

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

[1] Civil Revision Application NO. 198 OF 2014

Shri Anand Gangadhar Joshi ...Applicant

Versus

Smt Khairunnissa Sadruddin Bilawala
And Ors ...Respondents

....

Mr.R.A. Thorat, Senior Advocate a/w. S.M. Sabrad, for the Applicant.

Mr.P.S. Dani, Senior Advocate a/w. Ms. Geetika Jain i/b. Balasaheb R. Deshmukh, for the Respondents.

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WITH

[2] Civil Revision Application NO. 103 OF 2016

Smt. Khairunnisa Sadruddin Bilawala ...Applicant

Versus

Surendrakumar Shamji Sangoi
And Ors ...Respondents

....

Mr.P.S. Dani, Senior Advocate a/w. Ms. Geetika Jain i/b. Balasaheb R. Deshmukh, for the Applicant.

Mr. Pawankumar R. Prasad, for Respondent No.1.

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CORAM : R. G. KETKAR, J.

RESERVED ON : 13th OCTOBER, 2016

PRONOUNCED ON: 16th NOVEMBER, 2016

P.C.

1. Heard Mr. R.A. Thorat, learned Senior Counsel for the applicant in C.R.A. No.198/2014, Mr. P.S. Dani, learned Senior Counsel for the respondents in C.R.A No.198/2014 and for the applicant in C.R.A. No.103/2016, and Mr.

Pawankumar Prasad, learned Counsel for respondent No.1 in C.R.A. No.103/2016, at length.

2. C.R.A. No.198/2014 is instituted by the applicant, hereinafter referred to as 'defendant No.2' against judgment and decree dated 30.7.2007 passed by the learned Judge, presiding over Court Room No.15 of the Court of Small Causes at Bombay in R.A.E. & R. Suit No.387/833 of 1992 as also the judgment and decree dated 24.12.2013 passed by the Appellate Bench of the Small Causes Court in (A-1) Appeal No.735/2007. By these orders, the Courts below decreed the suit instituted by the plaintiffs for recovery of possession of flat No.4, on 3rd floor and two stilts on the ground floor of the building known as "Vasundhara", situate at Ganesh Peth Lane, Off Ram Maruti Road, Dadar, Mumbai - 400 028 (for short, 'suit premises').

3. C.R.A. No.103/2016 is instituted by the plaintiffs challenging the judgment and decree dated 21.11.2015 passed by the Appellate Bench of the Small Causes Court in (A-1) Appeal No.730/2007. That appeal was preferred by defendant No.5 challenging the findings recorded by the learned trial Judge against the additional issues No.1, 5 and 6 in the judgment and decree dated 30.7.2007 in R.A.E & R. Suit No.387/833 of 1992. Appellate Court remitted the matter to the learned trial Judge for determining the additional issues as per Order XLI Rule 25 of C.P.C. The

parties shall hereafter referred to as per their status before the trial Court.

4. The plaintiffs instituted suit against defendant No.1 Smt. Prabha Gangadhar Joshi, since deceased, (deleted), defendant No.2 Anand Gangadhar Joshi, defendant No.3 Anjali Gangadhar Joshi, defendant No.4 Aruna Gangadhar Joshi, defendant No.5 Surendrakumar Shamji Sangoi, defendant No.6 Shripad R. Shende, since deceased, represented by defendants No.6(a) & 6(b) for recovery of possession of suit premises *inter alia* contending that the plaintiff is a co-owner and landlady along with B.M. Buch of 'Vasundhara' building. Gangadhar Joshi was the original tenant in respect of the suit premises at the monthly rent of Rs.141.15 paise in respect of Flat No.4 and Rs.40.70 for two stilts. Gangadhar Joshi died leaving behind defendant No.1 Prabha, defendant No.2 son and defendants No.3 & 4 daughters.

5. The plaintiff came with the case that by Indenture of Conveyance dated 3.10.1966 Madhukar N. Garge had purchased the building for Rs.34,000/-. He had mortgaged that property under the Deed of Mortgage dated 30.7.1969 to Smt. Rubabai Salehbhai Bandukwalla and others to secure Rs.1,25,000/-. On 4.5.1978, Indenture of Transfer of mortgage was executed by and between (1) Rubabai

Salehbhai Bandukwalla, (2) Ms. Bilkish Zakiuddin Bandukwalla, (3) Kaiser Salehbhai Bandukwalla and (4) Moiz Salehbhai Bandukwalla (for short, 'Bandukwallas') as transferors being party of First Part and Madhukar Garge, mortgagor being party of Second Part and Gangadhar Vishwanath Joshi, transferee being party of Third Part to secure sum of Rs.54,950/-. Madhukar Garge, mortgagor, committed default in payment of Municipal taxes and consequently the Municipal authorities attached the building and sought auction of the same. On 5.12.1983 the auction was held for an amount of Rs.33,000/-. One J.M. Parekh gave bid of Rs.33,000/- who was declared as the highest bidder. On 29.8.1989 on behalf of the plaintiff and Mr.B.M. Buch, M/s. Bilwala and Company, Advocates and Solicitors issued a letter. At the request of J.M. Parekh a certificate of sale was issued on 11.4.1986 by the Municipal Authorities in favour of Narandas Karsandas. The title in the property passed on to said Narandas Karsandas subject to the charge in favour of defendants No.1 to 4. By deed of transfer dated 25.12.1986 executed by Narandas Karsandas, the building was transferred to the plaintiff and B.M. Buch. Certificate of sale issued in favour of Narandas Karsandas dated 22.1.1987 was confirmed on 19.9.1987. The plaintiff, therefore, came with the case that she is co-owner of 'Vasundhara' building along with B.M. Buch.

6. The plaintiff contended that by letter dated 22.5.1984 addressed by the Solicitor for J.M. Parekh and others, Gangadhar Joshi was informed about the ownership rights of the plaintiff and B.M. Buch. He was called upon to pay rent from 4.1.1984. By subsequent letter dated 29.8.1987 addressed to all the tenants/occupants including Gangadhar Joshi, the plaintiff informed them that she along with B.M. Buch became owners of the building and called upon them to pay arrears of rent. By another letter dated 8.8.1988 the plaintiff called upon Gangadhar Joshi to pay arrears of rent @ Rs.141.15 paise as also alleged about unlawfully enclosing balcony of flat No.4. The plaintiff issued notice through Advocate dated 31.10.1991 calling upon the defendants to pay arrears from 4.1.1984 to 31.10.1991 @ Rs.181.85 paise per month amounting to Rs.17,639.45 paise. The plaintiff also called upon the defendants to hand over the suit premises. It is the case of the plaintiff that despite receipt of this notice, the defendants failed to comply. The plaintiff, therefore, claimed possession on the ground of arrears of rent under Section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act').

7. The plaintiff further alleged that one of the balconies in the suit premises was unlawfully enclosed, which constitutes a permanent nature. Enclosure of the

balcony has caused waste and damage to the suit property. The plaintiff is, therefore, entitled to recover possession on the ground under Section 13(1)(a) of the Act read with Section 108(o) of the Transfer of Property Act, 1882 (for short, 'T.P. Act') and Section 13(1)(b) of the Act. The plaintiff further alleged that defendants No.2 to 4 unauthorizedly and illegally sublet two stilts on the ground floor to defendant No.5 and thereby caused breach of tenancy and contravened the provisions of the Act. Defendants No.1 to 4 are illegally profiteering by illegally inducting defendant No.5. Defendant No.5 is using two stilts as godown. By letter dated 25.1.2000 addressed by the plaintiff's Advocate to defendants No.2 to 4 enquired about how and when they inducted defendant No.5 along with original defendant No.1. No reply was given by the defendants. The plaintiff also addressed similar letter to defendant No.5. Defendant No.5 replied through Advocate on 31.1.2000 and denied the title of the plaintiff.

8. The plaintiff further alleged that defendants No.1 to 4 have unauthorizedly and illegally sub-let the stilt No.3 on the ground floor of 'Vasundhara' to defendant No.6 thereby causing breach of the tenancy. Defendants have enclosed stilt No.3 which is only for the purpose of car parking. Defendant No.6 is using stilt No.3 as a godown. Defendants No.1 to 4 have been illegally profiteering by inducting

defendant No.6. By letter dated 18.11.2002 issued by the plaintiff through Advocate to defendants No.2 to 4, she enquired as to when defendant No.1 illegally sub-let or inducted defendant No.6 in stilt No.3. No reply was given by defendant No.6. The plaintiff has also invoked ground of nuisance as contemplated under Section 13(1)(c) of the Act. Thus, the plaintiff has instituted suit for recovery of possession of the suit premises against the defendants by invoking grounds under Sections 12, 13(1)(a) read with Section 108(o) of T.P. Act read with Sections 13(1)(b), 13(1)(c) and 13(1)(e) of the Act.

9. Defendant No.1 filed written statement dated 17.4.1997 denying assertions made by the plaintiff. Defendant No.1 contended that the suit is not maintainable in law and that the Small Cause Court has no jurisdiction to entertain and try the suit. The suit is also bad for non-joinder of necessary / proper parties. There is no cause of action to institute the suit. Defendant No.1 referred to mortgage dated 30.7.1969 executed by Madhukar N. Garge in favour of Bandukwallas for securing Rs.1,25,000/- advanced by mortgagors to him. Defendant No.1 referred to transfer of mortgage dated 4.5.1978 in favour of Gangadhar Joshi for securing sum of Rs.54,950/- advanced by later to the mortgagors which was paid to the mortgagors under the mortgage dated 30.7.1969. Defendant No.1 referred to the

auction conducted by Municipal Authorities and denied the ownership of the plaintiff. It was further contended that the plaintiff has not joined Narandas Karsandas or B.M. Buch to the suit. Defendant No.1 referred to Suit No.1609/2009 instituted by her on the Original Side of this Court for enforcement of the mortgage debt under the Indenture of Transfer of Mortgage dated 4.5.1978 and the pendency of the suit.

10. Defendant No.2 filed written statement dated 17.4.1977 and additional written statement dated 19.10.2002 and denied all the adverse allegations made by the plaintiff. It was contended that there is a valid and subsisting mortgage in favour of defendants No.1 to 4 being the heirs of Gangadhar Joshi. Defendant No.2 contended that he is ready and willing to pay rent for the room occupied by him as tenant under Section 5(11)(c) of the Act. Defendant No.2 also denied the ownership of the plaintiff. Defendant No.3 filed written statement and denied all the adverse allegations made by the plaintiff.

11. Defendant No.5 filed written statement dated 11.11.2002 and denied all the adverse allegations made by the plaintiff. Defendant No.5 also substantially raised identical contentions raised by defendants No.1, 2 and 3. Defendant No.6 filed written statement dated 4.7.2003. Defendant No.6(a) filed written statement on 12.1.2006

reiterating the contentions raised by other defendants. Defendant No.4 did not file written statement.

12. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. Parties led evidence. After considering the evidence on record, the learned trial Judge decreed the suit under Sections 12, 13(1)(a) read with Section 108(o) of T.P. Act, Sections 13(1)(b) and 13(1)(e) of the Act. The learned trial Judge negated the ground under Section 13(1)(c) of the Act. The learned trial Judge held that the plaintiff and B.M. Buch are the owners and landlords of 'Vasundhara' building. The learned trial Judge held that defendant No.1 failed to establish that the suit as filed is not maintainable and has further held that the Small Causes Court has jurisdiction to entertain and try the suit. The learned trial Judge also negated the contentions on behalf of the defendants that the suit is bad for non-joinder of necessary or proper party. The learned trial Judge held that the plaintiff proved that defendants No.1 to 4 have been profiteering by unlawfully sub-letting the suit premises.

13. Aggrieved by this decision, defendant No.2 preferred Appeal No.735/2007. Defendant No.5 preferred Appeal No.730/2007. By judgment and decree dated 24.12.2013, Appellate Bench dismissed the appeal preferred by defendant No.2. Aggrieved by this decision, defendant

No.2 has instituted C.R.A. No.198/2014.

14. By judgment and decree dated 21.11.2015, Appellate Court partly allowed Appeal No.730/2007 preferred by defendant No.5 and set aside the findings recorded by the learned trial Judge against additional issues No.1, 5 and 6. Appellate Court set aside the judgment and decree to that extent and remitted the matter to the trial Court for determining the additional issues No.1, 5, 6 as per Order XLI Rule 25 of C.P.C.. It is against this decision, the plaintiff has instituted C.R.A. No.103/2016.

15. In support of C.R.A. No.198/2014 Mr. Thorat strenuously contended that the Courts below committed serious error in decreeing the suit. He submitted that there is no relationship of landlord and tenant between the parties. The Small Causes Court has, therefore, no jurisdiction to entertain and try the suit. Gangadhar Joshi was admittedly tenant of the suit premises. He submitted that defendants No.1 to 4 have valid charge on 'Vasundhara' building. He submitted that by Indenture of Conveyance dated 3.10.1966 Madhukar N. Garge purchased 'Vasundhara' building. On 30.7.1969 Madhukar Garge executed Deed of Mortgage in favour of Bandukwalla's for securing Rs.1,20,000/-. On 4.5.1978 the deed of transfer of mortgage was executed by Bandukwalla's as Transferors and Madhukar Garge as Mortgagor in favour of Gangadhar

Joshi for securing Rs.54,950/-. He submitted that till date the suit for redemption of mortgage is not instituted. He submitted that Article 61 of the Limitation Act, 1963 provides the period of thirty years for filing suit for redemption. Admittedly that period is over. He submitted that defendants No.1 to 4 became owners of the building. In any case during the subsistence of mortgage, the tenancy rights of Gangadhar Joshi remained in abeyance. He has taken me through the impugned orders and submitted that the Courts below have not dealt with this aspect. The issues have been dealt with the Courts below in a casual manner. He submitted that the Courts below have not considered the effect of Section 58 of the T.P. Act. In support of his submissions, Mr. Thorat relied upon following decisions :

- (i) ***Nirmal Chandra v. Vimal Chand, (2001) 5 SCC 51*** and
- (ii) ***Puran Chand (deceased) through LRs and others v. Kirpal Singh (deceased) and others, (2001) 2 SCC 433*** to contend that there is no merger of lease and a mortgage, even where the two transactions are in respect of the same property as for a merger it is necessary that lesser estate and a higher estate should merge in one person at one and the same time and no interest in the property should remain outstanding. Neither of the two rights are higher or lesser estate than the other. It is further observed that a tenant mortgagee

could be directed to deliver the possession of the property at the time of redemption only if at the time of the mortgage there was surrender of lease rights in favour of the lessor. In the present case, the Courts below have not considered whether Gangadhar Joshi had surrendered the tenancy rights as also till date the suit for redemption of mortgage is not instituted.

(iii) ***Narayan Vishnu Hendra and others v. Baburao Savalaram Kothawale (since deceased) by his heir Anant Baburao Kothawale, (1995) 6 SCC 608*** to contend that lease of a property is a very valuable right and its implied surrender would not be readily inferred. Neither the conduct of the parties nor the document in the present case indicates that the mortgagee intended to surrender his tenancy rights.

. He, therefore, submitted that the application requires consideration.

16. On the other hand, Mr. Dani supported the impugned orders. He submitted that in paragraph-8 of ***Nirmal Chandra*** (supra), Apex Court observed that on execution of mortgage, tenancy rights would terminate only if it is clear expressly or impliedly by conduct or other related circumstances that the parties had intended so which would be a question of fact. In paragraph-18 of

Narayan Hendre (supra) Apex Court considered the conduct of the parties as also document and on facts found that only effect of the mortgage was that the lessee's rights were kept in abeyance and they stood revived upon the redemption of the mortgage.

17. Mr. Dani submitted that in the present case defendant No.2 or for that matter any other defendant did not raise plea that during subsistence of mortgage, tenancy rights of Gangadhar Joshi remained in abeyance. As there was no plea raised by either of the defendants, no issue was framed by the learned trial Judge. Consequently the parties did not lead any evidence. Even this point was not agitated before the Appellate Court. In short he submitted that as observed in the case of **Nirmal Chandra** (supra) whether the tenancy rights are kept in abeyance and would revive after redemption of mortgage is a question of fact. The applicant cannot agitate this point for the first time in this Court. He, therefore, submitted that the contention raised on behalf of defendant No.2 is liable to be rejected.

18. Mr. Dani further submitted that the contention raised by defendant No.2 that the suit is barred by limitation also cannot be accepted. He submitted that admittedly defendant No.1 and others have instituted suit on the Original Side of this Court being Suit No.1609/2009. He invited my attention to the prayers made in that suit and

the order dated 2.12.2009 passed by the learned Single Judge of this Court. Defendant No.1 and others had prayed for declaration that the plaintiffs therein have a valid charge on the property in the suit, namely, final plot No.155 of T.P. Scheme No.IV, Mahim Area together with the building standing thereon; for ascertaining as to whether defendant No.1 (Narandas Kasandas) or defendants No.2 & 3 (Mr.B.M. Buch, since deleted and Mrs. K.S. Bilawala) are legal owners of the property in the suit subject to the charge in favour of the plaintiffs therein; defendant No.1 or in the alternative defendants No.2 & 3 (depending upon the findings of the Court on the question of ownership of the property) be ordered and decreed to pay to the plaintiffs therein sum of Rs.1,72,736/- together with interest @ 18% per annum from the date of institution of the suit till passing of the decree and the interest on the decretal amount @6% per annum from the date of the decree till payment, amongst other prayers. By order dated 2.12.2009, the learned Single Judge of this Court directed the third defendant therein to deposit a sum of Rs.2,37,302/- with the Prothonotary and Senior Master. In pursuance thereof, defendant No.3 has deposited said amount. As defendant No.1 and others have already instituted suit for recovery of the mortgaged money, it is not necessary for the plaintiffs to institute suit for redemption. He, therefore, submitted that the contention advanced by defendant No.2 that the suit for redemption is

barred by limitation is wholly misconceived. Mr. Dani submitted that after appreciating the evidence on record, the Courts below have concurrently decreed the suit under Sections 12, 13(1)(a) read with Section 108(o) of T.P. Act, Sections 13(1)(b) and 13(1)(e) of the Act. The findings cannot be said to be perverse or contrary to evidence on record. It also cannot be said that no reasonable or prudent person would have arrived at the conclusions other than arrived by the Courts below. He, therefore, submitted that no case is made out for invocation of powers under Section 115 of C.P.C.

19. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record.

20. Mr. Thorat submitted that there is no relationship of landlord and tenant between the parties and the Small Causes Court has, therefore, no jurisdiction to entertain and try the suit. Gangadhar Joshi was admittedly tenant of the suit premises. On 30.7.1969 Madhukar Garge executed Deed of Mortgage in favour of Bandukwalla's for securing Rs.1,20,000/-. On 4.5.1978 the deed of transfer of mortgage was executed by Bandukwalla's as transferors and Madhukar Garge as mortgagor in favour of Gangadhar Joshi for securing Rs.54,950/-. In short, he submitted that Gangadhar Joshi as a tenant became mortgagee. As the

suit for redemption of mortgage is not instituted, the mortgage is subsisting. During the subsistence of the mortgage, tenancy rights of Gangadhar Joshi remained in abeyance. In other words, even if it is held that the mortgage is redeemed upon depositing the amount by the plaintiff in pursuance of order dated 2.12.2009 passed by the learned Single Judge of this Court in Suit No.1609/2009, the tenancy rights of Gangadhar Joshi and consequently of defendants No.1 to 4 are revived. He relied upon the decisions referred in paragraph-17. Perusal of the written statement filed by the defendants as also issues framed by the learned trial Judge shows that in the first place, none of the defendants raised this plea in the written statement. Secondly, the learned trial Judge also did not frame issue and consequently the parties could not lead evidence in that regard.

21. In the case of **Nirmal Chandra** (supra), in paragraph-7 the Apex Court observed thus :

“7. Before considering the terms and conditions of the mortgage deed, it may be better to first consider the legal position on the point. In a case reported in *Gambangi Appalaswamy Naidu v. Behara Venkataramanayya Patro*, (1984) 4 SCC 382, this Court held that there can be no merger of lease and a mortgage, even where the two transactions are in respect of the same

property as for a merger it is necessary that lesser estate and a higher estate should merge in one person at one and the same time and no interest in the property should remain outstanding. Neither of the two rights are higher or lesser estate than the other. It is further observed that a tenant mortgagee could be directed to deliver the possession of the property at the time of redemption only if at the time of the mortgage there was surrender of lease rights in favour of the lessor. It all depends on the intention of the parties at the time of execution of mortgage and its terms and conditions as well as the surrounding circumstances. On facts it was found that rent was payable by the lessee in the shape of share in the crop and there was an adjustment of rent and interest that is to say liability to pay rent during mortgage was kept alive which runs counter to implied surrender of lease right. It was further held that the mere fact that owner creates a mortgage in favour of a lessee is not by itself decisive to hold that the prior lease was surrendered and the possession on the earlier lease was only that of a mortgagee. The nature of possession would however be a question of fact in each case. In *Gopalan Krishnankutty v. Kunjamma Pillai Sarojini Amma* (1966) 3 SCC 424, a Bench of Three Judges of

this Court, held that unless there was a surrender of the lessee's right, at the time of execution of mortgage deed, mortgagor would not be entitled to obtain delivery of physical possession on redemption of mortgage. The question of actual surrender of rights depends upon the intention of the parties at the time of execution of the mortgage. It would be a question of fact depending upon evidence. It is further observed that in absence of proof of surrender of lease by the defendant, there is no automatic merger of an interest as lessee with that of the mortgagee when the same person is lessee as well as mortgagee. On redemption of the mortgage, the mortgagee is not entitled automatically to recover possession of the lease. In *Narayan Vishnu Hendre v. Baburao Savalaram Kothawale*, (1995) 6 SCC 608 this Court held that doctrine of merger does not apply where tenanted premises are mortgaged in favour of the lessee and such an inference cannot readily be inferred in the absence of any clear statement or indication in the deed or conduct of the parties. It has also been observed that lease of a property is a very valuable right and its implied surrender on execution of a mortgage would not be inferred unless there was a clear statement or indication to that effect in

the document itself. Redemption of mortgage would revive the tenancy of the mortgagee the only effect of mortgage was that the lessee's right were kept in abeyance and they stood revived by the redemption of the mortgage. In *Nemi Chand v. Onkar Lal*, (1991) 3 SCC 464 in a similar situation it was held that where it was stipulated that neither interest nor rent was payable as both amounts were equal it clearly shows that rent was kept alive and there was no merger of lease. Lessee was held entitled to be in possession of the property as lessee despite the redemption of mortgage. In *Nand Lal v. Sukh Dev*, 1987 Supp SCC 87 also the same view was taken that tenancy rights would get revived on redemption of the mortgage and the lessee mortgagee would not be liable to be evicted.”

22. In paragraph-7 Apex Court referred to the decision of *Gambangi Appalaswamy Naidu v. Behara Venkataramanayya Patro*, (1984) 4 SCC 382 wherein it was observed that the tenant mortgagee could be directed to deliver the possession of the property at the time of redemption only if at the time of the mortgage there was surrender of lease rights in favour of the lessor. **It all depends on the intention of the parties at the time of execution of mortgage and its terms and conditions as well**

as the surrounding circumstances. The nature of possession would however be a question of fact in each case.

[Emphasis supplied]

23. The Apex Court thereafter referred to the decision of *Gopalan Krishnankutty v. Kunjamma Pillai Sarojini Amma* (1966) 3 SCC 424 wherein a Bench of three learned Judges held that unless there was a surrender of the lessee's rights, at the time of execution of mortgage deed, mortgagor would not be entitled to obtain delivery of physical possession on redemption of mortgage. The question of actual surrender of rights depends upon the intention of the parties at the time of execution of the mortgage. It would be a question of fact depending upon evidence. Apex Court also referred to the decision of **Narayan Hendra** (supra) wherein it was held that the doctrine of merger does not apply where tenanted premises are mortgaged in favour of the lessee and such an inference cannot readily be inferred in the absence of any clear statement or indication in the deed or conduct of the parties.

24. In paragraph-8, Apex Court held that on execution of mortgage, tenancy rights would terminate only if it is clear expressly or impliedly by conduct or other related circumstances that the parties had intended so which be a question of fact. In view of the decisions of Apex Court, in

my opinion, defendant No.2 cannot be permitted to agitate this point for the first time in this Court. Reliance placed by Mr. Thorat on the decisions of **Nirmal Chandra** (supra) and **Narayan Hendra** (supra), therefore, does not advance the case of defendant No.2.

25. Mr.Thorat relied upon the decision of Puran Chand (supra). In that case the question that fell for consideration was whether despite redemption of prior mortgage by payment to respondents No.1 & 2, they can claim to remain in occupation of the land as tenants. The facts in that case were that Raunaq Ram, predecessor-in-interest of the appellants was the owner of 247 kanals and 15 marlas of agricultural land situate in the District of Patiala. On 22.3.1950, Raunaq Ram mortgaged the land with possession to respondent No.3 Amar Singh. In the year 1951-52, respondent No.3 Amar Singh sold his interest in the land to one Labhu Ram. In November, 1953 Labhu Ram inducted Bir Singh, the father of respondents No.1 and 2, as a tenant in respect of the land. After Labhu Ram's death, his son Sat Paul sold his rights as a mortgagee which he had inherited from Labhu Ram to respondents No.1 and 2 by two deeds dated 14.1.1963 and 5.12.1966. Respondents No.1 and 2, therefore, became the mortgagees of the entirety of the disputed land by 1966. In 1971, Bir Singh died. Respondents No.1 and 2, as his sons, claimed

to have inherited his tenancy rights to the land. In the meantime, Raunaq Ram died leaving behind his widow Ram Piari (respondent No.6) and four daughters, namely, Purni (appellant No.2), Lachhmi (appellant No.3), Sheela (appellant No.4) and Dayawanti (respondent No.5). Raunaq Ram had executed a Will in favour of his four daughters by which he bequeathed the land to them. All the daughters executed mortgage in favour of appellant No.1 Puran Chand. On 26.8.1971, the appellants instituted suit for redemption of prior mortgage against respondents No.1 and 2. Respondents No.1 and 2 contended that they were entitled to continue in possession of land as tenants of Labhu Ram. That contention was rejected by the trial Court on the ground that since respondents No.1 and 2 had purchased Labhu Ram's interest before their father expired, they did not inherit any tenancy rights as they could not be their own tenants. The suit was decreed in favour of appellant No.1 on 28.4.1977 and he was given right to redeem the first mortgage and obtain possession of land upon payment of Rs.18,000/-. Appellant No.1 deposited Rs.18,000/-. Respondents No.1 and 2 preferred appeal which was dismissed. Respondents Nos.1 and 2 preferred Second Appeal before the High Court.

. During pendency of Second Appeal, two significant events took place. Appellants No.2 to 4 redeemed appellant No.1 Puran Chand's mortgage so that they

resumed full ownership of the land. The second event was that Dayawanti (respondent No.5) sold her share of the equity of redemption in the land in favour of respondents No.1 and 2 by two separate deeds dated 8.9.1977 and 11.1.1978. Respondents No.1 and 2 filed an application praying redemption against appellant No.1 Puran Chand in respect of $1/4^{\text{th}}$ of the land sold to them by Dayawanti before the Collector. The Collector dismissed the application. Respondents filed two applications in the Second Appeal pending before the High Court. First application was to bring on record the fact of purchase of $1/4^{\text{th}}$ share from Dayawanti and; the second for being allowed to redeem the mortgage of Puran Chand in respect of such $1/4^{\text{th}}$ interest. The High Court allowed the Second Appeal of respondents No.1 and 2 by holding that respondents No.1 and 2 were entitled to continue in actual physical possession of the land as tenants despite the decree of redemption. The High Court was of the view that the respondents right as tenants did not merge with their rights as mortgagees and therefore even on redemption of the mortgage, their tenancy rights survived.

. In paragraph-7, Apex Court observed that normally the right of the mortgagee's tenants to continue in possession is coterminous with the mortgagee's right to do so on the principle that no one can give a better right than he has himself. This maxim was recognised in the locus

classicus Mahabir Gope v. Harbans Narain Singh, AIR 1952 SC 205. The principle was consistently followed subsequently. Mahabir Gope's case also recognized an exception to the principle when it held that in certain circumstances a lease created by a mortgagee may be binding on the mortgagor and those circumstances were (1) consent of the mortgagor to the creation of the tenancy by the mortgagee, (2) Section 76(a) of the T.P. Act which lays down that a mortgagee must manage the property as a person of ordinary prudence would manage if it were his own and (3) proof of statutory protection.

. In paragraph-19, Apex Court held that Labhu Ram had created tenancy in favour of Bir Singh. After Laghu Ram's death, his son Satpal became landlord. Satpal transferred all his rights vis-a-vis the land to respondents No.1 and 2. Respondents No.1 and 2, therefore, became landlords and Bir Singh in effect became a tenant under them. When Bir Singh died in 1971, his tenancy rights could not be inherited by his sons for the simple reason that they were his landlords and could not become their own tenants.

. Thus, the main question that fell for consideration before Apex Court was about the rights of mortgagee's tenants in possession. Here Gangadhar Joshi is a tenant mortgagee. It is nobody's case that Gangadhar Joshi being mortgagee inducted somebody as a tenant. In view thereof,

on facts, the decision of Puran Chand (supra) is not applicable to the present case.

26. As noted earlier, the Courts below have decreed the suit under Sections 12, 13(1)(a) read with Section 108(o) of T.P. Act, Sections 13(1)(b) and 13(1)(e) of the Act. With the assistance of learned Counsel appearing for the parties, I have perused the impugned orders. As far as the trial Court is concerned, the learned trial Judge while answering issue No.1 held that the plaintiff and B.M. Buch are the owners and landlords. The ground under Section 12 is dealt with under Issues No.2 to 4 and 6. After considering the evidence on record, the learned trial Judge held that the plaintiff proved that the defendants failed and neglected to pay the arrears of rent from January, 1984 to October, 1991 and that the demand notice dated 31.10.1991 was duly served on the defendants. The learned trial Judge held that the plaintiff has established the ground of arrears. The learned trial Judge has dealt with the ground under Section 13(1)(a) read with Section 108(o) of T.P. Act and Section 13(1)(b) while answering issues No.5 and 5A. These issues are discussed in paragraphs-40 to 42. After appreciating evidence on record, the learned trial Judge held that the plaintiff proved that one of the balconies was unlawfully closed and that the defendant has caused waste and damage by enclosing the balcony. As far as the

ground of unlawful sub-letting and profiteering by defendants No.1 to 4 in favour of defendants No.5 & 6 is concerned, the same is considered by the learned trial Judge while answering additional issues No.1, 2, 3, 7 and 8. The learned trial Judge has discussed these issues from paragraphs-48 to 52 and held that the plaintiff has proved that the defendants No.1 to 4 have unlawfully sub-let the suit premises to defendants No.5 & 6 and thereby they are profiteering. Apart from this, the learned trial Judge also held that the suit is not barred by limitation and is not bad for non-joinder of necessary party.

27. In appeal preferred by defendant No.2, Appellate Court held that the plaintiff proved that she is landlord and that defendants No.1 to 4 are the tenants; that defendants No.1 to 4 are in arrears of rent and that the plaintiff proved that defendants No.1 to 4 have illegally and unauthorizedly enclosed the balcony and made additions and alterations of permanent nature thereby causing waste and damage to the suit property. Upon reappreciating the evidence on record, Appellate Court dismissed the appeal and confirmed the findings recorded by the learned trial Judge. After considering the evidence on record as also the findings recorded by the Courts below, I do not find that defendant No.2 has made out any case for invocation of powers under Section 115 C.P.C. The Appellate Court

confirmed the decree under Sections 12, 13(1)(a) read with Section 108(o) of T.P. Act, Sections 13(1)(b) and 13(1)(e) of the Act except to the extent of findings recorded by the learned trial Judge in respect of additional issues No.1, 5 and 6. Defendant No.2 was not in a position to demonstrate that the findings recorded by the Courts below against him are perverse being based on no evidence or that they are contrary to evidence on record. Defendant No.2 was not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Courts below. Hence no case for invocation of powers under Section 115 of C.P.C. is made out. Civil Revision Application No.198/2014 fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs.

28. As far as C.R.A. No.103/2016 is concerned, the plaintiff has challenged the judgment and decree dated 21.11.2015 passed by the Appellate Court in (A-1) Appeal No.730/2007 preferred by defendant No.5. By that order, Appellate Court reversed the findings recorded by the learned trial Judge in respect of additional issues No.1, 3, 5 and 6 and to that extent set aside the trial Court's decree. Appellate Court remitted the matter to the trial Court for determining additional issues No.1, 5 & 6 as per Order XLI Rule 25 of C.P.C. Mr. Dani submitted that Appellate Court

was not justified in reversing the findings recorded by the learned trial Judge against additional issues No. 1, 5 and 6. On the other hand, Mr. Prasad supported the impugned order.

29. Perusal of the order passed by Appellate Court shows that Appellate Court observed in paragraph-21 that defendant No.5 proved leave and licence agreement dated 24.8.1972 at Exhibit-19. Defendant No.5 came with the case that he is in lawful possession of suit stilts since 1972 i.e. prior to 1.2.1973. In paragraph-23, Appellate Court observed that the learned trial Judge did not consider the said leave and licence agreement. Mr. Dani was not in a position to successfully attack these findings of the Appellate Court. In view thereof, I do not find that Appellate Court committed any error in passing the impugned order. Hence, Civil Revision Application No.103/2016 also fails and the same is dismissed. In the circumstances of the case, there shall be no order as to costs. By way of abundant caution it is clarified that the learned trial Judge will decide additional issues No.1, 5 and 6 uninfluenced by the observations made by the Appellate Court as also made by this Court. All contentions of the parties in that regard are expressly kept open.

30. At this stage, Mr.Deshmukh prays for direction to the learned trial Judge to dispose of the suit expeditiously.

He submitted that the suit is instituted in the year 1992. In view thereof, liberty is reserved to the plaintiffs to file appropriate application before the trial Court for disposing of the suit in a time bound manner. If such an application is made, the learned trial Judge will bear in mind the fact that the suit is of the year 1992 and will pass appropriate order.

(R. G. KETKAR, J.)

Deshmane(PS)