

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2748 OF 2004**

M/s. Impex (India) Limited	}	...Petitioner
V/s.		
1. Mr. Dinashah Jal Daruwala	}	
1-A. Talera Hoteliers Pvt. Ltd.	}	
1-B. Mr. Kersasp S.T.Kothavala	}	
2. Mrs. Zerene Siasp Kothawala	}	
2-A. Talera Hoteliers Pvt. Ltd.	}	
2-B. Mr. Zerasp Siasp Kothavala	}	
2-C. Shahanaz R. Irani nee Kothavala	}	...Respondents

**NEETA
SHAILESH
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**WITH
CIVIL APPLICATION NO. 2644 OF 2016**

Talera Hoteliers Private Limited	}	...Applicant
		(Orig.Resp. No.1-A and 2-A)

IN THE MATTER BETWEEN :

Impex (India) Limited	}	..Petitioner
V/s.		
Mr. Dinshah Jal Daruwala and Ors.	}	...Respondents

WITH
CIVIL APPLICATION NO. 1847 OF 2014

M/s. Impex (India) Limited } ...Applicant

V/s.

Dinashah Jal Daruwala (since deceased)
and others } ...Respondents

Mr. Virag Tulzapurkar, Senior Advocate a/w Mr. Chirag Kamdar, Mr. Suraj Juneja and Ms. Aishwarya Ghule i/b M/s. Wadia Ghandy & Co. for the Petitioner.

Mr. Darius Khambata, Senior Advocate a/w Mr. Amit Mehta, Mr. Rahul Soman, Mr. Karan Rukhana, Mr. Hitesh Mishra and Mr. Vinayak Shukla, for the Respondent Nos.1A and 2A.

CORAM : SANDEEP V. MARNE, J.

Reserved On : 12 MARCH 2024.

Pronounced On : 4 APRIL 2024.

JUDGMENT:

A. THE CHALLENGE

1) Petitioner-tenant has filed this petition challenging the Judgment and Decree dated 23 January 2004 passed in Civil Appeal No. 624 of 2001, by which the District Court has dismissed its Appeal and has confirmed the Decree dated 13 June 2001 passed by the Small Causes Judge, Pune in Civil Suit No. 490 of 1998. The Small Causes Court had allowed the suit

filed by original Plaintiffs and directed Petitioner to handover vacant possession of the suit premises to them.

B. FACTS

2) Facts of the case, as pleaded in the Plaint, are as follows. Original Plaintiffs owned a plot of land bearing Municipal House No. 108 in Koregaon Park, Pune on which, a bungalow known as 'Gardenia' is constructed, in addition to few other structures like outhouses and a garage. By Agreement of Lease dated 1 November 1961, Petitioner, who is the original Defendant in the Suit, was inducted as a lessee in respect of the bungalow 'Gardenia' together with garage and two rooms in the outhouse and the garden appurtenant to the bungalow together with right to use common servant toilet. The property leased out to Petitioner/ Defendant is described as the 'suit premises' in the Plaint. There is open strip of land behind the bungalow-Gardenia admeasuring about 10,000 sq.ft. Additionally there are two more rooms in the outhouse. Plaintiffs did not grant lease in respect of the said vacant land behind the bungalow or in respect of the remaining two rooms in the outhouses, which apparently remained in their possession.

3) Plaintiffs averred in the Plaint that the open strip of land situated at the rear side of the bungalow was fenced with barbed wire fencing in such a manner that the suit premises in Defendant's possession and the open strip of land with two rooms in the outhouses in possession of the Plaintiffs were separated. That Plaintiffs did not have any access from the side of the Bungalow to the open strip of land, but there was an independent entrance gate from northern side of the plot to access the open strip of the land and the two rooms in the outhouses in possession

of the Plaintiffs. It is Plaintiffs' case that such gate on the northern side was being used for approaching the open strip of the land and the two rooms in the outhouses in possession and occupation of the Plaintiffs. It is Plaintiffs' case that the said two rooms in the outhouses were occupied by Plaintiffs' *Mali*-cum-caretaker named Shipru, who was employed by the Plaintiffs and used to reside in the said two rooms alongwith his family. At the time of filing of the Suit, Plaintiff No.1 was stationed at Mumbai, whereas Plaintiff No.2 was stationed at Masinigudi, Tamil Nadu.

4) Plaintiffs pleaded that Defendant sent letter dated 17 September 1991 to mother of Plaintiff No.1 requesting her for permission to construct a temporary removable wall to prevent trespass into the suit property. The said letter was also addressed to Plaintiff No.2, who informed Defendant by letter dated 26 September 1991 expressing her no objection for construction of such temporary removable wall at Defendant's cost only for the purpose of preventing unauthorised trespass. Plaintiff No.2 however clarified that approval should also be received from her aunt i.e. mother of Plaintiff No.1. Accordingly, Defendant addressed letter dated 30 October 1991 to the mother of Plaintiff No.1 with a copy addressed to Plaintiff No.2 enclosing a copy of the site plan indicating the location of the proposed wall. First Plaintiff's mother and Plaintiff No.2 were requested to endorse their signatures on the site plan for the purpose of submission to the Pune Municipal Corporation for approval. That first Plaintiff's mother did not give her consent for construction of temporary removable wall. That the Defendant illegally and unauthorizedly and without the written consent of the Plaintiffs, constructed a permanent wall in stone and cement on the open land on the eastern side of the plot in such a manner that only a narrow passage was left for accessing the two rooms in the outhouses

and this is how Defendant illegally and unauthorizedly encroached upon the open land, which was not leased to Defendant. That Defendant illegally and unauthorizedly closed the independent entrance gate to the open land on the northern side. That they constructed two more walls on the southern side of the plot between the garage and the boundary wall. Plaintiffs further alleged that Defendant removed old barbed wire fencing behind the bungalow, which originally separated the portions occupied by the Defendant from the portion occupied by the Plaintiffs and thereby encroached upon the open land of the Plaintiffs admeasuring 10,000 sq.ft. Plaintiffs accordingly accused Defendant of committing encroachment on land, which was not leased out to it. Plaintiffs therefore contended that the Defendant was liable to be evicted under the provisions of Section 13(1)(a) (read with Section 108 (o) of the Transfer of Property Act, 1882) and 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (**for short 'the Bombay Rent Act'**).

5) Plaintiffs further pleaded that the Defendant illegally and unauthorisedly took possession of the common toilet block which was being used by servants of Plaintiffs and Defendant. Since Plaintiffs' servants were blocked from use of the toilet block, they were forced to construct a open privy for their own use. Defendant complained to the Municipal Corporation and to the Plaintiffs about foul smell emitting from such temporary toilet erected by Plaintiffs' servants, which resulted in issuance of notice by the Municipal Corporation to the Plaintiffs. Plaintiffs accused Defendant of being solely responsible for construction of the temporary toilet by servants and alleged that such behaviour of Defendant became a source of continuous nuisance to the Plaintiffs and to the neighbouring occupiers. Plaintiffs therefore contended that Defendant became liable to be evicted under Section 13(1)(c) of the Bombay Rent Act. Plaintiffs also claimed that they became entitled for

recovery of possession of the premises under section 13 (1) (k) of the Bombay Rent Act on the ground of non-user.

6) Plaintiffs served Notice on the Defendant on 20 September 1997 calling it upon to demolish the compound wall. Defendant sent a reply stating that detailed reply would be sent later. However, no reply was received by the Plaintiffs. Plaintiffs accordingly proceeded to file Civil Suit No. 490 of 1998 in the Small Causes Court, Pune seeking a direction against the Defendant for handing over vacant and peaceful possession of the premises described in para-1 of the plaint. Plaintiffs also sought a prayer for payment of mense profits to be determined under the provisions of Order XX Rule 12(c) of the Code of Civil Procedure from the date of the suit till receipt of possession.

7) Defendant appeared in the suit and filed written statement contesting the suit. It denied that the bungalow was separated from vacant land by barbed wire fencing and claimed that the entire premises being 108, Koregaon Park, Pune which is also known as 'Gardenia House' was let out to the Defendant right from the beginning, including the area in occupation of *Shirpu Mali*, who was Plaintiffs' employee. Defendant claimed that its registered office is at Mumbai and the suit premises are resting place to its directors and officers. Defendant claimed in the written statement that *mali*, who was earlier in Plaintiffs' employment, resigned in the year 1971. That despite not being in employment of the Plaintiffs, the said *mali* refused to vacate the room in his occupation because of the support of the predecessor in title of the Plaintiff. That he was prevented from using the lavatory in the year 1971 and Defendant engaged another *mali* to look after the entire garden of the Plot including the area of open land behind the main bungalow. That in the year 1988, the children of *mali* constructed illegal toilet, which led

to filing of complaint by Defendant and the same was accordingly demolished by the Municipal Corporation. Thereafter, children of *Shirpu Mali* constructed a toilet over the manhole of sewerage and they also started claiming that the open land was gifted to them by Plaintiff, who denied such gift. That the Plaintiffs had offered to sell the entire premises to Defendant. That children of *mali* started constantly trespassing and causing nuisance and therefore Defendant requested the Plaintiffs to permit construction of temporary removable wall in order to curb the nuisance created by *mali's* children. That Plaintiffs had consented for construction of the wall. That Plaintiff No.2 was mainly looking after the premises and hence gave no objection for and on behalf of both the Plaintiffs. Though Plaintiffs were requested to endorse the plan for construction of wall, it later transpired that permission of Municipal Corporation was not required for construction of temporary removable wall and therefore the Defendant did not insist upon signatures of Plaintiffs on such plans. Defendant claimed that construction of wall was for the purpose of protection of the property from trespassers and for mutual benefit of both the parties.

8) Defendant further pleaded in its written statement that after construction of temporary removable wall, number of meetings took place between the heirs of Hilla Daruwala and Defendant as well as with Plaintiff No.2 and her husband. That Plaintiffs and their predecessor in title visited the premises and were always aware of construction of the wall and that they did not take objection. That the wall is temporary in nature which is capable of being removed without causing any damage to the suit property. That Plaintiffs were negotiating to sell the property to the Defendant. That the passage was left for access to the trespassers as per the desire of the Plaintiffs who did not want to displease the trespassers. Defendant further pleaded that Plaintiffs had agreed to sell

the property to third party, who was a well known builder/promoter in Pune and that the theory of trespass, nuisance, non-user was invented with a view to aid the said builder. Defendant also pleaded that Plaintiffs had sold the suit property to one Shri. Suresh Talera for which purpose permission under Section 37(1) of the Income Tax Act was obtained. It was pleaded that Plaintiffs had already registered the agreement of conveyance and that therefore the suit was not tenable. The Defendant also set up an alternate plea that in the event of the open space not being treated as a part of tenanted premises, the alleged trespass made by the Defendant outside tenanted premises did not entitle the Plaintiffs to file a suit seeking decree for eviction and that the Small Causes Court did not have jurisdiction to consider the alleged act of encroachment in respect of the property outside tenanted premises. Defendant accordingly pleaded for dismissal of Plaintiffs' Suit.

9) Plaintiffs examined Mr. Siaspt Kothavala, husband of Plaintiff No.2 as their witness. Plaintiffs also examined Mr. Vasant Shripati Bhilare as Witness No.2. Plaintiffs also examined Jardosh Marasban Bharucha, an engineer and partner in Barucha & Co., who had inspected the wall and prepared a report. Plaintiffs also examined Dattatraya Maruti Sabale, Registrar of Companies, Pune for proving the documents produced by him. Defendant, on the other hand, examined its director Mr. Suhas Baburao Godse and Mr. Anand Krishnaji Kulkarni, a Structural Engineer in relation of construction of the wall. The Defendant also examined Mohammad Rashid Ramzan Madari, a photographer, Kiran Padmakar Vaishnav a Draughtsman and Rudrasingh Dalipsingh Nagarkoti-watchman deputed at the suit property.

10) After considering the pleadings and evidence on record, the Judge, IInd Small Causes Court, Pune decreed Plaintiffs' suit by Judgment

and Decree dated 13 June 2001 holding that the Defendant encroached upon the land admeasuring 10,000 sq.ft in Plaintiffs' possession. That the wall constructed by Defendant was of permanent nature and that the same is unauthorized. The Small Causes Court further held that the behaviour of the Defendant was a source of nuisance and annoyance to the neighbours. The Small Causes Court further held that it had jurisdiction to decide the suit. The Court however rejected the ground of non-user of the suit property six months prior to the institution of the suit. Though the Small Causes Court held that Defendant was liable to be evicted from the entire property, the ultimate decree is for eviction only from the suit property.

11) Aggrieved by the Decree dated 13 June 2001 passed by the Small Causes Court, Defendant filed Civil Appeal No. 626 of 2001 before the District Court, Pune. Plaintiff filed cross-objections so far as rejection of prayer for eviction on the ground of non-user is concerned. The District Court, Pune, by its judgment and Decree dated 23 January 2004, dismissed Defendant's Appeal. The cross-objections filed by Plaintiffs are also dismissed. The Defendant was directed to handover possession of the suit premises to the Plaintiff within two months.

12) Aggrieved by the decree passed by the District Court on 23 January 2004, the Petitioner has filed the present petition.

C. EVENTS DURING PENDENCY OF PETITION

13) This Court admitted the petition by order dated 27 April 2004 and stayed the execution of the Decree of Small Causes Court as confirmed by the District Court during the pendency of the petition, subject to the condition of Petitioner not creating third party interest in

the suit property and not carrying on any further construction during the pendency of the petition. An application was filed to bring on record the factum of assignment of the property in dispute to M/s. Talera Hoteliers Private Limited as well as for bringing on record, legal heirs of both the Respondents who expired on 3 July 2005 and 8 November 2007 respectively. By order dated 25 January 2010, this Court allowed the applications and M/s. Talera Hoteliers Private Limited is impleaded as Respondent No.1-A and 2-A as assignee of both Respondents. Additionally, heirs of Respondents Nos.1 and 2 are also brought on record.

14) Petitioner No.1 filed a Civil Application No. 2952 of 2010 for a direction to Petitioner to pay Rs.16,21,300/- as interim compensation. The Application was however was withdrawn with liberty to file separate application to seek modification of Order dated 27 April 2004. Accordingly Civil Application No. 890 of 2012 was filed by Respondent No.1-A seeking modification of the Order dated 27 April 2004. The application was however withdrawn as the petition itself was to be finally heard. Since the petition was not taken up for hearing, Respondent No. 1-A filed Civil Application No. 1092 of 2013 seeking direction against the Petitioner for payment of compensation of Rs.16,21,300/-. By Order dated 25 February 2015, this Court directed the Petitioner to pay sum of Rs.6,00,000/- per month as compensation from May 2004 till disposal of the Writ Petition. Petitioner challenged the Order dated 25 February 2015 before the Supreme Court by filing Special Leave Petition (Civil) No. 9856 of 2015, which came to be dismissed by Order dated 10 April 2015. Petitioner accordingly deposited the amount of Rs. 8,70,00,000/- in the Registry of this Court in respect of the period from May 2004 to July 2016. Respondent No.1 filed Civil Application No. 2644 of 2016 seeking permission to withdraw the said deposited amount

of Rs.8,70,00,000/-. In the meantime, Petitioner filed Civil Application No. 1847 of 2014 for amendment of the petition to incorporate pleadings relating to assignment of the property by the Original Plaintiffs to Respondent No. 1-A and to incorporate grounds in connection with such assignment. Respondent No. 1-A filed Affidavit-in-reply to the said application and brought on record copy of Plaint filed by the Petitioner in Small Causes Court at Pune in Civil Suit No. 300 of 2015, by which Petitioner sought a declaration that the eviction decree challenged in the present petition was without jurisdiction, non-est, null and void and not executable against Petitioner. Both, Civil Application No. 2644 of 2016 for withdrawal of the amount as well as Civil Application No. 1847 of 2014 for amendment were directed be heard alongwith the main petition.

15) It appears that order passed by this Court on 9 November 2023 expressing inability to fix a date for final hearing was challenged before the Apex Court in Special Leave Petition (Civil) No. 27500 of 2023, in which the Apex Court passed order dated 15 December 2023 requesting this Court to take up the Writ Petition and to dispose of expeditiously preferably within three months.

D. SUBMISSIONS

16) Extensive submissions are canvassed by the learned counsel appearing for rival parties. Both the sides have also tendered written submissions. The gist of the submissions advanced before me is recorded as follows.

D.1 SUBMISSIONS ON BEHALF OF PETITIONER

17) Mr. Tulzapurkar, the learned senior advocate appearing for Petitioner would submit that though the suit is filed seeking eviction

under the provisions of Section 13(1)(a), (b), (c), and (k) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act, 1882, the ground with relation to non-user of the tenanted premises under Section 13(1)(k) has been rejected by Small Causes Court as well as the Appellate Court. That therefore the finding with regard to the ground of non-user has attained finality. So far as the ground of nuisance or annoyance under Section 13(1)(c) is concerned, Mr. Tulzapurkar would submit the pleaded case of the Plaintiffs was that nuisance was created on account of construction of toilet by servants of Plaintiffs to the Marker family, who are neighbouring occupiers. That this pleaded case of the Plaintiffs has been rejected by the Appellate Court and therefore the pleaded case of nuisance is disproved. However, the Appellate Court upheld the ground of nuisance on non-pleaded case of cause of nuisance to Plaintiffs on account of construction of wall in the open land. He would further submit that both the Courts have concurrently held that the decree of eviction is warranted under Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act as well as under Section 13(1)(b) of the Bombay Rent Act. He would therefore submit that Petitioner will have to deal with the grounds of:

- (i) Commission of act contrary to the provisions of Clause (o) of Section 108 of the Transfer of Property Act;
- (ii) Erection of permanent structure without landlord's consent in writing; and
- (iii) Nuisance or annoyance to the landlord himself on account of construction of wall in open land not forming part of tenanted premises.

18) Mr. Tulzapurkar has broadly premised his submission on the aspects of (i) validity of decree of eviction from tenanted premises on account of construction of wall in non-tenanted premise; (ii) lack of Small

Causes Court's jurisdiction to deal with allegation of trespass on non-tenanted premises; (iii) finding of the Appellate Court about cause of nuisance or annoyance to landlords on account of Defendant causing construction of wall on non-tenanted premises when Plaintiffs are not covered by the expression 'neighbouring or adjoining occupiers' and (iv) Plaintiffs' conduct of suppression disentitling them to seek decree of eviction.

19) Mr. Tulzapurkar would submit that both the courts below have ordered eviction under Section 13(1)(a) and (b) of the Bombay Rent Act from the "tenanted premises" for acts allegedly done by the Petitioner on non-tenanted premises. That Plaintiffs' pleaded case in the plaint is that open land was not part of the tenanted premises, in relation to which decree of eviction was sought in the suit. That suit was filed for recovery of possession of premises described in para-1 of the plaint and admittedly the open land was not included in the description of premises in para-1 of the plaint. That both the Courts below have rendered concurrent finding of fact that the open land did not constitute part of the premises, for recovery of which the suit was filed. That Section 13(1)(a) of the Bombay Rent Act applies only in respect of the acts done which are relatable to tenanted premises. That the Small Causes Court did not have jurisdiction to order eviction from tenanted preemies when admittedly none of the acts in the context of allegation of violation of Section 13(1)(a) and (b) of the Bombay Rent Act are admittedly performed by Defendant in the tenanted premises.

20) Mr. Tulzapurkar would further submit that Plaintiffs' contention about construction of wall on non-tenanted premises blocking Plaintiffs' access to the tenanted premises is contrary to the specific case pleaded in the plaint, where the Plaintiff pleaded that premises in possession of the

Plaintiffs did not have any access from the side of the main bungalow. That the contention is also contrary to the site map produced with the plaint. That none of the Courts have recorded a finding that construction of the wall hindered access to the tenanted premises or that the same was destructive or permanently injurious to any part of tenanted premises.

21) Mr. Tulzapurkar would further submit that neither Provincial Small Causes Courts Act, 1887 nor Bombay Rent Act conferred jurisdiction on the Small Causes Court to decide any issue concerning the open land. That under Section 28 of the Bombay Rent Act, the jurisdiction of the Small Causes Court is restricted to try a suit between a landlord and tenant relating to recovery of rent or possession of the 'premises' and to decide application made under the Act and to deal with any claim or question arising out of this Act or any of its provisions. It is trite law that existence of one of the statutory grounds mentioned in Sections 12 and 13 is a *sine qua non* for exercise of jurisdiction by the Rent Court. In support of his contention, he would rely upon the judgment of the Apex Court in ***Nagindas Ramdas V.s. Dalpatram Ichharam alias Brijram and others***¹. That therefore any acts which are not committed *qua* the premises in respect of which landlord-tenant relationship does not exist, the Small Causes Court would not have jurisdiction to deal with a Suit seeking eviction of a tenant. That both the Courts have held Petitioner guilty of breach of Sections 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act and Section 13(1)(b) of the Bombay Rent Act only on account of construction of wall on the open land which are not tenanted premises.

22) Mr. Tulzapurkar would further submit that the matters of encroachment and trespass are purely within Civil Court's jurisdiction

¹ (1974) 1 SCC 242

over which Small Causes Court cannot exercise jurisdiction. Relying on judgment of the Apex Court in *Raizada Topandas and another Vs. Gorakhram Gokalchand*², he would submit that Rent Court does not have jurisdiction to decide the question between rightful owner and a trespasser. He would also rely upon judgment of this Court in *Purshottam Vishindas Raheja Vs. Life Insurance Corporation of India and others*³.

23) Mr. Tulzapurkar would further submit that the Small Causes Court has erroneously assumed jurisdiction to decide the issue of trespass and encroachment under a specious ground of impermissibility to drive Plaintiffs to two Courts. That Plaintiffs' convenience cannot confer jurisdiction on Small Causes Court, which it inherently lacks. Mr. Tulzapurkar would further submit that it is a settled law that the Courts of exclusive jurisdiction cannot pass orders in excess of jurisdiction conferred on them. That once it was held that the open land is not tenanted premises, the Small Causes Court could not have exercised jurisdiction to decide the issue of trespass, encroachment or unauthorized construction made on non-tenanted premises. In support of his contention, he would rely upon on the following judgments :

- i. *Jagmittar Sain Bhagat and others Vs. Director, Health Services, Haryana and others*⁴
- ii. *Natraj Studios (P) Ltd. Vs. Navrang Studios and another*⁵
- iii. *Harshad Chiman Lal Modi Vs. DLF Universal Ltd. and another*⁶
- iv. *Shrisht Dhawan (Smt) Vs. M/s Shaw Brothers*⁷
- v. *Kanwar Singh Saini Vs. High Court of Delhi*⁸

² (1964) 3 SCR 214
³ AIR 1982 Bom 523
⁴ (2013) 10 SCC 136
⁵ (1981) 1 SCC 523
⁶ (2005) 7 SCC 791.
⁷ (1992) 1 SCC 534.
⁸ (2012) 4 SCC 307.

- vi. ***Chief Engineer, Hydel Project and others Vs. Ravinder Nath and others***⁹
- vii. ***Arun Kumar and others Vs. Union of India and others***¹⁰

24) Mr. Tulzapurkar would seek to distinguish various decisions relied on behalf of Respondents in support of the contention that jurisdiction of Rent Control is wide enough to cover eviction from tenanted premises due to act of trespass committed on non-tenanted premises. He would submit that each of the cases relied on behalf of the Respondents is distinguishable and that none of the judgments lay down an absolute proposition of law that acts done by a tenant in respect of non-tenanted premises can always be a ground for ordering his eviction from tenanted premises.

25) Mr. Tulzapurkar would rely upon judgment of Calcutta High Court in ***Rameshwar Roy V/s. Baidhendra Kinkar Patra***¹¹ and ***Ajoy Sharma V/s. Dwijendra Nath Dhar, since deceased, rep. by Mrs. Chitralekha Pyne and others***¹², which, according to him, conclusively hold that exclusive jurisdiction conferred upon a Rent Act cannot extend to disputes that arise due to relationship of landlord and tenant and in relation to premises that do not comprise part of tenanted premises. Mr. Tulzapurkar has placed reliance on judgment of Single Judge of Calcutta High Court in ***Santosh Kumar Mazumdar V/s. Smt. Rekha Bose***¹³ to counter Mr. Khambata's plea of *Rameshwar Roy* being per incuriam. He would submit that it is settled law that for seeking decree of eviction under Section 13(1)(b) of the Bombay Rent Act, permanent construction must be made within the tenanted premises and in support he would

⁹ (2008) 2 SCC 350.

¹⁰ (2007) 1 SCC 732.

¹¹ 1986 SCC OnLine Cal 161.

¹² 2023 SCC OnLine Cal 2309.

¹³ 2001 SCC Online Cal 404

rely upon judgment of this Court in *Rukhaminibai Ramvilas Lehoti V/s. M/s. Muralldhar Govindram and another*¹⁴ and of the Apex Court in *Janaklali S. Gupta (deceased) through LRs V/s. Namdeo Mahadeo (Deceased) by LRs. and another*.¹⁵

26) Mr. Tulzapurkar would further submit that the findings of breach of Section 13(1)(c) of the Bombay Rent Act is *ex-facie* perverse as the same is based on a non-pleaded case and in absence of any evidence to show specific ingredients contemplated under Section 13(1)(c). That the case of the Plaintiffs under Section 13(1)(c) as pleaded in the plaint was expressly rejected by the Appellate Court. That Plaintiffs pleaded in the Plaint that nuisance was caused by *Mali/Mali's* legal heirs to the neighbours i.e. Marker family on account of construction of illegal temporary toilet. That this pleaded case of the Plaintiffs was rejected by the Appellate Court holding that such acts did not cause any nuisance to the neighbours i.e. Marker family. However, according to Mr. Tulzapurkar, the Appellate Court exceeded its jurisdiction in recording a finding of nuisance on the basis of altogether new and non-pleaded factor of construction of wall by the Plaintiffs on the open land. That in absence of pleading of cause of nuisance by the act of construction of wall, the Appellate Court could not have ordered eviction under Section 13(1) (c) of the Bombay Rent Act. He would submit that it is trite law that the Court is bound to decide issues only on the basis of case as pleaded by the parties and that no amount of evidence can substitute the requirement for pleadings. In support of his contention, he would rely upon judgment of this Court in *Hotel Rosalia Pvt. Ltd. V/s. M/s Metro Hotels & Ors.*¹⁶

¹⁴ 1983 SCC OnLine Bom 14.

¹⁵ (2002) 2 SCC 176.

¹⁶ 2001(2) Mh.L.J. 881.

27) Mr. Tulzapurkar would further submit that the act of construction of wall was never characterized as being nuisance in the plaint by the Plaintiffs. Furthermore, there was no specific pleading of nuisance or annoyance affecting the mental health of the Plaintiffs which is now sought to be raised in oral arguments. That both the Courts have not recorded a finding that construction of wall disturbed the mental peace of mind of the Plaintiffs. That pleadings in para-6 of the plaint were for the purpose of demonstrating that construction of wall resulted in construction of illegal toilet, which became source of nuisance/annoyance. That Respondents cannot be permitted to raise the issue of disturbance of mental peace of mind in oral submissions, which is neither pleaded nor decided by both the Courts. That even if it is assumed that the pleading with regard to the disturbance of mental peace exists in the plaint, no evidence was placed on record to prove the same. Additionally, both the Plaintiffs resided at the relevant time in Mumbai and Tamil Nadu and there was no reason for disturbance of their mental peace on account of construction of wall, which was constructed with the consent of atleast one of the Plaintiffs and for mutual benefit of both the parties so as to protect the open land from being encroached.

28) Mr. Tulzapurkar would further submit that Section 13(1)(c) has no application to the present case as the Plaintiffs failed to produce any evidence nor there is a finding by either of the Courts that nuisance or annoyance was caused to 'adjoining or neighbouring occupiers.' According to Mr. Tulzapurkar, nuisance or annoyance under Section 13(1)(c) has to be caused only to the adjoining or neighbouring occupiers. In support of his contention, he would rely upon judgments of Gujarat High Court in *P.D. Trivedi V/s. Chandaben M. Shah*¹⁷ as followed by this Court in *Suklal s/o Kalu Thorat (D) Thr. L.Rs. V/s. Ramkrushna s/o*

¹⁷

(1999) 1 GLR 355.

Hari Wani (D) Thr. L.Rs.¹⁸ He would submit that the Plaintiffs are not adjoining or neighbouring occupiers within the meaning of Section 13(1)(c) as they were permanently residing outside Pune at the time of filing of the suit. Considering the object and purpose of Section 13(1)(c), the expression “adjoining or neighbouring occupiers” must be the person in actual physical occupation of the premises adjoining or neighbouring to the tenanted premises. That in ***Sorab Jamshed Irani and Ors. V/s. Hiraji C. Mistry and others***¹⁹ this Court held that nuisance does not mean nuisance in a technical sense and that the words “to adjoining occupiers” govern “nuisance” as well as “annoyance.” That therefore no matter how wide meaning is given to the term “nuisance or annoyance”, eviction under Section 13(1)(c) can be ordered only when the same is caused to adjoining or neighbouring occupiers. That both the Courts have misdirected themselves by applying Section 13(1)(c) to the present case even without considering or rendering any finding as to whether Plaintiffs are “adjoining or neighbouring occupiers” of the tenanted premises.

29) Mr. Tulzapurkar would submit that various Courts have repeatedly held that the term “occupier” refers to persons in actual physical occupation. That in ***Nilesh Laxmichand and another Vs. Shantaben Purshottam Kakad***²⁰, the Apex Court has held that the burden to prove specific requirements of Section 13(1)(c) is solely on the Plaintiffs and the evidence of persons actually residing as neighbours and experiencing nuisance is crucial and indispensable. That the Apex Court has held that persons who are merely visiting are not competent to lead evidence of such nuisance. That in ***P.D. Trivedi***, eviction was refused even after finding that landlord’s premises in the same building were

¹⁸ 2018(2) Mh.L.J. 80.

¹⁹ MANU/MH/0611/1981

²⁰ 2019 6 SCC 542.

trespassed only on the ground that the landlord was not found to be adjoining or neighbouring occupier. That *P.D. Trivedi's* case has been followed by this Court in *Suklal*. That in *Kashinath Kaul V/s. Shamdas Tirathdas Vaswani*²¹ it is held that nuisance or annoyance must be caused to the other occupiers in the very building. That when a case of nuisance is extended beyond the very same building to adjoining buildings, it must be a very strong case. That this Court in *Kashinath Shankar Gambhire V/s. Sudha Gopal Patil and others*²², held that an action to constitute as nuisance or annoyance under Section 13(1)(c), the action must be gross and unusual in character, frequently persistent and such that the same makes it impossible for the affected person to lead normal life. That this Court in *Hotel Rosalia Pvt Ltd* held that nuisance or annoyance must be to adjoining or neighbouring occupiers. That this Court in *Fulchand s/o Laxman Bangade V/s. Anil s/o Janbajji Pund*²³ reversed the order of eviction when it found that the landlord was not adjoining or neighbouring occupier though he was physically occupying the premises only four shops away from the tenanted premises. That this Court, Bench at Nagpur in *M/s New Laxmi Cycle Company V/s. Jagdishchandra S/o Amrutlal Vakharia*²⁴ reiterated the requirement for evidence and proof to establish nuisance or annoyance to the adjoining or neighbouring occupier as a ground for eviction.

30) Mr. Tulzapurkar would further submit that the expression “adjoining or neighbouring occupiers” must be given its plain and ordinary meaning. That it is well settled law that the words of the Statute when are plain and unambiguous, must be given clear, plain and ordinary meaning. In support of his contention, he would rely upon

²¹ MANU/MH/1013/1990.

²² AIR 2000 Bom 493.

²³ 2010 SCC OnLine Bom 1123.

²⁴ Writ Petition No. 1778 OF 2005 decided on 06 & 07 November 2009.

judgment of the Apex Court in *Nathi Devi V/s. Radha Devi Gupta*²⁵ and of this Court in *Narendra H. Khurana and others V/s. Commissioner of Police and another*.²⁶ That in *Rajendra K. Bhutta V/s. Maharashtra Housing and Area Development Authority and another*²⁷, the Apex Court has held that the expression “occupied by” would mean and would be synonymous with being in actual physical possession or being actually used by. That the Full Bench judgment of Punjab and Haryana High Court in *Ude Bhan and others V/s. Kapoor Chand and others*²⁸ relied upon by Mr. Khambata followed by the Apex Court in *Rajendra K. Bhutta* unanimously agreed that the expression “occupied by” must necessarily mean actual physical occupation. That in *Krishanlal Ishwarlal Desai V/s. Bai Vijkor and others*²⁹, the Apex Court has considered the distinction between the words ‘possession’ and ‘occupation’ and held that occupation cannot be understood to mean possession. That various Sections of the Bombay Rent Act clearly uses the words ‘occupation’ and ‘possession’ in different contexts. Mr. Tulzapurkar would further submit that the contention of the Respondents that the word “occupier” must be contextually interpreted and that the words “nuisance” and “annoyance” must be given wide meaning is misconceived. He would submit that one of the objective of the Bombay Rent Act being to protect the interest of tenants, the words used in Section 13(1)(c) must be given plain and natural meaning. He would submit that the judgment of this Court in *Gulam Husain Mirza* relied upon by the Respondents has been considered in *Awabai Muncharji Cama V/s. M. N. Kaka*³⁰ and where it is clarified that the same cannot be applied in every case of nuisance or annoyance. That in

²⁵ (2005) 2 SCC 271.

²⁶ 2004(2) Mh.L.J. 72.

²⁷ (2020) 13 SCC 208.

²⁸ ILR (1966) 2 P&H 400.

²⁹ (1964) 1 SCR 553.

³⁰ 1985 SCC OnLine Bom 82.

*Haryana Financial Corporation and another V/s. Jagdamba Oil Mills and another*³¹ it is held that Courts should not place reliance on decisions without discussing as to how factual situation fits with the fact situation of the decision on which reliance is sought to be placed.

31) Mr. Tulzapurkar would submit that the so called constructive possession of the Plaintiffs would not convert them into neighbouring or adjoining occupiers within the meaning of Section 13(1)(c) of the Bombay Rent Act. That Plaintiffs never pleaded in the plaint that they were in constructive occupation as their servants were occupying the open land. That there is no finding of fact recorded by either of the Courts that their servants were occupying the open land. He would therefore submit that the finding recorded by the Appellate Court about cause of nuisance or annoyance is perverse and based on no evidence and that this Court is therefore entitled to exercise jurisdiction under Article 227 of the Constitution of India in respect of such perverse findings.

32) Mr. Tulzapurkar would further submit that the original Plaintiffs indulged in suppression of facts as they entered into conveyance on 19 March 2001 with M/s. Talera Hoteliers Private Limited and did not bring the said fact to the notice of the Small Causes Court. That they committed fraud on the Court by doing so and the Small Causes Court ought not to have granted any relief in their favour. That Petitioner has brought on record facts suppressed by Respondents by filing Civil Application No. 1847 of 2014. That since the order of eviction is outcome of fraud and suppression, the Orders passed by the Small Causes Court and Appellate Court deserves to be set aside. That the very institution of the suit was with malafide intention of somehow seeking eviction of Defendants with a view to enable the purchaser to receive tenant free property purchased

³¹ (2002) 3 SCC 496.

by it. That though construction of wall was fully in the knowledge of the original Plaintiffs, the suit was filed only after Plaintiff started negotiating sale of the entire plot in favour of Mr. Suresh Talera. That though the Deed of Conveyance was executed in favour of M/s. Talera Hoteliers Pvt. Ltd during pendency of the suit, the said fact was suppressed from the Small Causes Court. That the suit was thus prosecuted by parties who no longer remained landlords. That the suit is therefore liable to be dismissed on account of suppression of facts. In support of his contention, Mr. Tulzapurkar would rely upon judgments in *S.P. Changalvaraya Naidu V/s. Jagannath and others*³², *Bhaskar Laxman Jadhav and others V/s. Karamveer Kakasaheb Wagh Education Society and others*³³ and *Kishore Samrite V/s. State of Uttar Pradesh and others*³⁴.

D.2 SUBMISSIONS ON BEHALF OF RESPONDENTS

33) Mr. Khambata, the learned senior advocate would appear on behalf of the Respondents and support the Decree passed by the Small Causes Court and the Appellate Court. He would submit that the concurrent findings of fact cannot be interfered by this Court under Article 227 of the Constitution of India. Mr. Khambata would submit that both the Courts have concurrently found that the open land did not form part of the leased land. That both the Courts below have recorded findings of facts of nuisance and annoyance. It has also held that original Plaintiffs occupied and possessed the open land. That these findings of facts recorded by the Small Causes Court and Appellate Court after considering evidence on record cannot be disturbed in exercise of writ

³² (1994) 1 SCC 1.

³³ (2013) 11 SCC 531.

³⁴ (2013) 2 SCC 398

jurisdiction under Article 227 of the Constitution of India. In support of the contention, he has relied upon judgments in :

- i. *Union Bank of India V/s. Chandrakant Shah*³⁵
- ii. *Gulshera Khanam V/s. Aftab Ahmad*³⁶
- iii. *Pralhad V/s. Smt. Munnabhai*³⁷ and
- iv. *Hotel Rosalia Pvt.Ltd* (supra).

34) Mr. Khambata would further submit that the Defendant did not plead that Plaintiffs were not occupiers of open land within the meaning of Section 13(1)(c) of the Bombay Rent Act. After recording of findings of fact that original Plaintiffs did not have right to possess nor did they possess the open land, Petitioner is seeking to argue an alternate case that even though its possession on open land is not proved, original Plaintiffs did not prove that they actually and physically occupied the open land. According to Mr. Khambata, this alternative plea ought to have pleaded in the written statement and in absence of any pleading, Petitioners cannot now be permitted to raise the plea of original Plaintiffs' non-occupation of the open land. Without prejudice, he would submit that the original Plaintiffs specifically pleaded in the Plaint that they were in possession and occupation of the open land. He would take me through the relevant pleadings in the plaint and the written statement as well as the evidence on record.

35) Without prejudice to his contention that concurrent finding of fact of nuisance cannot be disturbed, Mr. Khambata would contend that the said findings on Section 13(1)(c) are consistent with the settled law that the words 'nuisance' and 'annoyance' are of wide amplitude. That the words are not defined under the Bombay Rent Act, but must be

³⁵ (1994) 6 SCC 271.

³⁶ (2016) 9 SCC 414.

³⁷ 2011(4) Mh.L.J. 259.

construed to mean a conduct which seeks to interfere with person's use and enjoyment of immovable property or some right in respect thereof. In support of his contention, he would rely upon judgment of the Apex Court in *Rafat Ali V/s. Sugni Bai and others*³⁸. Relying upon judgement of this Court in *Gulam Husain Mirza V/s. Laxmidas Premji and another*³⁹, Mr. Khambata would submit that every action causing material interference with the ordinary comfort of existence would constitute 'nuisance' whereas everything that irritates or is offensive and has tendency to invoke reasonable objection and leads to unpleasurable feeling would be 'annoyance'. He would also rely upon judgment of this Court in *Smt. Manoramabai Vishwanath Limaye and others V/s. Smt. Pramila Vijay Phansalkar*⁴⁰. That the words 'nuisance' and 'annoyance' are of such wide amplitude that they not only cover the act which causes physical discomfort or displeasure but also disturbs someone else's peace of mind. That the test to determine whether an act or conduct constitutes nuisance or annoyance is to examine whether it disturbs normal peace, enjoyment or reasonable peace of mind of adjoining or neighbouring occupiers.

36) Mr. Khambata would submit that the expression 'neighbouring or adjoining occupiers' would also include a landlord who occupies the neighbouring premises. He would submit that in the present case, the original Plaintiffs occupied the open land. He would submit that the word 'occupier' must be given contextual meaning. That interpretation of statutory provisions must take colour from its context and collocation as held in *Union of India V/s. Sheo Shambhu Giri*⁴¹ and *Rupak Kumar V/s. State of Bihar and another*⁴². That therefore the word 'occupier' must be determined in the context of the provisions of the

³⁸ (1999) 1 SCC 133.

³⁹ 1983 SCC OnLine Bom 301.

⁴⁰ 2011(4) AIR BomR 699.

⁴¹ (2014) 12 SCC 692.

⁴² (2014) 4 SCC 277.

Bombay Rent Act. That therefore reliance of Petitioner on *Nathi Devi* (supra) about giving a plain meaning to the words used in the statute is misplaced. That in *Land Acquisition Officer V/s. Karigowda*⁴³ it is held that in every case it is not possible to decide whether certain words are plain or ambiguous, unless they are studied in their context and construed accordingly. He would also rely upon *Central Bank of India V/s. State of Kerala*⁴⁴, *Reserve Bank of India V/s. Pearless General Finance and Investment Co. Ltd.*⁴⁵ and *Sidhharth Viyas and another V/s. Ravi Nath Misra and others*⁴⁶. According to Mr. Khambata, interpretation of the word 'occupier' must take colour from the definitions of the term 'nuisance' and 'annoyance' to include landlord, who has right to regain possession of his premises in case of nuisance or annoyance. That language of Rent Control provisions should not be stretched or strained to make it impossible or extremely difficult to get decree of eviction. In support of this contention, he would rely upon judgment in *Joginder Pal V/s. Naval Kishore Behal*⁴⁷ which cites *Mst. Bega Begum and others V/s. Abdul Ahad Khan and others*⁴⁸. Mr. Khambata would also rely upon judgment of the Apex Court in *Cantonment Board, Ambala Cantonment V/s. Dipak Prakash (Minor) and others*⁴⁹ wherein, according to Mr. Khambata, the word occupation appearing in the provisions of the Cantonment Act, 1924 is interpreted to mean that a person entitled to occupy, permits some other person to be in the building, he is in actual occupation through such person. That in *Sant Ram V/s. Union of India and others*⁵⁰, the Delhi High Court following *Cantonment Board, Ambala Cantonment* judgment, interpreted the word 'occupation' in the context

⁴³ (2010) 5 SCC 708.

⁴⁴ (2009) 4 SCC 94.

⁴⁵ (1987) 1 SCC 424.

⁴⁶ (2015) 2 SCC 701.

⁴⁷ (2002) 5 SCC 397.

⁴⁸ (1979) 1 SCC 273.

⁴⁹ (1963) 1 SCR 196.

⁵⁰ AIR 1976 DELHI 90.

of the provisions of Displaced Person (Compensation and Rehabilitation) Rules, 1955 to hold that it was the tenants and not sub-tenants who were recognized occupants of the building though they were not actually present in the building.

37) Mr. Khambata would then submit that the plain meaning of the word 'occupation' would also include 'constructive occupation'. He would press this argument in support of contention that Plaintiffs' servants are found to be in occupation of two rooms in the outhouses which are admittedly in possession of the Original Plaintiffs and not let out to the Defendant. That therefore in any case, Plaintiffs proved their constructive occupation over the open land and the two rooms in the outhouses through their servants. In support he would rely upon *Emperor V/s. Taylor*⁵¹, *B. N. Gamadia and others V/s. Emperor*⁵², *Emperor V/s. Dhanji Govindjee Bhate*⁵³ and *Ude Bhan and others V/s. Kapoor Chand*⁵⁴. Relying on the judgment of this Court in *Achut Pandurang Kulkarni V/s. Sadashiv Ganesh Phulambrikar*⁵⁵, Mr. Khambata would submit that a person can be held to be in occupation if there is inward intent to return coupled with outward intent of installing a caretaker or representative. Relying upon the judgment in *Dr. Mohammed Ibrahim V/s. Ahmed Khan and another*⁵⁶, he would contend that the test is to determine whether the premises are ready for habitation whenever the person pleases. Mr. Khambata would submit that the judgment in *Rajendra K. Bhutta* relied upon by Petitioners has no application to the present case, as the word 'occupied' is interpreted therein in the context of Insolvency and Bankruptcy Code.

⁵¹ 1907 SCC OnLine Bom 81.

⁵² 1925 SCC OnLine Bom 266.

⁵³ 1912 SCC OnLine Bom 16.

⁵⁴ ILR (1966) 2 P&H 400.

⁵⁵ 1972 SCC OnLine Bom 77.

⁵⁶ 63 L.W. 410.

38) Mr. Khambata would further submit that defendant is found to be guilty of nuisance and annoyance by construction of permanent wall, by encroaching on open land and by blocking original Plaintiffs' access from Gate 'K' used for accessing the open land. That in ***D.V. Panse (Major) and another V/s. Laxminarayan Khar and another***⁵⁷, this Court, following *Gulam Husain Mirza's* judgment, has held that any act obstructing landlord's possession constitutes nuisance.

39) Mr. Khambata would further submit that construction of wall in open land not leased out in favour of Defendant amounts to nuisance as the same resulted in blocking of Plaintiffs' access to the open land through Gate 'K'. That Section 108 (o) of the Transfer of Property Act uses the word 'commit any other act which is destructive or permanently injurious thereto'. That the blocking of access to Plaintiffs property undisputedly caused injury/damage to the tenanted premises as well. He would draw distinction between the provisions of Clauses-(p) and (o) of Section 108 of the Transfer of Property Act. According to Mr. Khambata the words 'on the property' is used in clause-(p) whereas Clause-(o) refers to commission of any act which is destructive or permanently injurious 'to the tenanted premises'. Therefore commission of act destructive or permanently injurious need not be 'on' tenanted premises under Section 108 (o) of the Transfer of Property Act. In support, he has relied upon the judgment of Calcutta High Court in ***Kalpna Dhar & Ors. V/s. Subodh Kumar Paul & Ors.***⁵⁸

40) So far as the issue of jurisdiction is concerned, Mr. Khambata would submit that Defendant's action of committing trespass is in its capacity as the tenant. It is not an independent act and the act of trespass

⁵⁷ 2002(4) Mh.L.J. 873.

⁵⁸ MANU/WB/0782./1978

is indeed committed believing that the open land was also tenanted premises. Referring to Section 28 of the Bombay Rent Act, he would submit that the Small Causes Court has jurisdiction to try any suit or proceeding between a landlord and a tenant 'to decide any application made under the Act or to deal with any claim or question arising out of the Act or any of its provisions'. He would submit that all that needs to be proved is that there is a dispute between the landlord and tenant. That since the cause of nuisance need not emanate from tenanted premises, such nuisance caused even outside the tenanted premises can be a reason for ordering eviction from tenanted premises. That thus Small Causes Court under Section 28 of the Bombay Rent Act has jurisdiction to deal with conduct of the tenant outside the tenanted premises. He would submit that in any case, the decree is granted in Plaintiffs' favour only in respect of the tenanted premises and the Small Causes Court undoubtedly had jurisdiction to order eviction from the tenanted premises. He would rely upon the judgments in *Importers and Manufacturers Limited V/s. Pheroze Framroze Taraporewala and others*⁵⁹, *Jamnadas Dharamdas V/s. Dr. J. Joseph Ferreira and another*⁶⁰, *Patel Chandulal Trikamlal and others V/s. Rabri Prabhat Harji and another*⁶¹, *Bhanwar Singh and Ors. V/s. Smt. Meva Devi & Anr.*⁶² and *Laxmibai Ganpati Bhingare V/s. Shivaji Dnyani Salunkhe*⁶³.

41) Mr. Khambata would contest Petitioner's claim about suppression by contending that Petitioners were always aware about sale of the property to M/s. Talera Hoteliers Private Limited. That written statement filed by Petitioner before the Small Causes Court contains a reference about sale of the property to Shri. Suresh Talera. That in

⁵⁹ (1952) 2 SCC 728.

⁶⁰ (1980) 3 SCC 569.

⁶¹ 1995 Supp (4) SCC 167.

⁶² 2006 SCC OnLine Raj 527.

⁶³ 2018(4) Mh.L.J. 190.

evidence also it has come on record that the Defendant had acquired knowledge about sale of the property to M/s. Talera Hoteliers Private Limited. That in any case since the conveyance is registered in the office of the Sub-Registrar of Assurances, Defendant is deemed to have notice of execution of the same. That therefore there is no suppression and therefore various decisions relied upon by the Petitioner has no application to the present case. That in any case, the original Plaintiffs had right to continue the proceedings and it is assignee's option to have itself impleaded as held in *Sharadamma V/s. Mohammed Pyrejan (Dead) Through LRs and another*⁶⁴ and *Ratnamala Mohan Aklujkar V/s. Sushila Nirmalkumar Rungta, Thr. LRs. Nirajkumar Nirmalkumar Rungta and others*⁶⁵.

42) On the above broad submissions, Mr. Khambata would seek dismissal of the petition.

E. POINTS FOR CONSIDERATION

43) Though extensive submissions are canvassed by the learned counsel appearing for the parties on every minute aspect of the case, the broad points that arise for consideration are as under :

- (i) Whether wall constructed by Defendant is completely outside tenanted premises?
- (ii) By construction of wall in open land behind tenanted premises, whether Defendant committed act destructive or injurious to the tenanted premises for its eviction under Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act?

⁶⁴ (2016) 1 SCC 730.

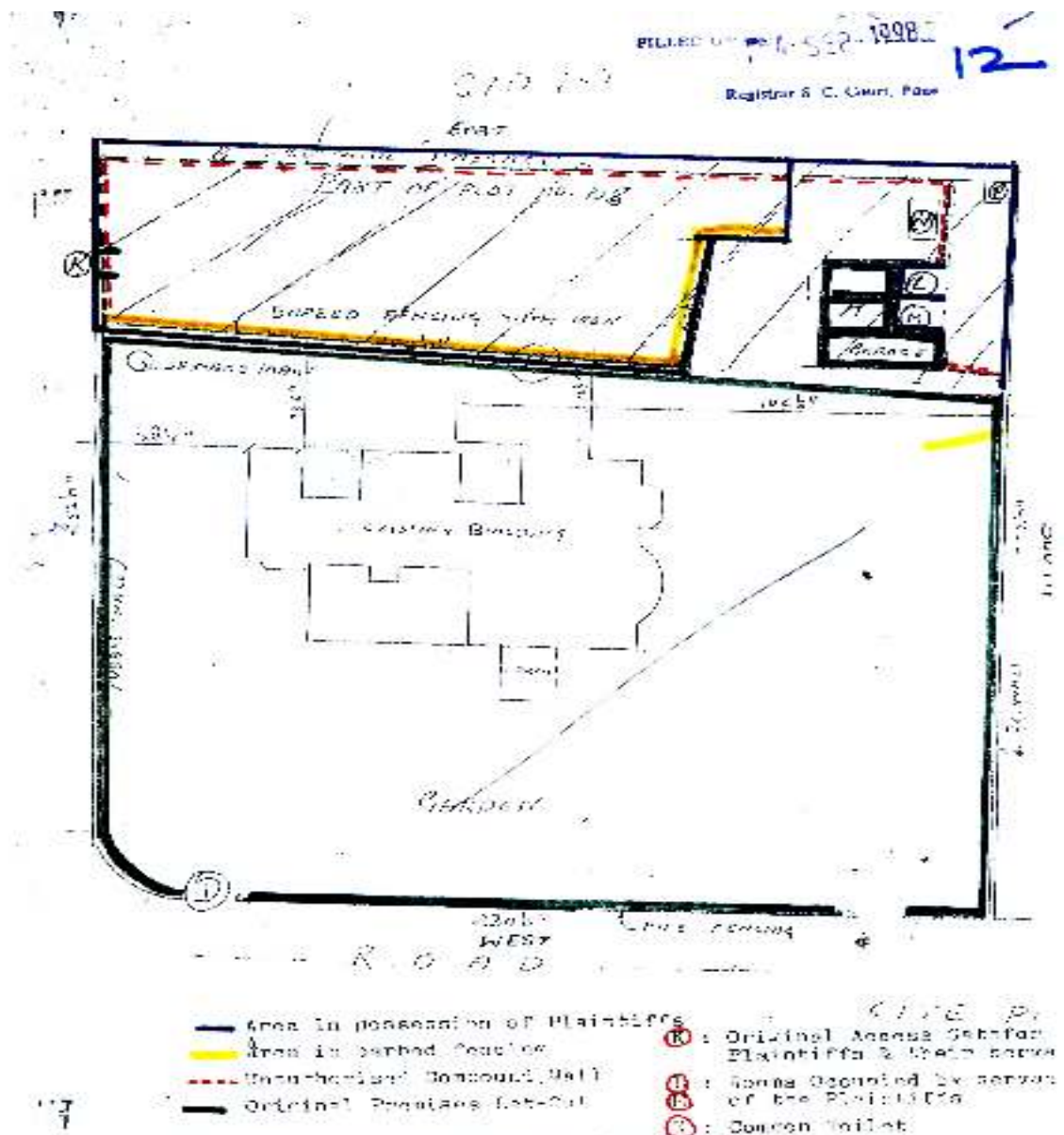
⁶⁵ 2023 SCC OnLine 2540.

- (iii) Whether wall constructed Defendant can be construed as erection of permanent structure on the premises within the meaning of Section 13(1)(b) of the Bombay Rent Act ?
- (iv) Whether original Plaintiffs could be treated as 'neighbouring or adjoining occupiers' within the meaning of Section 13(1) (c) of the Bombay Rent Act ?
- (v) Whether act of construction of wall by Defendant in open land constituted nuisance or annoyance to Plaintiffs for directing Defendant's eviction under Section 13 (1)(c) of the Bombay Rent Act ?
- (vi) Whether the orders passed by the Small Causes Court and the Appellate Court suffer from a jurisdictional error?
- (vii) Whether original Plaintiffs suppressed the fact of transfer of the Plot including tenanted premises to M/s Talera Hoteliers Pvt Ltd and if yes, what would be the effect of such suppression?

F. REASONING, ANALYSIS AND FINDINGS

44) The undisputed fact is that the Original Plaintiffs owned the Plot of land assigned Municipal No.108 at Koregaon Park, Pune on which the bungalow named 'Gardenia' has been constructed. Plaintiffs decided to grant lease in respect of the said bungalow in favour of the Defendant, who intended to use the bungalow as a resting place for its Directors and Officers. The registered office of the Defendant-Company at the relevant time was in Mumbai and it appears that it decided to take the bungalow on lease for use of its directors and officers visiting Pune. Accordingly, parties entered into Agreement for Lease dated 1 November 1961. A factual dispute arose before the Small Causes Court and the Appellate Court as to whether the entire Plot of land bearing No.108 was leased out

to Defendant. Concurrent findings of fact are recorded that the open land behind the bungalow was not leased out to Defendant. Thus, the Plot bearing No.108 is in two parts, the first portion together with bungalow being leased out to the Defendant whereas the open land at the rear side kept in possession of the original Plaintiffs. Additionally, there are some small structures in the open land at the rear side, which are partly leased out to Defendant and partly kept in possession of Plaintiffs. To better understand the exact position of the Plot, it would be apposite to incorporate the plan placed on record by Plaintiffs alongwith their suit. The same is as follows :



45) Thus, what is indicated by green lines on the map was leased out to Defendant, whereas what is indicated in blue/purple line was retained in possession by the Plaintiffs. The above map indicates that the entire bungalow alongwith the front and side gardens was leased out to Defendant. Additionally, two rooms in the outhouse and a garage was part of the lease. What Plaintiffs retained in their possession were two rooms indicated as 'L' and 'M' in the outhouse occupied by their servants. According to the Plaintiffs, a barbed wire fencing indicated by yellow line on the map, separated the portions in possession of the Plaintiffs and the Defendant. The map indicates that in addition to the main front gate, there was additional gate indicated as 'K' to independently access the vacant land behind the bungalow, which remained in occupation of Plaintiffs. It is Plaintiffs' case that Defendant erected a permanent compound wall which is indicated in red dotted lines in the map. According to Plaintiffs, the said compound wall completely blocked Plaintiffs' independent access to the vacant land from Gate 'K'. That additionally removal of the barbed wire fencing, indicated in yellow lines which earlier separated lands in possession of Plaintiffs and Defendant, coupled with construction of wall enabled Defendant to encroach upon the vacant land. Plaintiffs thus alleged that the Defendant not just encroached upon open land but also blocked access to the vacant land. It was also contended that construction of that wall prevented servants of Plaintiffs from accessing the common toilet indicated as 'N' standing on the vacant land. Plaintiffs thus alleged that Defendant not just encroached upon the vacant land but also blocked Plaintiffs' access to the vacant land. That the wall was constructed by leaving an extremely narrow passage at the boundary of the plot for the purpose of accessing rooms 'L' and 'M' by Plaintiff's servants. That thus entry of Plaintiff's servants to the open land was also blocked by construction of wall. Plaintiffs contended in the plaint denial of access to common toilet 'N' to

Plaintiffs' servants resulted in those servants constructing unauthorized open privy, which became source of nuisance and annoyance for neighbours i.e. Marker family. Plaintiffs therefore filed Civil Suit No. 490 of 1998 in the Small Causes Court at Pune seeking recovery of possession from the Defendant under the provisions of Section 13(1)(a),(b), (c) and (k) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act. As observed above, the ground of non-user under Section 13(1)(k) was also raised, but the same was rejected by recording concurrent findings of fact which have attained finality.

46) Since eviction of Petitioner/Defendant is directed under the provisions of Section 13(1)(a), (b) and (c) of the Bombay Rent Act read with Section 108 (o) of the Transfer of Property Act, it would be apposite to reproduce the said provisions. Clauses-(a), (b) and (c) of Section 13(1) of the Bombay Rent Act reads as under :

13. When landlord may recover possession.

(1) Notwithstanding anything contained in this Act but subject to the provisions of section 15 and 15A, a landlord shall be entitled to recover possession of any premises if the Court is satisfied-

(a) that, the tenant has committed any act contrary to the provision of clause (o) of section 108 of the Transfer of Property Act, 1882; or

(b) that, the tenant has, without the landlord's consent given in writing, erected on the premises any permanent structure;

Explanation.- For the purposes of this clause, the expression "permanent structure" does not include the carrying out of any work with the permission , whenever necessary, of the local authority, for providing a wooden partition, standing cooking platform in kitchen, door, lattice work or opening of a window necessary for ventilation, a false ceiling, installation of air-conditioner, an exhaust outlet or a smoke chimney; or

(c) that 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 occupiers, 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 provision of clause (a) of sub-section (1) of section 394 or of section 394-A of the Bombay Municipal Corporation Act; or

47) Thus, under Section 13(1)(a) of the Bombay Rent Act, the landlord is entitled to recover possession of any premises if tenant commits any act contrary to the provisions of Clause (o) of Section 108 of the Transfer of Property Act. Section 108 provides for rights and liabilities of lessor and lessee. Clauses (a) to (c) of Section 108 deals with rights and liabilities of lessor and Clause (d) to (q) of Section 108 deals with rights and liabilities of lessee. Since Section 13(1)(a) refers to clause (o), it would be necessary to reproduce Section 108(o) which reads thus :

108. Rights and liabilities of lessor and lessee.

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;

48) Thus, under clause-(o) of Section 108, the lessee is under obligation to use the property as a person of ordinary prudence would use as if it was his own and he is prohibited *inter alia* from committing any such act which is destructive or permanently injurious to the leased property. Thus, conjoint reading of Section 13(1)(a) of the Bombay Rent Act with Clause 108 (o) of the Transfer of Property Act would indicate that if a tenant commits any act which is destructive or permanently injurious to the premises, the landlord becomes entitled to seek recovery of possession thereof.

49) Under Section 13(1)(b) of the Bombay Rent Act, the landlord becomes entitled to recover possession of premises from a tenant who,

without landlord's consent given in writing, erects structure of permanent nature. Under Clause 13(1)(c), the landlord becomes entitled to recover possession of the premises if a tenant or any person residing with him is found to be guilty of conduct, which is nuisance or annoyance to the adjoining or neighbouring occupiers.

50) In the present case, the Small Causes Court framed following issues :

- (1) Does the plaintiffs prove that the defendant encroached upon the land admeasuring 10,000 sq.fts.?
- (2) Does they prove that the walls constructed by the defendants are permanent and unauthorised?
- (3) Does the plaintiffs prove that the defendant kept suit premises non-used for more than six months prior to filing of the suit?
- (4) Does the plaintiffs prove that the behaviour of the defendant is source of nuisance and annoyance to the neighbours?
- (5) Whether this Court has jurisdiction to hear and decide the matter?

51) As observed above, except issue No.3 relating to non-user, all other issues have been answered by the Small Causes Court in the affirmative. The first two issues relate to landlord's right to recover possession under Section 13(1)(a) and (b) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act. Issue No.4 framed by the Trial Court deals with right of the landlord to recover possession under Section 13(1)(c) of the Bombay Rent Act. The fifth issue relating to jurisdiction is essentially linked to the first two issues where the Petitioner/Defendant questioned the right of the landlord to recover possession of the tenanted premises for acts done in respect of the property which is outside the tenanted premises. Issue No.5 relating to jurisdiction in that sense, has connection to answer to Issues Nos.1 and 2.

52) As observed above, in its Written Statement, Defendant adopted a defence that the entire plot bearing No.108, Koregaon Park including the open space behind the bungalow was leased to it by

Plaintiffs vide Agreement for Lease dated 1 November 1961. This defence of Defendant has been negated by the Small Causes Court, which held that the open space behind the bungalow does not form part of tenanted premises. This finding of fact recorded by the Small Causes Court has been upheld by the Appellate Court. Mr. Tulzapurkar, in his usual fairness, has accepted the position that the said findings of fact recorded by the Small Causes Court and upheld by the Appellate Court cannot be disturbed by this Court in exercise of jurisdiction under Article 227 of the Constitution of India. He has accordingly proceeded on a footing that the open land behind the bungalow does not form part of the tenanted premises. As a matter of fact, the entire attack of Mr. Tulzapurkar on decree of eviction passed under Section 13(1)(a) and (b) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act is based on submission that construction of wall on vacant land not forming part of tenanted premises cannot entail decree for eviction under those provisions. Mr. Khambata terms this course of action adopted by Defendant as its attempt to convert loss in respect of open land to succeed in protecting the tenancy in respect of the bungalow. Be that as it may. This Court accordingly proceeds on a footing that the vacant land behind the bungalow was not leased out to the Defendant, except garage and two rooms in the outhouse, and that the open land did not form part of tenanted premises.

F.1 COMMISSION OF ACT DESTRUCTIVE OR PERMANENTLY INJURIOUS TO TENANTED PREMISES

53) The Small Causes Court has passed the decree of eviction of Defendant from the tenanted premises by holding that it encroached upon open land admeasuring 10,000 sq.ft behind the bungalow and that the wall constructed by it is permanent and unauthorised. In the Plaint,

Plaintiffs' case was that the vacant land admeasuring 10,000 sq.ft behind the bungalow was separated by a barbed wire fencing and that the Plaintiffs had an independent access to the said open land through Gate-'K'. It was Plaintiffs' case that fencing was erected in such a manner that both Plaintiffs and Defendant were able to use the premises in their respective occupation without causing any hinderance to each other. The tenanted premises admittedly included one garage and two rooms in the outhouse, which are actually situated on the land behind the main bungalow. In the same outhouse, two rooms numbered as 'L' and 'M' on the Map were retained in possession by the Plaintiffs where Plaintiffs' servants were residing. Additionally, there was a common toilet numbered 'N' on the map, which was apparently being used by the servants both of Plaintiffs and Defendant. As observed above, both the Courts below have recorded a finding of fact that the vacant land admeasuring 10,000 sq.ft behind the bungalow does not form part of tenanted premises. Therefore, defendant admittedly did not have right to enter upon or remain on the said vacant land admeasuring 10, 000 sq.ft. Defendant's case that there was no barbed wire fencing separating the bungalow from the land admeasuring 10,000 sq.ft. In my view, existence or otherwise of the barbed wire fencing is immaterial for the purpose of examining conduct of Defendant in entering upon and remaining on the open land not forming part of tenanted premises and consequences arising out of such conduct.

54) Defendant does not dispute the position that it had entered upon and remained on the vacant land admeasuring 10,000 sq.ft. The only defence taken in the written statement was that even the vacant land was leased out to it. The said defence is already negatived. This means that Defendant's conduct of committing the trespass on vacant land not forming part of tenanted premises is proved on account of Defendant's

own admissions. It is thus factually proved that Defendant has encroached upon the land admeasuring 10,000 sq.ft. which did not form part of tenanted premises.

55) The second conduct alleged by Plaintiffs against the Defendant for seeking recovery of possession under Sections 13(1)(a) and (b) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act is construction of wall by the Defendant. The Defendant does not dispute that the wall indicated in red hatched lines on the map has been actually constructed by it. Thus, construction of the wall by the Defendant is not in dispute. Such construction is done by Defendant on land not forming part of tenanted premises.

56) Thus, there is no dispute to the position that Defendant actually encroached upon the vacant land and that he constructed walls thereon. The issue is whether such encroachment committed by the Defendant or construction caused by it on land not forming part of tenanted premises would entail a decree of eviction under section 13(1)(a) and (b) of the Bombay Rent Act or under Section 108 (o) of the Transfer of Property Act.

57) According to Mr. Tulzapurkar, the expression used in Clause (o) of Section 108 is *"commit any other act which is destructive or permanently injurious thereto"*. According to him, the words "thereto" would refer to the leased premises. Thus according to Mr. Tulzapurkar, for seeking a decree under Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act, the landlord must prove commission of act destructive or permanently injurious to the tenanted premises. According to him, if an act committed by tenant does not destroy or cause any permanent injury to the tenanted premises, eviction under Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of

the Transfer of Property Act cannot be ordered. He has further submitted that even in respect of Section 13(1)(b) of the Bombay Rent Act, the words used are "*erected on the premises any permanent structure.*" He would therefore submit that even a permanent structure must be erected on the premises for seeking decree of recovery of possession under section 13(1)(b) of the Bombay Rent Act. According to Mr. Tulazapukar, in the present case, admittedly the Defendant has not destroyed or caused permanent injury to the tenanted premises nor has it erected any permanent structure on the tenanted premises.

58) In short, the submission of the Petitioner/Defendant is that encroachment committed by it or wall constructed by it on open land admeasuring 10,000 sq.ft not forming part of tenanted premises does not entitle the landlord to seek recovery of possession under Section 13(1)(a) or (b) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act. On the contrary, it is the contention of Mr. Khambata that both the acts of encroachment as well as erection of construction has caused destruction and injury to the tenanted premises and that therefore the decree of eviction is justified.

59) Before I proceed to examine the issue whether commission of encroachment or construction of wall has caused destruction or injury to the tenanted premises, it must first be observed that Petitioner/Defendant never approached the Small Causes Court with a defence that its actions of trespass or construction of wall outside tenanted premises cannot be a ground for passing a decree of eviction. This was not done so by it because the Defendant believed that vacant land admeasuring 10,000 sq.ft also formed part of tenanted premises. When the defence of the Defendant as pleaded in the written statement is taken into consideration, it is clear that both the acts of encroachment and

construction of wall by the Defendant were on premises, which Defendant believed to be tenanted premises. It never set up an alternative case that in the event of vacant land admeasuring 10,000 sq.ft. being held not to be tenanted premises, the decree of eviction cannot be passed for acts committed by it on property outside tenanted premiss. In that sense, the Defendant has improved upon its case in the present petition. Mr. Khambata seeks dismissal of the petition on this count and in my view, he is not entirely wrong in contending so. Nevertheless, instead of dismissing the petition on technical reason of failure to raise an alternate plea, I proceed to examine the point raised by Mr. Tulzapurkar about actions of encroachment and construction of wall outside tenanted premises not being a ground for ordering eviction under Section 13(1)(a) and (b) of the Bombay Rent Act.

60) The fact that Plaintiffs did not let out vacant land admeasuring 10,000 sq.ft. to the Defendant coupled with the fact that Plaintiffs' servants continued to reside in Rooms 'L' and 'M' on the map would clearly indicate that Plaintiffs desired to remain in occupation of the said vacant land even after executing lease in Defendant's favour. In order to enable the Plaintiffs to access the vacant land admeasuring 10,000 sq.ft. behind the bungalow, admittedly Gate indicated as 'K' on the Map existed. Thus, at the time of execution of the Agreement for Lease, the understanding between the parties was clear where both, Plaintiffs and Defendant were to independently use, occupy and enjoy the portions in their respective occupation without causing hinderance to each other. Defendant therefore could not have encroached upon Plaintiffs' vacant land admeasuring 10,000 sq.ft. However, mere defendant's act of committing an encroachment on vacant land in Plaintiffs' possession cannot be a reason for passing an order of eviction under Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of

Property Act. For that, it must be proved that it committed an act which is destructive or permanently injurious to the tenanted premises.

61) Admittedly, two rooms in the outhouse and garage formed part of the tenanted premises. The map would indicate that wall constructed by Defendant is not just in respect of open land it but also touches the two rooms in the outhouse which formed part of the tenanted premises. Therefore, it cannot be stated that construction of such wall by the Plaintiff did not touch upon tenanted premises in any manner. In my view, construction of wall by the Defendant therefore would be covered by the expression *"commit any other act which is destructive or permanently injurious thereto"* under Clause (o) of Section 108. Thus, on both grounds of failure to plead an alternate case as well as factual position of wall enveloping/touching the two rooms in the outhouse forming part of tenanted premises, the decree of eviction under Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act cannot be found fault with.

F.2 WRITTEN PERMISSION OF LANDLADIES FOR ERECTION OF WALL

62) Section 13(1)(b) of the Bombay Rent Act confers right on the landlord to recover possession of the premises if the tenant erects any permanent structure without landlord's consent given in writing. The construction of wall was done sometime in 1991 when Hilla J. K. Daruwala and Zarene Siasp Kothawala were there landladies. The Administration Manager of Defendant issued notice dated 17 September 1991 to Mrs. Hilla J. K. Daruwala proposing to construct temporary removable wall to prevent trespassing on the property and called her upon to state any objection to the proposal. It was stated in the notice that if nothing was heard within 15 days, Defendant was to proceed with

construction of wall. A copy of that notice was sent to Mrs. Zarine S. T. Kothawala. Only Zarine Kothawala responded to the letter on 26 September 1991 expressing her personal no objection to construction of temporary removable wall. However she expressly stated that the approval was subject to Mrs. Hilla Daruwala agreeing to erecting of temporary removable wall. Admittedly Mrs. Hilla Daruwala did not give written permission for erection of wall as proposed by Defendant. Considering the evidence on record, the Small Causes Court and Appellate Court have recorded finding that written consent of both the landladies was not obtained.

63) The Defendant took a defence in its Written Statement that Plaintiff No.2 was mainly looking after the premises and gave her No-Objection for and/on behalf of both the Plaintiffs. The Defendant further took a defence that though a plan showing proposed erection of wall was sent to both the landlords it later realized that permission of Municipal Corporation was not required for erection of wall and therefore there was no necessity of obtaining signatures of both the Plaintiffs on such plan. As observed about one of the landladies Hilla Daruwala never gave any consent to Defendant and consent given by Zarine Kothawala was subject to her aunt Hilla's approval. Furthermore, as against proposal sent for construction of temporary removable wall, Defendant went ahead and constructed permanent wall.

64) The Small Causes Court firstly held that the wall is of permanent nature repelling the defence that the wall was of temporary removable nature. The Small Causes Court thereafter proceeded to examine whether construction of wall was with written permission of the landladies. After considering the evidence on record, the Small Causes Court held that that

no permission was granted by Mrs. Hilla Daruwala. It rejected the defence of oral permission by Mrs. Hilla Daruwala.

65) I have gone through the correspondence that ensued between the parties on construction of Wall. Admittedly, Defendant did not obtain written permission from both the landladies at the relevant time for construction of wall. The permission granted by Plaintiff No.2 was subject to obtaining written permission Hilla Daruwala. Therefore, no serious flaw can be traced in the finding recorded by the Small Causes Court about absence of written permission from the landladies for construction of the wall. The findings recorded by the Small Causes Court about non-grant of written permission by the landladies has been upheld by the Appellate Court and I do not find any justifiable reason to interfere in the said finding.

F. 3 ERECTING OF PERMANENT STRUCTURE ON THE PREMISES

66) Having held that the wall erected by Defendant is permanent structure and that written permission of both landladies was not obtained for construction thereof, the next issue for determination is whether construction of wall is outside or on the tenanted premises and whether the decree of eviction under Section 13(1)(b) could have been passed. It is Mr. Tulzapurkar's case that the wall has been constructed in open space behind the main bungalow and that therefore decree under Section 13(1)(b) could not have been passed. In short, the expression "*on the premises*" used in clause (b) of Section 13(1) is sought to be interpreted by the Petitioner/Defendant to mean that any construction outside tenanted premises would not affect tenancy rights of a tenant.

67) As observed above while dealing with the issue of commission of act destructive or permanently injurious to tenanted premises, the wall

constructed by Defendant also touches the garage, which is admittedly part of tenanted premises. It therefore cannot be said that construction of wall is totally unconnected with the tenanted premises. The map clearly shows that the wall is erected in such a way that part of it touches the garage on the southern side. Therefore, even factually, it cannot be suggested that construction of the entire wall is entirely outside the tenanted premises.

68) However momentarily ignoring the factual position that the wall touches the tenanted premises and assuming that the major portion of the wall is outside the tenanted premises, I proceed to examine whether construction of wall by Defendant could entail decree for eviction under Section 13(1) (b) of the Bombay Rent Act.

69) Both the sides have relied upon various judgments on the issue of landlord's right to recover possession from a tenant who causes construction outside the tenanted premises. It would be apposite to make reference to the judgments cited by both the parties:

- (i) In **Rameshwar Roy** (supra) relied upon by Mr. Tulzapurkar, the Defendant was a tenant in respect of three rooms, one on first floor and two on ground floor, with a common bath and privy. There was a covered verandah along the first floor of the building, which was not let out to any tenant but was meant for common use of the tenants and also by the landlord. The Defendant made an attempt to convert the verandah into additional kitchen and the Plaintiff sent ejectment notice on that count. A defence was raised by the Defendant that forcible user of the verandah and making illegal construction thereon did not amount to erection of structure on the tenanted premises. In the light of this factual position, the Division Bench of Calcutta High Court held in paras-27, 28 and 30 as under :

27. Section 108 of the Transfer of Property Act deals with the rights and liabilities of the lessor and the lessee in respect of the lease-hold property and clauses (m), (o) and (p) as mentioned above form part of the rights and liabilities of the lessee in such a property. All those rights and liabilities, however, must therefore relate to the lease-hold property, i.e. the immovable property leased out by the lessor to the lessee. So far as the property other than the lease-hold property is concerned, clauses (m), (o) and (p) or Section 108 of Transfer of Property Act would not be attracted in respect of such other property, inasmuch as, the word 'property' as mentioned in Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act would mean only the premises demised and not any other property or premises. This is simply because of the fact that if the tenant occupies land of property other than the lease-hold property, he is not to be treated as a tenant in respect of such excess land or premises unless there is any such contract, and in the absence of any such contract, his said occupation would be that of a trespasser and/or unauthorised occupant, but clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act, would not be attracted in such a case.

28. Admittedly, the disputed western verandah is not a part of the appellant's tenancy and it within the occupation of the plaintiff landlord as per his own statement since, the plaintiff/respondent in the plaint had categorically stated that the disputed western verandah was not included within the tenancy of the defendant/appellant and/or it was not a part of his tenancy as his tenancy comprised of one room on the first floor, two rooms on the ground floor and user of common bath and privy. The learned trial Judge also came to a categorical finding that the disputed western passage on the first floor of premises No. 5/2, Ram Kanai Adhikari Lane, Calcutta-12, was not within the tenancy held by the defendant/appellant in the suit premises. In such view of the matter, even if the defendant/appellant had illegally and/or forcibly occupied the said western verandah and converted the same into a kitchen and also made construction on the same, thereby committing nuisance and annoyance to the plaintiff/respondent, the plaintiff/respondent being the owner thereof should bring proper proceeding to get possession of the said verandah by ousting the defendant/appellant therefrom, treating him as a trespasser and/or unauthorised possessor of the said verandah, but cannot evict the defendant/ appellant from his tenancy on the ground that his such acts amount to contravention of Clauses (b) (d) and (e) of Section 13(1) of the West Bengal Premises Tenancy Act, 1956 as according to us Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act, would only apply to the premises demised and not to any other premises or building.

30. In the present case, as we have already observed, the plaintiff/ landlord in the plaint and in his evidence had categorically stated that the disputed western verandah was not part of the tenant/defendant's tenancy and the said verandah was being used by the kind lord and the other tenant of the premises. Nowhere it was stated by the landlord that the said verandah was

the only entrance for the other tenant to his tenanted portion, or that the defendant also could not use his tenanted portion without the said passage. Moreover, the landlord in his cross-examination had also clearly admitted that the disputed western verandah was not included in the tenancy of the other tenant also, but it was within the landlord's occupation. If this be the version of the landlord, then it would amount to forceable occupation of a passage belonging to and under the occupation of the landlord by the tenant for which the tenant is to be treated as a trespasser and he is to be evicted from the same as such, but such force able occupation cannot be equated with the provisions of Section 108(m), (o) and (p) of the Transfer of Property Act, nor the tenant can be held guilty of contravening such provisions of law for his such , forceable occupation of a portion of the building which was under the exclusive occupation of the landlord. Over and above the other tenant of the disputed premises also had not deposed in the suit making any allegation that the alleged acts on the part of the defendant had also caused, annoyance to him and that his ingress to and/or egress from his tenanted portion was affected thereby. In the present case the landlord was the sole witness on behalf of the plaintiff and he did not cite any other person as his witness in the suit. We therefore hold that the appellant, in the facts and circumstances of the case, cannot be held guilty of violating clauses (b), (d) and (e) of Section 13(1) of West Bengal Premises Tenancy Act, 1956. The findings of the learned trial Judge on Issues Nos. 2 to 4 therefore are not correct and cannot be sustained in law for the reasons as aforesaid, and are therefore set aside, so far as the validity and legality of notice to quit as served upon the defendant/appellant in the present case is concerned, considering the facts and circumstances of the case and also Exhibits 5.6-6 A and 7-7 A we hold, concurring with the finding of the trial Court on the notice point, that the notice was legal, valid and duly served upon the defendant.

Thus, in ***Rameshwar Roy***, Division Bench of Calcutta High Court held that landlord can bring proper proceedings to get possession of the verandah by seeking Defendant's ouster therefrom, but he cannot evict the Defendant from tenanted premises on the ground that the act of causing unauthorized construction on verandah contravened para-materia provisions under Clauses (b), (d) and (e) of Section 13 (1) of the West Bengal Premises Tenancy Act, 1956 or under Clauses (m), (o) or (p) of Section 108 of the Transfer of Property Act.

(ii) In **Ajoy Sharma** (supra), a Single Judge of the Calcutta High Court has followed the judgment of Division Bench in **Rameshwar Roy** and held in para-18 as under :

18. In view of aforesaid discussion I have no other option but to say that the court below i.e. the First Appellate Court was not justified in setting aside the Trial Court's observation that the plaintiff/landlord failed to prove that the defendant/tenant has made any unauthorized permanent construction within the tenanted portion, so that it may attract either of the provisions of (m) or (o) or (p) of section 108 of the Transfer of Property Act. Defendant if made any construction unauthorizedly outside the tenancy then it is a matter which is to be dealt with by the plaintiff and concerned Corporation and even if the defendant is in possession of such unauthorized construction then appropriate remedy is to file suit for eviction against trespasser from unauthorized construction but the present suit which has arisen from notice under the West Bengal Premises Tenancy Act 1956 for eviction of tenant from specific tenanted portion, will not help the plaintiff to get remedy against the defendant in respect of that unauthorized portion. Accordingly that part of impugned judgment passed by First Appellate Court is hereby set aside and the order of Trial Court is affirmed.

(iii) On the other hand, Mr. Khambata has relied upon judgment of Division Bench of Calcutta High Court in **Kalpana Dhar** (supra), in which the Defendant/tenant was accused of causing construction of a room with pucca walls of bricks and cement by digging roof of the house. The tenant took a defence that the disputed construction was outside the demised premises and that therefore Section 13(1)(b) of the West Bengal Premises Tenancy Act read with Clauses (m), (o) and (p) of Section 108 of the Transfer of Property Act were not attracted. The Division Bench held in para-3 under :

3. Mr. Matilal contended that the construction was outside the demised premises and therefore the tenant is not liable to be evicted. The next contention of Mr. Matilal-is that the construction being outside the demised premises, section 13(1)(b) and for that matter section 108(p) is not applicable. If this contention is to be

accepted, the tenant will have a right to make any construction outside the demised premises, and continue with impunity as a tenant in respect of the tenancy. In our opinion, that cannot be a reasonable interpretation of section 13(1)(b) of the West Bengal Premises Tenancy Act. In an unreported case, being F.A. 26 of 1977 (Kishnadas Roy v. Basanta Kumar Sett. & Anr.) decided on 10th February, 1978 it has been held that if a tenant has made any construction in a passage through which alone the ingress and egress is possible, the landlord is entitled to get a decree of eviction under section 13 of the West Bengal Premises Tenancy Act. **In our opinion, during the continuance of the lease or tenancy if the tenant erects or constructs any permanent structure in a portion to which the landlord another other tenants can have access, then he will come within the mischief of section 108(p) of the Transfer of Property Act and will be liable to be ejected.** It will be no answer of the defendant-tenant, as has been argued by Mr. Matilal, that the portion on which the tenant has made the construction is outside the demised premises. In our opinion, this, interpretation will violate the reasonable interrelation of section 13(1)(b) West Bengal Premises Tenancy Act read with section "108 of the Transfer of Property Act. **The true test in our opinion, it whether the tenant can retain possession of the new construction he has made after his eviction from the demised premise. If the answer is 'no', then any construction he has made will entail the eviction of the tenant if he has violated any provision of section 108(p) of the Transfer Property Act.**

(emphasis added)

Thus, in **Kalpana Dhar**, the Division Bench of Calcutta High Court held that if during continuance of lease or tenancy, the tenant erects or constructs any permanent structure in portion in which landlords and other tenants could have access, he would come under the mischief of Section 108 (p) of the Transfer of Property Act and would be liable to be ejected. The Division Bench further held that the defence adopted by the tenant that construction was outside demised premises would violate reasonable interpretation of Section 13(1)(b) of the West Bengal Premises Tenancy Act and of Section 108 of the Transfer of Property Act. According to Mr. Khambata, the Division Bench in **Rameshwar Roy** did not notice the earlier Division Bench judgment in **Kalpana Dhar**.

- (iv) With a view to counter Mr. Khambata's reliance on the Division Bench judgment of Calcutta High Court in **Kalpana Dhar**, Mr. Tulzapurkar has placed reliance on judgment of Single Judge of Calcutta High Court in **Santosh Kumar Mazumdar**. According to Mr. Tulzapurkar, the argument that the Division bench judgment in **Rameshwar Roy** was *per-incuriam* as it did not consider the judgment in **Kalpana Dhar** has been rejected by the Single Judge in **Santosh Kumar Mazumdar**. According to Mr. Tulzapurkar, in **Santosh Kumar Mazumdar**, Single Judge of Calcutta High Court held that erection of septic privy outside tenanted area did not violate clause (p) of Section 108 of the Transfer of Property Act.
- (v) Mr. Tulzapurkar has relied upon judgment of Single Judge of this Court in **Rukhaminibai Ramvilas Lehoti**. In that case, the Plaintiff-landlord complained of the Defendant-Tenant erecting permanent structure in open space lying between the godown and the shop of the Defendant. It was sought to be argued that the open space between the shop and the godown must be held to be premises let out to the Defendant within the meaning of the word "premises" as defined under Section 5(8) of the Bombay Rent Act since the open space was appurtenant to the building which was part of the premises let to the Defendant. This Court held in para-21 as under :

21. The question was, however, more directly considered in the case, reported in (*M & J.S. Properties Ltd v. White*), (1959) 2 All E.R. 81. In that case the building consisted of ground and first floor. Beyond the ground floor, there was a garden. That garden was used in common between the first floor and the ground floor tenants. The question was whether it could be treated as a part of the premises and it was held that the word 'premises' in proviso to Section 11, sub-section (2) of the Rent Act, 1957 referred to premises which were capable of physical occupation and not to ancillary incorporeal rights, such as a right to use a garden in

common with another tenant. It, therefore, follows that where that which is used in common with others would not become a part of the concept of 'premises' and would be, therefore, outside the pale of the definition of the word 'premises' occurring in Section 5, sub-section (8A).

(vi) Mr. Tulzapurkar has also relied upon judgment of the Apex Court in **Janaklali S. Gupta** (supra). In the case before the Apex Court, the landlord therein brought a suit for eviction of the tenant, *inter-alia* on the ground of erection of permanent structure. The Apex Court held in para-6 as under :

6. So far as the next submission that the defendants had made a constructions which were of permanent nature is concerned, the finding is that the alleged construction was made by Defendant 2 on area which is outside the premises let out to him and for which the landlord has already filed a suit which is pending before the Bombay City Civil Court. So far as Defendant 3 is concerned, there is no finding that he has made any construction which is permanent in nature. For all these reasons, the High Court was justified in holding that Defendants 2 and 3 had not made any permanent construction.

The judgment in **Janaklali S. Gupta**, in my view, cannot be cited in support of an absolute proposition that in every case where permanent structure is erected outside the premises let out to the tenant, suit for eviction under Section 13(1)(b) of the Bombay Rent Act cannot be maintained. In case before the Apex Court, a separate suit was filed by the landlord in the Bombay City Civil Court, which is one of the factors considered by the Apex Court for holding that erection of permanent structure outside the tenanted premises was not a ground for seeking eviction of tenant or sub-tenant.

70) Thus there is difference of opinion in two Division Benches of Calcutta High Court over the issue of tenant's eviction if construction is erected outside the tenanted premises. In **Rameshwar Roy** the Division

Bench held that construction cause in verandah outside the tenanted premises could not result in eviction of tenant. On the other hand, in ***Kalpana Dhar*** delivered by the Division Bench of Calcutta High Court at a prior point of time, it is held that if a tenant erects or constructs any permanent structure in portion in which landlords and other tenants could have access, he would be liable to be evicted. While Mr. Khambata contends that judgment in ***Rameshwar Roy*** delivered without noticing ***Kalpana Dhar*** is *per incurium*, Mr. Talzapurkar relies on judgment of Calcutta High Court in ***Santosh Kumar Mazumdar***, in which, according to him the plea of Rameshwar Roy being *per incuriam* is rejected. None of the three judgments bind me and it is better to steer clear of the controversy about conflict of view between two Division Benches of Calcutta High Court. Judgment of single judge of this Court in ***Rukhaminibai Ramvilas Lehoti*** discusses mainly the issue whether the premises in which construction was erected was 'appurtenant' to the building in which tenanted structures were located. The judgment therefore does not provide much assistance to the issue at hand.

71) After considering various judgments cited by the learned counsel appearing for parties, in my view, the question whether erection of permanent structure outside the tenanted premises would entail decree for eviction would depend on facts and circumstances of each case, and particularly, on the location at which, and the situation in which, such structure is erected. In the present case, it is Defendant's case that construction of wall is done to protect the property including the tenanted premises from constant trespass and nuisance by children of *mali*. Thus construction is carried out by Defendant for its better enjoyment of the tenanted premises and mere location of major part of the wall outside the tenanted premises cannot and did not mean that the wall did not have any connection with the tenanted premises.

Considering the facts and circumstances of the case, I am of the view that the act of Defendant in constructing the wall both touching the tenanted premises as well as in the open land behind the bungalow is covered by the eventuality specified in Section 13(1) (c) of the Bombay Rent Act.

72) Also of relevance is the fact that Defendant itself believed that open space admeasuring 10,000 sq.ft was also part of tenanted premises, which is the reason why it sought written permission from the landladies for erection of the wall. It is only after the said open land is held to be not tenanted premises that the Defendant now wants to alter its stand by contending that erection of wall outside tenanted premises cannot be a reason for its eviction from tenanted premises.

73) Therefore, considering the facts and circumstances of the present case, and the manner in which construction of the wall is put up by the Defendant on the open land and touching the garage on the southern side, I am of the view that the landlords were entitled to seek a decree of eviction against the Defendant under Section 13(1)(b) of the Bombay Rent Act.

F.4 EVICTION UNDER SECTION 13(1)(C) ON GROUND OF NUISANCE OR ANNOYANCE TO THE ADJOINING OR NEIGHBOURING OCCUPIERS

74) Plaintiffs sought Defendant's eviction on the ground of nuisance and annoyance to the neighbouring and adjoining occupiers under Section 13(1)(c) of the Bombay Rent Act. The relevant pleadings in the plaint are to be found in para-6 which reads thus :

6. The Plaintiffs submit that the Defendant's were permitted to use only two rooms of the servants quarters, garage and the garden appurtenant thereto. However, the defendants have illegally and unauthorisedly taken possession of the common toilet block marked as W in the plan

annexed hereto which was used by the servants (Mali) of the plaintiffs and the servants of the defendants. As a result of stopping the user of the toilet block by servants of the plaintiffs, it appears that the plaintiffs servants were forced to construct a toilet for their own use and occupation is marked as P in the plan annexed hereto. The defendants then complained to the Pune Municipal Corporation and to the plaintiffs about the said construction and about the foul smell emitting from the said temporary toilet. The Pune Municipal Corporation served a notice on the plaintiffs in that behalf. The Plaintiffs were unaware about the reasons of the construction of the said toilet as they are permanently residing out of Pune and hence they requested the defendants to see that the said temporary block was removed. It is only subsequently when plaintiffs came to know as to how the defendants stopped the user of the toilet block by the plaintiffs servants resulting in great hardship to the plaintiffs servants they were compelled to construct another temporary toilet block which created unhygienic conditions. The plaintiffs submit that the defendants are solely responsible for the construction of the temporary toilet by the servants. It is clear from the correspondence that the defendants had undoubtedly attempted to usurp the entire land behind the main bungalow which is in the possession of the defendants and with that in view the defendants kept seeking the plaintiffs permission to put up a temporary wall to prevent the alleged nuisance and trespass by the servants of the plaintiffs. By these acts of the defendants, the defendants behaviour is a source of continuous nuisance and annoyance to the plaintiffs, and the neighbouring occupiers. The defendants have prevented the plaintiffs servants from using the toilet which is in the in the possession of the plaintiffs and thereby forced them to construct their own temporary toilet resulting in unhygienic conditions being created in the property. On this ground also the plaintiffs are entitled to possession of the suit premises under section 13(1)(c) of the Bombay Rent Act.

75) Thus the reason for cause of annoyance as pleaded in the Plaint was construction of temporary toilet by servants of Plaintiffs on account of blocking of access to the common toilet by Defendant by constructing the Wall. It was Plaintiffs' pleaded case that construction of such unauthorised toilet by Plaintiffs' servants was attributable to the actions of the Defendant. That construction of such temporary toilet resulted in foul smell emitting from the temporary toilet. It was further pleaded that Defendant attempted to usurp the entire land behind the main bungalow. The Plaintiff pleaded that 'by these acts of Defendant' its behaviour was

source of continuous nuisance and annoyance 'to the Plaintiffs and the neighbouring occupiers'.

76) The Trial Court accepted Plaintiffs' case and held while answering Issue No.4 that construction of wall by Defendant was the cause for construction of new toilet by Plaintiffs' servants as use of common toilet facility got disturbed on account of construction of wall. The Small Causes Court held that this disturbance on the part of the tenant to the landlord and to the neighbour to live peacefully amounted to nuisance and annoyance.

77) The Appellate Court however refused to accept the finding of the Small Causes Court in entirety on the issue of nuisance. The Appellate Court infact rejected the theory of cause of nuisance or annoyance to Mr. Marker on account of open privy constructed by Mr. Vasant Bhilare. However, the Appellate Court thereafter went on to examine whether construction of wall by the Defendant caused nuisance or annoyance to the Plaintiff and held in paras-23 and 24 of the judgment as under :

23. As far as second aspect i.e. the encroachment on the land is not let out to the tenant itself would fall within mischief of Section 13(1)(c) of the Bombay Rent Act. I have already concluded that the open land admeasuring 10000 sq.ft. was not let out to the tenant and that the tenant has committed encroachment upon such land. So for such act/ mischief, I hold the tenant guilty of nuisance. The learned advocate Shri Castilino for the landlord has referred on this point the case of Gulam Husein v/s Laxmidas reported in 1984 Bombay R.C. 107 and the case of Boranna v/s NA Chandra Raju, reported in AIR 1990 Karnataka 121. In our case the tenant blocked the gate shown by letter "K" in the plaint map by constructing a wall. Thus, the landlord was prevented from using this gate. This gate is the only way to reach the open piece of land retained by the landlord. So this amounts to nuisance and annoyance.

24. On the other hand, learned advocate Mr. Abhyankar for tenant cited the case of Narpatchand Bhandari v/s Shantilal Malshankar Jani, reported in 1994(1) BCR 608, & Rafat Ali v/s Sugribai, reported in 1999(1) SCC 133, which defines the terms of nuisance and annoyance. The learned advocate also referred the case of Kashinath v/s Sudha

Gopal, 2001(1) Mh.LJ wherein it is held that the alleged nuisance must be of gross and unusual character, frequent and persistent. There cannot be any dispute about the definition and the kind of nuisance. But I have already discussed as to how the construction of the wall caused nuisance to the landlord. In view of such discussion, I hold that the landlord is entitled to recover the possession of the rented premises from the tenant. The point is accordingly answered in the affirmative.

78) According to Mr. Tulzapurkar, Plaintiffs never pleaded in the plaint that construction of Wall *per se* caused any nuisance or annoyance to the Plaintiffs and that Plaintiffs' pleaded case of nuisance/annoyance was only *qua* Mr. Marker on account of construction of temporary open privy by Plaintiffs' servants. Mr. Tulzapurkar would contend that once the Appellate Court rejected Plaintiffs' pleaded case of cause of nuisance or annoyance to Mr. Marker, it ought to have dismissed suit for eviction under Section 13(1)(c) of the Bombay Rent Act. I am unable to agree. Petitioner's case that Plaintiffs never pleaded cause of nuisance or annoyance only on account of construction of wall arises out skewed and myopic reading of the Plaint. Para-6 of the plaint is already culled out above. On correct reading of para-6 of the plaint, it is seen that reasons for cause of nuisance pleaded by the Plaintiffs are twofold. Plaintiffs pleaded that construction of open privy by their servants caused emitting of foul smell. The other reason pleaded by the Plaintiffs is that the Defendant attempted to usurp the entire land behind the main bungalow and for that purpose sought Plaintiffs' permission to put up a temporary wall. It was further pleaded that Defendant prevented the Plaintiffs' servants from using the toilet located on land in possession of the Plaintiffs. It therefore cannot be stated that there is absolutely no pleading in the plaint to the effect that construction of wall by itself did not cause nuisance or annoyance to the Plaintiffs. Plaintiffs did plead that Defendant's attempts to usurp the property caused nuisance and annoyance to them. I am therefore unable to except the submission of Mr.

Tulzapurkar that cause of nuisance or annoyance to Plaintiffs on account of construction of wall in open land was not pleaded in the plaint.

79) Under Section 13(1)(c) of the Bombay Rent Act, eviction of a tenant can be sought if the tenant commits any act which is nuisance or annoyance to the adjoining or neighbouring occupiers. Mr. Tulzapurkar fairly admits that even a landlord, in a given case, can be a neighbouring or adjoining occupier. He however contends that Plaintiffs in the present case were not 'neighbouring or adjoining occupiers' and that therefore the decree of eviction under Section 13(1)(c) of the Bombay Rent Act could not have been passed, even if it is assumed that any of the acts of Defendant caused nuisance or annoyance.

80) The hotbed of controversy amongst the rival parties is about interpretation of the term 'occupier' and in support of their respective contentions, numerous decisions are cited. There is also a debate amongst Mr. Tulzapurkar and Mr. Khambata about how to read and interpret the words 'nuisance or annoyance' appearing in Section 13(1)(c) of the Bombay Rent Act. First, it would be necessary to decide the debate between parties about interpretation of the word 'occupier' appearing in Section 13(1) (c). Before doing that, it would be necessary to first deal with the issue of the manner in which the word 'occupier' is to be interpreted. While Mr. Tulzapurkar submits that a plain and literal meaning is required to be given to the word 'occupier', it is Mr. Khambata's contention that the said word is required to be contextually interpreted.

F.4.1 PLAIN OR CONTEXTUAL INTERPRETATION OF THE TERM 'OCCUPIER'

81) The law is well settled that Court's jurisdiction can be invoked to interpret a statute only when some ambiguity is noticed in a particular

provision thereof. If the language of the statute is plain and unambiguous and admits only one meaning, there is no question of construction of statute. Mr. Tulzapurkar, has relied upon the judgment of *Nathi Devi* (supra) in which it is held that literal interpretation should be given to a statute, if the same does not lead to absurdity. In relation to rent control legislation, the Apex Court has held that condition precedent in provision enabling landlord to recover possession must be strictly complied with. There cannot be two opinions about the proposition that the words used in a statute must be given plain meaning. However at the same time, in many cases, the context in which the word is used in a particular statute, can connote a different meaning to a word as compared to use of the same word in another statute. As the discussion in judgment progresses, this aspect would be clear from various judgments where the word 'occupier' is given different meaning by courts on account of its contextual use in particular statute.

82) My view that words used in statute can also be interpreted contextually finds support in various decisions, some of which are cited by Mr. Khambata. In *Reserve Bank of India* (supra) in it is held in para-33 as under :

33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the

scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression 'Prize Chit' in *Srinivasa* and we find no reason to depart from the Court's construction.

(emphasis added)

83) The above principle is reiterated in ***Rupak Kumar*** wherein the Apex Court held in para-9 as under :

9. In the present case, according to the prosecution, the appellant, a Superintendent of Jail, had stored rice and haldi and, therefore, his act comes within the mischief of Section 7 and 16 of the Act. In view of the aforesaid, what needs to be decided is as to whether the expression 'store' as used in Section 7 and Section 16 of the Act would mean storage simplicitor or storage for sale. We have referred to the provisions of Section 7, Section 10 and Section 16 of the Act and from their conjoint reading, it will appear that the Act is intended to prohibit and penalise the sale of any adulterated article of food. **In our opinion, the term 'store' shall take colour from the context and the collocation in which it occurs in Section 7 and 16 of the Act.** Applying the aforesaid principle, we are of the opinion, that 'storage' of an adulterated article of food other than for sale does not come within the mischief of Section 16 of the Act. In view of the authoritative pronouncement of this Court in the case of *MCD v. Laxmi Narain Tandon*, (1976) 1 SCC 546, this submission does not need further elaboration. In the said case it has been held as follows: (SCC p.550, para 14)

"14. From a conjoint reading of the above referred provisions, it will be clear that the broad scheme of the Act is to prohibit and penalise the sale, or import, manufacture, storage or distribution for sale of any adulterated article of food. The terms "store" and "distribute" take their colour from the context and the collocation of words in which they occur in Sections 7 and 16. "Storage" or "distribution" of an adulterated article of food for a purpose other than for sale does not fall within the mischief of this section."

(emphasis added)

84) In ***Rajendra K. Bhutta*** relied upon by Mr. Tulzapurkar also, the Apex Court has held that *"The expression 'occupied' has been the subject-matter of decision in a number of judgments in different contexts."*

85) I am therefore of the view that the word 'occupier' needs to be interpreted in the context of its use in section 13(1)(c) of the Bombay Rent Act and it cannot be ascribed plain or literal meaning without referring to the context in which it appears in various provisions of the Bombay Rent Act. This is more particularly so because the words 'occupy' and 'use' appear in section 13(1)(c) and 13(1)(k) of the Bombay Rent Act in different contexts.

F.4.2 WHETHER PLAINTIFFS COULD BE TREATED AS 'ADJOINING OR NEIGHBOURING OCCUPIER'

86) Having held that the word 'occupier' needs to be interpreted contextually, the next issue is whether the original Plaintiffs could be treated as adjoining or neighbouring occupiers to whom nuisance or annoyance is caused on account of Defendant's act of construction of wall. As observed above, it is Defendant's case that mere possession of open land behind main bungalow did not make original Plaintiffs 'adjoining or neighbouring occupiers' within the meaning of section 13(1)(c) of the Bombay Rent Act and hence construction of wall could not have caused any nuisance or annoyance to them. Mr. Khambata has countered the submission contending that for fitting into the definition of the term 'adjoining or neighbouring occupiers', it is not necessary that the landlord must be physically present or residing on adjoining premises. Both sides have relied upon various judgments in support of their respective contentions, and I proceed to consider the ratio laid down therein:

- i. In ***Rajendra K. Bhutta*** (supra) relied upon by Mr. Tulzapurkar, the issue before the Apex Court was whether an owner/lessor of the property can seek recovery of property thereof when the same is

‘occupied’ by corporate debtor. In the context of the said controversy, the Apex Court has discussed distinction between the terms ‘possession’ and ‘occupation’. The Apex Court held in paras-19, 20, 21, 22 and 23 as under :

19. The expression “occupied” has been the subject-matter of decision in a number of judgments in different contexts. Thus, in *Industrial Supplies (P) Ltd. vs. Union of India* (1980) 4 SCC 341, this Court was faced with the following question (SCC pp.344-45, para 2)

“2. The appeals raise a question of far-reaching importance namely, whether a raising contractor of a coal mine is an owner within the meaning of subsection (1) of Section 4 of the Coking Coal Mines (Nationalisation) Act, 1972 (hereinafter referred to as the “Nationalisation Act”); and if so, whether the fixed assets like machinery, plants, equipment and other properties installed or brought in by such a raising contractor vest in the Central Government. They also give rise to a subsidiary question, namely, whether subsidy receivable from the erstwhile Coal Board established under Section 4 of the Coal Mines (Conservation, Safety and Development) Act, 1952 up to the specified date, from a fund known as Conservation and Safety Fund, by such raising contractor prior to the appointed day, can be realised by the Central Government by virtue of their powers under sub-section (3) of Section 22 of the Nationalisation Act, to the exclusion of all other persons including such contractor and applied under sub-section (4) of Section 22 towards the discharge of the liabilities of the coking coal mine, which could not be discharged by the appointed day.”

20. In answering the aforesaid question, this Court distinguished *Chief Inspector of Mines vs. Karam Chand Thapar* (1962) 1 SCR 9 in the context of raising contracts of coal in paragraphs 18 and 19 of the judgment; and such raising agreements by registered instruments being held not to amount to a lease, were held to be licenses coupled with a grant. **This being the case, a raising contractor being in possession on behalf of an owner of property, or a lessee of a mine was held to be an “occupier” within the meaning of Section 2(1) of the Mines Act, 1952.** In so holding, this Court went into various dictionary meanings of the word “occupier” and “occupation” and held as follows: (SCC p.349, para 19)

“19. ... These observations, if we may say so, with great respect, are rather widely stated. They are indeed susceptible of a construction that a raising contractor being in possession on behalf of a proprietor or the lessee of a mine in possession is not an “occupier” within the meaning of Section 3(n) of the Nationalisation Act read with Section 2(1) of the Mines Act, 1952. We are quite sure that that was not the intention of the legislature. There is no reason why the word “occupier” should not be understood to have been used in its usual sense, according to its plain meaning. In common parlance, an “occupier” is one who “takes” or (more usually) “holds” possession: *Shorter Oxford Dictionary*, 3rd Edn., Vol. 2, p. 1433. In the legal sense, an occupier is a person in actual occupation. The petitioners being raising contractors were, under the terms of the agreement dated February 7, 1969 entitled to, and in fact in actual physical possession and enjoyment of the colliery and were, therefore, an occupier thereof. That being so, the petitioners being in possession, in their own right, by virtue of the substantial rights acquired by them under the agreement, were not in possession on behalf of somebody else and, therefore, the decision in *Karam Chand Thapar case* cannot apply.”

21. Likewise, in *Dunlop (India) Limited vs. A.A. Rahna* (2011) 5 SCC 778, this Court was concerned with Section 11(4)(v) of the Kerala Buildings (Lease and Rent Control) Act, 1965 which was set out in paragraph 19 of the judgment as follows: (SCC p. 794)

“11.(4)(v) if the tenant ceases to occupy the building continuously for six months without reasonable cause.”

Coming to the word “occupy” in the said section, this Court then held: (Dunlop India Ltd. case, SCC pp. 794-95 & 799-800, paras 21, 25 & 29-30)

“21. The word “occupy” used in Section 11(4)(v) is not synonymous with legal possession in technical sense. It means actual possession of the tenanted building or use thereof for the purpose for which it is let out. If the building is let out for residential purpose and the tenant is shown to be continuously absent from the building for six months, the court may presume that he has ceased to occupy the building or abandoned it. If the building is let out for business or commercial purpose, complete cessation of the business/commercial activity may give rise to a presumption that the tenant has ceased to occupy the premises. In either case, legal possession of the building by the tenant will, by itself, be not sufficient for refusing an order of eviction unless the tenant proves that there was a

reasonable cause for his having ceased to occupy the building.

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25. The Court highlighted the distinction between the terms “possession” and “occupy” in the context of rent control legislation in the following words: (*Ram Dass case* (2004) 3 SCC 684, SCC pp. 687- 88, para 7)

‘7. The terms ‘possession’ and ‘occupy’ are in common parlance used interchangeably. However, in law, possession over a property may amount to holding it as an owner but to occupy is to keep possession of by being present in it. The rent control legislations are the outcome of paucity of accommodations. Most of the rent control legislations, in force in different States, expect the tenant to occupy the tenancy premises. If he himself ceases to occupy and parts with possession in favour of someone else, it provides a ground for eviction. Similarly, some legislations provide it as a ground of eviction if the tenant has just ceased to occupy the tenancy premises though he may have continued to retain possession thereof. The scheme of the Haryana Act is also to insist on the tenant remaining in occupation of the premises. Consistently with what has been mutually agreed upon, the tenant is expected to make useful use of the property and subject the tenancy premises to any permissible and useful activity by actually being there. To the landlord's plea of the tenant having ceased to occupy the premises it is no answer that the tenant has a right to possess the tenancy premises and he has continued in juridical possession thereof. The Act protects the tenants from eviction and enacts specifically the grounds on the availability whereof the tenant may be directed to be evicted. It is for the landlord to make out a ground for eviction. The burden of proof lies on him. However, the onus keeps shifting. Once the landlord has been able to show that the tenancy premises were not being used for the purpose for which they were let out and the tenant has discontinued such activities in the tenancy premises as would have required the tenant's actually being in the premises, the ground for eviction is made out. The availability of a reasonable cause for ceasing to occupy the premises would obviously be within the knowledge and, at times, within the exclusive knowledge of the tenant. *Once the premises have been shown by evidence to be not in occupation of the tenant, the pleading of the landlord that such non-user is without reasonable cause has the effect of putting the tenant on notice to plead and prove*

the availability of reasonable cause for ceasing to occupy the tenancy premises.”

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29. In *Ananthasubramania Iyer v. Sarada Amma* 1978 KLT 338, the learned Single Judge of the Kerala High Court held: (SCC OnLine Ker para 6: KLT pp. 339-40, para 3)

The physical absence of the tenant from the building for more than six months would raise a presumption that he had ceased to occupy the building and that he had abandoned it and that it was for the tenant to dislodge the presumption and establish that he had the intention to continue to occupy the tenanted premises.

30. The word “occupy” appearing in Section 11(4)(v) of the 1965 Act has been interpreted by the Kerala High Court in a large number of cases. In *Mathai Antony v. Abraham* (2004) 3 KLT 169, the Division Bench of the High Court referred to several judgments including the one of this Court in *Ram Dass v. Davinder* (2004) 3 SCC 684 and observed (Mathai Anthony case, SCC OnLine Ker para 6)

“6. ... The word ‘occupy’ occurring in Section 11(4)(v) has got different meaning in different context. The meaning of the word ‘occupy’ in the context of Section 11(4)(v) has to be understood in the light of the object and purpose of the Rent Control Act in mind. The rent control legislation is intended to give protection to the tenant, so that there will not be interference with the user of the tenanted premises during the currency of the tenancy. The landlord cannot disturb the possession and enjoyment of the tenanted premises. Legislature has guardedly used the expression ‘occupy’ in Section 11(4)(v) instead of ‘possession’. Occupy in certain context indicates mere physical presence, but in other context actual enjoyment. Occupation includes possession as its primary element, and also includes ‘enjoyment’. The word ‘occupy’ sometimes indicates legal possession in the technical sense; at other times mere physical presence. We have to examine the question whether mere ‘physical possession’ would satisfy the word ‘occupy’ within the meaning of Section 11(4)(v) of the Act. In our view mere physical possession of premises would not satisfy the meaning of ‘occupation’ under Section 11(4)(v). The word ‘possession’ means holding of such possession, animus possidendi, which means, the intention to exclude other persons. The word ‘occupy’ has to be given a meaning so as to hold that the tenant is actually using the premises and not mere physical presence or possession. A learned Single Judge of this

Court in *Abbas v. Sankaran Namboodiri* (1993) 1 KLT 76 took the view that the word 'occupation' is used to denote the tenant's actual physical use of the building either by himself or through his agents or employees. The Division Bench of this Court of which one of us is a party (*Radhakrishnan, J.*), in *Rajagopalan v. Gopalan* (2004) 1 KLT (SN) 54 interpreting Section 11(4)(v) took the view that occupation in the context of Section 11(4) means only physical occupation, which requires further explanation. Occupation in the context of Section 11(4)(v) means actual user. If the landlord could establish that in a given case even if the tenant is in physical possession of the premises, the premises is not being used, that is a good ground for eviction under Section 11(4)(v) of the Act. Section 11(4) uses the words 'put the landlord in possession' and not 'occupation', but Section 11(4)(v) uses the words 'the tenant ceases to occupy'. In Section 11(4)(v) in the case of landlord the emphasis is on 'possession' but in the case of tenant the emphasis is on 'occupation'. The word 'occupy' has a distinct meaning so far as the Rent Act is concerned when pertains to tenant, that is, possession with user." (emphasis in original)

22. A Full Bench judgment of the Punjab and Haryana High Court reported in *Ude Bhan v. Kapoor Chand* AIR 1967 P&H 53 is also instructive. Paragraph 1 of the judgment speaks of three questions referred to the Full Bench. We are directly concerned with question 2 which is set out by us herein below: (SCC OnLine P&H)

"(2) If any building attached to the main residential house belonging to and occupied by a non agriculturist judgment-debtor is let out to a tenant, will that portion be considered to be in his occupation within the meaning of the above provision?"

In answering this question, the Full Bench went into various authorities and dictionaries as to what the expression "occupied" would mean, as follows: (*Ude Bhan case*, SCC OnLine P&H paras 20-23 & 26)

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23. The conspectus of the aforesaid judgments would show that the expression "occupied by" would mean or be synonymous with being in actual physical possession of or being actually used by, in contra-distinction to the expression "possession", which would connote possession being either constructive or actual and

which, in turn, would include legally being in possession, though factually not being in physical possession. Since it is clear that the Joint Development Agreement read with the Deed of Modification has granted a license to the developer (Corporate Debtor) to enter upon the property, with a view to do all the things that are mentioned in it, there can be no gain saying that after such entry, the property would not be “occupied by” the developer. Indeed, this becomes clear from the termination notice dated 12.01.2018, issued by MHADA to the developer, in which it is stated:

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Relying on *Rajendra K. Bhutta*, Mr. Tulzapurkar has contended that the word ‘occupied by’ would mean or be synonymous with being in actual physical possession or being actually used by, in contradiction to the expression ‘possession’. He would further submit that the Apex Court has held in *Rajendra K. Bhutta* that the word ‘possession’ would merely connote possession, being either constructive or actual, which would only mean and include, being in legal possession, and not factually in physical possession. He would submit that it is only a person who actually and physically possesses a property or uses it, can be covered by the term ‘occupier’ used in Section 13(1)(c) of the Bombay Rent Act. On the contrary, Mr. Khambata has sought to distinguish the judgment in *Rajendra K. Bhutta* submitting that the interpretation by the Apex Court is in the light of the provisions of Section 14(1)(d) of the Insolvency and Bankruptcy Code, 2016, which provision uses the words “occupied by” and “possession” in contradistinction unlike Section 13(1)(c) of the Bombay Rent Act. Mr. Khambata has submitted that in *Rajendra K. Bhutta*, the Apex Court relied upon its judgment in *Dunlop (India) Ltd. V/s. A.A. Rahna*⁶⁶ wherein the Apex Court interpreted Section 11(4)(v) of Kerala Buildings (Lease

and Rent Control) Act, 1965 which, unlike Section 13(1)(k) of the Bombay Rent Act, uses the word 'occupied' as opposed to the word 'use'. Mr. Khambata has therefore submitted that it would be inapposite to rely on the judgment in either *Dunlop (India) Ltd.* or *Rajendra K. Bhutta* to interpret the word 'occupier' appearing in Section 13(1)(c) of the Bombay Rent Act to mean only an actual user, or else such interpretation would negate the conscious distinction between use of the words 'occupier' in Section 13(1)(c) and 'use' in Section 13(1)(k) of the Bombay Rent Act.

- ii. In *Sorab Jamshed Irani* (supra), the Single Judge of this Court was dealing with a case of nuisance and annoyance to the adjoining and neighbouring occupiers. This Court held that even a landlord, if he is an adjoining occupier, can maintain proceedings under Section 13(1)(c) of the Bombay Rent Act. Since Mr. Tulzapurkar has not disputed this position, the judgment in *Sorab Jamshed Irani* is not useful to decide the controversy in hand. However, it appears that this Court has drawn some distinction between the words "nuisance" and "annoyance" by holding that the term "nuisance" must be construed in normal way, whereas, the term "annoyance" is much wider and covers anything which reasonably troubles the mind or pleasure of an ordinary sensible person.
- iii. In *Hotel Rosalia Pvt. Ltd.* (supra), the Single Judge of this Court (V.C. Daga, J.) has dealt with the grounds, *inter-alia* of breach of Section 108(o) of the Transfer of Property Act and commission of acts of nuisance and annoyance in an eviction suit filed by the landlords. It was case of Plaintiff therein that Defendant-tenant committed unlawful encroachment upon the open space beneath the staircase on the ground floor which was not part of the

tenanted premises and constructed a cabin for their hotel premises. It was further alleged that the tenant illegally removed two water storage tanks located on terrace of the building and replaced the same with their own two new tanks and also installed a water pump and thereby caused not just trespass but also nuisance and annoyance. This Court referred to the judgment of the Apex Court in *Shankar V/s. Britania Biscuit Co.*⁶⁷ wherein the Apex Court has held that in absence of pleadings, evidence cannot be led. This Court thereafter considered landlord's case for eviction under Section 13(1)(b) of the Bombay Rent Act and held in paras-18 and 19 as under :

18. Now, turning to the next ground pressed into service by the plaintiff relates to breach of Section 13(1)(c) of the Rent Act which permits the landlord to evict tenant and recover possession of the premises amongst others, if the Court is satisfied that the tenant or any person along with tenant has been guilty of conduct amounting to nuisance and annoyance to the adjoining neighbouring occupier. In the light of the above provisions if one turns to the plaint pleadings; it would be clear that the pleadings in this behalf are that the construction of the cabin beneath the stair case has been causing nuisance and annoyance to the tenants and to the plaintiff's staff, who are required to use the staircase.

At this Juncture, it is necessary to notice that though the word "nuisance" is not defined but, it can be inferred from the context In which it is used what is meant therein is the actionable nuisance as recognised in Common Law. Nuisance as understood in law is broadly divided into two classes, public nuisance and private nuisance. The former consists of some acts of omissions which result in violation of rights which one enjoys in common with other members of the public. But the latter i.e. private nuisance is one which interferes with a person's use and enjoyment of immovable property or some right in respect of it.

19. In Halsbury's Laws of England (Vol. 34 of the fourth edition) at page 102, essentials of common law of nuisance are mentioned as under :

"309. Both unlawful act and damage necessary.

In order to constitute a nuisance there must be both (1) an unlawful act and (2) damage, actual or presumed. Damage alone gives no right of action; the mere fact that an act causes loss to another does not make that act a nuisance.

For the purposes of the law of nuisance an unlawful act is the interference by act or omission with a person's use or enjoyment of land or some right over or in connection with land."

20. Suffering of damage must be proved in a case of nuisance unless it can be presumed by law to exist. But the damage to amount to actionable nuisance must be substantial or at least of some significance. In other words, if the damage is insignificant or evanescent or trivial it would not be actionable nuisance. The following passage para. 312 of the same volume in Halsbury's Laws of England is worth extracting in this context.

"312. Damage essential.- Damage, actual or prospective or presumed, is one of the essentials of nuisance. Its existence must be proved, except in those cases in which it is presumed by law to exist.

The damage need not consists of pecuniary loss *but it must be material or substantial*, that is. it must not be merely sentimental, speculative or trifling or damage that is merely temporary, fleeting or evanescent."

In the above backdrop, if clause (e) of sub-section (1) of section 13 is examined, it is clear from the said clause that what is envisaged therein is only private nuisance and not public nuisance.

19. On the canvass of the above discussion and pleadings, if evidence led by the plaintiffs is examined, it would be clear that the plaintiff has neither examined any tenant nor any person occupying adjoining premises or for that purpose any member of its staff so as to establish nuisance being caused to those who are required to use the stair case. Not a single person of the category pleaded in the plaint was examined by the plaintiff. Consequently, finding recorded by the Appellate Court that the plaintiff failed to prove its case under section 13(1)(c) cannot be faulted.

Broadly, the ratio of judgment of this Court in *Hotel Rosalia* is on the issue of need to lead evidence of the neighbour or person occupying the adjoining premises with a view to prove the case of nuisance and annoyance.

- iv. In *M/s. New Laxmi Cycle Company* (supra), a Single Judge of this Court (*B.P. Dharmadhikari, J.*) has considered the ground of eviction under Section 16(1)(c) of the Maharashtra Rent Control Act, 1999 which is more or less *pari materia* with Section 13(1)(c) of the Bombay Rent Act. This Court held that it was the responsibility

of the landlord to show that activity of bicycle assembling undertaken in open plot in front of tenanted godown by Petitioner-tenant was causing nuisance or annoyance to the adjoining or neighbouring occupier. This Court held that no neighbour or other occupier in the vicinity of tenanted premises was examined by the landlord but he had merely produced photographs to show the position of the open plot being used by the tenant. In cross-examination, the landlord admitted that he was not personally occupying any premises or structure in the vicinity of the godown or open plot. No other godown owner or occupier of any property in the vicinity was examined. In the light of this factual position, this Court held that the landlord failed to make out a case of nuisance or annoyance to the adjoining or neighbouring occupiers under Section 16(1)(c) of the Maharashtra Rent Control Act. The judgment in *M/s. New Laxmi Cycle Company* is thus on need for leading of evidence of neighbouring occupier to prove the case of nuisance.

- v. Mr. Tulzapurkar has relied upon Constitution Bench judgment in *Krishanlal Ishwarlal Desai* (supra) in support of distinction between meaning of the terms “occupation” and “possession” and also strictness with which the Apex Court has considered the provisions of Section 13 of the Bombay Rent Act. The case before the Apex Court involved eviction decree under Section 13(1)(g) and Section 13(1)(i) of the Bombay Rent Act, where eviction was sought for bonafide requirement of the landlord and for erection of new building respectively. Under Section 17 of the Bombay Rent Act, after passing of decree of eviction under Clauses (g) or (i) of Section 13(1), if the premises are not occupied or the work of erection is not commenced within one month, the Court can order

the landlord to place the tenant back in possession. In the context of the provisions of Section 17 of the Bombay Rent Act, the Apex Court made following observations :

6..... It is clear that when section 17 (1) refers to the requirement that the premises must be occupied by the landlord, the occupation intended by the provision is different from possession, because the first clause of 17 (1) makes a clear distinction between occupation and delivery of possession. The effect of this clause is that when a landlord who has obtained a decree for possession executes the decree and obtains possession of the premises in question he must occupy them in terms of the case made out by him under section 13 (1) (g) and held proved at the trial. Whether or not the occupation by the landlord should be for the same purpose which he set out at the trial or can be for a different purpose, is a question which it is unnecessary to decide in the present appeal. What is, however, clear beyond any doubt is that when the possession is obtained in execution it must be followed by an act of occupation which must inevitably consist of some overt act in that behalf and this overt act was, on the finding of the District Court, done by the appellant on October 24, 1957. That means that the appellant occupied the premises beyond the period of one month prescribed by Section 17 (1).

The judgment in *Krishanlal Ishwarlal Desai* (supra) is not useful for decision of issue at hand because Section 17 of the Bombay Rent Act requires the landlord to himself occupy the tenanted premises within the stipulated period from the date of passing of Decree for eviction under Section 13(1)(g) or (i). Such occupation under Section 17 is bound to be physical and actual occupation and not merely constructive possession. In para-8 of the judgment, the Apex Court has held as under:

8. Besides, the scheme of section 17(1) clearly supports this construction. Section (13) (1) has allowed the landlord to eject the tenants from the premises in their possession for specified reasons and Section 17(1) affords a protection to the tenants where a decree for ejectment has been passed against them under clauses (g) or (i) of section 13 (1). If the legislature thought it necessary to require the landlord to commence the work of erection if he has obtained a decree for possession under section 13 (1) within one month, there is no reason why the legislature should not have provided for the same or similar period in respect of occupation

which is referable to the decree passed under section (13) (1) (g). Mr. Setalvad contends that the occupation could be effected within a reasonable time for he suggests that no limitation having been prescribed in that behalf, the general rule would be that it should be done within a reasonable time. We think this construction cannot be accepted because it is extremely unlikely that the legislature should have provided the period of one month for one category of decrees and should have made no specific provision in that behalf in respect of decrees of the other category. Besides, the construction of the clause according to the rules of ordinary grammar is decisively against the appellant's contention.

It is Mr. Tulzapurkar's contention that since Section 13 entails eviction of a tenant, no decree for recovery of possession can be passed unless all elements provided in the Section are strictly complied with. There can be no dispute to this proposition. However, the judgment in *Krishanlal Ishwarlal Desai* is not useful for deciding the issue as to whether the Plaintiffs in the present case would be covered by the term 'adjoining or neighbouring occupiers' within the meaning of Section 13(1)(c) of the Bombay Rent Act.

- vi. In *Suklal Kalu Thorat* (supra), a Single Judge of this Court (*Ravindra V. Ghuge, J.*) has relied upon the judgment of the Gujarat High Court in *P.D. Trivedi* (supra), to which reference is being made separately in the latter part of the judgment. Relying on *P.D. Trivedi's* judgment, this Court held in para-22 as under :

22. Taking into account the words 'adjoining or neighbouring occupiers', I am of the view that this would include the landlord as he amounts to being an adjoining or neighbouring occupier. The landlord can, therefore, invoke section 13(1)(c) even to the extent of the act and conduct of the tenant visavis a landlord. However, in this case, no such instances have been pointed as being acts causing annoyance and nuisance to the landlord considering the principles laid down by this Court in paragraph No.6 of the *Kashinath Shankar judgment* (supra) and paragraph No.9 of the *P.D.Trivedi judgment*(supra).

In my view, the judgment in *Suklal Kalu Thorat* again does not throw any light on the issue at hand. It merely holds that the expression 'adjoining or neighbouring occupiers' would also include a landlord. The case for eviction under Section 13(1)(c) was rejected as no instance of act causing nuisance or annoyance to the landlord was proved.

- vii. In *Emperor V/s. Taylor* (supra), it is held that what constitutes 'occupation' is a question of fact in each case, which needs to be determined in reference to well-known principles of law. This Court held in para-4 of the judgment as under :

4. On the second question the answer to it must depend upon the circumstances in each case and the question cannot be treated as one purely of law. There is nothing in the Act to make the mere successor in office of a person who has given notice under section 14 *an occupier* himself unless the occupation is legally in him. **What is an occupation is a question of fact in each case, to be determined with reference to some well-known principles of law.** The learned Magistrate, who has made the reference Seems to think that the legal meaning of *occupier* is a person who is in actual possession. **But a person may occupy or possess a land or building actually on constructively. In either case it is occupation.** The Factories Act does not speak of an actual occupier or actual occupation. If a land or building belonging to A is vacant, the law regards it as occupied by A, unless he has parted with his right of occupation in favour of some other person, such as a tenant or the like. If, again, the said land or building is occupied by A's servant or agent for A's purposes and on A's behalf, the occupier is A, though his occupation is only constructive. In this connection the familiar illustration of the landlord of a hotel or of a lodging house given in of the leading cases on the subject of occupation is valuable. Because the landlord lets a room to a lodger, the latter does not become its occupier and that because, though "both in a sense are in occupation" yet "the occupation of the landlord is paramount, that of the lodger subordinate."

(emphasis added)

- viii. In *B.N. Gamadia V/s. Emperor* (supra), the Division Bench of this Court considered the distinction between the words 'occupier' and

‘control’ in the light of the provisions of the Indian Factories Act, 1911, under which occupier and manager of factory are jointly and severally liable to fine, if convicted for employing or allowing to work any person contrary to the provisions of the Act. The Division Bench held that the word ‘occupier’ is not exhaustively defined in the Indian Factories Act and that there is nothing in the definition which limits the normal meaning of the word ‘occupier’, as indicating a person who is in actual possession or control of a factory.

- ix. Mr. Khambata has relied upon Division Bench judgment of this Court in *Emperor V/s. Dhanji Govindjee Bhate* which is relied upon in *B.N. Gamadia* in which again, the Division Bench of this Court held that the word ‘occupier’ plainly means a person who regulates factory and controls the work that is done there. Thus, both in *B.N. Gamadia V.s Emperor* and *Emperor V/s. Dhanji Govindjee Bhate*, the Division Bench of this Court held that the word “occupier” in the Indian Factories Act would not only mean a person who only physically and actually occupies a factory but would also include a person who regulates the factory and controls the work performed therein.
- x. **Ude Bhan** (supra) is a Full Bench decision of Punjab High Court which is infact referred to in by the Apex Court in *Rajendra K. Bhutta*. The issue before the Full Bench was whether a non-agriculturist letting out a portion of land or building attached to his main residential house to a tenant or tenants, can be deemed to be in occupation of that portion of land or building. In the light of this question, the Full Bench of Punjab High Court has interpreted the word ‘occupier’ and held as under :

The term "occupy" has been interpreted in numerous cases of the Punjab and other Courts in India and it would be tedious as well as unnecessary to refer to all of them. On behalf of the judgment-debtors reference has been made to the interpretation of the terms "occupation" and "occupy" in clause (3) of the Mysore House Rent and Accommodation Control Order in *Ratilal Bros. v. The Govt. of Mysore and another*, AIR 1951 Mysore 66 and section 11(3) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, in *Balmakund Khatry v. Hari Narain and others*, AIR 1949 Patna 31 and on behalf of the decree-holders reliance was placed on the definition of similar terms in section 7 (3) of the Madras Buildings (Lease and Rent Control) Act, 1946, as given in *Dr. Mohammad Ibrahim v. Syed Ahmed Khan and another*, AIR 1950 Mad 556 and in sub-section (5) of section 15 of the East Punjab Urban Rent Restriction Act, 1949, as made in *Shakuntala Bawa v. Ram Parkash*, ILR (1963) 1 Punj. 827. These interpretations depend on the particular context in which the terms occur in the relevant statute but what has been observed in most of these cases is that the term "occupation" is of a wider import than the term possession and means something more than legal possession, which may be either actual or constructive. More helpful are some cases which arose in the Punjab under section 60(1) (c) or (ccc) of the Code. In *Jagat Singh v. Phuman Singh and another* AIR 1934 Lahore 680 it was held that the expression "occupied by" means "lived in by" or "used for agricultural purposes by" and, of course, so far as Clause (ccc) is concerned, a similar term would mean "lived in by the judgment-debtor". In *Bindra Ban and another v. Firm Chet Ram Budh Ram and another* (1956) P.L.R. 4, Bishan Narain, J. observed that under clause 60 (1) (ccc) the term "occupy" suggests a physical occupation at a given time, that is, at the time of attachment. No case under section 60(1) (c) or (ccc) could be cited in which it was held that the term "occupation" would mean constructive occupation also so as to give protection if the entire house was let out to a tenant, no part of it being physically occupied by the landlord.

The authority of the Supreme Court to which reference has been made for interpretation of the term "occupation" is *The Cantonment Board, Ambala Cantonment v. Dipak Parkash (Minor) and others* AIR 1963 SC 963 at pages 965 and 966. This was a case in which the Central Government had under the authority conferred by section 7 of Cantonments (House Accommodation) Act, 1923, obtained a lease of a house in Ambala Cantonment and a military officer was in occupation of the house as a licensee of the Central Government. In appeal against the assessment of the house tax of this bungalow, the question arose whether the Central Government or its licensee-the military officer-was liable to pay the house tax. The Supreme Court held that where the Central Government after obtaining the lease under section 7 of the Cantonments (House Accommodation) Act, 1923, leases it out to any person, it is itself not entitled to actual occupation but has to put the sub-lessee into occupation and in such a case, it may be reasonably said that the Central Government has ceased to be in occupation. In the case where the Government after taking the lease merely gives a licence to some persons to come and live in it, it is entitled to take away the

permission at any time and thus to come into possession itself. Thus, the fact that the person to whom such permissive possession has been given is residing in the building, does not make it any the less the actual occupation of the Government. The Supreme Court was, therefore, making a clear distinction between a lease and a license and it was held that it was only in the latter case that the Government could be held to be in the occupation while in the former it ceased to be in occupation.

Thus in ***Ude Bhan*** the Full Bench of Punjab High Court held that interpretation of the term 'occupy' would depend on the particular context in which the terms occur in the relevant statute and that in most of these cases, the term 'occupation' is of a wider import than the term 'possession' and means something more than legal possession, which may be either actual or constructive. The Full Bench in ***Ude Bhan*** referred to the decision of the Apex Court in ***The Cantonment Board, Ambala Cantonment*** which is separately dealt with in latter portion of the judgment.

- xi. In ***Sant Ram*** (supra), the Delhi High Court has dealt with a case of Petitioner claiming to be occupants of a Shop owned by a person who migrated to Pakistan resulting in his property to be notified as evacuee property. The issue for consideration before the Single Judge of the Delhi High Court was whether the word 'occupant' under the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 means a person who is entitled to occupation or whether it would include a person who is actually in occupation. The Delhi High Court held that the expression 'occupation' in Rule 26 would take colour from its context. The Learned Judge referred to the observations of Judge Learned Hand that "*it is one of the surest indices of a matured and developed jurisprudence not to make a fortress of the dictionary but to remember that statutes have always some purpose and object to accomplish, whose*

sympathetic and imaginative discovery is the surest guide to their meaning.” The learned Judge of the Delhi High Court held that Petitioner therein who was not physically using the premises cannot be treated as ‘occupier’ and the tenants whose tenancy was created by the original owner, who migrated to Pakistan, were treated as ‘occupiers’ within the meaning of the Rules of 1955.

- xii. ***Achut Pandurang Kulkarni*** (supra) is a judgment of Single Judge of this Court which is relied upon by Mr. Khambata in support of his contention that installing of Plaintiffs’ servant, *Shirpu Mali* and latter his family by the Plaintiffs on the open land behind the main bungalow would make Plaintiffs occupiers of the vacant land even if they were physically residing in Mumbai or Tamil Nadu. This Court held in ***Achut Pandurang Kulkarni*** as under:

“The tenant must couple and clothe his inward intention to return, with some formal, outward and visible sign of it as for instance **by installing some caretaker or representative**, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his own ultimate homecoming.”
(emphasis added)

Thus under ***Achut Pandurang Kulkarni***, a Single Judge of this Court, while dealing with the issue of eviction decree under Section 13(1)(k) of the Bombay Rent Act relating to non-user, has held that even if the tenant keeps a caretaker or representative in the tenanted premises by way of license, the tenant is deemed to be the user within the meaning of Section 13(1)(k) of the Bombay Rent Act. Following this ratio, Mr. Khambata contends that since Petitioner kept his servants/caretakers in the open land behind the main bungalow, the Plaintiffs are deemed to be in occupation of that vacant land.

- xiii. ***Dr. Mohammed Ibrahim*** (supra) is a judgment of Division Bench of Madras High Court which has dealt with recovery of possession from tenant to satisfy landlord's own needs. The landlord wanted the premises for his own occupation. In the context of that dispute, the Division Bench of the Madras High Court has interpreted the term 'occupier' by holding that even if a person is deemed to occupy residential building at the time of making application for eviction even though physically, he himself might not be residing therein.
- xiv. The judgment of the Apex Court the ***Cantonment Board, Ambala Cantonment*** (supra) has been relied upon by Full Bench of Punjab High Court in ***Ude Bhan*** to which reference is already made hereinabove. In case before the Apex Court, the issue was whether occupation by a Military Officer of portion of a building would amount to occupation thereof by the Central Government within the meaning of Section 99 (f) of the Cantonment Act, 1924. The expression employed in Section 99 (f) of the Act of 1924 is "*in the occupation of the Central or any State Government*". The Apex Court held in paras-13 and 14 as under :

13. It is worth noticing that while Section 65 (1) speaks of actual occupation by the owner and makes the tax primarily leviable on the owner if he is the actual occupier, Section 99(2) uses the words "in the occupation of the Central or any State Government" and not "in the actual occupation of the Central or the State Government". Even so, it has been argued by Mr. Sen that the word "occupation" without anything more, should ordinarily be interpreted as actual occupation. While this may be correct, we find it difficult to agree that when a person, entitled to actual occupation by reason of his lease permits another to occupy it, then it ceases to be in the actual occupation of the person so permitting. Where the Central or the State Government after obtaining the lease under Section 7 leases it out to any person, it is itself not entitled to actual occupation but has to put the sub-lessee into occupation. In such a case it may be reasonably said

that the government has ceased to be in occupation. In the case where the government after taking the lease merely gives a licence to some person to come and live in it, it is entitled to take away the permission at any time and thus to come into possession itself.

14. We can see no reason for thinking that in such a case the fact that the person to whom possession has been given is residing in the building, makes it any the less the actual occupation of the Government. If that was so, the fact that the Military Officer may be away for months together and the members of his family or his servants are residing would make the building cease to be in occupation of the Military Officer. That is on the face of it absurd. In our opinion, where the person entitled to occupy, permits some other person to be in the building, he is in actual occupation through such other person.

Thus, the Apex Court in *Ambala Cantonment* held that even if a Military Officer resides in the bungalow, it would be the Central Government who would be the real occupier thereof.

87) After having considered the series of judgments cited by Mr. Tulzapurkar and Mr. Khambata, it is seen that the word 'occupier' cannot be given a universal meaning. The term 'occupier' will have to be contextually interpreted in the context of the statute in which the same is used. It would take colour from the context of the statute in which it appears. Though the Apex Court, in series of judgments, has held that plain language used in a Statute must be given literal interpretation. At the same time, it is equally well settled principle that the interpretative function of the Court is to discover the true legislative intention.

88) However, after taking stalk of various judgments by both the parties, it is seen that the word 'occupier' is interpreted differently in the context of different statutes. While interpreting the provisions of the Insolvency and Bankruptcy Code, 2016 the Apex Court in *Rajendra K. Bhutta* has interpreted the term 'occupied' to mean 'a person actually and physically using the premises'. On the contrary, while interpreting the

provisions of the Indian Factories Act, the Division Benches of this Court in *B.V. Gamadia* and *Dhanji Govindjee Bhate* have interpreted the term 'occupier' to mean not just the person who is physically present in the factory, but also a person who regulates the factory and controls the work which is performed therein. In *Cantonment Board, Ambala Cantonment* the Apex Court held that even though a Military Officer physically occupies a bungalow it would be the Central Government who would be covered by the expression 'occupation' within the meaning of Section 99(2)(f) of the Cantonment Act, 1924. So far as the Bombay Rent Act is concerned, no decision is cited which interprets the term 'occupier' to mean that only a landlord who physically occupies or is physically present at the adjoining land/premises can complain of nuisance or annoyance or that a landlord, who though in possession of neighbouring or adjoining premises but not physically present there, would not be 'occupier' within the meaning of Section 13(1)(b). The judgments of this Court in *Hotel Rosalia, New Laxmi Cycle Company* and *Suklal* deal with the issue of need of leading cogent evidence for proving cause of nuisance or annoyance to landlord who claims to be neighbouring or adjoining occupier.

89) The Bombay Rent Act uses the words 'possession' and 'occupier' and 'use' in different provisions in different contexts. Section 13(1) talks of landlord's entitlement to recover 'possession' and therefore a landlord can virtually oust everyone and everything that is found in the tenanted premises. Recovery of 'possession' would mean ouster of even a servant or caretaker of a tenant and of a tenant who is in physical, actual or constructive possession. Section 13(1)(c) talks of acts of nuisance/annoyance to the adjoining or neighbouring 'occupiers'. Here the word 'occupier' would not mean only a person who is in physical or actually present at the neighbouring or adjoining premises and would

also cover a landlord who suffers nuisance or annoyance on account of acts of tenant who interferes with landlord's use and possession of adjoining property. This is explained in latter portion of the judgment. The legislative intent of use of the word 'occupier' is not to restrict the provision to person who is actually and physically present all the time in neighbouring or adjoining premises, or else the legislature would have used the word 'use' as is done in Section 13(1)(k). Section 13(1)(k) provides for eviction of a tenant if premises have not been 'used' for a specified period. In Section 13(1)(k), actual and physical presence of tenant is contemplated, which does not appear to be the case for neighbouring or adjoining occupiers in section 13(1)(c). To make this clearer, use of the words 'occupiers' in section 13(1)(c) and 'occupied' in Section 17(1) leaves no manner of doubt that the word 'occupier' cannot be given same meaning in every section. In Section 17(1), the landlord is required to occupy the premises within one month of obtaining a decree for eviction under Section 13(1)(g) or (i), or else the tenant can seek re-entry in the premises. In Section 17(1), the word 'occupied' has to be interpreted to mean, actual and physical occupation and not mere possession. In the light of further discussion on the point of cause of nuisance or annoyance to landlord who may not be present in the neighbouring premises at all times, it is difficult to hold that the word 'occupier' in section 13(1)(c) would include only a person who physically or actually occupies the same.

90) In my view, therefore since a landlord is covered by the expression 'adjoining or neighbouring occupiers' used under Section 13(1)(c) of the Bombay Rent Act, it is difficult to hold that the landlord must be physically present all the time in the adjoining/neighbouring property/premises which are in landlord's possession. The word 'occupiers' appearing in Section 13(1)(c) therefore cannot be interpreted

to mean actual physical occupation by the landlord. A landlord who is found to be in possession of adjoining or neighbouring property/premises would also be covered by the expression 'occupiers' under Section 13(1)(c) of the Bombay Rent Act.

F.4.3 WHAT CONSTITUTES NUISANCE OR ANNOYANCE UNDER SECTION 13(1)(C) OF THE BOMBAY RENT ACT

91) As observed above, Plaintiffs case of cause of nuisance and annoyance to neighbouring Marker family on account of construction of open privy by servants of Plaintiffs has been rejected by the Appellate Court. The Appellate Court thereafter went ahead and examined the issue whether Defendant's act of construction of wall on the open land behind the main bungalow caused nuisance and annoyance to Plaintiffs and held such act caused nuisance and annoyance to the Plaintiffs.

92) It is Defendant's case that construction of such wall could neither have caused any nuisance or annoyance to Plaintiffs nor any evidence was led to prove cause of the same. It is further contended that Plaintiffs resided at Mumbai and Tamil Nadu and could not have suffered any nuisance and annoyance on account of construction of such wall which was constructed not only with the consent of atleast one of the landladies but admittedly did not cause any nuisance and annoyance during the time gap of construction of wall and filing of the suit. On the contrary, it is the contention of Respondents that any interference caused by tenant for use of open land belonging to Plaintiffs would necessarily constitute nuisance and annoyance. Both the sides have relied upon judgments in support of their respective contentions as under :

- i. ***Nilesh Laxmichand*** (supra) is relied upon by Mr. Tulzapurkar in support of his contention that in absence of leading of

evidence of a neighbour and where landlord did not reside in the building, the alleged act of tenant of causing pollution, smoke and smell by preparation and sale of food stuff did not constitute any nuisance. In case before the Apex Court, the Defendant-tenant was operating business of bookshop in the tenanted shop. Plaintiff-landlord alleged that the tenant sublet the premises to third party and that business of preparation and sale of food stuff from the tenanted premises was commenced and the same was causing pollution, smoke and smell thereby causing nuisance and annoyance to the Plaintiff-landlady and other occupants of the building. Plaintiff-landlady resided in the same building but was not examined as a witness. On the other hand, her son was examined as P.W.1, who resided elsewhere and occasionally visited his mother/landlady. No adjoining occupier was examined as a witness to support the case of nuisance. In the light of this position, the Apex Court held in para-19 as under:

19. As regards the case of nuisance, Section 16(1)(c), inter alia, declares that conduct which is a nuisance or annoyance to the adjoining or neighbouring occupier by the tenants or others under him, is the ground for eviction. The nuisance, apparently, is attributed to the period of time when business of fast food was being carried out. We have noticed the findings of the Trial court. **The evidence of none of the neighbours, be they any of the shopkeepers in the building itself or otherwise, is forthcoming.** Details, as such, thereof are not seen established. **The original plaintiff who resided in the same building has not given evidence.** The evidence essentially constitutes of the deposition of PW1, the son of the original plaintiff and the complaint in writing. **Admittedly, he does not reside in the building. He resides elsewhere.** No doubt, his evidence that when he came to visit his mother and he would go around, is relied upon to conclude that he has experienced nuisance and that nuisance is established. **We would think that having regard to the serious consequences which arise out of ground of nuisance, being established, the facts of this case may not justify eviction of appellants on the said**

ground. In fact, the High Court has not independently gone into the matter and it has affirmed the findings of the Appellate Forum. These findings, we have adverted to. We do not think that there was justification for the Appellate court or the High Court to sustain eviction on the ground of nuisance.

(emphasis supplied)

Mr. Tulzapurkar would strenuously rely upon judgment in ***Nilesh Laxmichand*** in support of his twin contentions of (i) Plaintiffs not residing in the open land behind the main bungalow and (ii) non-examination of any member of Marker family to prove the case of nuisance. On the other hand, Mr. Khambata would distinguish the judgment in ***Nilesh Laxmichand*** by contending that in the present case, Plaintiffs have led evidence of cause of nuisance and that in case before Apex Court, the case involved cause of nuisance/annoyance on account of pollution, smoke and smell as opposed to interference in peaceful enjoyment of the open land by the Defendant by construction of wall in the present case.

- ii. The Judgment of Single Judge of Gujarat High Court in ***P.D. Trivedi*** (supra) is strenuously relied upon by Mr. Tulzapurkar as the case involved allegation of cause of nuisance by reason of commission of trespass, as in the present case. In ***P.D. Trivedi***, the allegation against the tenant was that he forcibly took possession of one of the rooms kept reserved for personal use and occupation of the landlord by forcibly breaking open the lock and forcible occupation of the room by the tenant. The question before the Gujarat High Court was whether the act of the tenant amounted to nuisance and annoyance within the meaning of Section 13(1)(c) of the Bombay Rent Act. In the

above factual background, a Single Judge of Gujarat High Court held in paras-7, 10 and 14 as under :

7. The case of the landlady is that the conduct of the tenant amounts to nuisance or annoyance to the adjoining or neighbouring occupiers. **The question for consideration is whether an act of the tenant committing trespass in one of the rooms amounts to annoyance or nuisance to the landlady who is not residing in the locality or in the premises itself rather she is residing at Bombay.** There is also no allegation that this act of the tenant amounted to nuisance or annoyance to the neighbouring occupiers or to the adjoining occupiers. Only thing is that according to the landlady because the room was forcibly occupied by the tenant in her absence by breaking open lock and she had to face the litigation in the Criminal Court, Civil Court and upto the Apex Court this amounted to nuisance and annoyance to the landlady.

10. Learned Counsel for the respondent, however, placed reliance upon two other cases of this Court. The first is Chandrakant Madhavrao Bhaiber Vs. Gajendrakumar Sunderlal Shah MANU/GJ/0133/1970. It was Laid down this case as follows:

In order to attract Clause (c) of Section 13(1) of the Bombay Rent Control Act, the landlord has to establish first, a conduct of the tenant, secondly, that the said conduct is a nuisance or annoyance and thirdly that the nuisance or annoyance is caused to the adjoining neighbours or occupiers of the premises. In this Clause the Legislature has used the words "nuisance" or "annoyance" meaning thereby, that the word "annoyance" has a different meaning than the word "nuisance" as the Legislature would not ordinarily use the same expression twice over. The word "annoyance" indicates such conduct of a person which would harm, injure or irritate other persons or to make them angry. The word "annoyance" as used in Clause (c) of Sub-section (1) of Section 13 of the Act includes an act which interferes with the peaceful and reasonable enjoyment of the premises by the adjoining or neighbouring occupiers....

14. However, considering this case and facts of the case before me and also considering the judgment of the lower Appellate Court laying down the philosophy of nuisance and annoyance I am of the view that **single act of the tenant in committing trespass over one room owned and possessed by the landlady could not amount to annoyance to the adjoining occupiers or neighbouring**

occupiers. Occupiers of adjoining building or neighbouring building have no concern with such activity of the tenant nor their personal life is disturbed by alleged and proved trespass committed by the tenant. Obviously, the landlady is not permanently residing in the adjoining portion of the suit accommodation or in any other building adjoining the disputed building. On the other hand, she is residing at Bombay and she casually comes to the locality where the disputed building is situated. Such casual visit cannot be treated as occupation of the landlady in a portion of the disputed building or of any adjoining building. As such the alleged trespass might have caused irritation to the landlady but it does not amount to nuisance on which tenant can be evicted.

It is Mr. Tulzapurkar's contention that mere act of commission of trespass by a tenant over one room owned and possessed by landlord was held to be not amounting to nuisance or annoyance to the adjoining or neighbouring occupiers and also to the landlady who was residing at Bombay and was occasionally visiting the building. According to Mr. Tulzapurkar, landlady's casual visit was held to be not amounting to 'occupation' in portion of disputed building or of any adjoining building. According to Mr. Tulzapurkar, as held by the Gujarat High Court in *P.D. Trivedi*, such act of trespass may amount to causing of irritation to landlord but does not amount to nuisance for attracting the suit for eviction. Mr. Khambata has sought to distinguish judgment in *P.D. Trivedi* by contending that the view taken by this Court in various judgments (to which detailed reference is made in paragraphs to follow) was not brought to the notice of the learned Single Judge of Gujarat High Court in *P.D. Trivedi*. He would therefore submit that *P.D. Trivedi*'s case cannot be cited in support of absolute proposition that in every case when a trespass is committed by a tenant on land/premises in

possession of landlord, such act would not constitute nuisance and annoyance.

- iii. ***Fulchand Laxman Bangade*** involved a case where tenant's eviction was sought under Section 16(1)(c) of the Maharashtra Rent Control Act, 1999 alleging cause of nuisance and annoyance to the adjoining or neighbouring occupiers. It is not known from the reading of the judgment as to what exactly was the cause for nuisance and annoyance. However, Single Judge of this Court held that since nuisance should necessarily be caused to adjoining dwellers or neighbours. Location of shop of the landlord away after four shops from that of the tenant was held to be the reason for not upholding the ground of nuisance and annoyance. The judgment is distinguished by Mr. Khambata by submitting that Plaintiffs admittedly have open land abutting the tenanted premises and therefore the judgment of Single Judge of this Court in ***Fulchand Laxman Bangade*** has no application to the present case.
- iv. Mr. Khambata has relied on judgment of this Court in ***Gulam Husain Mirza*** (supra), in which a Single Judge of this Court has dealt with validity of eviction decree passed against the tenant under Section 13(1)(c) of the Bombay Rent Act. The landlords in that case were occupants of second floor premises in the same building and the tenant occupied three rooms on the third floor and one room called the terrace room on the top floor. The landlord complained of the tenant trespassing on the entire terrace on the top floor of the building and alleged that the tenant was using the entire terrace as a part of his exclusive property by putting stones, mud, flowering plants etc. The

question before the Single Judge of this Court was whether such conduct was covered by the words "nuisance" or "annoyance". This Court held in paras-13, 14, 16 and 19 as under :

13. In *Walter v. Gelfe*, 20 LJ Ch 435, Knight-Bruce V.C. observed that the nuisance is an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober simple notions among the English people. This test was approved in the case of *Tod-Heatley v. Benham*, 40 Ch.D. 80, Talbot, J. in *Gunard and Wife v. Antifyre Ltd.*, (1933) 1 KB 555 observed that private nuisance could be confined to that which is injurious to property. In *Read v. Lyons & Co. Ltd.*, (1945) KB 216, Winfield's proposition that the nuisance is the unlawful interference with a person's use of enjoyment of land, or some right over or in connection with it was cited with approval and was further affirmed in other cases, such as *Howard v. Walker*, (1947) 2 All ER 197, and *Newcastle-under Lyne Corporation v. Wolstanton Ltd.*, (1947) Ch. 92. In *Buller v. Standard Telephones and Cables Ltd.*, (1940) 1 KB 399 injurious encroachment by the roots of a tree going underneath a house was treated to be an actionable nuisance. In *Harrison v. Good*, LR 11 Eq. 338 Becon V.C. observed that unless the nuisance complained of is one for which an indictment would lie, or an action could be maintained, it is no nuisance within the terms of the convenient which was being considered and further found that the establishment of a national school with playground for boys in the vicinity of a residential property would not be a nuisance, though it would be an annoyance. Lindley L.J. in *Tod-Heatley v. Benham* referring to those cases thought that the term appeared to be restrictively interrupted while Bowen L.J. doubted the correctness of the interpreted. The decision of the learned Lord Justice in *Tod-Heatley v. Benhman*, goes to show that the term "annoyance" is also of very side amplitude. Cotton, Lord Justice asked now what is the meaning of annoyance? The meaning is that which annoys, that which raises objection after and unpleasant feeling. Anything which raises an objection, in the minds of reasonable men may be an annoyance within the meaning of the covenant, while Bowen Lord Justice observed that it implies more, as it seems, then nuisance and further stated that it was clear that if annoyance and nuisance were put together in a convenient of the kind which was being considered, it should mean something different from each other. The learned Lord Justice further observed :

"Any material interference with the ordinary comfort of existence; that would be a nuisance... "Annoyance" is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house-if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be annoyance although it may not appear to amount to physical detriment to comfort."

14. Therefore, whatever causes material interference with the ordinary comfort of existence would be nuisance and anything that disturbs the reasonable peace of ordinary person and leads to unpleasurable feeling, would be annoyance. Jessel M.R. In *Watson v. Loasington College*, 25 SJ 30, said that it might perhaps be difficult to appreciate the difference between "nuisance" and "annoyance", but as both words were used, "annoyance," evidently meant something less than "nuisance", while *Tod-Heatley v. Benham* (supra), "annoyance" was treated to have a wider meaning than "nuisance".

16. Thus, the legal comprehension that encompasses these terms appears to be well-settled. Though the terms are of very wide amplitude covering variety of circumstances and cannot be fenced by any definite meaning, **whatever causes material interference with the ordinary comfort of human existence would, surely be the nuisance, while that which annoys, irritates or is offensive and has tendency that would evoke reasonable injection and leading to unpleasant feeling amongst persons, would be annoyance.**

19. As the section itself shows, it is the conduct that thereunder comes in issue. While considering nuisance and annoyance, that conduct on behaviour complained of will have to be objectively appreciated. It may have relation either to the rights and enjoyment of the property or other rights and entitlements of persons who, as ordinary men, are entitled to have peaceful, trouble free and ordinarily comfortable situation. These entitlements are basic in human society. These are to be judged by the given standard or norms available in such society, a given conduct adversely affects such entitlement or encroaches there upon, then the conduct would be within the mischief of the clause. One must hasten to add that the phrase employed by the statute being of wider amplitude, there is always a possibility of overstraining the meaning so as to include even the trifle and trivial matters. That is why every conduct should be judged in the context, and fairly. Without being elaborate and exhaustive, it can safely be said that all that conduct which is offensive, quarrelsome or violent, unethical in just a position of peaceful, civil and by ordinary standard unethical would be within the mischief. Matters of physical assaults by one against other would attract squarely the clause so also to other types of subtle assaults that offend human senses. Such acts may affect the peace and interfere with the pleasurable enjoyment of the property and, consequently, be within them mischief. **Similarly, cases where property is trespassed upon and appropriated to one's own use to the exclusion of others' entitlement would be within the mischief of nuisance.** Whenever question arises under the clause, first the conduct or behaviour that is in issue should be fairly and objectively ascertained and then, secondly, its effect in relation either to the property or the persons occupying the property should be taken into account All this should be done in keeping with the social background of the given society, having norms of reasonable peace, comfort and enjoyment as well as in the light of the entitlements of the occupiers regarding the specific property. Having considered all these three aspect, if the conclusion is reached that the conduct was such which affected or tended to affect the reasonable entitlements of ordinary

normal expectations of life, then all that this clause intends would be clearly answered.

(emphasis & underlining added)

Thus in ***Gulam Husain Mirza***, this Court by referring to various English cases held that the term “nuisance” is of wide amplitude. This Court therefore held that whatever causes material interference with the ordinary comfort of human existence would be nuisance and acts that disturbs the reasonable peace of ordinary person and leads to unpleasant feeling, would be annoyance. This Court further held that cases where property is trespassed upon and appropriated to one’s own use to the exclusion of others’ entitlement, would be within the mischief of nuisance. This Court therefore held that the conduct of tenant in trespassing on the entire boundaries and putting the same to his exclusive use caused nuisance and annoyance to the landlord.

- v. Mr. Tulzapurkar seeks to distinguish the judgment in ***Gulam Husain Mirza*** by submitting that subsequently, the view taken therein about concept of nuisance and annoyance is not approved in subsequent judgment by another single judge of this Court (*S. K. Desai J*) in ***Awabai Muncharji Cama*** (supra). In para-7 of the judgment, this Court held as under :

7. The claim of nuisance as alleged in the plaint was expressly dropped in the trial Court but an attempt was made by Mr. Dalvi to resurrect the same before me in view of the decision of the learned Single Judge of this Court in ***Gulam Husain Mirza v. Laxmidas Premji***, 1984 M.L.J. 215. This is totally a new aspect of the matter which cannot be permitted to be raised after the plea on the point of nuisance was expressly dropped. The nuisance as now urged before me is different from what was pleaded and the contention seems to be that if the tenant trespasses upon or attempts to trespass upon or obstruct the landlord in enjoyment of any premises or part of premises or land other than the

demised premises, the same would constitute nuisance and may entitle the landlord to a Decree for eviction. **A similar plea seems to have been upheld by the learned Single Judge who decided *Gulam Husain Mirza's* case.** In my opinion, it is not open to the writ petitioner to take up this plea and hence whatever observations I may make upon the approach and ultimate conclusion in *Gulam Husain's* case would be clearly obiter. However, I am impelled to observe that the concept of nuisance as envisaged in the said case appears to be contrary totally to the well settled ideas of regarding nuisance under the law of torts. Further, in section 13(1)(c) the nuisance or annoyance is to the 'adjoining or neighbouring occupiers'. Various interesting questions arise. The landlord may fall within the requirements of the statutory provisions if he himself is occupying the adjoining property or premises but not otherwise. Further the nuisance or conduct complained of must be of such a character that it may cause nuisance or annoyance in general or at least to more than one person and this view seems to be supported by the use of the plural in the provisions whilst adverting to "neighbours" or "occupiers". **It is, however, unnecessary to consider *Gulam Husain Mirza's* case further in the present matter.**

(emphasis and underlining added)

Mr. Tulzapurkar would contend that in *Awabai Muncharji Cama*, this Court did not approve the concept of cause of nuisance as enunciated in *Gulam Husain Mirza's* case and held that the view in that case is contrary to the well settled idea of nuisance in the law of torts. Mr. Tulzapurkar is however is fair in admitting and the learned judge himself has made it clear that his observations would be obiter. Mr. Khambata would submit that since observations are obiter, the same need not be considered by this Court.

- vi. ***Kashinath Shankar Gambhire*** (supra) is again relied upon to distinguish the judgment of this Court in *Gulam Husain Mirza*. In case before the Single Judge of this Court (*R.M. Lodha, J.*, as he then was) involved cause of nuisance and annoyance by tenant in unnecessarily litigating against the landlord and

frequently quarrelling, assaulting and abusing the neighbouring occupiers. This Court held in paras-6, 7 and 8 as under :

6. The nuisance for which an action would lie under section 13(1)(c) is incapable of any legal definition. Nuisance ordinarily means that which annoys or hurts or that which is offensive. It includes any act, omission or conduct which causes or is likely to cause inconvenience, hurt, damage or which may interfere with the enjoyment of the life or property. Anything done which unwarrantably affects the rights of others, endangers life or health, gives offence to the senses, violates the law of decency or obstructs the comfortable and reasonable use of property amounts to nuisance. The question whether a particular act, omission or thing is nuisance or annoyance actionable in law depends on surrounding circumstances. The alleged act or omission, the mode of committing it and the consequences flowing therefrom, amount to nuisance or not at all times would be the question dependent on facts and circumstances of the case. **However, one thing is certain that in order to attract the ground of eviction under section 13(1)(c) invariably it needs to be satisfied that the alleged nuisance is of gross and unusual character, frequent and persistent and that it would not be possible for the affected person or persons to lead normal life and it is such that one cannot ordinarily expect in household. Initiating legal process by filing suits or defending the litigation by a party cannot amount to a nuisance or annoyance, a ground for eviction contemplated under section 13(1)(c).** It is always open to a party to assert and vindicate his right in the competent Court though he may succeed or fail in such litigation. A party who pursues his remedy through legal process or defend himself by opposing the litigation initiated against him, cannot by any stretch of imagination be blamed to be guilty of an act which may be covered by expression "nuisance or annoyance" within the meaning of section 13(1)(c). The Courts below thus, committed serious error of law in relying upon the civil litigation between the parties and a criminal case initiated against the respondent at the instance of the petitioner as an act of nuisance under Section 13(1)(c) of the Bombay Rent Act. Moreover, it would be seen that issue before the trial Court in relation to the ground for eviction under section 13(1)(c) was to the effect. "Do the plaintiffs prove that the defendant is guilty of causing nuisance to the adjoining occupiers of the suit premises?" The issue was not framed by the trial Court to the effect whether by filing various suits and making some applications in the suit filed by the landlords, the tenant was guilty of nuisance or annoyance. In the light of the controversy which was crystallized in the form of the issue, the Courts below were only called upon to decide whether the defendant was guilty of causing nuisance to the adjoining occupiers of the suit premises and it was not open to

the Courts below to examine the ground of nuisance on the basis of various litigations between the parties which was not subject-matter of issue. Thus, the approach of the Courts below which was erroneous, while considering the issue relating to the ground of nuisance vitiates their findings on that issue. Besides it would be hazardous to guess that if the Courts below had not considered the litigation between the parties as an act of nuisance caused by the tenant. What would have been its finding in respect of the alleged conduct of the petitioner towards his neighbours as alleged by the two witnesses viz. Bhagwan Vithal Deshpande and Eknath Bapuji Kulkarni. Moreover, the evidence led by the plaintiffs does not prove that the defendant was guilty of causing nuisance to his neighbouring occupiers. The finding recorded by two Courts below in this connection is totally unsustainable. It would be seen that heavy reliance has been placed by the plaintiffs-landlords on Exhibit 45, the letter said to have been received from five neighbours which sets out the conduct of the tenant with his neighbouring occupiers. In the letter Exhibit 45, the tenant has been alleged of looking on women folk in adjoining neighbour houses with bad intention; making abusive remarks while passing, trespass and causing obstruction in the construction of plots purchased by others. The said letter is signed by five persons. Out of these five persons, four have not entered the witness box and only Bhagwan Vithal Deshpande has been examined as P.W. 2. In his deposition, he does not utter a word about tenant's looking on women folk in their houses with bad intention, making abusive remarks about their parents, forcibly trespassing and causing obstruction in the construction of their plots. This witness only has vaguely deposed that the tenant was giving troubles to them in all respects. The tenant would contract persons who visited them; he would chase and abuse them. The tenant would quarrel with them and lifted this witness and fell, him. He has not given details of any of the incidence. He has not named any person who visited him and was contacted by the tenant. He has not given details of quarrels and the incident when this witness was allegedly lifted, in his cross-examination, he admitted that he was not in a position to give dates of incidents. I am afraid such evidence cannot prove the ground for eviction based on nuisance and annoyance to neighbours under section 13(1)(c). The deposition of another witness Eknath Bapuji Kulkarni is no better. His deposition is as vague as that of Bhagwan Vithal Deshpande. He has deposed that the conduct of the tenant was suspicious and mischievous. The tenant used to contact the persons who used to visit them. The tenant used to abuse, quarrel and fell them. He, however, admitted that he has not filed any complaint. In the cross-examination, he admitted that the defendant quarrelled with him only two times during the period of more than two decades. Such evidence is no evidence in

the eye of law for proving nuisance under section 13(1)(c) since the evidence must be able to satisfy frequent, persistent, gross and unusual act or omission of nuisance. The nuisance or annoyance to the adjoining or neighbouring occupiers which is contemplated under section 13(1)(c) must be of serious nature, intensity and frequency. The evidence which has been led by the plaintiff miserably fails to satisfy the said test and, therefore, the Courts below seriously erred in holding that the plaintiffs have been able to prove that defendant was guilty of causing nuisance to the adjoining occupiers of the suit premises.

7. Since the learned counsel for the respondents heavily relied upon the two judgments, one of the Apex Court and the other of this Court, it would be proper for me to deal with the said decisions now. In the case of *Narpatchand A Bhandari v. Shantilal Moolshankar Jani*, (1993) 3 SCC 351, upon which the strong reliance has been placed by the learned counsel for the respondents, it would be seen that in that case the appeal Court found as a fact that the tenant erected a Textile Printing Mill on the terrace of storeyed building and ran it during nights so as to make the occupiers of the adjoining and neighbouring tenements in the storeyed residential building suffer the vibrations and noise in the building arising on account of the running of the mill and lose their quiet and sleep during nights. The appeal Court also found in that case that the tenant unauthorisedly was utilizing water stored in the common overhead tanks on the terrace, meant for domestic use of all the occupiers of the tenements, for running his mill. It was also the finding of the appeal Court in that matter that the tenant and the persons residing with him in the premises had often removed the radio aerials and T.V. antennas of the occupiers of the adjoining and neighbouring tenements and the tenant and the persons residing with him were wrongly preventing the landlords and the workers in reaching the common terrace for repairs of radio aerials, T.V. antennas, telephone lines and the like of the occupiers of the neighbouring tenements by locking staircase. On the facts so found, the Apex Court held that ground of nuisance and annoyance was made out. The said judgment, therefore, has no application since in the present case, there is no legal evidence to prove that defendant is guilty of causing nuisance to the adjoining neighbours. **The judgment of this Court in *Gulam Husain Mirza v. Laxmidas Premji*, 1984 Mh.L.J. 215, upon which reliance has been placed by the learned counsel for the respondents also cannot be applied in the present facts and circumstances.** In *Gulam Husain Mirza's* case, the tenant was inducted as tenant with regard to three rooms on the third floor and one room with a terrace room on the top floor. The tenant trespassed on the entire terrace on the top floor of the building and appropriated major portion of the terrace

by putting flowerpots and further he was excluding everyone including the landlords to use the said terrace. The tenant was using water from the water tank on the top Boor directly for the purpose of maintaining garden of flowerpots to the detriment of other occupiers. He was using the entire portion of terrace by putting stones, mud and all that was necessary to keep up the flowerpots and for nursing and tending the flowerpots. In the light of the said facts which were found proved, the conduct of the tenant was held amounting to nuisance and annoyance covered under Section 13(1)(c) of the Bombay Rent Control Act. *Gulam Husain Mirza's* case also, therefore, has no application in the present case.

8. In view of the foregoing reasons, I am satisfied that case for interference is made out in the judgment and decree for eviction passed by the Courts below.

(emphasis supplied)

In *Kashinath Shankar Gambhire* (supra), this Court did not accept the evidence of witnesses examined by the landlord and held that nuisance or annoyance to the adjoining or neighbouring occupants must be of serious nature. The case is thus decided on the facts of that case.

- vii. On the other hand Mr. Khambata relies on judgment of this Court in *D.V. Panse* (supra) wherein a Single Judge of this Court (*A.M. Khanwilkar, J. as he then was*) followed the view taken in *Gulam Husain Mirza* and held that tenant's conduct of assigning rights in respect of the open garden and passage not forming part of tenanted premises amounted to cause of nuisance or annoyance to the landlords. His Lordship *Khanwilkar, J.* observed that the tenant had obstructed the landlord and his family members from entering upon the open garden and passage which constituted an act causing nuisance and annoyance to the landlord. This Court held in paras-12 and 13 as under :

12. The next contention of the learned Counsel for the tenants that the conduct of both the parties will have to be looked into so as to ascertain whether the conduct of the tenant amounted to causing nuisance or annoyance to the landlord, because the issue of nuisance and annoyance is a relative term. That aspect to my mind, will be a pure question of fact. Moreover, this submission clearly overlooks the clinching evidence on record. Further, both the trial Court and the Appellate Court on analyzing the materials on record have found that there is clear evidence on record that the conduct of the tenants amounted to causing nuisance and annoyance to the landlords. That finding of fact cannot be overturned by this Court in exercise of writ jurisdiction. In the circumstances, there would be no occasion for this Court to reappreciate the evidence which is the subtle attempt made in the above submission. Therefore, this submission is devoid of merit.

13. The next submission pressed into service on behalf of the tenants is that, when the matter pertains to a dispute relating to the property, a person who is in possession and occupation of the property is bound to assert his right and if he has done that then no fault can be found with that person and he cannot be branded as having caused nuisance or annoyance to the owner. No doubt this submission seemed to be attractive at the first blush, but in the present case there is overwhelming evidence on record to show the spoilt relationship between landlords and tenants and the extent to which it has precipitated. The tenants no doubt is entitled to assert his right in respect of certain premises which according to him have been let out to him, however, he could do so within the limits which any prudent man is expected of whereas, in this case the evidence would indicate that the tenants have crossed the limits as is noticed by the Courts below. **Be that as it may, it is concurrently found that the tenanted premises consisted of only two rooms and a kitchen and sanitary block. However, the tenants were asserting rights in respect of the open garden and passage as well, as if the same was also let out to them. Moreover, it has been found by two Courts below that the tenants obstructed the landlords and his family members from entering upon the open garden and passage. Naturally, there can be no just reason for any tenant to do so. This by itself would constitute an act causing nuisance and annoyance to the landlords.** The Appellate Court has rightly relied on the decision in Gulam Hussian's case (supra) to answer the issue against the tenants on this count. In that case the tenant obstructed the landlord from coming on the terrace which was not let out to him. This Court held that such a conduct would result in causing nuisance and annoyance to the landlord. To my mind, this singular circumstance was sufficient to pass decree against the tenant under section 13(1)(c) of the Act.

(emphasis & underlining added)

Thus in *D.V. Panse* this Court held that the act of the tenant asserting rights in respect of the garden and passage not forming

part of tenanted premises, and obstructing landlords and his family members from entering upon the garden and passage, constituted nuisance and was held to be sufficient for passing decree against the tenant under Section 16(1)(c) of the Maharashtra Rent Control Act.

Khanwilkar J. held that the Appellate Court therein had rightly followed the judgment in *Gulam Husain Mirza*. Another important observation in the judgment of *D.V. Panse* is that cause of nuisance is a pure question of fact and finding recorded by lower Court cannot be overturned by the High Court in exercise of writ jurisdiction.

viii. *Kashinath Kaul* (supra) is another judgment of *S.K. Desai, ACJ.* relied upon by Mr. Tulzapurkar, in which it was held that annoyance must be caused to the occupiers in the very building and that when case of nuisance is extended beyond the adjoining building, it must be a very strong case. Mr. Khambata would counter the judgment in *Kashinath Kaul* submitting that a strong case of nuisance has indeed been made out in the present case.

ix. In *Rafat Ali* the Apex Court held that though the word 'nuisance' is not defined, the term is wide so as to include interference with person's use and enjoyment of immovable property or some right in respect of it. The Apex Court held in para-14 as under :

14. Though the word "nuisance" is not defined it can be inferred from the context that what is meant therein is the actionable nuisance which is recognized Common Law. Nuisance as understood in law is broadly divided into two classes--public nuisance and private nuisance. The former consists of some acts

or omissions which result in violation of rights which one enjoys in common with other members of the public. But the latter i.e. private nuisance, is one which interfere with a person's use and enjoyment of immovable property or some right in respect of it.

- x. In *Smt. Manoramabai Vishwanath Limaye*, the Single Judge of this Court, (*D.G. Karnik J.*) reiterated the principle that anything which unwarrantly affects the rights of landlady or other occupants or obstructs the comfortable or reasonable use of property amounts to actionable nuisance. This Court held in para-11 as under :-

11.....In my view the decision does not in any way support the case of the tenant. As held in the aforesaid decision, actionable nuisance under Section 13(1) (c) is incapable of a perfect legal definition. Nuisance, ordinarily, means an act which annoys or hurts or that which is offensive. Nuisance actionable under Section 13(1)(c) includes any act, omission or conduct which causes or likely to cause inconvenience, hurt, damage or which may interfere with the enjoyment of the life or property. Anything which unwarrantly affects the rights of the landlady or other occupants or endangers life or health, gives offence to the senses, violates the law of decency or obstructs the comfortable and reasonable use of property amounts to actionable nuisance. Whether a particular act, omission or conduct is such as would amount to nuisance is required to be decided by common sense and the sense of a prudent and reasonable man living in the society and not according to any fanciful or imaginary concepts of decency or behaviour affecting rights of others or endangering their life or health. In a metropolitan city like Pune people have certain notions of life and manner of living. An elderly landlady spending most of her time at home is facing an offensive discharge or leakage from water closet or commode into her kitchen and dining room in her premises immediately below, would certainly consider it to be an offence to the senses and violative the concept of decency and cleanliness. A passive discharge in a latrine below not caused on account of any act or omission on the part of the tenants has to be distinguished from an active discharge resulting from the act of the tenant such as making of a new or opening of a new latrine and water closet right above the kitchen and the dining room of the landlady or other occupants.

93) Thus, from various judgments cited on the issue of nuisance and annoyance, it can be inferred that every act of tenant which interferes with landlord's right to use or occupy his property would amount to actionable nuisance. In ***Gulam Husain Mirza*** this Court has gone to the extent of holding that every act of a tenant which disturbs the reasonable peace of ordinary person and which leads to unpleasurable feeling would constitute nuisance or annoyance. No doubt in ***Awabai Muncharji Cama*** the Single Judge of this Court (*S.K. Desai, J.*) has struck a sort of discordant note *qua* the observations in ***Gulam Husain Mirza***, but the learned Judge himself has clarified that his observations are obiter. It therefore cannot be contended that in ***Awabai Mansarji Cama***, *S.K. Desai, J.* disagreed with the view taken by *Masodkar, J.* in ***Gulam Husain Mirza***. Infact, *A.M. Khanwilkar, J.* has subsequently followed ***Gulam Husain Mirza***'s decision in ***D.V. Panse***. I am therefore of the view that every act of tenant which seeks to interfere with landlord's peaceful use and occupation of his property would constitute nuisance and annoyance, especially when the landlords property adjoins that of tenanted premises. A tenant cannot trespass upon landlord's property, obstruct him from using his own property and then contend that the same does not constitute nuisance or annoyance. A tenant has no business to interfere with landlord's use and enjoyment of his own property and if he does so, his act would be covered in the mischief of nuisance and annoyance.

94) The contention of Mr. Tulzapurkar that no nuisance or annoyance could be caused to Plaintiffs, who admittedly resided at Mumbai and Tamil Nadu and occasionally visited the open land behind tenanted premises cannot be accepted. His reliance on the judgment of the Apex Court in ***Nilesh Laxmichand*** and of this Court in ***Fulchand Laxman Bangade*** does not assist the case of the Petitioner. In ***Nilesh Laxmichand***,

the Plaintiff-landlord did not examine herself but examined her son who occasionally visited the building. Thus, the landlord to whom nuisance was allegedly caused on account of smell, smoke and pollution emitting from tenant's preparation and sale of food stuff did not enter witness box before the Trial Court. The Apex Court has not held that the act of the tenant in *Nilesh Laxmichand* did not constitute nuisance or annoyance. The case went against landlady essentially on account of failure to lead evidence of landlord. In *Fulchand Laxman Bangade*, the theory of nuisance was rejected as landlord's shop was found to be 4 shops away from the tenanted premises. In the present case, Plaintiffs' land is located right behind tenanted premises and Plaintiffs alleged interference with their use and enjoyment of the open land by acts committed by the tenant.

95) Considering the overall conspectus of the case and various case laws cited by the learned counsel appearing for rival parties on the issue of nuisance and annoyance, I am of the considered view that the act of Petitioner-tenant in constructing wall in the open land behind the tenanted premises thereby blocking Plaintiffs access, as well as interference with Plaintiffs use and enjoyment of the open land, clearly constituted nuisance and annoyance. Plaintiffs are thus entitled to seek recovery of possession under Section 13(1)(c) of the Bombay Rent Act.

F.5 WHETHER ORDER PASSED BY SMALL CAUSES COURT AND APPELLATE COURT SUFFER FROM JURISDICTIONAL ERROR

96) Petitioner/Defendant has raised the issue of jurisdiction of Small Causes Court to decide Plaintiffs' suit for eviction. The plea of jurisdiction was raised in the written statement as an alternative plea in the event of the Small Causes Court holding that the Defendant is not a tenant in respect of the open land behind the main bungalow. Both, Small

Causes Court as well as the Appellate Court, have concurrently held that Defendant is not a tenant in respect of the open land behind the main bungalow. Mr. Tulzapurkar, would therefore contend that the Small Causes Court did not have jurisdiction to decide the issue of trespass or encroachment allegedly committed by the Defendant in that open land. Before proceeding to decide the objection raised by the Petitioner, it would be necessary to clarify that Plaintiffs sought and the Small Causes Court has directed eviction of the Defendant only from the tenanted premises. Thus the decree does not direct Defendant's eviction from the open space. The operative portion of the Decree passed by the Small Causes Court reads thus :

24. The defendant committed the breach of tenancy agreement, encroached on the rest of the property, constructed permanent walls without written permission, they deprived the use of common toilet to one of the occupants by constructing wall and thereby the defendant is liable for eviction from the entire property. In the circumstances, the suit is to be allowed and accordingly order:

ORDER

(1) The suit is allowed with costs.

(2) The defendant shall handover the vacant possession of the suit property to the plaintiffs within two months.

(3) The decree be drawn accordingly.

97) The suit property was described in the Plaint as under :

Description of Property:

All that piece or parcel of land or ground together with the structure standing thereon consisting of the Main Bungalow together with Garage and only two rooms in the outhouses and the garden appurtenant thereto together with the use of common servant toilet and also together with the furniture, fixture, and fittings appurtenant thereto and which Bungalow is commonly known as 'Gardenia' being portion of Municipal No. 108, Koregaon Park, Pune - 411 001, within the limits of the Pune Municipal Corporation, in the Registration Sub District of Pune, Taluka Haveli, District Pune and bounded as under:-

On or towards the North : By Road.

On or towards the East : By portion of the encroached land originally in possession of the plaintiffs till 1991 and delineated in purple in the plan annexed which forms part of the plaint.

On or towards the South : Partly by bungalow no. D7 Koregaon Park, Pune 1 and Mali quarters in possession of the plaintiffs.

On or towards the West : By road.

98) In my view, since the Small Causes Court has not directed Defendant's eviction from the open space behind the main bungalow, which does not form part of the suit premises, the entire debate on jurisdiction of the Small Causes Court is quite unnecessary. It is therefore not necessary to burden this otherwise lengthy judgment by discussing various case laws cited by the rival parties on the issue of jurisdiction. Mr. Tulzapurkar, has relied upon judgments in *Jagmittar Sain Bhagat*, *Natraj Studios (P) Ltd.*, *Harshad Chiman Lal Modi*, *Shrisht Dhawan (Smt)*, *Kanwar Singh Saini*, *Arun Kumar*, *Chief Engineer Hydrel Project*, *Raizada Topandas*, *Nagindas Ramdas*, *Purshottam Vishindas Raheja* and *Narendra H. Khurana* in support of his contention that existence of jurisdictional fact is a condition precedent for exercise of jurisdiction and that suit for recovery of possession from a trespasser must be instituted before the Civil Court and that a decree passed without jurisdiction is nullity.

99) On the other hand, Mr. Khambata has relied upon judgments in *Laxmibai Ganpati Bhingare*, *Patel Chandulal Trikam Lal*, *Jamnadas Dharamdas*, *Bhanwar Singh* and *Importers and Manufacturers Ltd.* in support of his contention that jurisdiction of Small Causes Court under Bombay Rent Act extends to deal with any claim or question arising out of the Act or any of its provisions. Mr. Khambata has submitted that

making the landlord file two distinct proceedings for eviction under the Bombay Rent Act before the Small Causes Court and for recovery of possession in respect of trespassed portion before the Civil Court would lead to absurdity. Both, the Small Causes Court as well as the Appellate Court have concurrently held that landlord cannot be driven to two distinct Courts in respect of the same cause of action where tenant commits trespass on adjoining land of the landlord. As observed above, it is not really necessary to enter into a detailed debate on rival contentions in view of the fact that the Small Causes Court has not even directed recovery of possession of non-tenanted premises. However, at the same time, I am of the view that the issue of trespass of tenant into the adjoining open land is also connected with landlord's right to seek decree for recovery of possession under Section 13(1)(a)(b) and (c) of the Bombay Rent Act. The act of nuisance and annoyance is undoubtedly committed by the tenant on open land behind the main bungalow. The act of erection of permanent structure is common, both to tenanted as well as non-tenanted premises as the wall is constructed not just on the open land but also touches the rooms and garage let out to the tenant. I have also arrived at the conclusion that the act of construction of wall is also destructive and injurious to the tenanted premises. Thus, the act of trespass by a tenant on the open land behind the main bungalow is not a standalone act, for which the landlord was expected to file a Civil Suit for recovery of possession thereof. If landlord was not to seek recovery of possession of tenanted premises and was aggrieved only by the act of trespass committed by the tenant on adjoining land, filing of Civil Suit on such trespass would be warranted. Therefore, in a case where the landlord's right to seek recovery of possession of tenanted premises has a direct connection with tenant's act of trespass on adjoining non-tenanted premises, filing of two separate suits, one for recovery of possession of tenanted premises in Small Causes Court and another for recovery of

non-tenanted premises in a Civil Court would not just result in multiplicity of proceedings but would encourage erring tenants to brazenly commit trespass on landlord's adjoining premises. Therefore, even though the issue of jurisdiction of Small Causes Court does not really arise in the present petition on account of absence of direction for eviction from non-tenanted premises, I am of the view that the Small Causes Court as well as the Appellate Court have not committed any palpable error in rejecting Defendant's objection of jurisdiction.

100) After going through concurrent findings of fact recorded by Small Causes Court and by Appellate Court, I am of view that the same do not suffer from any perversity or patent error. It is well settled law that in an application filed under Article 227 of Constitution of India, this Court is not supposed to interfere in just and proper exercise of jurisdiction by the Courts below. The supervisory jurisdiction of this Court is limited to ensuring that the subordinate court or tribunal functions within its authority. In this contention, the reliance by Mr. Khambata in *Union Bank of India, Gulshera Khanam, Pralhad and Hotel Rosalia Pvt. Ltd.* (supra) appears to be apposite. I am therefore not inclined to interfere in various concurrent findings of fact recorded by Small Causes Court and Appellate Court.

F.6 ALLEGATION OF SUPPRESSION

101) Petitioner has filed Civil Application No. 1847 of 2014 seeking amendment of the petition. In the proposed amendment, Petitioner desires to incorporate pleadings about sale transaction between the Original Plaintiffs and M/s. Talera Hoteliers Private Limited. In the proposed amendment, it is sought to be pleaded that prior to filing of Civil Suit No. 490 of 1998, the Original Plaintiffs had entered into

agreement for sale dated 26 March 1998, agreeing to sale and transfer of the entire plot to Respondent No.2A for consideration of Rs.1,53,00,000/- and that an amount of Rs.25,00,000/- was paid in pursuance of that agreement. That during pendency of the suit, original Plaintiffs received further consideration of Rs.48,00,000/- within one year of date of execution of agreement. That before passing of Decree, Original Plaintiffs executed Deed of Assignment dated 19 March 2001 in favour of M/s. Taleria Hoteliers Private Limited and received balance consideration of Rs.80 lakhs. Petitioner accordingly accused original Plaintiffs of suppressing execution of Agreement for Sale and Deed of Assignment and continuing to prosecute the suit despite loss of title in the suit premises. The Decree is therefore sought to be set aside on the ground that the benefit thereof can no longer enure to the benefit of the original Plaintiffs.

102) Petitioner infact went to the extent of filing a separate Civil Suit No. 300 of 2015 in the Court of Small Causes at Pune seeking a declaration that the Decree dated 13 June 2001 passed by the Small Causes Court in Civil Suit No. 490 of 1998 as well as the Decree of the Appellate Court was passed without jurisdiction and the same is non-est, null and void and is not executable against the Petitioner. Thus, during the pendency of this petition challenging the validity of eviction decree, the Petitioner simultaneously filed a Suit for a declaration that the eviction decree is without jurisdiction, null and void and not binding on it. Such conduct on the part of the Petitioner is required to be deprecated. Faced with the situation where two remedies were being simultaneously exercised in respect of the same decree, Petitioner made a statement before this Court on 21 February 2024 that Civil Suit No. 300 of 2015 shall be withdrawn without prejudice to the contentions raised in the Writ Petition and the Civil Application for amendment.

103) Coming back to the allegation of suppression sought to be raised by the Petitioner, perusal of the Written Statement filed by the Petitioner/Defendant in the suit would indicate that it was fully aware about the transaction of sale of the plot by the original Plaintiffs and in fact raised a plea to that effect in its written statement. In para-16(n) and (p) of the written statement, Defendant pleaded as under :

16(n) the defendant says and submit that the plaintiffs have agreed to sell the property to some 3rd party who is very well known builder promoter of Pune and with a view to help the said builder promoter the plaintiff have invented this theory of trespass, nuisance and non-user, etc.

(p) that the plaintiff has sold the suit property to one Shri Suresh Talera or one of his companies and for that that they have also obtained permission under 37(1) of Income Tax Act and to the knowledge of the defendant, plaintiff have already registered the agreement and it is a deemed conveyance and therefore the suit is not tenable.

104) It is therefore incomprehensible as to how Petitioner, who himself was aware of transaction of sale and who pleaded the same in the written statement, can accuse Plaintiffs of suppressing the factum of sale transaction between the original Plaintiffs and M/s. Talera Hoteliers Private Limited. The allegation of suppression therefore is totally misplaced and requires outright rejection. Therefore, it is not necessary to make any discussion about the judgments of the Apex Court in *S.P. Chengal Varaya Naidu*, *Kishore Samrite* and *Bhaskar Laxman Jadhav* on which reliance is placed by Mr. Tulzapurkar in support of allegation of suppression.

105) The right of M/s. Talera Hoteliers Private Limited who is impleaded as Respondent Nos.1-A and 2-A in the petition as a substitute for original Plaintiffs (in addition to legal heirs of Original Plaintiffs) to

prosecute the petition is sought to be questioned on the ground of sale transaction having taken place during pendency of the suit and M/s. Talera Hoteliers Private Limited not being brought on record in the suit. Mr. Khambata has relied upon judgment of the Apex Court in ***Sharadamma*** in which it is held that mere assignment or release of rights during pendency of Appeal does not entail loss of right of the appellant to continue the Appeal and that the assignee has a right to move an application for impleadment. The Apex Court has held in para-3 as under :

3. We have heard learned counsel for the parties and opine that the impugned judgment is patently illegal. Merely due to the assignment or release of the rights during the pendency of the appeal, the appellant did not in any manner lose the right to continue the appeal. Merely by transfer of the property during the pendency of the suit or the appeal, plaintiff or appellant, as the case may be, ordinarily has a right to continue the appeal. It is at the option of the assignee to move an application for impleadment. Considering the provisions contained in Order 22 Rule 10 and Order 22 Rule 11 of the Code of Civil Procedure, the impugned judgment and order of the High Court cannot be allowed to be sustained.

106) In ***Ratnamala Mohan Aklujkar*** Single Judge of this Court considered correctness of the order passed by the Small Causes Court rejecting the plaint on the ground of original Landlord/Plaintiff transferring the suit premises by execution of conveyance to third parties. Right of the original Plaintiff-landlord to continue the suit was questioned by the Tenant in the ground that he ceased to be the owner and accordingly the relationship of Landlord-tenant came to an end. Single Judge of this Court (***Rajesh Patil, J.***) relied upon judgment of the Apex Court in ***Sharadamma*** and held that the Suit was filed on the grounds of Section 16(1)(a) of the Maharashtra Rent Control Act and the same was not filed for bonafide need under Section 16(1)(g). This Court

therefore held that it was open for the Original Plaintiffs/erstwhile landlord to continue with the proceedings for the benefit of new owner.

107) In my view, the judgment of the Apex Court in *Sharadamma* and of this Court in *Ratnamala Mohan Aklujkar* clearly provide an answer to the objection raised by the Petitioner on right of original Plaintiffs to continue with the suit as well as option available to the assignee (M/s. Talera Hoteliers Private Limited) to seek impleadment.

108) In my view, therefore there is neither any material suppression on the part of the original Plaintiffs nor they lost right to continue the eviction suit against the Defendant. M/s. Talera Hoteliers Private Limited had an option of seeking impleadment at any stage of the suit/Appeal or even in the present petition. The said option has been exercised by M/s. Talera Hoteliers Private Limited, who is already impleaded as Respondent Nos.1-A and 2-A in the present petition. Therefore, even if the amendment sought to be incorporated in Civil Application No. 1847 of 2014 were to be granted, the same would have no impact on the ultimate result of the petition.

G. AMOUNT DEPOSITED IN THIS COURT BY PLAINTIFF

109) As observed above, while admitting the petition by order dated 27 April 2004, this Court stayed the execution of the eviction decree during the pendency of the petition, subject to the condition of Petitioner not creating third party interest in the suit property and not carrying on any further construction during the pendency of the petition. Respondents filed Civil Application No. 1092 of 2013 seeking direction against Petitioner for payment of mesne profits or compensation for use and occupation of the premises in the sum of Rs. 61,21,300/- per month. By a detailed order dated 25 February 2015, this Court partly allowed that

application and directed that 35% percent of that amount being Rs. 6,00,000/- per month be deposited by Petitioner for the period from May 2004 till February 2015 in the registry of this Court. SLP filed by Petitioner challenging the Order dated 25 February 2015 came to be dismissed by the Supreme Court. Accordingly, Petitioner has deposited amount of Rs. 8,70,00,000/- (Rs. Eight Crore Seventy Lac) in this Court for period from May 2004 to July 2016. Respondents have filed Civil Application No. 2644 of 2016 for withdrawal of that amount with accrued interest.

110) While deciding the amount of deposit, this Court considered the judgment of the Apex Court in *Atma Ram Properties (P) Ltd Vs. Federal Motors (P) Ltd.*⁶⁸ and the valuation report dated 17 April 2008 which had suggested the compensation to the tune of Rs. 16,00,000 to Rs, 16,50,000 per month. This Court however reduced the amount of compensation to Rs. 6,00,000 per month considering the description of property and its location. Relevant findings of this Court in Order dated 25 February 2015 read thus:

In this case also the litigation has gone on for a very long period. The original suit was filed sometime in September 1998 and the trial court decreed the suit on 13.6.2001. The appeal filed by the petitioners came to be dismissed on 23.1.2004. On 27.4.2004 rule was issued and made returnable early with liberty to apply for a fixed date of hearing. The present Civil Application itself has been filed in March 2013. We are in February 2015. When litigation like this go on for such a length of time, the tenants like the petitioners continue in occupation of the premises and if they lose in the end, do not lose anything. On the contrary they stand to gain having enjoyed the use and occupation of the premises almost for free. They would have also earned lot from the premises if they are nonresidential in nature and all that they will be liable to pay for use and occupation by way of damages is the same rate which they would have even otherwise paid by way of rent. The Apex Court has also held that once a decree for possession has been passed and execution is delayed depriving the landlord of the fruits of decree, it is necessary for the courts to pass appropriate orders so that reasonable compensation to the decreeholder for loss/delay in execution of the decree by the grant of stay order has to be paid.

14 In the circumstances, I hold that the respondents are entitled to be reasonably compensated.

15 The valuation report relied upon by the respondents is issued in April 2008, i.e., almost 7 years ago. The petitioners however, deny the basis for calculation. The property is land plus existing residential heritage Bungalow, out houses and garden on plot area of 5289.30 sq. mtrs. which is approximately about 57000 sq. ft. (1 sq. mtr. = 10,763 sq. feet) which is about 1.31 acres. The property also has out houses, servant's quarters, W.C and bath for servants, garage, bore well etc. Koregaon park is a high class affluent area.

16 The valuation report issued on 17.4.2008 suggests that mesne profits as compensation can be anywhere between Rs.16,00,000/ to Rs.16,50,000/ per month. Though property prices would have gone up in the last 6 to 7 years, in my view, taking into account the description of the property and location etc. 35% of the amount that was indicated in April 2008, rounded off to Rs.6,00,000/, would be a reasonable compensation per month.

17 The petitioners are therefore, directed to pay sum of Rs.6,00,000/ per month as compensation from May 2004 until February 2015 i.e., for 118 months within two months either lump sum or in four installments and continue to pay the same for every successive month on or before 5th day of the month until disposal of the present petition. The amount to be deposited with the Registry and the Registry shall invest the amount with a nationalized bank. The monthly installment to be invested every month on or before 21st of that month.

111) In pursuance of Order passed by this Court, the Petitioner has deposited total amount of Rs. 14,34,00,000/- in this Court upto month of March 2024.

112) Since I have upheld the decree for eviction, the amount of compensation deposited by Petitioner in this court can be withdrawn by Respondent Nos. 1A and 2A.

H. ORDER

113) After considering the overall conspectus of the case, I find that the Defendant's eviction has been lawfully ordered under the provisions of Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act as well as under Section 13(1)(b) and 13(1)(c) of the Bombay Rent Act. There is no patent error in the order passed by the

Appellate Court, in which the decree of the Small Causes Court has merged. The Writ Petition filed by the Petitioner is devoid of merits.

114) I accordingly proceed to pass the following Order :

- i. Writ Petition filed by Petitioner is dismissed.
- ii. Petitioner shall handover possession of tenanted premises to Respondents within 2 months.
- iii. Respondent Nos.1-A and 2-A shall be permitted to withdraw an amount of Rs. 14,34,00,000/- deposited by the Petitioner in this Court in pursuance of Order dated 25 February 2015 alongwith accrued interest.
- iv. There shall be no order as to costs.

[SANDEEP V. MARNE, J.]