

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 509 OF 2011

Candida Mascareanhas (D'cunha)
and others.

...Applicants

Versus

Mrs. Ethel Mendes
and others.

...Respondents

....

Mr. S.K. Chaturvedi i/b. M/s. Chaturvedi & Associates, for the
Applicants.

Mr. Ajit Anekar a/w. Ms. Madhuri Rawat i/b. Rekha C. Shukla, Advocate
for Respondent No.1.

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CORAM : R. G. KETKAR, J.

DATE : 21st & 24th JUNE, 2019

JUDGMENT :

1. Heard Mr.S.K. Chaturvedi, learned counsel for the
applicants and Mr.Ajit Anekar, learned counsel for respondent No.1, at
length.

2. By this application under Section 115 of the Code of Civil
Procedure, 1908 (for short, 'C.P.C.'), the applicants, hereinafter referred
to as 'defendants No.5 to 7', have challenged the judgment and decree
dated 1.4.2011 passed by the Appellate Bench of the Small Causes
Court at Mumbai in Appeal No.345/2002. By that order, the Appellate
Court allowed the appeal preferred by respondent No.1, hereinafter
referred to as the 'plaintiff' and set aside the judgment and decree dated

30.11.2001 passed by the learned trial Judge in R.A.E Suit No.687/1987. The Appellate Court decreed the suit and directed the defendants No.5 to 7 to hand over vacant possession of 'Archille Lodge' situate at Mia Mahomed Chhotani Cross Road, Mahim, Mumbai – 400 016 (for short, 'suit premises'). The facts and circumstances giving rise to filing of the present C.R.A., briefly stated, are as under.

3. In the year 1938, the suit premises was let out to Dr. Framroze Navroze Surveyor (for short, 'Framroze') by Ethel Mendes, mother of present respondent No.1 Teresa D'Silva. Framroze was a Doctor by profession and was using part of the suit premises for his practice and part of the premises for residential purpose. In 1946, Framroze brought defendant No.3 Cosu alias Cosou Mascarenhas (for short, 'Cosu') to reside with him at the suit premises. At the relevant time, Framroze was having maid-servant. She had one daughter by name Candida. Framroze, brought Cosu as a companion to Candida, child of former maid servant of Framroze. In 1963, Framroze got Cosu married to defendant No.4 Peter Mascarenhas (for short 'Peter'). After marriage, Peter started residing in the suit premises.

4. On or about 24.2.1967, Ethel Mendes (for short, 'Ethel') instituted R.A.E. Suit No.1081/1967 against Framroze for recovery of possession of the suit premises. Ethel alleged that Framroze was not

ready and willing to observe and perform the terms of tenancy in as much as he had parted the possession of part of the suit premises. He had wrongfully sublet or otherwise transferred part of the suit premises to a person who has no right to use the premises having regard to the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, 'Act'). She required the suit premises reasonably and bonafide for her own use and occupation and occupation of her family.

5. Framroze filed written statement dated 26.6.1967 denying that he was not ready and willing to observe and perform the terms of tenancy or that he had parted with the possession of the part of the premises. Framroze denied that he had wrongfully sub-let or transferred the part of the suit premises to a person who has no right having regarding to the provisions of the Act. Without prejudice it was contended that an individual has been residing in the suit premises with his permission for a long time and at no time the premises or portion thereof has been sublet to this individual or any other person. Framroze denied that Ethel required the suit premises reasonably and bonafide. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues.

6. Ethel adduced her evidence. Ethel deposed that Cosu was a

maid-servant and was illegally residing with her husband and her four children in the suit premises. Framroze examined Soona T. Mistry as also himself. After considering the evidence on record, by order dated 30.8.1973, the learned trial Judge dismissed the suit. The learned trial Judge held that Cosu was adopted daughter of Framroze and is residing in the suit premises along with her family as Framroze treated them his family members. It is common ground between the parties that Ethel did not challenge this order.

7. On 20.4.1987, Framroze expired. On or about 1.6.1987, Ethel instituted present suit against

defendant No.1 – Bavrih Boman N. Surveyor,
defendant No.2 - Nashir Boman N. Surveyor,
defendant No.3 – Cosu
defendant No.4 – Peter
defendant No.5 – Candida
defendant No.6 – Michael Mascarenhas, &
defendant No.7 – Yolanda Mascarenhas

8. The suit is filed on the ground that after death of Framroze, defendants No.3 to 7 have become unlawful occupants of the suit premises. In or about November, 1990 defendants No.3 to 7 filed their written statement *inter alia* contending that earlier R.A.E. Suit No.1081/1967 was between the same parties in respect of the suit premises. The suit was dismissed which decision attained finality. Present suit is, therefore, hit by principles of resjudicata. In the earlier

suit it was held that defendants No.3 to 7 are family members of Framroze and thus they are tenants as contemplated by Section 5(11)(c) (i) of the Act.

9. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The parties adduced evidence. After considering the evidence on record, by order dated 30.11.2001 the learned trial Judge dismissed the prayer for possession and issued injunction restraining defendants No.3 to 7 from creating third party interest.

10. Aggrieved by this decision, Ethel preferred appeal before the Appellate Court. Pending the appeal, defendant No.3 Cosu and defendant No.4 Peter expired. Accordingly they were deleted. By order dated 1.4.2011, the Appellate Court reversed the trial Court's judgment and decreed the suit. The Appellate Court directed defendants No.5 to 7 to hand over vacant and peaceful possession of the suit premises to the plaintiff. It is against this order, defendants No.5 to 7 have instituted present C.R.A.

11. Mr. Chaturvedi has taken me through :

- i. pleadings and evidence adduced by the parties in earlier suit, namely, R.A.E. Suit No.1081/1967;
- ii. order dated 30.8.1973 passed by the learned trial Judge in R.A.E.

Suit No.1081/1967.

- iii. Complaint in the present suit and written statements of defendants No.1 & 2 and defendants No.3 to 7. Additional written statement of defendants No.3 to 7.
- iv. evidence adduced in the present suit.
- v. Order dated 30.11.2001 passed by the learned trial Judge in R.A.E. Suit No. 687/1987.
- vi. impugned order.

12. Mr. Chaturvedi strenuously contended that from the evidence of Framroze and Soona T. Mistry as also the findings recorded by the learned trial Judge in the order dated 30.8.1973, it is evident that defendants No.4 to 7 were residing in the suit premises as family members of Framroze. He submitted that the finding recorded by the learned trial Judge in the order dated 30.8.1973 in R.A.E. Suit No.1081/1967 operates as resjudicata. He submitted that the learned trial Judge rightly dismissed the suit. As against this, the Appellate Court committed serious error in decreeing the suit. He submitted that the findings as also the approach of the Appellate Court is perverse. The impugned order deserves to be set aside thereby dismissing the suit.

13. On the other hand, Mr. Anekar supported the impugned order. Mr.Anekar has invited my attention to paragraph-2 of the complaint

in the earlier suit, namely, R.A.E. Suit No.1081/1967. In paragraph-2 Ethel asserted that Framroze was not ready and observe and perform the terms of tenancy in as much as he has parted the possession of part of the suit premises. He has wrongfully sublet or otherwise transferred part of the suit premises to a person who has no right to use the premises having regard to the provisions of the Act.

14. Along with the plaint, notice dated 22.12.1966 issued to Framroze was also annexed. In that notice also it was contended that Framroze had unlawfully sub-let part of the tenant as also parted with the possession. The plaintiff was informed that Framroze all along is residing and as Framroze is not in need of the premises, he had put in unlawful sub-tenant.

15. Framroze filed points of defence dated 26.6.1967. In paragraph-2 apart from denying the assertions made in paragraph-2 of the plaint, without prejudice it was submitted that an individual has been residing in the suit premises with defendant's (Framroze's) permission for a long time and at no time the premises or a portion thereof has been sublet to said individual or to any other person. In other words, Mr. Anekar submitted that with the permission of Framroze Cosu was residing in the suit premises and, therefore, it will not confer the status of member of family of Framroze and consequently after the

death of Framroze, tenant in the suit premises.

16. Mr. Anekar submitted that in the judgment dated 30.8.1973 of R.A.E. Suit No.687/1987 no finding is recorded that defendants No.4 to 7 were residing in the suit premises as family members. He submitted that defendants No.5 to 7 cannot claim to be family members of Framroze. He submitted that Candida's mother was working as a maid-servant with Framroze. She pre-deceased Candida. Candida died in 1959. Cosu was working as a maid-servant with Framroze. He submitted that the expression 'member of family' will not include stranger or servant. He submitted that it is the case of the plaintiff that after the death of Framroze, defendants No.3 to 7 are unlawful occupants of the suit premises. In support of this submission, he relied upon the decision of this Court in **Jaysen Jayant Rele & Others Vs. Shantaram Ganpat Gujar & others, 2002 (6) Bom.C.R. 415.**

17. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record including the original record of R.A.E. Suit No.687/1987 and the present suit.

18. With the assistance of the learned counsel appearing for the parties, I have also perused the pleadings and evidence adduced by the parties in R.A.E. Suit No.1081/1967. In the evidence adduced by the

plaintiff Ethel, she deposed that Framroze is a bachelor. Cosu is a maid-servant working with Framroze. She is living in the suit premises along with Framroze. Cosu is residing with her husband and the children in the suit premises. She deposed that sub-letting took place after Cosu was married. Framroze had unlawfully sub-let the suit premises to Cosu who is residing with her husband and children in the suit premises. Teresa D'Silva, daughter of Ethel was examined as PW-2.

19. On behalf of Framroze, he examined Soona T. Mistry. She deposed that Framroze is residing with adopted daughter Cosu and her husband along with the children in the suit premises. In the cross-examination she deposed that “it is not true that Parsis do not adopt children from other communities.” She denied that Cosu was working as a maid servant.

20. Framroze was also examined. He deposed that Cosu came to reside in the suit premises some time in the year 1946 or 1947. He took Cosu in the suit premises as a companion to Candida, child of his former maid-servant. He used to look after both the children. No other member of his family was residing with him. Candida expired in 1959. All along he was the head of the family in the suit premises. He had a servant to cook his meals. Cosu sometimes helped her. He has been treating Cosu and her children as his own children. After her marriage,

Cosu has been residing with him. Her husband is a Tailor. He deposed that he had not parted with the possession of any of the rooms in the suit premises. He has not sub-let any portion thereof nor he has been receiving any rent. Cosu has four children. Three are schooling and the fourth is an infant. He got them admitted in the schools. Their school fees are being paid by him and Peter.

21. During the course of cross-examination he deposed that he always maintains a house hold servant. At present he has only one house hold servant. It is a female servant. She does all the house hold work including cooking. He pays her Rs.55/- per month. He has brought Cosu in the house about ten years before the death of Candida in 1959. Cosu was about 7 or 8 years old then. The idea in bringing Cosu to his place at that time was to provide company to Candida who was alone. Both Candida and Cosu lived as his own children. Even Candida was his adopted child. He did not admit Cosu in any school for education. He denied that because he wanted services of Cosu he did not admit her in the school. Mother of Candida had pre-deceased and, therefore, he brought Cosu. He was treating Peter as his son since his marriage to Cosu.

22. Mr. Chaturvedi invited my attention to paragraphs-20, 21 and 24 of the judgment dated 30.8.1973 passed by the learned trial

Judge in R.A.E. Suit No.1081/1967. He submitted that in these paragraphs the learned trial Judge categorically recorded a finding that Framroze had been treating Cosu as his child for all purposes and that they are his family members.

23. The moot question, therefore, is whether Cosu, Peter and their children can be said to be family members of Framroze. In order to appreciate this question, it is necessary to make a reference to the pleadings, evidence and the findings recorded by the learned trial Judge in the order dated 30.8.1973 in R.A.E. Suit No.1081/1967 filed by Ethel against Framroze. In paragraph-2 of the written statement in that suit, Framroze denied the allegations of subletting. Without prejudice, Framroze contended that an individual has been residing in the suit premises with his permission for a long time. In paragraph-20, the learned trial Judge observed that Framroze deposed that he brought Cosu in the suit premises when she was a child of seven or eight years. He was treating Cosu as his child. He admitted that there was no adoption of Cosu. He was treating her as his child for all purposes. The learned trial Judge referred to the marriage invitation card of Cosu and her husband at Exhibit-1. It emanated from Framroze. This document substantiated the claim of Framroze that Cosu was treated by him as child for all practicable purposes.

24. In paragraph-21, the learned trial Judge observed that

Framroze claimed that he has been treating Cosu as his child since her childhood. The learned trial Judge referred to the evidence of Soona T. Mistry that Cosu is Framroze's daughter for all practical purposes except that he is not related to her by blood. In paragraph-23, the learned trial Judge observed that Ethel failed to prove that a portion of the suit premises was exclusively given in possession of Cosu and her husband and she failed to make out a case of periodical payment either in cash or kind for a transfer of right in the demised premises. The learned trial Judge held that Ethel failed to establish the case of sub-tenancy.

25. In paragraph-24, the learned trial Judge observed that Framroze had gone to the extent of saying that it is he who admitted the children of Cosu in school. This circumstance strengthens the claim of Framroze that Cosu and her husband and their children are treated by him as his family members.

26. It has come on record that Framroze professed Zoroastrian religion. There is no concept of adoption. The claim of Cosu that she is adopted daughter of Framroze, therefore, cannot be accepted. Framroze is not related to Cosu by blood. Cosu was residing in the suit premises with his permission. If at all Framroze claimed that Cosu was treated by him as his daughter, no satisfactory explanation has come on record as to why he did not admit her (Cosu) in the school though he admitted her children to school. It has also come on record that there was only one

female servant working with Framroze. Mr. Chaturvedi could not point out any female servant other than Cosu. I, therefore, find merit in the submission of Mr. Anekar that reference to female servant in the deposition of Framroze was to Cosu. Thus, Cosu was occupying the suit premises was occupying the suit premises in the capacity of a servant of Framroze. The learned trial Judge did not record a categorical finding that Cosu, her husband and children are the members of Framroze's family.

27. I will deal with the issue whether servant can be treated as member of the family. Before answering this issue, it is necessary to refer to the decision in **Maria Margarida Sequeria Fernandes & Ors. Vs. Erasmo Jack de Sequeria (dead) through L.Rs., AIR 2012 SC 1727.**

In paragraphs-97 to 100, the Apex Court observed thus :

- “97. This Court in *Puran Singh v. The State of Punjab* : (1975) 4 SCC 518 : (AIR 1975 SC 1674) held that an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession.
- 98. This Court in *Mahabir Prasad Jain* (AIR 1999 SC 3873 : 1999 AIR SCW 3957) (*supra*) has held that the possession of a servant or agent is that of his master or principal as the case may be for all purposes and the former cannot maintain a suit against the latter on the basis of such possession.
- 99. In *Sham Lal v. Rajinder Kumar and Ors.* 1994 (30) DRJ 596, the High Court of Delhi held thus:

“On the basis of the material available on

record, it will be a misnomer to say that the Plaintiff has been in 'possession' of the suit property. The Plaintiff is neither a tenant, nor a licensee, nor a person even in unlawful possession of the suit property. Possession of servant is possession of the real owner. A servant cannot be said to be having any interest in the suit property. It cannot be said that a servant or a chowkidar can exercise such a possession or right to possession over the property as to exclude the master and the real owner of the property from his possession or exercising right to possession over the property.

Possession is flexible term and is not necessarily restricted to mere actual possession of the property. The legal conception of possession may be in various forms. The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of law, if the animus be lacking. On the contrary, to be in possession, it is not necessary that one must be in actual physical contact. To gain the complete idea of possession, one must consider (i) the person possessing, (ii) the things possessed and, (iii) the persons excluded from possession. A man may hold an object without claiming any interest therein for himself. A servant though holding an object, holds it for his master. He has, therefore, merely custody of the thing and not the possession which would always be with the master though the master may not be in actual contact of the thing. It is in this light in which the concept of possession has to be understood in the context of a servant

and & master.”

100. The ratio of this judgment in Sham Lal (supra) is that merely because the Plaintiff was employed as a servant or chowkidar to look after the property, it cannot be said that he had entered into such possession of the property as would entitle him to exclude even the master from enjoying or claiming possession of the property or as would entitle him to compel the master from staying away from his own property.”

28. In paragraph-101, the principles of law were crystallized.

Clauses-2, 3 and 5 read thus :

- “2. Caretaker, watchman or servant can never acquire interest in the property irrespective of his long possession. The caretaker or servant has to give possession forthwith on demand.
- 3. The Courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative, caretaker or as a servant.
- 4. xxxxx
- 5. The caretaker or agent holds property of the principal only on behalf of the principal. He acquires no right or interest whatsoever for himself in such property irrespective of his long stay or possession. ”

29. In the light of the above decision, Cosu can never acquire interest in the suit premises irrespective of her long possession.

30. Now I deal with the issue whether the servant can be treated as a Member of the Family. In order to answer this issue, it is necessary to make a reference to the

decision of **Jaysen Rele** (supra). In this case, the learned Single Judge of this Court has exhaustively considered the expression 'member of family of a tenant' appearing in Section 5(11)(c) of the Act. Paragraphs-13 to 18 thereof read thus :

- “13. It is very pertinent to note that in spite of the catena of judgments interpreting and construing the words "member of a family of the tenant and a family", the legislature has not budged from its position and has not moved to amend Section 5(11)(c) of the Act to reflect the precis of the judicial pronouncements in the Act in any manner. The Section 5(11)(c) has remained as it is though the Act has undergone surgery by way of amendments on a number of occasions at the hands of the Legislature to meet off-arising problematic situations. It is far more pertinent to note that even in the present Maharashtra Rents Act which has replaced the earlier Bombay Rents Act the Legislature has not taken cognizance of the interpretation of the words in Section 5(11)(c) and the Legislature has not enlarged the words "family and the member of a family". It would have been very easy for the Legislature to have removed all the doubts and difficulties which have created innumerable disputes giving rise to innumerable judgments by replacing the words "any member of the tenant's family" by "any person..... residing with the tenant at the time of his death." The Legislature has not enlarged the term used in the original Sub-section 5(11)(c) i.e. "any member of the tenant's family". The Legislature could have deleted the aforesaid words and could have put only one word "person" in place of "member of the tenant's family" to resolve all the so called construction and interpretation difficulties. The intention of the Legislature therefore is absolutely clear to retain the present construction in the Sub-section 5(11)(c) in the form in existence i.e. "any member of the tenant's family". It did not and it does not intend to give a wider meaning to the concept of family to include even a stranger as a member of the

family. The Legislature did not and does not intend to depart from the ordinary meaning of the word "family" as understood in common parlance. We understand a family as consisting of father, mother, sons, daughters, sisters and all such blood relations and other relations arising from lawful marriages in the family. We don't include in the concept of family any one who is not related by blood and that is the whole purpose and intention of the Legislature not to remove the word "family" from the said provision. If it wanted to enlarge the meaning of the family it would have expressly said so. The Legislature wants to protect only the members of the family, who are bound by the blood relations and never any stranger however near he or she might be and however thick the love and affection bonds might exist. In my opinion the Legislature has not given any importance to such emotional and sentimental ideas. In the Rent Control Act, which regulates relationship between the landlord and the tenant. It is enacted to protect the tenants and their families and not to create any rights in favour of strangers who have no blood relations with the tenant or his family. The Legislature never intended to wide open the umbrella of the Rent Act to give protection to every one who would claim to be a member of the tenant's family on one or the other ground of love and affection or close friendship or father like and son-like or such relationship. A tenant cannot be heard to say that the person residing with him is like his father or like his son or like his daughter or brother. There is no place for the words "like" or "as". The Act protects only those who were really blood relations of the tenant. The Legislature has not allowed any provision in respect of the relationship. The present protection is to the tenant and his family members with whom he has blood relations. The Legislature has been reasonable and moderate to grant protection to the tenant and extend the protection to the members of the family in the ordinary parlance as commonly understood in the society. The Legislature is fully conscious of the fact that it cannot fly at tangent to give protection to all such occupants of the tenanted premises at the cost of

the landlord and the valuable property rights of the owners of the premises. The landlord rents out his premises to a tenant on certain terms and conditions which the tenant must observe and if such terms and conditions are observed by the tenant the landlord cannot evict him at his sweet will and in contravention of the provisions of the Rent Act. The Act protects the tenants at the same time controls the property rights of the landlords by imposing reasonable restrictions on them within the four corners of the Act. The rights of the landlords are not given a complete go by and are not extinguished altogether. If the Legislature intended that a tenant and all those who claim through him should be granted protection from eviction at any cost that would result in total extinguishment of the rights of the landlords and that would mean that the landlord has to write-off his property forever, as the tenants and all such strangers who would claim to be the members of their families talking love and affection would have grabbed the property forever and the same would be bequeathed for such love and affection at the cost of the landlord.

14. The Legislature has not given up the concept of protection to the family of a tenant. The family is a permanent and basic structure in the scheme of protection of tenant. There is no departure from the scheme though there are hundreds of the judgments under this Act construing the provisions of Section 5(11)(c). The Legislature has not budged even by changing a coma. It could have very well incorporated the Judicial liberal pronouncements in the newly enacted Rent Act. The Legislature wants to maintain the legitimate balance and equilibrium between the rights of the landlord and the protection to be given to the lawful tenants within the frame work of the Act.
15. The universal epigrammatically adage of "Vasudhaiva Kutumbkamb" was and is not unknown to the Legislature. The whole world is my family is the eternal message given by the age old sages. The

Legislature however has not adopted or borrowed the said concept of family to include every one in its compass. It has in my opinion rightly restricted to the commonly known and plainly understood concept of family. Though there is no definition of a family in the Rent Act, the Legislature has explained in Section 6 of the Maharashtra Co-operative Societies Act, 1960 who is a member of a family. For the purposes of this Section and the explanation under Section 8 a member of a family means a wife, husband, father, mother, son or unmarried daughter. The context in which the aforesaid explanation is given is a membership of a Co-operative Housing Society to hold a flat or tenement in such a society. The Legislature has indicated that by a member of a family it contemplates only blood relations and no strangers are included as a member of a family. It cannot be contemplated that the legislative intention would take radical departure from one Act to another Act In respect of the terms which are normally used and understood in the society without making it explicitly clear.

16. In a judgment of the Supreme Court given under the Uttar Pradesh Urban Building (Regulation of Letting, Rent and Eviction) Act. 1972 in the case of Mohd. Azeem v. District Judge, Aligarh MANU/SC/0385/1985MANU/SC/0385/1985 : [1985]3SCR906 . The Legislature has wisely defined a family as under (at page 1119 of AIR) :

"Family in relation to a landlord or tenant of a building, means : "his or her -- (i) spouse, (ii) male lineal descendants, (iii) such parents, grand parents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her, and includes, in relation to a landlord, any female having a legal right of residence in that building".

In my humble opinion the Legislature has clearly indicated what is meant by a family in the scheme of Rent Control and Eviction. There is no place for a stranger in the said definition. In a similar situation under the Delhi Control Act, 1958 a family is defined as spouse, son, daughter, parents, daughter-in-law. In paragraph 17 of the judgment in the case of Baldev Sahal Bangla v. R. C. Bhasin : [1982]3SCR670 the Supreme Court has summarised what would consist a family, as under (at page 1093 of AIR) :

17. A conspectus of the connotation of the term 'family' which emerges from a reference to the aforesaid dictionaries clearly shows that the word 'family' has to be given not a restricted but a wider meaning so as to include not only the head of the family but all members or descendants from the common ancestors who are actually living with the same head. More particularly, in our country, blood relations do not evaporate merely because a member of the family -- the father, the brother or the son -- Leaves his household and goes out for some time. Furthermore, in our opinion, the legislature has advisedly used the term that any member of the family residing therein for a period of six months immediately before the date of the filing of the action would be treated as a tenant. The stress is not so much on the actual presence of the tenant as on the fact that the members of the family actually live and reside in the tenanted premises. In fact, it seems to us that Clause (d) of the

proviso to Section 14(1) of the Act is a special concession given to the landlord to obtain possession only where the tenanted premises have been completely vacated by the tenant if he ceased to exercise any control over the property either through himself or through his blood-relations."

The Supreme Court has considered in the context of the aforesaid Rent Act definitions of family given in different Dictionaries the Supreme Court has specifically observed the real interpretation of a family and that is the national heritage. It is very significant to note that under the emphasis given by the Supreme Court to blood relations to construe a family. By construing the term family widely the Supreme Court has not included within the family those who do not have blood relations. Blood is the limit to consider a family relationship.

17. In the case of C. Krishna Prasad v. CIT Bangalore : [1974]97ITR493(SC) , while considering the question under Income Tax Act the Supreme Court has accepted the meaning of family as is commonly understood. It is observed in paragraph 6 that "family" connotes a group of people related by blood or marriage. The Supreme Court has further referred to the meaning of family in the Shorter Oxford English Dictionary where the word "Family" is spelled out as the group consisting of parents and their children, 'whether living together or not, in wider sense, all those who are nearly connected by blood or affinity; a person's children regarded collectively; those descended or claiming descent from a common ancestor; a house, kindred, lineage; a race; a people or group of peoples. In another Judgment : [1988]2SCR1068 , State of Gujarat v. Jat Laxmanji Talasji the Supreme Court has considered the meaning of family in the context of Gujarat Agricultural Land Ceiling Act, 1960. In paragraph 7

the Supreme Court has observed as under, (at page 828 of AIR) :

7. This reasoning is obviously fallacious. The expression 'family' has not been defined in the Act. One has therefore to go by the concept of family as it is commonly understood, taking into account the dictionary meaning of the expression. Collins, English Dictionary defines family as :

"a primary social group consisting of parents and their offspring, the principal function of which is provision for its members."

"a group of persons related by blood, a group descended from a common ancestor."

"all the persons living together in one household."(Emphasis is given by me)

It is therefore crystal clear that the Supreme Court has always followed the meaning of "family" as is commonly understood without artificial stretching it to bring under the roof of family who are never related by blood or marriage. In no case the domestic servant is included as a member of the family, howsoever long association there might be and howsoever thick relationship there might be. In my humble opinion even liberalise and benevolence have their inherent limitations. Benevolence to one cannot harm another.

18. It is therefore not possible for me to interpret the Bombay Rent Act taking a radical or complete departure from the meaning given to the word "family" in the context of the common man and the national heritage. We cannot forget that the Bombay Rent Act like any other Rent Act is an enactment to control and define the relationship between a

landlord and a tenant. It does not abolish or extinguish the property rights of the landlords or the property owners. The Rent Acts are enacted to balance the property rights and such balance cannot be disturbed by a so-called liberal interpretation for the word "family" by giving to it an artificial and unnatural meaning which was never intended by the Legislature. To include total a stranger on the basis of even real love and affection between the tenant and such a stranger would amount to violence to the natural meaning of a family. Such love and affection cannot be at the cost of the landlord or any other person who would be required to sacrifice his property in favour of those who are totally unknown and strange to him. The tenant can return his love and affection to such stranger in any other form of sacrifice of his own property. In the present case Shri Athwankar has demonstrated his love and affections towards the defendants by bequeathing the tenancy rights in his will on oath. In law he could not just bequeath the tenancy rights to any one. Fairly and rightly both he learned counsel have agreed to this legal position. What the original tenant has done was at the cost of the landlord and he had nothing to lose by showing his love and affection to them. 19. The original tenant had bequeathed 25% of his fixed deposits to the defendant No. 1 and not even the whole. The larger amounts were given to his nephew. No doubt the defendants have received old furniture, fixtures and utensils in the Will as a token of love and affection of the deceased tenant. Even if he were to give the entire moveable property to the defendants that would not have created a blood relationship between them which is the basis of the formation of a family. It is therefore not possible for me to enlarge the definition of a member of tenants family to include the defendants. The defendants therefore cannot claim the tenancy rights of the deceased tenant. The permission given by the landlord to the deceased tenant and his wife had come to an end with their death. There was no other relative or legal heir of the said tenant and therefore, the contention of the defendants to occupy the said premises without

lawful authorisation or permission by the landlords amounts to trespassing and therefore, the defendants are trespassers on the suit premises and they are therefore liable to be evicted by the plaintiffs-landlords. The defendants might not be domestic servants but they were certainly not blood relations of the deceased tenant, and therefore, they did not become members of his family who were residing at the time of his death. The defendants therefore are not entitled to get protection of Section 5(11)(c) or any other provision of the Act. ”

31. Mr. Chaturvedi relied upon the decision in **Laxmidas Morarji Vs. Jehangir Dinshaw Bamji & five others & Jamshed Nusserwanji Guzdar & six others**, 1998 (1) BCR 712. In that case the petitioner therein had instituted suit against respondent No. 6 - Salehbhai for recovery of possession of the suit flat on the ground that the suit flat was let out to one Dhanbai Batliwala as a monthly tenant. She died without leaving any heir behind. The executors of the Will left behind were parties to the suit as also respondent No. 5 - Miss Behroze was also joined as defendant No. 5. It was claimed that she has no right to remain in the suit premises because she cannot be an adopted daughter of the original tenant Dhanbai. Decree was claimed by the landlords on the ground that there is default committed in payment of rent. The trial Court found that the respondent No. 5 Behroze was residing with the tenant Dhanbai as a member of her family. Deceased Dhanbai had also adopted her as her daughter. She had inherited the tenancy and, therefore, she is entitled to be in possession of the suit

premises. The trial Court did not accept the case of respondent No. 5 that she is adopted daughter of the deceased tenant Dhanbai. The trial Court held that respondent No. 5 has established that Dhanbai treated respondent No. 5 as a member of her family and therefore according to the trial Court, she inherits the tenancy under the provisions of section 5(11)(c) of the Act. The landlords challenged that judgment by filing appeal before the Appellate Court. The Appellate Court dismissed the appeal and held that respondent No.5 was an adopted daughter of the deceased tenant Dhanbai and she inherited tenancy. Feeling aggrieved by this observation of the Appellate Court, Parsi Panchayat Funds and Properties filed Civil Application No. 3284 of 1984 for intervention in the matter and to address the Court on the question whether a Parsi was legally competent to adopt as held by the Appellate Court.

32. A perusal of that decision shows that when the petition was called for final hearing, none appeared for the petitioner and none appeared for the respondents as well. This Court noted that the Courts below concurrently held that Miss Behroze was residing with the tenant at the time of her death, as a member of the tenant's family, she would inherit the tenancy of the suit premises. This Court did not find any exception to the findings recorded by the Courts below.

33. A perusal of this judgment does not indicate that pointedly contention was raised about Behroze could be treated as a family

member. No argument was advanced on behalf of the landlord as to whether a stranger can be treated as a member of the family. Consequently, no finding was recorded by this Court. In my opinion, said decision is not applicable to the facts of the present case. The decision in **Jaysen Rele** (supra) applies on all fours to the facts of the present case.

34. Mr. Chaturvedi also invited my attention to the decision of **Kamal Chintaman Mithari Vs. Ganpatrao Ramchandra Powar, AIR 1977 BOM 163** to contend that this Court has held that a mistress is member of the family. He also relied upon the decision in **K.V. Muthu Vs. Angamuthu Ammal, 1997(2) SCC 53** where 'foster son' is held to be a member of the family. Lastly, he relied upon the decision of this Court in **Lakhichand Punamchand Marwadi, deceased by his heirs – Sou Pramila Bai Punamchandji Ladha etc. and another Vs. thakursheth Lalasaheb Tokeram, AIR 1991 BOMBAY 207** to contend that Section 5(11)(a) is amended by Maharashtra Act No.18 of 1987 and the words “before the 1st day of February, 1973” were added. The effect of addition of the words is that such sub-tenant and other persons who have derived title under the tenant before 1.2.1973 are also covered by the expression 'tenant'. As Cosu was inducted in the suit premises much prior to 1.2.1973 she has acquired the status of tenant.

35. Mr. Chaturvedi relied upon the decision of **Kamal Mithari**

(supra). In that case, defendant Muktabai was found to be a mistress in exclusive keeping of one Chintamani Mithari. The suit premises belonged to one Suresh Vasudeo Dongarkar who sold the same to the plaintiff/respondent. Chintamani died in or about 1962. In 1965, the respondent/plaintiff instituted suit against Muktabai Nikam, mother of the appellants. The plaintiff came with the case that Muktabai was mistress of Chintamani and she was living in the premises with Chintamani. After the death of Chintamani, she continued to stay with her children. The plaintiff contended that on the death of Chintamani, the possession of Muktabai, the defendant, became wrongful and that she became a trespasser.

36. In paragraph-4, the learned Judge considered question as to whether in view of the fact that the defendant Muktabai was found to be a mistress in the exclusive keeping of the said Chintamani, it could be said that she was a member of his family for the purpose of Section 5(11)(c) of the Act. It was also noted that there was no dispute that at the time of death of Chintamani, the defendant Muktabai was staying with him along with their illegitimate children in the suit premises.

37. In paragraph-6, it was observed that the learned trial Judge pointed out that under Hindu Digest, which was in force in Kolhapur, the position is that even a mistress would be a member of a joint Hindu

family. In view thereof, it was held that the defendant Muktabai has been regarded as a member of the family of the deceased Chintamani residing with him at the time of his death. This decision does not assist the case of defendants No.5 to 7.

38. Insofar as the decision in **K.V. Muthu** (supra) is concerned, in that case application was filed by the respondent for eviction of the appellant *inter alia* on the ground of personal need and willful default. The respondent contended that her husband Thiruvannamalai Bakthar carried on the business of lime-shell together with the respondent, brought up one Arunachala Bakthar as their son and member of their family. Thiruvannamalai Bakthar died leaving behind a Will dated 30th November, 1970 in which it was specified that Arunachala Bakthar who was the son of the real brother was brought up by him and it was through him that he was carrying on the lime-shell business. The Will created a life estate in favour of the respondent in respect of the residential house and the remainder was vested in the children of Arunachala Bakthar. The Will further recited that the lime-shell business would be carried on by the respondent and Arunachala Bakthar but after the death of the respondent, Arunachala Bakthar alone would carry on the business. The premises in occupation of the appellant were said to be required for carrying on the lime-shell business for herself and for her

son Arunachala Bakthar.

39. In that case, the Apex Court was considering the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Section 2(6A) defined the expression 'member of his family' to mean his spouse, son, daughter, grand-child or dependent parent. The Apex Court referred to Section 3(57) of the General Clauses Act, which defines the expression "son" to mean in the case of any one whose personal law permits adoption, shall include an adopted son.

40. In paragraph-32, the Apex Court noted that Arunachala Bakthar was the brother's son of the respondent's husband who, therefore, was related to the appellant's husband by blood and was his heir not only under the old Mitakshara Law (as brother's son) but also under the Hindu Succession Act, 1956 as a class-II heir. Arunachala Bakthar was brought up by the appellant and her husband and was living all along with them.

41. In my opinion, this judgment also does not advance the case of the defendants.

42. Mr. Chaturvedi relied upon the decision in **Pramilabai Ladha** (supra) to contend that as Cosu was inducted in the suit premises prior to 1.2.1973, she has acquired the status of tenant. It is not possible to accept this submission. In the written statement filed by

Framroze in R.A.E. Suit No.1081/1967, he contended that Cosu was residing with Framroze with Framroze's permission. Thus her possession was permissive. I have already held that Cosu was working as servant of Framroze. In view thereof, reliance placed by Mr. Chaturvedi on **Pramilabai Ladha's** case (supra), does not advance the case of the defendant.

43. In the light of the aforesaid discussion, I do not find that the Appellate Court committed any error in passing the impugned order. Defendants No.5 to 7 are not in a position to demonstrate that the findings recorded by the Appellate Court perverse, being based upon no evidence or that they are contrary to the evidence on record. Defendants No.5 to 7 are also not in a position to demonstrate that no reasonable person would have arrived at the conclusions other than arrived by the Appellate Court. Merely because on the basis of evidence on record another view is possible, that itself is no ground for invocation of powers under Section 115 of C.P.C. No case is made out for invocation of powers under Section 115 of C.P.C. Hence, Civil Revision Application fails and the same is dismissed with no order as to costs.

44. Mr. Anekar submits that Cosu has deposited an amount of arrears and previous rent in the Small Causes Court as per the orders passed by this Court, respondent No.1 may be permitted to withdraw

that amount. In view of dismissal of C.R.A., respondent No.1 is permitted to withdraw the amount unconditionally. All parties, including the Small Causes Court to act upon the authenticated copy of this order.

45. At this stage, Mr. Chaturvedi seeks stay of this order for a period of ten weeks. He submits that the applicants are in possession and nobody else is in possessions. They have neither created third party interest nor parted with the possession. They will hereafter neither create third party interest nor part with the possession. He further states that the applicant and all adult family members using the suit premises are ready and willing to give usual undertakings. He states that applicant No.1 Candida and applicant No.3 Yolanda are residing in Mumbai. They will file undertaking in this Court within two weeks from today. As far as applicant No.2 Michael is concerned he is residing in Muscat and applicant No.4 Maria is residing in Australia. He assures that within five weeks from today, undertakings of applicants No. 2 and 4 will be filed. Learned Counsel for the respondent opposes said prayer.

46. Having regard to the fact that applicants desire to challenge this order before the Apex Court, in my opinion, ends of justice would be met by staying this order for a period of ten weeks from today subject to applicants No.1 & 3 filing undertakings within two weeks from today and applicants No.2 and 4 filing undertaking within five weeks from today, with advance copy to other side incorporating therein:

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party interest nor part with the possession of the suit premises;
- (iv) that they will pay the arrears of rent, if any, to the respondent within two weeks from today; and
- (v) that in case the applicant is unable to obtain suitable orders from the higher Court within ten weeks from today, they will deliver vacant and peaceful possession of the suit premises to the respondent.

47. In view thereof, notwithstanding dismissal of Civil Revision Application, the effect, operation and implementation of this order shall remain stayed for a period of ten weeks from today, subject to the applicant filing undertakings in the aforesaid terms with copy in advance to the other side. It is made clear that in case the applicants do not file undertaking in the above terms and/or commits breach of any of the clauses of the undertaking, the interim order shall stand vacated without further reference to the Court. List the application for reporting compliance after three weeks. Order accordingly.

(R. G. KETKAR, J.)