

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 589 OF 2016

- 1. ESOOF SHOEB CONTRACTOR,**
An adult, Age 37 years,
Occupation: Business
- 2. SHAMIM JABIR PAREKH,**
An Adult, Age 60 years,
Occupation: Business,
- 3. NISREEN ALIASGAR**
CONTRACTOR,
An Adult, Age 50 years,
Occupation: Housewife,

All of Mumbai Indian Inhabitants,
having their address at Maskati House,
Room No. 2, 1st Floor, 76,
Mohammedali Road, Mumbai 400 003 ... **APPLICANTS**

~ VERSUS ~

MRIDANGRAJ HIRALAL SUCHAK
ALIAS BARFIWALA,
An Adult of Mumbai Indian Inhabitant,
Occupation: Business, having his address at
Shop Nos. 1-3, 55/57/59, Coronation
Building, C Block, C.P. Tank, Mumbai 400
004 ... **RESPONDENT**

ALONG WITH
WRIT PETITION NO. 1977 OF 2013
IN
REVISION APPLICATION NO. 190 OF 2012
IN
RAN APPLICATION NO 66/SR/2009

- 1. ESOOF SHOEB CONTRACTOR,**
An adult, Age 37 years,
Occupation: Business
- 2. SHAMIM JABIR PAREKH,**
An Adult, Age 60 years,
Occupation: Business,
- 3. NISREEN ALIASGAR**
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APPEARANCES

FOR THE APPLICANTS **Mr GS Godbole**, *with Jui Kanade & S
Shah, i/b Kavita A Shah.*

FOR THE RESPONDENT **Mr Rohit Kapadia**, **Senior Advocate**,
*with Vineet Naik, Senior Advocate,
i/b Khan Javed Akhtar.*

CORAM : G.S.Patel, J.

DATED : 15th July 2019

ORAL JUDGMENT:

1. The applicants are the original plaintiffs. They are the landlords. They filed an eviction suit in the Court of Small Causes against the sole Defendant-tenant. The Trial Court dismissed the suit on 8th April 2015.¹ The landlords' appeal failed on 6th June 2016.² The landlords challenge that appellate order in this Civil Revision Application. A learned single Judge admitted the CRA on 23rd March 2017.

2. I have heard Mr Godbole for the Appellants (Original Plaintiffs), and Mr Kapadia for the Respondent (Original Defendant) at considerable length. I have considered carefully the record of the Civil Revision Application and the Writ Petition, the rival submissions and the authorities cited. For the reasons that

1 Record, *pp.* 363–396.

2 Record, *pp.* 397–420. Minor errors in the appellate order were corrected on 9th August 2016 (Record, *pp.* 411–412.)

follow I have held against the Plaintiffs and dismissed both the Civil Revision Application and the Writ Petition in this common judgment.

3. The Plaintiffs sought the Defendant's eviction from the suit premises on three principal grounds under the Rent Act: bona fide requirement or need; non-user of the rented premises; and non-payment of arrears of rent and permitted rent increases.

4. The building in question is known as Coronation Building. It is at Cawasji Patel Tank in Mumbai, an old and densely populated area. There are several such old buildings here, many of them tenanted. The present tenancy premises in question are on the ground floor of Coronation Building. These are commercial premises. They admeasure about 2,200 sq ft. The Plaintiffs were not the original owners of this building. The Defendant's father, Hiralal, was the original tenant. The three Plaintiffs say they purchased the building on 7th October 2003. I will return to a description of the three Plaintiffs and how they are associated with each other a little later. After Hiralal died, his tenancy devolved on the present Defendant, ("**Suchak**"). On 29th March 2006, the Plaintiffs through their Advocate sent a notice to Suchak saying he was in arrears of rent and permitted increases, claiming that he had not used the premises for six months without reasonable cause, and also claiming they required the premises for their own bona fide requirement. They terminated Suchak's tenancy.

5. The Plaintiffs filed an eviction Suit No. 1312 of 1979 (“**the first eviction Suit**”) against Suchak. In July 2007, this suit was dismissed in default. The Plaintiffs filed an application to have that order of dismissal set aside. This was allowed in 2008. Suchak filed a Revision Application. In April 2008, that Revision Application was allowed. Against that order, the Plaintiffs filed a Civil Revision Application to this Court. This was dismissed on 2nd July 2008 but with a clarification that, subject to limitation, the Plaintiffs were at liberty (the order says “have a right”) to file a fresh suit in accordance with law.³ A few months later, on 29th August 2008 the Plaintiffs filed the present eviction Suit — RAE & R Suit No. 1063/1796 of 2008 (“**the second eviction Suit**”). This sought Suchak’s eviction on the three grounds I have mentioned earlier.

6. While this suit was pending and after he filed his written statement in April 2009, Suchak filed RAN Application No. 66/SR of 2008 for fixation of the standard rent for the suit premises.⁴

7. In the meantime, the second eviction Suit proceeded. The Trial Court framed issues on 30th June 2011.⁵ A little over a year later it framed additional issues.⁶ At about the same time, in July 2012, the Trial Court rejected Suchak’s standard rent fixation application. He filed Revision Application No. 190 of 2012 and this was allowed on 25th October 2012 fixing the standard rent at Rs.

3 Record, *pp.* 16–17.

4 Record, *pp.* 33–44.

5 Record, *p.* 45.

6 Record, *p.* 46.

432/- per month. Against this, the Plaintiffs filed the present Civil Writ Petition No. 1977 of 2013.

8. While this standard rent fixation litigation was going on at different levels, the trial in the second eviction Suit began. The Plaintiffs' examined five witnesses:⁷ the 1st Plaintiff's father Shoeb Contractor as PW1;⁸ a photographer named Anis Hakim as PW2;⁹ a Municipal Corporation Ward Inspector as PW3, one Madhuri Milind Parab;¹⁰ one Kirti Mehta as PW4, a tenant of the premises directly above Suchak;¹¹ and an officer of Maharashtra Housing & Area Development Authority of MHADA as PW5.¹²

9. Three documents are of consequence. Exhibit "55" is a document of 22nd November 1968. It pre-dates the Plaintiffs' ownership of the premises.¹³ This agreement is between the original owner, one Laldas, and Suchak's father, Hiralal. It confirms that Hiralal had a lease of three shops Nos. 1, 2 and 3 in Coronation Building on the ground floor and it tells us that this lease deed was of 25th June 1943. That original lease deed is not part of the record before me. The 1968 document says that after the lease ended, Hiralal continued in occupation and possession. He asked Laldas for

7 List of witness, Record, *p.* 121.

8 Affidavit in lieu of examination-in-chief, *pp.* 47-61 and cross-examination, *pp.* 97-120.

9 Affidavit in lieu of examination-in-chief, *pp.* 122-124.

10 Affidavit in lieu of examination-in-chief, *pp.* 125-137.

11 Affidavit in lieu of examination-in-chief, *pp.* 128-132.

12 Affidavit in lieu of examination-in-chief, *pp.* 136-145, and cross-examination, *pp.* 278-292.

13 Record, *pp.* 183-187.

permission to do any other business. Laldas agreed and allowed him to do other business without damaging the property. Some clauses of the 1943 document stood substituted. One of these was clause 5(4) which allowed the lessee at his own cost to make alterations, additions, repairs and fittings in the premises for renovation. More importantly, by clause 6(4) Hiralal was allowed to give the rented premises out on leave and license basis periodically to persons of his choice for temporary occupation. In other respects, the 1943 original lease was confirmed.

10. The next document of immediate consequence is the one marked Exhibit 59 in evidence.¹⁴ This is an Indenture of 10th August 2007 between the Trustees of the Maganlal Himatram Barfiwala Charity Trust in favour of Suchak in regard to premises in another building in the Girgaon Division known as Barfiwala Building, from which Suchak was allowed to conduct a sweetmeat vending business. Exhibit “60” in evidence marked during Suchak’s cross-examination was a lease of 21st July 2008 between Suchak and the Union Bank of India in regard to these Barfiwala Trust building premises.

11. First, as to the plaint in the second eviction Suit. It begins with the assertion that Suchak is in arrears of rent from 1st December 1976. It claims that the present rent as on the date of the suit was Rs. 3,980/- per month. To the end, as we shall see, there is no explanation at all as to how this amount was arrived at. The Plaintiffs claimed to have calculated the full amount of arrears. Then

14 Record, *pp.* 293–334.

in paragraph 5 the Plaintiffs say their predecessors-in-title had demanded these arrears but Suchak continued to be in default. There is mention of a 1993 eviction Suit, but before it was disposed of the earlier owners sold the building to the present Plaintiffs. That suit itself was dismissed in default on 12th January 2006. Then there is a mention of the notice dated 29th March 2006 and institution of the first eviction Suit No. 1312/1979 of 2006, its dismissal and the ultimate order of 2nd July 2008 to which I have earlier referred. In paragraph 12 is the averment that the notice of 29th March 2006 that preceded the first eviction Suit provides a continuing cause of action even in the second eviction Suit for recovery on the ground of arrears of rent; hence, the application under Section 15(2) of the Maharashtra Rent Control Act 1999.

12. Paragraph 13 contains three distinct grounds which I will now reproduce:

“13. That the Plaintiffs state that they are still having subsisting cause of action regarding the grounds of non-user and bonafide requirement on which ground the earlier suit came to be filed and therefore the Plaintiffs filed the present suit against the Defendant on the following grounds.

(a) That the Defendant has failed and neglected to comply with the requisition of the notice dated 29th March 2006 to pay to the Plaintiffs the arrears of rent and permitted increases demanded therein within the statutory period as provided under Section 15(2) under the provisions of Maharashtra Rent Control Act 1999.

(b) That the Defendant is not using and/or occupying the suit premises for the reasonable

purpose for which the same were let out to the Defendant continuously for more than six months immediately preceding the date of institution of the present suit as the Defendant is keeping locked the suit premises. According to the Plaintiffs there is no electric consumption in the suit premises and the Plaintiffs therefore crave leave to refer to and rely upon the electricity bill as and when obtained and produced before this Hon'ble Court.

(c) That the Plaintiffs require the suit premises for their bonafide and reasonable use and occupation for the purpose of their business activities as the Plaintiffs have no other business premises being available to them for doing their business and the suit premises is suitable for their bonafide and reasonable use and occupation for the purpose of their business as the suit premises is conveniently located. The Plaintiffs state that greater hardship will be caused to them if eviction decree is refused on this ground and no hardship will be caused to the Defendant if the decree of eviction is passed in respect of the suit premises as the Defendant does not require the suit premises for his own use and occupation and which is located in a place like Mumbai and withholds the occupation by the Defendant keeping idle and locked the suit premises, the Defendant is demanding reason from the Plaintiffs which the Defendant is not entitled.”

13. These are said to be grounds under Section 15(2), 16(1)(c), 16(1)(g), 16(1)(n) and 16(2) of the Rent Act 1999. The relief sought is for eviction and for a decree of arrears of rent. The four sections

mentioned above from the Maharashtra Rent Control Act 1999 read thus (with Section 15 being set out fully):

“15. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and permitted increases.

(1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the, standard rent and permitted increases, if any, and observes and performs the other, conditions of the tenancy, in so far as they are consistent with the provisions of this Act.

(2) No suit for recovery of possession shall be instituted by a landlord against the tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of ninety days next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in section 106 of the Transfer of Property Act, 1882.

(3) No decree for eviction shall be passed by the court in any suit for recovery of possession on the ground of arrears of standard rent and permitted increases if, within a period of ninety days from the date of service of the summons of the suit, the tenant pays or tenders in court the standard rent and permitted increases then due together with simple interest on the amount of arrears at fifteen per cent per annum; and there after continues to pay or tenders in court regularly such standard rent and permitted increases till the suit is finally decided and also pays cost of the suit as directed by the court.

16. When landlord may recover possession.— (1)

Notwithstanding anything contained in this Act but subject to the provisions of section 25, a landlord shall be entitled to recover possession of any premises if the court is satisfied

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... ..

(c) that the tenant, his agent, servant, persons inducted by tenant or claiming under the tenant or, any person residing with the tenant has been guilty of conduct which is a nuisance or annoyance to the adjoining or neighbouring occupier, or has been convicted of using the premises or allowing the premises to be used for immoral or illegal purposes or that the tenant has in respect of the premises been convicted of an offence of contravention of any of the provisions of clause (a) of sub-section (1) of section 394 or of section 394A of the Mumbai Municipal Corporation Act, or of sub-section (1) or of section 376 or of section 376A of the Bombay Provincial Municipal Corporations Act, 1949, or of section 229 of the City of Nagpur Municipal Corporation Act, 1948; or of section 280 or of section 281 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965; or

... ..

(g) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust that the premises are required for occupation for the purposes of the trust;

... ..

(n) that the premises have not been used without reasonable cause for the purpose for which they were let for

a continuous period of six months immediately preceding the date of the suit.

16(2) No decree for eviction shall be passed on the ground specified in clause (g) of sub-section (1), if the court is satisfied that, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant, greater hardship would be caused by passing the decree than by refusing to pass it. Where the court is satisfied that no hardship would be caused either to the tenant or to the landlord by passing the decree in respect of a part of the premises, the court shall pass the decree in respect of such part only.

Explanation.— For the purposes of clause (g) of sub-section (1), the expression “landlord” shall not include a rent-farmer or rent-collector or estate-manager.“

14. Suchak’s written statement filed on 18th April 2009 denied the Plaintiffs’ claim that the rent was Rs. 3,980/- per month.¹⁵ He stated that the Coronation building commercial premises were first let out to his father at Rs. 90/- per month accompanied by a security deposit of six months’ rent. He denied being in default of rent, municipal taxes, repair cess and permitted increases from 1976 and said he was always ready and willing to pay the contractual rent. In paragraph 5 he said that on his application the standard rent had been fixed. He also said that following an order of 4th April 2009 he had deposited the amount in Court. He denied that there was any demand from the Plaintiffs’ predecessors-in-title and pointed out that in the 1993 eviction Suit by the previous owners, these three

15 Record, pp. 33–44.

present Plaintiffs sought impleadment as fellow plaintiffs but failed to secure a favourable order. In paragraph 8, he wholly denied receipt of the 29th March 2006 notice or any other demand notice.

15. We then come to paragraph 14, possibly most crucial part of this written statement. In this, Suchak denied that he had not been using or occupying the premises let out to him for more than six months immediately prior to the date of the institution of the suit. He denied the Plaintiffs' case of bona fide requirement. He said that he had been allowed by the earlier landlord to give out the suit premises on leave and license and referenced the document of 22nd November 1968. Given that much of the argument has turned on the evidence of non-user, I believe it is necessary to set out paragraph 14:

“14. With reference to para 13 of the plaint, this defendant denies that the plaintiffs are having any cause of action in their favour on the alleged grounds mentioned in this para or the alleged grounds are still subsisting. This defendant put the plaintiffs to strict proof of correctness of contents of this para. This defendant denies that this defendant has failed or neglected to comply with the requisition contained in the alleged notice dated 29.03.2006 as falsely alleged or otherwise. This defendant says that this defendant has not received alleged notice dated 29.03.2006 and hence question of complying with the said notice or failure to comply with the requisition contained in the said notice does not arise. This defendant denies that this defendant has not been using or occupying the suit premises for the purpose for which the same was let out to this defendant continuously for more than six months, immediately preceding the date of institution of the present

suit or that this defendant has been keeping the suit premises locked as falsely alleged or otherwise. This defendant denies that there is no electricity consumption in the suit premises as falsely alleged. This defendant craves leave and rely upon the electricity bills in respect of the consumption of electricity in the suit premises in support of the contention to show consumption of that the electricity from meter supplying the electricity to the suit premises. This defendant denies that the plaintiffs require the suit premises either reasonably or bonafide for the purpose of their business activities, as falsely alleged or otherwise. It is pertinent to note that no particulars of the alleged requirement of the plaintiffs are furnished. This defendant denies that question of hardship to this defendant does not arise. This defendant denies that this defendant do not require the suit premises as falsely alleged or otherwise. This defendant says that if the decree of eviction is passed against this defendant, great harm and injury shall be caused to this defendant and this defendant will put to tremendous hardship. This defendant says that predecessor-in-title of the plaintiffs had permitted this defendant to give the suit premises on the basis of leave and licence to any other person/s, firms, concerns, or companies whomsoever the defendant's father may choose as on that date or there after in future at any time. This permission was granted to the deceased tenant by registered document duly registered with the Sub-Registrar of Assurance. This defendant craves leave and rely upon the said registered document dated 22-11-1968 in support of his contention."

16. I have extracted this because one of the principal arguments from Mr Godbole is that there was no pleading in the written statement that the premises in question were not in habitable

condition and could not have been occupied; and, therefore, Suchak could not have led any evidence of this for want of a supporting pleading.

17. The Trial Court discussed the issues framed against the pleadings and the evidence. I will consider that order for the limited purpose of the three grounds canvassed in this CRA. On the question of arrears, in paragraph 11,¹⁶ the Trial Court noted that the Appellate Bench of the Small Causes Court on Suchak's application fixed the standard rent at Rs. 432/- per month and asked the Plaintiffs to adjust the amount of dues in future rent. The Trial Court considered the basis of the Plaintiffs' claim for rent at Rs. 3,980/- per month. It found that not only was there no evidence led of anybody with any personal knowledge, but not a single rent receipt had been produced to show any arrears. The municipal officer's evidence would not explain arrears from 1976. PW1, Shoeb agreed that he did not know the quantum of the basic rent fixed by the Appellate Bench or when the Municipal Corporation increased the rateable value of the building. However, he agreed that Suchak had never been informed of any such increase in the rateable value and that in the last two decades there has been no such increase. There was, therefore, nothing from the Plaintiffs to show the basis of the claim for arrears. There is some discussion about the service of 29th March 2006 notice but I will address that separately.

18. The Trial Court then turned to the question of non-user and accepted Suchak's evidence that for the relevant period of six

16 Record, *pp.* 369–370.

months prior to the institution of the second eviction Suit the premises in question were unusable because MHADA was repairing them. The time frame is important because this would put the relevant period as roughly between February or March 2008 and August 2008. The Trial Court noted that there was some electricity usage. It was not negligible.

19. It then proceeded to consider the 22nd November 1968 amendment to the original 1943 lease deed. The Trial Court rejected the Plaintiffs' arguments that the amendment was 'illegal'. It held the agreement to be binding on the Plaintiffs. The Trial Court also held that once there was a right to give the premises on leave and license, keeping the premises vacant for a period between two licenses would not attract the provisions of Section 16(1)(n) of the Rent Act. The agreement itself at Exhibit "55" allowed the tenant to license the premises to third parties.

20. On the question of the state of repair, the Trial Court noted the evidence of MHADA, also a matter to which I will briefly turn. Finally the Trial Court rejected the Plaintiffs' case on bona fide requirement.

21. In Appeal, the Appellate Bench framed these eight points for determination:¹⁷

Sr. No	POINTS	FINDINGS
1.	Is it established by plaintiffs that the	In the negative.

¹⁷ Record, pp. 403-404.

Sr. No	POINTS	FINDINGS
	defendant is wilful defaulter in payment of rent of the suit premises?	
2.	Whether the demand notice dtd. 29.03.2006 is proper and legal?	In the negative.
3.	Whether the demand notice dt. 29.03.2006 was properly served upon the defendant?	In the affirmative.
4.	Is it established by plaintiffs the suit premises is reasonably and bonafide required by them for their own use and occupation?	Not proved.
5.	To whom greater hardship would be caused, if the decree for possession is passed or refused to pass?	Does not survive.
6.	Is it established by the plaintiffs that the suit premises are not being used for a continuous period of six months immediately preceding the date of the suit?	In the negative.
7.	Whether the judgment of the learned Trial Judge needs to be interfered with?	In the negative
8.	What order?	As per the final order.

22. On the question of non-user, the Appellate Bench too, held for Suchak. But whether Suchak could ever have taken the plea of the premises being under repairs only at the evidence stage without an underlying pleading was a question on which the Appellate Bench found for the Plaintiffs. Yet, coming to the question of non-user, the Appeal Court held that the Plaintiffs had not been able to

prove that the premises were unused without reasonable cause for a continuous period of six months immediately prior to the date of institution of the suit. Similarly on the question of arrears of rent, the Appellate Bench held that the demand notice dated 29th March 2006 could hardly serve as a foundation for the present claim within the meaning of Section 15(2) of the Rent Act, given that the second eviction Suit was filed only in August or September 2008. The Appellate Court returned a finding that the Plaintiffs themselves were unsure as to the period from which the rent was allegedly due and there was no evidence whatsoever to support the claim for Rs. 3,980/- per month as rent.¹⁸ Finally on the question of bona fide requirement, the Appellate Bench held that the Plaintiffs had not led direct evidence. Not one of the three Plaintiffs had stepped into the witness box. The only evidence on their behalf of bona fide requirement was that of their Constituted Attorney, the 1st Plaintiff's father Shoeb, PW1. He claimed to have managing the property, collecting rent and negotiating transactions since 2002.

RE: BONA FIDE REQUIREMENT

23. On this aspect of the matter, I believe Mr Godbole's submissions to be unhelpful to his clients' cause. He draws my attention to the finding returned by the Appellate Bench to say that it was entirely in error in holding that one of the Plaintiffs — or perhaps even each of the Plaintiffs — ought to have led evidence themselves and not through their Constituted Attorney. In proving the claim for bona fide personal requirement, there is no absolute

18 Paragraph 44, Record, *p.* 405.

rule that *only* the Plaintiff can directly establish this. In *Rankubai & Ors v Hajharimal Dhokalchand Chandak & Ors*,¹⁹ when an appellate court held that bona fide requirement speaks to a state of mind, the Supreme Court held to the contrary, although that decision appears to have proceeded on a concession. In a later decision of a learned Single Judge of this Court in *Mangesh Govind Patane v Nagesh Vasant Kadam & Ors*,²⁰ a learned Single Judge (before whom too Mr Godbole cited *Rankubai*) drew support from a Supreme Court decision to say that the burden of proving that the claimants in that case had a share in the property made it obligatory on the appellants to give evidence themselves. The Court held, following the Supreme Court, that a Constituted Attorney's powers under Order III Rules 1 and 2 of the Code of Civil Procedure, 1908 ("CPC") did not extend to deposing in place and stead of the principal. He could only depose to those acts he has done pursuant to that Power of Attorney. This decision is actually against Mr Godbole. He, therefore, turns to the Division Bench decision in *Nathulal Gangabaks Khandelwal & Ors v Nandubai Bansidhar Khandelwal & Ors*.²¹ This was again in the context of a bona fide requirement. The Court noted the submission that the failure of the landlady to enter the witness box to establish this bona fide requirement was fatal. The Division Bench held that absent any specific provision as to how the bona fide requirement is to be proved, a plaintiff seeking eviction on this ground could adduce any evidence that satisfied the Court. If there were peculiar facts perhaps the personal presence of the plaintiff was necessary. But if the necessary factors could be

19 AIR 1999 SC 3089.

20 2005(4) Bom.C.R. 554.

21 1984 Mh.L.J. 253.

established by evidence other than that of the landlord (or, in that case, the landlady) by putting on record circumstances sufficient to indicate the bona fide requirement, then the law did not deem it fatal to the landlord's case if he failed to give personal evidence. What is required is something more than proof of a state of mind.

24. Mr Godbole extends this argument to say that the Appellate Court did not re-appreciate the evidence as it was required to do under Order 41 of the CPC. There was no discussion on hardship. If there was a family need — i.e. not a personal or individual need — any family member could depose. PW1 Shoeb, the 1st Plaintiff's father, knew of that need and, therefore, the presence of any of the Plaintiffs as witnesses was unnecessary. Therefore, he submits, the Appellate Bench's reliance on Sections 60 and 62 of the Evidence Act is misplaced. I will leave aside the fact that this argument overlooks the provisions of Order 18 of the CPC that mandates that a plaintiff must himself lead his own evidence first, because what is more pivotal in this case is not who led evidence but what that evidence actually was. I will accept, therefore, that it might be an overbroad proposition to say that if a landlord does not himself depose to his bona fide requirement his case must necessarily fail for that reason alone.

25. What it is that PW1 Shoeb said regarding the bona fide requirement of the Plaintiffs for these premises? We find this in paragraph 28 of his Affidavit in lieu of examination-in-chief.²² This

22 Record, *p.* 58.

is an almost verbatim reproduction of paragraph 13(c) of the plaint.²³

The relevant portion reads:

“28. I state that the Plaintiffs require the suit premises for their reasonable and bonafide use and occupation for the purpose of their business activities as the Plaintiffs have no other business premises being available to them for doing the business and the suit premises is suitable for their reasonable and bonafide use and occupation for their business as the suit premises is located in the vicinity which is convenient for the Plaintiffs for doing the business therein. I state that the Plaintiffs are not in a position to acquire the business premises with the area of 2200 sq ft as the prices are sky rocketing and they are not so financially strong to acquire the business premises.”

26. This tells us nothing at all. It is stated in the broadest generalities. What is of relevance in the evidentiary record comes from the cross-examination. This does Suchak no harm, but almost entirely destroys the Plaintiffs’ case. To begin with, we must note that the 2nd Plaintiff is an outsider to the 1st Plaintiff’s and Shoeb’s family. In cross-examination and in regard to the three Plaintiffs, Shoeb said that he himself graduated in 1966–1967 from Bombay University with a degree in commerce. The 1st Plaintiff is his younger son. Plaintiffs Nos. 2 and 3 are unrelated to them. The 1st Plaintiff studied only up to 11th standard and then abandoned his further studies at the age of 20 or 22. He began work and Shoeb used to pay him. The 2nd Plaintiff is a friend of Shoeb’s elder son, and comes from the same community. He has an electrical shop in Lohar Chawl but does no other business. The 3rd Plaintiff is a

23 Record, *p.* 28.

housewife.²⁴ Now this is interesting because the supporting pleading as we have seen in paragraph 13(c) makes no distinction between the bona fide requirements of the three Plaintiffs inter se. We are therefore asked to believe that *all three together* need these premises. But for what? We are not told. The cross-examination does not stop at this. Shoeb later said that the 3rd Plaintiff's husband had a manufacturing unit elsewhere with an office at Kokha Bazaar. He agreed that she did not live at the address given in the cause title of the suit — that was Shoeb's own office address. All three Plaintiffs were using that address as their office address only for the Coronation building. Shoeb himself lived elsewhere at Mohammed Ali Road. The 3rd Plaintiff's husband did not have any other business at all. She and her husband had two children, a son and a daughter. The latter was married and lived in America. Her son was studying. Shoeb then went on to say that his younger son, Plaintiff No. 1 and his elder son had a partnership business in construction. They had an ongoing project at Parel. They purchased that property five or six years earlier. He knew of a building at Nagdevi Street called Adam Manzil about three minutes' walking distance from the Plaintiffs' address in the cause title of the suit. Adam Manzil had been developed and was now a 34-storey building.

27. So far, this tells us that Plaintiffs Nos. 2 and 3 had no case at all for bona fide requirement. They were not co-Plaintiffs as partners of a firm but as co-sharers in their individual capacity of the Coronation Building property. This evidence leaves us only to consider the material adduced to support the claim on behalf of the 1st Plaintiff. In my view, even if that was established, it would not be

24 Record, *pp.* 108-109.

sufficient because the supporting pleading makes no distinction at all and says that the Plaintiffs, i.e. all three of them, had this bona fide requirement. It was that which the Plaintiffs had to prove and not some fractional part of it.

28. PW1 Shoeb in further cross-examination²⁵ agreed that the 1st Plaintiff was working with Rubberwala Developers with an office at Agripada. Adam Manzil was developed by Rubberwala, though at the relevant time the 1st Plaintiff was not a partner. He mentioned another building at Girgaon, some distance away and confirmed that his elder son too is connected with Rubberwala Developers. He went on to add that even the 1st Plaintiff did not live at the address given in the cause title (though described as his residential address) but at Mohammed Ali Road, two buildings away from Shoeb's own home.

29. The most that can be said about this evidence is that the Plaintiff No. 1 is or was largely nomadic between his residence and his places of work. He most certainly did not live in Coronation Building. He did not even not have his own office there. It may be true that two lower Courts' discussion on a Constituted Attorney giving evidence is less accurate than one might have hoped but that is all that can be said about it. There is nothing at all in the examination-in-chief to show any bona fide requirement, established business need or commercial requirement. There is not even minimal evidence.

25 Record, *p.* 113.

30. But that is not all. Shoeb went on to say in his evidence that the firm he mentioned in paragraph 2 of his Evidence Affidavit (two Contractor family firms) looks after about 200 properties in Mumbai and employ as many as six rent collectors. The suit property is one of these 200. Once PW1 gave this evidence, an explanation was essential. Were none of those other properties available? What precisely was the so-called need? It is one thing to say that a Constituted Attorney may depose to bona fide need. It is quite another to argue that his evidence must be accepted as sufficient even when it falls woefully short. What is material, following settled law, is not who gave evidence, but what that evidence showed. The lack of evidence cannot be papered over by arguing about the identity of the evidence-giver or witness.

31. It is for this reason that the decision of the learned Single Judge of this Court (AM Khanwilkar, J., as he then was) in *Madhukar Punjaram Sonawane & Anr v Gajanan Vithal Khandekar*²⁶ is of no assistance. Indeed that decision turned on an appreciation of the evidence that was led and on a reading of the plaint as a whole. There was evidence led to substantiate the claim for bona fide requirement including importantly that the 1st plaintiff, a cobbler, was being prevented by municipal authorities from plying his trade on the kerb or footpath, and this required him to find proper premises for his shoe-making business. He bought the house in question with that objective in mind. In the case at hand, we have none of this.

26 2009 Bom RC 61.

32. The modified lease deed is also of relevance. As Mr Kapadia says, generally, a case of bona fide requirement is incompatible with a contractual power to license and to sublet. This is because an essential component of this ground for eviction is 'comparative hardship'; and granting the right to sub-let eliminates any assessment at the landlord's instance of whether the tenant needs the premises himself. By allowing sub-letting, the landlord has accepted that the tenant may not use the premises himself, but may let others occupy the premises. This, too, is an aspect that the present Plaintiffs wholly fail to address.

33. Mr Kapadia is, therefore, correct in saying that bona fide requirement is a matter that must be both accurately and fully pleaded and proved. Generalized statements are insufficient. The law demands proof of a requirement. It speaks of a need. The Rent Act is a piece of welfare legislation to prevent tenants from being effected willy-nilly by landlords setting out to profiteer from rising property prices. One may debate the relative merits and demerits of the Rent Control legislation and rent fixation but this does not allow a Court to accept less proof than the law demands. The opinions expressed as to who may give evidence may be incorrect, but they are immaterial to the outcome. On the evidence before them, neither of the Courts below could possibly have held for the Plaintiffs on bona fide requirement. Had they done so, they would have been in most grievous error.

RE: CLAIM FOR NON-USER

34. This claim is placed clearly within the frame of Section 16(1)(n) of the Rent Act. To succeed in this claim a Plaintiff-landlord must show that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit.

35. Mr Godbole formulates his submission in a less than convincing manner when he says that this section, therefore, allow a Defendant to entirely deny non-user or plead a reasonable cause for non-user; the two are mutually incompatible. The Defendant cannot say both. The written statement only contains a blanket denial. In evidence, the Defendant put up the case that the building was dilapidated for use.

36. To begin with, we must note that the case of non-user, set out in paragraph 7 of the plaint, is that the first eviction Suit for which the 29th March 2006 notice was given was *inter alia* founded on this as well. That first eviction suit was dismissed but Mr Godbole would have it that this situation continued, i.e. of non-user, right to 2008. This is an awkward position for Mr Godbole because he is now required to accept that Suchak had the right to give the suit premises out to a third party on leave and licence. This is because his case now is that between 2006 and 2008 there was no licensee. Indeed he goes so far to say that after 1993 no third party ever came into these premises. But this is not something I will countenance in a Civil Revision Application for the simple reason that the entire argument before the Appellate Bench of the Small Causes Court was to the contrary. Paragraph 55 of the Appellate decision at pages 380–381 indicates that what the Plaintiffs argued in appeal was that

the 22nd November 1968 agreement was unlawful, contrary to the Rent Act and illegal, and, consequently Suchak had no authority to let out the property to anybody at all. It may be convenient, but it is little more than that, to now take a different line. But I do not see how it is possible within the confines of a Revision Application to upset a finding of a lower Court on a plea not taken before it or an argument not canvassed before it. This is relevant because Mr Godbole's present construct is not one purely of law but is predicated on pleadings and evidence.

37. Section 115 of the Code of Civil Procedure 1908 gives us the parameters of a Revision Application. It reads:

“Section 115.—Revision. (1) The High Court may call for the record of an case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears:

- a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

Provided that the High Court shall no, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—

- (a) the order, if it had been made in favour of the

party applying for revision, would have finally disposed of the suit or other proceedings, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation.—In this section, the expression “any case which has been decided” includes any order made, or any order deciding an issue in the course of a suit or other proceeding.”

38. There is no question of exercise of a wrongful jurisdiction or the failure to exercise jurisdiction, nor of the illegal exercise of the jurisdiction and, therefore, the argument is limited to seeing whether the first Appellate Court acted with “material irregularity”. But if the argument that Mr Godbole now makes before me was not before the Court whose order is assailed, then it is difficult to see how this submission can be accepted.

39. Mr Godbole says that paragraph 13²⁷ is specific to the second eviction Suit of 2008 and speaks of no electricity consumption. Suchak disputed this and relied on his electricity bills. The Courts below arrived at the conclusion that the Plaintiffs could not prove no electricity consumption, nor even, according to the Trial Court, illusory or scanty consumption. Again that is not a material

27 Record, *p.* 27 of the plaint.

irregularity. As I noted above, we are concerned with the period of about February or March 2008 to August or September of that year. There is a chart in evidence at page 84 which shows meter reading *inter alia* for this period,²⁸ the earliest date being the last entry. In fact it shows that between January and September 2008 the meter readings steadily went up. The case of the Defendant in evidence was that during this time MHADA was very much on the scene and was engaged in extensive repairs. To argue today that this increase was notional on account of unpaid electricity arrears is insufficient.

40. Mr Godbole draws attention to the cross-examination of Suchak,²⁹ to say that after the license Suchak granted to Bank of Baroda ended in 1993 he kept the premises vacant without use. When he was shown photographs,³⁰ his answers were, Mr Godbole says, evasive though they seem to show that the suit premises were shuttered. When considering this evidence, Mr Godbole submits, the Appellate Bench materially misdirected itself.

41. I do not believe Mr Godbole is correct in this at all. Indeed the reliance on the evidence of the photographer, Hakim, PW2 is misplaced. After all, those photographs were admittedly taken at least five years earlier in 2003. When Mr Godbole submits that the Appeal Court acted with material irregularity because in paragraph 24 of its decision³¹ it relied on electricity bills without appreciating that the increased bills were only because of unpaid arrears of power

28 The chart is to be read from the lowest entry on the right upward.

29 Record, *pp.* 281-282.

30 Record, *p.* 288.

31 Record, *p.* 407.

supply dues, I do not think that he successfully brings his case within the frame of Section 115 of the CPC. The trial record does not establish the Plaintiffs' contentions and it is no part of the duty of any Court at any level to conjecture or surmise let alone to strain the evidence to arrive at some convenient conclusion. Conjecture is no substitute for evidence.

42. Mr Godbole cites the decision of the Supreme Court in *Vora Rahimbhai Haji Hasanbhai Popat v Vora Sunderlal Manilal & Anr.*³² The facts of that case were indeed peculiar. The Supreme Court said that it was not the statutory intent to permit a tenant to keep premises locked for years together without using it absent reasonable cause. These trailing words are important.³³ It is Mr Godbole's submission that the requirement of law is not of total non-user but it is sufficient for a landlord to prove that the tenant has not used the premises for the purpose for which they were let for a continuous period of six months immediately prior to the date of the institution of the suit and that this non-user was without reasonable cause. But this decision will not assist Mr Godbole, because in the peculiar facts of the present case there is the uncontroverted evidence of the modified lease with Suchak's father and which contemplated periods of non-user between licenses. The purpose was commercial and the modified lease deed tells us not only that the tenant (Suchak or his father) could renovate or modify the chambers in their business but as part of that 'purpose' were also allowed to let out the premises.

³² (1984) 4 SCC 551.

³³ The decision was followed by a learned Single Judge of this Court in *Radheshyam G Garg v Safiyabai Irbahim Lightwala*, 1987 Mh LJ 725.

43. There is a fundamental flaw in Mr Godbole's construct, as Mr Kapadia quite correctly points out. He submits that Section 16(1)(n) has four requirements: (a) non-user; (b) non-user without reasonable cause; (c) use other than for the purpose for which the premises were let; and (d) all three of the foregoing for a continuous period of six months prior to the date of institution of the suit. He submits that the burden of satisfying all four requirements remains on a plaintiff seeking eviction, and never shifts. It is never enough for a plaintiff to show only some of these four and to leave the others to imagination or speculation. Implicit in these is the burden on the plaintiff to show there was no impediment during the statutorily-mandated period to the tenant using the premises for the purpose for which they were let. This is not, in his submission, one that I am inclined to accept, a question of a plaintiff being asked to prove the negative; and even if it were, what of it? Mr Kapadia asks. Where the statute demands such proof, there is no escaping that burden by invoking a vague proposition of being asked to prove 'the negative'. Indeed it is not the negative which is to be proved, strictly speaking. It is positive proof that the premises were at all times usable without hindrance or external impediment. In the evidentiary process, the onus may shift but not the burden of proof.

44. I believe this to be entirely accurate. First, at the general level, Mr Kapadia's four-fold dissection of the statutory provision is inescapable. It is also undoubtedly true that it is for a plaintiff to prove each ingredient. What the section tells us, clearly, is that mere non-user is not ground for eviction. Only a certain species of non-user is actionable and will result in a eviction decree and this must

be properly averred and proved. That special class of non-user must show each of the four ingredients.

45. Indeed these very Plaintiffs knew precisely this. This is the only reason for the Plaintiffs' introduction of PW5, Mahajan, an officer from MHADA and PW4, the upstairs tenant Kirti Mehta. Mahajan's name featured on the Plaintiffs' list of witnesses given on 6th July 2013.³⁴ Mahajan himself was not named but the cited witness was identified by designation as an Executive Engineer of MHADA. Importantly, this list came to be tendered after the examination-in-chief of PW1 was filed, and while the cross-examination was going on.³⁵ The evidence was sought to be led to show that all MHADA repairs were complete in 2006 and there was no impediment in the relevant period in 2008. But PW5, the MHADA witness, Mahajan, as Mr Kapadia puts it, 'forsook' the Plaintiffs. His evidence says clearly that repairs were going on from 2007 to 2009. And that is not all that his evidence says. PW5 Mahajan goes on to say that even prior to that, the building was repaired about three times. These were mostly structural repairs. The repair work included work on beams, ceilings, flooring, brick work and plasters to all floors. In cross-examination he agreed that if the ceiling of the ground floor premises was to be replaced then "the suit premises could not have been in use".³⁶ He went on to add that whenever a ceiling of premises was being replaced, props were used and placed on site. His own office record showed that some part of the upper floors of the building were repaired and plastered, toilet

34 Record, *p.* 121.

35 Record, *p.* 104, cross-examination recorded on 13th February 2013.

36 Record, *p.* 134.

blocks were totally demolished and repaired, and that debris and waste, as also the repair material, were kept on the ground floor.

46. There is then the evidence of PW1, Shoeb himself which indicates that between 2007 and 2010 there were repairs going on in the building.³⁷

47. As to the purpose for which the premises were let out PW1 Shoeb said that he had never read the 1968 document.³⁸

48. The other tenant, Kirti Mahajan, who occupied premises on the upper floor, also agreed that all the walls from the ground floor to the top floor as also all toilet blocks were repaired by MHADA. Iron girders were fixed to the ceilings.³⁹ He also noticed that there were props in the suit premises, i.e. Suchak's premises, and indeed there were props even in Kirti Mehta's own premises.⁴⁰

49. What is important here is that Shoeb's evidence was taken in November 2011, Kirti Mehta's in October 2013 and Mahajan's evidence in November 2013. All of them say that work was going on in 2008 and the evidence inevitably points to the building being entirely unusable in that time.

50. As to the question of MHADA evidence, Mr Godbole's submission that no amount of evidence can be led in support of a

37 Paragraph 6, *p.* 108.

38 Record, *p.* 118.

39 Paragraph 7, *p.* 131.

40 Paragraph 6, *p.* 131.

plea not taken is misdirected. The reason is plain. It was not the Defendant who led the evidence of MHADA. It was the Plaintiffs. They did so for one reason, and one reason only. They knew they had to prove that premises were usable during the relevant time. There is little purpose achieved in saying that Suchak should have summoned MHADA. He did not need to; the burden lay on the Plaintiffs to show that the premises were not unusable.

51. Mr Kapadia relies on a very old decision of the Court of Appeals in England in *Abrath v The North Eastern Railway Company*.⁴¹ This was an action in damages for malicious prosecution. One of the questions before that Court was precisely about the burden of proof. The Court said that a plaintiff may give prima facie evidence which, unless it is contradicted by the other side's evidence, had to lead the Court to find for the plaintiff. The defendant may lead evidence to contradict the plaintiff's evidence or by proving other facts and the Court must then weigh both sides. Where the defendant is able by additional facts to put the mind of the Court in a real state of doubt then the plaintiff must be held to have failed to discharge the burden of proof that fell on him. In that case, the Court said:

“Who had to make good their point as to the proposition whether the defendants had taken reasonable and proper care to inform themselves of the true state of the case? The defendants were not bound to make good anything. It was the plaintiff's duty to shew the absence of reasonable care; and it is, I think, because the Court below has been drawn, if I may use the expression, into thinking that what Cave, J.,

41 1883 Vol XI QBD 440.

was really leaving to the jury was an issue upon a subordinate fact, that I respectfully differ from their view”.

It was not necessary, therefore, for Suchak to prove that the premises were unusable or that he had reasonable cause for not using them. It was for the Plaintiffs to show that he had no reasonable cause and that the premises were always in a usable state. They knew this, and they knew it all along; hence they led the evidence of the MHADA witness Mahajan. Once his answers did not bolster their case, it was not open to them to say that Suchak could not rely on that evidence.

52. Mr Kapadia is also correct in his reliance on the decision of the Supreme Court in *Ram Sarup Gupta v Bishun Narain Inter College and others*⁴² for the proposition that it is the substance of the pleadings that should be considered. This is, after all, a case where the parties went to trial knowing exactly what each had to prove. It is too late in the day now, having led the evidence of MHADA, and having found themselves to be “forsaken” by it, for the Plaintiffs to say either that it was the Defendant who should have led MHADA’s evidence or that the Defendant cannot rely on that part of the evidentiary record. To the contrary, the relief that the Plaintiffs seek must be founded on his pleadings and it is the substance of those pleadings that must be considered.⁴³

53. Mr Godbole’s submission that no amount of evidence can be led in support of a plea not taken is, therefore, wholly misconceived,

42 AIR 1987 SC 1242.

43 *Bhagwati Prasad v Chandramauli*, AIR 1966 SC 735.

simply because the evidence that Suchak relied on was not evidence he led or sought to lead. He relied on the evidence led by the *Plaintiffs*, and he did so to establish that they had not discharged the burden of proof that lay on them. He was always at liberty to do that, and to demonstrate that the Plaintiffs had not established the habitability of the premises, and hence had not proved that he failed to occupy them without sufficient or reasonable cause.

RE: ARREARS OF RENT

54. On the question of arrears, Mr Kapadia's submission is that the notice was entirely improper. The present suit of 2008 is based on a stale notice of 29th March 2006 and could not possibly satisfy the requirements of non-payment of rent or of non-user. There was no 90-day period requirement satisfied, and the notice itself was defunct. Mr Godbole's own statement of reckoning does not further the Applicants' case. According to him, Suchak deposited Rs 31,326/- at the rate of Rs. 681/- per month from September 2008 to June 2012 in terms of the order fixing standard rent. On 26th October 2012, standard rent was determined at Rs. 432/- per month, and the difference was allowed to be adjusted. He claims that the excess deposit of Rs 11,454/- which Suchak was entitled to adjust, was 'exhausted' in 26.5 months. If computed from July 2012 8th April 2015 when the suit was dismissed, there is a default of Rs.2,802/-. Nothing was deposited pending the appeal. The difficulty with this line of reasoning is self-evident. This is not the Plaintiffs' case in suit at all; and they have never accepted the standard rent fixed. Their claim for arrears is on a completely unknown basis (what the Appellate Bench called 'the magic figure').

This was never proved, and the Plaintiffs' case for default was based only on this.

55. The authorities cited by Mr Godbole will not assist.⁴⁴ There are no authorities for such a scenario where the Plaintiffs assert one thing in the plaint and, in a civil revision, say something totally different. No ground for non-payment of rent can be brought where the plaintiff claiming arrears is himself unable to demonstrate the rent actually due. To this day, the Plaintiffs insist that they contest the decision fixing standard rent. If that be so, then there is quite simply no basis at all to say that rent remained unpaid as claimed in the plaint.

56. Further, on the question of arrears, the argument from Plaintiffs shows shifting stands. What is now being argued is that the excess deposit of Rs. 11,454/- noted above, was 'fully adjusted' by August 2014. Therefore, Suchak was in arrears; and it is Mr Godbole's submission that, on this ground of arrears since August 2014, an eviction decree simply cannot be resisted.

57. There are so many problems with this formulation that it is difficult to know where to begin. Perhaps a good starting point might be the companion Writ Petition No. 1977 of 2013 that challenges the order dated 25th October 2012 of the Revisional Court fixing the standard rent at Rs. 432/- inclusive of permitted increases and repair cess. That order clearly says that the amount of Rs. 11,454/-

⁴⁴ *Hari Baburaji v Rajendra Shankar Dawknor*, 2009 (6) Mh LJ 483; *Mranalini Shah v Bapalal Shah*, (1980) 4 SCC 251; *Bhaskar Shinde v Vasudha Kadam & Anr*, 2005 (3) Mh LJ 428.

was deposited by Suchak in excess (on this computation of standard rent) and had to be adjusted.⁴⁵

58. The challenge to this order is quickly despatched. It is based only on three documents, Exhibits 18, 19 and 20 at pages 48, 49 and 50. Now the document at Exhibit 18 is interesting. It is a rent receipt in Gujarati of 1943. It accords exactly with Suchak's standard rent fixation application,⁴⁶ for Suchak says that this was the year when his father, Hiralal, took the tenancy. Suchak puts the rent at that time at Rs. 90/- per month or Rs. 540/- for six months. This is exactly the figure we find in the 1943 rent receipt at Exhibit 18. In the impugned order, the Revisional Court used this document and these figures to compute the standard rent.

59. Mr Godbole would have it that the standard rent should have been much higher. He points to two later documents of 1985⁴⁷ and 1987.⁴⁸ These are also in the name of Suchak's father, but that is where all similarity ends. While Mr Godbole describes these as rent receipts, they seem to me to be nothing of the kind. The Plaintiffs' predecessor-landlord, one Dalal, who issued the documents did not accept them as rent receipts. In fact, he said these were receipts for 'compensation' and the amounts received were 'without prejudice' and as compensation for use and occupation.

45 I will not repeat the facts as I believe they are sufficiently set out while discussing the present Civil Revision Application.

46 Writ Petition, *pp.* 32–38.

47 Writ Petition, Exhibit 20, *p.* 50.

48 Writ Petition, Exhibit 19, *p.* 49.

60. Whether the Plaintiffs like it or not, they are bound by the actions of their predecessors. If Dalal, the erstwhile landlord, thought it appropriate to distance himself from describing these as rent receipts, then the Plaintiffs who took from him cannot have it better in regard to the documents Dalal issued. These documents cannot and could not have formed the basis of the Revisional Court's computation of standard rent. In contrast, the document of 1943 was not only unqualified but was undisputed. I do not see how Mr Godbole's reliance on the provisions of Section 5(10) and Section 11 of the Rent Act will in any way assist him.

61. There is, therefore, no substance to the challenge to the correctness of the fixation of the standard rent. The Writ Petition will have to be dismissed.

62. Realising this, Mr Godbole then submits that assuming the rent was correctly fixed at Rs. 432/- per month and an amount of Rs. 11,454/- was to be adjusted, this amount was fully adjusted and the adjustment amount exhausted by August 2014. The submission is that ever since then Suchak has been in default and in arrears and is liable to be evicted.

63. This is not the basis of the notice of demand in the first place. It is not the basis of the suit. It was never made the basis of the suit. The Trial Court Judgment is in fact dated 8th April 2015 and there is no reflection in it anywhere, nor in the documents in the Civil Revision Application, showing that the Plaintiffs ever pointed out to the Trial Court or the Appellate Bench after August 2014 that the

standard rent fixed had been fully adjusted. Mr Godbole complains that even the Appellate Court overlooked this. But what this overlooks is that the Plaintiffs' Advocates before the Appellate Bench themselves did not point this out to the Appellate Bench. In fact paragraph 45 at pages 415 and 416 of the Appellate Order is a finding returned that it was *never the case of the Plaintiffs that Suchak defaulted in making payment of the amount determined*, i.e. of the standard rent fixed. I accept Mr Godbole's proposition that the Appeal is a continuation of the suit, and that the tenant must continue depositing; and, too, that where a demand is made, the tenant must deposit the admitted amount. I see no reason to multiply authorities needlessly on law so well settled. But this takes him nowhere. I do not think it is the province of the court to embark on some expedition to find out what it is that the parties have or have not done, or that an appellant is at liberty to omit bringing to the notice of court after a point he believes is in his favour, and when he fails, to complain long and loud that the court did not excavate that nugget of information. Law is not archaeology. We take the facts as they are brought before us. We do not go around rooting for some factual truffle.

64. Mr Kapadia is at some pains to point out that there is no proof at all of the claim for arrears. The only thing that is known for certain is the amount of standard rent fixed on Suchak's application and nothing more.

65. Mr Godbole then turns to some Civil Application that Suchak filed in this very Writ Petition asking for permission to deposit rent. According to Mr Godbole this constitutes an admission. That might

indeed be so, but perhaps quite not in the way Mr Godbole imagines because it could equally turn to the conclusion (again adopting Mr Godbole's advocated method of returning a finding on nothing at all) that Suchak was willing to pay the rent or deposited but was being opposed by the Plaintiffs. Indeed this is precisely what Mr Kapadia says: when an attempt was made to deposit, this was opposed on the basis that the standard rent fixed by the Court was yet pending in dispute in a higher court, and, therefore, the deposit ought not to be allowed. I am unable to see how the Plaintiffs can oppose such an application and simultaneously complain of non-deposit.

66. I also do not see how, only at the fag end of all of this, the Plaintiffs can turn around and say that they will accept the correctness of the standard rent fixed, something that they opposed steadily throughout. It is impermissible, in my view, to raise in this court for the first time a ground never taken before, rely on a factual statement to which the Plaintiffs drew no Court's attention, one that is not a ground in the Writ Petition, but of which there is no evidence at all.

FINAL ORDER

67. There is no substance to the Civil Revision Application and the Writ Petition. Both are dismissed. There will be no order as to costs.

(G.S. PATEL, J.)