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

CIVIL REVN. APPLICATION NO. 31 OF 2015
with
CIVIL APPLICATION NO. 87 OF 2015
in
CIVIL REVN. APPLICATION NO. 31 OF 2015

M/s. Mocambo Investments and Finance Pvt. Ltd.
Having its address at 5th floor, Behram Mansion,
218, Homji Street, Mumbai – 400 001
through the Director and Authorized
representative, Mr. Suresh M. Jagtiani. … Applicant.

V/s.

Mrs. Shireen Nowrosji Gamadia,
Aged 82 years, Occupation : Housewife
(Since deceased) through legal heirs. … Respondent 1.

2. Jehangir N. Gamadia,
Aged 47 years, mentally handicapped
through the next friend and guardian
Mrs. Shireen N. Gamadia and
Behram N. Gamadia. … Respondent 2.

3. Behram N. Gamadia,
Aged 45 years, Occupation : Business
All of Bombay Indian Inhabitants,
residing at 31, Nepean Sea Road,
Mumbai – 400 006. … Respondent 3.

4. Shiv Kathuria,
4th floor, Behramji Mansion,
18, Homji Street, Sir P.M. Road,
Fort, Mumbai – 400 001. … Respondent 4.

5. The others heirs and legal representatives
if any, of the late Mr. Kathuria,
the Proprietor of Indo European Trading
Agencies, having their office on the 4th
floor, Behramji Mansion, 18 Homji Street,
Sir P.M. Road, Fort, Mumbai – 400 001. … Respondent 5.

6. Suresh M. Jagtiani,
Aged 64 years, Indian Inhabitant,
4th floor, Behramji Mansion,
18, Homji Street, Mumbai – 400 001. ... Respondent 6.

Mr. Haresh Jagtiani, Senior Advocate a/w. Yashpal Jain, Suprabh Jain, Ms. Harshita Joglekar, Ms. Dhruti Chheda i/b. Yashpal Jain for the Applicant in both Applications.
Mr. P.S. Dani, Senior Advocate a/w. Nachiket Khaladkar, Murari Madekar, Ms. Tasneem Loharchawlwala and Sachin Kudalkar i/b. Madekar & Co. for Respondents 1 to 3.

CORAM : N.M. Jamdar, J.

20 January, 2017.

Oral Order :-

By this Revision Application, the Applicant has challenged the concurrent judgments and orders passed by the learned Small Causes Court, Mumbai and the Appellate Bench of Small Causes Court, Mumbai, decreeing the suit filed by the

Respondent – landlord and directing the Applicant to hand over possession of the suit premises.

2. User of the suit premises is commercial. Premises are located on 4th floor on Behramji Mansion, 18, Homi Street, Mumbai. Suit bearing No. R.A.E. Suit No. 992/2398 of 1992 was filed by the Respondent – landlord seeking eviction of the Applicant and the other Defendants from the suit premises. The suit was filed by the Original Plaintiff as executor of an estate of deceased Bai Navajbai Nowrosji Gamadia as a landlord of the suit premises. It was stated that the suit premises was initially let out to Mr. Satyadev Kathuria, who was carrying out business in the name of M/s. Indo European Agencies. The Defendant No.1 was the son and the legal representative of Mr. Kathuria. It was alleged that the suit premises were not used without a reasonable cause for the purpose which they were let out for continuous period of six months with constituted non-user of the suit premises. It was also alleged that on 19 October 1992 the Defendant No.1 approached the Respondent – Plaintiff to enquire regarding feasibility of transferring the tenancy as the premises were not required which was refused by the Respondent – Plaintiff. It was the case of the Respondent – Plaintiff that inspite of this position, the Applicant was put in possession which constituted an act of subletting. The Respondent – Plaintiff accordingly sought possession of the suit premises on the ground of subletting and non-

user of the suit premises. The Applicant and the Defendant No.1 filed their written statements. It was contended that the suit premises were lawfully assigned to one M/s. Mocambo Investments & Finance Pvt. Ltd. It was stated that after Mr. Satyadev Kathuria expired, the Defendant No.1 was carrying out the business in the name of M/s. Indo European Trading Agencies. He was a Chartered Accountant doing the accountancy and was taking tuitions. Business was assigned to the Applicant and the Defendant No.6 i.e. the Managing Director of the Applicant. It was contended that the premises were being used, and the allegation of non-user is baseless. The other contentions raised by the Respondent – landlord, were denied.

3. An amendment was carried out in the plaint by the Respondent – Plaintiff wherein the ground of subletting was added. Also the Applicant and other Defendants were joined in the suit. The learned Small Causes Court Judge, after going through the rival pleadings and the evidence on record, held that the premises were not used for the purpose for which they were let out for period of six months preceding the filing of the suit and case of non-user was made out by the Respondent – landlord. The learned Small Causes Court Judge also held that the Applicant and Defendant No.1 failed to prove that their assignment in favour of the Applicant was of a running business and no cogent evidence was produced in

that regard and that being the position and the fact that the Applicant was in possession and control of the premises, case of subletting was made out. Accordingly, by the judgment and decree dated 17 October 2006, the learned Small Causes Court Judge decreed the suit.

4. An Appeal bearing No. 36 of 2007 was filed by the Applicant challenging the judgment and order passed by the learned Small Causes Court Judge dated 17 October 2006. Both the parties reiterated their contentions raised before the learned Small Causes Court Judge. The Applicant moved an application for producing certain additional documents on record by filing an application below Exhibit 22 on 24 April 2009. The Appellate Bench of Small Causes Court considered the application as well as the contentions of the parties and confirmed the findings rendered by the learned Small Causes Court Judge that the case was made out by the Respondent – landlord of non-user as well as of subletting. The Appellate Bench appreciated the evidence which was produced on record afresh and held that the evidence led by the Applicant was not adequate enough to hold that what was assigned was a running business. The Appellate Bench held that evidence which was sought to be produced on record as an additional evidence was neither trustworthy nor relevant and there was no due diligence on the part of the Applicant. Accordingly, the evidence could not be considered.

The Appeal was dismissed on 21 November, 2014. It is against these two concurrent findings that the Applicant has approached this Court by way of Revision Application.

5. Heard Mr. Haresh Jagtiani, learned Senior Advocate for the Applicant and Mr. P.S. Dani, learned Senior Advocate for the Respondents-landlord.

6. It was submitted that in view of the Notification dated 24 September 1948, issued by the Health and Local Government of Bombay, assignment of going concern is permitted what was assigned in favour of the Applicant was a business of a going concern and the Defendant No.1 and the other Defendants had stepped in a witness box and that the registered assignment deed was produced on record. He submitted that the legality of the assignment deed was never put in question nor there was any cross-examination of the Defendant No.1. Therefore, the case of the Applicant that what was assigned was the running business, has gone unquestioned. It was also contended that inspite of the knowledge that an assignment has been made in favour of the Applicant, for almost eight years no amendment was carried out and that the Respondent – Plaintiff continued to accept rent from the Applicant which clearly led the Applicant to believe that the deed of assignment was accepted by the Respondent – landlord. It was submitted that in view of this position, it was incumbent upon the Courts below to frame an issue

regarding the legality of the deed of assignment and the Applicant could not have been taken by surprise by holding that the assignment itself was not legal. It was contended that this inaction on the part of the Respondent – landlord clearly establishes an acquiescence on the part of the Respondent – landlord. It was also contended that certain receipts were produced showing the running business from a third party which were needlessly kept out of consideration by insisting upon production of bank accounts. Mr. Jagtiani submitted that the vouchers in respect of corresponding receipts were produced by way of additional evidence which has been wrongly discarded. Mr. Jagtiani further submitted that since Defendant No.1 was not interested, the evidence could not be produced. It is the Applicant who made efforts to collect the evidence and when it was found in a warehouse of a third party, in the Appeal it was sought to be produced. It is permissible to produce an additional evidence in Appeal under the provisions of Order 41 Rule 27 of the Code of Civil Procedure, if in spite of due diligence, it could not be produced earlier and that its material for adjudication. Mr. Jagtiani submitted that the Appellate Bench could not have rejected the application for production of additional evidence as well as commented upon the merits of the evidence at the same time. Mr. Jagtiani relied on the following decisions and as far as the power of the Appellate Court to receive additional evidence and framing of an issue *Union of India v/s. E.I.D. Party (India) Ltd.*[1], *Smt. Jabeda*

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1 AIR 2000 SC 831

Khatun and Anr. v/s. Hazi Mohammed Ibrahim and Ors.[2]*, Union of India v/s. K.V. Lakshman & Ors.*[3]*, Wadi v/s. Amilal & Ors.*[4]*, Yudhishter v/s. Ashok Kumar*[5]*, dil Jamshed Frenchman (Dead) by LRs. v/s. Sardar Dastur Schools Trust and Ors.*[6]*, North Eastern Railway Administration, Gorakhpur v/s. Bhagwan Das (Dead) by LRs.*[7] Mr. Jagtiani submitted that both the Courts have confused between the non-user of the premises and the aspect of subletting and have held that because non-user is proved, there is no running business which finding is entirely incorrect. It was submitted that once the Defendant No.1 stated that he did not have any evidence and as the Defendant No.1 was not interested, notice was given by the Applicant to the authorities who stated that old record is not available. Therefore, there was due diligence.

7. Mr. Dani, learned Senior Advocate on the other hand submitted that in the case of the Applicant and the Defendant alone, case of subletting was proved. Burden of establishing that the assignment was within the parameters of the Notification dated 24 September 1948 was entirely on the Applicant and the Defendant No.1 which burden they have failed to discharge. It was submitted that there is no adequate evidence to show that what was transferred was running business which is a finding of fact. Mr. Dani submitted

2 AIR 1957 CALCUTTA 360
3 2016 SCC OnLine SC 641
4 JT 2002 (6) SC 16
5 (1987) 1 SCC 204
6 (2005) 2 SCC 476
7 (2008) 8 SCC 511

that it is not correct to state that the Defendant No.1 was not interested as he stepped in the witness box and had deposed and had offered himself to cross-examination. It was also contended that once notice was given to Defendant No.1 to produce electricity bills and other documents and the Defendant No.1 showed his inability, the search which was taken in the year 2004 could have easily been taken earlier. It was submitted that since the Applicant filed an application for additional evidence on the ground that it is relevant for adjudication and also gave reasons why it could not produced earlier, the Appellate Bench looked the relevancy of the documents. It was submitted that even these documents will not show that there was any running business. It was submitted that there is no confusion in the mind of both the Courts, as sought to be made out as decree of subletting was not passed on the ground of non-user but on the ground of lack of evidence that what was assigned was the running business. Mr. Dani relied upon the following decisions : *The Municipal Corporation of Greater Bombay v/s. Lala Pancham and Ors.*[8], *Mahavir Singh and Ors. v/s. Naresh Chandra and Anr.*[9], *Surjit Singh & Ors. v/s. Gurwant Kaur & Ors.*[10], *M/s. Hundusthan Petroleum Corporation Ltd. v/s. M/s. R.P. Agarwalla & Brothers (Pvt.) Ltd.*[11] and *Jamadar Singh v/s. Shaikh Naiyab Ali.*[12]

8 AIR 1965 SC 1008
9 (2001) 1 SCC 309
10 AIR (2014) SC 3679
11 AIR 1986 CALCUTTA 403
12 45 CLCUTTA WEEKLY NOTES 498

8. The main questions that arises for consideration is whether there have been a subletting of the suit premises in favour of the Applicant. If the case of the Applicant and Defendant No.1 is perused, it clearly demonstrates that the Defendant No.6 and the Applicant were put in control of the suit premises for a consideration. That the Applicant and the Defendant No.6 are in possession of the suit premises and that they had taken over all the rights from Defendant No.1 is the case of the Applicant itself. It is also a position which has been proved on record that there is no written consent of the Respondent – landlord. In view of this established position, two provisions of the Bombay Rent Act, 1947 come into play. First is Section 13(1)(e) of the Act which reads thus :-

> "13. **When landlord may recover possession.**
>
> (1) *Notwithstanding anything contained in this Act [but subject to the provisions of section 15 and 15A], a landlord shall be entitled to recover possession of any premises if the Court is satisfied-*
>
> *(e) that the tenant has, since the coming into operation of this Act, [unlawfully sub-let] [or after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, unlawfully given on licence, the whole or part of the premises or assigned or transferred in any other manner] his interest therein;"*

and the second is Section 15 of the Act which reads thus :-

> *"15.* ***[In absence any contract to the contrary tenant not to sublet or transfer] [or to give on licence]****. [(1)] Notwithstanding anything contained in any law, [but subject to any contract to the contrary], it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein [and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises] :*
>
> *[Provided that the [State] Government may by notification in the Gazette, permit in any area the transfer of interest in premises held under such [lease or class of leases or the giving on licence any premises or class of premises] and to such extent as may be specified in the notification.]*
>
> *[(2) The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in sub-section (1), shall, subject to the provisions of this sub-section, be deemed to have had no effect [before the 1st day of February 1973] in any area in which this Act was in operation before such commencement ; and accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order of a Court, any such sub-lease, assignment or transfer of any such purported sub-lease, assignment or transfer*

in favour of any person who has entered into possession, despite the prohibition in sub-section (1), as purported sub-lessee, assignee or transferee and has continued in possession shall be deemed to be valid and effectual for all purposes, and any tenant who has sub-let any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (l) of section 13,

The provisions aforesaid of this sub-section shall not affect in any manner the operation of sub-section (1) after the [date aforesaid]."

9. The conjoined reading of above provisions would show that there is a complete embargo on a tenant to sublet whole or any part of the premises without the consent of the landlord except for certain categories which have been indicated in Section 15 of the Act. The first proviso to Section 15(1) permits the State Government by a Notification in a Official Gazette that in any area the transfer of interest held any lease or class of leases is exempted from the recourse of Section 15(1). Pursuant to this power, a Notification has been issued by the Health and Local Government of Bombay on 24 September 1948, which reads thus :-

" No. 5975/33. In exercise of the powers conferred by Section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom. LVII of 1947), the Government of Bombay is pleased to amend the Government Notification in

the Health and Local Government Department, No. 5975f/33, dated the 12th May 1948, as follows, namely :-

In the Schedule to the said notification -

(i) the present entry shall be numbered as (1); and

(ii) the following new entry shall be added to it namely :-

"(2) Transfer or assignment incidental to the sale of a business as a going concern together with the stock-in-trade and the good-will thereof, provided that the transfer or assignment is of the entire interest of the transferor or assignor in such lease-hold premises together with the business and the stock-in-trade and good-will thereof."

10. The above Notification contemplates and saves only such transfer which are incidentally to the sale of a business as a going concern together with the stock-in-trade and good-will provided that the transfer or assignment is of the entire interest of the transferor or assignor in such lease hold premises together with the business and the stock-in-trade and good-will. This Notification issued under a proviso, which itself is an exception to the embargo casts upon a tenant, has to be strictly construed. Unless specifically consented to by the Respondent – landlord, subletting is prohibited under the provisions of the Parent Act. It is by way of a legislative intervention that this rigor is lessoned and the right of a landlord is eroded to that extent. Therefore, all ingredients of the Notification

must exist. A casual and inferential approach regarding existence of these grounds is not warranted, neither contemplated under the Act. It is therefore necessary for the party who seeks to take the benefit of the Notification to prove all ingredients thereof.

11. The Directors of the Applicant, who is stated to be an investment and finance company, is presumed to know both the embargo upon the landlord and the existence of the Notification. It is not the case put up that the Directors of the Applicant are uneducated. Therefore, once, in spite of clear embargo against subletting, the Applicant was to enter upon the suit premises based upon the Notification, as any prudent businessman would do, will ensure that the criteria specified in the Notification exist and when called upon will have to produce material to demonstrate the same. Therefore, the contentions raised by the learned Counsel for the Applicant that when the Applicant was called upon to demonstrate the existence of the parameters of the Notification, it was taken by surprise cannot be accepted and will have to be rejected outright. Once the Applicant sought to protect itself within the ambit of the Notification, which is an exception, it was a defence of the Applicant to the charge of subletting. Therefore, both the Courts rightly framed a issue as regard the charge subletting alone. The case of the Respondent – landlord was that simplistic that there has been a subletting in favour of the Applicant as the Applicant was found in

possession and control of the premises. The defence of the Applicant to this charge was considered under this issue. Therefore, there is no error committed by both the Courts in not framing a separate issue as regard validity of the assignment deed.

12. Furthermore, if the written statement filed by the Defendant No.1 and Defendant No.6 and the Applicant are seen, they are fully aware of the case that they had to meet and in fact had put forth the parameters of the Notification as their defence. Therefore, both the parties went to trial with the full knowledge of the case put against them. There is absolutely no question of any prejudice to the Applicant for lack of framing a specific issue regarding the validity of the deed. The reliance of Mr. Jagtiani, on the Apex Court decisions wherein the Courts have stressed on the need of fair play and that during the course of trial the parties must be put to notice as regard the case against it by framing a specific issue, does not arise in the present case.

13. The contention that because the assignment deed was brought to the notice of the Respondent on 23 May 1994 and that amendment was sought to be carried out in the year 2004 and that in the intervening period rent was accepted from the Applicant, the Applicant was entitled to presume that the genuineness of the deed was not in issue, also cannot be accepted. The notice dated 23 May

1994 refers to the present suit therefore it is clear that it is after the suit was instituted that the assignment deed was brought to the notice of the Respondent – landlord. There may be a delay in amending the plaint, but once the amendment was granted and that amendment it was during the course of trial wherein the dispute between the parties were pending, no waiver on the part of the Respondent – landlord could be presumed neither the Applicant could presume that the case against the Applicant was given up. Merely because the rent was accepted during the pendency of the suit also does not lead to neither a waiver on the part of the Respondent – landlord neither it can give rise to a presumption or an expectation in the mind of the Applicant that the assignment was accepted. The receipts, which were issued, continued to be in the name of Indo European Trading Agencies. There is no specific and express communication from the Respondent – landlord accepting the assignment. The correspondence and the conduct which is pointed out by Mr. Jagtiani is during the pendency of the suit, therefore neither the case of acquiescence or waiver on the part of the Respondent – landlord can be accepted. Nor it can be accepted that this conduct of the Respondent – landlord led the Applicant to believe that the deed of assignment was accepted and the Applicant was taken by surprise. The Applicant knew all along that it had to establish its case on a Notification and also attempted to lead evidence in that regard.

14. The next question therefore is whether both Courts were right in holding that the Applicant established that the assignment was within the parameters of the Notification dated 24 September 1948. For this purpose the Applicant had to establish that the assignment was of a Going Concern and that there was a live business, stock-in- trade and good-will. All these factors are essential ingredients of the Notification. Both the Courts have categorically held that the Applicant and the Defendants failed to lead cogent evidence regarding existence of these parameters. On the aspect of the Running Business is concerned, the written statement was filed by the Defendant No.1. It was stated that he is a Chartered Accountant on or 1984 till the Applicant joined business of his father. He was doing business of consultancy and giving tuitions and some time in the year 1993, the Defendant No.1 met the Defendant No.6, who was interested in the field of education and suggested that the business be handed over to him. Accordingly, the Running Business was handed over to a company of the Defendant No.6 i.e. the Applicant together with stock-in-trade, furnitures, fixtures and other equipments and accorded tenancy rights. These statements have been reiterated by the Defendant No.1 in his affidavit of evidence.

15. The argument of Mr. Jagtiani that there has been no cross-examination of the Defendant No.1 is entirely incorrect. The

Defendant No.1 has been cross-examined in detail on this aspect. The Defendant No.1 in the cross-examination admitted that he is a Chartered Accountant. He has stated that a notice was given by the Respondent – Plaintiff for production of electricity bills, which electricity bills he did not have. He admitted that Indo European Trading Agency was not paying income tax. He has stated that when his father was alive, the balance-sheets were prepared and his father was maintaining books of accounts. After his father's death, no business of Indo European Trading was carried out. He himself carried out the business. The bank account was operative till father carried out the business. He admitted that father did not give nomination as regard the bank accounts and after the death of the father, the business stopped. He also admitted that he cannot produce the Statement of Accounts or any pass-books.

16. Therefore, it was admitted by the Defendant No.1 that after the father is expired, the business was not carried out. He asserted that he carried out certain business and bank account existed, but they were not produced. No income tax returns nor sales tax extracts were produced. Therefore, all that was on record was a self-serving statement of Defendant No.1. Mr. Jagtiani, as it was done in the Courts below, relied upon certain receipts issued by one Servitor Marketing & Export Pvt. Ltd. These documents only state that some cheques were issued in the name of M/s. Indo

European Trading from 22 July 1991 to September 1994. The amounts vary from Rs. 1000/- to Rs. 4000/-. On the basis of this evidence, the Applicant and Defendant No.1 are seeking the protection of the Notification. Whether there existed a stock-in-trade, whether there existed good-will, which is commercial aspect, had to be proved by cogent endevour. Existence of a live business could have been established by examining the ones who were associated with it. The persons who did the business with the Applicant could have been examined, which were not examined. Even basic documents such as bank accounts were not produced. Both the Courts therefore rightly relied upon the law laid down by this Court regarding the stringent need to establish a running business and recorded a finding regarding the failure of the Applicant to do so. The conclusion drawn by both the Courts that there was no such cogent evidence was led, cannot therefore be called as perverse. Whatever little evidence that is led by the Applicant and the Defendant No.1 and other Defendants trying to establish a Running Business, has been evaluated by both the Courts.

17. Before the Appellate Bench, an application for additional evidence was moved seeking to produce certain electricity bills and vouchers to correspond with the receipt. Even assuming everything in favour of the Applicant that there was due diligence, even these documents will not take case of the Applicant as regard the

establishment of running business any further. Merely because some vouchers correspondence with the cheques issued does not change the position or the requirement emphasized by both the Courts that it still had to show whether they were deposited in the accounts, whether the accounts existed and what was the real nature of the business. Further what is emphasized in the notification is a 'business'. As rightly pointed out by Mr. Dani, which is an additional factor, that by his own case the Defendant No.1 was doing consultancy and coaching classes, and therefore, there was no 'business' which requires a stock-in-trade.

18. As far as the additional evidence is concerned, from the date the assignment was entered into, the Applicant was fully aware that the Applicant may be called upon to establish the factum of legality of the assignment. According to the Applicant the entire business, stock-in-trade and everything that there was in the premises was handed over. If that was the position, the documents would have been in possession of the Applicant, instead they have been sought to be produced from the custody of a customer of Defendant No.1 that too after period of almost fourteen years from the institution of the suit, which theory has rightly been not believed by both the Courts. The charge of Mr. Jagtiani that the Appellate Bench has both discarded the additional evidence and also commented upon it at the same time, unjustified. From the

application filed by the Applicant alone, it can be seen that both the ingredients of Order 41 Rule 27 were pressed in service. In that context the Appellate Bench had to examine the relevance as well as factum of due diligence. The Appellate Court therefore looked at the additional evidence and found that it was not relevant. Even assuming in favour of the Applicant that there were certain electricity bills and telephone bills, that will at the most demonstrate somebody opened and used the premises, and no answer to the moot question in this application as regard the existence of a running business on the date of transfer. Therefore, in this back drop of the present case, law relied upon by Mr. Jagtiani in respect of the powers of the Appellate Court to admit additional evidence do not arise for consideration. The contention of Mr. Jagtiani that both the Courts have confused the issue of non-user and subletting and have held that because non-user has been proved, there was no business and therefore action of subletting follows, is entirely incorrect. Both the Courts were clear that the subletting was on the ground of complete failure of the Applicant to demonstrate the existence of a running business.

19. As far as the non-user of the premises is concerned, it has been argued on behalf of the learned Counsel for the Applicant that the Defendant No.1 was not interested having assigned the business to produce the evidence to show user of the premises. It was

submitted that when the documents were made available, an application for additional evidence was made. This submission cannot be accepted. It is entirely incorrect to state that the Defendant No.1 was not interested in the litigation. The Defendant No.1 stepped in witness box and deposed and offered himself to cross-examination. It was also clear to the Defendant No.1 that if the deed of assignment is not held to be legal and valid, then there can be a decree on the ground of subletting which will follow on the premises that the Defendant No.1 continues to be a tenant of the suit premises. Not only therefore the Defendant No.1 in law was affected but also demonstrated that he was interested in the outcome of the litigation. The Defendant No.1 admitted in the evidence that pursuant to the notice he did not produce any electricity bills, which the Defendant No.1 was specifically called upon to produce.

20. Next is the aspect of the additional evidence regarding electricity bills. The charge of non-user is under Section 13(1)(k) of the Act. This provision applies where the premises are not used for a specified period without a reasonable cause for the purpose it was let. The present premises were let out for a business which were carried on by the father of the Applicant. Therefore, even assuming that there was some electricity consumption and few telephone calls, it will not bring the case out of ambit of Section 13(1)(k). There is no evidence of any neighbour or any business associate produced on

record to demonstrate that the premises were being used for the purpose of business. Therefore, the findings of fact recorded by both the Courts regarding non-user of the premises on the basis of the evidence led by the Applicant including the additional evidence which was looked at by the Appellate Bench, the case for non-user was rightly been held as proved by both the Courts. This finding, even considering the additional evidence, is a possible finding.

21. To reiterate, whether there existed a running business and whether the Applicant demonstrated the existence of parameters of Notification dated 24 September 1948 is the main issue in this Revision Application. The second ground is of non-user. There are factual aspects. Both the Courts have concurrently come to the conclusion that there did not exist any running business. In limited jurisdiction under Section 115 of the Code of Civil Procedure, it is not possible to re-appreciate the evidence. Even if the evidence is to be looked at again, the Applicant has failed to establish the ingredients of the Notification. It is clear is that the Applicant has taken a clear and calculated risk with full knowledge and taken over the premises without the consent of landlord and has sought to create only a theory or existence of a running business to save itself from the clutches of eviction under the ground of subletting. As a consequence of this brazen step, the Respondents-landlord had to approach the Court of law and litigate for last 25 years, therefore

costs will have to impose. The Civil Revision Application is dismissed with the costs quantified at Rs.50,000/-.

22. Mr. Jagtiani, at this stage seeks extension of the ad-interim of the ad-interim order granted by this Court for period of twelve weeks from today. I am inclined to grant period of ten weeks to the Applicant. However, it will take some time to get the copy of the order, therefore the impugned order will not be executed for period of twelve weeks from today on the following condition :- The Applicant and all its Directors will file an undertaking, with a resolution duly passed, that the Applicants are alone in possession and they will not create third party rights or part with possession and that they will clear all arrears of the rent, if any. This undertaking will have to be filed within period of four weeks from today. If the undertaking is not filed within period of four weeks from today, the decree shall stand executed forthwith.

23. In view of disposal of the Civil Revision Application, the Civil Application does not survive and is disposed of accordingly.

(N.M. Jamdar, J.)