



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6252 OF 1999

Shri. Harilal Anurup Awadhia, (since
deceased through legal heirs)
1A. Shyamavtar Harilal Awadhia
alias Chauhan and Ors.

....Petitioners

: Versus :

Prabhakar Shravan Shinde

....Respondent

WITH
INTERIM APPLICATION NO. 9880 OF 2022
(FOR REPAIRS)

Shri. Harilal Anurup Awadhia, (since
deceased through legal heirs)
1A. Shyamavtar Harilal Awadhia
alias Chauhan and Ors.

....Applicants

In the matter between

Shri. Harilal Anurup Awadhia, (since
deceased through legal heirs)
1A. Shyamavtar Harilal Awadhia
alias Chauhan and Ors.

....Petitioners

: Versus :

Prabhakar Shravan Shinde

....Respondent

Mr. Tejas Deshumukh with **Mr. Harishchandra Chavan**, for the Petitioners.
Mr. Sandip Khurkute, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

Reserved On : 4 October 2024

Pronounced On : 16 October 2024

JUDGMENT:

1) This petition is filed challenging the judgment and order dated 26 August 1999 passed by the II Additional District & Sessions Judge, Kalyan in Regular Civil Appeal No.218/1996 dismissing the Appeal and confirming the eviction decree dated 12 January 1994 passed by the Joint Civil Judge Junior Division, Kalyan in Regular Civil Suit No.57/1981. The Trial Court has decreed the suit filed by Plaintiff-Respondent on the ground of commission of acts contrary to provisions of Section 108(o) of the Transfer Property Act by invoking provisions of Section 13(1)(a) of the Bombay Rent (Hotels and Lodging House Rates Control Act, 1947 (**Bombay Rent Act**). Aggrieved by the confirmation of eviction decree passed by the Appellate Court, the Petitioner-Original Defendant No.1 has filed the present petition.

2) Plaintiff is the owner of two shops in House No.1 in Municipal land No.28, Tilak Chowk, Kalyan. Out of the said two shops, one shop is the suit premises in which Defendant No.1 was inducted as monthly tenant for rent of Rs.35/-. Plaintiff instituted Regular Suit No.57/1981 in the Court of Civil Judge Junior Division, Kalyan contending that Defendant No.1 was in arrears of rent from 1 March 1980 for which Plaintiff served notice dated 6 October 1980, which was replied by Defendant No.1 on 21 October 1980, who claimed offering of rent upto October 1980 by money order. It appears that Plaintiff did not accept the money order as the entire arrears of rent were not

offered. Plaintiff further claimed that Defendant No.1 erected permanent structure of loft inside the suit premises thereby endangering the life of the building. Plaintiff also alleged that Defendant No.1 unauthorisedly sublet the suit premises to Defendant Nos. 2 to 5 without Plaintiff's consent. It was further claimed in the plaint that Defendant replaced the entry door and while doing so, he removed the pillar thereby causing loss to the premises as well as endangering the structure. It is further alleged that the furnace constructed by Defendant No.1 inside the suit premises was also endangering the premises and causing nuisance. Plaintiff accordingly sought recovery of possession of the suit premises from the Defendants. The suit was resisted by Defendant No.1 by filing Written Statement. Additional Written Statement was filed by Defendant Nos.1 and 2 denying the allegation of unauthorised subletting to Defendant Nos.3 to 5. It was contended that Defendant Nos.1 and 2 are real brothers and Defendant No.3 is their sister, whereas Defendant Nos.4 and 5 are husband and son of Defendant No.3. That Defendant Nos.3 to 5 are close relatives. Defendant Nos.3 to 5 also filed Written Statement contesting the suit.

3) Parties led evidence in support of their respective claims. After considering the pleadings, documentary and oral evidence, the Trial Court proceeded to accept the ground of commission of acts contrary to the provisions of Section 108(o) of the Transfer of Property Act and consequently ordered eviction of Defendant No.1 on the ground of Section 13(1)(a) of the Bombay Rent Act. The other grounds of willful default, subletting, permanent additions and alterations and nuisance/annoyance were answered against the Plaintiff. Accordingly, all the Defendants were directed to handover

possession of the suit premises to Plaintiff by decree dated 12 January 1994. Defendant Nos.1 and 2 filed Civil Appeal No.218/1996 in the Court of District Judge, Thane in which Defendant Nos.3 to 5 were impleaded as *proforma* Respondents. The Appellate Court has however proceeded to dismiss the Appeal by its judgment and order dated 26 August 1999, which is the subject matter of challenge in the present petition which is filed by Defendant Nos.1 and 2.

4) During pendency of the petition, Petitioner No.1 has passed away and accordingly his legal heirs are prosecuting the present petition.

5) Mr. Deshmukh, the learned counsel appearing for the Petitioner would submit that the Trial and the Appellate Court have erred in accepting the ground of commission of acts contrary to the provisions of Section 108(o) of the Transfer of Property Act for ordering eviction of the Defendants. He would submit that the said ground under Section 108(o) of the Transfer of Property Act is accepted by both the Courts only on account of alleged change of user by using part of the suit shop for residential purpose. Mr. Deshmukh would submit that the folly under Section 108(o) of the Transfer of Property Act and Section 13(1)(a) of the Bombay Rent Act can be committed only in the event of cause of damage or destruction to the property. That since cause of damage or destruction to the premises is a *sine qua non* for attracting the provisions of section 108(o) of the Transfer of Property Act, mere use of part of commercial premises for residential use would not attract the ground of eviction under Section 13(1)(a) of the Bombay Rent Act. That in the present case, the ground of making additions and alterations and thereby causing damage to

the suit premises is rejected by both the Courts. That there is no finding of damage to the suit premises and that therefore the ground under Section 13(1)(a) of the Bombay Rent Act has erroneously been accepted. In support of his contention, he would rely upon judgment of the Apex Court in **Sant Ram Versus. Rajinder Lal and others**¹.

6) Mr. Deshmukh would further submit that, even otherwise, the bar under the provisions of Section 25 of the Bombay Rent Act applies only for use of residential premises for commercial purposes. That such bar does not apply to part of the premises used for residence. That Courts have accepted the concept of small traders residing in portion of shop and such an act cannot be presumed as change of user. He would rely upon judgment of this Court in **Suresh Vasant Malegaonkar Versus. Ramabai Keshav Gokhale and others**² and **Dattatraya Ramchandra Sapkal Versus. Gulabrao Tukaram Bhosale**³. Mr. Deshmukh would accordingly pray for setting aside the impugned decrees.

7) The petition is opposed by Mr. Khurkute the learned counsel appearing for Respondent-Original Plaintiff. He would submit that the Trial and the Appellate Courts have rightly accepted the ground under Section 13(1)(a) of the Bombay Rent Act of commission of acts contrary to the provisions of Section 108(o) of the Transfer of Property Act. That Defendant No.4 had submitted application for securing ration card at the address of the suit premises. That Defendant No.4-Murlidhar has admitted holding of ration card at the

¹ (1979) 2 SCC 274

² (2002) 1 Mh.L.J. 933

³ 1977 SCC OnLine Bom 95

address of the suit premises. That premises were let out solely for the purpose of business and only to Defendant No.1, which Defendant Nos.3 to 5 could not have used as their residence. That a fallacious stand was taken by Defendant No.1 in Regular Civil Suit No. 230/1980 claiming that the suit shop was let out for business-cum-residential purposes which defence is ultimately found to be false. That both the Courts below have concurrently held that the suit premises are being dominantly used for residence by Defendant Nos.3 to 5. That therefore clear case of breach of terms of tenancy is made out. He would rely upon judgment of the Apex Court in **Mr. Arul Jothi Versus. Lajja Bal (Deceased) and anr⁴**. He would rely upon judgment of this Court in **Jainath Matadin Chourasia and another Versus. Gopikishan Ramgopal Garg⁵**. Mr. Khurkute would pray for dismissal of the petition.

8) Rival contentions of the parties now fall for my consideration.

9) Though Plaintiff initially sought eviction of Defendant No.1-tenant on grounds of willful default, unlawful subletting, permanent additions and alterations and cause of nuisance and annoyance, the said grounds have been concurrently rejected by both the Courts below. The suit has ultimately been decreed only on singular ground of commission of acts contrary to the provisions of section 108(o) of the Transfer of Property Act read with Section 13(1) (a) of the Bombay Rent Act. There is no dispute to the position that Defendant No.1 is the tenant in respect of the suit premises. Defendant No.2 is the brother of Defendant No.1. There are some

⁴ Civil Appeal No. 14150 of 1996 decided on 29 February 2000

⁵ 2013(3) Mh.L.J. 154

disputes between the parties about the quantum of standard rent and it appears that Miscellaneous Application No.5/1981 was filed by Defendant Nos.1 and 2 for fixation of standard rent of the suit premises. However, it is not necessary to delve deeper into the aspect of quantum of standard rent as the ground of default in payment of rent is ultimately rejected by the Trial Court. Perusal of the findings recorded by the Trial Court on Issue No.4 relating to commission of acts contrary to the provisions of Section 108(o) of the Transfer of Property Act, shows that the issue is answered in the affirmative in favour of the Plaintiff on the ground that Defendant Nos.3 to 5 were found to be dominantly using the suit shop for the purpose of residence. Defendant Nos. 3 to 5 are not the tenants in respect of the suit premises and it was the allegation that Defendant No.1 had unlawfully sublet the suit premises to Defendant Nos.3 to 5. As observed above, Defendant No.3 is the sister of Defendant No.1 and Defendant Nos.4 and 5 are her husband and son respectively. So this is a case involving brother permitting the sister to reside in the suit premises. However, the ground of unlawful subletting has been rejected by the Trial Court on the ground that they are close relatives of Defendant No.1. One of the reasons for rejecting the ground of unlawful subletting was absence of evidence of payment of consideration. The Trial Court also found that Defendant Nos. 3 to 5 were not exclusively possessing the suit shop. Since Plaintiff did not prefer Appeal or cross-objections with regard to the rejection of ground of subletting, it is not necessary to delve deeper into the reasons recorded by the Trial Court for not accepting the ground of unlawful subletting.

10) Since the ground has been accepted under the provisions of Section 13(1)(a) of the Bombay Rent Act, it would be necessary to reproduce the said provisions as under:

13. When landlord may recover possession.

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

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

11) Section 13(1)(a) makes the landlord entitled for recovery of possession if tenant is found committing any act contrary to the provisions of Clause (o) of Section 108 of the Transfer of Property Act. It would therefore be necessary to reproduce Clause (o) of Section 108 of the Transfer of Property Act which provides thus:

108. Rights and liabilities of lessor and lessee.

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

12) Thus, under Section 108(o) of the Transfer of Property Act, the lessee/tenant is required to use the property and its products as a person of ordinary prudence would use as if they were of his own. The tenant is prohibited from using or permitting other persons to use the tenanted premises for the purpose other than for which they are leased nor shall commit any act which is destructive or

permanently injurious thereto. According to Mr. Deshmukh, the last contingency 'or commit any act which is destructive or permanently injurious thereto' is applicable to earlier two contingencies of using the premises for purpose other than for which they were leased as well as falling, pulling or damaging the building belonging to the lessor. Mr. Deshmukh has thus contended that for attracting the folly under the provisions of Section 108(o) of the Transfer of Property Act, the landlord must establish that the act of tenant using the premises for the purpose other than the one for which it is let out has caused destruction or permanent injury to the tenanted premises. In support of his contention, Mr. Deshmukh has relied upon judgment of single Judge of this Court (V. C. Daga J.) in **Suresh Vasant Malegaonkar** (supra) in which both the Courts below had concurrently accepted commission of breach by the tenant of provisions of Section 13(1)(a) to 13(1)(e) of the Bombay Rent Act. The issue formulated by this Court for consideration in para-12 reads thus :

THE ISSUES

12. In the aforesaid backdrop, two issues arise for my consideration:
(1) Whether there has been a violation of the terms of tenancy by using the premises for the purpose other than for which it had been leased and whether the petitioner (tenant) has been guilty of committing breach of section 13(1)(a) of the Bombay Rent Act?
(2) Whether the alleged sub-tenant was in exclusive possession of the part of the premises and whether the tenant had retained no control over that part of the premises and that the petitioner/defendant No. 1 has been guilty of committing breach of section 13(1)(e) of the Bombay Rent Act?

- 13) This Court thereafter proceeded to decide Issue No.1 relating to change of user. It was contended before this Court that mere change of user did not amount to breach of Clause (o) of Section 108 of the Transfer of Property Act, unless the change is found to be

destructive or injurious to the property. This contention is noted in para-14 of the judgment as under:

14. The learned, counsel for the petitioner contended that mere change of the purpose of user does not amount to breach of clause (o) of section 108 of the Transfer of Property Act so as to attract liability for eviction under section 13(1)(a) of the Bombay Rent Act unless change is found to be destructive or injurious to the property or shown to be prejudicial to the interest of the landlord.

14) In support of the contention, the Petitioner in **Suresh Vasant Malegaonkar** relied upon judgment of the Apex Court in **Gurdial Batra Versus. Raj Kumar Jain**⁶ which has considered the law laid down by this Court in **Dattatraya Versus. Gulabrao**⁷ and the same was confirmed. In **Dattatraya**, this Court held that the lease-deed provided for business in plastic goods, change in the nature of the said business did not bring about change of user as contemplated under Section 108(o) of the Transfer of Property Act. Mr. Deshmukh has also relied upon the judgment of this Court in **Dattatraya**. After considering the judgment of the Apex Court in **Gurdial Batra**, this Court held in paras-18, 21, 22 and 23 of its judgment in **Suresh Vasant Malegaonkar** as under :

18. It is not in dispute from the narration of facts and the findings recorded by both the Courts below, that the suit premises were and are being continued to be used for the purposes of running business, even though, subsequent to the creation of tenancy the defendant No. 1 entered into some arrangement like alleged partnership for running business of photography. The Supreme Court in **Gurdial Batra v. Raj Kumar Jain**, AIR 1989 SC 1841 in paragraphs 6 and 7 has observed:

“6. Letting of a premises can broadly be for residential or commercial purpose. The restriction which is statutorily provided in section 13(2)(ii)(b) of the Act is obviously one to protect the interest of the landlord and is intended to restrict the use of the landlord's premises taken by the tenant under lease. It is akin to the provision contained in section 108(o) of the Transfer of

⁶ (1989) 3 SCC 441

⁷ 1978 Mh. L.J. 545

Property Act dealing with the obligations of a lessee. That clause provides:

The lessee may use the property and its products, if any, as a person of ordinary prudence would use them if they were of his own; but he must not use or permit another to use the property for a purpose other than that for which it was leased....

A house let for residential purpose would not be available for being used as a shop even without structural alteration. The concept of injury to the premises which forms the foundation of clause (o) is the main basis for providing clause (o) in section 13(2)(ii) of the Act as a ground for the tenant's eviction. The Privy Council in *U Po Naing v. Burma Oil Co.*, AIR 1929 PC 108 adopted the same consideration. The Kerala High Court has held that premises let out for conducting trade in gold if also used for a wine store would not amount to an act destructive of or permanently injurious to the leased property 1977 Ker LT 417. Similarly, the Bombay High Court has held that when the lease deed provided for user work and the lessee used the premises for business in plastic goods, change in the nature of business did not bring about change of user as contemplated in section 108(o) of the Transfer of Property Act, 1978 Mh. LJ 545.

7. The landlord parts with possession of the premises by giving a lease of the property to the tenant for a consideration. Ordinarily, as long as the interest of the landlord is not prejudiced, a small change in the user would not be actionable.”

21. In the case of *Bright Brothers v. Venkatlal* (supra), this Court while interpreting provisions of section 108(o) of the Transfer of Property Act was of the view that five categories of the prohibited acts under the second part of clause (o) are distinct in nature and independent of each other. Secondly, it was held that first four categories mentioned therein being self descriptive. The concluding words were intended to furnish identity of the fifth category of undescribed “any other act”. Thirdly, it was noticed that all the five categories of these acts being separated by cases and disjunctive “or” restricting the application of the descriptive concluding wording to the last category and disconnecting it from the earlier other four categories. While dealing with and interpreting this part of the section, the Division Bench came to the conclusion that the concluding portion of the clause (o) was not applicable to the first four categories of the prohibited acts mentioned therein. In other words, it was applicable only to the fifth category alone. This view of the Division Bench of this Court was subsequently followed by this Court in *Kasturchand Panachand v. Yeshwant Vinayak*, AIR 1980 Bom. 270. The learned counsel appearing for the respondent Nos. 2 to 7 placed reliance on these two judgments of this Court.

22. The Apex Court in the case of *Gurdial Batra v. Raj Kumar Jain* (supra) while dealing with the above part of the submission, which was also made before it, held as under:

“..... The concept of injury to the premises which forms the foundation of clause (b) is the main basis for providing clause (b) in section 13(2)(ii) of the Act as a ground for the tenant's eviction. The Privy Council in *U Po Naing v. Burma Oil Co.*, AIR 1929 PC 108 adopted the same consideration. The Kerala High Court has held that premises let out for conducting trade in gold if also used for a wine store would not amount to an act destructive of or permanently injurious to the leased property (1977 Ker LT 417). Similarly, the Bombay High Court has held that when the lease deed provided for user work and the lessee used the premises for business in plastic goods, change in the nature of business did not bring about change of user as contemplated in section 108(o) of the Transfer of Property Act.”

23. In view of the law laid down by the Apex Court in *Gurdial Batra v. Raj Kumar Jain* (supra), the judgment of this Court in the case of *Bright Brother and/or Kasturchand Panachand* (both cited supra) cannot be said to be a good law. Thus the findings recorded by the lower Appellate Court, that the premises were used for the purpose other than that for which it was let out, cannot stand to the scrutiny of law. In view of this, the findings recorded by the lower Appellate Court with regard to breach of section 13(1)(a) of the Bombay Rent Act will have to be set aside. **The plaint did not make out any case falling within the sweep of section 108(o) of the Transfer of Property Act. Consequently, no evidence was led to the effect that the change of business was destructive of the purpose for which the premises was leased, the adverse findings on this issue recorded by the Courts below are thus set aside.**

(emphasis added)

15) Thus, in the light of the judgment in *Gurdial Bhatra*, this Court distinguished the ratio of the judgment of this Court in *Bright Brothers Versus. Venkatlal*⁸ in which it was held that Section 108(o) of the Transfer of Property Act deals with five categories of prohibited acts, each category being distinct in nature and independent of each other. It was also held in *Bright Brothers* that the first four categories were self descriptive and that therefore the fifth category of acts of destructive or injurious to the premises was not necessary for attracting any of the first four categories and that therefore the presence of the fifth category. Therefore in *Suresh Vasant Malegaonkar*,

⁸ 1979 Mh. L.J. 894

this Court reversed the finding of the Appellate Court that mere change of user amounts to breach under Section 108(o) of the Transfer of Property Act and it was necessary to lead evidence that the change of business was destructive for the purpose for which the premises were leased. On the contrary, Mr. Khurkute has relied upon judgment of the Apex Court in **M. Arul Jothi** (supra) which also considers the judgment of the Apex Court in **Gurdial Batra** (supra). The Apex Court considered the provisions of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 and the allegation was that the shop which was let out for carrying out business in radios, cycles, fans, clocks and steel furniture with specific prohibition for carrying on any other business was being used for conducting the business of selling chillies, dals and other condiments. The Apex Court held that the provisions of Section 10(2)(ii)(b) of the Tamil Nadu Rent Act was akin to the provisions of Section 108(o) of the Transfer of Property Act, the Apex Court held that in **Gurdial Batra**, there was absence of stipulation in the rent deed restricting or limiting the business except the one specified in the deed and that the judgment was rendered in the facts of that case. The Apex Court held in paras-10 and 11 of **M. Arul Jothi** as under:

10. Having heard learned counsel for the parties in our considered view the cases cited on behalf of the appellants were all those where there was no specific clause restricting the use of the tenanted accommodation. On the other hand, in the case in hand, there is a specific prohibition clause in the rent deed. In the present case there is a specific clause which states “shall be used by the tenant *only* for carrying on his own business ... and the *tenant shall not carry on any other business than the abovesaid business*”. By the use of the word “*only*” with reference to the tenant doing business coupled with the last three lines, namely, “the tenant shall not carry on any other business than the abovesaid business”, clearly spells out the intent of the parties which restricts the user of the tenanted premises, only for the business which is stated

therein and no other. In order to meet this, learned counsel for the appellant referred to Section 108(o) of the Transfer of Property Act and the language of Section 10(2)(ii)(b) which is similar hence he submits interpretation has to be given in a broader perspective, that is the use of the building by the tenant should not be such as to damage it or diminish its value and restriction if any could be that if it was given for business it should not be used for residential purpose and vice versa. We have no hesitation to reject this. If such an interpretation is given, it would make any specific term of a valid agreement redundant. Once parties enter into a contract then every word stated therein has to be given its due meaning which reveals the rights and obligations between the parties. No part of the agreement or words used therein could be said to be redundant. Such restriction could only be if any statute or provision of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 specifies, which is none. Nor do we find any restriction by Section 108 of the Transfer of Property Act. In fact, Section 108 of the Transfer of Property Act starts with the words “in the absence of a contract or local usage to the contrary”. In other words, it permits contract to the contrary mentioned under that section.

11. So, we come to the conclusion that use of the words in the rent deed “not to use it for any other purpose”, have to be given effect to and hence Section 10(2)(ii)(b) has to be interpreted to mean that use of the building shall not be for a purpose other than that for which the shop was given. There is a specific clause restricting its user thus it has to be used for the purpose given and no other.

16) Thus in **M. Arul Jothi** the Apex Court rejected the contention that cause of damage or injury to the tenanted property was necessary for establishing the ground of change of user.

17) Mr. Khurkute has also relied upon judgment of Single Judge of this Court (S.C. Dharmadhikari, J.) in **Jainath Matadin Chourasia** (supra) which has considered the judgment in **Gurdial Batra, Bright Brothers** and **M. Arul Jothi**. This Court held in para-31 as under:

31. In all the cases, thus, the emphasis was on the peculiar factual position and intent of the parties. If there was minor or small deviation from the user, but the user remained essentially the same, then, the eviction was held not be justified, unless other elements of damage or diminishing in value are proved. However,

when the change of user is to such an extent that the premises let out for residence were used for commercial purpose or the premises let out for business are utilized for a completely different business activity not agreed or intended by the parties, then, the Supreme Court holds that in such cases there is no requirement of proving damage or diminishing value.

18) This Court thereafter relied upon judgment of the Apex Court in **Bharat Lal Baranwal Vs. Virendra Kumar Agarwal**⁹ and **Hari Rao Vs. Govindachari**¹⁰. This Court thereafter distinguished the judgment of this Court in **Jainath Matadin Chourasia** in para-37 as under :

37. In these circumstances Mr. Dani does not gain much from certain observations in the judgment of the Honourable Mr. Justice V.C. Daga. Once the position has been clarified by the Honourable Supreme Court and as noted by me above, then, there is no conflict or diversion of views or different opinions. There is no question in the case before me of dominant user theory being applied as suggested by Mr. Dani. Once the user throughout was undisputedly for residence and it was changed to commercial as is evident by the concurrent findings of fact which I do not find to be perverse in any manner, then, there is no substance in this Civil Revision Application. There is no error of jurisdiction and even if the eviction is on the sole ground as held by the lower Appellate Court, namely, on the ground of change of user. In the backdrop of the facts and circumstances and equally the position in law, I do not find that the jurisdiction has been exercised illegally or with material irregularity, warranting interference in revisional jurisdiction.

19) The conspectus of the above discussion is that it cannot be accepted as absolute proposition of law that mere change of user of premises does not attract the folly under Section 108(o) of the Transfer of Property Act in absence of injury or destruction to the premises. Change of user contemplated under Section 108(o) of the Transfer of Property Act, to my mind, appears to be an independent

⁹ AIR 2003 SC 1056

¹⁰ AIR 2005 SC 3389

breach not requiring proof of injury or destruction to the premises by such use.

20) In the present case, both the Trial as well as the Appellate Court have conclusively held that Defendant Nos.3 to 5 are dominantly using the premises for their residence. They have secured ration cards at the address of the suit premises which were let out to Defendant No.1 for commercial purposes. Mr. Deshmukh has relied upon judgment of this Court in **Sant Ram** (supra) in support of his contention that the tenant can always reside in the rear portion of the premises. In paras-4 and 8 of the judgment, the Apex Court has held as under :

4. The factual matrix may be shortly projected for as Mr Justice Cardozo luminously stated: [Benjamin Nathan Cardozo : What Medicine Can do for Law, address before the New York Academy of Medicine, November 1, 1928 —Readings in Law and Psychiatry]

“More and more we lawyers are awaking to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts — the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light.”

A cobbler — the appellant — was the lessee of a portion of a shop in Ram Bazar, Simla, since 1963, on an annual rent of Rs 300 (i.e. Rs 25 per month). Ext. P-1, the lease deed, disclosed no purpose; but inferentially it has been held by the High Court that the lease being of a shop the purpose must have been commercial. Possible; not necessarily sure. The actual life situations and urban conditions of India, especially where poor tradesmen like cobblers, candlestick makers, cycle repairers and tanduri bakers, take out small spaces on rent, do not warrant an irresistible inference that if the lease is of a shop the purpose of the lease must be commercial. It is common knowledge that in the small towns — why, even in the big cities,— little men plying little crafts and possessing little resources take on lease little work places to trade and to live, the two being interlaced for the lower, larger bracket of Indian humanity. You struggle to make a small income and work late into the night from early in the morn and, during intervals, rest your bones in the same place, drawing down the shutters of the shop for a while. The primary purpose is to ply a petty trade, the secondary, but necessary incident is to sleep in the same place since you

can hardly afford anything but a pavement for the creature needs of cooking food, washing yourself, sleeping for a time and the like.

8. It is impossible to hold that if a tenant who takes out petty premises for carrying on a small trade also stays in the rear portion, cooks and eats, he so disastrously perverts the purpose of the lease. A different “purpose” in the context is not minor variations but majuscule in mode of enjoyment. This is not a case of a man switching over to a canteen business or closing down the cobbler shop and converting the place into a residential accommodation. On the other hand, the common case is that the cobbler continued to be cobbler and stayed in the shop at night on days when he was running his shop but left for his home on shop holidays. A sense of proportion in social assessment is of the judicial essence.

21) The Apex Court in **Sant Ram** dealt with case of a cobbler who was a petty tenant and was found to be cooking food, eating and sleeping in the rear portion of the premises, which is considered as minor variation by the Apex Court. In the present case, Defendant No.1 is not found to be committing minor variation of residing in some portion of the suit premises but a finding of fact is recorded that the suit premises are being dominantly used by Defendant Nos.3 to 5 for their residence. Thus this is not a case where the tenant himself resided in part of the premises. He has let his relatives to dominantly use the premises for residence. The family members have created all sorts of address proofs of their residence like ration card, voter Id, etc at the tenanted premises. In my view, therefore the judgment of the Apex Court in **Sant Ram** would not assist the case of Mr. Deshmukh.

22) In the present case, both the Courts have concurrently upheld complete change of user on the part of Defendant No.1-tenant by allowing his sister and her family members to reside in the suit premises. A clear case of breach of terms of tenancy attracting the

provisions of Section 108(o) of the Transfer of Property Act and consequently Section 13(1)(a) is made out. Consequently, I do not find any valid reason to interfere in the concurrent findings recorded by the Trial and the Appellate Court in exercise of writ jurisdiction under Article 227 of the Constitution of India.

23) Consequently, the orders passed by the Trial and the Appellate Court are found to be unexceptional. The Writ Petition must fail. Writ Petition is accordingly **dismissed**. Rule is discharged.

24) In the facts and circumstances of the case, Defendants are granted time upto 31 December 2024 to vacate the suit premises.

25) With the disposal of Writ Petition, nothing survives in Interim Application No. 9880 of 2022 and the same accordingly stands disposed of.

[SANDEEP V. MARNE, J.]