

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

1. CIVIL REVISION APPLICATION NO. 322 OF 2008

Dhirajlal Ratanshi Somaiya ..Applicant

Vs

1.Shree Padmanabh Builders .. Respondents
and Ors.

WITH

2. CIVIL REVISION APPLICATION NO. 323 OF 2008

Smt.Kantabai H. Oza ..Applicant

Vs

1.Shree Padmanabh Builders .. Respondents
and Ors

WITH

3. CIVIL REVISION APPLICATION NO. 424 OF 2008

1. Shree Padmanabh Builders ..Applicants
and Ors

Vs

Smt. Kantabai H. Oza .. Respondent

Shri Vivek R. Walawalkar i/b Mr. Sameer R. Bhalekar Advocate for Applicant/s in CRA/322/2008, Ms. Shobha Pawar for Applicant in CRA/323/08 and for Respondents no.1 and 2 in CRA/424/2008.

Mr. Hiralal J. Thacker, Senior Advocate with Mr. Vijay Thorat, Senior Advocate with Mr. K.D.Shah and Mrs. Uma Shah, Advocates for Respondent/s in CRAs/322/2008, 323/2008 and for applicant/s in CRA/424/2008.

CORAM : **R.G.KETKAR,J.**
RESERVED ON : **05/08/2016**
PRONOUNCED ON: **22/09/2016.**

ORDER:

1. Heard Mr. Vivek Walawalkar, learned counsel for the applicant/s in C.R.As No.322 of 2008, Ms.Shobha Pawar, learned counsel for Applicant in C.R.A. No. 323 of 2008 and for respondent in C.R.A No.424 of 2008 and Mr. Hiralal Thackar, learned Senior Counsel for respondents in C.R.As. No.322 of 2008, 323 of 2008 and for applicants in C.R.A No.424 of 2008 at length.

2. Civil Revision Application No.322 of 2008 is instituted by applicant-Dhirajlal Ratanshi Somaiya, hereinafter referred to as 'defendant no.2', challenging the Judgment and decree dated 10th to 17th March, 2004 passed by the learned Judge presiding over Court Room No. 15 of the Court of Small Causes Bombay in R.A.E.&R Suit No.1046/3040 of 1990 as also the Judgment and decree dated 18.2.2008 passed by the Appellate Bench of Small Causes Court at Bombay in Appeal No.419 of 2004. By these orders, the Courts below decreed the suit instituted by respondents (1) Shree Padmanabh Builders, (2) Shri Kanayyalal Madhavji Thakkar, hereinafter referred to as 'plaintiffs', under section 13(1)(a) read with Section 108(o) of the Transfer of Property Act, 1882 (for short, 'T.P.Act') and Section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947

(for short, 'Act'). The leaned trial Judge also accepted grounds under section 13(1)(e) (unlawful subletting by defendant no.1 in favour of defendant no.2) and 13(1)(k) (non user of the suit premises by defendant no.1-tenant). The Appellate Court decreed the suit only under section 13(1)(a) read with Section 108(o) of T. P. Act and 13(1)(b) of the Act. The Courts below directed the defendants to hand over vacant and peaceful possession of Shop no.3, Parekh Market, Khatau Wadi, M.G.Road, Ghatkopar (E), Mumbai -400 077 (for short, 'suit premises') to the plaintiffs.

3. Civil Revision Application No.323 of 2008 is instituted by applicant Smt.Kantabai H.Oza, hereinafter referred to as 'defendant no.1', challenging the very same judgments and decrees passed by the trial Court as also by the Appellate Court in Appeal No.420 of 2004.

4. Civil Revision Application No.424 of 2008 is instituted by applicants (1) Padmanbh Builders and (2) Kanaiyalal Thakkar, (plaintiffs), challenging the Judgment and decree dated 18.2.2008 passed by the Appellate Bench of the Small Causes Court in Appeals No.419 and 420 of 2004. By that order, the Appellate Court partly allowed Appeals No. 419 and 420 of 2004 preferred by the defendants and confirmed the decree on the ground of additions and alterations of permanent nature under section 13(1)(b) and causing waste and damage to the suit

property under section 13(1)(a) read with section 108(o) of T.P.Act and set aside the trial Court's findings on the ground of unlawful subletting, 13(1)(e) and non user, 13(1)(k) of the Act. The relevant and material facts giving rise to these Applications, briefly stated, are as under.

5. Initially, plaintiff no.1-Shree Padmanabh Builders instituted suit on or about 11.11.1990 against the defendants, inter alia, contending that defendant no.1 has, since coming into operation of the Act, unlawfully sublet or given on leave and licence, the whole or part of the suit premises or assigned or transferred in any other manner or interest thereof in favour of defendant no.2. Defendant no.1 has lost protection under the Act and made herself liable to be ejected from the suit premises. Defendant no.1 has committed breach of the terms of tenancy and is not ready and willing to perform the terms and conditions of the tenancy and as such has lost the protection of the Act. In short, plaintiff no.1 has sought possession under section 13(1)(e) of the Act.

6. Plaintiff no.1 further contended that defendant no.1 is herself not using the suit premises for the purpose for which it was let out for a period of more than six months prior to filing of the suit. In other words, the plaintiff has claimed possession on the ground under section 13(1)(k) of the Act.

7. Defendant no.1 filed Written Statement on or about

21.7.1992, inter alia, denying the assertions as regards unlawful subletting of suit premises by her in favour of defendant no.2. Defendant no.1 contended that defendant no.2 has been lawfully exclusively in use, occupation and possession of the suit premises since 1968 as he is in possession of voluminous documents, namely, books of accounts, shop and establishment certificate, receipt of payment of licence fees paid to defendant no.1, correspondence received at the suit address, as well as Sales Tax Registration certificate, I.T. Assessment orders, Bills, delivery Challans, Receipts (rent) issued by the plaintiff and his predecessor-in-title. Defendant no.1 contended that defendant no.2 has been paying licence fees regularly to defendant no.1.

8. Defendant no.1 further contended that by an agreement of leave and licence dated 1.7.1970 executed between her and defendant no.2, she had granted suit premises on leave and licence initially for a period of three years from 1.7.1970 with option to defendant no.2 to renew the agreement for further period of two years. Licence granted by defendant no.1 to defendant no.2 was valid and subsisting as on 1.2.1973. Defendant no.2 had paid rent in respect of the suit premises to the plaintiff by cheque. Defendant no.1 denied that she is not using the suit premises for the purpose for which it was let out for a period of more than six months prior to filing of the suit. Defendant no.1 contended that by Advocates' letter dated

12.10.1990, plaintiff falsely alleged that the defendants have carried out extension in the rear side of the suit premise. The plaintiff had made bogus complaint dated 12.10.1990 to B.M.C. authorities as defendant no.2 had filed affidavit dated 10.9.1990 in favour of one of the tenants, Smt. Vasanti B. Palan in Suit (ST) 647 of 1990. Defendant no.2, by his Advocates' letter dated 28.10.1990 had placed various facts on record. On 8.11.1990, B.M.C. authorities issued notice under section 351 of the Mumbai Municipal Corporation Act, 1888 to defendant no.2 in respect of the alleged extension of suit premises on rear side. By Advocate's letter dated 14.11.1990, defendant no.2 replied the said notice. As the defendants did not carry out any alleged extension, the Assistant Engineer (Building and Factory) N/Ward informed the defendants by his letter dated 25.3.1991 that the action under section 351 will not be pursued as per directions of Deputy Commissioner, Zone-V.

9. Defendant no.2 filed Written Statement on or about 27.1.1993 substantially reiterating the stand of defendant no.1. Defendant no.2 denied the allegations of unlawful subletting as also non user. He reiterated that he is in possession of the suit premises since 1968 on leave and licence basis. Defendant no.1 executed leave and licence agreement dated 1.7.1970 in favour of defendant no.2. The said licence was valid and subsisting on 1.2.1973.

10. On the basis of pleadings of the parties, the learned trial Judge framed issues on 21.5.1999 covering the grounds under section 13(1)(e) and 13(1)(k) of the Act.

11. During the pendency of the suit, plaintiff no.1 took out Interim Notice No.6248 of 1999 for amending plaint. That notice was allowed on 30.3.2001. Plaint was amended on 10.4.2001. Paragraph 3(a) was incorporated whereunder plaintiff no.1 contended that during the pendency of the suit, the defendants have carried out additions and alterations of permanent nature and have caused waste and damage to the suit premises and property without prior permission of the plaintiffs or B.M.C. The defendants have demolished the rear wall of the suit premises and have constructed/affixed rolling shutters thereon and encroached upon open space adjacent to the suit premises. These acts have resulted in reduction of F.S.I. of the suit property and have endangered the structure stability of the building which is very old. Plaintiff no.1 contended that due to the aforesaid acts, the defendants have caused acts of waste and damage as contemplated under section 108(o) of T.P.Act. Thus, the defendants are liable to be evicted on the ground under section 13(1)(a) read with section 108 (o) of the T.P.Act as also Section 13(1)(b) of the Act.

12. On 8.1.2002, the defendants filed amended written statement dealing with allegations made in the newly added

paragraph 3(a). The defendants denied the assertions made by plaintiff no.1 that they have carried out work of additions and alterations of permanent nature and that they have caused waste, damage and injury to the suit premises. The defendants also denied that they have demolished the rear wall of the suit premises and affixed the rolling shutter and have encroached upon the space annexed to the suit premises and have caused loss of F.S.I. of the suit property and have endangered the structural stability of the building which is very old as contemplated under section 108(o) of T.P.Act and liable for eviction under section 13(1)(a) read with Section 108(o) of the T.P.Act and Section 13(1)(b) of the Act.

13. Plaintiff no.2 took out application (Interim Notice No. 3026 of 2003) on 7.7.2003 for impleading himself as plaintiff no.2 and for adding paragraph 1(a) and 1(b). Defendant no.2 filed reply on 15.7.2003. Defendant no.1 filed reply dated 15.7.2003 opposing the said application. By order dated 23.7.2003, the learned trial Judge allowed the application. Plaint was amended on 25.7.2003 by addition of plaintiff no.2 and addition of paragraphs 1(a) and 1(b). On 4.8.2003, defendant no.1 filed additional written statement. Defendant no.2 filed additional written statement on 7.8.2003. Defendants, inter alia, contended that though plaintiff no.2 filed application under Order 22, Rule 10 of C.P.C., the relief claimed in the application is

outside the scope of that provision. Plaintiff no.2 had played fraud on the court and attempted to defeat the right of the defendants which were accrued in their favour by passage of time and otherwise. After quietly leading his evidence and closing his case, application was filed with ulterior motives. Plaintiff no.2 attempted hoodwink the Court. The assignment and transfer made by plaintiff no.1 in favour of plaintiff no.2 was also denied.

16. On 7.8.2003, the learned trial Judge framed additional issues, namely Issue no.2(a) relating to ground under section 13(1)(b) and Issue no.2(b) relating to ground under section 13(1) (a) read with Section 108(o) of the T.P.Act. On 22.2.2004, further additional issues were framed on the point of plaintiff no.1 assigning and transferring the suit property to plaintiff no.2 and whether the defendants establish that the documents of plaintiff no.2 are colorable, got up, fabricated and whether defendant no.2 proves that he is a deemed tenant/protected licensee in respect of the suit premises and finally whether the suit is barred by law of limitation. Parties led oral as well as documentary evidence.

14. In support of the plaintiffs' case, plaintiffs examined plaintiff no.2-Kanhaiyalal Madhvji Thakkar, Constituted Attorney of plaintiff no.1 and for himself as PW 1, PW 2-Manish Ramesh Basani, photographer who produced photographs which were

marked as Exhibit-F Collectively, PW 3-Madan Gangaram Dodani at the relevant time working as Assistant Engineer (Building and Factory Department) 'N' Ward, Corporation, PW 4-Prafull Narhari Powale, Structural Engineer/Valuer, who inspected the suit premises on 7.7.2003 and submitted report dated 7.7.2003 which was marked as Exhibit-H.

15. As against this, on behalf of the defendants, Mangal K Thakkar, Constituted Attorney of Defendant no.1 was examined as DW 1. Defendant no.2 examined himself as DW 2.

16. By Judgment and decree dated 10th to 17th March 2004, the learned trial Judge decreed the suit and held that the plaintiffs proved that defendant no.1, since coming into operation of the Act, unlawfully sublet the suit premises and/or given it on leave and licence basis in favour of defendant no.2 (section 13(1)(e)). The plaintiffs proved that the suit premises were not used by defendant no.1-tenant without reasonable cause for the purpose for which they were let out for a continuous period of six months preceding the date of the suit {(Section 13(1)(k)}. Plaintiffs further proved that the defendants have carried out additions and alterations of permanent nature without permission of the plaintiffs as alleged in paragraph 3(a) of the plaint.(Section 13(1)(b)). Plaintiffs also proved that the defendants have caused waste and damage to the suit property thereby violating provisions of Section 108(o) of the T. P. Act. The learned trial

Judge also held that the plaintiffs proved that the suit property was sold, assigned and transferred to him by plaintiff no.1 and that the defendants failed to prove that the documents of plaintiff no.2 are colourable, got up, fabricated. The learned trial Judge further held that defendant no.2 failed to prove that he is a deemed tenant/protected licensee in respect of the suit premises and that the suit is barred by law of limitation.

17. Aggrieved by this decision, defendant no.2 preferred Appeal No. 419 of 2004. Defendant no.1 preferred Appeal No. 420 of 2004. By Judgment and decree dated 18.2.2008, the Appellate Bench of the Small Causes Court partly decreed the suit only on the grounds of additions and alterations of permanent nature, Section 13(1)(b) and causing waste and damage as contemplated by section 13(1)(a) and 108(o) of T.P.Act. It is against these decisions, the above Civil Revision Applications are instituted under section 115 of C.P.C.

18. Civil Revision Application No.322 of 2008 is instituted by defendant no.2. Civil Revision Application No. 323 of 2008 is instituted by defendant no.1. Learned trial Judge has decreed the suit under section 13(1)(a) read with Section 108 (o) of T.P.Act, Section 13(1)(b), 13(1)(e) and 13(1)(k) of the Act. The Appellate Court decreed the suit only under sections 13(1)(a) read with Sections 108(o) of the T.P.Act and 13(1)(b) of the Act. For the sake of convenience, learned counsel for the parties have argued

Civil Revision Application No.322 of 2008 and have submitted that decision therein will govern the fate of C.R.A. No.323 of 2008.

19. In support of this Application, Mr. Walawalkar submitted that plaintiff no.1 had made complaint dated 12.10.1990 (Exhibit-G) through Advocate to the Assistant Engineer (B&F) of the Corporation alleging that the defendants have unauthorizedly extended shop no.3 during Navratri 1990 on the rear side. The latter was called upon to take legal action for demolition of the unauthorised extension, failing which plaintiff no.1 will move the appropriate Court. On 8.11.1990, the Corporation issued notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 (Exh.E/6), inter alia, calling upon the defendants to pull down the unauthorised extension to the existing shop with brick masonry walls and R.C.C. slab admeasuring (i) 2.75 meters x 2.50 meters (ii) 4.15 meters x 2.05 meters. On the reverse side of that notice, suit premises and unauthorized extensions were indicated by rough sketch. He submitted that on 11.11.1990, plaintiff no.1 instituted suit against the defendants under section 13(1)(e) and 13(1)(k) of the Act. On 25.3.1991, the Assistant Engineer (B&F) 'N' Ward issued letter (Exh.5) to defendant no.1 informing her that action initiated under Section 351 will not be pursued further. Plaintiff no.1 executed agreement of sale in favour of plaintiff no.2 on 11.11.1991. Deed of Confirmation was executed

on 31.12.1992. Interim Notice No. 6248 of 1999 was taken out by the plaintiffs for amending the plaint so as to incorporate paragraph 3(a). Interim notice was allowed on 30.3.2001. Plaint was amended on 10.4.2001.

20. On 7.7.2003, at the request of plaintiff no.2, the suit premises was inspected in order to estimate changes carried out by occupier. Report at Exhibit-H was prepared on 7.7.2003.

Paragraphs no. 9 and 10 of the report read thus:-

(9) The back side is extended by 2.75 MTS X 2.5 MTS PLUS 4.15 x 3.05 MTS (This as per Municipal Corporations of Greater Bombay Notice u/s 351 of BMC Act) This specifically is shown in block plan of building whereas detail plan shows only a portion which extent to chajja less by 3" is covered by breaking the existing 9" thick wall along with window and door. Presently the backside wall portion is covered with Rolling shutter of full width of wall and height upto chajja bottom level. This has developed cracks in the beam supporting slab of 1st floor and the parapet wall. Similarly there are cracks in the terrace slab portion. There is a crack in the R.C.C. Pillar in the south east corner which is supporting the terrace slab. This crack is extended inside the ground and has given passage to corrosion of reinforcement of column and footing supporting it. With passage of time the reinforcement in the footing may corrode and cracks will be developed in footing concrete; thus it will not be in position to bear the above load and may settle and will give way to distortion of column which may further damage the structural stability of entire building. This will subject to reduce the life of property. There are cracks in chajja due to corrosion which has developed due to breaking of chajja located at previous position."

10. There was a partition wall inside the premises acting as a part of load carrying member has been demolished by the occupier and reconstructed to his requirement i.e opening in wall was in the centre with respect to approved plan but in the present condition the opening is shifted towards shop no. 4 and 5. This has made the remaining load bearing walls to bear additional load and subjected to more stress than it was

design. Hence it has reduced the life of this wall and helped to reduce the structural stability of the entire structure and may be main cause to bring down the structure to earth. Also a new wall 9" is constructed exactly 6' away towards backside of above wall, having opening at the location parallel to new location of opening of above mentioned wall. The backside ceiling portion is collapsed and reinforcement are exposed to atmosphere. Thus reduce life of structure rapidly. The unauthorized construction beyond approved plan means FLOOR SPACE SCANDAL which may lead to put the owner for imprisonment or loss of money as he has to deduct FSI of this portion from balance area available for future development. If owner decided to rearrange as per approved plan after dismantling existing mean access to additional damage to structural stability of structure."

21. On 21.7.2003, the Corporation issued notice under section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 (for short, 'M.R. & T.P. Act') calling upon defendant no.2 to remove 7'6" wide rolling shutter erected on the rear side of the shop premises and restore brick masonry walls as per the approved plan of 18.10.1995. On 27.10.2003, after hearing the parties, Assistant Commissioner, 'N' Ward, passed order. By that order, defendant no.2 was directed to remove unauthorised rolling shutter and outer window opening and brick masonry wall should be constructed within 15 days from receipt of the order, failing which necessary action will be initiated against occupier. Aggrieved by this order, defendant no.2 instituted Suit No.5332 of 2003. Suit was dismissed. Aggrieved by that order, defendant no.2 has instituted First Appeal No.2240 of 2011 in this Court and the Appeal is admitted and interim stay is operating.

22. Mr. Walawalkar submitted that the suit is instituted on

11.11.1990. During the pendency of the suit, plaintiff no.1 took out interim notice for amending the plaint so as to incorporate paragraph 3(a) raising ground of additions and alterations of permanent nature and causing waste and damage. He invited my attention to the sanctioned plan dated 9.11.1990 at Exhibit-C and photographs produced by the plaintiffs at Exhibit-F Collectively. If the sanctioned plan at Exhibit-C and photographs at Exh.F Collectively are compared, it cannot be said that the defendants have made additions and alterations and that the plaintiffs have made out a case of eviction under section 13(1)(a) read with section 108(a) of T.P.Act and section 13(1)(b) of the Act. He has taken me through the evidence of the plaintiffs' witnesses. In fact, by communication dated 25.3.1991 (Exhibit-5) Assistant Engineer (B&F) of the Corporation informed defendant no.1 that action initiated under section 351 will not be pursued further.

23. Mr. Walawalkar submitted that the Courts below have decreed the suit under sections 13(1)(a) read with section 108(o) of the T.P.Act and section 13(1)(b) on the basis of the plaintiffs case of defendants carrying out extension to rear side by demolition of the existing outer boundary wall; committing encroachment of open space by construction of side walls and encroaching the same by putting rolling shutters. The findings recorded by the Courts below are contrary to:

- (i) sanctioned plan at Exhibit-C;
- (ii) photographs at Exhibit-F collectively;
- (iii) In view of communication dated 25.3.1991 issued by Assistant Engineer (B&F) informing defendant no.1 that the action initiated under Section 351 will not be pursued further;
- (iv) stand of the Corporation before the Assistant Commissioner during the course of hearing of notice issued under section 53(1) of the M.R.& T.P. Act to the effect that "the Plan dated 4.2.1980 shows that at shop no.3, rear side with brick wall with window and door opening, and there is no Ota for shop no.3 on rear side. Also at shop no.3, there is no second partition wall dividing the shop in three parts. As per the occupation plan dated 20.9.2001, there is no change for the premises of shop no.3 as approved in 1982".

24. He further submitted that the findings on the ground under section 13(1)(a) read with section 108(o) of T.P.Act is based solely on the findings on the ground under section 13(1)(b) of the Act. As the findings recorded on the ground under section 13(1)(b) are perverse, the findings recorded on the ground under section 13(1)(a) read with section 108(o) are required to be set aside.

25. Mr. Walawalkar invited my attention to paragraph 39 of the trial Court's judgment. In paragraph 39, the learned trial Judge observed that "the plaintiffs also allege that due to extension of rear side and fixation of rolling shutters unauthorisedly and illegally carried out by the defendants, it affected or amounts to deduct the FSI of the suit building which would be available in the future for construction. The report of the Architect (Exhibit-H) has also stated that due to rear side extension, it developed cracks in the terrace slab portion. It will give way to destruction of columns which may further damage the structural stability of the suit building. This evidence of the witness Mr. Powale (Architect) remains unchallenged. In the absence thereof and in view of the facts that the M.R.&T.P. proceedings had taken place against the defendants which would sufficiently hold that due to the alleged acts, the defendants have caused waste and damage to the suit premises thereby committing acts contrary to the provisions of Section 108(o) of the T.P.Act".

26. He also invited my attention to paragraph 82 of the Appellate Court Judgment, wherein it was observed thus:

"As far as waste and damage is concerned, it is the case of the plaintiffs that additions and alterations of the suit premises are in the rear and as such they are made by encroaching upon open space in the rear of the suit premises. According to the plaintiffs, the said extension of the suit premises by constructing side walls and putting slab has affected the stability of the suit building and the plaintiffs have suffered on account of F.S.I. to the extent of encroached area and as such the same amounts to waste

and damage in the suit property. On this aspect of the matter the plaintiffs' Architect PW no.4 has mentioned in his report at Exhibit-H that the said construction by way of additions and alterations have developed cracks in the beam supporting slab of first floor and the side walls and there are cracks in the terrace slab portion. There are cracks in the R.C.C. Pillar in the south East corner which is supporting the terrace flat. He has also stated that structural stability of entire building is endangered. Moreover, unauthorised construction beyond approved plan means FLOOR SPACE SCANDAL which may lead to put the owner for imprisonment or loss of money as he has to deduct F.S.I. Of this portion from balance area available for future development. In the cross examination of this architect nothing material is elicited in order to falsify him or diminish evidentiary value of this report. The main objection on behalf of the appellants/original defendants as regards the Architect's report is that, the same is of the year 2003 whereas the alleged additions and alterations are stated to be of the year 1990 and hence the said report is of no use. However, we do not find any force in the said submission as existence of the said additions and alterations is admitted and assessment of its nature in the year 2003 does not affect the merit of the case."

27. He submitted that the findings recorded by the Courts below are plainly contrary to (i) the sanctioned plan at Exhibit-C; (ii) photographs at Exhibit-F Collectively; (iii) in view of communication dated 25.3.1991 issued by Assistant Engineer (B&F) informing defendant no.1 that the action initiated under Section 351 will not be pursued further; (iv) stand of the Corporation before the Assistant Commissioner during the course of hearing of notice issued under section 53(1) of the M.R. & T.P. Act.

28. Mr. Walawalkar further submitted that none of the plaintiffs witnesses deposed that the alleged additions and alterations are

of a permanent nature. He further submitted that the Courts below have also not considered criteria laid down by various decisions of this Court and Apex Court for determining whether a particular structure or work is a permanent structure coming within the mischief of clause (b) of Section 13(1) of the Act. For determining whether the structures were permanent or not, following factors should be taken into consideration:

1. Intention of the party who put up the structure;
2. The said intention can be gathered from the mode and degree of annexation;
3. If the structure cannot be removed without doing irreparable damage to the demise premises, then that would be certainly one of the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure ;
4. Its remove-ability has to be taken into consideration. But these were not the sole tests.
5. The purpose of erecting the structure is another relevant factor;
6. The nature of the materials used for the structure.

These are the broad tests to be applied by the Court for determining whether a particular structure is of a permanent nature or not. In the present case, the Courts below have not applied the above criteria. In support of this proposition, he

relied upon the following decisions:

1. Surya Properties (Pvt) Ltd Vs. Bimalendu Nath Sarkar, AIR 1964 Cal. (1) (Special Bench) and in particular paragraphs 33,35,71 and 101;
2. Surya Properties P. Ltd Vs. B Nath; AIR 1965 Cal 408 and in particular paragraphs 5,6,24 and 44;
3. Special Civil Application No.121 of 1968 decided on 25/28th Jan.1972 by P.S.Malwankar, J.
4. Alisaheb Abdul Latif Mulla Vs. Abdul Karim Abdul Rehman Mulla, 1981 Bom.C.R. 388 and in particular paragraphs 19 and 21;
5. Pitambardas Vs. Dattaji, 1981 Mh.L.J. 290 and in particular paragraph 6;
6. Ratanlal Ramgopal Agarwal Vs. Kurban Hussaian Gulamali Lahri, 1986(2) Bom. C.R. 597 and in particular paragraph 12;
7. Parvati Kevalram Moorjani Vs. Madanlal Anraj Porwal, 1987 Mh.L. J. 917, and in particular para 8;
8. Somnath Krishnaji Gangal Vs. Moreshwar Krishnaji Kale, 1995 (3) Bom C.R. 327 and in particular paras. 14, 16 and 21;
9. A-1 Engineering Works Vs Rajendra Kasturchand Vora, 2011 (3) Bombay C.R. 856 and in particular para 9;
10. Venkatlal G. Pitie Vs Bright Brothers Pvt Ltd, 1987(3) SCC 558 and in particular paras 9, 14 to 16, 18, 21 to 23, 26 and 27.
11. Purushottamdas Bangur Vs Dayanand Gupta, (2012) 10 SCC 409 and in particular paras 15 and 22;
12. Babu Manmohan Das Shah vs Bishun Das, AIR 1967 SC 643;
13. Om Prakash Vs. Amar Singh, (1987) 1 SCC 458,
14. Brijendra Nath Bhargava Vs. Harsh Wardhan, (1988) (1) SCC 454.

29. Mr. Walawalkar further submitted that the Courts below were not justified in decreeing the suit under sections 13(1)(a) read with 108(o) of T.P.Act and Section 13(1)(b) of the Act. The findings recorded by the Courts below are perverse and, therefore, this Court will be justified in exercising its powers under section 115 of C.P.C. In support of this proposition, he relied upon the following decisions:

1. Venkatlal G. Pitie (supra) and in particular paragraphs 26 and 27;
2. Chandavarkar Sita Ratna Rao Vs. Aashalata Guram, 1986 (4) SCC 477 and in particular paragraph 20;
3. Hindustan Petroleum corporation Ltd Vs.Dilakar Singh, (2014) 9 SCC 78 and in particular paragraph 43 thereof;
4. Kasthuri Radhakrishnan Vs.M.Chinniyar, (2016) 3 SCC 296. In paragraph 27, paragraph 43 of the H.P.C.L was reproduced.
5. Vishwanath Agarwal Vs Sarla Vishwanath Agarwal, (2012) 7 SCC 288 and in particular paragraph 38;
6. Sheo Nand Vs Dy. Director of Consolidation, Allahabad, (2000) 3 SCC 103 and in particular paragraph 21 thereof;
7. Prem Kaur Vs. State of Punjab, (2013) 14 SCC 653 and in particular paragraphs 16and 18. In paragrph 19, reference was made to decision in Satyavir Singh Vs. State of U.P. (2010) 3 SCC 17. In paragraph 21 of that report, the Court has dealt with “perverse findings”;
8. Govind Bala Patil Vs. Ganapati Ramchandra Naikwade, (2013) 15 SCC 193 and in particular paragraph 8;
9. S.R.Tewari Vs. Union of India, (2013) 6 SCC 602 and in particular paragraph 30.

Mr.Walawalkar, therefore, submitted that Civil Revision

Applications No. 322 of 2008 and 223 of 2008 deserve to be allowed by setting aside the impugned orders passed by the Courts below.

30. On the other hand, Mr. Thacker supported the impugned orders. He submitted that the ground of eviction under section 13(1)(b) of the Act is established by evidence of plaintiffs' witnesses. P.W.4 Prafull Narhari Powale had inspected the premises and submitted report at Exhibit-H. Defendants have not cross examined the said witness on the report. The plaintiffs' case of extension of rear side portion is established by photographs at Exhibit-F Collectively. He has taken me through the evidence of the plaintiffs' witnesses. Even there was no cross examination of PW 3-Madan Dodani, Assistant Engineer (B&F) of the Corporation. As far as ground under section 13(1)(a) read with Section 108(o) of the T.P.Act is concerned, he submitted that the partition wall was removed. Brick wall, window and door were removed and were replaced by rolling shutter. He submitted that evidence of expert's witness PW 4-Powale was rightly given weightage by the Courts below while decreeing the suit on this ground. In fact, there was no cross examination by the defendants on this ground. He submitted that the impugned orders cannot be said to be perverse so as to warrant interference under section 115 of C.P.C. He relied upon the decision of H.P.C.L (supra) to contend that the High Court can

interfere under section 115, where the findings recorded by the Courts below are perverse, based on no evidence or misreading of the evidence or the findings have been arrived at by ignoring or overlooking the material evidence or the findings are so grossly erroneous that if allowed to stand, will occasion in miscarriage of justice. While exercising revisional jurisdiction, the High Court cannot re-appreciate the evidence on record and exercise appellate jurisdiction. In other words, the High Court cannot exercise its powers as an appellate power to re-appreciate or re-assess the evidence for coming to different findings on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal.

31. He also relied upon the decision of S.R.Tewari (supra) and in particular paragraph 30 to contend that the findings of fact recorded by a Court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is “against the weightage of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be reverse. But **if there is some evidence on record**

which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. He, therefore, submitted that no case is made out for invocation of powers under section 115 of C.P.C. and Applications deserve to be dismissed.

32. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Courts below have decreed the suit under section 13(1)(a) read with section 108(o) of the T.P.Act and Section 13(1)(b) of the Act. Learned counsel appearing for the parties have relied upon various decisions referred herein above. In Special Civil Application No. 121 of 1968 decided on 25/28.1.1972, P.S. Malvankar, J., observed that there cannot be any hard and fast rule or formula defining a permanent structure. The decision in each case will depend upon the facts and surrounding circumstances of that case. However, in order to determine whether or not a particular construction is a permanent structure, the following factors will have to be taken into consideration:

(1) The intention of the party who puts up the structure. This intention is to be gathered from the mode and degree of annexation, the nature of the structure, the extent of the structure and surrounding circumstances. If the structure cannot

be removed without doing irreparable damage to the demised premises, then that would be certainly one of the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure and its easy removability will have to be taken into account but, surely, these are not decisive tests.

(2) The purpose of erecting the structure is also another factor which requires consideration. If the structure is a permanent or substantial improvement of the premises, so that when the person who has made it leaves the premises, such a structure amounts to a permanent gift to the original owner, then that would certainly be a circumstance for determining whether or not the structure is a permanent structure. But if the person who has put up the structure has done it only to better or more completely enjoy it temporarily, such a structure cannot be treated as a permanent structure. It is also necessary to consider in this connection whether the structure brings about a substantial change in the character of the premises.

(3) The third factor would be the nature of the material used for the structure and

(4) Lastly, the durability of the structure. These are broadly the factors which must be taken into account while considering the question whether or not a particular structure is a permanent structure.

33. In *Suraya Properties Pvt. Ltd (supra)*, Special Bench of Calcutta High Court, headed by Bose, C.J., has dealt with the question as to whether a particular structure is permanent or not. Bosh, C.J., has observed in paragraph 9 that whether a particular structure is a permanent structure or not, is a question which depends on the facts of each case and on the nature and extent of a particular structure and the intention or purpose for which the structure is made may also be a relevant consideration in certain circumstances but no hard and fast rule can be laid down with regard to this matter.

Bachawat, J. (as His Lordship then was) in a concurring judgment, observed in para 15 that no hard and fast test can be laid down for determining whether a particular structure is a permanent structure for purposes of clause (p) of Section 108 of T.P.Act. The nature and situs of the structure, the mode of annexation, the intention of the tenant and the surrounding circumstances must all be taken into account for the purpose of determining whether or not a particular structure is a permanent structure.

Sinha, J. also in a concurring judgment observed in paragraph 33 that what amounts to a permanent structure depends on the facts of each case. The answer depends on the nature of the structure, the intention of the parties and the surrounding circumstances. Usually, a structure which is intended

to be permanent is built substantially. On the other hand, it is possible to envisage a substantial structure intended to be used only temporarily. The intention of the parties is the most important test, but this can only be derived from an investigation of the surrounding circumstances. For these reasons, it is obvious that a satisfactory answer cannot be given which will be applicable to the facts of every case. In other words, there is no universal formulae that can be applied to all the cases and under all circumstances.

P.N.Mookerjee, J. also in a concurring judgment observed in paragraph 35 that whether a structure is permanent or not within the meaning of Section 108 (p) of the T.P.Act depends on various factors which cannot be catalogued in detail or exhaustively enumerated. It is a mixed question of law and fact, which depends, for its answer on the facts of the particular case before the Court. The same structure may be well held to be permanent in one case and non-permanent in another. Indeed, no hard and fast rule can be laid down in the matter, although certain broad tests may be formulated which may conveniently guide the determination and facilitate the correct approach. Relevant from this point of view would be, inter alia, the nature of the structure or construction in question and the intention, with which it is made, and, almost in every case, they would be of primary and prime importance, the situs, the mode of

annexation and the surrounding circumstances being all appropriate matters for consideration of the above two basic and usually determinant elements.

Mitter, J. (as His Lordship then was) in a concurring judgment quoted the decision in *Atul Chandra Lahiry V Sonatan Daw*, AIR 1962 Calcutta 78 and observed in paragraph 101 that it is impossible to lay down any test which will apply to all cases to find out whether the structure is a permanent structure within the meaning of Section 108(p) of T.P.Act.

34. In the case of *Suraya Properties Private Ltd (supra)*, the Division Bench of Calcutta High Court observed that no hard and fast test can be laid down for determining the question whether a particular structure by a tenant is a “permanent structure” for purposes of Section 108(p) of T.P.Act. The answer to the question depends upon the facts of each case and on the nature, situs extent of the particular structure. The mode of its annexation to the original building, the intention of the tenant and the surrounding circumstances must all be taken into account for determining the question. The thickness of the walls is of little consequence and the more important thing to consider, is their durability. The test of removability or demolition is not an invariable test and the fact that the structure can be demolished does not make it any the less permanent.

35. In the case of *Alisaheb Abdul Latif Mulla, (supra)*, the

learned single Judge of this Court in paragraph 19 observed that a number of decisions were referred to. In the very nature of things no two cases will provide identical facts and the question as to whether a particular structure or work is a permanent structure or otherwise, will have to be determined with reference to the facts found in each of such cases.

36. In *Purushottam Das Bangur (supra)*, the Apex Court in paragraph 20 observed that no hard-and-fast rule can be prescribed for determining what is permanent or what is not. The use of the word 'permanent' in Section 108(p) of the T.P.C. Act is meant to distinguish the structure from what is temporary. The term "permanent" does not mean that the structure must last forever. A structure that lasts till the end of the tenancy can be treated as a permanent structure. The intention of the party putting up the structure is important for determining whether it is permanent or temporary. The nature and extent of the structure is similarly an important circumstance for deciding whether the structure is permanent or temporary within the meaning of Section 108(p) of the Act. Removability of the structure without causing any damage to the building is yet another test that can be applied while deciding the nature of the structure. So also the durability of the structure and the material used for erection of the same will help in deciding whether the structure is permanent or temporary. Lastly, the purpose for which the

structure is intended is also an important factor that cannot be ignored.

37. In paragraph 21 of Venkatlal G. Pittie case (supra), the Apex Court observed that one must look to the nature of the structure, the purpose for which it was intended and take a whole perspective as to how it affects the enjoyment, the durability of the building etc., and other relevant factors and come to a conclusion.

38. Keeping in mind the principles laid down in the above decisions, let us consider the evidence adduced by the parties.

39. In support the plaintiffs case, the plaintiffs have examined plaintiff no.2 Kanhyalal Madhavji Thacker, Constituted Attorney of plaintiff no.1 and for himself as PW 1. PW.-2 Manish Basani, photographer who produced photographs at Exh.F Collectively, PW-3 Madan Dodani, Assistant Engineer (B&F) of the Corporation and PW 4 Praful N Powale, Structural Engineer who inspected the suit premises on 7.7.2003 and submitted report dated 7.7.2003 at Exh.H. As against this, defendants examined Mangal Thakkar, Constituted Attorney of defendant no.1 as DW 1. D.W 2 examined himself as DW 2. The defendants also relied upon photographs at Exhibits 2,3 and 4.

40. As noted earlier, on 8.11.1990 the Corporation had issued notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 (Exh.E/6), inter alia, calling upon the defendant no.1 to

pull down unauthorised extension to the extended shop with brick masonry walls and R.C.C slab admeasuring (i) 2.75 meters x 2.50 meters (ii) 4.15 meters x 2.05 meters. On the reverse side of that notice, the suit premises and unauthorised extension were indicated by rough sketch.

41. On 7.7.2003, PW 4-Prafull Powale inspected the suit premises and submitted report on 7.7.2003. I have already reproduced paragraphs 9 and 10 of that report in the earlier part of the order. On 21.7.2003, the Corporation had issued notice under section 53(1) of the M.R.&T.P.Act calling upon defendant no.2 to remove 7'6" wide rolling shutter erected on the rear side of the shop premises and restore brick masonry wall as per the approved plan of 18.10.1995. On 27.10.2003, Assistant Commissioner 'N' Ward passed order after hearing the parties. By that order, defendant no.2 was directed to remove unauthorised rolling shutter and outer window opening and brick masonry wall should be constructed within 15 days from the receipt of the order failing which necessary action will be initiated against the occupier. It is no doubt true that defendant no.2 instituted suit challenging the said action. The suit was dismissed. Aggrieved by that order, defendant no.2 has instituted First Appeal No.2240 of 2011 in this Court. Appeal is admitted and interim order is operating.

42. PW 1 Kanhaiyalal Madhavji Thakker, in substance, deposed

that the defendants have demolished rear side wall. There was Otlā to the rear side of the suit premises. The defendants covered it by constructing walls affixed a rolling shutter by removing the wall. Due to the work carried out by the defendants, structure of the suit building is weakened. Life of the building is reduced. Additions and alterations carried out in the suit premises have not been shown in the sanctioned plan at Exhibit C. In the cross examination, suggestion was put to him that he did not plead encroachment in respect of Otlā. He replied that suggestion as 'It is not true that I have not pleaded in respect of the Otlā on which the defendant has encroached upon. It is not true that since there was no Otlā any time to the suit premises, therefore, it is not so pleaded". He also denied suggestion that the defendants have not extended the suit premises and the suit premises are in the same situation as it was in the beginning as shown in Plan C as under:

"It is not true that the defendant has not extended the suit premises. It is not true that suit premises is in the same situation as it was in the beginning, as shown in the plan at Exh.C. It is not true that the defendant has not made any additions or alterations or extension in the suit premises as deposed by me."

PW 1 filed additional affidavit of evidence on 16.6.2003. He deposed that the defendants have encroached upon the open space and Otlā and have annexed the said open space with the suit premises. The defendants have demolished the rear side

wall of the suit premises and have constructed and fixed the rolling shutter. He further deposed that the encroachment has caused waste and damage to the suit property. The said suit property is very old and the additions and alterations carried out by the defendants are of permanent nature and are carried out without written consent of the plaintiffs. However, no attempt was made by the defendants in the cross examination of this witness either falsifying or contradicting the said statement.

43. Plaintiffs also examined PW 2-Manish Ramesh Basani, photographer. He produced photographs Exh.F Collectively. He deposed that he noticed that rear side portion is at some ahead distance of the building line. No attempt was made by the defendants in the cross examination for falsifying the said statement. Plaintiff examined PW 3 Madan Gangaram Dodani, Assistant Engineer (B&F). He deposed that he had visited the suit premises as also verified the plans of the suit property and the suit premises. He noticed the difference in the sanctioned plan and the suit premises. In the sanctioned plan, a door and wall is shown on the rear side of the suit premises. There on the site of the suit premises, a rolling shutter is provided. Partition in the suit premises was found to be removed. In the cross examination, he admitted that he had made a report to the Ward Officer. In that report, he did not mention about rolling shutter on the rear side of the suit shop and removal of partition wall

therein. He further deposed that “it is not true that my statement as regards to the rolling shutter and removal of partition wall is not correct.”

44. Plaintiffs examined PW 4 Prafull Powale, Structural Engineer. He had produced report dated 7.7.2003 at Exh.H. In paragraph 10 of the report, he mentioned about demolition of the partition wall by occupier is based on the sanctioned plan of B.MC and situation of the actual site. He was shown sanctioned plan Exh.C and deposed that the said fact is not mentioned therein. He deposed that 'it is not true that all the contents of my report (Exh.H) are not correct and it is contrary to reality". He was not cross examined in respect of his report, Exhibit-H.

45. As against this, in the cross examination DW 1 deposed that defendant no.2 Dhirajbhai got the notice issued under section 351 withdrawn. He denied that in the year 1991 defendants no.1 and 2 had made alleged additions and alterations, namely, removing interconnecting partition wall, removing the rear side wall, putting enclosure on Otlā and replacing wooden door by rolling shutter and thereby increasing the area of the suit premises and thereby caused waste and damage. He was shown photographs (3) at Exh.F Collectively as also photographs Exh.2 Collectively at sr. no.2 He deposed thus:

“In the photographs Exh.2 collectively, the WC/toilet is seen and the rolling shutter of the suit premises is at ahead

distance of the line of WC and toilet”.

He denied that to the rear side of the suit premises, previously, there was an ota and it was removed and put on it a rolling shutter, enclosed by defendants no.1 and 2.

46. As far as trial Court is concerned, the learned trial Judge has considered the ground under section 13(1)(b) of the Act and 13(1)(a) read with section 108(o) of the T.P.Act from paragraph 30 onwards. After considering the evidence on record, in paragraph 38, the learned trial Judge referred to the notice issued under section 351 and 53(1) of the M.R& T.P.Act against defendant no.2 ordering him to remove unauthorised rolling shutter at the backside of the suit premises and ordered to construct brick masonry wall at its places. The learned trial Judge observed that on considering the same, the evidence led by the plaintiff establishes the very aspect in dispute that defendant no.2 has extended the rear side portion and fixed rolling shutter unauthorisedly and illegally. Though defendant no.2 denied the alleged authorised additions and alterations and extension to the suit premises, he did not put forth any evidence to make believe the case or that he has not constructed the alleged construction of permanent nature in the suit premises. Defendant no.2 also did not examine any other neighbouring shop owner or occupant which would show that the alleged construction to the suit premises to the rear side is not unauthorised or illegal. Further

the defendants did not examine previous landlord who could have stated about alleged construction in the suit premises of defendant no.2. The learned trial Judge, therefore, held that the plaintiffs have proved that the defendants have carried out additions and alterations of permanent nature unauthorisedly and illegally.

47. In paragraph 39, the learned trial Judge referred to report of PW 4 Powale at Exhibit-H wherein it is stated that due to rear side extension the building developed cracks in the terrace slab portion. It will give way to destruction of columns which may further damage to structure stability of the suit building. Evidence of PW 4 remained unchallenged. The learned trial Judge, therefore, held that the defendants have committed acts contrary to provisions of section 108 (o) of the T.P.Act.

48. As far as the Appellate Court is concerned, the Appellate Court has considered these grounds from paragraph 74 onwards. In paragraph 78, the Appellate Court observed that perusal of the oral and documentary evidence produced by both the parties makes it clear that existence of additions and alterations as alleged by the plaintiffs is a fact. In paragraph 80, it was observed that the defendants in their evidence tried to justify the said additions and alterations contending that such additions and alterations are there also in the adjoining shops and the plaintiffs have tolerated the said additions and alterations in

respect of the same. Ultimately in paragraph 88, the Appellate Court observed that the evidence on record shows that additions and alterations of permanent nature were carried out in the suit premises in the year 1990 and the same are attributable to defendant no.2.

49. Mr. Walawalkar submitted that the Courts below failed to consider that by communication dated 25.3.1991 issued by the Assistant Engineer (B & F) of Corporation, he informed DW 1 that action initiated under section 351 will not be pursued further. It is not possible to accept this submission for more than one reason. In the first place, the notice issued under section 351 is not withdrawn by the Corporation. Secondly, the defendants did not examine anybody from the Corporation to bring on record the reasons for not pursuing the action initiated under section 351. Thirdly, there could be various reasons for not pursuing the action, one of them being filing of the suit by the plaintiffs on 11.11.1990 and other being in the cross examination DW 1 deposed that defendant no.2 Dhirajlal got the notice under section 351 withdrawn. Lastly, the Corporation may not have pursued action initiated under section 351 as it is a case of the defendants that the plaintiffs had tolerated additions and alterations of other shop premises. The fact, however, remains that the defendants did not examine anybody from the Corporation for bringing on record reasons for not pursuing

action initiated under section 351.

50. Mr. Walawalkar submitted that the findings recorded by the Courts below are contrary to sanctioned plan at Exh.C, photographs at Exh.F collectively. He further submitted that the Courts below have not considered the criteria laid down by various decisions of this Court for determining whether a particular structure or work is a permanent structure coming within the mischief of clause (b) of section 13(1) of the Act. For determining whether the structures were permanent or not, following factors should be taken into consideration.

- (i) Intention of the party who puts up the structure;
- (ii) The said intention can be gathered from the mode and degree of annexation;
- (iii) If the structure cannot be removed without doing irreparable damage to the demised premises, then that would be certainly one of the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure ;
- (iv) Its removability has to be taken into consideration. But these were not the sole tests.
- (v) The purpose of erecting the structure is another relevant factor;
- (vi) The nature of the materials used for the structure.

52. In the case of Venkatlal G Pittie (*supra*), in paragraph 21 and 22 the Apex Court observed thus:

“21. There are numerous authorities dealing with the question how the structure is a permanent structure or not should be judged. It is not necessary to deal with all these. One must look to the nature of the structure, the purpose for which it was intended and take a whole perspective as to how it affects the enjoyment, the durability of the building etc. and other relevant factors and come to a conclusion.

22. Judged in the aforesaid light on an analysis of the evidence the trial court as well as the appellate court had held that the structures were permanent. The High Court observed that in judging whether the structures were permanent or not, the following factors should be taken into consideration referring to an unreported decision of Malvankar J. in special civil application No. 121 of 1968. These were (1) intention of the party who put up the structure; (2) this intention was to be gathered from the mode and degree of annexation; (3) if the structure cannot be removed without doing irreparable damage to the demised premises then that would be certainly one of the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure and (4) its removability had to be taken into consideration. But these were not the sole tests. (5) the purpose of erecting the structure is another relevant factor. (6) the nature of the materials used for the structure and (7) lastly the durability of the structure. These were the broad tests. The High Court applied these tests. So had the Trial Court as well as the appellate bench of Court of Small Causes.”

It is no doubt true that the trial Court as well as Appellate Bench of Small Causes Court did not in terms refer to the broad tests laid down by P.S.Malvankar J. As observed in paragraph 21, one must look to the nature of the structure, the purpose for which it was intended and take a whole perspective as to how it affects the enjoyment, the durability of the building etc and other relevant factors and come to a conclusion.

53. In the light of the evidence on record, let us consider various factors in the present case. As far as the intention of the defendant no.2 who put up the structure is concerned, it is manifest that he has extended rear side portion of the suit premises so that he can utilize more area than what is let out to him. The mode and degree of annexation and material used therefor clearly shows that defendant no.2 has carried out permanent construction. The structure cannot be removed without doing irreparable damage to the demised premises. The structure is capable of lasting till the term of the lease. It is also evident that if defendant no.2 who has made permanent construction, leaves the premises, such a structure would amount to a permanent gift to the landlord. It also cannot be said that defendant no.2 has put up the structure only to better and more completely enjoy it temporarily. In other words, it cannot be treated as a temporary structure. The structure constructed by defendant no.2 also brings about substantial change in the character of the premises.

54. In the light of the evidence on record and applying the tests laid down by P.S.Malvankar, J. in Special Civil Application No.121 of 1968 decided on 25th/28th January 1972, I do not find that the Courts below committed any error in decreeing the suit under sections 13(1)(b) and 13(1)(a) read with section 108(o) of T.P.C.Act. In fact, as far as the ground under section 13(1)(a)

read with 108(o) of the T.P.Act is concerned, the evidence of PW 4 Powale, Structural Engineer and the reports made by him at Exhibit -H, remained absolutely unchallenged. The Courts below after appreciating the evidence on record have concurrently held that defendant no.2 has carried out additions and alterations of permanent nature. The said findings are based upon evidence on record.

55. In the case of S.R.Tewari (supra), the Apex Court observed in paragraph 30 thus:

“30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. **But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.** (Vide: Rajinder Kumar Kindra v. Delhi Administration, AIR 1984 SC 1805; Kuldeep Singh v. Commissioner of Police, AIR 1999 SC 677; Gamini Bala Koteswara Rao and Ors. v. State of Andhra Pradesh, AIR 2010 SC 589; and Babu v. State of Kerala (2010) 9 SCC 189).

(emphasis supplied)

56. The Apex Court observed that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. In the present case, as the evidence led by the plaintiffs is acceptable and can be relied

upon, this Court will not be justified in interfering with the findings recorded by the Courts below in exercise of powers under section 115 of C.P.C. Merely because on the basis of evidence on record, another view is possible that, by itself, is no ground for invocation of powers under section 115 of C.P.C. It also cannot be said that no reasonable or prudent person would have reached the conclusions arrived at by the Courts below. Defendant no.2 was not in a position to demonstrate that the findings recorded by the Courts below are not based on any material evidence or that they are contrary to evidence on record or it has resulted in manifest injustice.

57. In the light of the aforesaid discussion, no case is made out for invocation of powers under section 115 of C.P.C. Civil Revision Applications No. 322 of 2008 and 323 of 2008 fail and the same are dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs.

58. This brings me to Civil Revision Application No.424 of 2008 instituted by the plaintiffs. The plaintiffs have challenged the Judgment and decree dated 18.2.2008 passed by the Appellate Bench of the Small Causes Court in Appeals No. 419 to 2004 preferred by defendant no.2 and 420 of 2004 preferred by defendant no.1. By that order, the Appellate Court set aside the trial Court's findings on the ground of unlawful subletting as

contemplated by Section 13(1)(e) and non user as contemplated by Section 13 (1)(k) of the Act.

59. Plaintiffs have contended that defendant no.1 has, since coming into operation of the Act, unlawfully sub-let or given on leave and licence, the whole or part of the suit premises or assigned or transferred in any other manner her interest thereon in favour of defendant no.2. Defendant no.1 is herself not using the suit premises for the purpose for which it was let out for a period of more than six months prior to filing of the suit. The defendants have denied those assertions. In substance, the defendants came with the case that defendant no.1 had executed agreement of leave and licence dated 1.7.1970 in favour of defendant no.2. She had granted suit premises on leave and licence initially for a period of three years from 1.7.1970 with option to defendant no.2 to renew the agreement for a further period of two years. Licence granted by defendant no.1 to defendant no.2 was valid and subsisting as on 1.2.1973. Defendant no.2 has thus deemed to have become tenant of the plaintiffs by virtue of Section 15A of the Act.

60. The parties led evidence in support of their respective case. On the basis of evidence on record, the learned trial Judge passed decree even on the ground of unlawful sub-letting and non user against the defendants. The Appellate Court, however, set aside this part of the trial Court's decree.

61. In support of this Application, Mr. Thacker has taken me through the pleadings, oral as well as documentary evidence adduced by the parties. He submitted that DW 1 Mangal K.Thakkar deposed that under an agreement of leave and licence dated 1.9.1968 defendant no.1 inducted defendant no.2 in the suit premises. On 1.7.1970 defendant no.1 executed another leave and licence agreement in favour of defendant no.2. The said agreement bears the signatures of defendant no.1 and defendant no.2. He identified the signatures of defendant no.1 and defendant no.2 on the said agreement. The said agreement was marked as Exhibit-8. In the cross examination, he admitted that defendant no.2 is his relative. Defendant no.2 might be having an agreement of leave and licence dated 1.9.1968. He was confronted with paragraph 4 of the written statement dated 21.7.1992 of defendant no.1 wherein reference was made to books of accounts, shop and establishment certificate, receipts of payment of licence fees paid to defendant no.2, sales tax registration certificate, Income tax assessment orders, bills, delivery challans, receipts (rent) issued by the plaintiffs and their predecessor-in-title. He admitted that he is unable to produce any of the documents as stated in paragraph 4 of the written statement. He further admitted that he does not know as to who were the witnesses to the agreement of leave and licence dated 1.9.1968. He admitted that defendant no.1 was doing the

business of Hardwares in the suit premises for 2 years since 1968.

62. Mr.Thacker has also invited my attention to the evidence of DW 2. In examination in chief, defendant no.2 who was examined as DW 2 deposed that defendant no.1 had granted leave and licence agreement for a period of 22 months commencing from 1.9.1968 to end of June, 1970. Pursuant to that agreement, he was required to pay Rs.350/- per month as compensation to defendant no.1. He was given exclusive possession of the suit premises on leave and licence basis. He paid compensation to defendant no.1 as agreed. He, however, deposed that the said leave and licence agreement and compensation receipts are misplaced and they are neither available with defendant no.1 nor with defendant no.2. In cross examination, he admitted that he does not have any document or payment receipts of 1968 about payment of compensation or document of leave and licence agreement. He deposed that he was having copy of the leave and licence agreement of 1.9.1968 till the year 1970 when another agreement was executed. He had torned of agreement of 1968 on making of the new agreement as it was not necessary to keep it. 2-3 days after execution of the new agreement, he torned of agreement of 1968.

63. Mr. Thacker relied upon Section 5(4A) and 15A of the Act. He submitted that in order to claim benefit of Section 15A of the

Act, defendant no.2 has to establish (1) that he is in occupation of the premises or such part under the subsisting agreement as on 1.2.1973 of licence given for a licence fee or charge as on 1.2.1973. (2) He must establish that he is in exclusive possession and not in joint possession with the licensor.

64. Mr. Thacker submitted that in the present case, defendant no. 2 has not established payment of compensation to defendant no.1. Documents produced by defendant no.2 show that he is in joint possession with defendant no.1. In so far as leave and licence agreement dated 1.7.1970, Exhibit-8, is concerned, it bears endorsements to the following effect:-

“I say received a sum of Rs.5000/- (Rupees Five thousand only) as and by way of deposit as stated hereinabove.

LICENSOR.”

“Rs.2000/- received from previous agreement and Rs.3000/- by a cheque no. AB 800176 of Dena Bank dated 1st October, 1970.”

Sd/-
Kanta Harsukhrai Oza
(Defendant no.1)”

65. Mr. Thacker submitted that the defendants have not established execution of leave and licence agreement dated 1.9.1968. Apart from the fact that they have not produced leave and licence agreement dated 1.9.1968 which was in writing, they also did not examine defendant no.1 to substantiate that case. In fact, the leave and licence agreement dated 1.7.1970 also does not make reference to leave and licence agreement dated

1.9.1968. The defendants have also not established payment of Rs.2000/- as part of deposit from previous agreement. As far as payment of Rs.3000/- by cheque is concerned, defendant no.2 has not established that he maintained account with Dena Bank at the relevant time. A cheque was issued on 1.10.1970 when agreement was executed on 1.7.1970. Defendant no.2 did not produce either passbook or statement of account of Dena Bank to substantiate that cheque of Rs.3000/- was debited to his account. In other words, there is absolutely no evidence to substantiate payment of Rs.5000/- towards deposit. Thus, the defendants have neither established payment of deposit of Rs.5000/- nor even payment of licence fee. In short, he submitted that document dated 1.7.1970 is a got up and ante-dated document with a view to claiming benefit of Section 15A.

66. He has taken me through the impugned order and in particular paragraphs 54 to 73. In paragraph 63, the Appellate Court dealt with suggestion given to DW 1 in the cross examination to the effect that leave and licence agreement of defendant no.2 was revoked and cancelled by defendant no.1 in the year or about 1972 because defendant no.1 herself wanted the suit premises and the said licence was not subsisting. Referring to this suggestion, the Appellate Court observed that the suggestion given to DW 1 in his cross examination clearly goes against the plaintiffs as the said suggestion amounts to

admission of leave and licence agreement dated 1.7.1970 between defendant no.1 and defendant no.2 in respect of the suit premises. The Appellate Court further observed that the plaintiffs admit not only the execution of the said agreement but also admit that atleast before 1972 the suit premises were occupied by defendant no.2 as a licensee of defendant no.1 when it is stated that defendant no.1 wanted to come to the suit premises herself. These circumstances and in fact admission heavily goes against the plaintiffs and certainly helps the defence of the defendants. He submitted that the suggestion in the cross examination is not admission of the said fact. Suggestion is also not evidence of the said fact. In support of this proposition he relied upon the following decisions:

- 1.Narayan Dagadu Patil Vs. Hirabai Gajanan Mulik, AIR 2000 Bombay 68; and in particular paragraph 8;
2. V.K.Jhamb V C.M.Bhatia, 1985 Bom. R.C. 293;
3. Trikam Jivraj Vs. State of Gujarat, AIR 1969 Gujarat 69'
4. Bai Devmani V. Raviskankar, AIR 1929 Bombay 147.

He also relied upon Section 21 of the Indian Evidence Act, 1872.

67. In paragraph 66, the Appellate Court observed that payment of compensation by defendant no.2 to defendant no.1 will have to be inferred. He submitted that the said finding, to say the least, is perverse. In short, he submitted that as the

defendant no.2 did not establish payment of deposit, payment of compensation as also his exclusive possession in the suit premises, defendant no.2 cannot avail benefit of Section 15A. The findings recorded by the Appellate Court are perverse. In fact, the findings recorded by the appellate court outrageously defy logic as to suffer from the vice of irrationality. The decision arrived at by the Appellate Court is on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it. In support of this submission, he relied upon the decision of the Apex Court in the case of S.R.Tewari (supra).

68. As far as the ground of non user under section 13(1)(k) of the Act is concerned, he has invited my attention to paragraphs 72 and 73. He submitted that it has come on record that defendant no.1 has permanently shifted to Muscat some time in the year 1989. Thus, the plaintiffs have established that defendant no.1 tenant has not used the suit premises for the purpose for which they were let out for continuous period of six months immediately preceding the date of the suit. The Appellate Court observed that the plaintiffs did not plead specifically one of the ingredients of Section 13(1)(k), i.e. without reasonable cause. The Appellate court observed that no cause of action was available to the plaintiffs to maintain the suit on the ground under section 13(1)(k) of the Act. He submitted that the said approach of the Appellate Court is perverse. For all these

reasons, he submitted that Civil Revision Application deserves to be allowed and the suit ought to be decree also on the ground under section 13(1)(e) and 13(1)(k) of the Act.

69. On the other hand, Mr. Walawalkar supported the impugned order. He submitted that the suit instituted by the plaintiffs is clearly barred by the law of limitation. He has taken me through the evidence of PW 1-Kanhaiyalal Madhavji Thakkar. In the affidavit of evidence dated 16.6.2003 and in particular paragraph 12, he deposed that upto the year 1975-77 he had seen defendant no.1 doing her own business from the suit premises. After about 1976 he had seen defendant no.2 in the suit premises. Defendants, after entering the suit premises in the year 1976, had created antedated document which includes leave and licence agreement as well as shop and establishment licence. In the cross examination of PW 1 conducted on 25.6.2003, he deposed that he lastly met defendant no.1 in the year or about 1971-72 atleast about 10 times. He saw defendant no.2 in the suit premises for the first time in 1970-71.

70. Mr. Walawalkar submitted that the plaintiffs acquired knowledge of alleged unlawful sub-letting by defendant no.1 in favour of defendant no.2 in the year 1970-71. In any case, as per the affidavit of evidence dated 16.6.2003, the plaintiffs acquired knowledge about the alleged unlawful sub-letting in the year 1976. The suit is instituted on 11.11.1990. Article 66 of the

limitation prescribes period of limitation of 12 years and the time begins to run when the forfeiture is incurred or the condition is broken. Article 67 prescribes period of limitation of 12 years and the period of limitation begins to run when the tenancy is determined. He submitted that in the facts and circumstances of the present case, Article 66 of the Limitation Act is applicable. As the plaintiffs acquired knowledge in the year 1970-71 or in any case in the year 1976 about the alleged sub-letting by defendant no.1 in favour of defendant no.2 and the suit is instituted in the year 1990, it is clearly barred by limitation. He submitted that the Courts below wrongly held that the suit instituted is within limitation. He has taken me through the orders passed by the Courts below in that regard.

71. Mr. Walawalkar has invited my attention to the documentary evidence on record to contend that the defendants have established existence of Leave and Licence Agreement and that defendant no.2 is inducted as licensee and the licence was subsisting as on 1.2.1973. He relied upon the following documents:

(i) Agreement of Leave and Licence dated 1.7.1970
-Exhibit-8;

(ii)(a) Partnership Deed dated 31.3.1972 between (1)
Hiralal Ratanshi Somaiya (brother of defendant no.2) and
(2) Dhirajlal Ratanshi Somaiya (defendant no.2),

whereunder it was agreed between them to carry on business of partnership in the name and style of 'Ghatkopar Hardware Stores' at the address of the suit premises,

(b) extract of Registrar of Firms and Registration Certificate both at Exhibit-11 Collectively;

(iii) Registration Certificate of Establishment of Ghatkopar Hardware Stores dated 23.5.1969 Exhibit-12. At sr.no.3, in respect of the name of employer, names of defendant no.1 (licensor) and defendant no.2 (licensee) are shown.

(iv)(a) Letter dated 22.3.1973 addressed by Contract Officer (SB) Bombay Telephones, to defendant no.2 which recorded that defendant no.2 had made application on 21.12.1970 showing address of the suit premises.

(b) Letter dated 14.11.1972 addressed by Contract Officer (SB) Bombay Telephones to defendant no.2 informing the latter that the address where defendant no.2 requires the telephone connection to be installed, comes under the jurisdiction of Chembur Telephone Exchange Area and hence his registration was transferred to the waiting list of that Exchange. Waiting list of Chembur Exchange was cleared upto March 1970 covering last Registration no. C/OYT/CHM/10922;

(c) Letter dated 10.5.1973 addressed by Contract Officer,

- (SB) Bombay Telephones to defendant no.2;
- (d) Demand Note issued on 10.5.1973 by Contract Officer (Suburban), Bombay Telephones to defendant no.2;
- (e) Letter dated 18.6.1973 issued by Contract Officer (SB) Bombay Telephones to defendant no.2 informing the latter that every attempt will be made to provide him with telephone connection as early as possible after the necessary formalities are completed;
- (f) Bill dated 11.10.1973 issued by Indian Posts and Telegraphs Department to defendant no.2 (all at Exhibit-13 Colly.)
- (v)(a) Registration Certificate of Establishment dated 17.1.1978 showing name of establishment as Ghatkopar Hardware Stores. At sr.no.3 in respect of the name of employer, names of defendant no.1 and no.2 are shown.
- (b) Registration Certificate of Establishment dated 15.9.1990 showing name of establishment as Ghatkopar Hardware Stores. At sr.no.3, name of defendant no.1 (licensor) is shown against the name of employer.
- (c) Registration Certificate of establishment dated 5.4. 1995 showing name of establishment as Ghatkopar Hardware Stores. At sr.no.3, names of defendant no.1(licensor) and 2 are shown against the name of the employer (all at Exh. 15 Colly.)

72. Mr. Walawalkar submitted that defendant no.1 inducted defendant no.2 as licensee in the year 1968. Registration Certificate of the establishment dated 23.5.1969 at Exh.12 substantiates the case of defendant no.2 that he is there in the suit premises since 1968. He submitted that defendant no.1 was carrying on business under the name and style of M/s Sarvodaya Stores. As against this, defendant no.2 is carrying on business under the name and style of Ghatkopar Hardware Stores. Documents at Exhibits 11 (Colly), 12, 13 (Colly), 15, substantiate defendants' case.

73. Mr. Walawalkar invited my attention to cross examination of DW 1-Mangaldas K. Thakkar. He submitted that the plaintiffs' Advocate had given two suggestions, viz. (1) the agreement of Leave and licence of defendant no.2 was revoked or cancelled by defendant no.1 in the year 1972 and (2) that defendant no.1 herself wanted the suit premises and the said licence was not subsisting as on 1.2.1973. He submitted that this suggestion also pre-supposes that defendant no.1 was not occupying the suit premises. DW 1 denied those suggestions. In other words, defendant no.2 was in exclusive possession of the suit premises on the basis of subsisting leave and licence agreement as on 1.2.1973. He, therefore, submitted that the Appellate Court rightly held in paragraphs 63 and 66 that the plaintiffs admitted existence of leave and licence agreement dated 1.7.1970

between defendants no.1 and 2 in respect of the suit premises. Plaintiffs not only admitted execution of the said document but also admitted that atleast before 1972 the suit premises were occupied by defendant no.2 as licensee of defendant no.1. The Appellate Court also held that the suggestion given by the plaintiffs would establish that defendant no.2 is in exclusive possession of the suit premises since 1.7.1970.

74. Mr.Walawalkar relied upon Sections 18 and 58 of the Indian Evidence Act, 1872 as also decision of Calcutta High Court in the case of A.E.G.Carapiet Vs A.Y. Derderian, AIR 1961 Calcutta 359 and in particular paragraphs 9 and 10 thereof, to contend that failure to put the important and crucial part of the case to the witnesses coming to prove testamentary capacity must be held against the applicants herein. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. The said decision was quoted with approval by the Apex Court in Sarwam Singh Vs. State of Punjab, (2003) 1 S.C.C. 240 and in particular paragraph 9. In paragraph 9, the Apex Court has observed that it is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that

issue ought to be accepted. He, therefore, submitted that no fault can be found with the reasoning given in paragraphs 63 and 66.

75. Mr. Walawalkar submitted that under section 5(4A) defines the expression "licensee" to mean the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence **given for a licence fee or charge**. He invited my attention to the leave and licence agreement dated 1.7.1970 and in particular paragraph 5 thereof. Clause 5 recited that licensee shall pay a sum of Rs.450/- as a compensation for the use and occupation of the suit premises. The licensee shall also pay electric bill in respect of consumption of electricity in the suit premises. Thus the suit premises was given for licence fee by defendant no.1 to defendant no.2. He submitted that the evidence on record clearly substantiates the case of payment of compensation by defendant no.2 to defendant 1. He relied upon decision of Apex Court in Dipak Banerjee Vs Lilabati Chakraborty,(1987) 4 SCC 161 and in particular paragraphs 10 & 12 thereof. In paragraph 9 of that report, the Apex Court referred to Section 105 of the T.P.Act. Section 105 defines lease. It lays down that a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share

of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Relying upon this judgment as also Section 105 of T.P. Act he submitted that leave and licence agreement dated 1.7.1970 clearly shows that it was given for payment of compensation of Rs.450/- as compensation. Defendant no.2 permitted to pay Rs.450/- per month as compensation to defendant no.1.

76. Mr. Walawalkar has taken me through the oral evidence of witnesses examined by the plaintiffs as also by the defendants. He submitted that over all assessment of evidence on record establishes that defendant no.1 was not in possession of the suit premises from 1970-71. Defendant no.1 was carrying on business under the name and style as 'Survodaya Hardware Stores'. As against this, defendant no.2 is carrying on the business under the name and style as 'Ghatkopar Hardware Stores'. Documentary evidence relied by the defendants are not got up documents. The learned trial Judge held that the leave and licence agreement is not proved. As against this, the Appellate Court held that the leave and licence agreement is duly proved by the defendants.

77. Mr. Walawalkar also relied upon the decisions referred herein above dealing with scope of revisional jurisdiction under Section 115 of C.P.C. He submitted that the findings recorded by

the Appellate Court as regards grounds of eviction under section 13(1)(e) and 13(1)(k) of the Act cannot be said to be perverse. It cannot be said that the Appellate Court recorded the findings by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. It also cannot be said that the findings are against the weightage of evidence. The evidence on record is acceptable and can be relied upon. The conclusions of the Appellate Court cannot be treated as perverse and the findings cannot be interfered with in exercise of powers under section 115 of C.P.C. He, therefore, submitted that no case is made out for invocation of powers under section 115 of C.P.C.

78. In Rejoinder, Mr. Thacker submitted that both the Courts below have held that the suit instituted by the plaintiffs is within limitation and is not barred by law of limitation. In the present case, Article 66 is applicable as there is no termination of tenancy so as to apply Article 67. He submitted that plaintiff no.1 had purchased the suit premises on 8.2.1979 which fact is borne out from Articles of Agreement dated 11.11.1991 and Deed of Confirmation dated 31.12.1992 between plaintiff no.1 and plaintiff no.2. The suit is instituted on 11.11.1990. Thus, it cannot be said that the suit is not instituted within 12 years as contemplated by Article 66 of the Limitation Act. He submitted that the defendants have not established payment of

compensation by defendant no.2 to defendant no.1. Defendant no.2 has also not established exclusive possession. In fact, the defendants did not produce leave and licence agreement dated 1.9.1968. The defendants also failed to establish that defendant no.2 was in possession on the basis of the leave and licence agreement dated 1.7.1970. Presence of defendant no.2 in the suit premises that by itself does not mean that he was in exclusive possession of the suit premises. Defendant no.2 was in fact employee of defendant no.1. Documents produced by defendants no.1 and 2, at the highest, show his joint possession and not exclusive possession. For all these reasons, he submitted that the order passed by the Appellate Court to the extent of refusing to pass decree under section 13(1)(e) and 13(1)(k) of the Act deserves to be set aside, thereby, decreeing the suit even on this ground.

79. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have sought possession of the suit premises on the ground of unlawful sub-letting as contemplated by section 13(1)(e) and non user as contemplated by Section 13(1)(k) of the Act. The plaintiffs came with the case that defendant no.1 has unlawfully sublet the suit premises to defendant no.2 and that defendant no.1-tenant is herself not using the suit premises for the propose for which it

was let out for a period of more than six months prior to filing of the suit. As against this, the defendants came with the case that defendant no.1 had inducted defendant no.2 as licensee. In the written statements filed by defendants no.1 and no.2, though it was contended that defendant no.2 has been lawfully, exclusively in use and occupation and possession of the suit premises since the year 1968, they did not specifically plead about execution of leave and licence agreement dated 1.9.1968. However, the said case is sought to be introduced during the course of evidence. It is, therefore, necessary to find out whether the defendants have established existence of leave and licence agreement dated 1.9.1968. In order to consider this aspect, it is necessary to have a glance at the pleadings and evidence adduced by the parties. In the written statement, the defendants have not specifically set up execution of leave and licence agreement dated 1.9.1968. DW 1-Mangaldas Kanji Thakkar, Constituted Attorney of defendant no.1, filed his affidavit dated 25.8.2003. He deposed that defendant no.1 executed Power of Attorney in his favour on 25.11.1990. In paragraph 2, he stated that defendant no.1 gave the suit premises to defendant no.2 on leave and licence basis in the year 1968. Defendant no.1 was doing hardware business in the suit premises upto July, 1968. Defendant no.1, thereafter, closed her business. In paragraph 3, he stated that defendant no.1

inducted defendant no.2 in the suit premises under an agreement of leave and licence dated 1.9.1968 for a period of 22 months. Defendant no.1 gave exclusive possession of the suit premises to defendant no.2 in 1968. After his induction, defendant no.2 is doing his own hardware business in the suit premises. In paragraph 4, he stated about leave and licence agreement dated 1.7.1970 executed by defendant no.1 in favour of defendant no.2. The agreement bears signatures of defendant no.1 and defendant no.2. He identified their signatures and stated that the contents of the said agreement are true and correct.

80. In the cross examination, he deposed that defendant no.2 might be having an agreement of leave and licence dated 1.9.1968. He did not inquire with defendant no.2 about a copy of the said agreement. It was on a stamp paper. Agreement was between defendants no.1 and 2. The rent/compensation under the said agreement was Rs.350/- per month. **There was no payment of deposit under the said agreement.** He deposed that he does not know as to whether defendant no.1 issued receipt towards compensation received from defendant no.2. He did not know as to in which year for the first time defendant no.1 left to Muscat after 1968. He was shown written statement dated

(emphasis supplied)

21.7.1992 which was signed by him. He did not know as to who had drafted the written statement. In the year 1992, he had not come to the Court to instruct Advocate. He did not know the contents of the written statement. He did not know that the written statement is prepared by defendant no.2. He does not want to say anything about the documents relied in paragraph 4 of the written statement as also list of the documents enlisted therein. He is unable to produce any of the documents as stated in paragraph 4 of written statement. He also can not state whether he is not producing the documents as stated in paragraph 4 of the written statement deliberately as the same would go against defendants no.1 and 2. He further admitted that he did not ask for the said documents to defendant no.1 before filing the affidavit in examination in chief. Defendant no.1 was having her hardware business in the suit premises. She was personally doing the said business. She was doing the business of hardware in the suit premises for two years since 1968. He did not know as to who were the witnesses to the agreement of leave and licence dated 1.9.1968. He denied that there was no such documents of agreement of leave and licence dated 1.9.1968 and that it is an imaginary one.

81. D.W. 1 was confronted with leave and licence agreement dated 1.7.1970 Exh.8. He denied the suggestion that the said document was prepared antedated or that it was prepared in the

year 1980. He did not remember about M/s Gopaldas & Co. He also did not remember as to who had purchased the stamp paper for the said agreement. There is no name either of defendant no.1 or defendant no.2 for purchase of the stamp paper of the agreement Exh.8. He deposed that the agreement dated 1.7.1970 bears his signature as witness no.1. He did not put the date below his signature. He signed the said document in 1970 at the suit premises on 1.7.1970. He denied that he had signed on it in 1980. On 1.7.1970, defendant no.1 and the defendant were present. He denied that agreement Exh.8 is a bogus document. He denied that the said agreement was prepared by Advocate Bipin Joshi in 1980. **He did not know the name of the Advocate who prepared document Exh.8.** He could not state as to whether the endorsement is written in the handwriting of one Mr Bipin Joshi. Total deposit amount was Rs.5000/- in the agreement. Rs. 3000 was paid by cheque and Rs. 2000 by cash. Payment was made in his presence. He does not have documentary evidence to show that payment of Rs.3000/- was made by way of cheque. He denied that there was no payment of Rs.3000/- by cheque on that date. He was confronted with notice dated 3.9.2003 for production of documents referred to in paragraph 4 of the written statement

(emphasis supplied)

dated 21.7.1992 of defendant no.1. His Advocate received the same. He further admitted that defendant no.1 did not send any document or paper to him from Muscat. In cross examination DW 1 deposed that defendant no.2 had paid monthly compensation of Rs.450/- sometimes to him or sometimes to defendant no.1 and even sometimes to plaintiff no.1. Defendant no.2 had paid compensation to defendant no.1 till 1971-1972. From 1972 to 1986 he was collecting compensation amount from defendant no.2. Defendant no.2 used to pay by cash. He was not issuing receipt for the same. He does not have any account thereof. **He was not having power of attorney from defendant no.1 during the period of 1971-72 to 1986.** He denied the suggestion that the agreement of leave and licence of defendant no.2 was revoked or cancelled by defendant no.1 in the year or about 1972 because defendant no.1 herself wanted the suit premises and the said licence was not subsisting. In re-examination he was shown written statement dated 21.7.1992. He stated that he had signed and verified written statement dated 21.7.1992. He signed the same on the first floor of the court building. It was prepared by Mr. Joshi Advocate. In the cross examination, he deposed that he never met Mr Bipin Joshi Advocate. He had never been to the office of Advocate Bipin

(emphasis supplied)

Joshi. He had not given any instructions to him at any time. Thus, perusal of evidence of DW 1 shows that:

1. he has no evidence to support that defendant no.2 paid compensation either to defendant no.1 or defendant no.2 from 1968 onwards;
2. defendant no.1 gave him power of attorney on 25.11.1990. In other words, he did not have authority to collect compensation for the period 1972 to 1986 from defendant no.2.
3. he does not have leave and licence agreement dated 1.9.1968;
4. defendant no.1 was carrying on business for two years since 1968;
5. though notice for production of documents referred in paragraph 4 of the written statement dated 21/7/1992 was issued on 3.9.2003 and which was received by him still, he did not produce documents, as sought for. Though he deposed that he is collecting compensation from 1971-72 from defendant no.2, he admitted that he did not have power of attorney from defendant no.1 during the period of 1971-72 to 1986.;
6. Not only that DW 1 deposed that sometimes defendant no.2 paid compensation even to plaintiff no.1.

In view of his admission that he never gave instructions to

Advocate Bipin Joshi for drafting W.S., the entire evidence of DW 1 has to be discarded.

82. As far as evidence of DW 2 is concerned, he filed affidavit of evidence on 22.9.2003. In paragraph 2, he deposed that he was inducted in the suit premises by defendant no.1 in the year 1968. Defendant no.1 had granted leave and licence to him in respect of the suit premises for a period of 22 months commencing from 1.9.1968 and ending on June, 1970 under a written agreement of leave and licence. He was given exclusive possession and he paid compensation to defendant no.1 as agreed. He, however, proceeded to state that the leave and licence agreement and compensation receipts are misplaced and they are neither available with defendant no.1 nor with him. After the expiry of leave and licence Agreement of 1968, another leave and licence agreement dated 1.7.1970 was executed between defendant no.1 and himself. He agreed to pay Rs.450/- per month as compensation. He identified his signatures appearing thereon. Pursuant to that agreement, he had paid compensation between 1968 sometimes to defendant no.1, sometimes to DW 1, and sometimes to even plaintiff no.1, as per the instructions of defendant no.1 and DW 1 Mangaldas.

83. In the cross examination, he deposed that he was in service of one Vallabhdas K. Palan from 1961 to 1971. He denied that he had not taken the suit premises on leave and licence

basis in the year 1968. He denied that he was employed as Manager of defendant no.1 in the year 1968. He denied that there was no document of 1968 referred to in his affidavit of evidence. He, however, admitted that he is not having any document or payment receipts of 1968 about payment of compensation or document of leave and licence agreement. Mr Gopaldas Advocate from Solicitors firm M/s Gopaldas & Co. had prepared document leave and licence in 1968. One copy was given to him, other copy was given to defendant no.1. He did not know as to whether he had kept copy for his record. He did not remember as to whether copy of the said agreement was with DW 1 Mangaldas. He did not feel it necessary to instruct Advocate Bipin Joshi while drafting written statement as regards the fact that agreement of leave and licence of 1968 is lost or misplaced. Since another agreement of leave and licence was executed, earlier agreement was not retained. He was having with him copy of agreement of 1968 till the year 1970 when another agreement was executed. He had torned off agreement of 1968 on making new agreement as it was not necessary to keep it. Therefore he torned it. Some 2-3 days after new agreement was executed it was torned. Though he had instructed about these facts to his Advocate while preparing affidavit of evidence, he had not sent any letter to Advocate Gopaldas for sending copy of the agreement. He did not send

any letter to defendant no.1 or her husband or DW 1 Mangaldas about the same. He denied that there was no agreement of leave and licence of 1968. In the agreement of 1968, Rs.2000 was shown as deposit amount. He paid that amount by cash. He, however, does not have document to show that he had paid Rs.2000/- as deposit. He further admitted that he instructed Advocate Bipin Joshi about agreement of 1968 while filing written statement. After reading over the contents of the written statement and after understanding of the contents, he signed on it. He did not remember as to not mentioning of leave and licence agreement of 1968 in the written statement. He could not give any reason as to why factum of agreement of September, 1968 was not pleaded in the written statement.

84. As noted earlier, firstly, the case of execution of written leave and licence agreement on 1.9.1968 was not at all pleaded. Secondly, the case of written leave and licence agreement dated 1.9.1968, though sought to be introduced in the evidence of DW 1 and defendant no.2, the evidence on record clearly shows that the defendants have failed to establish the very existence of leave and licence agreement dated 1.9.1968. Apart from this evidence, if the leave and licence agreement of 1.7.1970 is perused it also does not make reference to leave and licence agreement of 1.9.1968. This assumes importance because of specific deposition of defendant no.2 that he retained copy of

leave and licence agreement dated 1.9.1968 even after execution of subsequent leave and licence agreement of 1.7.1970. Perusal of evidence also shows that the defendants have not established payment of compensation right from 1968 onwards. In fact, the notice of production dated 3.9.2003 was specifically issued. The receipt of that notice is admitted. Despite that, the documents referred in para 4 of the written statement dated 21.7.1992 were not produced.

85. As far as leave and licence agreement dated 1.7.1970 is concerned, it bears endorsements which are already extracted in the earlier part of the judgment. Defendant no.1 licensor made endorsement to the effect that she received a sum of Rs. 5000/- as and by way of deposit. Defendant no.1 received Rs.2000/- from previous agreement and Rs.3000/- by cheque No.AB 800176 of Dena Bank dated 1.10.1970. In examination-in-chief, DW 1 did not depose that defendant no.2 had paid deposit of Rs.2000/- in pursuance of leave and licence agreement dated 1.9.1968 though he deposed that defendant no.1 inducted defendant no.2 in the suit premise under the leave and licence agreement dated 1.9.1968 and that exclusive possession was given to him. In cross examination he admitted that no deposit was paid under that agreement. As far as evidence of defendant no.2 is concerned, in the examination-in-chief he did not depose that he had paid Rs.2000/- in cash towards security deposit in pursuance

of leave and licence agreement dated 1.9.1968. In cross examination, he admitted that he does not have any document or payment receipts of 1968 about payment of compensation or document of leave and licence agreement. He also does not have any document to show that he had paid Rs.2000/- as deposit. In fact, the defendants have failed to establish existence of leave and licence agreement dated 1.9.1968 and consequently payment of deposit of Rs.2000/- thereunder.

86. As far as payment of Rs.3000/- by cheque of Dena Bank is concerned, it is material to note that leave and licence agreement was executed on 1.7.1970. Defendant no.2 claims to have issued cheque dated 1.10.1970 of Dena Bank. What is even more significant is that defendant no.2 did not produce pass book/statement of accounts of Dena Bank to substantiate the debit entry of Rs.3000/- from his account. In fact, defendant no.2 did not even attempt to establish that at the relevant time he was having account with Dena Bank. Thus, defendant no.2 failed to establish payment of Rs.3000/- towards deposit in pursuance of leave and licence agreement dated 1.7.1970. In other words, there is absolutely no evidence to substantiate payment of Rs.5000/- towards deposit. It has, therefore, to be held that the defendants have neither established payment of deposit of Rs.5000/- or even payment of compensation.

87. The suggestions were given to defendant no.2 about

preparing antedated document of leave and licence. These suggestions were naturally denied. In the facts and circumstances of the case, irresistible conclusion is that the defendants have prepared antedated document so as to claim benefit of Section 15A of the Act.

88. Section 5(4A) in so far as it is relevant for deciding the presently controversy reads thus:

“5. In this Act unless there is anything repugnant to the subject or context,-

(4A) "licensee", in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, **under a subsisting agreement for licence given for a licence fee or charge;**

Section 15A reads thus:

“15A. Certain licensees in occupation on 1st February 1973 to becomes tenants.

(1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purpose of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section (1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid”.

Conjoint reading of Section 5(4A) and Section 15A shows that

(1) the licensee has to establish that the agreement of leave and licence was subsisting as on 1.2.1973;

(2) he has to also establish that he has made payment of licence fee or charge;

(3) he was put in exclusive possession of premises or any part thereof, which is not less than a room as a licence.

89. Perusal of the document on record and in particular Exhibit-8, Exhibit 11 Collectively, Exhibit-12, Exhibit 13 Collectively, Exh.15 Collectively, does not indicate defendant no.2 was in exclusive possession of the suit premises. At the highest, defendant no.2 was shown along with defendant no.1 in possession of the suit premises. In other words, assuming in favour of the defendants, at the highest, defendant no.2 was in joint possession of the suit premises along with defendant no.1. In fact, perusal of the certificate of registration at Exhibit-12 under Bombay Shops and Establishment Act, 1948 (for short, 'said Act') makes interesting reading. Section 7 of the said Act deals with registration of establishment and lays down that employer of every establishment shall send to Inspector of the local area of concise statement in a prescribed form together with such fee as may be prescribed containing

(a) name of employer and the Manager, if any etc.. ..

Rule 5 of the Maharashtra Shops and Establishment Rules, 1961 lays down that the employer of every establishment has to send a statement in form A for renewal under form B. Item 5 of form A under rule 5 is in respect of name of the employer. Perusal of

registration certificate of establishment of 'Ghatkopar Hardware Stores' dated 23.5.1969 at Exhibit-12 shows that at sr.no.3 in respect of the name of employer, names of defendant no.1 (licensor) and defendant no.2 (licensee) are shown. The addition of the words (licensor) against defendant no.1 and (licensee) against defendant no.2 is not explained by the defendant. In fact, that is not the requirement under the said Act and the Rules framed thereunder. What is contemplated by the said Act and the Rules is the name of the employer and Manager, if any. In what capacity persons are occupying the premises is not contemplated under the said Act and the Rules. The documents relied by the defendants show that defendant no.2 is not in exclusive possession of the suit premises but is in joint possession along with defendant no.1. I, therefore, find merit in the submission of Mr. Thacker that the defendants have not established their case based on leave and licence agreements dated 1.9.1968 and 1.7.1970.

90. The learned trial Judge decreed the suit under section 13(1) (e) of the Act. The Appellate court reversed the finding of the trial Court. In paragraph 63, the Appellate Court dealt with suggestion given to DW 1 in the cross examination to the effect that leave and licence agreement of defendant no.2 was revoked and cancelled by defendant no.1 in or about 1972 because defendant no.1 herself wanted the suit premises and the licence

was not subsisting. Referring to these suggestions, the appellate court observed that the suggestion given to DW 1 in his cross examination clearly goes against the plaintiffs. The said suggestions amount to admission of leave and licence agreement dated 1.7.1970 between defendant no.1 and defendant no.2. The Appellate Court further observed that the plaintiffs not only admitted execution of the said agreement but also admitted that atleast before 1972 the suit premises were occupied by defendant no.2 as a licence of defendant no.1 when suggestion was given that defendant no.1 wanted to come to the suit premises herself. The Appellate Court held that these circumstances and in fact admissions heavily go against the plaintiffs and certainly help the defence of the defendants. In my opinion, the approach of the Appellate Court, to say the least, was perverse. In fact, the suggestions were given to the defendants witnesses that leave and licence agreement dated 1.7.1970 is an antedated document. The suggestions given during the course of cross examination of DW 1 were in the alternative. It does not mean that the plaintiffs admitted leave and liecence agreement dated 1.7.1970. For the reasons already indicated, I have held that the defendants have failed to establish existence of leave and licence agreement dated 1.9.1968 as also I am satisfied that the leave and licence agreement dated 1.7.1970 is a got up and antedated document

and the same is brought into existence with a view to claiming benefit of section 15A of the Act. In paragraph 66, the Appellate Court observed that considering the suggestions given to DW 1 during the course of cross examination, the payment of compensation by defendant no.2 to defendant no.1 will have to be inferred.

91. Mr. Walawalkar submitted that the findings recorded by the Appellate Court are based upon appreciation of evidence on record. This Court would not be justified in interfering with these findings in exercise of powers under section 115 of the C.P.C. Paragraph 30 of the Apex Court decision in S.R.Tewari (supra) is already extracted herein above. Applying the tests laid down therein to the facts of the present case, I am satisfied that the findings recorded by the Appellate Court are perverse. The findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The findings are against the weight of evidence. The findings outrageously defy logic. The decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it. In view thereof, the Appellate Court was not justified in refusing to pass decree under section 13(1)(e) of the Act.

92. That brings me to the last ground of eviction, namely non user of the suit premises as contemplated by section 13(1)(k) of

the Act. The learned trial Judge has dealt with this aspect in paragraph 29. The plaintiffs came with the case that defendant no.1 was carrying on her business in the suit premises till 1976-77 and thereafter defendant no.2 is in unlawful occupation of the suit premises. The learned trial Judge disbelieved the case of the defendants that defendant no.2 was inducted in the suit premises in the year 1968. In fact, the leave and licence agreement dated 1.7.1970 at Exh.8 does not mention that defendant no.2 already started business of hardware in 1968. In fact, there is no mention of licence granted to defendant no.1 in 1968. The learned trial Judge, therefore, held that defendant no.1 has not been using the suit premises for a period of six months or more immediately preceding to the date of institution of the suit.

93. As far as appellate court is concerned, the appellate court has dealt with this ground in paragraph 69 onwards. After considering the evidence on record, in paragraph 73 the appellate court observed that the plaintiffs have not pleaded specifically one of the ingredients of section 13(1)(k), i.e. without reasonable cause. The plaintiffs, therefore, have no cause of action to maintain the suit in the absence of pleadings of without reasonable cause. The Appellate Court, therefore, held that the plaintiffs are not entitled to decree of eviction under section 13(1)(k).

Section 13(1)(k) of the Act reads thus:

“Section 13 - When landlord may recover possession:

(1) Notwithstanding anything contained in this Act but subject to the provisions of sections 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

(k) that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit;”

94. In my opinion, the Appellate Court committed serious error in holding that in the absence of specific pleadings as regards without reasonable cause, the suit under section 13(1)(k) of the Act cannot be maintained. It is for the defendants to set up reasonable cause and not for the plaintiffs to plead the said fact. From the evidence on record, it is abundantly clear that defendant no.1 had shifted to Muscat. I have already held that defendant no.2 is unlawful occupation of the suit premises as he has failed to establish that he is a protected licensee under section 15A of the Act. The result is, therefore, obvious that defendant no.2 is unlawful occupation of the suit premises and defendant no.1 has not been using the suit premises for more than six months preceding the date of institution of the suit, i.e. she is not in possession from May 1990 to 11.11.1990 when the suit was instituted.

95. In view thereof the Appellate Court was not justified in declining to pass decree under section 13(1)(k) of the Act. In the

light of the aforesaid discussion, the findings recorded by the Appellate Court denying the decree under section 13(1)(e) and 13(1)(k) cannot be sustained and as such liable to be set aside. Suit instituted by the plaintiffs under section 13(1)(e) and 13(1)(k) under the Act deserves to be decreed. Rule is made absolute accordingly in C.R.A.No.424 of 2008, with no order as to costs.

96. Civil Revision Applications No. 322 of 2008 and 323 of 2008 are dismissed. Rule is discharged, with no order as to costs.

97. At this stage, Mr. Walawalkar orally applies for stay of this order for a period of eight weeks from today. He states that defendants are in possession of the suit premises and nobody else is in possession. Defendants have neither created third party interest nor parted with possession and that defendants will hereafter neither create third party interest nor part with possession. He assures that the defendants and all adult family members using the suit premises will give usual undertakings in this Court within two weeks from today with advance copy to other side, incorporating therein:

- (i) that they are in possession of the suit premises and nobody else is in possession;

- (ii) that they have neither created any third party interest nor parted with possession;

- (iii) that they will hereafter neither create third party interest nor part with possession;

(iv) that they will pay arrears of rent within 2 weeks from today to the plaintiffs;

(v) that they will not apply for further extension of time;

(vi) that in case they are unable to obtain suitable orders from higher Court within 8 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the plaintiffs.

98. In view thereof, notwithstanding dismissal of C.R.A.No.322 of 2008 and 323 of 2008 and allowing C.R.A.No.424 of 2008, this order shall remain stayed for a period of eight weeks from today subject to the defendants and all adult family members using the suit premises filing undertakings in the aforesaid terms within two weeks from today and serving copy in advance to other side. It is made clear that in case arrears upto and inclusive of 8 weeks from today are not paid as also the undertaking in the aforesaid terms is not filed within two weeks from today, the interim order shall stand vacated without further reference to the Court.

List the Application for reporting compliance after three weeks.

(R.G.KETKAR,J.)