

Anand

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

WRIT PETITION NO.1805 OF 1993

1. Fakruddin Allabaksh Kalal ..Petitioners
(Since deceased) through Lrs.
Age : 69 years, Occu : Agriculturist
and business

1-A. Bashir Fakruddin Kalal
since deceased by his Lrs.

1A(1) Smt. Faimida Bashir Kalal
Age : 57 years, Occu : Household work

1A(2) Sadique Bashir Kalal
Age : 27 years, Occu : business

1A(3) Imran Bashir Kalal
Age : 24 years, Occu : Household work

1A(4) Mohsin Bashir Kalal
Age : 22 years, Occu : Household work

All Nos. 1-A(1) to 1-A(4)
R/at 113, Kesare Galli,
Khan Bhag,
Sangli 416 416.

2. Sikander Allabaksh Kalal
Since deceased by his legal
representatives :-

2-A Shri Nisar Sikandar Kalal
Age : 36 years, Occu : business
Residing at 113 Khan Bhag,
Kesare Galli,
Sangli 416 416.

2-B Smt. Hasina Iliyas Ghodake
Age : 40 years, Occu : Household duties

Residing C/o.Haji Kasam Hasan
 Ghodake, Haji Kasam Chawl No.36
 Gaothan No.3, Andheri
 Mumbai 400 058.

- 2-C Smt.Muneera Mushtaq Rahimatpure
 Age : 28 years, Occu : Household duties
 R/o.Khan bhag, Kesare Galli
 Madhav-Malti Apartment,
 Sangli
3. Smt.Anjirbi Allabaksh Kalal
 since deceased by her Lrs.
 And Petitioners 1, 2, 4 & 5
4. Smt.Jaibunbi w/o.Sikander Khatik
 Age : 42 years, Occu : Household work
 R/o.Gavali Galli, Khatik Galli
 Sangli.
5. Smt.Ashabi w/o.Noormohamed Khatik(Palkar)
 Age : 40 years, Occu : Household
 Resident of Shaniwar Peth, Behind Mosque
 Satara.

V/s.

1. Gulab Dadabhai Mujawar ..Respondents
 since deceased by his heirs
- 1.A Smt.Gulshan w/o.Gulab Mujawar
 Age : 50 years, Occu : Household work
 Residing at 53, Khanbag, Opp. Police
 Lines, Sangli.
- 1.B Smt.Shahida w/o.Shahnivaz Adamsaheb Mulla
 Age : 35 years, Occu : Household
 Residing at Palus, Taluka Tasgaon
 District Sangli.
- 1.C Smt.Rihana d/o.Gulab Mujawar
 Age : 21 years,

Residing at 53, Khanbhag,
Sangli.

2. Shri Gani Dadabhai Mujawar
Age : 52 years, Occu : business
3. Shri Bashir Chandulal Mujawar
Age : 40 years, Occu : business

Respondent Nos.2 to 4 residing at
Kupwad, Taluka Miraj,
District Sangli.

Mr.S.G.Deshmukh, Advocate, for the Petitioners
Ms.Pawar h/f.Mr.S.S.Patwardhan, Advocate, for
the Respondents

CORAM : A.S.OKA, J.

DATE : 22ND APRIL, 2010

JUDGMENT

. The present Writ Petition has been filed by the Petitioners, who are the original Plaintiffs. The Respondents are the original Defendants. The suit for eviction was filed by the Petitioners under the provisions of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (Hereinafter referred to as the said Act). A suit for eviction was filed on various grounds such as arrears of rent, bona fide requirement, non-user and sub-

letting. The suit was contested by the Respondents. The trial Court decreed the suit. The trial Court passed the decree on the ground of non-user and unlawful sub-letting. An Appeal was preferred by the original 2nd to 4th Defendants. The Appellate Court has interfered and the decree for possession has been set aside. However, decree for arrears of rent was confirmed.

2. It will be necessary to briefly refer to the factual aspect of the case before advertng to the various submissions made by the learned Counsel appearing for the parties. An allegation made in the plaint is that the suit premises was let out to the 1st Respondent (Gulab). It is stated that prior to creation of tenancy in favour of the 1st Respondent, the suit premises was let out to his brother Abdul. It is stated that after his demise, the suit shop premise was closed and on the request made by the 1st Respondent, the suit

premises has been let out to the 1st Respondent.

3. In the plaint it is contended that the sons of the 1st and 2nd Petitioners have grown up. It is stated that the 1st and 2nd Petitioners have obtained a liquor license and were carrying on business of selling liquor. It is alleged in the plaint that due to various difficulties, the liquor business was no longer viable. It is stated that the sons of the 1st and 2nd Petitioners were interested in carrying on business of selling stationery and cutlery and running General Stores. It was contended that no other premises was available for them to carry on the said business. It is alleged that the 1st Respondent has not been using the suit premises for a period of more than five years prior to the date of the institution of the suit. It is alleged that the 1st Respondent has unlawfully transferred and assigned the

suit premises in favour of the 2nd to 4th Respondents. Reliance has been placed on notice of demand dated 13th June, 1979 sent by the Advocate for the Petitioners to the 1st Respondent. However, the 1st Respondent refused to accept the notice. Before the said notice, another notice dated 1st June, 1977 was served by the Petitioners through his Advocate to the 1st Respondent. The particulars of arrears of rent and permitted increases claimed by the Petitioners have been set out in the plaint.

4. The Respondents filed a common Written Statement. A contention was raised that originally one Kashim Mohammed Mujawar started a shop in the suit premises 70 years prior to the date of the institution of the suit. The name of the brother of Kashim was Dadasaheb. It is stated that the said Kashim was running a shop on behalf of his family. It is stated that during the life time of Kashim, the said

Dadabhai died and subsequently, in the year 1957 the said Kashim Mohammed Mujawar expired. It is stated that during the life time of Kashim, one Abdul who was the eldest son of Dadasaheb was conducting the business in the suit premises. After his demise, the 1st Respondent (Gulab) and the 2nd Respondent (Gani), who were the sons of Dadasaheb were running business along with the 3rd and 4th Respondents. The 3rd and 4th Respondents are sons of Chandulal, who was another son of Dadasaheb. It is, therefore, contended that the 1st Respondent has not sub-let or assigned the suit premises to the 2nd to 4th Respondents. It is stated that the Respondents were the tenants in respect of the suit premises. As far as the issue regarding arrears of rent is concerned, the case made out in the Written Statement is that rent in respect of the suit premises was Rs.180/- per year. It is stated that though, rent for the period 1st December, 1973 to 30th November, 1974 of Rs.180/- was

paid to the 1st Petitioner, a receipt thereof was issued on 1st January, 1975. It is stated that the rent for the further period was paid but the receipt thereof was not issued by the 1st Petitioner to the Respondents. It is stated that notice dated 1st June, 1977 was replied by the Respondents and a Money Order was sent for the rent for the period between 1st December, 1974 and 30th June, 1977 which was received by the Petitioners. Reliance is placed on various Money Orders which were subsequently sent by the Respondents. A specific case made out in the Written Statement is that the notice dated 13th June, 1979 which was a notice of demand was never tendered to the Respondents. The ground of bona fide need was denied by contending that the 1st Petitioner was having five shop premises.

5. Reference to findings recorded by the Courts below on various grounds of eviction is

necessary. As far as the ground of arrears of rent is concerned, the trial Court considered the case of the Petitioners regarding service of demand notice dated 13th June, 1979. The trial Court referred to the 1st notice dated 1st June, 1977. The trial Court observed that the 1st Petitioner, who had stepped into witness box did not refer to the 1st notice and he referred to the notice of demand dated 13th June, 1979. An envelope containing the said notice was produced by the Petitioners at Exhibit 38 on which there is an endorsement of refusal. The trial Court noted that endorsements of issuing intimations were made on the envelope from 21st June, 1979 till 28th June, 1979. The trial Court noted that the envelope was returned to the sender on 27th June, 1979. Further, the trial Court observed that when intimation was given on 28th June, 1979, the 1st Respondent could not have claimed envelope which was returned on 27th June, 1979 and therefore, it cannot be said that the 1st

Respondent refused to accept the notice dated 13th June, 1979 sent by R.P.A.D. The learned trial Judge made an observation that the concerned Postman has unnecessarily made expediency in returning the registered article. The learned Judge held that burden was on the Petitioners to prove that the 1st Respondent has refused to accept the said notice and the said burden was not discharged. Therefore, the ground of the arrears of rent was negatived by the trial Court. The Appellate Court has also considered the evidence on the said aspect and has confirmed the findings of the trial Court. As far as the ground of bona fide need is concerned, the Courts below have rejected the bona fide requirement. Though, the trial Court accepted that it was the 1st Respondent who was tenant and that he had sub-let the suit premises to the Respondent Nos.2 to 4, the Appellate Court has upset the said finding by holding that the 1st Respondent alone was not the tenant. The

case of the Respondents that all of them were entitled to claim tenancy was accepted by the Appellate Court and therefore, even the ground of the non-user was negatived by the Appellate Court.

6. The learned Counsel appearing for the Petitioners has taken me through the Judgments of the Courts below. He has invited my attention to the findings recorded by the Courts below on the issue of service of notice of demand to the 1st Respondent. The learned Counsel pointed out that there were clear endorsements of refusal made by the Postman. He submitted that the finding on the service of notice was completely erroneous and perverse. He pointed out that need of the sons of the 1st and 2nd Petitioners was pleaded specifically in the plaint and it was contended that the suit shop premises were suitable for starting the business of stationery and cutlery. He contended that the

issue of joint family was alien and foreign to the Mohammedan law. It was contended that the evidence on record shows that a fresh tenancy was created in favour of the 1st Respondent. He, therefore, submitted that the finding recorded by the Appellate Court on the issue of unlawful transfer and sub-letting was completely erroneous. He has invited my attention to the Affidavits filed by the Petitioner No.2-A on 14th February, 2005 and 3rd December, 2008. He stated that in the first Affidavit it is pointed out that the suit premises are kept completely closed and are not being used by any of the Respondents. He pointed out that the three sons of Bashir (the son of the 1st Petitioner) namely Sadiq, Imran and Mohsin were without any employment and they are in need of premises to start their own business. Reliance is placed to the photographs annexed to the Affidavits. It is stated that there is no consumption of electricity in the suit premises. There is a

further Affidavit filed on 3rd December, 2008 in which it is pointed out that on 19th October, 2008 the suit premises was opened by the Respondents and they started painting of the suit premises with a view to create false evidence. He submitted that there is no reply filed by the Respondents dealing with what is set out in the aforesaid two additional Affidavits. He, therefore, submitted that the impugned decree deserves to be quashed and set aside. He submitted that this was a case wherein apart from other grounds, the decree ought to have been passed on the ground of bona fide requirement by both the Courts below.

7. The learned Counsel appearing for the Respondent Nos.2 to 4 invited my attention to the findings recorded by Courts below and in particular to the learned District Judge. Her submission is that there is no specific evidence of creation of a fresh tenancy in

favour of the 1st Respondent. She submitted that as far as the grounds of bona fide requirement and arrears of rent are concerned, there are concurrent findings recorded by both the Courts below. She submitted that there is a finding of fact recorded on the basis of the evidence on record that the demand notice has not been served. She, therefore, submitted that in Writ Jurisdiction no interference is called for. The learned Counsel appearing for the Petitioners has invited my attention to the charts placed on record showing the payments/deposits made by the Respondents from time to time.

8. I have carefully considered the submissions. In paragraph 38 onwards of the Judgment of the Appellate Court, a reference has been made to the bona fide need of the son of the 1st and 2nd Petitioners who have attained majority. The Appellate Court has referred to the evidence of the 1st Petitioner in which he

stated that he was in possession of a shop which is adjacent to the suit premises. The learned District Judge noted the explanation of the 1st Petitioner that the premises were in possession of some Bhishi Mandal of which he is the Chairman. The learned District Judge observed that the said shop premises was available to the Petitioners where stationery and cutlery shop can be opened. Thereafter, the learned District Judge noted the admitted position that the son of the 1st Petitioner was running a Mutton Shop at Haripur. The learned District Judge also observed that the Mutton Shop has been closed and the son is doing the business of liquor with the Petitioners. The finding recorded on this aspect in paragraph 41 is material to be noted which reads thus :-

In recent days, one cannot believe for a moment even that the business of liquor is very difficult and the person who is running business is sustaining loss in it. **On the contrary, no business is more profitable now-a-days than the business of liquor. The business of stationery and cutlery article which the plaintiff wants to start**

definitely cannot be more earning business than this present business. The necessity therefore as shown by the plaintiff does not inspire any confidence and genuine.

(Emphasis Added)

Thus the learned District Judge has committed an error by equating bona fide need with necessity. Thereafter, in paragraph 42 of the Judgment the learned District Judge has referred to property tax extract at Exhibits 147 and 151 which according to the learned Judge show that there were other premises available to the Petitioners. Therefore, the learned Judge came to the conclusion that the need pleaded by the Petitioners was not bona fide and genuine. It will be necessary to advert to the findings of the trial Court on the issue of bona fide requirement. The trial Court noted that in his deposition, the 1st Petitioner has come with the case that the need of the suit premises is for his son and the son of the 2nd Petitioner. Thereafter, the learned Judge considered the evidence of P.W.2

Nissar, who stated that Bashir whose need was pleaded was 45 years old. The learned Judge noted that the business of the family was of selling liquor and that a liquor shop was started in the name of the 1st Petitioner in the year 1975. The learned Judge noted the admission in the cross examination of the 1st Petitioner that Bashir was running his meat shop on Haripur road for about three years but subsequently he closed the shop as there was nobody to look after liquor business. Therefore, the learned Judge proceeded to record a conclusion that Bashir must have been engaged in the country liquor shop business of the first and second Petitioner. The learned Judge observed that the family business was of selling liquor and therefore, it is not possible to accept that the sons of the 1st and 2nd Petitioners changed their minds to enter in the business of cutlery and Stationery. The learned Judge, thereafter, observed thus :-

If really the fate of country liquor shop is fluctuating and not profitable then the plaintiffs Nos.1 and 2 may close their country liquor shops and start stationery or novelty stores therein. Admittedly the dimensions of the suit premises are 8' x 8' wherein a small panshop is being run by the defendant No.1. Therefore, for two persons this much portion is not sufficient for starting novelty and stationery stores.

Thus, what has been held by the learned Judge is that the 1st and 2nd Petitioners may close their liquor shop and start Novelty or Stationery stores therein. The learned Judge held that in any case, the suit premises was of the size of 8' x 8' which was not sufficient for starting Novelty and Stationery stores. The learned Judge, thereafter, proceeded to conclude that the said son Bashir was not at all in need of premises for Stationery or Novelty store as there is no one except he himself to look after the liquor business. The learned Judge also considered the need of Nissar pleaded for the same purpose and held that even the 2nd Petitioner was in the country liquor business and hence

bona fide need of Nissar, the son of the 2nd Petitioner was not established. The learned Judge held that there is nothing on record to hold that the shop premises adjacent to the suit premises is in possession of Bhis Mandal.

9. Thereafter, the learned Judge referred to the contents of the legal notice and observed that the particulars of the business which was intended to be started have not been incorporated in the notice. The learned Judge, thereafter, noted that as the 1st and 2nd Petitioners have admitted having their country liquor shops which were running profitably, there was no hardship which will be caused to them if the decree on the ground of bona fide requirement was refused.

10. As pointed out earlier, there is a specific pleading in the plaint as regards the need pleaded by the Petitioners. It is

specifically stated that the 1st and 2nd Respondents were carrying on business of selling liquor and the said business was no longer feasible. It was specifically stated that the grown up sons of the 1st and 2nd Petitioners were intending to start business of Stationery, Cutlery and General Stores apart from existing liquor business of the 1st and 2nd Petitioners. As far as the trial Court is concerned, the said Court has noted that son of the 1st Petitioner was also involved in the liquor business of his father and that he had closed a Mutton shop which he was running at Haripur Road. The finding of the trial Court seems to be that as the son of the 1st Petitioner was also in the liquor business, there is no need for him to start the business of selling Stationery and Cutlery. Curiously the trial Court has gone to the extent of holding that the size of the suit shop is so small that the business which the sons of the 1st and 2nd Petitioners intend to start cannot

be started in such a small premises. The Appellate Court has expressed an opinion that the business of Stationery and Cutlery cannot be more profitable than the business of selling liquor.

11. The Courts below ignored the well settled principle of law that a landlord is the best Judge of his requirements and it is not for the Court or any one else to judge requirement pleaded by the landlord. As stated earlier, in the plaint it is disclosed that the 1st and 2nd Petitioners were in the liquor business but essentially the need pleaded is of the adult sons of the 1st and 2nd Petitioners. At this stage, it will be necessary to advert to the evidence on record. The trial Court has referred to the evidence of Nissar, the 2nd witness examined by the Petitioners who has deposed that the 1st and 2nd Petitioners are running their own liquor shops. It must be noted here that even in the

said evidence the need pleaded is of the sons of the 1st and 2nd Petitioners. He stated that the son of the 1st Petitioner Bashir was jobless, who has studied up to 4th Std. and he himself has studied up to 12th Std. He stated that he and Bashir intended to start Stationery shop in the suit premises. He has also stated that he has taken necessary information about business from his friend, who is in the said business.

12. The Courts below have not recorded any finding that there are other vacant premises apart from the premises of the liquor business of the Petitioners available to the sons of 1st and 2nd Petitioners for starting their own business. The specific pleading is that apart from the existing business of selling liquor which was run by the Petitioner Nos.1 and 2, their respective sons desire to start a new business of sale of stationery etc. There is no reason to hold that the requirement of the

sons of the 1st and 2nd Petitioners has not been established only because they were carrying on business of their respective fathers. There is no specific finding recorded by both the Courts below that there are other premises available for the sons to start their own business. Availability of premises where liquor business is carried on by the 1st and 2nd Petitioners cannot defeat the requirement of their respective sons. Even assuming that a premises in possession of Bhishi Mandal are available to the Petitioners, the requirement pleaded is of sons of both the Petitioner Nos. 1 and 2. Apart from what is observed above, in the further Affidavit dated 14th February, 2005 filed by Nissar, the son of the 2nd Petitioner who was examined as 2nd witness it is stated as under :-

I say that the suit shop is a shop at the corner of the building in the prime commercial area of the Sangli City having frontage on two sides. Bashir-the petitioner No.1A and myself wanted to start a stationery shop of our own at the suit shop. I say that today, three sons of Petitioner No.1A-

Bashir namely Sadiqe : aged about 26, Imran : aged about 23 and Mohsin : aged about 21 are without any employment and are in need of some place to start business. However, in view of respondents' retaining possession and keeping it locked since 1998, the said shop is not at all being used and the same is kept vacant. I annex hereto xerox copies of 3 photographs at **Exhibit 'A'** in support of our case of the suit shop being totally closed .

There is no reply filed to the said Affidavit by the Respondents. In my view, the findings recorded by the Courts below on the issue of bona fide requirement are completely illegal in as much as the said findings run contrary to the well established law that the landlord is the best Judge of his own requirement. There was no reason to hold that the bona fide need of the sons of the 1st and 2nd Petitioners has not been established. There is nothing wrong if the said Bashir, Nissar and three grown up sons of Bashir require suit premises for starting their business of sale of stationery, cutlery etc.

13. At this stage, it must be noted that the mandatory requirement of law in view of Sub-section 2 of Section 13 of the said Act is the determination of issue of comparative hardship. As far as the Appellate Court is concerned, no finding has been recorded on the issue of comparative hardship. As far as the trial Court is concerned, there is a finding recorded on the issue of comparative hardship in favour of the Respondents. The Appellate Court is the final Court of facts which has not recorded a finding on the issue of comparative hardship. As far as the comparative hardship is concerned, subsequent events have been pleaded in the additional Affidavits filed by the Petitioners. It will not be proper for the Writ Court to record a finding on the issue of comparative hardship especially when the Appellate court has not recorded any finding. Therefore, a finding will have to be invited from the Courts below on the said issue by keeping the Petition

pending.

14. That takes me for consideration of the other grounds which are set up by the Petitioners. As far as the ground of sub-letting is concerned, one controversy which is addressed to by both the Courts below is based on the contention of the Respondents that the 1st Defendant/1st Respondent is not a sole tenant but tenancy is of the family of the Respondents. Before dealing with the issue of sub-letting this issue will have to be dealt with in as much as this issue has a direct bearing on the issue of comparative hardship in as much as what is required to be assessed is the hardship which may be caused to the tenant.

15. The specific case made out by the Petitioners in the plaint is of creation of a fresh tenancy in favour of the 1st Respondent. On this aspect, the 1st Petitioner, who stepped

into witness box has stated that the suit premises was let out to Kashim. After his death, tenancy was created in favour of one Abdulbhai. The said Abdulbhai died and thereafter, the shop was closed and thereafter, a request was made by the 1st Respondent that the suit premises be let out to him. According to the case of the 1st Petitioner, the suit premises was let out to the 1st Respondent at the rent of Rs.15/- per month. In the examination-in-chief, there is no specific document relied upon showing creation of tenancy in favour of the 1st Respondent (1st Defendant). The witness has been cross examined on this aspect by the learned Counsel for the Respondents. The 1st Petitioner was confronted with the rent receipt dated 1st October, 1967 in the evidence and a suggestion was given to him that the rent was being annually accepted from the said Abdul and the 1st Respondent. The rent receipt at Exhibit 67 which was shown in the cross

examination is in the name of Abdul Dada Mujawar. The said receipt is for the period from 1st October, 1966 to 30th September, 1967. According to the case made out by the Petitioners, tenancy was created in the name of the 1st Respondent in the year 1967. There is some cross examination made by giving a suggestion that the sons of Dada and Kashim were looking after the business in the suit premises. Before dealing with the findings recorded by the Courts below on the said issue, the evidence of the Respondents on the said issue will have to be considered. The Respondents examined Musa, a son of Chandulal. According to him, the business was running in the suit premises for last 70 to 80 years. He relied upon the genealogy set out in the Written Statement. He stated that initially shop license was in the name of Kashim and after his demise, the license was in the name of Abdul and after the death of Abdul, the license was in the name of the 1st Respondent

(Gulab). Thereafter, he stated that the suit shop belongs to Mujawar family. He denied that the suit premises was let out to the 1st Respondent. He stated that all the Respondents were residing together and there is no partition. On this aspect, the finding of the Appellate Court will have to be dealt with. The Appellate Court has noted that the Respondents are the legal heirs of Kashim and that the Respondents have inherited property of Kashim. The specific case made out in the Written Statement has also been dealt with by the Appellate Court. The Appellate Court noted that the 1st and 2nd Respondents were the sons of Dadabhai and the business was standing in the name of Kashim. The learned Judge observed that in the year 1957 and thereafter, it was but natural that the suit business ought to have been carried on by Abdul. The learned Judge relied upon the admissions of the 1st Petitioner that initially Kashim was the tenant in the suit premises till the year

1957. The learned Judge observed that the business was run from time to time by the different members of the Mujawar family and there was no evidence on record to show that before alleged creation of tenancy in favour of the 1st Respondent, the possession of the suit premises was obtained by the Petitioners. Therefore, a finding of fact was recorded that the business which was admittedly started by Kashim in the suit premises was continued by the members of Mujawar family. In the absence of any specific evidence adduced by the Petitioners to show that in the year 1967, the Petitioners had obtained possession of the suit premises and thereby had created a fresh tenancy in favour of the 1st Respondent, the Appellate Court has negatived the contention that it was only the 1st Respondent, who was the tenant. In that context the Appellate Court recorded a finding that there was no question of sub-tenancy being created in favour of the 2nd to 4th Respondents.

16. The perusal of the Judgment of the Appellate Court shows that the evidence on record on this aspect has been carefully examined. It is material to note that the specific case made out in the plaint as well as in the deposition of the 1st Petitioner was that the suit premises was let out to the 1st Respondent (1st Defendant) in the year 1967. As pointed out earlier, rent receipt at Exhibit 67 has been produced by the Petitioners which shows that on 1st October, 1966 Abdul paid rent for the period from 1st October, 1966 to 30th September, 1967. There is no evidence adduced on record to show that after demise of Kashim in the year 1957, a fresh tenancy was created in favour of Dada or thereafter, in the name of Abdul. Chandulal was the second son of Dada and the 1st Respondent (Gulab) is the 3rd son of Dada. It must be noted here that the case made out by the 1st Petitioner in his deposition is that

after the demise of Kashim, Abdul met him and accordingly, the suit premises was let out to him. The 2nd Respondent (2nd Defendant) is the 4th son of Dada. The 3rd and 4th Respondents are the sons of Chandulal. Even assuming that a fresh tenancy was created in favour Dada after demise of Kashim, there is no evidence on record to show that tenancy came to an end and that after demise of Abdul, a fresh tenancy was created in the name of the 1st Respondent. In the cross examination, the 1st Petitioner admitted that Abdul died issueless and Chandulal was a brother of Abdul. He admitted that when Abdul was sick for a period of 2 to 3 years, the 1st Respondent was paying rent to him. In this context in absence of any evidence to show that a fresh tenancy was created in favour of the 1st Respondent, it is not possible to accept that the 1st Respondent had sub-let and/or unlawfully transferred the suit premises to the 2nd to 4th Respondents. Therefore, to that extent the finding of the

Appellate Court cannot be disturbed. The Respondents are the legal representatives of the original tenant. The finding of the Trial Court on the ground of non user rested on the finding that only the 1st Respondent was the tenant. Therefore, that finding is also rightly set aside by the Appellate Court.

17. One more issue which needs to be considered is regarding the ground of arrears of rent. The dispute is regarding service of notice of demand which is a condition precedent for filing a suit for possession. The specific case made out in the plaint is that though intimation was issued of the notice sent by R.P.A.D, the 1st Respondent declined to accept the service of notice. The perusal of returned envelope shows that there are various remarks. Below the remark N.F , the dates mentioned are 17/6, 19/6 and 20/6. On the top of the envelope, there is a remark that intimation was posted on 21st June, 1979

and 28th June, 1979. The remark of refusal allegedly recorded by postman is of 27th June, 1979. After the said remark, there is a remark made on 28th June, 1979 regarding posting of intimation. There is a remark that the envelope was returned to sender on 27th June, 1979. The said remark is inconsistent with the subsequent remark of 28th June, 1979 of the posting of an intimation to the addressee. The question of posting intimation did not arise after the envelope was returned to the sender. There is a categorical denial of service of notice by the 1st Respondent. Considering these factual aspects, there is a concurrent finding recorded that the presumption of service stands rebutted. No fault can be found with the said finding and therefore, a decree could not have been passed on the ground of arrears of rent.

18. Thus, the net result of the aforesaid discussion is that the bona fide need has been

established. As pointed out earlier, the Appellate Court has not recorded any finding on the issue of comparative hardship. An opportunity deserves to be granted to both the parties to lead additional evidence on issue of comparative hardship as there appear to be subsequent events. Instead of remanding the matter, since the suit is of the year 1980 and Writ Petition is of the year 1993, a finding will have to invited on the said issue from the Trial Court which will have to be certified by the Appellate Court.

19. Hence, I pass the following Order.

(i) The findings in the impugned Judgment and Decree on all grounds except the ground of bona fide requirement are confirmed.

(ii) The finding of the Courts below on the issue of bona fide requirement are quashed and set aside. It is held that the Petitioners have established their bona fide requirement.

(iii) The parties are directed to appear before the learned 2nd Joint Civil Judge (Junior Division), Sangli on 5th July, 2010 at 11.00 A.M.

(iv) The trial Judge will permit the parties to adduce further evidence on the issue of comparative hardship. After considering the evidence which is already on record and the further evidence which may be adduced, the trial Court will record a finding on the issue of comparative hardship. The said finding shall be recorded on or before 30th September, 2010. The said finding shall be certified by the District Court. The finding shall be certified on or before 3rd December, 2010.

(v) R & P shall be forthwith sent to the trial Court.

(vi) Copies of the findings shall be made available to the learned Counsel appearing for the parties. It will be open to the parties to file objections to the findings. The objections shall be filed in the form of Affidavits.

(vii) Petition shall be placed on board on 21st December, 2010 under the caption Directions .

(A.S.OKA, J.)