IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 272 OF 2024

1. Babarjit Singh Hari Singh
C/o. Punjab and Sindh Bank,
Gurunanak Khalsa College,
Sri Ganganagar, Rajasthan – 335 001.

2. Mrs. Kuldeep Kaur w/o Mahabir Singh

3. Gurpreet Singh s/o Mahabir Singh

4. Harpreet Singh s/o Mahabir Singh

Applicant Nos. 2, 3 and 4 residing at
Block No.3, Ground Floor, Daji Pandurang
Bhavan, Plot No.472A, Near Maheshwari
Udyan, King's Circle (E), Mumbai – 400 019. .... Applicants
(Original Defendants)

-VERSUS-

1. Manorama Vishwanath Surve
(deleted since deceased)

2. Divakar Vishwanath Surve
Age : 60 years, Indian Inhabitant,
Occ : Business,

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Respondent Nos. 1 and 2 both
Residing at Daji Pandurang Bhavan,
Plot No. 472A, Near Maheshwari Udyan,
King's Circle (E), Mumbai – 400 019 …. Respondents
(Original Plaintiffs)

Mr. S.M. Gorwadkar, Senior Advocate with Mr. Vaibhav Mehta and Mr. Nilesh Pandey i/b Vaibhav Mehta & Associates, *for the Applicants.*

Mr. Atul Damle, Senior Advocate with Mr. Suresh Sabrad, Mr. Amey Sawant, Ms. Neha Zanje, G. Saldanha, Mr. Pratik Sabrad and Ms. Payal Vardhan, *for the Respondents.*

CORAM: SANDEEP V. MARNE, J.

Judgment Reserved On: 25 June 2024.

Judgment Pronounced On: 5 July 2024.

JUDGMENT:-

A. THE CHALLENGE

1) Applicants have filed Civil Revision Application challenging the judgment and order dated 1 November 2023 passed by the Appellate Bench of the Small Causes Court allowing Appeal No. 100 of 2017 filed by Plaintiffs-landlords and setting aside the judgment and decree dated 9 October 2015 passed by the Small Causes Court by which R.A.E. Suit No.1303/1949 of 2009 was dismissed. The Appellate Bench has decreed

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the suit directing that tenancy of the Applicants/Defendants over the suit premises is terminated on the ground of subletting under Section 16(1)(e) of the Maharashtra Rent Control Act, 1999. The Applicant/Defendants are directed to handover vacant possession of the suit premises to the Plaintiffs. The Appellate Bench has also directed conduct of enquiry into mesne profits under Order 20 Rule 12 of the Code of Civil Procedure, 1908 from the date of the decree till the actual delivery of possession of the suit premises.

B. FACTS

2) Plaintiffs/Respondents are owners and landlords of the building known as Daji Pandurang Bhavan, Plot No.472-A, Kings Circle, Mumbai-400 019. One Hari Singh Ujjagar Singh was the original tenant in respect of the suit premises bearing Block No.3 admeasuring 44.64 sq. mtrs in the said Daji Pandurang Bhavan building. The said Hari Singh Ujjagar Singh did not have any issues. Applicant No.1/Defendant No.1-Babarjit Singh was born on 5 August 1956 to the sister of Hari Singh. It is Applicants' case that Defendant No.1 started residing in the suit premises alongwith Hari Singh and his wife since the year 1968 as their family member and that Defendant No.1 was treated as the adopted son of Hari Singh. Applicants claim that in the year 1978, the brother of the first Defendant-Mahabir Singh, alongwith his wife (Kuldeep Kaur) and son-Gurpreet Singh started residing in the suit premises alongwith Hari

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Singh's family and the First Defendant. That Defendant No.4-Harpreet Singh was born to Defendant No.2 and Mahabir Singh in the suit premises in the year 1979. That both Defendant Nos. 3 and 4 are disabled. After the death of Mahabir Singh, Defendant Nos. 2 to 4 continued residing in the suit premises as family members of tenant-Hari Singh.

3) On 22 January 1981, R.A.E. Suit No. 411 of 1981 was filed by the landlords against Hari Singh on the ground of illegal subletting in addition to some other grounds. It is the case of the Applicants that on 29 November 1983, Ration Card was issued in the name of Hari Singh, Babarjit Singh, Indrajit Singh (wife of Babarjit Singh), Kuldeep Kaur and her children, as well as son of Babarjit Singh. In January 1986, the original tenant-Hari Singh passed away. His widow also passed away in 1987. Applicants claim that they continued to reside in the suit premises. On account of Hari Singh's death, R.A.E. Suit No. 411 of 1986 was dismissed as abated on 26 July 1986.

4) On 29 July 1987, R.A.E. Suit No. 1714/5439 of 1987 was filed by the landlords against the '*heirs and legal representatives of Sardar Harisingh Ujjagar Singh'* as Defendant No.1 and Babarjit Singh was impleaded as Defendant No.2 therein. The ground of ejectment was illegal conversion of residential premises into non-residential ones as a Lodge by permitting several persons as lodgers. Defendant No.1-Babarjit Singh, who was Defendant No.2 in the said suit, filed Written Statement claiming that he

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was the adopted son of Hari Singh. It was also contended that he was the family member of Hari Singh. Plaintiff denied Babarjit's relationship as adopted son of Hari Singh. On 5 September 2002, R.A.E. Suit No. 1714/5439 of 1987 was dismissed, *inter-alia* holding that Hari Singh had accepted Babarjit Singh as his adopted son and that Babarjit Singh was also a blood relative of Hari Singh, being son of Hari Singh's sister and was residing in the suit premises as family member of Hari Singh. It was further held that person residing in the suit premises were closely related to Babarjit Singh and were not lodgers. Plaintiffs preferred Appeal No. 218 of 2003 before the Appellate Bench of the Small Causes Court challenging the decree dated 5 September 2002. By judgment and decree dated 7 January 2009, the Appellate Bench dismissed the Appeal. However, the Appellate Bench held that Babarjit Singh failed to prove that he is the adopted son of Hari Singh. The Appellate Bench however held that Babarjit Singh was a family member of deceased tenant and was residing with him at the time of death of the tenant and that therefore he is entitled to get tenancy rights under Section 5(ii)(c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (**Bombay Rent Act 1947**). It was further held that the persons residing with Babarjit Singh were family members and could not be described as Lodgers. It appears that the decree of the Appellate Bench dated 7 January 2009 attained finality as the same was not challenged further by the Plaintiffs.

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5) On 1 July 2009, Plaintiffs issued notice to Babarjit Singh and called him upon to deliver possession of the suit premises alleging that he was not occupying the suit premises. Reference was made in the notice to the Affidavit filed by Babarjit Singh in R.A.E. Suit No. 1714/5439 of 1987 about his posting at Jaipur and Ganganagar after 1996. I was also alleged that there were arrears of rent from 1 July 1993. The notice was replied by Babarjit Singh stating that he was on transferable job and was frequently visiting Mumbai with his family to meet other family members residing in the suit premises. Defendant No.1 thus asserted that he continued to possess the suit premises. On 21 August 2009, another notice was issued by the Plaintiffs to Defendant No.1-Babarjit Singh for vacation of the premises. On 2 December 2009, Plaintiffs filed R.A.E. Suit No. 1303/1949 of 2009 seeking recovery of possession impleading Babarjit Singh as Defendant No.1, Kuldeep Kaur (wife of brother of Babarjit Singh) as Defendant No.2 and children of Kuldeep Kaur as Defendant Nos.3 and 4. Recovery of possession of the suit premises was sought on the ground that the first Defendant had illegally sublet the suit premises to Defendant Nos.2 to 4. It was alleged that Defendant No.1 had removed all his goods and had left Mumbai permanently with no intention of coming back. The First Defendant filed Written Statement denying the allegations in the plaint. He contended that his furniture, fixtures, kitchen utensils, are still lying in the suit premises. He contended that Defendant Nos.2 to 4 are his family members and are residing with him in their capacity as family members. It was denied that Defendant Nos. 2 and 4

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are in exclusive possession of the suit premises. A separate Written Statement was filed by Defendant Nos.2 to 4 contesting the suit. The learned Single Judge of the Small Causes Court, after considering the evidence on record, proceeded to dismiss the suit by judgment and decree dated 9 October 2015. The learned Judge held that Defendant Nos.2 to 4 were residing in the suit premises prior to 1980 alongwith Defendant No.1, as well as with original tenant-Hari Singh. That Defendant Nos.2 to 4 are family members of Defendant No.1. This is how the Trial Court rejected the contention of Plaintiff that there is subletting by Defendant No.1 to Defendant Nos.2 to 4.

6) Plaintiffs filed Appeal No.100 of 2017 before the Appellate Bench of the Small Causes Court challenging the decree dated 9 October 2015. The Appellate Bench has however reversed the decision of the learned Single Judge of the Small Causes Court by its judgment and decree dated 1 November 2023. The Appellate Bench held that Defendant No.1 is the adopted son of original tenant-Hari Singh and that therefore Defendant Nos. 2 to 4 cannot become his family members. It further held that the first Defendant has left Mumbai and has never resided in the suit premises. This is how the Appellate Bench held that there is subletting by Defendant No.1 to Defendant Nos.2 to 4 in respect of the suit premises. The Appellate Bench thus allowed the Appeal filed by the Plaintiffs and has set aside the judgment and decree passed by the Trial Court on 9 October 2015. The Appellate Bench has decreed R.A.E. Suit No. 1303/1949

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of 2009 by declaring that tenancy of the Defendants over the suit premises is terminated in the ground of unlawful subletting as per Section 16(1)(e) of the Rent Act. Defendants have been directed to handover possession of the suit premises to the Plaintiffs within 8 weeks. Enquiry into mesne profits under Order 20 Rule 12 of the Code is also directed to be held from the date of the decree till actual delivery of possession of the suit premises. Aggrieved by the decree of the Appellate Bench dated 1 November 2023 in Appeal No. 100 of 2017, Defendants/Applicants have filed the present Civil Revision Application.

C. SUBMISSIONS

7) Appearing for the Applicants, Mr. Gorwadkar, the learned senior advocate would submit that the Appellant Bench has erred in reversing the decision of the Trial Court. That the Appellate Bench has recorded perverse finding that Defendant No.1 is the adopted son of Hari Singh. That the said finding is in the teeth of the judgment delivered by the Appellate Bench in the second round of litigation in Appeal No.218 of 2003 in which it was conclusively held that Defendant No.1 is not the adopted son of Hari Singh. He would further submit that the Appellate Bench in Appeal No. 218 of 2003 has conclusively held that Defendant Nos.2 to 4 are family members of the First Defendant. That therefore it was impermissible for the Appellate Bench to hold in the present Appeal that they are not family members of the First Defendant. Mr. Gorwadkar

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would submit that Plaintiffs could not have pleaded in the third round of litigation that Defendant No.1 is the adopted son of Hari Singh or that Defendant Nos.2 to 4 are not family members in the light of findings recorded by the Appellate Bench while deciding Appeal No. 218 of 2003. That the Plaintiffs have failed to prove that Defendant No.1 has severed his connections with Defendant Nos.2 to 4 after his transfer out of Mumbai. That the Appellate Bench has overlooked the fact that Defendant Nos.2 to 4 are residing in the suit premises since prior to 1980 and have been treated as family members of not just the First Defendant, but also of the Original Tenant-Hari Singh. That occupation of the premises by Defendant Nos.2 to 4 has been tolerated by the Plaintiffs since the year 1980 and therefore it was impermissible for the Plaintiffs to induct them as sub-tenants in the suit filed in the year 2009.

8) Mr. Gorwadkar would rely upon judgment of the Apex Court in ***Baldev Sahai Bangia Versus R.C. Bhasin***[1] in support of his contention that the word '*family*' needs to be given a wider meaning so as to include all members or descendants from common ancestors. That in the case before the Apex Court in ***Baldev Sahai Bangia,*** the original tenant had migrated to Canada and his mother, brother and sister, who continued to reside in the suit premises, have been treated as family members. Mr. Gorwadkar has further relied upon judgment of this Court in ***Vasant Mahadev Pandit and another Versus Zaibunnisa Abdul Sattar and Others***[2] in support of his

[1] (1982) 2 SCC 210.
[2] 2001(3) Mh.L.J. 118.

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contention that wife of deceased brother is required to be treated as family member in relation to rent control legislation. He would also rely upon judgment of this Court in ***Surendra M. Wagh & anr. Versus Manohar Krishna Kale & anr.***[3] in support of his contention that mere occupation of premises is not sufficient to establish sub-tenancy unless it is proved that there is transfer of exclusive right to enjoy the property in favour of third party. He would also rely upon judgment of this Court in ***Kamal Chintaman Mithari and others Versus Ganpatrao Ramchandra Powar***[4] wherein even a mistress of tenant living with him was treated as member of family. Relying on judgment of this Court in ***Pandurang Narayan Mantri Versus Anant Shankarrao Samuel***[5]**,** he would submit that once some relation is established with the tenant and residence with the tenant is proved, transmission of tenancy under Section 5(11)(c) of the Bombay Rent Act, 1947 is required to be upheld. He would also rely upon judgment of this Court in ***Babanrao Shankarrao Chavan Versus Chandrashekhar Ramchandra Shinde***[6] in which widowed sister residing with the brother was treated as part and parcel of the family.

9) Mr. Gorwadkar would further submit that the Appellate Bench could not have accepted bare words and vague pleading about Defendant No.1 permanently leaving the suit premises. That it is erroneous to assume that Defendant Nos.2 to 4 are in exclusive

[3] 2006(4) Bom.C.R. 115.
[4] AIR 1997 Bombay 163.
[5] AIR 1982 Bombay 115.
[6] 1984 (2) Bom.C.R. 671.

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possession of the suit premises. That specific evidence was led that furniture and fixtures of Defendant No.1 are still present in the suit premises and that he visits the suit premises to meet his family members being Defendant Nos.2 to 4. That therefore the findings recorded by the Appellate Bench about subletting are unsustainable and deserve to be set aside.

10) *Per-contra,* Mr. Damle, the learned Senior Advocate appearing for the Respondents/Plaintiffs would oppose the Revision Application. He submitted that no interference is warranted in the well-reasoned judgment of the Appellate Bench in exercise of revisionary jurisdiction by this Court under Section 115 of the Code. He would invite my attention to the evidence led by the First Defendant in second round of litigation wherein he specifically deposed that he used to reside with his father, Hari Singh in the suit premises. That a specific finding was recorded by the Appellate Bench in the second round of litigation that only Babarjit Singh was residing with Hari Singh and his wife in the suit premises as their family member. That the First Defendant took a categorical stand in the second round of litigation that he alone was residing with Hari Singh and that he alone was entitled to inherit tenancy rights under Section 5(1)(c) of the Bombay Rent Act, 1947. That if indeed Defendant Nos.2 to 4 were also residing in the suit premises in the year 1980, nothing prevented Hari Singh from contending so in the second round of litigation. That Defendant No.1 cannot now change his stand to suit his

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convenience and contend that event Defendant Nos.2 to 4 were residing in the suit premises when the second round of litigation went on between the parties.

11) Mr. Damle would further submit that in the second round of litigation, as well as in the present round, the First Defendant has been consistent in his stand that he is the adopted son of Hari Singh. By taking that stand, he has essentially sought to disconnect his ties with his original family. That he conveniently took a stand in the second round of litigation that he became member of family of Hari Singh in his capacity as the adopted son for the purpose of tenancy rights. Now he is changing his stand by trying to re-establish his connection with his original family so as to ensure that his brother's wife (Defendant No.2) and his children continue with the tenancy rights. That thus the First Defendant has clearly approbated and reprobated, which cannot be countenanced in law.

12) Mr. Damle would further submit that the First Defendant did not even contest the Appeal filed by the Plaintiffs. That even in the present Revision Application, his address is of Rajasthan and not of the suit premises. That the First Defendant thus has no interest left in respect of the suit premises, who has been continuously residing out of Mumbai since the year 1996. That he has retired from service in the year 2016 and there is nothing on record to indicate that after his retirement, he has

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shifted back to the suit premises in Mumbai. That even after his retirement, he continues to reside in his mother's house at Ganganagar, Rajasthan State. That the suit premises have infact not been used by any person which is clear from the recent electricity consumption. That this is a perfect attempt to continue to possess the suit premises from generations to generations despite tenancy rights coming to an end. Mr. Damle would therefore submit that handing over exclusive possession of the suit premises by the First Defendant to Defendant Nos.2 to 4 is conclusively proved. That it is not necessary for the Plaintiffs to prove any financial arrangement between the tenant and the sub-tenant. That all ingredients of sub-tenancy are established and therefore the findings recorded by the Appellate Bench need not be disturbed. Mr. Damle would pray for dismissal of the Revision Application.

D. REASONS AND ANALYSIS

13) This is the third round of litigation for recovery of possession instituted by the Respondent/landlords. The first suit was filed bearing R.A.E. Suit No. 411 of 1981 (**First Suit**) by V.S. Surve against the sole Defendant-Hari Singh. In that suit, eviction of Defendant-Tenant therein was sought on the ground that he was allowing several persons to occupy the premises and reside with him from time to time and was profiteering therefrom. It was alleged that the said act not only amounted to unauthorized subletting and parting with possession, but was also a

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source of nuisance and annoyance to the Plaintiff and neighbouring tenants. The *bonafide* need of the Plaintiff was also a ground pleaded in the said suit. The first suit was dismissed as abated on 26 July 1986 after the death of the Original Tenant, Hari Singh in January 1986.

14) Immediately after dismissal of the first suit, R.A.E. Suit No. 1714/5439 of 1987 (**Second Suit)** was instituted by Smt. Manorama V. Surve, Nandkumar V. Surve and Dinanath V. Surve (all heirs of late, Vishwanath Surve). In the second suit, '*heirs and legal representatives of Sardar Harisingh Ujjagarsingh*' were impleaded as the First Defendant and Sardar Babarjit Singh was impleaded as the Second Defendant. In the second suit, it was alleged that the First Defendant had changed the user of the suit premises by converting the same from residential to non-residential premises and the First Defendant had started unauthorisedly lodging houses therein. That the Defendants were keeping several persons in the suit premises which was also a source of nuisance and annoyance to the Plaintiffs and other neighbourers and occupants and tenants of the building. The ground of bonafide need was also pleaded for seeking eviction of the Defendants therein. The second suit was defended by Babarjit Singh by filing Written Statement contending that he and his brother, Inderjit Singh are nephews (*sister's children*) of original Tenant-Hari Singh and were residing in the suit premises as family members. It was also pleaded that Babarjit Singh was adopted son of Hari Singh. In the Affidavit of Evidence filed by Babarjit Singh on 25 July 2002, it was

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stated that his father Hari Singh was a protected tenant and in his capacity as son of Hari Singh, member of his family, he was living with the original tenant in the suit premises at the time of his death. Babarjit Singh therefore claimed that he was also the protected tenant within the meaning of the Bombay Rent Act, 1947. It was deposed by Babarjit Singh that on account of his transfer, he was temporarily residing at Ganganagar with his mother and as and when he was on leave, he used to come and stay in the suit premises. He further deposed that at the time of filing of evidence, his brother's wife, Kuldeep Kaur was residing in the suit premises alongwith her two handicapped children, who could not move out of the house on their own. He further deposed that he had every intention to go back and reside in Mumbai and to give education to his son in Mumbai. He further deposed that '*at present, my brother's wife is looking after the suit flat in my absence*'. It was further contended that after his father's death, he was paying the rent of the suit premises. The Small Causes Court dismissed the second suit by judgment and order dated 5 September 2002 by rejecting the grounds of change of user, nuisance/annoyance and *bonafide* need. The Small Causes Court held Babarjit Singh, being the blood relative of Hari Singh, was within his right to claim tenancy under Section 5(11)(c) of the Bombay Rent Act, 1947. The Small Causes Court also highlighted the aspect of acceptance of rent by the landlords from Babarjit Singh. The Small Causes Court held that the persons residing in the suit premises were closely related to Babarjit Singh and hence were not lodgers.

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15) The decree dated 5 September 2002 was tested by the landlords by filing Appeal No. 218 of 2003 before the Appellate Bench of the Small Causes Court. The Appeal however, came to be rejected by judgment and decree dated 7 January 2009. Though the Appeal was dismissed, the Appellate Bench however refused to accept that Babarjit Singh is the adopted son of the original tenant-Hari Singh. The Appellate Bench held *'Therefore, we find that defendant no.2 failed to prove that he is the adopted son of deceased, Harisingh. Once, he failed to prove that he is the adopted son of deceased tenant, he cannot get right as heir of deceased tenant'*. The Appellate Bench thereafter went into the issue as to whether Babarjit Singh was residing alongwith Hari Singh and his wife as their family member for the purpose of claiming tenancy right under Section 5(11)(c) of the Bombay Rent Act, 1947. After detailed discussion, the Appellate Bench held that *'Considering the authorities cited by the defendants' advocate and the facts on record it clearly shows that defendant no.2 was residing with deceased tenant as a family member in the suit premises. Therefore, we find that defendant no.2 was a family member of deceased tenant and residing with him in the suit premises at the time of death of the tenant. Therefore, he is entitled to get tenancy rights under Section 5(11)(c) of the Bombay Rent Act.'*. The Appellate Bench thereafter went into the issue of change of user of the suit premises by Babarjit Singh by converting it into lodging house. As observed above, Babarjit Singh deposed in his evidence that after his transfer to Ganganagar, his brother's wife Kuldeep Kaur was staying in the suit premises alongwith her two handicapped children and that she was looking after the suit premises in his absence.

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Thus, residence of Kuldeep Kaur, her two children in the suit premises was admitted by Babarjit Singh. It appears that electoral roll of 1988 was produced reflecting names of Babarjit Singh, his wife Naginder Kaur, his real brother Inderjit Singh and his wife, Jaspal Kaur. Electoral Roll of 1997 reflected names of Babarjit Singh's brother-Amarjit and his wife, Manjit Kaur, as well as names of his deceased brother's wife, Kuldeep Kaur Mahavir Singh. It appears that Amarjit Singh and his wife Manjit Kaur had settled in America and the other brother, Inderjit Singh was also not residing in the suit premises. This is how only Kuldeep Kaur (wife of Mahavir Singh, Babarjit Singh's brother) and her two handicapped children were residing in the suit premises. Considering the evidence on record, the Appellate Bench held that the persons whose names are reflected in the Ration Card are family members of Babarjit Singh and therefore though could not be termed as 'lodgers'. The Appellate Bench, therefore repelled the theory of change of use of the suit premises into Lodging House. The finding recorded by the Appellate Bench about Kuldeep Kaur and her two children (Defendant Nos.2 to 4) being family members of Babarjit Singh is being heavily relied upon by Mr. Gorwadkar in the present round of litigation, which aspect is being discussed in the latter portion of the judgment.

16) The third round of litigation is in the form of R.A.E. Suit No. 1303/1949 of 2009 (**third suit**) was instituted by the landlords on 2 December 2009 i.e. few months after dismissal of the Appeal in the

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second suit. The third suit is instituted against Babarjit Singh (Defendant No.1), Mrs. Kuldeep Kaur (Defendant No.2) and her two children, Gurpreet Singh and Harpreet Singh (Defendant Nos.3 and 4). The recovery of possession of the suit premises is sought in the third suit by contending that Defendant No.1 (Babarjit Singh) is ultimately accepted by the landlords as the monthly tenant in respect of the suit premises. That Defendant No.1 was required to stay out of Mumbai on account of his service with Punjab & Sind Bank. That he used to induct persons in the suit premises as his lodgers as paying guests without the permission of Plaintiffs. However, it was admitted in the plaint that '*However during this period he used to reside in the suit premises at least for few months in the year*'. It was further pleaded that since the year 1999, the First Defendant has unlawfully sublet and/or assigned or transferred his interest in the suit premises and parted possession thereof to Defendant Nos.2 to 4 without prior permission of the Plaintiffs. That the First Defendant has removed all his goods, livestock and barrel and left Mumbai permanently with no intention to go back. That Defendant Nos.2 to 4 are in exclusive possession of the suit premises. That the First Defendant has therefore lost protection under the Maharashtra Rent Control Act, 1999 (**MRC Act**) and was liable to be evicted. Initially, written statement was filed by Defendant Nos. 2 to 4, contesting the suit raising the issue of bar of *res-judicata* and further contending that Defendant No.1 was being continuously posted out of Mumbai and was trying his best to opt for posting in Mumbai. That in any case, after his retirement, the First

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Defendant would come back to Mumbai and reside in the suit premises with his family member. It was contended that the First Defendant had not removed his goods from the suit premises and his articles, furniture and fixtures, utensils etc. are still lying in the suit premises. The First Defendant also filed his written statement raising more or less similar contentions raised by Defendant Nos.2 to 4.

17) On behalf of the Plaintiffs, evidence was led by Divakar Vishwanath Surve (P.W.1). Defendant No.2-Kuldeep Kaur examined herself as D.W.2. The first Defendant-Babarjit Singh examined himself as D.W.1 and stated that he was due for retirement in the year 2016 and before his retirement he was not transferred to Mumbai, he would certainly go back to Mumbai after retirement and reside in the suit premises with his family member. Despite, the Appellate Court in the second suit holding that Defendant No.1-Babarjit Singh is not the adopted son of Hari Singh, the First Defendant continued with his stand even in the third suit that Hari Singh had adopted him. He repeatedly deposed in cross-examination that he is the adopted son of Hari Singh.

18) The third suit came to be dismissed by the Small Causes Court by Judgment and Order dated 9 October 2015 holding that Defendant Nos.1 to 4 were residing in the suit premises prior to 1980 with the original tenant-Hari Singh. The Trial Court held that the Fourth Defendant-Harpreet Singh was born to Defendant No.1 while residing in

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the suit premises. The Trial Court held that there is close relationship between the First Defendant and Defendant Nos.2 to 4, who are family members of the First Defendant. So far the First Defendant's residence at Sri Ganganagar, Rajasthan is concerned, the Trial Court held that his absence in the suit premises was due to the service at various places and that there he cannot be termed as non-user. The Appellate Bench has however reversed the decree of the Trial Court dated 9 October 2015 by allowing Appeal No.100 of 2017 filed by the landlords.

19) The moot issue that arises for consideration is whether the act of Defendant No.1-Babarjit Singh not residing in the suit premises and letting Defendant Nos.2 to 4 to reside therein amounts to subletting within the meaning of Section 16(1)(e) of the MRC Act. Residence of Defendant Nos.2 to 4 in the suit premises is not disputed. However, what is claimed by the Defendants is that Defendant Nos.2 to 4 are close relatives of Defendant No.1 and that therefore their residence in the suit premises cannot be termed as unauthorized subletting by the First Defendant to Defendant Nos.2 to 4.

20) The relationship between Defendant No.1 and Defendant No.2 is also not under dispute. Defendant No.2 is the sister-in-law (wife of brother) of the First Defendant and Defendant Nos.3 and 4 are children of Defendant No.2. Mr. Gorwadkar has contended that close blood

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relation between Defendant No.1 and Defendant Nos.2 to 4 is thus established. He has particularly relied upon the findings recorded by the Appellate Bench in the second round of litigation arising out of RA.E. Suit No. 1714/5439 of 1987. According to him, the Appellate Court has already held Defendant Nos.3 and 4-children to be the family members and therefore no fresh enquiry into their status was warranted in the present round of litigation. It would be necessary to reproduce the findings recorded by the Appellate Bench in its judgment and order dated 7 January 2009 in the second round of litigation. The Appellate Bench has held in para-32 of its judgment as under:

> 32. Defendant No.2 denied on oath defendant No.1 or he himself changed the user of the suit premises from residence to non residence. He denied that defendants at any time have kept in the suit premises any lodger or paying guest as alleged by P.W.1. He stated electoral roll of the year 1988 is showing the name of himself, his wife Naginder Kaur, his real brother Inderjit Singh his wife Jaspal Kaur at the suit premises. Electoral roll of the year 1997 is showing the name of his brother Amarjit and his wife Manjit Kaur and the name of his brother's wife Kuldeep Kaur Mahavir Singh and the name of his wife Jaspal Kaur. He further stated that Amarjit Singh and his wife Manjit Kaur have permanently gone to America and Inderjit Singh and his wife Jaspal Kaur are also now not residing in the suit and at present his brother's wife Kuldeep Kaur Mahavir Singh and her two handicapped children are living in the suit premises and whenever he got leave from his present job he and his wife come and stay in the suit premises. He further stated that his father Harisingh was a social worker and he helped some of his relatives. Deceased Harisingh was his fathers sister's husband. He never charged any amount from anybody whenever any relative stayed with him or with his wife even for food. After perusal of cross examination by the plaintiff's Advocate, it shows plaintiff's advocate not denied evidence of defendant No.2 in respect of the persons staying in the suit premises as defendant, his wife, his brother, his

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> wife. Defendant No.2 produced ration card to show that persons names stated by him in examination-in-chief are residing in the suit premises and their names are shown in ration card. Defendants Advocate submitted that plaintiffs have not denied defendants evidence. Defendant disclosed the names of persons who are residing in the suit premises. In this circumstance, it cannot be said that there is change of user**. Considering the evidence on record, we find that persons whose names are disclosed by the defendant No.2 are shown in the ration card, they are family members, therefore, it cannot be said that they are lodgers.** Admittedly suit premises was let out for residence and defendant No.2 and his family members are residing in the suit premises, therefore, it cannot be said that defendant Nos.1 and 2 have changed the user of the suit premises. The Trial Court considering the evidence on record rightly recorded finding on this point. Therefore, we find that there is no need to interfere in this finding. Hence, we confirm the said finding.
>
> *(emphasis and underlining supplied)*

21) The issue before the Appellate Court in the second round of litigation was about proof of allegation of change of user by converting premises let out for residence into a lodging house. The suit was filed by the Plaintiffs against '*heirs and legal representatives of Sardar Harisingh Ujjagarsingh*' as Defendant No.1 and Sardar Babarjit Singh as Defendant No.2. It was contended that Defendant No.2 had let out several persons to reside in the suit premises who were lodgers. Thus, enquiry before the Appellate Bench was whether the persons residing with Babarjit Singh (which included Defendant Nos.2 to 4 herein) were lodgers or not. Therefore, the finding of the Appellate Court that '*Considering the evidence on record, we find that persons whose names are disclosed by defendant No.2 are shown in ration card, they are family members, therefore, it cannot be said that they are*

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lodgers.' is recorded in the context of enquiry into the status of Defendant Nos.2 to 4 as lodgers. The Appellate Bench was not concerned with the status of Defendant Nos.2 to 4 in the second round of litigation as subtenants. In my view, therefore the above finding about Defendant Nos.2 to 4 being family members of Defendant No.1 in the second round of litigation, recorded in the context of their status as lodgers, cannot be utilized in the present round of litigation for determination of their status as subletees/subtenants.

22) In my view, the issue of subletting in the present case needs to be decided in the context of allegation of the First Defendant permanently residing in Ganaganagar, Rajasthan and allowing Defendant Nos.2 to 4 exclusively occupying/possessing the suit premises. There is no dispute to the position that the First Defendant was working in Punjab & Sind Bank and got transferred out of Mumbai in the year 1996. He remained posted at Jaipur between 1996 till 1999 and thereafter came to be posted at Sri Ganganagar in Rajasthan. It further appears that he came to be posted at Beenj Bayale, District-Sri Ganganagar, Rajasthan and thereafter at Padampur, District-Sri Ganganagar, Rajasthan. At the time when the First Defendant filed his Affidavit of Evidence on 9 June 2015, he was posted at Chak Khera Wala, near Jalalabad, District: Fazilka, Punjab as a Branch Manager. The relevant evidence adduced by the First Defendant in the present round of litigation in paras-6 and 7 of his Affidavit is as under:

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6. I say that the Plaintiffs are aware that I am an Officer of Punjab & Sind Bank and due to the requirement of the Bank I am liable to be transferred at any place as per sole discretion the Management of the said Bank and accordingly for some period I was posted at Jaipur from 1996 to 1999 and thereafter posted at Sri Ganganagar and even from Sri Ganganagar, though I tried my best to be posted back to Mumbai, however, I was transferred by the Management of the Bank to Beenj Bayala, Dist: Sri Ganganagar, Rajasthan and not to Mumbai. I say that thereafter I was again transferred to Padampur, Dist: Sri Ganga Nagar, Rajasthan and at present I stand transferred to Punjab & Sind Bank, situated at Chak: Kherawala, near Jalalabad, District: Fazilka, Punjab, as a Branch Manager. I say that I am still trying my best to get myself transferred to Mumbai where the suit premises are situated and the Plaintiffs are bent upon filing one suit after the other just to harass me and my family members. I say that due to the nature of my employment and as an employee of a Nationalized Bank, I have no option but to go for work and stay at such places wherever I am transferred. I say that I am due for retirement in the year 2016, and if during the intervening period, I am unable to get transferred to Mumbai then in that case, after my retirement, I have to certainly come back to Mumbai, and reside in the suit premises, with my family members.

7. I deny that I used to induct different persons in the suit premises as my lodgers and paying guests without permission of the Plaintiffs or otherwise. I say that the said allegations were made in the earlier suits and the same were rejected by the Trial Court as well as by the Appellate Court and the same are barred by res judicata. I deny that since 1999, I have unlawfully sub-let or assigned or transferred my interest in the suit premises or parted with possession thereof to the Defendant No. 2 to 4 or that I have removed all my goods, lock, stock and barrel and left Mumbai permanently with no intention to come back, as alleged. I say that all my articles are still lying in the suit flat including furniture, fixtures, fittings, utensils in the kitchen and some personal articles. I say that the Defendant No. 2 to 4 are my family members and they are residing in the suit flat in that capacity and looking after the suit flat. I deny that there is any arrangement about monetary consideration between me and the Defendant No. 2 to 4 or that the Defendant No. 2 to 4 are in exclusive possession of the suit premises. I say that the Defendant No.2 is wife of my real brother, Mahabir Singh, and the Defendant No. 3 & 4 are sons of my said brother. I deny that I have lost protection of the Maharashtra Rent Control Act, 1999, or I am liable to be evicted from the suit premises. I deny that the Defendant No. 2 to 4 are the unlawful occupants. I deny that it is in the interest of justice that decree for eviction may be passed against the Defendants in respect of the suit premises. I deny that it is just, necessary and in the interest of justice that

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any order or injunction should be passed against any of the Defendants on the basis of false allegations. I deny that any irreparable prejudice, loss, damage or injury would be caused to the Plaintiff, if the order or injunction would not be granted to the Plaintiffs.

23) It is thus admitted position that rights since 1996 till filing of Affidavit of Evidence on 9 June 2015, the First Defendant remained continuously posted outside Mumbai for about 19 long years. He deposed in his Affidavit that he was trying his best to get posting in Mumbai. He further stated in his evidence that he was due for retirement in the year 2016 and in the event of he not being posted at Mumbai before his retirement, he had planned to return to Mumbai and reside in the suit premises with his family members after his retirement. It appears that the First Defendant has retired from service of Punjab & Sind Bank in the year 2016. However, there is no material on record to indicate that after his retirement, he has returned to Mumbai and has been continuously residing in the suit premises. No doubt the suit got decided on 9 October 2015 before retirement of the First Defendant. The Appeal however remained pending before the Appellate Bench till 1 November 2023. However, there is nothing on record to indicate that the First Defendant has shifted to Mumbai after his retirement. No additional evidence was led before the First Appellate Court in that regard. Obviously, Defendants defended the suit and have succeeded before the Small Causes Court were not under strict obligation to lead additional evidence. At the same time, residence by persons other than tenant in the suit premises was proved by Plaintiffs and therefore the onus had shifted on the Defendants

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to prove that Defendant No.1 as well as Defendant Nos.2 to 4 resided together in the suit premises as family members. Even if some benefit of doubt is to be given to the Defendants for absence of the First Defendant from the suit premises on account of his transferable job during his service tenure, it became incumbent for the First Defendant to show that after his retirement atleast, he shifted to Mumbai and has been residing in the suit premises. Mr. Damle has particularly highlighted the address of the First Defendant in the title of the Civil Revision Application which is of Sri Ganganagar, Rajasthan. However, Mr. Gorwadkar is quick enough to invite my attention to para-1 of the Revision Application in which it is clarified that for obviating any departmental objections, the Revision Applicants have maintained the same title as reflected in the suit.

24) It has thus come on record that from 1986, the First Defendant has not been residing in the suit premises and the same is being occupied by Defendant Nos.2 to 4. Mr. Gorwadkar has attempted to draw fine distinction between the terms '*possession*' and '*occupation*' in support of his contention that the First Defendant continued to be in legal possession of the suit premises.

25) Even though the First Defendant remained posted outside Mumbai at various places owing to his service, no definitive evidence is led by him that he returned to the suit premises from time to time and

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resided therein alongwith Defendant Nos. 2 to 4. Defendant No.1 ought to have produced some evidence to show that during 1996 to 2015, he returned to Mumbai and resided in the suit premises at any point of time. Mere production of ration card, electricity bill, bank pass-book reflecting his name and address at the suit premises was not sufficient to infer that he used to reside in the suit premises after 1986 in view of the admitted position that he remained posted out of Mumbai and resided mostly in Sri Ganganagar during the relevant time. Merely because the First Defendant did not remove his name from the Ration Card or did not transfer the electricity meter or did not change his address in the pass-book, did not mean that he resided in the suit premises with Defendant Nos.2 to 4 after 1986. Some concrete evidence was required to be produced to prove that during the period of vacations or leave, the First Defendant used to return to Mumbai and reside in the suit premises.

26) In the second round of litigation, Defendant stated in his Affidavit of Evidence filed on 25 July 2002 that *"I say I and my family members are temporarily at Ganganagar staying with my mother and as and when we get leave, we come and stay in the suit flat*'. Thus, this is not a case where Defendant was residing in any staff quarters. He appears to have resided in his mother's house since the year 1996 at Sri Ganganagar. Though he stated in the second round of litigation that during the period of leave, he used to visit Mumbai and resided in the suit premises, no such evidence is led in the current round of litigation. No witness is examined nor any

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documentary evidence is produced to prove that every year during the period of leave, the First Defendant used to visit and reside in the suit premises.

27) When tenant is posted out of the city where tenanted premises are situated and is required to temporarily shift his residence outside the tenanted premises, it becomes incumbent on the tenant to prove that his main and permanent place of residence continues to be the tenanted premises and that he temporarily resides outside the city only owing to his transfer. Thus, it becomes incumbent for the Tenant to prove that he returns to his permanent residence in the tenanted premises, whenever he gets an opportunity to do so. Usually when an employee on transferable job is required to move out of city due to his posting, such employee resides either in service quarters or on licence basis at the place of his posting and keeps on visiting his permanent residence. Thus he is permanently connected to the tenanted premises which is his real 'home', though he is forced to take temporary shelter outside the city due to transferable job. There are many ways in which a tenant can maintain his connection with the tenanted premises after his transfer outside the city. His wife and/or children can continue to reside in the tenanted premises. If his wife and/or children are also required to shift along with him to transferred place, the tenant, his wife and children keep on visiting the tenanted premises throughout the year during leave or vacations and reside therein. Thus intention to maintain and actual maintenance of

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connection with the tenanted premises must be established. Installation of brother's wife and her children in the tenanted premises with the tenant, his wife or children actually not residing therein at any point of time in a year, severs the connection of the tenant with the premises.

28) In the present case, it is proved that the First Defendant has been continuously residing in his mother's house at Sri Ganganagar since 1996 with his wife and son. More importantly his posting is not static. He has been posted at various places, but did not move his residence with his immediate family members at those transferred places. In his evidence, the first Defendant stated that he was posted at that time at Chak Khera Wala, near Jalalabad, District: Fazilka, Punjab. However apparently he did not shift his family to the transferred place and his wife and son continued to reside at Sri. Ganganagar. Thus at the time when the first Defendant was posted at Chak Khera Wala, near Jalalabad, District: Fazilka, Punjab, he possibly claimed three places of residence (i) at Chak Khera Wala in Punjab where he worked and was required to reside, (ii) Sri. Ganganagar where his wife and son resided and (iii) suit premises in Mumbai. Considering this position, I am of the view that the evidence on record clearly indicates that the first Defendant treated the premises in Sri. Ganganagar as his 'home' after 1996 and the suit premises are being exclusively possessed by Defendant Nos. 2 to 4 since 1996.

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29) In the present case, it is undisputed position that only the First Defendant is the tenant. Defendant Nos.2 to 4 are neither tenants nor have they filed any proceedings for declaration of their status as tenants. Though it is proved in the evidence that Defendant Nos.2 to 4 are residing in the suit premises since the year 1980, the important fact to be noted is that the original Tenant-Hari Singh was alive till January, 1986. However, in the second round of litigation, it is only the first Defendant who came forward and asserted that he resided with the tenant both as adopted son as well as family member at the time of death of the original tenant. Thus, the right to tenancy was claimed by the First Defendant alone and Defendant Nos.2 to 4 never asserted any rights to tenancy on the basis of their alleged residence in the tenanted premises since the year 1980. Therefore, there is no dispute to the position that the First Defendant alone is the tenant in respect of the suit premises since the year 1986. There is no material on record to indicate that he has shifted his residence back to Mumbai after his retirement in the year 2016. In my view, therefore a clear case is made out where Defendant No.1 handed over exclusive possession of the suit premises to Defendant Nos.2 to 4.

30) The Appellate Bench has relied upon following decisions on the issue of subletting :

(I) In ***Duli Chand (Dead) by L.Rs. Vs. Jagmender Dass***[7], the suit was filed for eviction of tenant-Dhulichand alleging subletting and parting with

[7] (1990) 1 SCC 169.

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possession of the Shop to M/s. Hira Lal Sri Bhagwan without the consent of the landlord. The tenant contended that there was no subletting or parting with possession since Hiralal was relative of the tenant, who died in the year 1958 and Shri. Bhagwandas, the son of the tenant and that the name of the business was named as M/s. Hira Lal Sri Bhagwan in the memory of the deceased relative, Hiralal. In the above factual background, the Appellate Tribunal and the High Court had held that the tenant had parted with legal possession of the shop to Sri Bhagwandas. The Apex Court upheld the said finding and held in paras-4 and 5 as under :

> 4. The facts in this case as found by the Rent Control Tribunal which was accepted by the High Court are that the concern M/s Hira Lal Sri Bhagwan is the sole proprietary concern of Sri Bhagwan, that Sri Bhagwan has been carrying on that business in the premises in dispute, that Duli Chand-tenant had no interest in the business, that Sri Bhagwan is in exclusive possession of the property, that tenant-Duli Chand works at another Shop, M/s Aggarwal Hard- ware and Mills Stores with his younger son, that there was no plea of concurrent user of the premises by the tenant nor there is any plea that Sri Bhagwan is a licensee, that occasionally the tenant-Duli Chand was seen sitting in the shop and that the tenant had not retained any control over the same. These facts clearly support the finding of Appellate Tribunal and High Court that the tenant had parted with legal possession of the shop to the said Sri Bhagwan.
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> 5. The learned counsel for the appellant, however, contended that Sri Bhagwan was not the adopted son of Hira Lal and that by permitting the son to carry on business it could not be stated that he had parted with the legal possession of the premises. In this connection, he drew our attention to the decision of this Court in *Lakshman Singh Kothari v. Smt. Rup Kanwar* wherein this Court had held that in order that an adoption may be valid under Hindu Law there must be a formal ceremony of giving and taking by the natural parent and the adopted parent after exercising their volition to give and take the boy in adoption and that such an evidence of a valid adoption is not available in this case. The Appellate Tribunal and the High Court have dealt with the evidence available in this case in detail and came

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> to the conclusion that Sri Bhagwan was adopted by Hira Lal. It is not necessary for us to rely on the evidence available or the findings as proof of a valid adoption under Hindu Law but the evidence and the findings are enough to show that though Duli Chand and Sri Bhagwan are father and natural son, it is not possible to invoke any presumption that they constituted a Joint Hindu Family. It may also be mentioned that in the written statement the tenant had not pleaded specifically that he and Sri Bhagwan, constituted a Hindu Joint Family, that they are in joint possession, that either the business is joint family business or Sri Bhagwan was permitted to use the premises for carrying on any business as licensee remaining in joint possession. The evidence on adoption is thus to be treated only relevant for the purpose of considering the question whether the tenant has not retained any control over the premises and that he has parted with the possession, and we do not think that the Courts below erred in relying on the same for this purpose.

Thus, in ***Duli Chand***, the Apex Court has highlighted the need to prove the concurrent user of the premises. In the present case, it was therefore necessary for the First Defendant to prove that he also resided currently with Defendant Nos.2 to 4 in the suit premises. On the basis of the evidence produced on record, it is difficult to infer the current user of the suit premises by Defendant No.1 and Defendant Nos.2 to 4. The judgment in ***Duli Chand*** (supra) also answers the point sought to be raised by Mr. Gorwadkar that residence of Defendant Nos.2 to 4 in the suit premises since the year 1980 has been tolerated by the landlords. In ***Duli Chand*** , one of the pleas raised was about waiver by the landlord. In para-11 of the judgment, the Apex Court has however held that there cannot be any implied consent and waiver of right dealing with rights of tenant and landlord cannot be presumed merely on the basis of conduct. The Apex Court has held in para-11 as under :

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> 11. In the aforesaid view it was held that it was necessary for the tenant to obtain the consent in writing to sub-letting the premises. The mere permission or acquiescence will not do. The consent shall also be to the specific sub-letting or parting with possession. This Court further observed that the requirement of consent to be in writing was to serve a public purpose, i.e., to avoid dispute as to whether there was consent or not and that, therefore, mere permission or acquiescence will not do. While noting that everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his individual capacity, in the context of the statutory provision of the Delhi Rent Control Act, this Court further held that the requirement as to the consent being in writing was in the public interest and that, therefore, there cannot be any question of waiver of a right, dealing with the rights of the tenants or landlord. The words used in the section are "without obtaining the consent in writing of the landlord." If the words were "without consent of the landlord" it might mean without consent, express or implied and in that sense question of waiver may arise. The question of implied consent will not arise, if the consent is to be in writing.

(II) In ***Dalsukhbhai G. Panchal & Ors. Vs. Mrs. Subhadrdevi S. Jani and others***[8], the Single Judge of this Court has dealt with a case where the allegation was that the father-in-law had sublet the suit premises to his son-in-law. This Court held in para-6 of the judgment as under:

> 6. On the main point, there is a concurrent finding of the statutory Courts. They have held that defendant No. 1 had acquired in 1967 and 1971 or 1978 additional accommodation which was suitable in every respect. It was argued that Kusumben and Champaklal continued to be members of the family of defendant No. 1 and that their needs could not be ignored while appraising the suitability or otherwise of premises subsequently acquired. It is not possible to agree with this submission. Kusumben and Champaklal are the daughter and son-in-law of defendant No. 1. While it is possible to hold that they were allowed to reside in the suit premises because of their kinship with defendant No. 1, it cannot be said that they were members of defendant No. 1's family. Admittedly the marriage of Kusumben and Champaklal took place in 1963. Till 1965 or thereabouts, the couple were staying in Nadiad in the State of Gujarat, and, in the home of Champaklal. It was only a temporary rift which led Kusumben to take refuge with her parants at Bombay. Champaklal, with a view to save the marriage,

[8] 493 Bom.R.C. 1987.

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> migrated to Bombay and started living with his wife and in-laws in the suit premises. Defendant No. 1 was under an obligation (moral or familial in nature) to take in his daughter and son-in-law. Once he had done that, the obligation disappeared. That he i. e. defendant No. 1 has been provided for, is evident from the admitted position that the suit premises are presently in the occupation of Kusumben and Champaklal and that defendant No. 1 along with his wife, sons and their children live in the textile Society flat. The suitability of that society flat is evident from defendant No. 1 finding it convenient to stay there Of course, the Textile Society flat must be a crowded one, what with defendant No. 1, his wife, sons, daughters-in- law and grand children. Were it possible, the family could do not only with the suit flat, but also with other accommodation. But of their own volition, they have left the suit room to be used by Kusumben and Champaklal. Neither of them has any claim upon defendant No. 1 to be provided with residence. Defendant 3 did not come into the family of defendant No. 1 as a resident son-in-law. He came in to reside with defendant No. 1 as a matter of concession on the part of his wife's father. Therefore, when assessing the suitability of the Textile Society flat, the requirements of Kusumben and Champaklal have to be ignored. Understood thus, defendant No. 1 has of his own shown that the Textile Society flat is suitable for the needs of those for whom he has to provide. In the result, I see no error in the verdict of the appellate Court and hence the order.

Thus, in ***Dalsukhbhai G. Panchal*** this Court has held that while daughter and son-in-law who were allowed to reside in the suit premises because of their kinship with the tenant, it could not be held that they were members of the tenant's family. The Court found that the daughter, after her marriage was residing in Nadiad in the State of Gujarat in the house of her husband and on account of rift of the couple, daughter took refuge with her parents (tenants) staying at Mumbai and the son-in-law followed his wife and started residing with her in the suit premises. This Court found that the daughter and son-in-law were occupying the suit premises since the original tenant had shifted alongwith the wife, sons and children in Textile Society flat.

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This Court held that the son-in-law came to reside with the tenant as a matter of concession on the part of his wife's father. This Court therefore held that the father-in-law had sublet the premises to son-in-law.

(III) In ***Kailasbhai Sukhram Tiwari Vs. Jostna Laxmidas Pujara & Anr.***[9] the cousin brother of the tenant's husband had started residing in the premises and continued residing therein even after the tenant and her husband had shifted elsewhere. The Apex Court has held in paras-12 to 15 as under :

> 12. It was sought to be argued before us that since the father of the husband of the tenant-Respondent 1 and the father of Respondent 2 are real brothers, there is blood relationship between the two and therefore it must be held that Respondent 2 is a member of the family of Respondent 1. This submission overlooks the fact that the tenant in question is not the husband of respondent 1 but the Respondent 1 herself. It cannot be said that Respondent 1 and Respondent 2 are blood relations. That apart, the question still remains as to whether in the facts and circumstances of the case it can be held that Respondent 2 is a member of the family of Respondent 1. It is futile to attempt to lay down a strait jacket formula as to who can be considered to be the member of the family of the tenant, particularly in the absence of definition of 'family' in the Act. Having regard to relevant considerations, the question must be decided on the facts and circumstances of each case. The High Court has relied upon some decisions of this Court wherein the question raised was whether the brother was a member of the family, or a case where the tenant had to go to a foreign country on business, leaving behind his parents and family members, including brothers and sisters. In such a factual situation, this Court held that the persons who occupied the premises were the members of the family of the tenant. Such is not the case here.
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> 13. It is not the case of the Respondent 2 that the family of the husband of Respondent 1, including his uncles and cousins, always resided together. In fact the evidence on record discloses that Respondent 1 resided in the

[9] (2006) 1 SCC 524.

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> premises with her husband only. Respondent 2 joined them sometime in the year 1980, and he had his own separate business. There is nothing to show that they ever resided together at any earlier point to time or that their fathers ever lived together. In fact the evidence on record is to the contrary. After he came to reside with Respondent 1 in the year 1980, an alternate premises was acquired by the tenant and she shifted to those premises sometime in the year 1981. Soon thereafter this dispute arose, because the tenant having shifted to another premises at Borivili, the premises in question continued to be occupied by Respondent 2. In the facts and circumstances, it is difficult to hold that Respondent 2 is a member of the family of Respondent 1, the tenant.
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> 14. The question as to whether a person is a member of the family of the tenant must be decide on the facts and circumstances of the case. Apart from the parents, spouse, brothers, sisters, sons and daughters, if any other relative claims to be a member of the tenants family, some more evidence is necessary to prove that they have always resided together as member of one family over a period of time. The mere fact that a relative has chosen to reside with the tenant for the sake of convenience, will not make him a member of the family of the tenant in the context of rent control legislation.
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> 15. We are, therefore, satisfied that the courts below were justified in holding, on the basis of the evidence on record, that the premises in question was let out to Respondent 1 which was occupied by her and her husband. She acquired another premises at Borivili where she shifted in the year 1981. Before that, in the year 1980 itself, Respondent 2 had come to reside with them and he continued to occupy the demised premises even after respondent No. 1 and her husband shifted to another accommodation at Borivili. Respondent 2 cannot be said to be a member of the family of Respondent 1, in the facts and circumstances of the case, and in the context of rent control legislation, with which we are concerned in the instant case.

Thus even though a closed blood relative, being cousin, was found in occupation of the demised premises from the year 1980 alongwith the original tenant, who shifted to another premises in the year 1981, the Apex Court has upheld the plea of subletting.

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(IV) In ***Vijay K. Gupta Vs. Nalini Varjeevandas Shah***[10], the Single Judge of this Court (S.A. Bobde, J. as he then was) has held that 'transfer in any other manner' in the context of suit on the ground of unlawful subletting includes gratuitous transfer and transfer without consideration. This Court held as under :

> 5. Even otherwise it was pointed out on behalf of the respondents that the eviction does not follow a finding of sub-letting in stricto sensu. **It follows the finding that there is an illegal transfer in any other manner. The words "transferred in any other manner" in section 13(1)(e) has been considered widely and will include gratuitous transfer and transfer without consideration.** The Gujarat High Court in *Sheth Jivaji Rajbhai and Sons vs. Patel Hatimbhai Nazarali 1999 Bom.R.C. 409* has observed in para. 17 as follows:
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> "17. **In my view, the words 'transfer in any other manner' in section 13(1)(e) are definitely wider and such transfer will include gratuitous transfer and transfer without consideration.** Consequently, if landlord places reliance upon the transfer or assigned tenancy rights by tenant-in-chief in other manner he need not prove existence of valuable consideration for such transfer as is required to be proved for illegal sub-letting. Thus, the trial Court was justified in decreeing the suit on grounds of illegal assignment or transfer of interest in the tenancy by tenant-in-chief to the defendant No. 2.
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> This view of the Gujarat High Court has been approved by the Supreme Court in *Mohammedkasam Haji Gulambhai vs. Bakerali Fatehali, (1998) 7 SCC 608* wherein the Supreme Court expressly referred to the above passage from the judgement of the Gujarat High Court and approved the view in the following terms:
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> "13. Clause (e) of Section 13(1) of the Act is couched in the widest terms. There is absolute prohibition on the tenant from sub-letting, assigning or transferring in any other manner his interest in the tenanted premises. There appears to be no way around this subject of course if there is any contract to the contrary between the landlord and the tenant. In a partnership where the tenant is a partner, he retains legal possession of the premises as a partnership is a compendium of the names of all the partners. In a partnership, the tenant does not divest himself of his right in the premises. On the question of sub-letting etc. the law is now very explicit. There is prohibition in absolute terms on the tenant from sub-letting, assignment or disposition of his interest in the tenanted premises."

[10] 2008 (2) Mh.L.J. 241.

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> 6. In this view of the matter, there is no merit in the submission that the decree is vitiated on the ground that there is no finding by the Courts below that transfer of interest in the petitioner's favour was not accompanied by a finding that there was consideration.

31) In my view, the Appellate Bench has rightly relied upon the aforesaid judgments for the purpose of holding that the First Defendant has unlawfully sublet the suit premises to Defendant Nos.2 to 4. The Appellate Bench is right in holding that the initial burden to prove subletting is on the landlord and once the landlord establishes that third party is in exclusive possession of the premises and that the tenant has no legal possession, the onus shifted on the tenant to prove the nature of occupation by the third party and that the tenant continues to hold legal possession in tenanted premises. In the present case, the Plaintiff has proved that Defendant Nos.2 to 4 are actually residing in the suit premises and that Defendant No.1 has been continuously residing outside the suit premises. It therefore became incumbent upon the First Defendant to prove that he not only continued to be in legal possession but also kept on visiting the suit premises and resided therein at various points of time throughout the year.

32) The Appellate Bench has rightly considered that once the persons residing in the suit premises are not parents, spouse, sister, sons or daughters, additional evidence is necessary to prove that the tenant has resided with such persons are members of one family continuously over a period of time. In the present case, continuous residence as member of

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one family of the Defendants is not proved. What is proved on the contrary is the fact that the First Defendant has continuously resided outside Mumbai and Defendant Nos.2 to 4 are exclusively residing in the suit premises since then.

33) Also of relevance is the fact that the landlord is denied possession of the premises in respect of the suit premises by seeking to pass over tenancy rights from one relative to the other. Hari Singh, the original the tenant, did not have any issue and ideally after his death, the premises ought to have reverted to the landlords. However after Hari Singh's death, Defendant No.1-Babarjit Singh came out with a case that he is the adopted son and claimed tenancy rights. Though he failed to prove his adoption before the Appellate Bench in the second round of litigation, he continues to assert even in the third round of litigation that he is the adopted son. This is how the First Defendant-Babarjit Singh ensured that the tenancy rights got recognised in his favour though he is not the son of the original tenant-Hari Singh. After the year 1986, Defendant No.1 has been continuously residing outside Mumbai in his mother's house at Sri Ganganagar. He is not in need of the suit premises, in any manner, he has not proved that he has returned to Mumbai after his retirement in 2016 and has been residing in the suit premises. Since Defendant No.1 does not need the suit premises, now the right to reside in the suit premises is claimed by another branch of family i.e. by Defendant Nos.2 to 4. Thus, there is continuous trend where upon

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cessation of need of earlier tenant, efforts are made to ensure that the tenancy rights are transferred to some other family member. Initially, the tenancy rights are transferred from Hari Singh to his nephew (sister's son). Now that the first Defendant is not residing in the suit premises, efforts are being made to ensure that the wife of his brother secures the tenancy rights. In my view, this trend must stop at some point of time and since need of the first Defendant to reside in the tenanted premises no longer survives, the possession thereof must be handed over to the landlord.

34) I am not impressed with the submission of Mr. Gorwadkar that the finding of Defendant Nos. 2 to 4 being family members of first Defendant in the previous round of litigation is final and binding since the same is not challenged. As observed above, the context in which the finding is recorded must be borne in mind and the finding cannot be used in isolation. 'Lodging' and 'subletting' are entirely two different concepts. Lodging involves occasional residence in the premises on payment of charges, whereas subletting involves occupation of the premises to the exclusion of the original tenant with or without payment of charges. Therefore, merely because Defendant Nos. 2 to 4 are treated as family members, to dispel the allegation of lodging, the same would not mean that they must be treated as family members for the purpose of deciding the issue of unlawful subletting as well.

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35) It must also be borne in mind that '*member of tenant's family residing with the tenant'* is a concept relevant for the purpose of determination of tenancy rights. In the present case, Defendant Nos.2 to 4 do not claim tenancy rights. Their residence in the suit premises is required to be considered in the context of allegations of subletting. For the purpose of dispelling the said allegation of subletting it was incumbent for the Defendant-Tenant to prove that he also resided with Defendant Nos.2 to 4 in the suit premises. 'Residence together' or 'concurrent residence' is an important criteria for determining whether the occupants can be treated as subtenants or not. The moment it is proved that the occupants are on their own in the suit premises and that the tenant has shifted elsewhere, subletting can be inferred. Therefore, 'residence of tenant with the occupants' is the important facet for the purpose of disproving the allegation of sub-tenancy. In the present case, the Defendants have miserably failed to prove that the First Defendant resides together with Defendant Nos.2 to 4 in the suit premises. Mere legal possession by a tenant while letting other occupants to reside independently in the suit premises would not save such occupation from consequences of subletting. What must be proved is the factum of residence of tenants and other occupants together concurrently.

36) Even if the concept of 'family' for determination of tenancy rights under Section 5(11)(c) of the Old 1947 Rent Act or Section 7(15)(d) of the Maharashtra Rent Control Act is to be invoked for deciding the issue of

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subletting, '*residence with the tenant*' becomes the decisive factor. Therefore even for declaration of status of tenancy, it must be proved with the person claiming to be a tenant must reside with the tenant. Therefore, joint residence of the tenant and the family member must be proved. I do not see why a different criteria needs to be applied while considering the allegation of subletting by permitting tenant to reside in separate premises while letting his family members reside in the suit premises. Present case does not involve a situation where the First Defendant left Mumbai due to service requirement and his wife or children continued to remain in the suit premises. He has left Mumbai with his immediate family members and the entire unit has shifted out of Mumbai for a considerable period of time and altogether different unit, being his brother's wife and her children, are permitted to reside in the suit premises. Their residence appears to be independent of the Defendant No.1. Shifting out of tenanted premises by first Defendant lock stock and barrel, as alleged by Plaintiffs, is thus conclusively proved. In my view, therefore all ingredients of subletting are met with in the present case.

37) What remains now is to deal with various judgments relied upon by Mr. Gorwadkar:

(I) ***Baldev Sahai Bangia*** (supra) is relied upon in support of the contention that even if the tenant moves out of the suit premises and migrates to another country, sub-tenancy cannot be assumed if the

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family members are allowed to reside in the suit premises. In ***Baldev Sahai Bangia*** the tenant migrated to Canada in 1971 followed by his wife and children. After he left for Canada, tenant's mother and brother continued to occupy the suit premises. When an application for ejectment was filed on the ground of non-residence of the tenant, a defence was raised by the tenant's mother, brother and sister that they continued to occupy the suit premises as family members, were paying rent and therefore the tenancy did not become vacant. In the above factual background, the Apex Court has held in paras-12, 17, 20, 21, 22, 23 as under :

> 12. We have heard counsel for the parties and given our anxious consideration to all aspects of the matter and we feel that the High Court has taken a palpably wrong view of the law in regard to the interpretation of the term 'member of the family' as used in clause (d) of Section 14(1) of the Act. In coming to its decision, the High Court seems to have completely overlooked the dominant purpose and the main object of the Act which affords several intrinsic and extrinsic evidence to show that the non-applicants were undoubtedly members of the family residing in the house and the migration of the main tenant to Canada would make no difference. The word 'family' has been defined in various legal dictionaries and several authorities of various courts and no court has ever held that mother or a brother or a sister who is living with the older member of the family would not constitute a family of the said member. Surely, it cannot be said by any stretch of imagination that when the tenant was living with his own mother in the house and after he migrated to Canada, he had severed all his connections with his mother so that she became an absolute stranger to the family. Such an interpretation is against our national heritage and, as we shall show, could never have been contemplated by the Act which has manifested its intention by virtue of a later amendment.
>
> 17. A conspectus of the connotation of the term 'family' which emerges from a reference to the aforesaid dictionaries clearly shows that the word 'family' has to be given not a restricted but a wider meaning so as to include not only the head of the family but all members or descendants from the common ancestors who are actually living with the same head. More

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particularly, in our country, blood relations do not evaporate merely because a member of the family-the father, the brother or the son-leaves his household and goes out for some time. Furthermore, in our opinion, the legislature has advisedly used the term that any member of the family residing therein for a period of six months immediately before the date of the filing of the action would be treated as a tenant. The stress is not so much on the actual presence of the tenant as on the fact that the members of the family actually live and reside in the tenanted premises. In fact, it seems to us that clause (d) of Section 14(1) of the Act is a special concession given to the landlord to obtain possession only where the tenanted premises have been completely vacated by the tenant if he ceased to exercise any control over the property either through himself or through his blood relations.

20. If this was the intention of the legislature then clause (d) of Section 14(1) of the Act could not be interpreted in a manner so as to defeat the very object of the Act. It is well settled that a beneficial provision must be meaningfully construed so as to advance the object of the Act, and curing any lacuna or defect appearing in the same. There are abundant authorities to show that the term "family" must always be liberally and broadly construed so as to include near relations of the head of the family.

21. In *Hira Lal v. Banarasi Dass* even the learned Judge who decided that case had observed at page 472 that the term ‘members of the family’ on the facts and circumstances of the case should not be given a narrow construction.

22. In *Govind Dass v. Kuldip Singh* a Division Bench of Delhi High Court consisting of H.R. Khanna, C.J. (as he then was) and Prakash Narain, J. while recognising the necessity of giving a wide interpretation to the word ‘family’ observed as follows:

I hold that in the section now under consideration the word ‘family’ includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptation of the word in this connection and that the legislature had used the word ‘family’ to introduce a flexible and wide term.

23. In *Mrs. G. V. Shukla v. Prabhu Ram Sukhram Dass Ojha*, Mahajan, J. (as he then was) observed as follows:

Therefore, it must be held that the word 'family' is capable of wider interpretation, but that interpretation must have relation to the existing facts and circumstances proved on the record in each case.

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Relying upon ***Baldev Sahai Bangia,*** Mr. Gorwadkar has contended that the term '*members of family*' cannot be given narrow construction and ought to be given wider interpretation. In my view, the judgment in ***Baldev Sahai Bangia*** would not assist the case of the Applicants on account of fundamental difference of tenant's mother, brother and sister paying rent to the landlord and the landlord accepting the same. Furthermore, the allegation in ***Baldev Sahai Bangia*** was not that of subletting but the ejectment was sought on the ground of non-residence of tenant. The Apex Court has interpreted the word '*family*' in the context of Section 14(1)(d) of the Delhi Rent Control Act, 1958 which provided for ejectment if the premises were let for use as a residence and neither the tenant nor member of his family was residing therein for six months. Section 14(1)(d) has been quoted in para-7 of the judgment:

> "14. (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favour of the landlord against a tenant:
> Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely:
> XX XX XX
> (d) that the premises were let for use as a residence and neither the tenant nor any member of his family has been residing therein for a period of six months immediately before the date of the filing of the application for the recovery of possession thereof;

In my view, therefore the interpretation of the term '*family*' by the Apex Court in ***Baldev Sahai Bangia*** cannot be extended to the present

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case. Under the Delhi Rent Control Act, the moment it is proved that a member of the family resides in the suit premises, eviction under Section 14(1)(d) becomes impermissible. In the present case, the suit is for ejectment is under the provisions of Section 16(1)(e) where allegation is unlawful subletting of whole or part of premises by the tenant. The Delhi Act permitted member of the family to occupy the suit premises independent of the tenant to quell ejectment under Section 14(1)(d), whereas under the Maharashtra Rent Control Act to defeat the ground of ejectment, it must be established that the tenant resides together with member of his family in the suit premises. In my view, therefore the judgment of the Apex Court in ***Baldev Sahai Bangia*** would not assist the case of the Applicants.

(II) Judgment of this Court in ***Vasant Mahadev Pandit*** (supra) is relied upon in support of the contention that the wife of the deceased brother residing with the tenant does not amount to subletting. In ***Vasant Mahadev Pandit***, this Court has considered the issue of subletting under Section 13(1)(e) of the Bombay Rent Act, 1947. In ***Vasant Mahadev Pandit***, the case involved allegation of premises being let to Vasant Pandit for residence and he leaving the suit premises and induction of his brother, Laxman and V.R. Salvi, (father-in-law of another brother-Bhalchandra) in the suit premises. The Trial Court rejected the ground of subletting and dismissed the suit. The Appellate Court allowed the Appeal and decreed the suit for

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possession against the Defendants. It appears that during the pendency of the suit, the original Defendant-Laxman and V.R. Salvi expired and the wife of deceased, Laxman and son of late, V.R. Salvi were brought on record as legal heirs. A petition before this Court was accordingly filed by the original tenant, Vasant Pandit, brother's wife, Sunanda Laxman Pandit and R.V. Salvi, son of late, V.R. Salvi. In the light of the above position, this Court held in paras-9, 10 and 12 as under :

> 9. The question that arises for consideration is whether the possession of defendant Nos. 2 and 3 of the suit premises amount to unlawful subletting of the suit premises by defendant No. 1. As mentioned above it is not in dispute that defendant No. 2 as well as defendant No. 3 are closely related to defendant No. 1. Original Defendant No. 2, since deceased, was the real brother of defendant No. 1; whereas original defendant No. 3, since deceased, was the father-in-law of the real brother of defendant No. 1. The case made out on behalf of the defendants before the Court below was that both the defendant Nos. 2 and 3 were occupying the suit premises only as family members of defendant No. 1. It was contended on behalf of the defendants that since defendant Nos. 2 and 3 were not strangers, the onus of establishing that the premises were unlawfully sub-let to defendant Nos. 2 and 3 and that the defendant No. 1 was profiteering out of the said transaction by charging sum of Rs. 50/- per month from them was very heavy on the plaintiff. No doubt the Appellate Court has recorded a finding that the plaintiff has established the case of unlawful sub-letting in favour of defendant Nos. 2 and 3. however, it is contended that, the said conclusion has been reached on the basis of surmises and conjectures. On the other hand the learned counsel for the respondent No. 1 plaintiff essentially adopted the conclusions reached by the Appellate Court.
>
> 10 . It is well settled that to make out a case of sub-letting the party has to establish that the party is in exclusive possession of the suit premises upon payment of consideration for such purpose. In the present case, on the basis of evidence on record and as analyzed by both the Courts below it Is not possible to even remotely suggest that defendant Nos. 2 and 3 were in exclusive possession of the suit premises. In asmuch as, besides defendant Nos. 2 and 3, other family members including mother of defendant No. 1 were all along staying in the suit premises. At any rate, there is absolutely

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no positive evidence brought on record by the plaintiff to show that defendant No. 1 was charging consideration that too a sum of Rs. 50/ per month from defendant Nos. 2 and 3. On close examination of the pleadings It would appear that vague allegation has been made that defendant No. 1 handed over exclusive possession of the suit premises to defendant Nos. 2 and 3 at the monthly rent of Rs. 50/- with or without the permission of the plaintiff. The assertion in the plaint is too vague and general, for it is not clear as to whether Rs. 50/- was being charged either from defendant No. 2 or from defendant No. 3 or from both. Be that as it may, the said assertion in the plaint was categorically denied by the defendants in their written statement. Besides denial the defendants came out with a specific case, as stated in para 7 of the written statement. Besides the specific pleading, the defendant adduced oral evidence of Vasant defendant No. 1 as well as of D.W. 2 Sunanda impleaded defendant No. 2/ 1 and of R. V. Salvi impleaded defendant No. 3/1. All the defendants have consistently deposed on oath that defendant Nos. 2 and 3 were staying in the suit premises as family members and there was no question of subletting the suit premises to them by defendant No. 1. The said defendants have also consistently deposed that no amount was paid either by defendant No. 2 or by defendant No. 3 towards consideration for occupying the suit premises as sub-tenants.

12. It is not unknown in our society that brothers and the wives of the deceased brother would come and stay in case of distress. It is also not unknown that relatives in distress would take shelter with their relations. The evidence adduced on behalf of defendants would clearly go to show that defendant No. 2 was none else but the real brother of defendant No. 1. Assuming that the suit premises were let out to defendant No. 1 the fact remains that defendant No. 2 was using the suit premises only in the capacity of a family member of defendant No. 1. After Laxman expired, his wife Sunanda impleaded defendant No. 2 continued to occupy the suit premises along with her mother-in-law Yashodabai i.e. mother of defendant No. 1. The evidence which has also come on record and not seriously challenged by the plaintiff is that the defendant No. 3 was the father-in-law of the real brother of defendant No. 1. In that sense he was also related to the defendant No. 1. Although, defendant No. 3 was not a blood relation, but generally he was closely related to the brother of defendant No. 1 and therefore can be said to be a family member. Obviously because of the close relation the defendant No. 3 was accommodated in the suit premises while in distress. The evidence adduced on behalf of defendants go to show that defendant No. 3 was compelled to shift in the suit premises due to threat of demolition of his accommodation which he was occupying at Thane. In other words, the evidence would unfailingly indicate that defendant Nos. 2 and 3 were occupying the suit premises only as the family members of defendant No. 1 and in no other capacity. If the premises are occupied by

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> the family member, even if such member has joined the original tenant subsequently that by itself will not amount to creation of any sub-tenancy in his favour. Such interpretation cannot be countenanced at all, for even the Legislature in its wisdom has thought it appropriate to exclude family members from being licensee. If reference is made to the definition of licensee, it would be seen that a member of the family residing together with the tenant is expressly excluded from the definition of licensee. If the principle underlying this legislative intent is applied to the fact situation I have no hesitation to hold that even if a family member starts staying with the original tenant at a later stage that by itself will not attract the mischief of unlawful sub-letting. Observations made by this Court in judgment in the case of ***Babanrao Shankarrao Chavan vs. Chandrashekhar Ramchandra Shinde, 1984 (2) Bom.C.R. 671*** would be useful, which reads thus :
>
> "9. ..... It is not unknown in our country that when a widowed sister conies to reside with her brother and when she starts residing with him *she resides not as a servant or a stranger, but resides as part and parcel of the family. This is the rule.* There may be exceptions. *But if there are exceptions, the exceptions have got to be proved by special evidence. In the absence of any such evidence to the contrary, it must be assumed that a widowed sister who comes to stay with her brother along with her, young one would be staying with him not as a stranger but as brother's family."* Likewise her younger son would be part of that very family." (emphasis supplied)

In ***Vasant Mahadev Pandit,*** this Court held that Defendant Nos.2 and 3 were closely related to Defendant No.1-tenant as Defendant No.2 was the real brother and Defendant No.3 was father-in-law of real brother of the tenant. This Court held that in order to make out a case of subletting, the party has to establish that Defendant is in exclusive possession of the suit premises upon payment of consideration for such purpose. After considering the evidence on record, this Court held that Defendant Nos. 2 and 3 were not in exclusive possession of the suit premises as their family members including mother of Defendant No.1-tenant was also residing in the suit premises alongwith Defendant Nos.2 and 3. Though this Court also recorded a finding of non-payment of consideration, in my view, the law in this

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regard is well settled now that proof of payment of consideration need not be established by the landlord for proving the allegation of subletting. In my view, distinguishing factor in the present case and in ***Vasant Mahadev Pandit*** is joint residence of family of tenant with his brother and brother's father-in-law. In case before this Court, a finding of fact is recorded that the other family members of the tenant including his mother continued to reside in the suit premises alongwith the alleged sub-tenant. In the present case, however it is an admitted position that the First Defendant, his wife or children have not resided in the suit premises after 1996.

(III) ***Kamal Chintaman Mithari*** (supra) is relied upon in support of the contention that even mistress of a tenant living with him can be treated as member of the family. This Court held in para-5 of the judgment as under :

> 5. Reference can usefully be made in this connection to the decision of the Court of Appeal in Hawes v. Evenden, ((1953) 2 All ER 737). In that case the defendant had lived with the tenant of a dwelling-house to which the Rent Restrictions Act applied, as his mistress, for some twelve or thirteen years prior to his death. They had two children, one of whom had been adopted by foster parents, while the second child was living with her parents at the time of the tenant's death and thereafter continued to live with the defendant at the same house. After the tenant's death the landlord claimed possession of the house from the defendant, who contended that she was entitled to the protection of Section 12(1)(g) of the increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as a member of the deceased tenant's family. The question really was whether the defendant could be regarded as a member of the deceased tenant's family residing with him at the time of his death. It was held that since the evidence justified a finding that the tenant, the defendant and their children all lived together as a family, the defendant was a member of the deceased tenant's family within

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> Section 12(1)(g) and was therefore, entitled to the protection of the Sub-section. It appears from the judgment of the Court of Appeal delivered by Somervell, L. J., that the correct test to be applied to such a case is :
>
> "Would an ordinary man, addressing his mind to the question whether the woman (defendant) was a member of the family or not, have answered 'Yes' or 'No' ?"
>
> It has been made clear in the judgment that the principle laid down therein applies to a case where it is found that the defendant was living with the deceased tenant as his mistress along with their child or children. In view of this decision, it would appear that there is no reason why the defendant who was living with the said Chintamani along with their children in the said premises at the tune of Chintamani's death should not be regarded as a member of his family for the purposes of Section 5(11)(c) of the said Act. It is true that the above decision is of an English Court, but I see no reason to take a different view in this connection regarding the provisions of Clause (c) of Sub-section (11) of Section 5 of the said Act.

Again the distinction in ***Kamal Chintaman Mithari*** was that the mistress was residing with the tenant alongwith their children at the time of tenant's death, which is not the case in the present application.

(IV) Judgment of this Court in ***Pandurang Narayan Mantri*** (supra) is again distinguishable as the Defendant and his wife in the said case were residing with the aged tenant to look after her and the Defendant's wife was found to be related to tenant (niece of tenant's husband). What is relevant is '*residence with tenant*' which is not the case in the present application.

(V) ***Babanrao Shankarrao Chavan*** decided by Single Judge of this Court involving residence of widowed sister alongwith the tenant and

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here again, sister's residence with tenant was proved which is not the case in the present application.

(VI) The judgment of Single Judge of this Court in ***Surendra M. Wagh*** is relied upon to indicate distinction between '*mere occupation*' and *'exclusive right to enjoy the property*'. The judgment would not assist the case of the Applicants as Defendant Nos. 2 to 4 are found to be exclusively enjoying the suit premises for the last several years to the exclusion of Defendant No.1, who is continuously residing outside Mumbai.

38) On the contrary, the judgment relied upon Mr. Damle in ***Vasant Sadashiv Joshi*** (supra) appears to be apposite in the present case. In case before this Court, the tenant, Achyut left the suit premises in the year 1979 and acquired alternative premises. The suit premises remained in occupation of tenant's cousin brother alongwith his family members. When landlord instituted eviction suit against the tenant, as well as, his cousin brother, the suit was resisted by raising a plea that the tenancy was in favour of Joint Hindu Family consisting of Raghunath and his father, Sadashiv and that therefore Sadashiv's son, (tenant's cousin) also acquired tenancy rights in respect of the suit premises. This Court rejected the said defence and held in paras-32, 33 and 34 as under :

> 32 . From a plain reading of section 5 (11)(c)(i) of the Act, it is difficult to accept the contention as urged on behalf of the petitioner/defendant no.2 that the provisions recognize that every member of the joint family or the joint family itself becomes a tenant for the purposes of the Bombay Rent Act. The introductory words of section 5 (11) defining tenant are crystal

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clear when it describes a "tenant" to mean "any person" by whom or whose account, rent is payable and would include as defined in sub-clause (c) of subsection 5 (11) any member of the tenants family residing with the tenant at the time of his death. Sub-clause (c) is required to be read in conjunction with the preceding relevant sub-clauses namely sub clauses (aa), (b) which also uses a similar phrase 'any person'. Thus a tenant necessary has to be any person as recognized by section 5(11) and not otherwise and certainly not a joint family as a unit. The legislature has avoided to include any such incident to include a joint family to be a tenant within the meaning of section 5(11).

33. In the present context, to interpret the phrase 'any person' as used in section 5 (11) of the Act to include any member of the joint family as asserted by the petitioner/defendant no.2, would lead to an absurdity. This more particularly contrary to the election as exercised by the family of the deceased tenant Raghunath, in choosing Achyut –defendant no.1 (Raghunath's son) to succeed to the tenancy. The absurdity would be two fold firstly it would amount to reading something into the definition of tenant, (Section 5(11) (c) (i)), what has been not provided for and/or excluded by the legislature; secondly it would be contrary to the conduct of the parties who wholeheartedly accepted, chose and elected that the tenant for the suit premises after the death of Raghunath would be defendant no 1–Achyut. Once this is a factually established position on record the petitioner/ defendant no.2 was not permitted and/or was estopped from taking a contrary stand.

34. In my opinion, such an assertion as made on behalf of the petitioner/defendant No.2 would lead to another absurdity namely, that it would create an insurmountable uncertainty for the landlord in pursuing eviction proceedings against a tenant as permissible in law. This for the reason that when a landlord grants the premises on tenancy it is a contract of tenancy as entered with a specific person (tenant). The landlord expects fulfillment of legal obligations from the tenant. The law therefore does not envisage that the landlord would be required to deal with all members of the joint family, a situation as in the present case when on the death of the original tenant he is replaced by another named member of a family. Hence, if such an argument by the petitioner/defendant no.2 to recognize him as a tenant, is accepted the landlord would never obtain an eviction of a tenant as may be permissible to him in law as every successive member of the tenant's family would start claiming legal rights and protection under the provisions of the Bombay Rent Act. Such can never be the object and intention of this rent legislation.

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39) After considering the overall conspectus of the case, I am of the view that no serious error can be traced in the order passed by the Appellate Bench. The learned Judge of the Small Causes Court had erred in dismissing the suit merely relying on the factum of residence of Defendant Nos.1 to 4 in the suit premises prior to 1980 with the original tenant-Hari Singh. While assuming close relation between the First Defendant and Defendant Nos.2 to 4 and while holding them to be family members, the Small Causes Court failed to conduct enquiry into the aspect as to whether Defendant No.1 resided in the suit premises alongwith Defendant Nos.2 to 4 or not. The Appellate Bench has rightly reversed the erroneous decision of the Small Causes Court. After conducting detailed scrutiny, I am unable to find any grave error in the order passed by the Appellate Bench of the Small Causes Court.

40) The trend of holding on to the tenanted premises by different members of family, even after cessation of need of earlier family member, must end somewhere. The first Defendant-Babarjit Singh claimed himself to be adopted son of Hari Singh to inherit tenancy rights (thereby severing his relations with his natural family) and now wants to reestablish the said relation with his brother to ensure that the tenancy rights pass on to his brother's sister. First Defendant-Babarjit Singh does not need the suit premises as he appears to be well settled at Sri. Ganganagar. He must therefore return possession thereof to the landlords.

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41) I accordingly find the impugned judgment and order passed by the Appellate Bench of the Small Causes Court to be unexceptionable. The Civil Revision Application must fail. Accordingly, the Civil Revision Application filed by the Applicants is **dismissed** without any order as to costs.

[SANDEEP V. MARNE, J.]

42) After the judgment is pronounced, the learned counsel appearing for the Applicant would request for continuation of the statement made on behalf of the Respondents about not taking further steps for execution of decree for a period of 8 weeks. Mr. Damle, the learned counsel appearing for the Respondents would oppose the request. Considering the fact that Applicant Nos.2, 3 and 4 are occupying the suit premises for considerable period of time, the statment recorded on behalf of Respondents shall continue to operate for a period of 8 weeks.

NEETA SHAILESH SAWANT
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[SANDEEP V. MARNE, J.]

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