bench in **Hiralal Vs. Namdeo**, 1983(2) Bom.C.R.71. The decision in **Jainuddin** (*supra*) was also followed in **V. Prabha & Co. Private Limited Vs. Kuljit Singh Chadha**, 2007 (2) ALL M.R. 352. Thus, the issue whether one of the co-owners can maintain the Suit inspite of other co-owners objecting to it is no longer *res integra* as far as this Court is concerned. That apart, if one of the co-owners objects to filing of the Suit by another co-owner, indirectly the rights of the co-owners who intend to institute the Suit or already instituted the Suit will be curtailed. In other words, such co-owners will not be entitled to exercise right incidental to the right of ownership of the property. In such situation, as observed by the learned Single Judge in **Jainuddin's case** (*supra*), remedy of other co-owner/s is to institute Suit for partition and separate possession. In

view thereof, I do not find any merit in the submission of Mr. Dhakephalkar that Suit was liable to be dismissed on this ground.

20. Before I consider the submissions advanced by the learned Counsel appearing for the parties in respect of ground of unlawful subletting, it is necessary to refer to the condition No.3 of rent bill, which reads thus:

“3. Tenant not to sublet rented premises and take in new partner or assign to anyone without prior written permission of landlord.”

21. Mr. Dhakephalkar has taken me through the - (i) clauses 5 and 7 of the Partnership Deed dated 16.05.1990 entered into by and between - (a) Dinkar Haridas Thakkar (party of the first part), (b) Bhupatbhai Bhagwatidas Unadcut (party of the second part), and (c) Jawahar Purshottam Popat (party of the third part) whereunder the parties agreed to and decided to carry on business in the name and style of M/s. Zameer Silk Emporium in the suit premises with effect from 14.05.1990. Clauses 5 and 7 read thus,

“5. The business of the Partnership shall be that of Trading in Readymade Garments, Perfumes, Art silk materials, Agar wood and General merchandise items and other trade with the consent of all the partners.

6. ...

7. The Profit and Losses of the Partnership business including capital gains or losses shall be divided between and borne by the parties in the following proportion:-

<u>No.</u>	<u>Name</u>	<u>Profit / Loss %</u>
1.	Shri Dinkar Haridas Thakkar	50%
2.	Shri Bhupatbhai B. Unadcut	25%
3.	Shri Jawahar P. Popat	25%

		Total... 100%
		=====

22. He submitted that the business of partnership is that of trading in readymade garments, perfumes, art silk materials, Agarwood and

general merchandise items and other trade with the consent of all the partners. The profits and losses of the partnership business including capital gains or losses are to be divided between and borne by the parties was set out in clause 7 of the Partnership Deed. He, therefore, submitted that defendant No.2 was carrying on business in readymade garments among others in partnership with the defendant No.1.

23. As against this, Mr. Kumbhakoni invited my attention to clause 10 of the said Partnership Deed. Clause 10 recited that the party of the first part, namely Dinkar Haridas Thakkar, is a sleeping partner, still, he is given 50% share in profits and losses. The ground of unlawful subletting is considered by the learned trial Judge from paragraph 8 to 15. In paragraph 8, the learned trial Judge referred to condition No.3 of the terms and conditions of the tenancy. The learned trial Judge considered evidence of plaintiff's witness namely, plaintiff No.2. He deposed that he personally visited the suit premises a few times as a customer and seen entire loft area portion of the suit premises being used and occupied by outsiders and strangers under the name and style of Zameer Silk Emporium namely, defendant No.2. He was asked for and was given their business cards by both the defendants. The business card of the defendant No.2 is printed on both the sides and one side of it is in Arabic or Urdu language. Plaintiff issued notice dated 20.11.2000 through Advocate Shri. M. A. Shukla upon the defendant No.2 at the suit address. The said notice was duly received by the defendant No.2. Defendant No.2, however, failed to give reply. He further deposed that when he visited the suit premises personally on 23.12.2000, he took photographs. These photographs show the name of defendant No.2 - Zameer Silk Emporium displayed on the name board of the suit premises in English and also in Urdu / Arabic. Suit summons was served on defendant No.2 at the suit premises on 08.01.2002 and the same was

accepted by one Jawahar P. Popat, who is claiming to be a partner of both the defendants firms. The summons was accepted by signing and affixing stamps of both the defendants on the suit summons and incidentally stamp of defendant No.2 is similar as that affixed on the postal acknowledgment.

24. The learned trial Judge considered evidence of D.W.1 Dinkar H. Thakkar, partner of defendant No.1. During the course of cross-examination, he admitted that one M/s. S. Damodar, who was doing business of commission agent in the suit premises from 1970 to 1976 was occupying 1/4th portion of the loft in the suit premises. He admitted that he did not obtain any written permission from landlord for inducting him in the portion of the suit premises. After considering the evidence on record, from paragraph 12 to 15, the learned trial Judge held that defendant No.1 has unlawfully parted with possession of the suit premises to the defendant No.2. Plaintiff had issued letter to the defendant No.2 questioning the presence, use and occupation of the portion of the suit premises and had warned that presumption would be drawn against it, if no reply is given. Defendant No.2 did not give reply. The learned trial Judge also considered Partnership Deed dated 16.05.1990 and observed that it is a doubtful document created with an intention of suppressing the unlawful subletting by the defendant No.1 to the outsiders namely, the other partners - Bhupatbhai Unadcut and Jawahar Popat. The learned trial Judge also noted that Bhupatbhai Unadcut and Jawahar Popat are working partners and are responsible for consequences arising out of the business, but Dinkar Thakkar is a sleeping partner and gets lion's share of 50% as per clause 7 of the Partnership Deed. In paragraph 14, the learned trial Judge observed that on the issue of unlawful subletting, there is no cross-examination of P.W.1 by the Advocate for defendant No.1.

25. As far as the appellate Court is concerned, this issue is considered from paragraph 8 to 15. The appellate Court has considered - (i) condition No.3 of the terms and conditions of the tenancy; (ii) notice dated 20.11.2000 issued by the plaintiff through their Advocate to defendant No.2; (iii) photographs taken by plaintiff's witness at exhibit-E collectively; (iv) service of suit summons on defendant No.2 at the suit address; (v) admission of D.W.1 in the cross-examination that one M/s. S. Damodar carrying on business of commission agent in the suit premises from 1970 to 1976 was occupying 1/4th portion of the loft area without any permission from the landlord; (vi) admission of defendants' witness that defendant No.2 was in occupation of loft portion of the suit premises, which was occupied by M/s. S. Damodar earlier; (vii) admission of defendants' witness that Zameer Silk Emporium has obtained necessary and separate Government Licence and Shop and Establishment Licence from the Corporation independently; (viii) Partnership Deed with defendant No.2 is not registered under the Indian Partnership Act, 1932 (for short 'Partnership Act');

26. In paragraph 12, the appellate Court recorded a finding that defendant No.1 has unlawfully parted with possession of the suit premises to the defendant No.2. Appellate Court also noted that the Partnership Deed dated 16.05.1990 is a doubtful document which was created only with an intention of suppressing the unlawful subletting of the suit premises by the defendant No.1 to the outsiders namely the so called other two partners Bhupatbhai Unadcut and Jawahar Popat. Bhupatbhai Unadcut and Jawahar Popat are described as working partners who would be engaged in day to day running of the business. However, D.W.1 Dinkar Thakkar gets lions share i.e. 50% as described in clause 7 of the Partnership Deed. The appellate Court, therefore, recorded a categorical finding that the Partnership Deed is not reliable and

that was the consideration by the defendant No.2 to the defendant No.1 for unlawful subletting. Two partners namely Bhupatbhai and Jawahar are not family members of D.W.1 Dinkar nor the partners of defendant No.1 firm. In fact, they were not remotely related to D.W.1 Dinkar and are strangers and outsiders inducted under the Partnership Deed dated 16.05.1990.

27. In paragraph 14, the appellate Court held that on the question of unlawful subletting, there was no cross-examination of P.W.1.

28. In the case of **Suresh Vasant Vs. Ramabai Keshav, 2002 (1) Mh.L.J. 933**, the learned Single Judge of this Court observed in paragraph 29 thus,

21. In the light of the above finding, if one turns to law laid down by the Apex Court in the case of *Shama Prasad Raje v. Ganpatrao*, AIR 2000 SCW 3493, it is obligatory on the part of the landlord to prove that the tenant has parted with possession of the tenanted premises and such parting of possession must be backed by for some consideration. In the instant case, it has been proved that the possession is with defendant No. 2. The admission given by defendant No. 1 that defendant No. 2 is his partner in the business run under the name and style of respondent No. 3, itself goes a long way to establish the case pleaded by the plaintiffs. Assuming that there was partnership between defendant Nos. 1 and 2 brought into existence of on 23 September, 1976 the terms and conditions thereof cannot be read for want of proof of document. Assuming that the contents thereof can be read in evidence, even then as already found, no genuine partnership could be said to have been established. It was brought into existence only to defeat the provisions of rent legislation. This Court in case of *Gangaram v. Ashok Kumar*, 1969 Mh.L.J. Note 43 has held as under :

".....that the question whether relationship between the petitioners amount to a partnership or not could not be decided merely on the basis of a deed which they had filed and the Court is entitled to examine all the incidents of the relationship between the parties as shown by the written agreement together with the surrounded circumstances at the time when the contract was entered into, conduct of the parties as well as other facts that

may be relevant, such for instance, as the right to control the property, the manner in which the accounts of the business are kept, the right to receive profits and the liability to share the losses and from these deduce the real intention of the parties. Existence of any written or verbal agreement, between the parties, conduct of the parties towards one another, the mode in which they have dealt with one another, the mode in which each has with the knowledge of the other dealt with other people, are all Indicia which may help the Court in finding whether partnership does or does not exist. The Court must consider all the facts and circumstances of the cases and draw an inference from them as a whole without attributing undue weight to any one of them. It will have to be found in each case whether a plea of partnership which is put forth as a defence to an application by the landlord under Clause 13(3)(iii) of the Rent Control Order is intended to be a mere cloak to cover up the use of the premises by a person other than the tenant or whether the tenant is himself carrying on the partnership business. Thus, the failure to produce account books, the conduct of the tenant in not taking part in the business which was carried on only in the name of the stranger and the earlier conduct in subletting the premises for a period of 5 years to another person indicated that the document of partnership was merely a cloak brought into being in order to defeat the application of the landlord under Clause 13(3)(iii) of the Rent Control Order. (Order of the Rent Control authorities holding that the tenant had sublet the premises upheld)."

29. Applying the tests laid down by this Court to the facts of the present case, it has to be held that defendant No.1 has failed to establish legal and genuine partnership between defendants No.1 and 2. Perusal of questions and answers during the course of cross-examination of D.W.1 as referred in paragraph 8 above also substantiates the case of unlawful subletting by defendant No.1 in favour of defendant No.2. The concurrent findings of fact recorded by the Courts below are based upon appreciation of evidence on record. In the present case, the premises and its availability for running business was the prime and basic consideration for inducing defendant No.2 by the defendant No.1.

Partnership Deed has not been registered under the Partnership Act. Perusal of the answer given by D.W.1 to question No.121 shows that partners of defendant No.1 have no experience in the business of Agarwood and perfumes. The Courts below have carefully scrutinized the evidence in the light of law. In view thereof, I do not find that any case is made out for invocation of powers under Section 115 of C.P.C. Defendant No.1 was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based upon no evidence or that they are contrary to the evidence on record. Defendant No.1 was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusion arrived at by the Courts below. Hence, Application fails and the same is dismissed.

30. In view of the dismissal of C.R.A., nothing survives in Civil Application No.86 of 2016 and the same is dismissed accordingly.

31. At this stage, Ms Raghuvanshi orally applies for stay of this order for a period of twelve weeks from today. She assures that within one week from today, the applicant will file usual undertaking disclosing the names of persons who are using / occupying suit premises and also file their undertaking incorporating therein :

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that they will pay the arrears of rent, if any to the respondents within one weeks from today; and
- (v) that in case the applicants are unable to obtain suitable

orders within twelve weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondent.

32. In view thereof, notwithstanding dismissal of Civil Revision Application, subject to the applicant and all adult persons using the suit premises giving undertaking in the aforesaid terms with advance copy to the other side within one week from today, the eviction decree shall not be executed for a period of 12 weeks from today. In case the applicants do not file undertaking in the above terms and/or arrears of rent are not paid within one week from today, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance on 27.10.2016. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab