

Presented on : 23.08.2006
Registered on : 25.08.2006
Decided on : 30.09.2013
Period required for disposal:
7 years, 01 month, 05 days

IN THE COURT OF SMALL CAUSES AT MUMBAI
T. E. & R. SUIT NO. 110/126 OF 2006

1. Mr. Krishnakant S/o Bootaram Bhalla)
Aged about 60 years, occupation : Business)
2. Mrs. Suhasini alias Shaluja Bhalla D/o)
Bootaram Bhalla)
Aged about 59, Occupation : Housewife)
3. Mrs. Mrinalini Alias Khungur Bhalla D/o)
Bootaram Bhalla)
Aged about 57, Occupation : Housewife)
4. Mrs. Manju Bhalla Alias Ghai D/o)
Bootaram Bhalla Aged about 55 years,)
Occupation : Housewife)
The legal representatives of late)
Mr. Bootaram Bhalla having address at)
C-21, Green Parkmain, New Delhi,)
110 016, India.) Plaintiffs.

Versus

1. Mrs. Maya Lokumal Malkani)

- Age-not known, Occupation-not known,)
First Floor, Nanak Niwas, Bhulabhai Desai)
Road, Mumbai – 400 026.)
2. Mrs. Anusaya Ananth Shenoy (Deleted)
since deceased))
age-not known, Occupation not known,)
3. Mrs. Suresh Ananth Shenoy,)
age-not known, Occupation not known,)
4. Mrs. Suvarnalatha Madhav Bhatt,)
age-not known, Occupation not known,)
5. Mrs. Prita Shashi Jakai,)
age-not known, Occupation not known,)
6. Mrs. Subha Lakshi Girish Kamat,)
age-not known, Occupation not known,)
All having address at 7th floor, Aashiya)
CHS Ltd., Mahalaxmi Temple Compound,)
Mumbai – 400 026.)
7. M/s. Bothra Metal & Wire Industries)
8. M/s. Bharat Wire & Engineering Industries)
9. M/s. Kunal Engineering)
7, 8 and 9 having address at Church Ward,)
Premier Road, Kurla, Mumbai – 400 070.)

10. Mr. Pankaj Ramanlal Raval)
age-not known, occupation : Business)
having address at Manoj Villa, Dr. D. Doshi)
Road, Vile Parle (West), Mumbai – 400 056.)
11. M/s. Kajaria Trading Company)
having office at 85, Jolly Maker, Chamber)
No. 2, Nariman Point, Mumbai – 400 021)
And at Church Ward, Premier Road, Kurla,)
Mumbai – 400 070.)
12. M/s. Panchal Automobiles)
having address at Church Ward, Premier)
Road, Kurla, Mumbai – 400 070.)
13. M/s. Vapsons Products,)
419-A, Arun Chambers, Tardeo,)
Mumbai – 400 034.) Defendants.

Shah & Lapasia Advocates, Advocates for the Plaintiffs.

Mr. Mohan Pawar, Advocate for the Defendant Nos. 3 to 6.

K. P. Gala & Associates, Advocate for Defendant No. 7.

Mr. Suneel D. Mogre, Advocate for Defendant No. 10.

Defendant Nos. 1, 8, 9, 11 to 13 ex parte.

Coram : V. C. Barde, Judge

C. R. No. 19

Date : 30.09.2013

ORAL JUDGMENT :-

The instant is filed by the plaintiffs for eviction of the defendants from the suit premises, injunction and mesne profits. Briefly stated, the facts of the case are as under:

One Late Mr. Bootram Bhalla, by an agreement dated 21.10.1948, leased out an open plot of land admeasuring 5657 sq. yards situated on Survey No. 85, Hissa No. 9, Survey No. 86, Hissa No. 1 and 5 situated at Church Ward, Premier Road, Kurla, Mumbai – 400 070 in favour of late Mr. L. B. Malkani and late Mr. K. A. Shenoy. Subsequently, an indenture of lease was executed dated 28.06.1952 modifying the terms and conditions of earlier lease and the area of leased out premises was reduced to 4279.8 sq. yards with monthly rent of Rs. 208/- per month. Accordingly, the original lessees surrendered the area of 1377.6 sq. yards. Thus, the suit premises remained of 4279.8 sq. yards. The original lessor Bootram Bhalla expired, and the plaintiffs are his heirs and legal representatives. The defendant No. 1 is the legal representative of the first original lessee late Mr. L. B. Malkani and defendant Nos. 3 to 6 are the legal representatives of the second original lessee late Mr. K. A. Shenoy. The original lessees were the partners of a firm by name M/s. Vapsons Products i.e. defendant No. 13. The defendant No. 7 to 13 are alleged to be the sub-tenants and / or present occupants inducted in the suit premises by defendant Nos. 1 to 6. A lease was for the period of 30 years, which period expired on 30.10.1978, and thereafter, no fresh lease deed has been executed between the parties. It is contended that with effect from 30.10.1978, the original lessees by name Mr. L. B. Malkani and Mr. K. A.

Shenoy became month to month tenants in respect of the suit premises and after their death, the defendant Nos. 1 to 6 became joint tenants of the suit plot. By notice dated 29.04.2006, addressed to defendant Nos. 1 to 6 and 13, the plaintiffs terminated the monthly tenancy as contemplated under Section 106 of The Transfer of Property Act. The notice was sent by Registered Post A. D., which is served on defendant No. 1 on 02.05.2006. However, the registered A. D. envelopes in respect of defendant Nos. 2 to 6 returned back with the remarks "not claimed". Therefore, the copies were sent Under Certificate of Posting, which have not been received back. The notice sent to defendant No. 13 returned back with endorsement as "left". Thus, it is contended that the lease is determined by issuing the said notice, and the defendants are occupying the premises without any semblance of rights. It is contended that the defendant No. 10 has filed criminal case against the plaintiffs and the partners of defendant No. 7 in Metropolitan Magistrate Court, Kurla. The defendants are bound to handover the possession by removing structures. The defendants are further claimed to have been bound to pay mesne profits at the rate of Rs. 20 Lakhs per month along with the interest. It is contended that the defendant Nos. 7 to 9 are intending to introduce the third persons in the suit premises. The defendant No. 10 has unlawfully inducted the defendant Nos. 11 to 13 in the constructed sheds in the suit premises. The plaintiffs have claimed injunction against the said defendants to prevent them from creating third party interest. Thus, the plaintiffs have claimed possession of the suit premises with injunction and mesne profits with costs in the suit.

2. The defendant Nos. 3 to 6 appeared in the case and filed their written statement at Exhibit 28 being the heirs and legal representatives of the original second lessee Mr. K. A. Shenoy. They submitted that suit is not maintainable and that there is no cause of action to the plaintiffs to file a suit. The suit is under valued. They submitted that this Court has no jurisdiction to entertain and try the suit. The suit is bad for mis-joinder of parties. The suit is filed against a dead person being defendant No. 2 who died long back. The suit is also stated to have been bad for non-joinder of necessary parties. It is submitted by them that the suit is barred by limitation as no action has been taken after the expiration of period of lease and there is waiver on the part of plaintiffs. The said defendant denied the heirship as claimed by the plaintiffs. They denied that the defendant Nos. 7 to 12 are sub-tenants or the occupants inducted by defendant Nos. 1 to 6. They denied that tenancy has been properly terminated, and submitted that the quit notice was addressed to dead persons, which is bad-in-law. The defendants denied that the open plot of land was leased. They submitted that the structure standing thereon was also leased. It is contended that after expiration of the period of lease, as per the request of the lessees, the lessors extended it orally. The defendants denied the subletting as alleged. They submitted that the notice dated 29.04.2006 is not properly served on the defendants. They denied that the packets returned with remark "not claimed". They denied the receipts of U. C. P. packets. They denied the contents of the said notice. They denied the termination of tenancy by the said notice. The defendants submitted that they are not aware of the criminal complaint filed by defendant No. 10. The defendants denied that they are liable to be evicted

and for mesne profits and costs. Thus, they have sought the dismissal of the suit with costs.

3. The defendant No. 7 M/s. Bothra Mental and Wire Industries has filed written statement at Exhibit 17, who is alleged by the plaintiffs to be the sub-lessee. The defendant No. 7 also contended that this Court has no jurisdiction as no exemption is available to the suit premises from rent Control Act. The suit is alleged to have been a counterblast to the criminal proceeding filed by defendant No. 10. The defendant contended that the tenancy is not properly terminated and there is no cause of action to file the present suit. The defendant No. 7 contended that the lease was the perpetual lease. The lessee K. A. Shenoy died on 04.10.1980. All the legal heirs and representatives are not joined as parties to the suit, and the suit is bad for non-joinder of necessary parties. The defendant denied that it is a sub-tenant inducted by defendant Nos. 1 to 6. It is not aware about the subsequent lease dated 20.06.1952. The defendant denied that the lease expired on 30.10.1978. The defendant No. 7 submitted that the suit premises consists of a land and structure standing thereon. The defendant denied the notice issued by the plaintiffs. The defendant denied its liability for eviction and further denied the reliefs claimed in the suit. The defendant No. 7 has put up the defence of defendant No. 10 that the defendant No. 10 has agreed to purchase the plot from the plaintiffs, and that, the said transaction could not be completed. The defendant denied that the defendant Nos. 7 to 9 stopped functioning from the suit premises. The defendant No. 7 denied all the adverse allegations pertaining to it, and denied that the defendant has any intention to create third party interest.

Thus, the defendant No. 7 has denied the reliefs claimed and sought dismissal of suit with costs. Defendant No. 7 filed additional written statement at Exhibit 33 denying that the defendant No. 3 is the only surviving heir of defendant No. 2 and submitted that the suit is liable to be dismissed with costs.

4. The defendant No. 10 filed written statement at Exhibit 33-A and submitted that the suit is not maintainable, it is false, and that, it be dismissed. It is contended that there was an understanding arrived at between the parties by document dated 30.09.1995 recording the facts as transpired. The defendant No. 10 has contended that by letter dated 20.02.1996 addressed to the defendant, the plaintiffs have accepted the legal status of the defendant as a tenant of the suit premises. They alleged that the plaintiffs have played fraud on them by issuing legal notice dated 23.03.1996 to the plaintiffs. The correct facts were brought to the notice of plaintiffs. The defendant No. 10 had gone to New Delhi together with Vijay Bothra being partner of defendant No. 7 on 12.04.1996 to make the balance payment of Rs. 91 Lakhs as a purchase price of sale of the suit property. It is contended that the plaintiff Nos. 3 and 4 replied the legal notice dated 23.03.1996. The defendant filed criminal complaint No. 105/S/2005. There are number of letters written by plaintiff No. 1 regarding sale of subject matter of the present suit to the defendant No. 10. The plaintiffs are falsely denying the knowledge of the transaction and the privity of contract. The defendant No. 10 also submitted that the suit filed claiming exemption of The Maharashtra Rent Control Act is not tenable. There is no cause of action to the plaintiffs. No proof regarding

the heirship is brought by the plaintiffs. The suit is bad for non-joinder of necessary parties. The defendant denied that after the expiration of lease on 30.10.1978, the original lessees became monthly tenants. The defendant denied that the defendant Nos. 1 to 6 unlawfully sub-let the premises to the other defendants, and that there is no privity of contract between plaintiffs and defendant Nos. 7 to 12. The defendant denied the notice dated 29.04.2006. It is not issued by all the plaintiffs. It was not issued to the said defendant. The defendant denied the entire suit claim. The defendant No. 10 further denied that it has unlawfully inducted any persons, and that the defendant Nos. 11 to 12 constructed sheds in the suit premises. The defendant No. 10 has sought dismissal of suit with costs and compensatory costs.

5. On the basis of rival pleadings of the parties and material on record, the Ld. Predecessor has framed issues below Exhibit 34. The findings to each of those issues have been recorded with the reasons therefor as under:

ISSUES

FINDINGS

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|--|--------------------|
| 1. Whether the plaintiffs prove that their predecessors-in-title leased out an open plot of land described in para 1 of the plaint to last Mr. L. B. Malkani and Mr. K. A. Shenoy the partners of Vapson Products, for the period of 30 years vide Indenture of lease dated 28.06.1952 ? | In the affirmative |
| 2. Whether the plaintiffs prove that by efflux of time indenture of lease dated 28.06.1952 expired on 30.10.1978 and thereafter, | In the affirmative |

lessees had become month to month tenant in respect of the suit premises ?

- | | | |
|------|---|---------------------------|
| 3. | Whether the plaintiffs prove that they have validly and legally determined the tenancy of the defendant Nos. 1 to 6 by issuing the notice of termination dated 29.04.2006 ? | In the affirmative |
| 4. | Whether plaintiffs prove that the defendants are in wrongful possession of the suit premises and they are liable to pay the monthly compensation / mesne profits @ Rs. 20,00,000/- per month from 01.06.2006? | Does not survive. |
| 4(a) | Whether the suit is maintainable ? | In the affirmative |
| 4(b) | Whether this Court has jurisdiction to entertain, try and dispose of the suit ? | In the affirmative |
| 4(c) | Whether the suit is within limitation ? | In the affirmative. |
| 5. | Whether the plaintiffs are entitled for the mesne profits alongwith the interest @ 15% per annum ? | Does not survive. |
| 6. | Whether the plaintiffs are entitled for relief of injunction as prayed for ? | In the negative. |
| 7. | What order and decree ? | As per final order below. |

REASONS:

6. To substantiate the claim in suit, the plaintiffs have examined P. W. 1 Krishnakant Bhalla being the plaintiff No. 1. He has been cross-examined by the Ld. Advocates appearing for defendant Nos. 3 to 6, defendant Nos. 7 and defendant No. 10 separately at length. The

defendant Nos. 3 to 6 vide Exhibit 86 informed that they do not want to lead any oral evidence. The defendant No. 7 firm examined its partner Krishan Bothra as D. W. 1. Similarly, the defendant No. 10 examined Pankaj Rawal as D. W. 2.

7. The plaintiffs have produced the certified copies of lease deed Exhibit 39 and Indenture of Lease Exhibit 40. The plaintiffs further filed the notice dated 29.04.2006 terminating tenancy at Exhibit 42, and letter of mother of plaintiff at Exhibit 43. The power of attorney at Exhibit 60 is marked during the cross-examination of D. W. 1 made on behalf of defendant No. 7. Further, there are 7/12 extracts, property card and record of rights at Exhibit 61 collectively. The further power of attorney is at Exhibit 65. The documents Exhibit 66 to 83 have been marked exhibits during the cross-examination of P. W. 1 made by Ld. Advocate for defendant No. 10 being correspondence and other documents.

8. The defendant No. 7 produced letters dated 09.01.2007 and 06.03.2007 at Exhibit 92 and 93. Further, the receipts issued by B. M. C. are at Exhibit 94/1 and 94/2 and Inspection Extract is at Exhibit 95.

9. The defendant No. 10 has produced 27 documents along with Exhibit 100, which are marked as Exhibit 104 to 127.

10. Heard Mr. Jayen Trivedi, Ld. Advocate for the plaintiffs, Mr. Mohan Pawar, Ld. Advocate for the defendants No. 3 to 6, Mr. Anil Gala, Ld. Advocate for defendant No. 7, and Mr. Suneel Mogre, Ld. Advocate for defendant No. 10. Perused the oral as well as documentary evidence and material placed before me by both the sides.

11. **As to Issue Nos. 1 and 2 :-**

Both these issues being in respect of relationship between the predecessors of plaintiffs and defendant Nos. 3 to 6 as lessor and lessees and duration thereof, they are interlinked, and therefore, are united and taken up together for discussion. It is the case of the plaintiffs as well as the evidence of P. W. 1 that the lease deed Exhibit 39 was executed between the predecessor of plaintiffs by name Mr. Bootram Bhalla and the predecessors of defendant Nos. 1 to 6 by names L. B. Malkani and K. A. Shenoy. The said lease deed is dated 21.10.1948, which is for a period of 30 years. It is for 5657 sq. yards of land and the lease commenced from 01.11.1948 with an option to the lessees to renew the same for a further period of 10 years. A monthly rent of Rs. 275/- was reserved by the lease, to be paid on or before the 5th day of each month.

12. From the evidence of P. W. 1 further, it appears that a second lease deed dated 28.06.1952 Exhibit 40 was executed between the same parties whereby the lessees surrendered 1377.6 sq. yards of land out of 5657 sq. yards thereof and lease remained only for 4279.4 sq. yards of land with effect from 28.06.1952 and the monthly rent is also reduced to Rs. 208/- per month on the same terms and conditions which were incorporated in the lease deed dated 21.10.1948.

13. Both the lease deeds are the certified copies obtained from the office of the Sub-Registrar, Mumbai. The Ld. Advocate for the defendant Nos. 3 to 6 has objected to the lease deeds in the course of final arguments contending that they are not primary evidence as originals, and therefore,

they are not proved in the manner provided by law and that both the certified copies of lease deeds have not been acquired by any of the plaintiffs but name of one Mr. Karim Mohammed is endorsed thereon as a receipient, and therefore, even though the said lease deeds have been exhibited, in view of the fact that both the certified copies not having been obtained by the plaintiffs, and that the originals being not on record, they have not been proved in the manner provided by law, and consequently, they shall not be considered in the case.

14. On the other hand, the Ld. Advocate for the plaintiffs argued that P. W. 1 has proved both the lease deeds, and that in perspective of the oral evidence of P. W. 1 on both the deeds, they shall be read in evidence.

15. With regard to both the deeds Exhibit 39 and 40, P. W. 1 has narrated that both the deeds were mutilated, and therefore, the certified copies have been obtained through the advocate for plaintiffs, from the office of Sub-Registrar. He deposed that both the documents have been executed by the lessor Bootram Bhalla and the lessees L. B. Malkani and K. A. Shenoy. Order as to admissibility of documents has been passed by my Ld. Predecessor on 08.10.2010 holding that P. W. 1 has led requisite secondary evidence in respect of the lease deeds Exhibit 39 and 40. In the light of oral evidence of P. W. 1, both the documents have been exhibited and the objections upraised regarding both the documents have been overturned. Thus, the said documents have been recognised in evidence as admissible ones.

16. In the cross-examination of P. W. 1, it is brought on record that

P. W. 1 was child when Exhibit 39 was executed. However, P. W. 1 has acknowledged the signature of his father on the said lease deed and in view of his evidence, the said document is exhibited. Moreover, it is brought in the cross-examination of P. W. 1 on record that the original lease deed was in bad condition, and therefore, a certified copy was obtained and it is filed on record.

17. On the contrary, in the written statement filed by the defendant Nos. 3 to 6, with regard to the agreements Exhibit 39 and 40, they submitted that both the documents require no reply or comments. The defendants disputed that only open land was allotted and submitted that the structure standing on the land was also allotted to them. Even their assertion is that after the expiry of the period of lease, orally the time was extended by the predecessor of the plaintiffs. Thus, they also claimed to be the lessees of suit premises.

18. Insofar as the defendant Nos. 7 to 12 are concerned, they are not parties to the original lease, and according to the plaintiffs, they are claiming through the defendant Nos. 1 to 6. Therefore, their contention in respect of those documents need not be gone through in the case as initial contract was between the predecessor of plaintiffs and predecessors of the defendant Nos. 1 to 6. Moreover, the lease deed exh. 39 does not contemplate the assignees or transferees from original lessees though it includes their survivors or legal heirs.

19. The defendant Nos. 3 to 6 so appearing have repudiated that an open plot of land as described in the plaint was leased out for a period

of 30 years. The defendant No. 7 has further claimed that it was a perpetual lease. Therefore, it is the contention of the defendant Nos. 3 to 6 that there is a tenancy in respect of open plot of land along with structure standing thereon. However, in support of the said assertion, the defendant Nos. 3 to 6 have not led any oral or documentary evidence. The said defendants along with defendant Nos. 7 and 10 have raised objection in the suit having so filed for the open plot of land. P. W. 1 has been cross-examined on this matter from the side of those defendants in which no matters obstinate or contrary to the contents of lease exh.39 and the case of the plaintiffs are brought on record.

20. The oral evidence of P. W. 1 on lease deeds Exhibit 39 and 40 is that his father Bootram Bhalla being owner of the open plot in the suit, as such executed the initial lease deed Exhibit 39 and again further a auxiliary lease deed Exhibit 40 in favour of the original lessees L. B. Malkani and K. A. Shenoy. The Ld. Advocate for the plaintiffs submitted that the perusal of both the deeds shows that it was the intention of the parties that the lease was for an open plot of land, and that vide clause (3) of the lease deed Exhibit 39, the lessees were to bare charges assessed for the factory or structure that may be erected by the lessees on the demised land payable to the municipality or the local authority or under the Bombay Factories Act. He further submitted that the lessees were permitted to erect, construct, pull down, alter or reconstruct any structure on the demised land. He submitted that the lessees having so permitted to construct or pull down the structure on the demised land, and that as per the intention so declared in the said lease deed Exhibit 39, the parties were

determined and resolute to create a lease of open land only.

21. On the other side, in the submissions of Ld. Counsel for defendant No. 10 as well as Ld. Counsel for defendant Nos. 3 to 6, the lease was in respect of an open land as well as structure in view of the intention explicit therein, and therefore, it cannot be said or interpreted that the lease was in respect only of an open plot of land.

22. In this respect, the Ld. Advocate for the plaintiffs relied on **Jagat Ram Sethi V. Rai Bahadur D. D. Jain and others, A. I. R. 1972 Supreme Court, 1727** wherein the Hon'ble Apex Court held that *"the lessor is not debarred from determining the lease or filing the suit for ejectment merely because the lessee has made construction to the knowledge of the lessor."*

23. In the above case before the Hon'ble Apex Court, the tenant transferred only the land and not the structure, and therefore, the transferee was not held to be the tenant of structures. At paragraph No. 7, the Hon'ble Apex Court observed that there was no provision in the relevant act debarring the lessor from determining the lease under Section 111 of The Transfer of Property Act merely because construction had been made by the lessee even to the knowledge of the lessor. The said ratio also applies to the instant case inasmuch as in the instant case the lease was in respect of an open plot of land and the parties are governed by provisions of The Transfer of Property Act, which provides for the determination of lease in the case.

24. The perusal of the terms of the lease deeds Exhibit 39 and 40

shows that it is recited therein that an open plot of land ad-measuring 4279.8 sq. yards was intended to be transferred on lease to the lessees at the relevant time and lessees were permitted to put the structure or do the needfuls keeping in mind the said area of land to be used in future by the lessees. The language used in the said documents Exhibit 39 and 40 is clear and the words are unambiguous, and the said documents containing those recitals are unchallenged till the date of this suit. Thus, when the language and words used in any document are plain, unambiguous and unequivocal carrying one meaning, no other aids shall be resorted to, to interpret the contents of such a document. Both the documents in the instant case on plain reading thereof show the express and lucid intention of the parties which can be discerned therefrom that the premises demised was an open plot of land admeasuring 4279.8 sq. yards, and that according to clause Nos. 3 and 4 read with the entire document exh. 39, the parties intended to create lease in respect of an open plot of land, which also appears in their subsequent conduct.

25. The lease deeds Exhibit 39 and 40 show that they both were executed by lessor Bootram Bhalla in favour of L. B. Malkani and K. A. Shenoy being the lessees, who carried on business under the name and style of M/s. Vapsons Products i.e. the defendant No. 13, which has been made as a party to the suit, which as yet, is not represented by anybody during the course of hearing in the suit, having been proceeded ex parte.

26. The period limited by the lease Exhibit 39 was of 30 years commencing from 01.11.1948 with an option and alternative to the lessees to rejuvenate the lease for a further period of 10 years. In the later deed

executed at Exhibit 40, the said period of 30 years is retained intact, and only the area of the demised premises is reduced along with the rent. After the period of 30 years from 01.11.1948, the lease was to come to an end. The oral evidence of P. W. 1 on record duly testified by way of cross-examination discloses that after such a period of 30 years, the lease factually did come to an end on 30.10.1978.

27. **Section 116 of The Transfer of Property Act** provides that if a lessee or sub-lessee of an immovable property remains in possession after the determination of lease so granted, and the lessor or his heirs and legal representatives accept rent from the lessee or under lessee or otherwise assents to his continuing in possession, then in such a case the lease, in absence of any agreement to the contrary, is renewed from year to year or from month to month, according to the purpose for which the property was leased out.

28. Turning to the facts of the present case, the lease herein, after the expiry of the period of 30 years on 30.10.1978, came to an end. Nevertheless, it appears that the original lessor Bootram Bhalla or his heirs and legal representatives i.e. the plaintiffs have permitted continuance of the occupation of the lessees over the suit premises. Even the notice of termination Exhibit 42 shows that the original lessees continued to occupy the suit premises and it is informed to the defendant Nos. 1 to 6 and 13 by the said notice that they continued to occupy the land on month to month basis on payment of rent and permitted increases so paid to Bootram Bhalla and thenceforth to the plaintiffs. It is further informed that the plaintiffs were recovering rents from the said defendants. The lease deed

was declared to have been terminated by the notice Exhibit 42. The said notice has been received by the defendant no. 1, which however, has been disputed by the defendant nos. 3 to 6.

29. It is also the pleading of the plaintiffs and oral evidence of P. W. 1 that even after expiration of the period of lease, the defendants continued in possession and that the lease was determined by the notice Exhibit 42. No refutation is offered to the evidence of P. W. 1 by the defendant Nos. 3 to 6 by adducing evidence. Cross-examination of P. W. 1 made on this aspect does not disclose any material antonymous to the position that the lease after expiration of the period of lease of 30 years came to an end and that thereafter, the lessees became month to month lessees.

30. As observed earlier, the design of the parties was to make over a lease of an open plot of land admeasuring 4279.8 sq. yards, and the original lessees were permitted to erect structure thereon and to use the said land. The rent reserved by the said deeds Exhibit 39 and 40 was to be paid in advance on or before 5th day of every month. The lease was for the period of 30 years commencing from 01.11.1948. All these recitals along with oral evidence adduced by P. W. 1 which is duly testified by an extensive cross-examination discloses that the lease expired on 30.10.1978, and that the lessees continued with the possession and that the plaintiffs or their predecessors accepted rent from the lessees. Therefore, in view of the discussion as made above, I answer Issue Nos. 1 and 2 in the affirmative.

31. **As to Issue No. 3 :-**

This issue relates to the validity and legality of the termination notice Exhibit 42, dt. 29.04.2006, issued by the plaintiffs.

32. In the submissions of Ld. Advocate for the plaintiffs, the said notice is legal and valid for the reason that it has been addressed to defendant Nos. 1 to 6, who are the heirs and legal representatives of the original lessees and as per law, the plaintiffs were supposed to issue notice to them only as the defendant Nos. 7 to 12 are illegal occupants and defendant No. 13 is nothing but a firm, represented by the original lessees. He submitted that the notice is sent by R. P. A. D. as well as U. C. P, the registered envelopes of which returned back unclaimed, whereas the U. C. P have not been so returned. The Ld. Advocate for the plaintiffs referred to Section 114(f) of The Indian Evidence Act and submitted to draw presumption of service of notice against the said defendants, read with Section 27 of The General Clauses Act. He even submitted that as the lease in the case expired due to efflux of time, there was no need even for the plaintiffs to issue a notice terminating the tenancy and on any ground, the plaintiffs are entitled for decree. The Ld. Advocate for the plaintiffs relied on the following citations in support of the case of the plaintiffs:

1. **Narayan Ganpat Bhoite V. Smt. Rampyari Suchitram Gupta since deceased through heirs (2000(4) ALL MR 713)**, in which it is observed- *“Such postal certificate may be manipulated, obtained or procured and therefore, such certificate may not inspire confidence, but in the present case the very document when it is examined with the postal receipt, rule out any such possibility, and therefore, there is no reasons to*

dis-believe the plaintiff on this point. The notice sent under Certificate of Posting can also be held to be a good service by raising a presumption under Section 114 of The Evidence Act. In the absence of anything indicating that the notice was not posted under Certificate of Posting and also in view of the fact that the said notice was not returned to the sender by the dead letter office of the Postal Department, it can be held to be a valid service.”

2.Manikchand Mahadeo Jain V. Smita Wd/o Arunrao Veginwar (1996(1) Mh. L. J. 526), in which it is held that *“The law is settled by a reported decision in 1977 Mh. L. J. 787 = AIR1978 Bom. 187 Sharad V. Vishnu. It is undoubtedly true that such presumption is not conclusive and is rebuttable. However, the fact remains further that the defendant has not made any effort to rebut this presumption.”*

3.Abdul Sattar and others V. Rameshwar and others (1993(1) Bom. C. R. 435), in which it is observed that *“It may be noted that though the defendants are denying the service of notice, but none of the defendants came and entered in the witness box to state that no notices were issued or received by them. The defendants also did not examine any other witness in this regard. The trial Court has recorded a clear finding that on the perusal of evidence of postal acknowledgment it seemed that the notice of terminating the tenancy was served on all the defendants.”*

4.Anil Kumar V. Nanak Chandra Verma (A. I. R. 1990 Supreme Court, 1215), wherein it is observed that, *“In our opinion there could be no hard and fast rule on that aspect. Unchallenged testimony of a tenant is*

certain cases may be sufficient to rebut the presumption but if the testimony of the tenant itself is inherently unreliable, the position may be different. It is always a question of fact in each case whether there was sufficient evidence from the tenant to discharge the initial burden.”

5. Vandavasi Karthikeya alias Krishna Murthy V. S. Kamalamma and others (A. I. R. 1994 Andhra Pradesh, 102).

6. Budha and others V. Bedariya (A. I. R. 1981 Madhya Pradesh, 76).

7. H. C. Pandey V. G. C. Paul (A. I. R. 1989 Supreme Court, 1470), wherein it is held that *“The heirs succeed to the tenancy as joint tenants. Therefore, when on the death of the original tenant the tenancy rights devolved upon the sons, daughters and wife of the original tenant and the notice terminating tenancy under Section 106 was addressed to and served upon one of the sons of the original tenant who paid rent on behalf of all and acted on behalf of all the heirs of the original tenant, the notice to only one of the joint tenants could not be said to be insufficient.”*

8. Pooran Chand V. Motilal and others (A. I. R. 1964 Supreme Court, 461), in which it is held that, *“It is, therefore, manifest that the lease was for a period of one year and that it is not a monthly tenancy. As the term fixed under the deed had expired, the appellant was not entitled to any statutory notice under Section 106 of The Transfer of Property Act, 1882.”*

Out of the citations so referred, only the citations in Abdul Sattar's case, Anilkumar's case, and in Narayan Bhoite's case can be made applicable to this case for the discussion made on this issue in view of facts of the instant case.

33. On the other hand, the Ld. Advocate for the defendant Nos. 3 to 6, who are heirs and legal representatives of original lessees, submitted that the notice to quit has not been served in the manner provided by law on all the heirs and legal representatives of the original lessees and that, it is even issued in the wrong name and address of the legal heirs. He submitted that no registered post acknowledgments or envelopes are placed on record and proved by the plaintiffs. He submitted that the U. C. P. is not reliable evidence. According to him, there is no notice of termination of tenancy as envisaged by law, and therefore, the suit is liable to be dismissed and he relied on-**Debabrata Mukherjee V. Kalyan Kumar Ray (A. I. R. 1983 Calcutta 241)**, in which it is held that, *“When a suit is filed without such a notice the court will refuse to entertain the suit and would dismiss it on the ground that such a notice had not been given entitling the landlord to file a suit.”*

34. The defendant No. 7 and 10 are stated to be the sub-lessees or the persons who have been introduced by defendant Nos. 1 to 6 and that they have been joined in the suit only with a view to have a complete effectual adjudication in the case. However, the defendant Nos. 7 and 10 have similarly challenged the said notice on various grounds on which it may have been challenged by the defendant Nos. 3 to 6 so appearing. The Ld. Advocate for the defendant No. 7 relied on- **Orissa Fisheries Development Corporation Ltd. and etc. V. Sudhansu Sekhar Sahu and another (A. I. R. 1994 Orissa, 158)**, in which it is held that, *“Where no notice contemplated under Section 111(g) was served by lessor on lessee who violated terms of lease by failing to pay rent of the year within time and no*

document was placed to prove that lessee ever surrendered the lease in favour of lessor or any other party determination of lease cannot be established.”

The notice in above case being under Section 111(g) for breach of conditions of lease regarding payment of rent, it does not apply to the present case.

35. The Ld. Advocate for the defendant No. 10 argued that the notice is not served on all the heirs and legal representatives of the original lessee in the manner provided by law and that there is no proof of service of notice on the defendant Nos. 1 to 6. He submitted that defendant No. 1 was in occupation on the date when the notice was issued. There was no authority to the plaintiff No. 1 to issue such notice on behalf of all the plaintiffs as the power of attorney is of the later date of the date of notice. He submitted that the termination notice is bad in law as service by U. C. P. is not contemplated under Section 106 of The Transfer Of Property Act. He further submitted that issuing notice send U. C. P. is not a valid notice, as such a certificate can be easily procured, and therefore, he relied on- **Gadakh Yashwantrao Kankarrao V. E. V. alias Balasaheb Vikhe Patil and others ((1994) 1 Supreme Court Cases, 682)**, in which it is held that, *“Gadakh's version that he sent the letter dated May 16, 1991 (Ex. Q) under certificate of posting is unbelievable. A certificate of posting is easy to procure and does not inspire confidence. Moreover, the circumstances belie his version. With his considerable means and past experience of elections, he would have sent such a letter by registered post to ensure its delivery and create cogent evidence of its despatch. Moreover, he would not merely send such a letter but have his denial published in newspapers because of its*

significance during elections. We have no doubt that Gadakh's conduct belies his belated denial at the trial.”

36. In the said case, a certificate of posting was not believed in view of the circumstances rendering untrue the version of the appellant therein in a matter arising out of election petition under The Representation of the Peoples Act and corrupt practices envisaged thereunder.

37. In the instant case, the notice is placed on record at Exhibit 42, proved through the evidence of P. W. 1 Krishnakant Bhalla. The said notice is addressed to defendant Nos. 1 to 6 and 13 by the plaintiffs, wherein at the foot, it is endorsed that the original of the notice has been sent by R. P. A. D. which returned unclaimed, and therefore, the copy is sent by U. C. P. to the said defendants. The postal receipts of the said notice have been filed on record. Acknowledgment signed by defendant No. 1 only is placed on record. Further U. C. P. in respect of the notice sent by U. C. P. to defendant Nos. 3 to 6 are filed on record.

38. The Ld. Advocate appearing for the defendant Nos. 3 to 6 and 10, therefore, submitted that the said notice, for want of any proof regarding service, is bad in law and it does not determine the tenancy as envisaged under Section 106 of The Transfer of Property Act.

39. On the other hand, the Ld. Advocate for the plaintiffs relied on Section 114(f) of The Indian Evidence Act along with Section 27 of The General Clauses Act for raising presumption regarding the service of notice sent by Registered Post Acknowledgement Due and U. C. P.

40. Under section 106 (4) of The Transfer of property Act, a 15 days notice determining a lease is obligatory in case of a lease of immovable property from month to month, and that such a notice must be in writing signed by or on behalf of all the persons giving it and either may be sent by post to the lessee or may be tendered or delivered personally or a copy thereof may be affixed to a conspicuous part of the property.

41. The pleadings in the plaint with regard to the said notice are that the plaintiffs by notice dated 29.04.2006 addressed to defendant Nos. 1 to 6 and 13, terminated the monthly tenancy by sending it by R. P A. D., which is served on defendant No. 1 and the packets of other defendant Nos. 2 to 6 returned back as not claimed. It is further pleaded that U. C. P copy has not been returned back and the plaintiffs relied on the said postal document including returned packets. The plaintiffs have placed on record as discussed above the R. P A. D. notice Exhibit 42 along with postal receipts of R. P A. D., acknowledgment of defendant No. 1 and U. C. P of the other defendants. However, the returned packets have not been placed on record even though the record reveals that the xerox copies thereof were filed at the earlier stage of the litigation.

42. P. W. 1 Krishnakant Bhalla has adduced evidence relating to the fact of issuance of the said notice and also deposed about the filing of the returned packets, which have not been so filed on record. No secondary evidence is adduced in that respect. However, the Ld. Counsel for the plaintiffs submitted that even though the returned envelopes have not been filed on record, it has come in the cross-examination of P. W. 1

made by Ld. Advocate for defendant No. 7 that the registered A. D. packets returned back with an endorsement “unclaimed.” He further submitted that U. C. P. packets have not been returned back and they have been presumed to have been served.

43. It is pertinent to note here that no evidence in rebuttal is adduced by defendant Nos. 3 to 6 to the case in respect which P. W. 1 has deposed. P. W. 1 has been duly cross-examined by the Ld. Advocate for defendant Nos. 3 to 6 in the case, in which insofar as notice Exhibit 42 is concerned, only suggestions are given that it is not served on the defendant Nos. 3 to 6, which P. W. 1 has denied. No other material is brought on record except the suggestion that the notice U. C. P. was not served. Insofar as the cross-examination of P. W. 1 by defendant Nos. 7 and 10 is concerned, as observed earlier, those defendants are alleged to be the sub-lessees or the persons claiming through the defendant Nos. 1 to 6. It is pertinent to note here that in the lease deed Exhibit 39, the original lessees L. B. Malkani and K. A. Shenoy have been described which expression was meant to include only the survivors of them, and the heirs, executors and administrators of the last survivors and the partners or partner of defendant No. 13, in which name the lessees carried on business. It is not envisaged under the said deed that assigns shall also be included in the term lessees. Thus, the defendant Nos. 7 to 12 cannot be considered, in view of the said recitals as lawful assignees. Section 108(j) of The Transfer of Property Act authorizes a lessee to transfer his interest in the property but not such an interest in which a tenant is having nontransferable right of occupancy. In the lease deed Exhibit 39, certain persons are mentioned,

who would claim through the original lessees in which the words “assignees” and “sub-lessees” are excluded.

44. Be that as it may, nothing is placed on record by the defendant Nos. 7 to 12 out of whom defendant Nos. 7 and 10 appeared in the case establishing that they acquired a legal and valid interest from defendant Nos. 1 to 6. Therefore, the claim made by the plaintiffs against defendant Nos. 1 to 6 excluding the defendant No. 2, appears to be legal and proper. It is stated that the defendant No. 2 though expired, the defendant Nos. 3 to 6 are her heirs and legal representatives already on record, and therefore, the suit is competent as filed. The suit is proceeded ex parte against defendant No. 1 as well as defendant Nos. 8, 9, 11 to 13.

45. The relevant citations out of the above applicable to this case need to be referred here. In **Abdul Sattar's case and Anilkumar's case (cited Supra)** relied on by the plaintiffs, burden is cast on the defendant-tenant to rebut the presumption of service of notice. Similarly, in **Narayan's case (cited Supra)** it is observed that a postal certificate may be manipulated or procured, still in that case, it was examined with postal receipt and possibility of manipulation was ruled out.

46. The observations in the above citations can be made applicable to the facts of the present case, inasmuch as there is oral evidence of P. W. 1 regarding the issuance of notice Exhibit 42 by R. P. A. D. and U. C. P. out of which acknowledgment of notice by defendant No. 1 is placed on record and U. C. P. in respect of the defendant Nos. 3 to 6 are placed on record. There is no evidence in rebuttal offered and advanced

by the legal heirs of the original lessees, being defendant Nos. 1 and 3 to 6 to the said evidence. They have not stepped into the witness box in disproof of the fact that none of the notices have been tendered to them. Thus, there is absence of evidence in rebuttal. They have not examined any postal employee to rebut issuance and service of notice to them. The postal receipts along with U. C. P. raise presumption in favour of plaintiffs and against defendant Nos. 3 to 6, which they have failed to rebut.

47. As discussed earlier, P. W. 1 has been cross-examined at length on Exhibit 42 in which no material discrepancy is brought on record. Even though U. C. P. can be procured as discussed earlier, the defendants have not brought anything on record to show that it is such a document procured or manipulated by the plaintiffs. On the contrary, the plaintiffs have produced along with the U. C. P. the postal receipts. It is brought by defendant No. 7 in the cross-examination of P. W. 1 that the postal envelopes have been returned back with regard to the defendant Nos. 3 to 6 with endorsement “not claimed”.

48. In the cross-examination P. W. 1 while answering the question asked by Ld. Advocate for defendant Nos. 3 to 6, testified that the notice Exhibit 42 is issued on the address of Aashiyana Society. However, he deposed that it was a spelling mistake. Ld. Advocate for the defendant Nos. 3 to 6 argued that it is a vital discrepancy which invalidates said notice.

49. In the plaint, the address of defendant Nos. 3 to 6 is shown as Aashiya CHS Ltd., Mahalaxmi Temple Compound, and the notice was issued on the address not as Aashiya CHS Ltd. but Aashiyana CHS Ltd.

Thus, the word “Aashiya” is referred to as “Aashiyana”. However, it is not a material discrepancy inasmuch as the other address is correct and as already observed, a presumption under Section 114 of The Evidence Act, and Section 27 of The General Clauses Act needs to be raised in the case. There is no rebuttal evidence from the side of defendants to that effect.

50. The above discussion of oral and documentary evidence along with the citations (supra), lead me to draw an irresistible conclusion that the notice Exhibit 42 is duly proved by P. W. 1 and that presumption of service with regard thereto can be drawn against the defendant Nos. 3 to 6. It is already served on defendant No. 1. The tenancy of the said defendants has been legally and validly terminated by the plaintiffs.

51. In view of the foregoing discussion, the said notice is held to be legal and valid, which determined the tenancy. Accordingly, Issue No. 3 is answered in the affirmative.

52. **As to Issue No. 4(a) :-**

This issue relates to the maintainability of the suit raised by the defendants. The defendant Nos. 3 to 6 in the written statement have raised pleas that the suit is not maintainable on various grounds in law, and that it is without any cause of action; suffering from mis-joinder and non-joinder of parties; and filed against defendant No. 2, who is a dead person. The defendant No. 7 raised a plea that the suit is not maintainable in law as there is no cause of action. The defendant No. 10 raised a plea that the suit is not maintainable in law.

53. Insofar as regards the plea of non-maintainability of suit filed

by the plaintiff No. 1 only, no plea is raised by any of the defendants so appearing in specific words in their written statements separately filed on record. The plaint is signed by the plaintiff No. 1 Krishnakant Bhalla for himself and as a C. A. for plaintiff Nos. 2 to 4. The power of attorney or the document under which authorization was claimed by the plaintiff No. 1, was not filed on record. It was for the first time in the cross-examination of P. W. 1 made on behalf of defendant No. 7, the fact was brought on record. It is brought on record that the plaintiff Nos. 2 to 4 are residing in U. S. A., who are the married sisters of plaintiff No. 1, and that, they have given a power of attorney to P. W. 1. Thereafter, the plaintiff No. 1 produced the said power of attorney along with an application Exhibit 57, which was contested by the defendant No. 7 only, when say was called of all the defendants.. My Ld. Predecessor allowed the production of power of attorney keeping open all the issues including genuineness and veracity. Thereafter, the said document is marked as Exhibit 60 on 03.05.2012. The said document was objected to by defendant No. 7 only. The defendant Nos. 3 to 6 and 10 who appeared in the case have not at all objected to the said document being produced and so exhibited. The said document is marked as exhibit by the said order below Exhibit 57 holding that it is produced in response to the request of the defendants and it is marked exhibit, keeping open all the issues including genuineness and veracity of the document.

54. P. W. 1 Krishnakant Bhalla has been cross-examined at length by the Ld. Advocates for the defendant Nos. 7 and 10 respectively. In the cross-examination made by Ld. Counsel for defendant No. 7, P. W. 1

testified that the power of attorney was not presented before any stamping authority in India for the adjudication of proper stamp duty. Even though the defendant No. 10 has not objected to the said document while deciding the admissibility thereof below Exhibit 57, he has been cross-examined on the said power of attorney in details by the said defendant.

55. Thus, after the document Exhibit 60 having been so exhibited, the defendant No. 7 moved an application Exhibit 63 for impounding the said power of attorney and recover the appropriate stamp duty and penalty thereon, as per the provisions of The Bombay Stamp Act and to allow the defendant No. 7 further to cross-examine PW.1 on the said power of attorney. The defendant No. 7, in fact, already cross-examined P. W. 1 on the said power of attorney after the order passed below Exhibit 57 and it was marked as Exhibit 60. The said application Exhibit 63 has been opposed by the plaintiffs.

56. Similarly, the defendant No. 10 moved an application Exhibit 88 for de-exhibiting the said power of attorney Exhibit 60, in view of the provisions or Order 13 Rule 4 of The Code of Civil Procedure. He further applied vide Exhibit 89 to send the power of attorney for examination and opinion of the handwriting expert being not an original one. Both the applications are opposed by the plaintiffs.

57. The Ld. Advocate for the defendant No. 7 argued that mere marking of exhibit to the power of attorney does not prove the said document. The document on record is a xerox copy not properly stamped. The original notarized power of attorney should have been produced in the

Court by the plaintiffs. The Ld. Advocate relied on notary public law of the U. S. A. containing the rules as to the notary public and the notarization of the documents by him. The Ld. Advocate for defendant No. 7 relied on the following citations in support of his submissions:

1. **Sait Tarajee Khimchand V. Yelamarti Satyam (A. I. R. 1971 Supreme Court, 1865)**, in which it has been held that “mere marking of an exhibit does not dispense with the proof of documents.”
2. **Ramji Dayawala & Sons (P) Ltd. V. Invest Import (A. I. R. 1981 Supreme Court, 2085)**, in which it is observed that, “Undoubtedly, mere proof of the handwriting of a document would not tantamount to proof of all the contents or the facts stated in the document. If the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue.”

58. The Ld. Advocate for the defendant No. 10 argued that the power of attorney Exhibit 60 is not an original document, and that it was wrongly exhibited, which should have been stamped within three months after it was first received in India, in view of the provisions of Section 18 of the Indian Stamp Act, 1899. He has taken me through the said provisions. The Ld. Advocate for the defendant No. 10 further vehemently argued that the said document is not original one, and that an opinion of expert is necessary to be obtained in the case as the questions are kept open by the

predecessor of this Court by passing an order below Exhibit 57. The Ld. Advocate for the said defendants relied on following citations:

1. Bipin Shantilal Panchal V. State of Gujarat and Another ((2001) 3 Supreme Court Cases, 1), in which it is held that *“It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence that Court does not proceed further without passing order on such objection. Such practices when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.*

When so recast, the practice which can be a better substitute is this. Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final Judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. There is no illegality in adopting such a course.

However, if the objection relates to deficiency of stamp duty or a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.”

2. Boman P. Irani and another V. Manilal P. Gala and others (2004(2) Mh. L. J. 128), in which **Bipin Panchal's case** was followed and it is

observed at para No. 6 as under:

“These Judgments were rendered in matters pertaining to Criminal proceedings. However, the above observations of the Supreme Court do not restrict the ratio to proceedings in criminal cases. In my view, the ratio of the aforesaid judgments apply equally to Civil cases.”

3.Sunil Tukaram Bharadkar V. Santosh Gopichand Rane (2006(5) Bom. C. R., 237), in which it has been observed that *“The proposition that there is no provision in the C. P. C. or under the Evidence Act to de-exhibit the document once exhibited in evidence, cannot be found fault with. However, such exhibition of documents shall be in accordance with the provisions of law. It is not mere endorsement on the document about the exhibit number that will constitute exhibition of the documents in evidence in accordance with the provisions of law. In order to say that the document has been exhibited in evidence, it has to be in accordance with the provisions of law comprised under Order 18, Rule 4 read with Order 13 Rule 4 of the C. P. C. If the document is exhibited in other manner or by adopting any other procedure, unless it is shown that such procedure has the sanction of law, exhibition of such document cannot be said to be an exhibition of document in evidence in accordance with the provisions of law.”*

4.Mr. Hemendra Rasiklal Ghia V. Subodh Mody (2008(6) ALL MR, 352) in which it has been observed that *“As already noticed, (i) objection to the document sought to be produced relating to the deficiency of stamp duty must be taken when the document is tendered in evidence and such*

objection must be judicially determined before it is marked as exhibit; (ii) Objection relating to the proof of document of which admissibility is not in dispute must be taken and judicially determined when it is marked as exhibit; (iii) Objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case.”

5. Naladhar Mahapatra and another V. Seva Dibya and others (A. I. R. 1991 Orissa, 166), in which it has been held that, *“In a case where a document which cannot be admitted into evidence due to some prohibition in law, even if it is admitted into evidence without objection, the Court can come to a finding that the document though admitted, is legally inadmissible.”*

6. Rekha W/o Ramrao Bhujang V. Subhadrabai W/o Keshavrao Bunage (2012(3) Mh. L. J., 249), wherein it has been observed that *“It is manifest that the objection regarding insufficiency of stamp has to be decided before exhibiting the document. In the present case, the trial Judge has failed to decide the said objection about the insufficiency of stamp though was raised before it was exhibited nor the procedure as it laid down under Rule 4 of Order 13 of the Civil Procedure Code for exhibiting the document has been followed. The said endorsement of exhibit on the document is no endorsement in the eyes of law and cannot be said to have been given proper 'exhibit' as per law.”*

59. The Ld. Advocate for the defendant Nos. 3 to 6 also objected to the said power of attorney Exhibit 60 and submitted that suit filed by

plaintiff No. 1 alone is not maintainable and that the power of attorney Exhibit 60 has not been proved as per law, and that it shall not be taken into consideration. He relied on following citations:

1. **Bank of India V. M/s. Allibhoy Mohammed and Ors. (A. I. R. 2008 Bombay 81)**, wherein it has been held that *“Section 85 of the Evidence Act lays down that the Court shall presume due execution and authentication of power of attorney when executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, Indian Counsel or it's Vice Counsel or representative of the Central Government, etc. This presumption is available in favour of the original Power of Attorney holder provided mandate of Section 85 is duly followed.”*
2. **Pradeep Kumar Jeloka (deceased) (A. I. R. 2008 (NOTES OF CASES) 2318 (Calcutta).**
3. **Bipin Shantilal Panchal V. State of Gujarat and Another (JT 2001 (3) S. C. 120)**, which was also relied by Ld. Advocate for defendant No. 10 as referred to above.

60. The ratio and principles laid down in the above citations having kept in mind, and considering the rival submissions, the said aspect is being decided as would appear in the forthcoming paragraphs. As discussed above, the said power of attorney Exhibit 60 has been for the first time agitated in the cross-examination of PW. 1, by the defendant No. 7 as well as defendant Nos. 3 to 6 and 10, which was produced in pursuance of the questions raised by defendant No. 7. My Ld. Predecessor has passed order below Exhibit 57 allowing production of the said

document, and it has been exhibited as Exhibit 60. It does not appear from the record that the objection as to stamp duty has been taken by defendant No. 7 or defendant No. 10, 3 to 6 so appearing separately. Even the defendant No. 10 has not filed any reply to the application Exhibit 57 though say was called from all the defendants. Therefore, when no objection was taken or whisper made regarding the stamp duty, it cannot be now raised, including the objection of non-payment of stamp duty on an instrument which is received in India for the first time, within the meaning of Section 18 of The Indian Stamp Act. Further, in the light of provisions of Section 35 of the Bombay Stamp Act, if any instrument has been admitted in evidence, it shall not be called in question at any stage of the same suit on the ground that the instrument has not been duly stamped. Therefore, the questions and objections raised by the said defendants on the count of stamp duty is an aftermath, unsustainable and the citations relied on by them in that regard do not come for their help.

61. Thus, the document Exhibit 60 for the first time was tendered in evidence of P. W. 1, and it was only objected to by the defendant No. 7, who himself has asked the questions relating thereto and in pursuance to which the said document came to be produced on record. My Ld. Predecessor observed in the order below Exhibit 57 that as the document was produced in response to the request of the defendant, it will have to be marked as exhibit, keeping open all the issues including genuineness and veracity of the document and it is observed that independent evidence towards disproof is not unknown to law. After the said document has been marked the defendant No. 7 as well as the defendant No. 10 have cross-

examined P. W. 1 thereon at length and even they have adduced evidence in rebuttal to the case of plaintiffs. It is pertinent to note here that all the said objections regarding the power of attorney are without any pleadings of the defendants so appearing. Still as a matter of law, and maintainability of the suit as is canvassed, they appear to have been permitted to proceed with the said objections raised subsequently.

62. As observed by **The Hon'ble Supreme Court in Bipin Panchal's case (cited supra)** the objection as to payment of stamp duty cannot be postponed to be decided at the final stage of the suit and consequently, as observed above, the objection on that ground raised vide applications Exhibit 63 and 88 is not sensible. The observations in **Hemendra's Ghia's case (Supra)** made by **The Hon'ble Bombay High Court** also support the case of the plaintiffs. Thus, the objection with respect to the said document regarding stamp duty and being not original or a copy need not be gone through in view of admissibility decided by the order below exh. 57, and only the issue as to genuineness and veracity thereof only were left open, on which aspect, P.W. 1 has been cross-examined at length by the Ld. Counsel for the defendant nos. 7 and 10, as also, both the defendants have adduced oral evidence subsequent thereto.

63. The document so produced as well as marked exhibit and having been subject to cross-examination of P. W. 1, has to be held as proved considering the evidence of P. W. 1 on record which is duly testified by way of cross-examination by the Ld. Advocates for defendant Nos. 7 and 10. Further, in view of the observations of Hon'ble Bombay High Court in **Hemendra's Ghia's case (cited supra)**, considering the oral evidence of P.

W. 1, the said document can be held to have been proved by P. W. 1. The Ld. Advocate for the plaintiffs also relied on the following citations in support of the said document as properly exhibited and proved:

1. **Citi Bank N. A., New Delhi V. Jaggilal Kamlapat Jute Mills Co. Ltd., Kanpur (A. I. R. 1982 Delhi, 487)**, in which it is held - *“What presumption has to be raised under Section 85 of The Evidence Act ? Section 85 says that the Court shall presume that such a document was so executed and authenticated. Executed by whom : obviously by the person purporting to have executed the power of attorney before the Notary Public.”*

2. **Naginbhai P. Desai V. Taraben A. Sheth, 2003(4) Bom. C. R., 313**, in which the observations have been made following **Bipin Panchal's case**, cited by the Ld. Counsel for defendant No. 10.

3. **Sarita W/o Narendra Shahu and others V. Public Co-operative Housing Society Ltd., Nagpur (2010(2) Mh. L. J. 308)**, in which it is observed as under :

“In 2009(10) SCC 239, P. C. Thomas V. P. M. Ismail and others the Apex Court has held that once no objection on pleas of “inadmissibility” or “mode of proof” was raised at the time of the exhibiting or any time later during trial, when most of the witnesses produced by the parties were examined and the documents were duly exhibited, it is too late in the day now to object to their exhibition on the ground of mode of proof. The Apex Court in the Judgment reported in 2004(7) SCC 107, Dayamathi Bai (Smt) V. K. M. Shaffi has held that the mode of proof being irregular and

insufficient falls within the procedural law and can be waived. It is held that such objection must be taken before the document is exhibited. In view of the said Judgment of the Apex Court, the contention of the Ld. Counsel that the said maps cannot be read in evidence though they have been duly exhibited by the Courts below cannot be accepted. As such the first contention of the Ld. Counsel for the appellants deserves to be rejected.”

4.Rajesh Wadhwa V. Dr. (Mrs.) Sushma Govil (A. I. R. 1989 Delhi, 144), wherein it is observed that, “ *The very purpose of drawing presumption under Sections 57 and 85 of The Evidence Act would be nullified if proof is to be had from the foreign country whether a particular person who had attested the document as a Notary Public of that country is in fact a duly appointed Notary or not. When a seal of the Notary is put on the document, Section 57 of The Evidence Act comes into play and a presumption can be raised regarding the genuineness of the seal of the said Notary, meaning thereby that the said document is presumed to have been attested by a competent Notary of that country.”*

64. On the other hand, the Ld. Advocate for the defendant No. 10 submitted that order below Exhibit 57 regarding production and exhibition of documents has kept open the issue, and the evidence on record led by plaintiff No. 1 does not prove and establish the said document and it cannot be read while deciding the suit. The Ld. Advocate relied on **in case of State of Orissa and another V. Mamata Mohanty ((2011) 3 Supreme Court Cases 458)**, in which it is held that “*It is a settled legal*

proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide Chandigarh Admn. V. Jagjit Singh, Yogesh Kumar V. Govt. of NCT of Delhi, Anand Buttons Ltd. V. State of Haryana, K. K. Bhalla V. State of M. P., Krishan Bhatt V. State of J. & K., Upendra Narayan Singh, and Union of India V. Kartick Chandra Mondal.) This principle also applied to judicial pronouncements. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same.”

The careful perusal of the above citation shows that the case was one under Article 14 of The Constitution of India and the order was passed by mistake which was held that it does not confer any legal right. In the case at hand, as observed above, the said order cannot be impugned subsequently in the circumstances so discussed, and further, it is not established that the order is erroneously or mistakenly passed and on the contrary, the said order remained unchallenged. Moreover, nothing is brought on record to hold that it is such an order which should be ignored, and that decision on Exhibit 60 shall be made afresh.

65. The power of attorney Exhibit 60, in view of the evidence of P. W. 1 is proved to have been signed by the plaintiff Nos. 2 to 5. It is bearing a notarial seal of the notary public and signed by him. As the said document has been exhibited in the evidence of P. W. 1, by order below Exhibit 57 and P. W. 1 was duly cross-examined on the said aspect by the

defendant Nos. 7 and 10, no material is brought on record establishing that it is not genuine document or that it does not confer power on P. W. 1. As submitted by Ld. Counsel for the plaintiffs, the said document which is so produced before the Court appears to have been executed in the United States before the appropriate notary. Therefore, in view of the evidence regarding said document available on record, the fact that the plaintiff Nos. 2 to 4 executed the power of attorney giving power and authority to plaintiff No. 1 to institute suit and proceed in the case, cannot be rendered improbable. The objections raised by the defendant No. 7 & 10 regarding said document subsequently do not sustain, and their requests made vide Exhibit 63, 88 and 89 do not deserve to be allowed.

66. Simultaneously, if the case of plaintiffs is viewed from another standpoint, the suit is filed under the signature of Krishnakant Bhalla, who is plaintiff no. 1, as also P. W. 1 in the case. It is brought on record that he is the legal heir and representative of the original lessor Bootram Bhalla. He further stated that the plaintiff Nos. 1 to 4 are the only legal heirs of deceased Bootram Bhalla. The said plaintiff has produced on record 7/12 extracts Exhibit 61/1, property card Exhibit 61/2, and record of rights at Exhibit 61/3 in which the names of the plaintiffs are mentioned as co-owners. Therefore, at the most, all the plaintiffs are co-owners of the suit property. The plaintiff No. 1 becomes one of the co-owners. Even if there had not been a power of attorney of the plaintiff Nos. 2 to 4 in the case, as per the settled law, the suit filed by the plaintiff No. 1 alone is maintainable being filed by one of the co-owners of an estate. The plaintiff No. 1 is one of the legal heirs of original lessor-deceased Bootram Bhalla,

and therefore, he is entitled to institute the suit and take an action against the defendants so far as plea in question is concerned. Therefore, the objection as to non-maintainability so raised is not maintainable.

67. Thereafter the Ld. Advocate for the defendant Nos. 3 to 6 raised an objection that there is no cause of action for the plaintiffs to file the suit, and therefore, the suit is not maintainable. On perusal of the plaint, it can be gathered that the plaintiffs have specifically pleaded that they have terminated the monthly tenancy under Section 106 of The Transfer of Property Act by notice dated 29.04.2007 Exhibit 42, addressed to the defendant Nos. 1 to 6, therefore, the cause of action is sufficiently stated in order to file the suit, and on this ground, it is held that the suit is maintainable.

Further, an objection is taken by the defendant Nos. 3 to 6 regarding non-maintainability of the suit for non-joinder of necessary or proper parties and mis-joinder of parties. The plaintiffs have filed the suit against the defendant Nos. 1 to 6 being the heirs and legal representatives of the original lessees. The defendant Nos. 7 to 12 are stated to be the sub-lessees or the persons to whom the premises have been transferred by the lessees. The defendant No. 13 is stated to be the partnership firm of which the original lessees were the partners. The defendant Nos. 7 and 10 only contested the suit, who have been so made as parties to the suit against whom the contentions of parting with possession by the lessees is made. Therefore, the suit is not bad for mis-joinder of parties. The defendant Nos. 3 to 6 further contended that the defendant No. 2 died long back, whose all the heirs are necessary and proper parties to the suit.

The plaintiffs stated that they have made parties to the legal heirs of deceased lessees on record and those persons are the only heirs and legal representatives, and that the death of defendant No. 2 would be of no consequences. The plaintiffs have issued the quit notice to the said heirs and legal representatives so available. No evidence in rebuttal is adduced by defendant nos. 3 to 6 to the case of plaintiffs and evidence brought by them on record. So also, the defendant nos. 7 & 10 have not brought anything on record to establish that there are other legal heirs. Hence, the said objection of defendants does not sustain and the suit does not deserve dismissal on the said ground.

68. In view of the foregoing discussion, the objections so taken regarding non-maintainability of the suit, therefore, do not deserve to be allowed. The suit cannot be dismissed on account of those objections taken by the defendants. Accordingly, I answer Issue No. 4(a) in the affirmative.

69. **As to Issue No. 4(b) :-**

Insofar as the jurisdiction of the Court is concerned, there are two-fold objections as to the jurisdiction of The Court of Small Causes under section 41 of The Presidency Small Causes Courts Act. The first objection is with regard to the subject matter of the suit being a land with structure standing thereon for factory purpose, and the second one is with regard to the defense of part performance put forth by the defendant no. 10. Relating to the first objection, it is the contention of the defendants that the suit premises is not an open plot of land, but open plot with structure was leased for manufacturing purpose and therefore, the suit

premises is governed by the provisions of The Maharashtra Rent Control Act, 1999, and therefore, the suit would have been filed by invoking the jurisdiction of The Small Causes Court not under Section 41 of The Presidency Small Causes Courts Act, but under the provisions of The Maharashtra Rent Control Act. It is the case of the plaintiffs that the demised premises is an open plot of land, as per the lease deeds Exhibit 39 and 40, and therefore, the Small Causes Court alone has jurisdiction under Section 41 of The Presidency Small Causes Courts Act, to entertain and try the suit. On this issue, P. W. 1 has been cross-examined at length by the Ld. Advocates for defendant Nos. 3 to 6, 7 as well as the Ld. Advocate for defendant No. 10.

70. It is relevant to note here that the original lessees are represented in this suit by their legal heirs who appeared in the case being defendant Nos. 1 to 6, out of whom, defendant Nos. 3 to 6 appeared and contested the matter. The defendant no. 1 and 13 are proceeded ex parte. The defendant No. 2 is stated to have been dead. The defendant Nos. 7 to 12 are stated to be the sub-lessees, who are stated to have been made parties for full and effectual adjudication in the case.

71. To rebut or controvert the case of the plaintiffs regarding grant of lease in respect of an open plot of land, no evidence is offered or adduced by the heirs and legal representatives of original lessees being defendant Nos. 3 to 6 so appearing. It is the so-called sub-tenants defendant Nos. 7 and 10, who have cross-examined P. W. 1 elaborately on this facet.

72. The perusal of the cross-examination of P. W. 1 Krishnakant discloses that he was born on 29.09.1945. So when the lease deed Exhibit 39 was executed on 21.10.1948, he was a child. He testified that he went to the suit premises in the year 1964 for the first time. Thus, his oral evidence regarding the situation of suit premises in the year 1948 would be of no consequences. Then only the document Exhibit 39 lease deed alone remains for consideration being the only available evidence on record, as well as keeping in view the provisions of Sec.91 and 92 of The Evidence Act.

73. While answering Issue Nos. 1 and 2, it is already observed that the said document discloses an intention of the then lessor to grant lease in respect of an open plot of land to the lessees being predecessors of defendant Nos. 1 to 6 as named in the suit. Thus, the intention which is expressed in lease deed Exhibit 39, being duly registered, and which remained noncontroversial till the date of suit, was that an open plot of land was intended to be transferred to the then lessees, within the meaning of Section 105 of The Transfer of Property Act. The said document cannot be interpreted or constructed in the manner as urged by the defendant Nos. 3 to 6, 7 and 10. Therefore, the jurisdiction of this court which is sought to be assailed on the said ground is of no consequence, and it is, therefore, held that the suit as has been filed is properly filed within the jurisdiction under Section 41 of The Presidency Small Causes Courts Act.

74. Turning to second objection, the jurisdiction of this Court is assailed by taking up a defense by defendant No. 10 that his possession is

protected under the provisions of Section 53A of The Transfer of Property Act. Defendant No. 10 has narrated the facts in his written statement that he is a lawful tenant of the suit premises and that the plaintiffs have contracted with him to transfer suit property for valuable consideration, and that there is a correspondence between the parties to that effect and proof of payment made to the plaintiff no.1. His case is that he is protected being tenant of the suit premises as well as the plaintiffs have entered into a contract with him to sell suit property, and that he is in possession thereof. Thus, the jurisdiction appears to have been claimed as barred in view of said status pleaded by defendant No. 10.

75. D. W. 2 (defendant No. 10) has adduced oral evidence by filing his affidavit of evidence, wherein he has stated that he agreed to purchase the suit plot and structure thereon from the plaintiffs, which transaction could not be accomplished.

76. The letter correspondence with regard to the said transaction is produced below Exhibit 66, being correspondence Exhibits 67 to 82, demand draft and notice Exhibit 83. The D. W. 2 has produced documents further vide Exhibit 104 to 127 in support of his case. It is the case as well as evidence of defendant No. 10 (D. W. 2) that he is a proprietor of M/s. Kunal Metal Industry, and that the defendant No. 7 permitted him to keep and store his material in the suit premises. He deposed that the defendant No. 7 firm informed him that they have acquired the land in question from defendant No. 8, and that registered lease deed was executed on 10.11.1959 between the original lessees and the partners of defendant No. 8. He deposed that he decided to purchase the land in question and

for that purpose, the defendant No. 7's partner K. Bothra and his uncle agreed to help him and to represent them. The Bothras executed power of attorney in his favour. He narrated that the mother of the plaintiff signed an agreement of sale dated 30.09.1995 which was for total consideration of Rs. 91 Lakhs, and that he paid Rs. 5 Lakhs, vide letter Exhibit 82 collectively. He further deposed to have issued public notice, and obtained certificate of the Manager of his bank. He further deposed to have gone to Delhi to the plaintiff no.1, with demand drafts of Rs. 86 Lakhs for balance consideration in favour of the plaintiffs. He deposed that the plaintiff No. 1 refused to accept five demand drafts and asked defendant No. 10 only to submit one demand draft. He further deposed that he was required to file a private criminal complaint bearing No. 149/MISC/05 against the plaintiffs and defendant No. 7. He deposed that plaintiffs wanted him to pay balance consideration of Rs. 86 Lakhs without complying with the provisions of Section 230A of The Income Tax Act and Section 31 of The FERA Act. He deposed that there was a contract in his favour regarding sale of the suit property by the plaintiffs. He denied that he is a trespasser over the suit land as alleged by the plaintiffs.

77. The evidence of D. W. 2 is duly testified by cross-examination, in which he deposed that he entered upon the suit premises in the year 1988 and took possession from defendant No. 7, and that the structure was existing at that time over the suit land. He testified that along with the structure, he also obtained possession of open land and was storing metal scrap and plastic goods on the area of 454.98 sq. mtrs. He testified that the agreement referred to by him is Exhibit 82 collectively. The

perusal of Exhibit 82 collectively shows that it is a letter addressed to the plaintiff Nos. 1 to 3 by defendant No. 10, wherein there is a mention of an oral agreement incorporating the terms and conditions, and a demand draft is stated to have been enclosed therewith for Rs. 5 Lakhs.

78. D. W. 1 has categorically stated in cross-examination that he has not filed any suit for enforcing agreement Exhibit 82. He testified that the agreement Exhibit 82 was not registered. He denied the suggestion that no agreement was executed. He deposed that in this suit, he came to know regarding the termination of tenancy of the original lessees.

79. The plaint is silent in respect of an agreement alleged between the plaintiffs or their mother on one hand with the defendant No. 10 on the other. Similarly, in the affidavit of evidence, P. W. 1 Krishnakant Bhalla has not deposed in respect of receipt of an amount from the defendant No. 10. According to P. W. 1, the defendant Nos. 7 to 12 are unlawful occupants from the defendant Nos. 1 to 6 and 13. Likewise, in the cross-examination of P. W. 1 made by Ld. Advocate for defendant No. 10, P. W. 1 admitted that the defendant Nos. 7 to 13 are, at present, the occupants of the suit premises, but he denied that they are sub-tenants. He stated in the cross-examination that he received Rs. 5 Lakhs from the Defendant No. 10. He testified that he found the new occupants in the year 2006 only being defendant Nos. 11 and 12. He testified that he never met defendant No. 10. He testified that however, he addressed certain letters to defendant no. 10 in the year 1995-96 though he did not meet him during that period, and that he has seen the defendant No. 10 first time in the year 2006, in the criminal case at Kurla. Thereafter, the correspondence between P. W. 1

and defendant No. 10 is placed on record at Exhibit 66 to 83. P. W. 1 testified in respect of Exhibit 82 that the said understanding was accepted by his mother and himself and that they acknowledged receipt of Rs. 5 lakhs from defendant No. 10. He testified that he was aware that he was intending to sell the suit property to defendant No. 10 on 05.10.1995. He testified that that transaction was not completed on or before 31.12.1995 as the balance consideration was not paid and he forfeited the earnest money. He testified that there was no agreement with defendant No. 7 in writing for sale of suit property, however, he addressed all letters to him and defendant No. 10 jointly as defendant No. 7 represented defendant No. 10 for all the negotiations. Lastly, P. W. 1 has denied the suggestion that he deliberately suppressed the agreement of sale with defendant No. 10 and termed him as an unauthorised occupant.

80. The Ld. Advocate for the defendant No. 10 submitted that initially P.W. 1 has not admitted the agreement of sale which he subsequently acknowledged during the course of his cross-examination and that in spite of that agreement, and receiving the part-consideration, P.W. 1 filed the present suit. He relied on citation in the case of **S. P. Chengalvaraya Naidu (dead) by L. Rs. V. Jagannath (Dead) by L.Rs. and others (A. I. R. 1994 Supreme Court, 853)**, wherein the Hon'ble Apex Court deciding a case of fraud by litigant observed that: *"The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A*

litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party.”

81. The oral and documentary evidence on record establishes that the agreement in question was oral one which has not been sought to be specifically enforced taking aid of the provisions of The Specific Relief Act. The defendant no. 10 has stated to have filed a criminal case in that respect against the plaintiffs and defendant no. 7's partner, which is totally a different aspect, having no bearing on this case inasmuch as in this case, it is only to be decided as to whether the possession of the defendant no. 10 is protected under sec. 53A of T. P Act. On these premise, and in view of the discussion being made on this issue, the above citation would not apply to the instant case.

82. The above discussed oral evidence of P. W. 1 (plaintiff No. 1) as well as D. W. 2 (defendant No. 10) does not disclose that there was any agreement in writing between the parties incorporating the essential terms of the contract, and further, no such agreement is filed on record. The Ld. Advocate for defendant No. 10 cross-examined P. W. 1 elaborately on the aspect of the said agreement of sale, which appears from the record that it was an oral agreement coupled with the correspondence referred to above. Exhibit 82, which is filed by P. W. 1, on perusal discloses that it is a letter dated 30.09.1995 addressed by defendant No. 10 to the plaintiffs and their mother along with the demand draft of Rs. 5 Lakhs, wherein oral agreement of sale between the parties is mentioned for consideration of

Rs. 91 Lakhs, of which the terms and conditions were to be reduced in writing at an early date, and transaction was to be completed by 31.12.1995. As a token of sale, a demand draft of Rs. 5 Lakhs was sent. P. W. 1 admitted in cross-examination that the said letter was received by himself and his mother.

83. Therefore, the said letter constitutes an acknowledgment on the part of P. W. 1 that an amount of Rs. 5 Lakhs by way of demand draft was received and the parties agreed to execute an agreement of sale in respect of the suit property. The agreement in the case is alleged by the defendant no. 10 to be dated 30.09.1995, which, however, is oral one, and the written agreement thereafter was not reduced into writing, as is appearing from the evidence brought on record.

84. In order to claim the benefit of protection envisaged under **Section 53A of the Transfer of Property Act**, the necessary ingredients inter alia are that- the transferor has contracted to transfer for consideration the immovable property, by writing signed by him or on his behalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. Further, the transferee must have taken possession of the property in part performance or being already in possession, should have continued it. The transferee must have done some act in furtherance of the contract, and that he must show that he was and is ready and willing to perform his part of contract. If such conditions are fulfilled, then, even though the contract has not been registered (as the law stood prior to the amendment of the year 2001) and instrument of transfer has not been completed in the manner prescribed, the transferor is

debarred from enforcing against the transferee any right in respect of the property in possession of the transferee.

85. Keeping in view the above essential ingredients of Section 53A of The Transfer of Property Act, it is a necessary and indispensable condition that such contract must be in writing. Perusal of the record of the present case shows that there was no agreement in writing between the plaintiffs and defendant No. 10 incorporating the terms and conditions of the contract of sale, and therefore, such terms and conditions cannot be ascertained in the case. There are certain letters between the parties, which cannot partake the nature of a written agreement and cannot dispense with the same, as agreement in writing is an essential condition under Section 53A of The Transfer of Property Act. At the most, the letter correspondence would amount to an acknowledgment of an oral agreement which will, however, not amount to a written contract or would not stand as a substitute therefor, for the purpose of Sec. 53A of the said Act. Those letters discussed in the evidence as above, cannot be taken to be an agreement of sale within the meaning of Section 53A of the Act spelling out terms of agreement of sale. The emphasis under Section 53A is not only on a written agreement, but also on the terms of the agreement to be ascertained with reasonable certainty from the written document.

86. Thus, from the discussion as made above, I am of the view that the defendant No. 10 does not acquire protection under Section 53A of The Transfer of Property Act, which would have stricken the jurisdiction of the Small Causes Court to entertain and try the suit in the case. A tenant who contracts to purchase immovable property, becomes entitled for

protection contemplated by Section 53-A of The Transfer of Property Act, if the ingredients thereof are fully satisfied, as he continues to be in possession in pursuance of such a contract in writing. If the conditions are not so satisfied, no such protection is available to him. Insofar as the said defense in this case is concerned, without going into the merits of the case of defendant No. 10 regarding the said agreement of sale along with possession, this Court can look into the nature of possession and the agreement as agitated as a matter of defense put forth by defendant No. 10 so far as affecting the jurisdiction of this Court.

87. In this way, after carefully going through the oral evidence and material placed before me on record, I am of the view that the suit as has been filed in The Small Causes Court, on all the counts is maintainable and the jurisdiction of The Small Causes Court has not been barred. Accordingly, I answer Issue No. 4(b) in the affirmative.

88. **As to Issue No. 4(c) :-**

This issue bears on the limitation, in respect of which the defendant Nos. 3 to 6 have taken up a plea in the written statement.

89. The said defendants contended at para No. 8 of the written statement that since the expiry of lease, no action was initiated by the plaintiffs and they stayed silent till the date of suit. However, it is the contention of the said defendants in paragraph No. 12 of the written statement itself that after the expiry of the period of 30 years constricted by the lease, the original lessees requested the original lessor for extension of the lease period, and that orally such period was extended, and that

there was no agreement in writing and thus, the period of lease was extended and the lease was renewed till the date of that written statement. No oral evidence is adduced in support of such plea. However, the plea as to limitation is taken by the said defendants contending that the suit is barred by limitation as no action has taken after the expiry of the period of lease.

90. While discussing Issue Nos. 1 and 2, it is already held that after the expiration of the period of lease, the lessees continued in possession of the suit premises. The plaintiffs came with the case that they have accepted the rent from the said defendants. After the expiration of the lease period, thus, lessees continued in possession, and at the most, their status over the suit premises would be that of lessees holding over within the meaning of Section 116 of The Transfer of Property Act.

91. The lease is stated to have been terminated by P. W. 1 by issuing notice Exhibit 42. In the plaint, there are averments that the tenancy of defendant Nos. 1 to 6 in respect of the suit premises has been determined by issuing notice dated 29.04.2006 under Section 106 of The Transfer of Property Act and that the R. P. A. D. packets addressed to defendant Nos. 2 to 6 returned back with the remark “not claimed”, and that such packet on defendant No. 1 has been served. P. W. 1 has adduced evidence in support of the said pleadings to which no rebuttal is offered on the side of legal heirs of the original lessees. Thus, considering the issuance of the said notice dated 29.04.2006, and the period of limitation would run from the said contentions regarding termination of tenancy, and thus, the suit filed in the year 2006 itself is within limitation being a suit

for possession filed against the lessees. Hence, I answer issue No. 4(c) in the affirmative.

92. **As to Issue Nos. 4 and 5 :-**

The issue regarding the mesne profits at the rate of Rs. 20 Lakhs per month with interest at the rate of 15% per annum has been framed by my Ld. Predecessor, in view of the pleadings in the plaint. The plaintiffs averred at para No. 7 of the plaint that the defendants are bound to pay mesne profits @ Rs. 20 Lakhs per month or such other rates as may be decided under Order 20 Rule 12 of The Code of Civil Procedure. In prayer clause (b) to the plaint, the said mesne profits are claimed after holding an inquiry under Order 20 Rule 12 of CPC. Thus, a separate inquiry has been prayed by the plaintiffs under Order 20 Rule 12 of CPC. Thus, within the meaning of Order 20 Rule 12(1)(ba) and (c) a separate enquiry may be held. Similarly in the affidavit of evidence, no verbal evidence is led by P. W. 1 in support of claim for mesne profits and on the other hand, a separate inquiry is sought to be ordered.

93. In view of such a position on record, the Issue Nos. 4 and 5 do not survive and accordingly, they are answered as do not survive.

94. **As to Issue Nos. 6 and 7 :-**

After recording the findings to issue Nos. 1 to 5 as above, I hold that the plaintiffs are entitled for the relief of possession only in respect of the suit premises. The plaintiffs have not proved any case with regard to the claim for the relief of injunction. The claim for mesne profits for the present does not survive. Accordingly, Issue No. 6 is answered in

the negative and the following order is passed.

ORDER

1. The suit of the plaintiffs for eviction and possession against the defendants is hereby decreed with costs.
2. The defendant do deliver vacant and peaceful possession of the suit premises to the plaintiffs within three months from today.
3. An inquiry into mesne profits under Order 20 Rule 12 of The Code of Civil Procedure shall be separately held.
4. The claim for injunction is hereby dismissed.
5. Decree be drawn up accordingly.

(V. C. Barde)
Judge, C. R. No.19,
30.09.2013

Order dictated on : 30.09.2013

Order transcribed on : 04.10.2013

Order checked & signed on : 05.10.2013