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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 514 OF 2003**

1a. NAMDEO DASHRATH NAIK

1b. PRADIP DASHRATH NAIK

Both residents of Saraswati
Building, Ganesh Peth Lane,
Dadar, Mumbai 400028.

1c. KANCHAN VIJAY MULIK
Resident of New M. H. Colony,
Building No. 27, Ground floor,
Borivali (East), Mumbai 400066.

1d. MANISHA AMUL NADAR
Resident of Good Luck Co-
operative Society, Mahakali
Maidan, Dharavi, Mumbai
400016.

All heirs and legal representatives
of the late Sumati @ Meenakshi
Dashrath Naik (the Original
Plaintiff).

**...Appellants
(Orig. Plaintiffs)**

~ VERSUS ~

1. ~~Bhagwan Mahadeo Parab~~
Since deceased through his heirs
and legal representatives:

1a. SUHASINI BHAGWAN PARAB

1b. ARAVIND BHAGWAN PARAB

1c. SUHAS BHAGWAN PARAB

1d. PRAVIN BHAGWAN PARAB

All residing at Room No. 1,
Saraswati Building, Ganesh Peth
Lane, Dadar, Mumbai 400028.

... Respondents

APPEARANCES

FOR THE APPELLANTS **Ms Sanchita Satyavan Thakur,**
Advocate

FOR THE RESPONDENTS **Mr SM Raikar,** *Advocate*

CORAM : G. S. Patel, J.

JUDGMENT RESERVED ON : 28 July 2017

JUDGMENT PRONOUNCED ON : 4 August 2017

JUDGMENT:

STRUCTURE

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A. INTRODUCTION

1. This First Appeal is directed against the judgment and decree dated 4 October 2002 of the City Civil Court at Bombay in SC Suit No 6292 of 1985. The suit is for recovery of possession of the rear portion (admeasuring about 8 x 12 feet) of Room No. 1, Saraswati Building, Ganesh Peth Lane, Dadar, Mumbai 400028 (“**suit premises**”). The appeal was admitted on 31 March 2003.

2. The present Appellants are the heirs and legal representatives of the original Plaintiff, Sumati alias Meenakshi Dashrath Naik (“**Sumati**”). The present Respondents are the heirs and legal representatives of the original Defendant, Bhagwan Mahadeo Parab (“**Bhagwan**”, “**Defendant**”). The Respondents have been brought on record by an amendment dated 5 March 2012.

3. I have heard Ms Thakur and Mr Raikar for the appellants and respondents respectively, and, with their assistance, considered the material on record and their submissions.

4. In the impugned order, the City Civil Court has attempted to draw a distinction between an unauthorised occupant and a trespasser. My view is that no such distinction exists in the facts of the case. In this light, this appeal is allowed and decreed accordingly. My reasons follow.

B. FACTS

5. Room No 1, Saraswati Building, Ganesh Peth Lane, Dadar, Mumbai 400028 (“**Room No 1**”) consists of a front portion and a rear portion, separated by a door.¹ The rear portion is the suit premises.

6. Gopal Murudkar (“**Gopal**”) was the original tenant of Room No 1.² Gopal’s daughter, Sumati, the original Plaintiff, was born on 9 January 1944 in Room No 1.³

7. Gopal died in 1946 at his home town, elsewhere. He was survived by his wife Gopikabai, his only child Sumati, and his mother Satyabhama Laxman Murudkar (“**Satyabhama**”).⁴ Soon after his death, Gopikabai also died, leaving Sumati under Satyabhama’s care. The exact date of Gopikabai’s death is unknown, but it is not in dispute that she died shortly after Gopal.⁵

8. It is not disputed that at some point of time, Gopal had created a license in favour of one Nandu Gopal. This is immaterial to the Respondents’ case.

1 Examination-in-chief of the Defendant, page 98 of the paper-book.

2 Examination-in-chief of Appellant 1a, page 90 of the paper-book.

3 Birth Certificate at Ex. “C”.

4 Impugned order, Gopal Murudkar’s death was in 1946 and Gopikabai’s followed, page 29 of the paper-book.

5 Cross-examination of Appellant 1a, page 96 of the paper-book.

9. The Respondents claim to be in sole occupation of the suit premises since 1953. Bhagwan, the Defendant, claims that Satyabhama permitted him to occupy the suit premises and accepted a payment of INR 500/- for this permission.⁶

10. In 1956, Satyabhama and Sumati shifted to their village in Sindhudurg district.⁷ In their absence, Satyabhama appointed Nandu Gopal as the manager of the suit premises.⁸ The Respondents claim that Satyabhama permitted Bhagwan to occupy the suit premises in exchange for a further payment of INR 500/- and half the amount of rent due every month.⁹

11. Sumati stayed in the village till 1969.¹⁰ In that time, Satyabhama passed away. Sumati got married and gave birth to three of her four children. She returned to Mumbai on or about 14 June 1969. Her fourth child was born in the suit premises.¹¹ The appellants claim that Sumati, and now her heirs, have since been occupying the front portion of Room No 1.¹²

12. In June 1969, Bhagwan filed a criminal complaint against Sumati and others under Section 441 of the Indian Penal Code.¹³

6 Examination-in-chief of the Defendant, page 98 of the paper-book.

7 Examination-in-chief of Appellant 1a, page 93 of the paper-book.

8 Page 'C' of the Memo of Appeal.

9 Examination-in-chief of the Defendant, page 99 of the paper-book.

10 Impugned order, page 30 of the paper-book.

11 Cross-examination of Appellant 1a, page 95 of the paper-book.

12 Complaint, page 53 of the paper-book.

13 Criminal Case No 194/S of 1969.

Sumati was acquitted.¹⁴ The Appellants claim that this complaint was filed only to harass them.¹⁵

13. On 3 July 1969, Bhagwan filed Short Cause Suit No 4564 of 1969 before the City Civil Court at Bombay. He sought a declaration of his lawful sub-tenancy. He also prayed for an injunction against Sumati from dispossessing him except by due process of law, and restraining her from entering into the rented premises or disturbing or interfering with his possession.

14. He also filed a Notice of Motion for an order of injunction against Sumati from entering Room No 1.¹⁶ Sumati was allowed to continue to occupy the front portion of Room No 1 because she had recently given birth. On appeal, this Court ordered that her possession would not be disturbed pending the hearing and final disposal of the suit.¹⁷ The SC Suit was dismissed after trial in March 1985.¹⁸

15. On 23 July 1969, Sumati issued a notice of revocation of the license through her advocate to Nandu Gopal, Bhagwan, and 10 others who were occupying the suit premises.¹⁹

14 Certified copy of the judgment and photocopy at Ex. "G" and "G-1".

15 Examination-in-chief of Appellant 1a, page 93 of the paper-book.

16 Impugned order, page 28 of the paper-book.

17 Appeal No 416 of 1969.

18 Certified copy of the judgment at Ex. "E".

19 Judgment of the Small Causes Court in EA No 755/E of 1969, page 112 of the paper-book.

16. In 1969, Sumati applied before the Small Causes Court against the landlord for transfer of tenancy rights in respect of Room No 1 to her name.²⁰ In February 1970, the court issued a declaration that the tenancy rights were transferred in her favour.²¹

17. Also in 1969, Sumati instituted an ejectment application against Nandu Gopal and 11 others before the Small Causes Court.²² Bhagwan was Respondent No 6 in this suit. In 1975, the Small Causes Court dismissed the application as not maintainable under Section 41 of the Presidency Small Cause Courts Act. This was on the finding that the defendants therein were trespassers and not sub-tenants. Nandu Gopal's license was held to be valid and subsisting.²³ The High Court confirmed this order and it became final on 15 September 1980.²⁴

18. After the failure of Bhagwan's suit for declaration in March 1985,²⁵ Sumati sent an Advocate's notice dated 27 March 1985 to the Defendant to vacate and deliver vacant and peaceful possession of the suit premises. The notice was duly served. However, the Defendant neither vacated nor replied to the notice.²⁶

20 RAW No 1074/Misc/69 (*Meenakshi @ Sumati w/o Dashrath Naik v Devdatta Diwakar Kamat and Anr.*).

21 Certified copy of the order and photocopy at Ex. "B" and "B-1".

22 EA No 755/E of 1969.

23 Complaint, page 55 of the paper-book. Certified copy of the judgment at Ex. "F".

24 Impugned order, paragraph 3, page 22 of the paper-book.

25 SC Suit No 4564 of 1969.

26 Complaint, page 57 of the paper-book.

19. Finally, in 1985, Sumati instituted SC Suit No 6292 of 1985 before the City Civil Court at Bombay for recovery of possession of the suit premises. On 18 November 1996, she died *pendente lite*.²⁷ The present Appellants continued the suit, which was dismissed by way of the impugned order.

C. IMPUGNED ORDER

20. On these pleadings, the learned Judge of the City Civil Court framed 11 issues and answered them thus:

Sr No	Issue	Answer
1.	Whether the defendant proves that the suit is barred by principles of res judicata as stated in paragraph 2 of the written statement?	In effect no.
2.	Whether the defendant proves that the suit is not maintainable on the ground of misjoinder of party as stated in paragraph 3 of the written statement?	No.
3.	Whether the defendant proves that the suit is barred by the law of limitation as stated in paragraph 4 of the written statement?	No.

27 Plaint, page 52 of the paper-book.

Sr No	Issue	Answer
4.	Whether the plaintiff proves that the original plaintiff was the contractual tenant in respect of the suit premises being the front room and the back portion as stated in paragraph 1 of the plaint?	Original plaintiff is proved to be the tenant.
5.	Whether the plaintiff proves that on 14 June 1969 that plaintiff started residing in the front portion of Room No 1 and is residing since then as stated in paragraph 3 of the plaint?	Yes.
6.	Whether the plaintiff proves that the defendant is in occupation of the rear portion of Room No 1 i.e. suit premises admeasuring 8 feet x 12 feet illegally and unauthorisedly and without any payment stated in paragraph 5 if the plaint?	Yes.
7.	Whether the plaintiff proves that the defendant is a trespasser in respect of the suit premises, and liable to (be) vacated as stated in paragraph 5 of the plaint?	No.
8.	Whether the plaintiff proves that they are entitled to damages at the rate of INR 1/- per day for a period of three years prior to the filing of the suit as stated in paragraph 7 of the plaint?	No.

Sr No	Issue	Answer
9.	Whether the plaintiff proves that they are entitled to recover mesne profits at the rate of INR 10/- per day from the date of filing of the suit till obtaining possession as stated in paragraph 7 of the plaint?	No.
10.	Whether the plaintiff is entitled to any reliefs, if so what?	No.
11.	And generally?	Suit is dismissed with no order as to cost.

D. EVIDENCE ON RECORD

21. The following 14 documents have been produced by the Appellants in evidence before the trial court:

- (1) **Ex. "A" Colly**: Original rent receipts in the name of Gopal Murudkar, dated 11 August 1948, 14 January 1949, 13 December 1950, 11 December 1951, 13 August 1952, and 13 November 1953;²⁸
- (2) **Ex. "A-1" Colly**: Photocopies of the rent receipts in the name of Gopal Murudkar, dated 11 August 1948, 14 January 1949, 13 December 1950, 11 December 1951, 13 August 1952, and 13 November 1953;

28 Examination-in-chief of Appellant 1a, page 91 of the paper-book.

- (3) **Ex. “B”**: Certified copy of the order of the Small Causes Court in RAW No 1074/Misc/69 (*Meenakshi @ Sumati w/o Dashrath Naik v Devdatta Diwakar Kamat and Anr.*), dated 16 February 1970;²⁹
- (4) **Ex. “B-1”**: Photocopy of the certified copy of the order of the Small Causes Court in RAW No 1074/Misc/69 (*Meenakshi @ Sumati w/o Dashrath Naik v Devdatta Diwakar Kamat and Anr.*), dated 16 February 1970;
- (5) **Ex. “C”**: Birth certificate of Sumati, with the date of birth being 9 January 1944;³⁰
- (6) **Ex. “C-1”**: Photocopy of the birth certificate of Sumati, with the date of birth being 9 January 1944;
- (7) **Ex. “D” Colly**: Rent receipts in Sumati’s name, dated 17 July 1970, 9 July 1971, 16 February 1972, 11 April 1973, 9 July 1974, and 22 January 1976;³¹
- (8) **Ex. “D-1” Colly**: Photocopies of the rent receipts in Sumati’s name, dated 17 July 1970, 9 July 1971, 16 February 1972, 11 April 1973, 9 July 1974, and 22 January 1976;
- (9) **Ex. “E”**: Certified Copy of the judgment in SC Suit No 4564 of 1969, dated 5 March 1985;³²
- (10) **Ex. “F”**: Certified Copy of the judgment in EA No 755/E of 1969 in the Small Causes Court, dated 27 November 1975;³³

29 Examination-in-chief of Appellant 1a, page 91 of the paper-book.

30 Examination-in-chief of Appellant 1a, page 91 of the paper-book.

31 Examination-in-chief of Appellant 1a, page 92 of the paper-book.

32 Examination-in-chief of Appellant 1a, page 92 of the paper-book.

- (11) Ex. "G": Certified copy of the judgment in Case No 194/S of 1969, dated 13 January 1970;³⁴
- (12) Ex. "G-1": Photocopy of the certified copy of the judgment in Case No 194/S of 1969, dated 13 January 1970;
- (13) Ex. "H": Death Certificate of Dashrath Naik, husband of Sumati, with the date of death being 21 April 1976;³⁵
- (14) Ex. "H-1": Photocopy of the death certificate of Dashrath Naik, husband of Sumati, with the date of death being 21 April 1976.

22. The following 11 documents have been produced by the Defendant in evidence before the trial court:

- (1) Ex. "2": Photocopy of the judgment of the High Court in Appeal No. 416 of 1969.³⁶
- (2) Ex. "3": Ration card of the Defendant;³⁷
- (3) Ex. "3-A": Photocopy of the ration card of the Defendant;
- (4) Ex. "4": ESTS I-Card of the Defendant;³⁸
- (5) Ex. "4-A": Photocopy of ESTS I-Card of the Defendant;
- (6) Ex. "5" Colly: Certified extract of the electoral roll, 1969 onwards;³⁹

33 Examination-in-chief of Appellant 1a, page 93 of the paper-book.

34 Examination-in-chief of Appellant 1a, page 93 of the paper-book.

35 Examination-in-chief of Appellant 1a, page 94 of the paper-book.

36 Cross-examination of Appellant 1a, page 97 of the paper-book.

37 Examination-in-chief of the Defendant, page 101 of the paper-book.

38 Examination-in-chief of the Defendant, page 101 of the paper-book.

- (7) Ex. “5-A” Colly: Photocopy of the certified extract of the electoral roll, 1969 onwards;
- (8) Ex. “6”: 18 electricity bills;⁴⁰
- (9) Ex. “6-A”: Photocopies of 18 electricity bills;
- (10) Ex. “7”: Receipts for deposit of rent in the court;⁴¹
- (11) Ex. “7-A”: Photocopies of receipts for deposit of rent in the court.

E. ISSUES

23. The learned Judge dealt with Issues 1, 2 and 3 with tenable reasoning. I will be considering Issues 4 to 9. I will first deal with Issues 5 and 6. I will then consider Issues 4 and 7, and finally Issues 8 and 9.

24. Issue 5 deals with whether Sumati proves that she has been in occupation of the front portion of Room No 1 since 14 June 1969.

25. In his examination-in-chief, Appellant 1A stated that Sumati’s youngest child was born in the suit premises. This court took cognizance of this fact in its order in Appeal No 416 of 1969.

26. In 1985, SC Suit No 4564 of 1969 filed by Bhagwan was dismissed. In this suit, Bhagwan could not prove that he was in

39 Examination-in-chief of the Defendant, page 101 of the paper-book.

40 Examination-in-chief of the Defendant, page 102 of the paper-book.

41 Examination-in-chief of the Defendant, page 102 of the paper-book.

exclusive use, occupation and possession of Room No 1 since before the filing of the suit. Sumati proved that she had been in possession of the suit premises since before the date of filing of the suit.⁴² This establishes that Sumati was in occupation of the front portion of Room No 1 in 1969. The City Civil Court therefore correctly answered Issue 5.

27. The question in Issue 6 is whether the Appellants prove that the Respondents' occupation of the suit premises is illegal, unauthorised and without any payment.

28. The Respondents argue that they are protected under Section 5(11)(c) of the unamended Rent Act 1947. They have also taken a plea of sub-tenancy. I will first test whether Bhagwan was protected under Section 5(11)(c).

29. The learned Judge has observed that the Defendant could by no stretch of imagination be said to be the tenant under Section 5(11)(c)(i) of the Rent Act.⁴³ I agree. The Respondents argue that the 1978 amendment to the Rent Act validated their sub-tenancy under Section 5(11)(c). The amendment legalised all otherwise lawful sub-tenancies created, which were unlawful under the Act.

30. Section 5(11)(c)(i) of the Rent Act says:

"(i) in relation to any premises let for residence, when the tenant dies, whether the death has occurred before or

42 Complaint, page 54 of the paper-book.

43 Impugned order, paragraph 9, page 32 of the paper-book.

after the commencement of the Bombay Rent, Hotel and Lodging House Rates Control (Amendment) Act, 1978, any member of the tenant's family residing with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the court;"

31. This section creates two categories of successors to the tenancy following the death of the original tenant: One, family members of the deceased tenant who were occupying the tenanted premises along with the deceased tenant, where the premises were being used for residential purposes; and, two, heirs of the deceased tenant as per the general law of inheritance. The Respondents do not logically fall under either category of persons.

32. The suit premises were only used for residential purposes. The Respondents claim that as Gopal's sole family member living in Room No 1 at the time of his death, Satyabhama had the right to allow them to occupy the suit premises under Section 5(11)(c) as amended in 1978.

33. The following extract from this court's decision in *Rajaram Brindavan Upadhyaya and Ors v Ramraj Raghunath Upadhyaya and Ors*.⁴⁴ must be noted. Citing a decision⁴⁵ of Tulzapurkar J, the Division Bench observed:

"16. Tulzapurkar J. overruled all the submissions made on behalf of defendant No. 1. He held that simply because

44 1977 Mh LJ 792.

45 First Appeal No 164 of 1963, decided on 19 August 1964 (unreported).

defendant No. 1 had been declared to be a tenant of the suit flat under Section 5 (11) (c) of the Rent Act, the rights of the plaintiff which she claimed under the general law of inheritance were not abrogated. The reasoning adopted by Tulzapurkar J. was as follows:

"It cannot be forgotten that the Rent Act is a piece of legislation which affords protection to tenants and section 5 (11) (c) in particular enacts that protection would be afforded to any member of the deceased tenant's family against eviction at the hands of the landlords, if such member of the deceased tenant's family was residing with the deceased tenant at the time of the death of such tenant. It is very clear and it was not disputed by Mr. Chagla before me that the Rent Act did not deal with the questions of inheritance or heirship to the estate left by a deceased and since the leasehold interest or tenancy rights to that heritable asset left by the deceased tenant under the general law of inheritance and **it is difficult to accept Mr. Chagla's contention that simply because there is a special definition of "tenant" given in section 5 (11) (c) of the Act the rights of the heirs under the law of inheritance are abrogated. In the absence of any express provision to that effect, it is difficult to hold that because the 1st Defendant was declared to be a tenant within the meaning of section 5 (11) (c) of the Rent Act to the suit flat, the rights of the plaintiff, who claimed the said tenancy rights as an heir of the deceased tenant under the general law of inheritance stand abrogated or that**

because of such special definition of "tenant" and the declaration that was granted in favour of the 1st Defendant there could in law be no devolution of tenancy rights upon the Plaintiff as contended by Mr. Chagla."

After citing some of the trial Court's observations with approval, Tulzapurkar J. came to the conclusion:

"...it is quite clear that in the present suit the plaintiff is seeking to establish her title to the tenancy under the general law of inheritance **and the title under the general law of inheritance remains unaffected by any of the provisions of the Rent Act.** In my view, the learned Judge was right in the view which he has taken that the decision which was given by the Small Causes Court by its Appellate Bench in appeal No. 199 of 1957 does not debar the plaintiff from filing the present suit."

Tulzapurkar J. also overruled the other two submissions made on behalf of defendant No. 1 that the devolution of interest upon the plaintiff would not include the right to physical possession and that the rights and obligations under the general law should be held to have been suspended so long as there was a decision of the Small Causes Court in favour of defendant No. 1 that he³ was a tenant under section 5 (11) (c) of the Rent Act. **We entirely agree with the reasoning and conclusion of Tulzapurkar J. in the abovementioned decision."**

(Emphasis added)

In conclusion, the Division Bench held:

"29. In conclusion, for the reasons stated above, therefore, **we hold that the provisions of section 5 (11) (c) of the Rent Act are not meant to supersede the right of inheritance to the tenancy vesting in the heirs on the death of the tenant, under the personal law of the party...**The plaintiffs alone will, therefore, be entitled to possession of the suit room as tenants. Defendant No. 1 has no right, title or interest in the suit room and, therefore, he is liable to be evicted and the plaintiffs are entitled to be put in possession."

(Emphasis added)

34. In *Romeo Pascol Kinny and Ors v Savitri wd/o Dr. Umashankar Dwivedi*, this Court held:⁴⁶

"17. Similarly, in the context of the definition of the term 'tenant' under section 5(11)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ("1947 Act"), the Division Bench of this Court in the case of *Rajaram Brindavan Upadhyaya & Ors. vs. Ramraj Raghunath Upadhyaya & Ors.*, 1977 Mh. L.J. 792 has held that the said provisions were not meant to supersede the right of inheritance to the tenancy vesting in the heirs on the death of the tenant under the personal law of the parties. The provisions contained in section 5(11)(c) were however amended by the Bombay Rent Act No. XXII of 1978 which entered into force on 23 October 1978. In the context of the amended provisions, the learned Single Judge of this Court in the case of *C.J. Ghadiali & Ors. vs. Z.B. Wadiwalla*, 1981 Mh. L.J. 876 held that there was complete change in law

46 2016 (1) Mh LJ 461.

since the decision in the case of *Rajaram* (supra) and after the 1978 Amendment, it is only in the absence of member of the tenant's family residing with the tenant at the time of the death of the original tenant, that any heir of the deceased tenant acquires tenancy rights under the Rent Act. **From this, it follows that under the un-amended 1947 Act, the Division Bench of this Court had recognized that the provisions of 1947 Act were not made to supersede the rights to inheritance of tenancy vesting in the heirs on the death of the original tenant. Further, after the amendment, such rights shall accrue to the legal heirs of the deceased tenant, only in the absence of member of the tenant's family residing with the tenant at the time of his demise. In both situations, therefore, devolution of the tenancy upon the heirs was contemplated, except that after the 1978 amendment, the devolution upon the heirs in accordance with law of inheritance was made subject to absence of any member of the tenant's family using the tenanted premises for the purposes for which they were let out along with the original tenant, at the time of the demise of such original tenant."**

(Emphasis added)

35. In view of the position of law before the 1978 Amendment, the devolution of tenancy was in favour of the successors-in-title of Gopal. Bhagwan could get no protection.

36. I will now address the issue of sub-tenancy. First, let us consider Nandu Gopal, the licensee. The Appellants claim that Bhagwan entered and occupied the suit premises through Nandu

Gopal. However, the Respondents claim no title through him.⁴⁷ It is not necessary to discuss this any further. The Respondents have produced a ration card, electricity bills, birth certificates of Bhagwan's children and entries in the electoral roll.⁴⁸ All that these documents do is prove his possession of the suit premises. They do not, by any means, validate his title. No evidence was produced before the learned Judge to establish the Defendant's claim of sub-tenancy.⁴⁹ There is no agreement between the landlord and Bhagwan nor any rent receipts in Bhagwan's name to support his claim.⁵⁰ Bhagwan claims that the landlord refused to accept rent from him. He further claims that whatever rent receipts he had were lost in the Small Causes Court proceedings in 1969.⁵¹

37. In his examination-in-chief, Bhagwan deposed that Satyabhama allowed him to reside in the suit premises for a payment of INR 500/- and half the rent due per month.⁵² Bhagwan does not have any receipt to show such a payment to Satyabhama. He also does not substantiate his claim that he made another payment of INR 500/- to Satyabhama when she left for her native village. Bhagwan admitted as much in his cross-examination.⁵³

47 Examination-in-chief of the Defendant, page 104 of the paper-book.

48 Exhibits "2", "3", "3-A", "4", "4-A", "5", "5-A", "6", "6-A".

49 Written Statement, page 80 of the paper-book.

50 Examination-in-chief of the Defendant, page 102 of the paper-book.

51 Examination-in-chief of the Defendant, pages 102 and 103 of the paper-book.

52 Examination-in-chief of the Defendant, page 98 of the paper-book.

53 Cross-examination of the Defendant, page 106 of the paper-book.

38. The Defendant had also instituted proceedings for declaration of sub-tenancy before the City Civil Court at Bombay.⁵⁴ This suit was dismissed after trial. This effectively ends Bhagwan's case of a sub-tenancy. He cannot re-agitate the same issue, finally concluded, again and again. Bhagwan has not been able to lead any evidence to substantiate his claim of sub-tenancy. His mere word cannot satisfy the Court. His failed claim of sub-tenancy in the City Court leaves me in no doubt that there was no valid sub-tenancy subsisting. The learned Judge has correctly concluded that no sub-tenancy was created in Bhagwan's favour. Issue 6 is therefore answered in the affirmative.

39. Issues 4 and 7 have been dealt with jointly. Issue 4 is about Sumati's contractual tenancy; Issue 7 deals with Bhagwan's alleged trespass. They are considered together because Issue 7 can only be answered conclusively after Issue 4 is answered.

40. Issue 4 deals with whether the Appellants in the present suit prove that Sumati was indeed the contractual tenant in respect of Room No 1.

41. Gopal was the original tenant of Room No 1. This is undisputed. Rent receipts dated 11 August 1948, 14 January 1949, 13 December 1950, 11 December 1951, 13 August 1952, and 13 November 1953, bearing Gopal's name, have been produced.⁵⁵ After Gopal's death in 1946, Gopikabai, Sumati and Satyabhama

54 SC Suit No 4564 of 1969.

55 Original rent receipts and photocopies at Ex. "A" and "A-1" Colly.

survived him. Gopikabai died without creating any third party interests with respect to the whole or any part of Room No 1, which is also undisputed. It is also not disputed that by the year 1969, Sumati was Gopal's only remaining heir. Satyabhama had died between 1956 and 1969.

42. By way of the suit before the Small Causes Court, the rights, title and interest of the original tenant were transferred in Sumati's name. This transfer was under Section 5(11)(c) of the Bombay Rent Act, 1947 ("**Rent Act**") by the Small Causes Court.⁵⁶ Rent receipts dated 17 July 1970, 9 July 1971, 16 February 1972, 11 April 1973, 9 July 1974, and 22 January 1976, bearing Sumati's name, have been produced.⁵⁷

43. The Respondents, in their Written Statement, have claimed that the suit for declaration of tenancy in the Small Causes Court was decided without informing them. They therefore claim that they are not bound by the order.⁵⁸ This is entirely without any merit. This claim assumes the Respondents' title over the suit premises. I find no evidence to support the same. Further, the Defendant had an adequate remedy before the Small Causes Court itself, which he chose not to exercise.

56 RAW No 1074/Misc/69 (*Meenakshi @ Sumati w/o Dashrath Naik v Devdatta Diwakar Kamat and Anr.*).

57 Original rent receipts and photocopies at Ex. "D" and "D-1" Colly.

58 Written Statement, page 72 of the paper-book.

44. The rent receipts are in Sumati's name. Her succession to the tenancy is undisputed. Sumati is clearly the contractual tenant. Issue 4 is therefore answered correctly in her favour.

45. Issue 7 deals with the question of the Defendant's trespass. The learned Judge has held them not to be trespassers. Instead, he has brought about a distinction between an unauthorised occupant and a trespasser. In my view, no such distinction exists in the facts of the case. I have already tested the initial entry and prolonged stay of the Respondents in the suit premises in Issues 4 and 6. I will now consider what constitutes trespass.

46. The portion of the impugned order dealing with the issue of trespass is particularly incoherent. Para 17 reads:⁵⁹

"The simple reason being that the present suit brought on the footing that defendant was a trespasser and in the contract of the present facts, the connotation was that he could not refer his possession of the suit premises to any valid right and in that sense only, he was described as trespasser. **Otherwise it was nobody's case that the defendant, kind of, garbed or broke into the suit premises.** If that be so, and if the provision above studied in the light of the law enunciated by our High Court afford to the possession of the plaintiff the colour of legality."

(Emphasis added)

47. The learned Judge seems to have proceeded on the footing that trespass occurs only in those limited circumstances where "the

59 Impugned order, paragraph 17, page 45 of the paper-book.

defendant, kind of, garbed or broke into the suit premises”. This is incorrect. The question is of the initial illegality of the entry, and brute force is not an ingredient.

48. The learned Judge has clubbed his reasoning on Issues 4 and 7. He concludes:⁶⁰

“The above discussion would make it very clear that although in the light of the phraseology of Issue No. 4 as framed by my Learned Brother, **the present defendant may not be the contractual tenant *strict sensu* but the net result of this discussion is that he is nevertheless the tenant and as such not trespasser.** It is in this scnso that the Issue No. 4 will have to be understood and therefore Issues Nos. 4 and 7 are answered accordingly.”

(Emphasis added)

49. Logically, it does not follow that a person in “illegal and unauthorised” occupation of a property would be a tenant and not a trespasser.

50. The Supreme Court has fully dealt with the question of trespass in *Kewal Chand Mimani (d) by Lrs. v SK Sen & Ors.*⁶¹ It held:

“24. The word ‘trespass’ in common English acceptation means and implies unlawful or unwarrantable intrusion upon land. It is a transgression of law or right, and a trespasser is a person, entering premises of another with

60 Impugned order, paragraph 20, page 48 of the paper-book.

61 AIR 2001 SC 2569.

knowledge that his entrance is in excess of the permission that has been given to him."

51. Trespass by remaining on land has been discussed in Salmond and Heuston on the Law of Torts:⁶²

"Even a person who has lawfully entered on land in the possession of another commits a trespass **if he remains there after his right of entry has ceased**. To refuse or omit to leave the plaintiff's; land or vehicle is as much a trespass as to enter originally without right. Thus any person who is present by the leave and licence of the occupier may, as a general rule, when the licence has been properly terminated, be sued or ejected as a trespasser, if after request and after the lapse of a reasonable time he fails to leave the premises."

(Emphasis added)

52. Halsbury's Laws of England says:⁶³

"If a person enters on the land of another under an authority given him by law, and, while there, **abuses the authority** by an act which amounts to a trespass, he becomes a trespasser ab initio, and may be sued **as if his original entry were unlawful**."

(Emphasis added)

53. The Appellants have pleaded an act of trespass on land by the Respondents. They have argued:⁶⁴

62 Discussed in *Gokak Patel Volkart Ltd. v Dundayya Gurushiddaiah Hiremath and Ors.*, (1991) 2 SCC 141.

63 Fourth Edn. Vol. 45 para 1389.

"The Learned Judge erred in holding that the Respondent is having tenancy rights in respect of part of the tenanted premises. It is respectful submission of the Appellant that the Civil Judge was ought to have held that the Respondent is tenant of the entire suit premises or a trespasser in the suit premises in view of the decision of the Small Causes Court that the Respondent is not a tenant of the suit premises."

54. Both an unlawful entry upon the land of another, and unlawfully *remaining* on the land of another after a lawful entry constitute trespass.

55. In the present case, the Respondents have not proved that their initial entry was lawful. Irrespective of whether the initial entry was lawful, the Appellants and the Plaintiff have repeatedly tried to remove the Respondents from the suit premises. They have clearly overstayed their welcome in the suit premises. Their continuance is without authority and is unlawful.

56. The learned Judge's observation on the issue of trespass is thus incorrect. I cannot uphold the finding that although the Respondents had illegally and unauthorisedly entered the suit premises, they can be protected as 'unauthorised occupants'. This is a clear case of trespass.

57. Issues 8 and 9 in the impugned order concern the award of damages and payment in lieu of mesne profits. The learned Judge did not address these issues, in view of his finding on Issue 7.

58. The reversal of the impugned order necessitates a fresh look at these issues. Mesne profits accrue when a person is deprived of the right to receive any benefit.⁶⁵ Upon the evidence adduced before me, the Appellants have failed to prove that they are entitled to any mesne profits or damages. No evidence has been led to prove that any benefit accrued to the Defendant which should have rightly been received by the Appellants. No grounds have been urged by them. No basis exists for awarding compensation.

F. ORDER

59. The appeal succeeds and is decreed. There will, therefore, be a decree in terms of prayer clauses (a), (b), (c) and (d) of the suit.

60. The Respondents will deliver vacant possession of the suit premises within a period of three months from today.

61. The operation of this decree is stayed for a period of three months from today.

65 Section 2(12), Code of Civil Procedure.

62. As regards prayer clause (e), this is a claim for damages but no evidence is led on this aspect of the matter. I will, therefore, not grant a monetary decree in terms of prayer clause (e).

63. Obviously till the period for possession and stay is over, a total of six months from today, the Appellants will not disturb the possession and occupation of the Respondents.

64. There will be no order as to costs.

(G.S. PATEL, J.)