

*Registration No: SMCST/473/2008.  
SMCST/13/2017.*

*Filing No.: SMCST/473/2008.  
SMCST/13/2017.*

*Filed On: 04/03/2008(473/2008)  
16/01/2017(13/2017)*

*Registered On: 04/03/2008(473/2008)  
16/01/2017 (13/2017)*

*Decided On: 02/04/2019.*

*Duration:*

*H.R.P. Suit No. 473/2008  
Y M D*

*H.R.P. Suit No. 13/2017  
Y M D*

***IN THE SMALL CAUSES COURT NO. 5, AT AHMEDABAD***

***H. R. P. SUIT No. 473 Of 2008  
&  
H. R. P. SUIT No. 13 of 2017.***

***Exh.....***

***(H. R. P. SUIT No. 473/ 2008)***

***Plaintiff:-***

|                 |                                                                                                                                                                                                                                                              |
|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b><i>1</i></b> | <b><i>Abdul Vasif Mohammadshafi Shaikh,<br/>Aged about:34 years. Occupation:Service.<br/>Address: Shafi Manzil, Raikhad Darwaja,<br/>Punjalal's Chali, Raikhad,Ahmedabad,<br/>Through his Power of attorney holder,<br/>Abdulgani Husainrahim Malek,</i></b> |
|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|  |                                                                                                                                                                  |
|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | <i>Aged about:67 years. Occupation: Retired.<br/>Address: Third Floor, Saloni Apartment,<br/>Behind Rupali Cinema,Besides Gun House,<br/>Khanpur, Ahmedabad.</i> |
|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**VERSUS****Defendants:**

|   |                                                                                                                                                                                                                   |
|---|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | <i>(Amended as per Order below Exh.15)<br/>Bhikhubhai Chhotubhai Lodha,<br/>Aged: Adult.<br/>Address: Municipal Census No.2051/9/1, paiki,<br/>in Front Side, Punjalal Sheth's Chali, Raikhad,<br/>Ahmedabad.</i> |
| 2 | <i>Rajeshbhai Shankarbhai Lodha,<br/>Aged: Adult.<br/>Address:Municipal Census No.2051/9/1, paiki,<br/>in Front Side, Punjalal Sheth's Chali, Raikhad,<br/>Ahmedabad.</i>                                         |

**H. R. P. SUIT NO. 13 / 2017.****Plaintiff:-**

|   |                                                                                                                                                                                                                                                                                                                                                         |
|---|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | <i>Abdulvasif Mohammadshafi Shaikh,<br/>Aged about:37 years. Occupation:Service.<br/>Address: Shafi Manzil, Raikhad Darwaja,<br/>Punjalal's Chali, Raikhad,Ahmedabad,<br/>Through his Power of attorney holder,<br/>Sajidahemad Bashirahemad Shaikh,<br/>Aged about:47 years. Occupation: Business.<br/>Address: 1396/2, Sector-B,<br/>Gandhinagar.</i> |
|---|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**VERSUS**

**Defendants:**

|   |                                                                                                                                                                                                 |
|---|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | <i>Bhikhubhai Chhotubhai Lodha,<br/>Aged: Adult. Occupation: Retired.<br/>Address: Municipal Census No.2051/9/1, paiki,<br/>in Front Side, Punjalal Sheth's Chali, Raikhad,<br/>Ahmedabad.</i>  |
| 2 | <i>Rajeshbhai Shankarbhai Lodha,<br/>Aged: Adult. Occupation: Service.<br/>Address: Municipal Census No.2051/9/1, paiki,<br/>in Front Side, Punjalal Sheth's Chali, Raikhad,<br/>Ahmedabad.</i> |

**Appearances :**

*Mr. I. B. Mev, learned advocate for the plaintiff.*

*Mr. G. P. Bhavsar & Mr. J. N. Ahmedi learned advocate for the  
defendants.*

**CORAM : Prem H. Singh, Judge.**

**:J U D G M E N T :**

1           *That the plaintiff-landlord has instituted the H. R. P. Suit  
No. 473/2008 against the defendant-tenant inter-alia on different  
ground for getting possession of the suit premises and for getting  
permanent injunction and the plaintiff-landlord has also filed H. R.  
P. Suit No. 13/2017 against the defendant-tenant inter-alia on*

*different grounds for getting vacant and peaceful possession and for getting arrears of rent, mesne profit and herein the plaintiffs-landlord in H. R. P. Suit No. 473/08 has given application vide Exh. 76 to consolidate the H. R. P. Suit No. 13/17 with the record of H. R. P. Suit No. 473/08 and to try both the suits together simultaneously since in both the suits parties are the same and the subject matter for which purpose of litigating are also the same and the Court has also granted the application of the plaintiff and passed the order and therefore, on the basis of order, the Court has consolidated both the suits together and proceeded both the suits under the common proceedings in H. R. P. Suit No. 473 /08 and further passed order that the deposition of witnesses and evidence of both the cases are ordered to be taken in H. R. P. Suit No. 473/08.*

*2. The brief facts leading to both suits are as such : The plaintiff-landlord has instituted this suit (H. R. P. Suit No.473/08) against the defendants-tenants for vacant and peaceful possession of the premises mentioned in para-'1' of the plaint of this suit, premises situated in Ahmedabad, Ward Raikhad-2, Survey No. 4841 paiki, Municipal Census No.2051/9/2/1 and Municipal Census No. 2051/9/2/2, a ground floor premises is ownership of the plaintiff and plaintiff has purchased the said premises from Lagirchand Punjalal Sheth, A Karta of H. U. F., by registered sale deed and*

*became owner of the suit premises. The plaintiff further averred that father of the defendant no. 1 namely deceased Chhotubhai Bhikhalal Lodha has taken on rent the premises bearing Municipal Tenement No. 0113-35-0062-0001-E, from the previous owner at the monthly rent of Rs. 17/- for the residential purpose and liability to pay the municipal tax is upon the landlord and previous owner has sent attornment letter to the defendant no. 1 on dtd. 26.3.1993; the defendant no.1 has not paid any rent of the suit premises to the plaintiff inspite of several demands have been made by the plaintiff, and defendant has not paid rent since the plaintiff became owner of the suit premises and plaintiff has issued notice to the defendant no. 1 as per Sec. 12(2) of the Bombay Rent Act; the defendant no. 1 has made illegal construction, alteration of permanent in nature without consent of the plaintiff and defendant no. 1 has put one door between suit premises and divided the suit premises into two portion and made alteration, which cannot remove without causing serious damage to the suit premises, the defendant no. 1 has divided the suit premises into two portion and defendant no. 1 resides in one portion and defendant no.1 has transferred, sublet the second portion of the suit premises to defendant no. 2 and defendant no. 2 is in possession of the second portion of the suit premises and thereby profiteering and hence, plaintiff has filed suit for recovery of possession of the suit premises and for permanent injunction.*

3. *The plaintiff has filed H.R.P Suit No. 13/2017 against the defendants for getting possession of the suit premises, for arrears of rent, mesne profit. The plaintiff further contended the same facts as stated in H.R.P. Suit No. 473/2008 and further contended that defendant no. 1 is tenant as per Sec. 5 (11) (c) of the Bombay Rent Act, of the plaintiff at the monthly rent of Rs. 17/-; the defendant no. 1 has not paid rent of the suit premises from 1.4.1993 to 31.3.2014 for 252 months, Rs. 4284/- is due and mesne profit from 1.4.14 to 31.12.2016 for 33 months at the rate of Rs. 5000/- per month and total mesne profit Rs. 1,65,000/- and mesne profit plus arrears of rent total Rs. 1,69,284/- is due and payable by the defendant no. 1 to the plaintiff, the plaintiff has demanded the same several times but defendant failed to pay the same and municipal tax of the suit premises is also due and defendant no. 1 has not deposited the municipal tax in the Municipal Corporation and defendant no. 1 became tenant in arrears of rent since more than six months; the plaintiff further contended that as per locality, location, facilities of the suit premises, the rent of the suit premises should be Rs. 5000/- per month and plaintiff is entitled to get Rs. 5000/- per month rent; the suit premises is in non-used conditions without any reasonable reason since more than six months and defendant no. 1 has no need of the suit premises and defendant no. 1 has illegally transferred, assigned, sublet the suit premises to the defendant no. 2 and thereby*

*profiteering, the defendant no. 1 has acquired suitable residential accommodation in Ahmedabad; the plaintiff has issued notice demanding arrears of rent and terminating tenancy of the defendant no. 1 to the defendant on dtd. 15.4.2014 but defendant no. 1 not acted as per notice and given false and evasive reply to notice on dtd. 22.4.2014 and hence, plaintiff has filed this suit.*

4. *On submission of the suit summons - notice was issued by my ld. predecessor which has been served upon the defendants, defendants appeared before the Court and defendants in both H.R.P. Suits have filed their written statement vide Exh. 23 in H.R.P. Suit No. 473/08 wherein the defendant has contended that plaintiff has filed false suit; father of the defendant no. 1 and brother Shankerbhai Lodha, father of defendant No. 2 were residing together in the suit premises, father of the defendant no. 1 namely Chhotubhai Bhikhubhai expired on 18.10.1972 in the suit premises and at that time defendant no. 1 and his family and his brother namely Shankarbhai and mother of the defendant no. 1 Jankiben were residing in the suit premises and thereafter, Shankarbhai Chhotubhai expired on dtd. 24.1.1980 in the suit premises and his family were residing in the suit premises and mother of Shankarbhai and the defendant no. 1 expired in the suit premises, thereafter, elder brother of the defendant no. 1 expired in the suit premises and*

*defendant no. 1, his family and defendant no. 2, his family are residing in the suit premises; the father of the defendant no. 1 was tenant of the suit premises since before 1945 and at that time rent of the suit premises was Rs. 13/- per month and thereafter, rent increased to Rs. 15/- per month and from March 1960 rent of the suit premises was/is Rs. 17/- per month and suit premises consisting of two rooms, Otlo, two latrine and Chokdi at front side and rent of Rs. 17/- per month is not standard rent and defendants have dispute in respect of the standard rent; defendants denied the structural alteration in the suit premises and there was door between the suit premises from the time when the suit premises was kept on rent and defendants have not made any alteration, construction in the suit premises; denied subletting second portion of the suit premises; the defendants denied bonafide requirement of the suit premises of the plaintiff and further contended that plaintiff became owner of the suit premises in the year 1993 and as per provisions of the Bombay Rent Act, plaintiff not became owner before 01.01.1964 and therefore, plaintiff is not entitled to get possession of the suit premises on the ground of bonafide and reasonable requirement of the suit premises; defendants used the otla portion since the suit premises has taken on rent and there is no any complaint of the defendants and denied almost all the facts of the plaintiff's suit and prayed for dismissal of the suit with costs.*



5. *The defendant in H.R.P. Suit No. 13/17 has filed their written statement at Exh. 13 and defendant no. 2 has given adoption pursis at Exh. 15 to consider the written statement of the defendant no. 1 as his written statement. Wherein the defendants have contended that plaintiff has filed false suit; father of the defendant no. 1 and brother Shankerbhai Chhotubhai Lodha, father of defendant No. 2 were residing together in the suit premises, father of the defendant no. 1 namely Chhotubhai Bhikhubhai expired on 18.10.1972 in the suit premises and at that time defendant no. 1 and his family and his brother namely Shankarbhai and mother of the defendant no. 1 were residing in the suit premises and thereafter, Shankarbhai Chhotubhai expired on 24.1.1980 in the suit premises and his family were residing in the suit premises and mother of Shankarbhai and the defendant no. 1, Jankiben expired in the suit premises, thereafter, elder brother of the defendant no. 2 expired in the suit premises and defendant no. 1, his family and defendant no. 2, his family are residing in the suit premises; the defendant further contended that he went to give rent of the suit premises but plaintiff denied to issue rent receipt and therefore, he has not paid rent and deposited amount of rent and advance rent in H.R.P. Suit No. 473/2008; denied subletting and also denied that he is not residing in the suit premises; the defendant is in possession of the suit premises and used the suit premises; the defendant further contended*

*that the previous owner of the suit premises has sent attornment letter on dtd. 14.6.1996 by writing date 23.3.1993 on letter, in the name of father of the defendant no. 1, at that time father of the defendant no. 1 expired and present and previous owner were well aware about the death of father of the defendant no. 1 and intentionally sent registered A. D, in the name of father of the defendant no. 1 and attornment notice received by the defendant no. 1 and defendant no. 1 has written registered letter to the previous owner but the said letter returned back with the endorsement "refused" and defendant no. 1 was not aware about address of the present landlord and therefore not sent rent of the suit premises and deposited the same in H.R.P. Suit No. 473/2008, and plaintiff well aware about of all these facts and plaintiff has sent statutory notice on dtd.15-04-2014, same was replied by the defendant No. 1 on dtd. 22-04-2014 disclosing hte facts that hee has already deposited the rent amount in the Court in H.R.P. Suit No. 473/2008. It is further stated that though notice was issued by the plaintiff on dtd. 15-04-2014 but filed suit in the year 2017 and suit is barred by law of limitation and suit premises is bearing Municipal Census No. 2051/9/1 and plaintiff has given wrong description of the suit premises; the Court commissioner has noted one latrine in his report actually there is two latrine in the suit premises, the plaintiff in his sale deed also mentioned two latrine and it is declared that there is two latrines in the suit premises; the*

*defendant further contended that as per photographs produced by the plaintiff, it shows that the plaintiff has illegally parked scooters in the egress and ingress way of the defendant and it causes obstruction, hindrance to the defendant and his family members and denied remaining facts of the plaintiff's suit and prayed to dismiss the suit of the plaintiff with heavy compensatory costs.*

6. *Following issues have been framed by my learned predecessor Judge in H.R.P. Suit No. 473/2008 vide Exh. 29.*

### **ISSUES**

- 1 *Whether the plaintiff proves that the defendant no.1 has not paid rent from 26.03.1993 onwards as alleged by the plaintiff?*
- 2 *Whether the plaintiff proves that the defendant no.1 has made permanent alternations in the suit premises?*
- 3 *Whether the plaintiff proves that he requires the suit premises for his personal bonafide use and occupation?*
- 4 *If so, whether greater hardship will be caused in passing the decree than refusing to pass it?*
- 5 *Whether the plaintiff proves that the defendant no.1 has been guilty of nuisance and annoyance as alleged?*
- 5(A) *Whether the plaintiff proves that defendant no.1 has sublet*

*and/or by illegal license transferred the suit premises to defendant no.2 as alleged?*

*5(B) Whether the plaintiff proves that defendant no.1 has committed breach of injunction? If yes, what is its effect?*

*6 Whether the plaintiff is entitled for injunction as prayed for?*

*6(A) Whether the plaintiff proves that the defendant no.1 has sublet and/or by illegal licence transferred the suit premises to the defendant no.2?*

*7 Whether the defendants prove that both of them alongwith other family members of the original tenant have become tenants under Section 5 (11) (c) of the Rent Act?*

*8 Whether the suit is bad for non-joinder of necessary parties?*

*9 What order and decree?*

*7. My findings for the above issues are as under:*

*1 In the negative.*

*2 In the negative.*

*3 In the negative.*

*4 In the negative. Defendants will suffered greater hardship.*

*5 In the negative.*

*5A In the negative.*

5B *In the negative.*

6 *In the affirmative.*

6A *In the negative.*

7 *In the affirmative.*

8 *In the negative.*

9 *As per final order.*

8. *Following issues have been framed in H.R.P. Suit No. 13/2017 by my ld. predecessor Judge vide Exh.16.*

**ISSUES**

- 1 *Whether the plaintiff proves that only the defendant no.1 is tenant of the suit premises?*
- 2 *Whether the plaintiff proves that the defendant no.1 is tenant in arrears of rent for more than six months prior to filing of the suit?*
- 3 *If so, whether the defendant is ready and willing to pay rent and is protected from eviction decree under Section 12 of the Bombay Rent Act?*
- 4 *Whether the plaintiff proves that the defendant no.1 has illegally transferred, assigned or sublet the suit premises to the defendant no. 2 and thereby profiteering?*
- 5 *Whether the plaintiff proves that the defendant no.1 has acquired alternative suitable accommodation as alleged?*

- 6     *Whether the plaintiff proves that legal and valid notice is served to the defendant no.1?*
  - 7     *Whether the defendant nos. 1 and 2 prove that they both are the tenants of the suit premises?*
  - 8     *Whether the defendants prove that plaintiff's suit is not maintainable?*
  - 9     *Whether the plaintiff is entitled for relief as prayed for?*
  - 10    *What order and decree?*
9.    *My findings for the above issues are as under:*
- 1     *In the negative.*
  - 2     *In the negative.*
  - 3     *In the affirmative.*
  - 4     *In the negative.*
  - 5     *In the negative.*
  - 6     *In the negative.*
  - 7     *In the affirmative.*
  - 8     *In the negative.*
  - 9     *As per final order.*
  - 10    *As per final order.*
10.   *In the support of his case the plaintiff has placed reliance on the following oral as well as documentary evidence.*

| <b>Sr. No.</b> | <b>Particulars</b>                                             | <b>Exh.</b> |
|----------------|----------------------------------------------------------------|-------------|
| 1              | <i>Examination-in-chief of the plaintiff.</i>                  | 80          |
| 2              | <i>Court commission report and map.</i>                        | 151, 152    |
| 3              | <i>Copy of municipal tax bill.</i>                             | 81          |
| 4              | <i>Photographs of the suit premises and bill.</i>              | 82,83       |
| 5              | <i>Photographs of the suit premises.</i>                       | 84 to 99    |
| 6              | <i>Court commission report and map dtd. 20.7.2017.</i>         | 153, 154    |
| 7              | <i>Photographs of the suit premises.</i>                       | 100 to 106  |
| 8              | <i>Copy of General Power of attorney.</i>                      | 107         |
| 9              | <i>Certified copy of sale deed of the suit premises.</i>       | 108         |
| 10             | <i>Office copy of notice issued by plaintiff to defendant.</i> | 109         |
| 11             | <i>Original postal slip.</i>                                   | 110         |
| 12             | <i>Original postal acknowledgment.</i>                         | 111         |
| 13             | <i>Reply of the defendant to notice of the plaintiff.</i>      | 112         |
| 14             | <i>Closing pursis.</i>                                         | 156         |

11. In the support of his case the defendant has placed reliance on the following oral as well as documentary evidence.

| <b>Sr. No.</b> | <b>Particulars</b>                                                               | <b>Exh.</b> |
|----------------|----------------------------------------------------------------------------------|-------------|
| 1              | <i>Examination-in-chief of the defendant namely Bhikhubhai Chhotubhai Lodha.</i> | 160         |
| 2              | <i>Original photographs of the suit premises.</i>                                | 161, 162    |
| 3              | <i>Original rent receipts of the suit premises.</i>                              | 117 to 124  |

|    |                                                                               |                   |
|----|-------------------------------------------------------------------------------|-------------------|
| 4  | <i>Original money order receipts.</i>                                         | <i>125 to 130</i> |
| 5  | <i>Copy of death certificate of the Chhotalal Bhikhabhai.</i>                 | <i>131</i>        |
| 6  | <i>Copy of death certificate of the Shankarlal Chhotalal.</i>                 | <i>132</i>        |
| 7  | <i>Copy of death certificate of the Mukeshbhai Shankarbhai Lodha.</i>         | <i>133</i>        |
| 8  | <i>Copy of death certificate of the Jankiben Chhotalal Lodha.</i>             | <i>134</i>        |
| 9  | <i>Original attornment letter dtd 23.3.1993 with original cover.</i>          | <i>135</i>        |
| 10 | <i>Copy of death certificate of Kalpesh Bhikhabhai Patel.</i>                 | <i>136</i>        |
| 11 | <i>Original School living Certificate of the Rajeshbhai Shankarlal Lodha.</i> | <i>137</i>        |
| 12 | <i>Original Electricity bills of the suit premises.</i>                       | <i>138 to 143</i> |
| 13 | <i>Photographs of the suit premises and bill of the photographs.</i>          | <i>144 to 146</i> |
| 14 | <i>Photographs of the suit premises and bill of the photographs.</i>          | <i>147 to 150</i> |
| 15 | <i>Closing pursis.</i>                                                        | <i>163</i>        |

### **REASONS**

*That all these issues are interconnected to each other and the discussion in respect of the said issues are interrelated hence, to avoid repetition, I assign my reasons for all these issues*



*together.*

**Issue Nos. 3 & 4 in H.R.P. Suit No. 473/2008.**

12. *To prove above issues, burden lies on the plaintiff but at the time of final arguments the ld. advocate for the plaintiff Mr. I. B. Mev, has vehemently argued that the plaintiff pleaded and deposed about he requires the suit premises for his reasonable and bonafide requirement for use and occupation and plaintiff will suffer greater hardship if the decree will not pass and same will refuse but plaintiff has not proved above issue therefore, he is not pressed above issues.*

13. *I have gone through the arguments as advanced by the ld. advocate for the plaintiff and while considering the facts as pleaded and deposed by the plaintiff, the plaintiff in his plaint as well as in his deposition on oath at Exh. 80, pleaded and deposed that the plaintiff is required the suit premises for his reasonable and bonafide use and occupation. But the ld. advocate for the plaintiff at the stage of final arguments fairly not pressed above both issues, but he has not moved any pursis for not pressing the above issues, therefore, considering the facts on record, it is admitted facts that suit premises was purchased by the plaintiff from the erstwhile landlord on dtd. 26<sup>th</sup> March, 1993 which corroborate from the document vide Exh. 108, a copy of registered sale deed. Not only that even while considering*

*the facts as admitted by the plaintiff in his cross-examination on oath below Exh. 80, he has admitted that "In his family there were 4 members and he was residing on the first floor of the suit premises and also made construction of second floor", therefore, while considering the provision as envisaged under Sec. 13 (1) (g) of the Bombay Rent Act, I am of the view that the plaintiff's requirement is not reasonable and bonafide but it appears that same is merely wish and will and not only that even while considering the Explanation (a) of the Sec. 13 (2) of the Bombay Rent Act, which is as **Explanation for the purpose of clause (g) of sub-section(1):-** "(a) A person shall not be deemed to be a landlord unless he has acquired his interest in the premises at a date prior to the beginning of the tenancy or the first day of January, 1964, whichever is later, or if the interest has devolved on him by inheritance or succession, his predecessor in title had acquired the interest at a date prior to the beginning of the tenancy or the first day of January, 1964, whichever is later"*

*Therefore, while considering the explanation for the purpose of clause (g) of sub-Section (1) of Sec. 13 of the Bombay Rent Act, it is admitted fact on record that plaintiff is not landlord of the suit premises on or before first January, 1964, not only that even no interest has been devolved in favour of the plaintiff by inheritance or succession, on the contrary it is admitted fact on record that the plaintiff became landlord of the suit premises since 26<sup>th</sup> March, 1993*

*which corroborate from the document vide Exh. 108, a copy of registered sale deed. Not only that even as discussed, it is an admitted facts on record that in the family of the plaintiff there were 4 members and and the plaintiff is residing on the first floor of the suit premises and also made construction on the second floor, it means that plaintiff is having sufficient premises to accommodate himself as well as his family members, therefore, while considering the provision as envisaged under Sec. 13 (2) of the Bombay Rent Act, I am of the view that greater hardship if decree will pass will suffer by the defendant-tenants and not by the plaintiff landlord therefore, considering the above facts and considerations, I decide the issue No. 3 in the negative and answer of issue No. 4 defendant will suffer greater hardship if decree is passed in favour of the plaintiff-landlord on the ground to Section 13 (1) (g) of the Bombay Rent Act.*

**Issue No. 8 in H.R.P. Suit No. 473/2008.**

14. *To prove the above issue, burden lies on the defendant and it appears that the defendant in his written statement at Exh. 23 as well as in his examination-in-chief on affidavit vide Exh. 160 plead and deposed that plaintiff has not joined all the legal heirs of the deceased original tenant, suit of the plaintiff is bad for non-joinder of the necessary parties but while appreciating of the*

*documentary evidence on record, from that it clearly transpires that though the plaintiff has pleaded and deposed that defendant no. 2 is a sub-tenant of the suit premises but while considering the discussion as held above, at the relevant time, it is held that the defendant no. 2 is not sub-tenant but defendant no. 2 is also statutory tenant of the suit premises as envisaged under Sec. 5 (11) (c) (i) of the Bombay Rent Act. Not only that there is no iota of evidence adduced by the defendant-tenant on the record that save and except the defendants who are other legal heirs of the deceased original tenant to whom the plaintiff has not joined as a defendants in the suit. On the contrary while considering the pedigree of the deceased original tenant Chhotubhai Bhikabhai Lodha, I am also of the view that present defendants are to be considered a necessary and proper party and it appears that the plaintiff has joined the both the defendants, it means, defendant no. 1 son of the original tenant and grand son of the original deceased tenant as a defendant, therefore, while considering above facts and circumstances, I am of the view that defendants failed to prove suit of the plaintiff is bad for non-joinder of the necessary party hence, I answer issue No. 8 in the negative.*

**Issue No. 8 in H.R.P. Suit No. 13/2017.**

15. To prove above issue, burden lies upon the defendant and it appears that the defendants in their written statement vide Exh. 13 and the defendant no. 1 in his examination-in-chief vide Exh. 160 pleaded and deposed that suit of the plaintiff is not maintainable but while appreciating entire documentary evidence on record and facts as pleaded and deposed by the defendants, defendants have admitted that the defendants are statutory tenants of the suit premises and also admitted that plaintiff became landlord after 26<sup>th</sup> March, 1993, it means that there is relationship as landlord and tenant between the plaintiff and defendants, therefore, considering the provisions as envisaged under Sec. 28 of the Bombay Rent Act, the Court of Small Cause Court is having jurisdiction to decide of the dispute between the landlord and tenant and it is an admitted fact on record that plaintiff being landlord filed both the suit against the defendants-tenants inter-alia on the different grounds for obtaining vacant and peaceful possession of the suit premises under the provisions of the Bombay Rent Act, and as discussed, regarding relationship between the parties, it is also admitted fact on record therefore, the relationship of plaintiff and defendant as landlord and tenant is admitted fact as per provisions as envisaged under Sec. 28 of the Bombay Rent Act. Therefore, suit between the parties is maintainable, hence, I am of the opinion that suit of the plaintiff is

*maintainable before this Court. Therefore, considering the above facts and circumstances, I am of the opinion that defendants failed to prove that plaintiff's suit is not maintainable, on the contrary, discussion as held in above, suit of the plaintiff is maintainable before this Court. Hence, I answer the issue No. 8 in the negative.*

**Issue No. 7 in HRP Suit No. 473/2008 and Issue Nos. 1 and 7 in HRP Suit No. 13 /2017.**

16. *To prove the above issue No. 7 in both the suits the burden lies upon the defendants and to prove the issue No. 1 in HRP Suit No. 13/2017 the burden lies on the plaintiff and to prove the above issues the defendant No. 1 has deposed on oath as per Order 18 Rule 4 of the Code of Civil Procedure and to prove the issue No. 1 as framed in HRP Suit No. 13/2017, the plaintiff submitted in his examination-in-chief on affidavit vide Exh. 80 as per Order 18 Rule 4 of the Code of Civil Procedure and both the parties have reiterated the same fact as pleaded in plaint as well as in the written statement.*

17. *Thereafter, the learned advocate for the plaintiff Mr. I. B. Mev argued that the plaintiff of the both the suits are landlord and purchase the suit premises from erstwhile landlord Lagirchand Punjalal Sheth, A Karta HUF by registered sale deed on dated*

*26/03/1993 and becomes owner of the suit premises. He further argued that the suit premises was let out by the erstwhile landlord to the father of the defendant No. 1 deceased Chhotubhai Bhikhubhai Lodha before 50 years back at the monthly rent amount of Rs. 17/- and the liability to pay the municipal tax as well as education cess is upon the defendant No. 1 tenant. He further argued that the erstwhile landlord who sold the suit premises by registered sale deed to the plaintiff on dated 26/03/1993, a copy of the registered sale deed is on record vide Exh. 108 and on the same date erstwhile landlord by attornment notice inform the defendant No. 1 tenant that he has sold out the suit premises to the plaintiff said attornment notice, is on record vide Exh. 135 was served to the defendant No. 1 tenant and though the defendant No. 1 tenant is having a knowledge that the monthly rent of the suit premises from dated 23/03/1993 onwards required to pay to the plaintiff landlord and though the plaintiff time and again demanded the monthly rent from the defendant No. 1 tenant then also the defendant No. 1 tenant has failed to pay the monthly rent to the plaintiff landlord. Not only that though the defendant No. 1 tenant was/is having a knowledge that the plaintiff is landlord and the defendant No. 1 tenant have no right and interest to transfer, assign and sublet the suit premises then also for invading the right and interest of the plaintiff landlord the defendant No. 1 tenant by putting one door between the suit premises divided the suit*

*premises into two portion and made alteration which cannot be removed without causing serious damage to the suit premises and by dividing the suit premises into two portion defendant No. 1 started residing in one portion and defendant No. 1 unlawfully transferred, assigned or sublet the second portion of the suit premises to the defendant No. 2 and thereby making profiteering out of the same. Therefore, on different grounds for obtaining the vacant and peaceful possession of the suit premises, the plaintiff landlord filed HRP Suit No. 473/2008 against the defendants it means the defendant No. 1 tenant and against the defendant No. 2 sub-tenant on dated 04/03/2008 and on service of the summons notice, the defendants were remained present and the defendants vide Exh. 23 filed the written statement and pleaded the false facts and denied the fact as pleaded by the plaintiff. Not only that even during the pendency of the HRP Suit No. 473/2008 as filed by the plaintiff landlord against the defendants, the plaintiff landlord filed another HRP Suit No. 13/2017 against the defendants on dated 06/01/2017 and in the said suit also the plaintiff specifically pleaded that the defendant No. 1 is only tenant of the suit premises and after the death of his father Chhotubhai Bhikhubhai as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, the defendant No. 1 is become statutory tenant of the suit premises and in the said suit also on service of the summons notice, the defendants were remained*



*present and vide Exh. 13 the defendant No. 1 filed written statement and vide Exh. 15, the defendant No. 2 adopted the written statement as filed by the defendant No. 1 and in the same also the defendants were merely denied the fact as pleaded by the plaintiff landlord that the defendant No. 1 is only tenant of the suit premises as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act. Not only that both the suits were consolidated and the evidence were recorded in HRP Suit No. 473/2008 and vide Exh. 80, the plaintiff has submitted his examination-in-chief on affidavit and in the same also the plaintiff has reiterated the same fact as pleaded in both the suits but during the cross-examination of the plaintiff, the defendants were not brought the correct fact and have not rebutted and controverted the fact as pleaded and deposed by the plaintiff landlord. Not only that even the defendants have not adduced any iota of evidence on the record to show that defendant No. 2 is also statutory tenant of the suit premises. On the contrary, the defendant No. 1 in his cross-examination below Exh. 160 on oath admitted that "he does not have the death certificate of Meenaben but he clarified the death certificate of Meenaben, he has not found out, therefore, he could not adduce on record. He further deposed and admitted in cross that Meenaben was residing in the suit premises for supporting the said fact, he will find out the evidence and will adduce on the record." Therefore, while considering the fact as admitted by the defendant*

*No. 1 in his cross-examination on oath it becomes crystal clear that the brother of defendant No. 1 Shankarbhai Chhotubhai Lodha wife Meenaben along with her children were shifted at Barampura, she was died at Barampura, Ahmedabad and defendant No. 2 is a son of said Meenaben and was not residing in the suit premises. Not only that though the defendant No. 1 deposed that he will adduce the document on the record that Meenaben was residing in the suit premises, but the defendant No. 1 has not adduced any documentary evidence on record. Therefore, as per the provision as envisaged under Section 114 (g) of the Evidence Act, adverse inference is required to be drawn against the defendant No. 1. Therefore, while considering the above facts and circumstances by cogent and corroborative evidence, the plaintiff has proved that the defendant No. 1 is only tenant of the suit premises and the defendant No. 2 is not tenant of the suit premises as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act. Therefore, he prays to answer the issue No. 1 in HRP Suit No. 13/2017 in the affirmative and prays to answer the issue No. 7 of both the suits in the negative.*

18. The learned advocate for the defendants Mr. J. N. Ahmedi argued that the plaintiff landlord filed HRP Suit No. 473/2008 on dated 04/03/2008 and in the said suit on service of summons notice, the defendants were remained present along with their learned

*advocate and filed their written statement vide Exh. 13 and in the said written statement the defendants specifically pleaded that the suit premises was let out by the erstwhile landlord to Chhotubhai Bhikhubhai Lodha in the year 1945 and said Chhotubhai Bhikhubhai Lodha was residing in the suit premises along with his family and said Chhotubhai Bhikhubhai Lodha original tenant was died on dated 18/10/1972 in the suit premises, a copy of the death certificate is on record vide Exh. 131. He further argued that at the time of death of original tenant Chhotubhai Bhikhubhai Lodha his wife Jankiben, son of Bhikhubhai Chhotubhai, Nandlal Bhikhubhai and Shankarbhai Bhikhubhai Lodha were residing in the suit premises. He further argued that the defendant No. 1 is a son of deceased Chhotubhai Bhikhubhai Lodha and the defendant No. 2 is a grand son of deceased original tenant Chhotubhai Bhikhubhai Lodha.*

19. *He further argued that even the defendants specifically pleaded that, the defendant No. 1 and his brother Shankarlal Chhotubhai Lodha residing in the suit premises along with their family member. He further argued that Nandlal Chhotubhai Lodha brother of defendant No. 1 was died intestate in the suit premises on dated 05/04/1979, thereafter, brother of defendant No. 1 Shankarlal Chhotubhai Lodha who was also residing in the suit premises along*

*with his family was died in the suit premises on dated 24/01/1980, a copy of death certificate is on record vide Exh. 132. He further argued that at the time of death of brother of defendant No. 1 Shankarlal Chhotubhai Lodha, his legal heirs wife Meenaben, son Mukeshbhai, Rajeshbhai and daughter Sunitaben was residing in the suit premises along with Shankarlal Chhotubhai Lodha. He further argued that wife of deceased Shankarbhai Chhotubhi Lodha, Meenaben was died in the suit premises on dated 13/01/1992, thereafter, son of deceased Shankarbhai Chhotubhai Lodha, Mukeshbhai was died in the suit premises on dated 26/07/1999 and daughter Sunitaben was married and she was residing in her in law's house it means that after 4 legal heirs of deceased Shankarbhai defendant No. 2 Rajeshbhai Shankarbhai Lodha who is son residing in the suit premises along with his family with the defendant No. 1. He further argued that on dated 05/01/2002 mother of defendant No. 1 Jankiben was also died in the suit premises, a copy of the death certificate is on record vide Exh. 134 and as he argued son of deceased Shankarbhai, Mukesh who was also died in the suit premises, a copy of the death certificate is on record vide Exh. 133. Therefore, considering the above facts, it is evident on the record that after death of Jankiben Chhotubhai Lodha, Bhikhubhai Chhotubhai Lodha, Nandlal Chhotubhai Lodha, Shankarlal Chhotubhai Lodha, Meenaben Shankarlal Lodha, Mukesh Shankarlal Lodha, who all*

*were falls under the definition of statutory tenant as per provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, the defendant No. 1 and his nephew defendant No. 2 become the statutory tenant of the suit premises as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act. He further argued that regarding the above facts the plaintiff landlord though having knowledge and said facts were not denied by the plaintiff by adducing cogent and corroborative evidence then also it appears that by filing the HRP Suit No. 13/2017 on dated 16/01/2017 with malice intention and without making any verification the plaintiff landlord again pleaded that the defendant No. 1 is only tenant of the suit premises and the defendant No. 2 is not tenant, but he is sub tenant, but in the said suit also by filing the written statement vide Exh. 13, the defendant came with the specific facts as pleaded in the written statement as filed vide Exh. 23 in HRP Suit No. 473/2008. Not only that even the said fact is also specifically deposed by the defendant No. 1 in his examination-in-chief on oath vide Exh. 160 but by adducing the cogent and corroborative evidence, the plaintiff has not rebutted and controverted the facts as pleaded and deposed by the defendant tenant. Not only that the plaintiff in his cross-examination on oath below Exh. 60 specifically admitted that suit premises was let out by the erstwhile landlord to Chhotubhai Bhikhubhai Lodha. Not only that even he has also admitted he was not having knowledge*

*and have not inquired regarding the fact as pleaded by the defendants in written statement regarding the death of above family members of the defendants. Therefore, while considering the document vide Exh. 132 to vide Exh. 134, a death certificate of deceased Shankarlal Chhotulal, death certificate of Mukeshbhai Shankarbhai Lodha and death certificate of Jankiben Chhotulal Lodha from that it becomes crystal clear that above deceased were died in the suit premises. Not only that even while considering the document vide Exh. 137 original school living certificate of Rajeshbhai Shankarlal Lodha it means the defendant No. 2 in the same also address of the defendant No. 2 is mentioned as address of the suit premises and regarding the said fact also the plaintiff has not adduced any cogent and corroborative evidence to rebut and to controvert and the said facts as pleaded and deposed by the defendants. Therefore, considering the above facts and circumstances and documentary evidence on the record the defendants proved that the defendants along with other family members of the original tenant have become tenant under Section 5 (11) (c) (i) of the Bombay rent Act, and both the defendants are tenant of the suit premises. Therefore, he prays to answer the issue No. 7 in both the suits in the affirmative and prays to answer the issue No. 1 in HRP Suit No. 13/2017 in the negative.*

20. *I have gone through the lengthy arguments as advanced by the learned advocates for the parties and also gone through the oral as well as documentary evidence as adduced on the record. Further while considering the oral as well as documentary evidence on record it is admitted fact that the plaintiff has purchased the suit premises by registered sale deed on dated 26/03/1993 from erstwhile landlord Legirchand Punjalal Sheth, a copy of registered sale deed is on record vide Exh. 108. Further it is also admitted facts on the record that the plaintiff landlord had purchased the suit premises with sitting tenant it is also admitted facts on the record that erstwhile landlord had let out the suit premises to one Chhotubhai Bhikhubhai Lodha and said original tenant was residing since decades in the suit premises along with his family. Further it is also admitted fact on the record that the defendant No. 1 is a legal heir of deceased Chhotubhai Bhikhubhai Lodha who was died on dated 08/10/1972, a copy of death certificate is on record vide Exh. 131. Further while considering the document vide Exh. 131 death certificate original deceased tenant Chhotubhai Bhikhubhai Lodha in the suit premises. Therefore, while considering the above facts, it becomes crystal clear on the record that Chhotubhai Bhikhubhai Lodha was tenant of the suit premises and was residing in the suit premises along with his family and was died on dated 18/10/1972. Further it is also admitted fact on the record that the monthly rent of the suit premises*

*is at the rate of Rs. 17/- per month and it is also admitted fact on the record that earlier liability to pay the municipal tax and education cess is upon landlord, but subsequently the said liability was shifted and liability to pay municipal tax and education cess is upon the defendant tenant.*

21. *Further while appreciating the oral as well as documentary evidence on the record after becoming the landlord on dated 26/03/1993, on dated 04/03/2008, the plaintiff landlord filed the suit against the defendants inter alia on the different grounds for obtaining the vacant and peaceful possession of the suit premises being HRP Suit No. 473/2008 and the plaintiff came with the specific case that the defendant No. 1 is a tenant and the defendant No. 2 is a sub tenant. Further it appears from the record that on service of summons notice the defendants were remained present along with their learned advocate and filed written statement vide Exh. 23 in the said suit and the defendants were came with the specific defence that the defendants are statutory tenant as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, and also pleaded in their written statement that Chhotubhai Bhikhubhai Lodha was original tenant and he was died in the suit premises on dated 18/10/1972 in the suit premises and said fact is also deposed by the defendant No. 1 in his examination-in-chief on*



*affidavit vide Exh. 160 and said fact is also corroborated from the document vide Exh. 131, a copy of death certificate of deceased Chhotubhai Bhikhubhai Lodha. Further while appreciating the entire facts as pleaded by the defendants in written statement vide Exh. 23, the defendant came with the specific defence regarding the pedigree of deceased Chhotubhai Bhikhubhai Lodha which is as under.*

*\* Pedigree of deceased Chhotubhai Bhikhubhai Lodha.*

*Chhotubhai Bhikhubhai Lodha*

*Original tenant*

*Died on dtd. 18/10/1972*

*Exh. 131 death certificates*

*Died in suit premises*

|                                |                        |                            |                               |
|--------------------------------|------------------------|----------------------------|-------------------------------|
| <i>Jankiben</i>                | <i>Defendant No. 1</i> | <i>Nandlal</i>             | <i>Shankarlal</i>             |
| <i>Chhotubhai</i>              | <i>Bhikhubhai</i>      | <i>Chhotubhai</i>          | <i>Chhotubhai</i>             |
| <i>Lodha</i>                   | <i>Chhotubhai</i>      | <i>Lodha</i>               | <i>Lodha</i>                  |
|                                | <i>Lodha</i>           |                            |                               |
| wife                           | son                    | son                        | son                           |
| Died on dtd.<br>05/01/2000     |                        | Died on dtd.<br>05/04/1979 | Died on dtd.<br>24/01/1980    |
| Exh. 134 death<br>certificates |                        |                            | Died in suit<br>premises      |
| Died in suit<br>premises       |                        |                            | Exh. 132 death<br>certificate |

|                                |                               |                               |                         |
|--------------------------------|-------------------------------|-------------------------------|-------------------------|
| Minaben<br>Shankarlal<br>Lodha | Mukesh<br>Shankarlal<br>Lodha | Rajesh<br>Shankarlal<br>Lodha | Sunitaben<br>Shankarlal |
| wife                           | son                           | son                           | Nandlal                 |
| Died on dtd.<br>13/01/1992     | Died on dtd.<br>26/07/1999    | Defendant No. 2               | Maried                  |
| Died in the suit<br>premises   | Exh. 133 death<br>certificate |                               |                         |
|                                | Suit address                  |                               |                         |

22. *Further it appears that the said fact is also deposed by the defendant No. 1 in his examination-in-chief on oath below Exh. 160 and there is no iota of evidence adduced by the plaintiff landlord on the record that the above legal heirs as shown in pedigree of the defendants are not correct, but same is fabricated and concocted. Not only that even the plaintiff has not rebutted and controverted the facts as pleaded and deposed by the defendant. Therefore, it becomes crystal clear on the record that at the time of death of original deceased tenant Chhotubhai Bhikhubhai Lodha is surviving legal heirs Jankiben Chhotubhai Lodha wife of deceased original tenant, defendant No. 2 Bhikhubhai Chhutobhai Lodha son of deceased original tenant, Nandlal Chhotubhai Lodha son of deceased original tenant and Shankarlal Chhotubhai Lodha son of deceased tenant*

*and it appears that the defendant came with the specific defence that all the legal heirs of deceased original tenant are residing in the suit premises and brother of defendant No. 1 Nandlal Chhouthobhai Lodha was died intestate in the suit premises on dated 05/04/1979 and another brother of defendant No. 1 Shankarlal Chhotubhai who was also residing in the suit premises was died on dated 24/01/1980 in the suit premises which is corroborated from the document vide Exh. 132, death certificate of Shankarlal Chhotubhai Lodha. Further it appears from the record that the mother of defendant No. 1 Jankiben Chhotubhai Lodha was died on dated 05/01/2000 in the suit premises, same is corroborated from the document vide Exh. 134 death certificate. Further it is also transpired from the record that the deceased brother of defendant No. 1 Shankarlal Chhotubhai Lodha who was died on dated 24/01/1980 was residing along with his family in the suit premises and after his death his wife, two sons and one daughter were residing in the suit premises. Further it appears that wife of deceased Shankarlal chhotubhai, Meenaben Shankarlal Lodha was died on dated 13/01/1992, thereafter Mukesh Shankarlal son of deceased Shankarlal Chhotubhai Lodha was died on dated 26/07/1990 in the suit premises and said fact is corroborated from the document vide Exh. 133, a death certificate of deceased Shankarlal Lodha. Further it appears that the defendant No. 2 Rajeshbhai Shankarlal is son of deceased Shankarlal Chhotubhai*

*Lodha and the daughter of deceased Shankarlal Chhotubhai, Sunitaben was married and residing in her-in-law's house. Therefore, while considering the above facts and the documentary evidence on the record from the same it clearly and ostensibly transpires that in HRP Suit No. 473/2008, the defendants were come with the specific defence that the defendant No. 1 is not only statutory tenant under Section 5 (11) (c) (i) of the Bombay Rent Act, but the defendant No. 2 son of deceased Shankarlal Chhotubhai Lodha is also become statutory tenant under Section 5 (11) (c) (i) of the Bombay Rent Act, after death of his father Shankarbhai Chhotubhai Lodha and as discussed even the said fact is also deposed by the defendant No. 1 in his examination-in-chief on affidavit vide Exh. 160. Not only that though the defendants in HRP Suit No. 473/2008 as filed by the plaintiff, by filing the written statement vide Exh. 23 came with the above specific defence then also it transpires that the plaintiff landlord who filed HRP Suit No. 13/2017 on dated 16/01/2017 in the same also the plaintiff has pleaded that the defendant No. 1 is a tenant and defendant No. 2 is a sub tenant, but nothing transpires from the record that the fact as pleaded by the defendants in their written statement vide Exh. 23 as filed in HRP Suit No. 473/2008, same was specific denied by the plaintiff landlord that the fact as pleaded by the defendants are not correct. Not only that even it appears from the record that in HRP Suit No. 13/2017*

*that the defendants by filing the written statement vide Exh. 13 again reiterated the same fact regarding the pedigree of deceased original tenant Chhotubhai Bhikhubhai Lodha and came with the specific defence that the defendants are statutory tenant of the suit premises as per the provisions as envisaged under Section 5 (11) (c)(i) of the Bombay Rent Act.*

23. *Further, while appreciating the oral as well as documentary evidence on the record though the plaintiff landlord came with the specific case that the defendant No. 1 is only tenant of the suit premises, but as discussed the plaintiff has not specifically denied the fact as pleaded by the defendants in their written statement vide Exh. 23 and vide Exh. 13. Not only that even the plaintiff has not rebutted and controverted that the document vide Exh. 132, Exh. 133 and Exh. 134 death certificates are false, concocted and fabricated. Not only that even while considering the document vide Exh. 137, a original school leaving certificate of defendant No. 2 in which also address appears of the suit premises. Therefore, while considering the provisions as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, which is as “tenant means any person by whom or on whose account rent is payable for any premises and includes (c) (i) in relation to premises let for residence, any member of the tenant’s family residing with the tenant at the time of, or within three months immediately preceding, the death of the tenant as may be decided in*

*default of agreement by the Court.” Therefore, while considering the definition of tenant after death of original tenant from it becomes crystal clear that after the death of original tenant any family members of the tenant residing with the tenant at the time of or within three months immediately preceding the death of the tenant are become statutory tenant of the rented premises and while considering the fact as discussed above it is evident on the record that the defendants by making specific pleading and by adducing the documentary evidence on the record came with the specific defence that both the tenants are statutory tenant of the suit premises as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act.*

24. *Further, while appreciating the entire oral as well as documentary evidence on the record and discussion as held above though the plaintiff came with the specific case that the defendant No. 1 is only tenant of the suit premises, but there is no iota of evidence adduced by the plaintiff on the record that after death of original tenant Chhotubhai Bhikhubhai Lodha on dated 18/10/1972 any one of legal heir of deceased original tenant is declared as a statutory tenant of the suit premises. Not only that even it appears that the plaintiff in his cross-examination on oath below Exh. 80 specifically deposed that “he is not knowing whether Chhotubhai*

*Bhikhubhai was died in the year 1972 or not? It is true that defendants in their written statement pleaded that Chhotubhai Bhikhubhai was died in the year 1972 regarding the said fact he has not made any inquiry, he is not aware at the time of death of Chhotubhai Bhikhubhai Lodha, his legal heir his wife and three sons surviving or not, he clarified I am having knowledge about his wife, I am not knowing out of the sons of Chhotubhai Bhikhubhai whether the defendant No. 1 and Nandlal and Shankarlal are sons or not? It is true that the defendants in their written statement pleaded that the defendant No. 1 and Nandlal and Shankarbhai are sons of Chhotubhai Bhikhubhai for that I have not inquired, I am not knowing whether Nandlalbai was died in the year 1979 or not? It is true that defendants in their written statement pleaded that Nandlalbai died in the year 1979 for that I have not inquired, I am not knowing another son of Chhotubhai Bhikhubhai Shankar was died in the year 1980 or not? It is true that regarding the death of Shankarbhai defendants in their written statement, but I have not made any inquiry, I am not knowing Meenaben was widow of Shankarbhai and Mukeshbai was son of Shankarbhai, it is true that regarding the above facts the defendants pleaded in their written statement, but I have not made any inquiry.” The plaintiff has also deposed in his cross-examination on oath below Exh. 80 that “it is true that after becoming owner of the suit premises, he has not issued*

*any attornment notice informing the defendants tenant that he becomes the landlord, he clarified that erstwhile landlord issued attornment notice, I have been shown document vide Exh. 135 is original attornment notice sent by erstwhile landlord to the defendant, it is true that attornment notice vide Exh. 135 issued in the name of Chhotubhai Bhikhubhai, I have not aware or known that the attornment notice as issued vide Exh. 135 on that day Chhotubhai Bhikhubhai was died or not, it is true that after death of Chhotubhai Bhikhubhai which of the legal heirs of deceased tenant be considered as a tenant of the suit premises regarding the said fact, I have not knowing whether any consent or agreement was held between the legal heirs or not?. It is true that when I become landlord of the suit premises at that time also legal heirs of deceased Chhotubhai Bhikhubhai, have not informed me that who becomes statutory tenant of the suit premises, it is true that since I become the landlord of the suit premises no rent receipt issued in the name of defendant No. 1, he clarified that no rent was paid to me.” Therefore, while considering the facts as deposed by the plaintiff in his cross-examination on oath below Exh. 80 from that it becomes crystal clear that no rent receipt was issued by the plaintiff in the name of defendant No. 1. Even it is also become crystal clear on the record that after death of original tenant Chhotubhai Bhikhubhai Lodha any one of legal heir of deceased original tenant was/is not become or*



*declared a tenant of the suit premises. On the contrary it appears from the record that all legal heirs of deceased original tenant Chhotubhai Bhikhubhai who were residing in the suit premises along with deceased tenant which corroborates from the documents vide Exh. 132 to Exh. 134 and Exh. 137 are residing in the suit premises and as discussed, the same fact is specifically pleaded and deposed by the defendants. Therefore, considering the above facts and circumstances and the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, I am of the view that plaintiff has failed to prove that defendant No. 1 is only tenant of the suit premises. On the contrary I am of the view that by adducing cogent and corroborative evidence, the defendants were proved that both of them along with their family members of the original tenant have become tenant under Section 5 (11) (c) (i) of the Bombay Rent Act and both the defendants are statutory tenant of the suit premises. Therefore, considering the above facts and circumstances and discussion as held above, I answer the issue No. 1 in HRP Suit No. 13/2017 in negative and answer the issue No. 7 in both the suits in the affirmative.*

**Issue No. 5A and 6A in HRP Suit No. 473/2008 and issue No. 4 in HRP Suit No. 13/2017:**

25. Above issues are inter connected to each other. Therefore, to

*avoid the repetition above issues are deciding together. Further for proving the above issues, the plaintiff has submitted his examination-in-chief on affidavit vide Exh. 80 as per the provision as envisaged under Order 18 Rule 4 of the Code of Civil Procedure and reiterated the same fact as pleaded in both the suits, thereafter, learned advocate for the plaintiff Mr. I. B. Mev argued that the defendant No. 1 is statutory tenant as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, after death of original deceased tenant Chhotubhai Bhikhubhai Lodha and without prior permission or written consent of the plaintiff landlord the defendant No. 1 by putting one door between the suit premises, divided the suit premises into two portion and in the first portion of the suit premises the defendant No. 1 tenant is residing and second portion of the suit premises unlawfully, sublet, transfer and assign and interest therein by the defendant No. 1 to the defendant No. 2 and defendant No. 2 is in possession of the second portion of the suit premises and said fact specifically pleaded and deposed by the plaintiff, but the defendants were merely denied the said fact. Therefore, by adducing cogent and corroborative evidence on the record, the plaintiff has proved that the defendant No. 1 has sublet and/or by illegally transfer the suit premises to the defendant No. 2 and thereby profiteering. Therefore, he prays to answer the issue Nos. 5A, 6A and issue No. 4 in the above suit in the affirmative.*

26. *The learned advocate for the defendants Mr. J. N. Ahmedi argued that the defendants are statutory tenant as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act and the defendant No. 1 is uncle of defendant No. 2 and said fact is also admitted by the plaintiff in his cross-examination on oath below Exh. 80. He further argued that the defendants in both the suits by filing in their written statement vide Exh. 23 and Exh. 13 specifically pleaded that how the defendants are become the statutory tenant of the suit premises and as he argued at the relevant time the said fact is not denied by the plaintiff. On the contrary the plaintiff in his cross-examination on oath below Exh. 80 admitted regarding the relationship between the defendant No. 1 and defendant No. 2. Not only that even the defendant No. 1 in his deposition on oath below Exh. 160 also deposed the fact as pleaded in the written statement, but the said fact is also not controverted and rebutted by the plaintiff during the cross-examination of the defendant No. 1. Therefore, while considering the relationship between the defendants and the arguments as advanced by him at the relevant time regarding the pedigree of the original tenant Chhotubhai Bhikhubhai Lodha, the defendant No. 2 is not a sub-tenant of the suit premises. On the contrary the defendant No. 2 who is the son of the deceased Shankarbhai Chhotubhai Lodha brother of defendant No. 1 is also*

*statutory tenant of the suit premises as per the provisions as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act. He further argued that though the defendants in their written statement vide Exh. 23 as filed in HRP Suit No. 473/2008 specifically pleaded regarding the pedigree of deceased original tenant Chhotubhai Bhikhubhai then also it appears that without any inquiry and verification the plaintiff in his HRP Suit No. 13/2017 again pleaded that the defendant No. 2 is sub tenant. But while appreciating the entire oral as well as documentary evidence on the record, the plaintiffs have not adduced any iota of evidence on the record that the defendant No. 1 is only tenant of the suit premises and defendant No. 2 is not a tenant of the suit premises. Not only that even the plaintiff has not adduced any iota of evidence on the record that the defendant No. 1 unlawfully, sublet, transfer and assign whole a part or interest therein to the defendant No. 2. Therefore, while considering the provisions as envisaged under Section 13 (1) (e) and Section 13 (1) (ee) of the Bombay Rent Act, the plaintiff has failed to prove the issue No. 5A and 6A in HRP Suit No. 438/2008 and also fails to prove the issue No. 4 as framed in HRP Suit No. 13/2017. Therefore, he prays to answer the issue No. 5A, 6A and 4 as framed in the above suit in negative.*

27. *I have gone through the lengthy argument as advanced by the*

*learned advocates for the parties and also gone through the oral as well as documentary evidence as adduced on the record and while considering the discussion as held at length while deciding the issue No. 1 in HRP Suit No. 13/2017 and issue No. 7 in both the above suits it becomes crystal clear on the record that the defendant No. 1 is son of the original deceased tenant Chhotubhai Bhikhubhai Lodha and the defendant No. 2 is a son of deceased Shankarlal Chhotubhai Lodha it means nephew defendant No. 1 and as discussed at length the defendants proved that both are statutory tenant of the suit premises as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, and it appears regarding the relationship between the defendants, the plaintiff in his cross-examination on oath also admitted. Not only that even while considering the discussion as held above at the relevant time the defendants in their written statement vide Exh. 23 as filed on HRP Suit No. 473/2008 specifically pleaded regarding the pedigree of deceased original tenant Chhotubhai Lodha and there is no iota of evidence adduced by the plaintiff on the record, the defendants are not family member of deceased original tenant Chhotubhai Bhikhubhai Lodha and the defendant No. 2 was not residing in the suit premises as statutory tenant. On the contrary, while considering the document vide Exh. 137, a original school leaving certificate of defendant No. 2 from that it is crystal clear that the defendant No. 2 was/is residing in the suit*

*premises and as discussed the defendant No. 2 is also statutory tenant of the suit premises. Therefore, once it is decided that the defendants are statutory tenant of the suit premises as per the provisions as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, then question of sub-letting, transferring and assigning whole a part or interest therein as per the provision as envisaged under Section 13 (1) (e) of the Bombay Rent Act does not arise then also it appears that by filing the HRP Suit No. 13/2017 on dated 16/01/2017 the plaintiff against the pleading of the defendants again pleaded that the defendant No. 2 is a sub tenant. But while appreciating the entire oral as well as documentary evidence on the record though the initial burden to prove the facts regarding the unlawfully, subletting, assigning and transferring whole a part interest therein by the head tenant to the sub tenant is lies upon the plaintiff landlord. Even while considering the provision as envisaged under Sections 101 and 102 of the Indian Evidence Act the first burden to prove the fact as pleaded and alleged is upon the plaintiff landlord regarding the above facts and once the plaintiff landlord discharge its initial burden then only onus will shift on the defendants to disprove the fact as alleged by the plaintiff, but while appreciating the entire oral as well as documentary evidence on the record, there is no cogent and corroborative or any iota of evidence adduced by the plaintiff landlord on the record that the defendant*

*No. 1 is only statutory tenant of the suit premises and by unlawfully and without obtaining the consent permission of the plaintiff landlord, the defendant No. 1 sublet, assign and transfer whole a part interest therein in the suit premises to the defendant No. 2 and defendant No. 2 is a sub tenant. On the contrary the discussion as held above and while considering the pedigree of deceased Chhotubhai Bhikhubhai Lodha, it becomes crystal clear on the record that the defendants are statutory tenant of the suit premises as envisaged under Section 5 (11)(c) (i) of the Bombay Rent Act. Not only that to falsify the fact as pleaded and deposed by the defendants in their written statement and the fact as deposed by the defendant No. 1 in his deposition on oath below Exh. 160, the plaintiff has not even examined any independent witness or erstwhile landlord or any neighbour to falsify the case of the defendants. Therefore, while considering the above facts and circumstances and discussion as held above, I am of the view that the plaintiff has not entitled for eviction decree against the defendant tenant and provision as envisaged under Section 13 (1) (e) and Section 13 (1) (ee) of the Bombay Rent Act and I am also of the opinion that the plaintiff has failed to prove that the defendant No. 1 is only tenant of the suit premises and has sublet and/or by legal licence transfer the suit premises to the defendant No. 2 and making profiteering out of the same. Therefore, considering the above facts and circumstances and discussion as held*

*above, I answer the issue No. 5A and 6A as framed in HRP Suit No. 473/2008 in negative and I also answer the issue No. 4 as framed in HRP Suit No. 13/2017 in negative.*

**Issue No. 5 in HRP Suit No. 13/2017 :**

28. *To prove the above issue, the plaintiff has submitted his examination-in-chief on affidavit vide Exh. 80 as per Order 18 Rule 4 of the Code of Civil Procedure and reiterated the same fact as pleaded in the plaint, thereafter, the learned advocate for the plaintiff Mr. I. B. Mev argued that the defendant No. 1 tenant has acquired alternative suitable accommodation and was not using the suit premises for the purpose same was let out. Therefore, he prays to answer the issue No. 5 in the negative.*

29. *Learned advocate for the defendants Mr. J. N. Ahmedi argued that though the plaintiff pleaded and deposed that the defendant No. 1 has acquired alternative suitable accommodation, but in support of the said fact the plaintiff has not adduced any iota of evidence on the record that where the defendant No. 1 has acquired any alternative vacant or alternative possession, suitable for residence. Therefore, in the absence of any evidence on the record the bare words could not be considered as evidence. Therefore, he prays to*



*answer the issue No. 5 in the negative.*

30. *I have gone through the lengthy argument as advanced by the learned advocates for the parties and the oral as well as documentary evidence as adduced on the record and while appreciating oral as well as documentary evidence on the record, the plaintiff landlord came with the specific case that the defendant No. 1 has acquired alternative suitable accommodation and it appears that the said fact is also deposed by the plaintiff on oath below Exh. 80, but while considering the fact as pleaded and deposed by the plaintiff as a whole not in isolation from the same it clearly and ostensibly transpires that the plaintiff in his plaint as well as in his deposition himself pleaded and deposed that the defendant No. 1 is residing in the first portion of the suit premises. Not only that even it appears that the plaintiff in his cross-examination on oath below Exh. 80 also admitted that the defendant No. 1 along with his family residing in the suit premises. Not only that though as per the provisions as envisaged under Section 101 and 102 of the Indian Evidence Act the burden to prove the above issue is lies upon the plaintiff landlord and once the plaintiff will discharge his burden of proof then only the onus will shift on the defendant tenant, but while appreciating the entire oral as well as documentary evidence on the record save and except bare words the plaintiff has not adduced any iota of evidence*

*on the record that the defendant No. 1 tenant after coming into operation of the Bombay Rent Act has built, acquired vacant possession of or been allotted a suitable residence. Therefore, in the absence of any cogent and corroborative evidence, I am of the view the plaintiff has failed to prove that he is entitled for eviction decree as per the provision as envisaged under Section 13 (1) (l) of the Bombay Rent Act. Hence I answer the issue No. 5 in negative.*

**Issue No. 5 in HRP Suit No. 473/2008 :**

31. To prove the above issue, the plaintiff has submitted his examination-in-chief on affidavit vide Exh. 80 as per Order 18 Rule 4 of the Code of Civil Procedure and reiterated the same fact as pleaded in the plaint, thereafter, the learned advocate for the plaintiff Mr. I. B. Mev argued that the defendant tenant by putting Charpai in the open space on the front of suit premises and by putting the vehicles as well as another articles in Northern side of the suit premises creating nuisance and annoyance to the plaintiff as well as the other neighbours and said fact corroborating from the photographs as adduced by the plaintiff on the record vide Exh. 82 and Exh.83. He further argued that though the said fact specifically deposed by the plaintiff in examination-in-chief on affidavit vide Exh. 80 then also the said fact was not rebutted and controverted by the defendant during the cross-examination of the plaintiff. Not only that even the

*defendants have not denied the said fact specifically in their written statement vide Exh. 23. Therefore, while considering the fact as pleaded and deposed by the plaintiff and document vide Exh. 82, the plaintiff has proved that the defendant tenant has put Charpai and vehicles in front of suit premises and defendant No. 1 is creating nuisance and annoyance. Therefore, he prays to answer the issue No. 5 in affirmative.*

32. *Learned advocate for the defendant Mr. J. N. Ahmedi argued that though the plaintiff pleaded and deposed regarding the nuisance and annoyance and came with the specific pleading that the plaintiff has put the Charpai and other household articles and material and vehicle in front of suit premises, open place and is guilty of nuisance and annoyance, but the said fact specifically denied by the defendants in their written statement. Therefore, to prove the above facts the burden lies on the plaintiff, but it appears that to prove the said fact save and except photographs vide Exh. 82 the plaintiff has not adduced any iota of evidence on the record. On the contrary while considering the fact as deposed by the defendant No. 1 in his cross-examination on oath below Exh. 160 the defendant No. 1 denied about the Charpai and Motor Cycle as appeared in photographs vide Exh. 82 and also specifically deposed that “it is true that sometimes in front of his house third person are keeping their vehicles, it is true that a Charpai as appeared in Exh. 82 is of his, he*

*clarified that same is on footpath not on the road, it is not true that by putting a Charpai, we are obstructing the plaintiff to come and out from his house.” Therefore, while considering the fact as deposed by the defendant No. 1 in his cross-examination though the defendant No. 1 admitted his Charpai as appeared in the photographs vide Exh. 82, but there is no iota of evidence adduced by the plaintiff on the record that due to putting the said Charpai in front of suit premises by the defendant No. 1 which is on footpath that creates a disturbance and obstruction to any enighbour or to the plaintiff. Not only that even while considering the fact as admitted by the plaintiff in his cross-examination on oath below Exh. 80, the plaintiff has admitted and deposed that “it is true that on the Northern side of the suit premises there is no door, I have been shown document vide Exh. 82 photographs while see the photographs, I state that from the Northern side road, I used to move, it is true that the property is situated in the Northern side, Western side same near to Chokddi, vehicle as parked which appears from the document vide Exh. 82 photographs, it is true that whenever, I am in Ahmedabad at that time I am also parking my vehicle on the Eastern side of the suit premises on road, a car which appears in the photographs vide Exh. 147 and Exh. 148, same is ownership of mine, it is true that a car which appears in photographs vide Exh. 147 and Exh. 148 for that no police complaint was lodged between me and defendant.” Therefore,*

*while considering the fact as admitted by the plaintiff in his cross-examination from that it becomes crystal clear that the defendants have not made any obstruction to the plaintiff landlord or the defendants have not encroached any property due to that the plaintiff or neighbours obstructed to use or to move. Not only that even the plaintiff in support of his above fact not examined any neighbours as a witness. Therefore, considering the above facts the plaintiffs have failed to prove that the defendant No. 1 has been guilty of nuisance and annoyance as alleged. Therefore, He prays to answer the issue No. 5 in the negative.*

33. *I have gone through the lengthy arguments as advanced by the learned advocates for the parties and also gone through oral as well as documentary evidence on record and while appreciating the entire oral as well as documentary evidence on record, the plaintiff in his plaint specifically pleaded that the defendants have put the Charpai in front of his house it means the rented premises in open place and it appears that said fact is also deposed by the plaintiff in his examination-in-chief on oath below Exh. 80, but while considering the fact as admitted by the plaintiff in his cross-examination the plaintiff has admitted that the defendants have not made any obstruction to the plaintiff to use his premises which is on first floor of the suit premises. Not only that even it is also evident on the record*

*that the plaintiff for coming and out from his house using Northern side way. Not only that even that plaintiff has also admitted that the car has appeared in the photographs vide Exh. 147 and Exh. 148, which is park on the road in front of the suit premise is ownership car of the plaintiff. Therefore, considering the fact as admitted by the plaintiff though the burden to prove nuisance and annoyance as alleged by the plaintiff is upon the plaintiff but nothing transpires from the record that to discharge this burden to prove the plaintiff adduced cogent and corroborative evidence on the record. Not only that even there is no iota of evidence on the record that defendant tenant by encroaching the public road restrained and made obstruction to neighbours as well as plaintiff to use the open place. Therefore, in the absence of above evidence, I am of the view that bare words as pleaded is not falls under the definition evidence, but the same are required to be proved by cogent and corroborative evidence, but as discussed and held above the plaintiffs have failed to prove that the defendant has been guilty of nuisance and annoyance as alleged. Therefore, I answer the issue No. 5 also negative.*

**Issue No. 2 in HRP Suit No. 473/2008 :**

34. To prove the above issue, the plaintiff has submitted in his examination-in-chief on affidavit vide Exh. 80 as per Order 18 Rule 4

*of the Code of Civil Procedure and reiterated the same fact as pleaded in the plaint, thereafter, the learned advocate for the plaintiff Mr. I. B. Mev argued that the suit premises is purchased by the plaintiff landlord from the erstwhile landlord by executing registered sale deed on dated 26/03/1993, a copy of the said registered sale deed is on record vide Exh. 108. He further argued that though the defendant No. 1 tenant having a knowledge that the plaintiff becomes the landlord and same was informed by the erstwhile landlord to the defendant No. 1 tenant by sending attornment notice dated 26/03/1993, a copy of the same is on record vide Exh. 135. He further argued that the defendant No. 1 tenant came to the knowledge from the attornment notice vide Exh. 135 which was submitted by the defendants themselves on record that the plaintiff becomes landlord of the suit premises then also the defendants failed to pay the monthly rent of the suit premises and the defendant No. 1 was/is arrears of rent. Not only that though the defendant tenant knowing very well that the defendants tenant having no right and interest or authority to make a permanent nature of construction alteration in the suit premises then also without the written consent or permission of the plaintiff landlord the defendant No. 1 has put one door between suit premises and divided the suit premises into two portions and made alteration which cannot be removed without cause serious damage to the suit premises. Not only that even by dividing the suit premises*

*two portions the defendant No. 1 is residing in one portion and unlawfully without permission of the plaintiff landlord sublet, transfer and assign the second portion to the defendant No. 2 and the defendant No. 2 is in possession of the second portion of the suit premises. Therefore, the defendant No. 1 tenant has breached the terms and conditions and violated the provisions as envisaged under Section 13 (1) (b) and Section 13 (1) (e) of the Bombay Rent Act. Therefore, inter alia on the different grounds for obtaining the vacant and peaceful possession of the suit premises, the plaintiff landlord filed the HRP Suit No. 473/2008 against the defendant No. 1 tenant and defendant No. 2 sub tenant. He further argued that on service of the summons notice the defendants were remained present and filed their written statement vide Exh. 23 by the defendants and denied the structure and alteration in the suit premises and also pleaded that there was door in common wall between two portion of the suit premises since inspection of the tenancy and they have not made any alteration or any permanent nature construction in the suit premises and defendant No. 1 also denied regarding the subletting of the suit premises to the defendant No. 2, but as per the settled principle of law and the provision as envisaged under Order 8 Rules 3, 4 and 5 mere denial is not considered as a denial but the denial must be specific, but as he argued regarding the construction the permanent nature the defendants have not made any specific deny.*



35. *He further argued that the suit premises consisting of Ota, two rooms, Chokdi and one latrine and said premises was let out by the erstwhile landlord to the original tenant Chhotubhai Bhikhubhai Lodha and after death of original tenant Chhotubhai Bhikhubhai Lodha the defendant No. 1 becomes the statutory tenant as per the provisions as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act and though the defendant No. 2 was not a statutory tenant of the suit premises, but the defendant No. 1 tenant who having malafide intention and for invading the right and interest of the plaintiff landlord without permission of the plaintiff landlord divided the suit premises into two portion by making construction of door between the premises and unlawfully, sublet, transfer and assign the second portion of the suit premises to the defendant No. 2 and said fact specifically pleaded and deposed by the plaintiff in his plaint as well as in his examination-in-chief on affidavit vide Exh. 80. He further argued that along with suit the plaintiff has also moved application vide Exh. 8 for appointing the court commissioner for making the local inspection of the suit premises as per the provisions as envisaged under Section 26 Rule 9 of the Code of Civil Procedure and said application of the plaintiff was pleased to allowed by the Hon'ble Court and thereafter, the court commissioner in the presence of the party, make the local inspection of the suit*

*premises and prepared the report as well as drawn map of the suit premises, report of the court commissioner as well as map is on record vide Exh. 151 and Exh. 152. He further argued that, while considering the map as drawn by the court commissioner which is on record vide Exh. 152 the suit premises was divided into two portion it means 'A' and 'B' and 'A' portion consisting of one room as well as Chokdi and in front of 'A' portion room, there is Osla and in Osla portion there is another Chokdi and in the Northern side of the Osla there is one WC it means latrine. He further argued that in 'B' portion room as well as Chokdi means wash area is situated and in 'A' portion as well as in 'B' portion there is one common wall and on said common wall there is one door and it appears that through that door one can move easily from 'A' portion room to 'B' portion room. He further argued that, further while considering the map as drawn by the court commissioner, the court commissioner has mentioned the straight loft attach will common wall between 'A' and 'B' portion it means there is straight loft in both 'A' and 'B' room. Therefore, while considering the document vide Exh. 152 the map as drawn by the court commissioner and the report as prepared by the court commissioner vide Exh. 151 from that it is crystal clear from the record that on dated 04/03/2008 when the court commissioner in the presence of the party made a local inspection of the suit premises on that day there is no loft in both the rooms in 'U' shape. Even there is*

*only one WC it means latrine in the Eastern side of Chokdi. He further argued that the court commissioner has made a local inspection and prepared the Panchnama as well as drawn map in the presence of the parties and there is no evidence on the record that the defendants tenant had taken any objection against the Panchnama as well as map as drawn by the court commissioner. Even there is no evidence adduced by the defendants that the court commissioner not drawn the map and prepared the Panchnama accordance with the true and correct fact in the suit premises. On the contrary the defendant No. 1 in his cross-examination below Exh. 160 admitted and deposed that "it is true that there is one common wall between both the rooms and inside of first room earlier there was RCC loft, it is not true that earlier there was wooden loft situated in the suit premises. He clarified that there was RCC loft, it is true that earlier there was no loft on both the walls of suit premises, it is true that along with the suit, plaintiff moved an application for appointing the court commissioner and the court commissioner prepared Panchnama." Therefore, while considering the fact as admitted by the defendant No. 1 in his cross-examination it becomes crystal clear that the court commissioner made a local inspection of the suit premises and prepared the Panchnama as well as drawn map in the presence of the parties.*

36. *He further argued that the defendant No. 1 in his cross-examination admitted regarding the Panchnama prepared by the court commissioner and drawn map of the suit premises, but as he argued against the report of the court commissioner which is on record vide Exh. 151 and map as drawn by the court commissioner which is on record vide Exh. 152, the defendant has not filed any objection it means the defendant tenant admitted situation of the suit premises as reported by the court commissioner it means that as per the report of the court commissioner and the map as prepared on Western side of the suit premises, there is only one WC it means the latrine in the suit premises and there was no two WC it means latrine in his report vide Exh. 151 and the map as drawn which is on record vide Exh. 152 it means that at the time of filing of the suit only one WC in the suit premises. He further argued that during the pendency of the present suit in question the defendant tenant moved an application vide Exh. 37 for tenantable repairing in the suit premises under Section 23 of the Bombay Rent Act and tenant has made request to permit tenantable repairing of the latrine as situated in the suit premises from his own cost and expenses and said application for tenantable repairing of the latrine was granted by the Hon'ble Court but under the guise of tenantable repairing of the latrine as passed by the Hon'ble Court the defendant tenant who is having a malafide intention made a construction of permanent nature in the suit*

*premises which clearly appears from the photographs as adduced by the plaintiff on record vide Exh. 85 to Exh. 99. He further argued that while considering the photographs of the suit premises from that it clearly and ostensibly transpires that by using the cement, concrete and iron road, the defendant tenant made a construction of permanent nature of the loft in the suit premises and also made a construction of second latrine in the suit premises. Therefore, to brought the correct and challenge the situation of the suit premises on record, the plaintiff has moved an application vide Exh. 52 for appointing the court commissioner and after heard both the parties, the Hon'ble Court was pleased to allow the application as moved by the plaintiff for appointing the court commissioner and as per the order as passed by the Hon'ble Court the court commissioner on dated 28/07/2017 in the presence of the parties made a local inspection of the suit premises and prepared the Panchnama as well as drawn the map which is on record vide Exh. 153 and Exh. 154 and against the said report of the court commissioner as well as the map drawn vide Exh. 153 and Exh. 154, the defendant tenant has not filed any objection or raised any dispute that the Panchnama as prepared by the court commissioner and the map as drawn by the court commissioner, the same is false, fabricated and concocted. Therefore, while comparing both the court commissioner reports it means vide Exh. 151 which was prepared by the court commissioner on dated*

*04/03/2008 and the second court commissioner Panchnama which was prepared on dated 28/07/2017 vide Exh. 153 and the map as drawn by the court commissioner at the time of making the local inspection first time in the year 2008 which is on record vide Exh. 152 and the second map as drawn by the court commissioner on dated 28/07/2017 which is on record vide Exh. 154 from both the Panchnama as well as map as drawn by the court commissioner from that it clearly and ostensibly transpires that earlier there was no 'U' shape loft in both the rooms of the suit premises and there was only one latrine, but while considering the second report of the court commissioner during the pendency of the suit vide Exh. 153 and the map as drawn which is on record vide Exh. 154 the court commissioner as noted regarding the 'U' shape loft in both the rooms and the said lofts are of the RCC and also two latrine noted by the court commissioner in the suit premises it means the defendant tenant made a permanent nature and construction of loft in both the rooms of 'U' shape and made a construction of second latrine in the suit premises which was not existence when the first time in the year 2008 the court commissioner after making the local inspection of the suit premises prepared the Panchnama and drawn map. Not only that even the defendant tenant was not permitted entirely repair the suit premises, but tenant was only permitted by the Hon'ble Court to repair the latrine as situated in the suit premises, but as he argued*

*under the guise of impugned order as passed by the Hon'ble Court below Exh. 37 the defendant tenant by damaging the suit premises entirely made a construction of permanent nature by using the cement, concrete and iron road which clearly corroborates from photographs which are on record vide Exh. 84 to vide Exh. 99 as well as the photographs which are on record vide Exh. 100 to Exh. 106. Not only that under the guise of repairing the defendant tenant also damaged the plaster and also damaged the floor by using cement, concrete and sand and by dawning the plinth level of the floor one foot the defendant tenant put the Kota stone on the floor and also make the construction of kitchen platform and also fitted cabin in washing area and also constructed another washing area it means the Chokdi in the second room and by that way the defendant tenant alter the suit premise and said fact is specifically deposed by the plaintiff in his examination-in-chief on affidavit vide Exh. 80 and said fact is also corroborated from the document vide Exh. 84 to Exh. 106 and same fact is also corroborated from the report of the court commissioner which is on record vide Exh. 153 and the map as drawn by the court commissioner vide Exh. 154.*

37. *He further argued that during the pendency of the suit the defendant tenant made a construction of permanent nature and altered the structure of the suit premises and change the*

*identification of the suit premises and though the said fact specifically deposed by the plaintiff in his examination-in-chief on affidavit vide Exh. 80 then also during the cross-examination the defendant has not specifically rebutted and controverted. Not only that even as he argued against the Panchnama vide Exh. 153 and the map as drawn vide Exh. 154, the defendant tenant has not filed any objection it means the fact as noted by the court commissioner regarding the construction of permanent nature in the suit premises by using the cement, concrete and iron rod, same is admitted by the defendant tenant. Not only that even as he argued the defendant No. 1 in his cross-examination on oath below Exh. 160 admitted and deposed that "it is true that between two rooms there is one common wall in first room of the said wall RCC loft is in existence from the beginning". Therefore, while considering the fact as deposed, there was no loft in the second room, but as he argued the court commissioner in his report vide Exh. 153 specifically noted regarding the 'U' shape loft in both the rooms. Not only that though there is only one WC in the suit premises in the year 2008, but in the year 2017 during the pendency when the second court commissioner was appointed the court commissioner has noted two WC in the suit premises but the defendants came with the defence in their examination-in-chief on affidavit vide Exh. 160 there was two WC existence in the suit premises it means against the report as well as*



*map drawn by the court commissioner which are on record vide Exh. 151 and Exh. 152 the defendant No. 1 in his cross-examination on oath deposed the false facts. Not only that even as he argued the Hon'ble Court was only permitted the defendant tenant to carried out repairing work of the latrine but under the guise of the impugned order as passed below Exh. 37 without taking written permission or consent of the plaintiff landlord the defendant tenant made a construction of permanent nature in the suit premises by using the cement, concrete, sand and iron road. Therefore, it is crystal clear from the record that defendant tenant violated the provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act. Therefore, he prays to answer the issue No. 2 in affirmative.*

38. *In the support of his argument, he placed reliance in the case of **Venkatlal G. Pittie and another V/s Bright Brother (Private) limited** reported in 1987 (2) GLH 300, and argued that in paras 22 and 26, the Hon'ble Supreme Court has laid down the ratio that in para 22 "Judged in the aforesaid light on an analysis of the evidence the trial court as well as the appellate court had held that the structures were permanent. The High Court observed that in judging whether the structures were permanent or not, the following factors should be taken into consideration referring to an unreported decision of Malvankar, J. In Special Civil Application No. 121 of*

*1968. These were: (1) intention of the party who put up the structure; (2) this intention was to be gathered from the mode and degree of annexation; (3) if the structure cannot be removed without doing irreparable damage to the demised premises then that would be certainly one of the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure and (4) its removability had to be taken into consideration. But these were not the sole tests. (5) The purpose of erecting the structure is another relevant factor. (6) The nature of the materials used for the structure and (7) lastly the durability of the structure. These were the board tests. The High Court applied these tests. So had the trial court as well as the Appellate Bench of the Court of Small Causes.”*

*And para 26 “Therefore, in view of the fact that large sums had been spent and considering the standard and the nature of the construction and lack of easy removability and the degree of an annexation to the enjoyment for the original purpose, we are of the opinion that the learned judge as well as Appellate Bench of the Court of Small Causes had applied the correct principles and came to a plausible conclusion. About the removability of the structure, the High Court was bound by the finding of the Appellate Authority which appears at pages 341 to 344 of the paper book. In a case of this nature, the High Court found that they had to enter into this question to find the real position whether the proper principles had been*

*correctly borne in mind. It is indisputable that the finding that has to be arrived at by the court in this case a mixed question of law and fact. Therefore, if the basic factors, for example, there was not proper appreciation of the evidence, if the assumption that lofts per se were not permanent structures then the courts below might be said to have committed error apparent on record and no court instructed in law could take such a view. But if all the relevant factors have been born in mind and correct legal principles applied then, right or wrong, if a view has been taken by the appellate court, in our opinion, interference under Article 227 of the Constitution was unwarranted.”*

*He further argued that, therefore, while considering the ratio as laid down by the Hon'ble Supreme Court in the above judgment, same is squarely applicable in the instant case on hand and while considering the tests as applied regarding the construction and permanent nature, in the instant case on hand also the construction of second latrine as constructed by the defendant tenant in the suit premises, same was constructed by the defendant tenant without prior permission or consent of the plaintiff landlord. Not only that though there was no 'U' shape loft in the suit premises but under the guise of impugned order as passed below Exh. 37, the defendant tenant made a construction of permanent nature of loft in 'U' shape and the defendant tenant in his cross-examination admitted regarding the construction of 'U' shape loft in the suit premises and*

*regarding the construction of permanent nature in the suit premises also corroborated from the photographs vide Exh. 84 to Exh. 106 as adduced by the plaintiff landlord and same is also corroborated from the report of the court commissioner vide Exh. 153 and map as drawn by the court commissioner vide Exh. 154. Therefore, considering the above facts and the ratio as laid down by the Hon'ble Supreme Court in the above judgment the intention of the defendant tenant to use the said construction of permanent nature till tenancy lies and if the construction of permanent nature as constructed by the defendant tenant in the suit premises, if the same will remove then it will cause serious damage to the suit premises. Therefore, while considering the provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act, the plaintiff by adducing the cogent and corroborative evidence prove that the defendant tenant made a construction of permanent nature and the construction as made by the defendant tenant in the suit premises, same does not fall under the ambit of the provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act. Therefore, also he prays to answer the issue No. 2 in affirmative.*

39. *He further argued that both the reports of court commissioner which are on record vide Exh. 151 and Exh. 153 and map as drawn by the court commissioner which are on record vide Exh. 152 and Exh. 154 while comparing the both reports of the court commissioner*

*and the map as drawn by the court commissioner, there is structural change in the suit premises noted by the court commissioner and the construction as made by the defendant tenant in the suit premises, same was not falls under the definition of repairing, but same is falls under the definition of construction of permanent nature. Not only that as he argued against both the reports of the court commissioner, the defendant tenant has not filed any objection it means the report of the court commissioner is to be considered as conclusive prove. In the support of his argument, he placed reliance in the case of **Southern Command Military Engineering Services Employees Co-op. Credit Society V/s V.K.N. Nambiar (since deceased)** by legal representative **madhvi Devi** reported in **AIR 1998 Supreme Court page No. 2126**, in paras 1 and 2 the Hon'ble Supreme Court has laid down the ratio that "After hearing learned counsel for the parties, we are satisfied that interference by the High Court with the findings of fact recorded by the lower appellate Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution was wholly unwarranted and in excess of its jurisdiction. The High Court was obviously in error in its view that the commissioner's report could not be acted upon or be treated as legal evidence. The Commissioner's report tends to show that the demised premises are no longer in occupation of strangers which fact does se an inference of subletting as held by the lower appellate Court."*

*And para 2 “We accordingly allow the appeal, set aside the judgment and order of the High Court and restore the judgment and decree passed by the lower appellate Court decreeing the plaintiff’s suit for eviction. We however direct that the decree for eviction shall not be executed for a period of four months from today provided the respondent files usual undertaking in this Court within four weeks from today. No costs.”*

*Therefore, while considering the ratio as laid down by the Hon’ble Supreme Court in the above judgment report of the court commissioner be treated as a legal evidence and in the absence of any objection or dispute, the report of the Court commissioner is required to be read and used as a evidence. He further argued that, therefore, while considering the ratio as laid down by the Hon’ble Supreme Court in the above judgment, same is squarely applicable in the instant case on hand and as he argued the defendants tenant have not filed any objection against both reports of the court commissioner which are on record vide Exh. 151 and Exh 153 and the map as drawn by the court commissioner which are on record vide Exh. 152 and Exh. 154, then the said report of the court commissioner is required to be considered as conclusive prove. Therefore, also the plaintiff by cogent and corroborative evidence prove that the defendant tenant made a construction of permanent nature in the suit premises and breached the provision as envisaged under Section 13*

*(1) (b) of the Bombay Rent Act. Therefore, the plaintiff landlord is entitled for eviction decree under Section 13 (1) (b) of the Bombay Rent Act. Therefore, he prays to answer the issue No. 2 in affirmative.*

40. *The learned advocate for the defendants Mr. J. N. Ahmedi argued that father of the defendant No. 1 and the grandfather of defendant No. 2 was original tenant of the suit premises and was kept the suit premises on monthly rent in the year 1945 and was regularly paid the monthly rent of the suit premises to the erstwhile landlord. He further argued that the plaintiff was become landlord in the year 1993 and the plaintiff has purchased the suit premises from the erstwhile landlord by registered sale deed on dated 26/03/1993, a copy of the said registered sale deed is on record vide Exh. 108. He further argued that the plaintiff has purchased the suit premises with sitting tenant it means with defendants and as he argued at the relevant time the plaintiff landlord after becoming the landlord not informed the defendant tenant by issuance of attornment notice, but the attornment notice was prepared by the erstwhile landlord on dated 26/03/1993, but same was sent for service by registered post A.D. in the year 1996 and same was served to the defendant on dated 14/06/1996 which clearly appears from the cover of registered A.D. which is on record along with attornment notice vide Exh. 135 and the said fact is specifically pleaded by the defendants in the written*

*statement vide Exh. 23 but to controvert and to rebut the said fact the plaintiff has not adduced any iota of evidence on the record. Not only that even plaintiff has not examined the erstwhile landlord in support of his pleading that the erstwhile landlord was informed the defendant tenant by issuance of attornment notice on dated 26/03/1993. Therefore, the plaintiff has failed to prove that the attornment notice vide Exh. 135 was served to the defendant tenant on dated 26/03/1993. Not only that even it is crystal clear from that attornment notice vide Exh. 135 and the cover along with attornment notice that same was not sent by the erstwhile landlord to the defendant tenant, but same was sent in the name of original defendant tenant Chhotubhai Bhikhubhai Lodha. Therefore, the defendant in the year 1996 came to know first time that the plaintiff becomes the landlord of the suit premises and said fact is specifically pleaded by defendants in their written statement vide Exh. 23 as filed in HRP Suit No. 473/2008, then also it appears that in HRP Suit No. 13/2017 as filed by the plaintiff in the year 2017, in the said suit also plaintiff has pleaded that the defendant No. 2 is sub tenant and attornment notice was issued by the erstwhile landlord on dated 26/03/1993. Therefore, while considering the conduct of plaintiff from that it appears that the plaintiff by hook and crook wants to possession of the suit premises.*



41. *He further argued that plaintiff has filed HRP Suit No. 473/2008 on dated 04/03/2008 and in para 4 of its plaint, plaintiff has pleaded that “without permission or consent of the plaintiff the defendant No. 1 has made illegal construction alteration in the suit premises and defendant No. 1 has put one door between the suit premises and divided the suit premises into two portion and made alteration or permanent nature which cannot remove without causing serious damage to the suit premises and by that way cause a serious damage to the suit premises.” Therefore, while considering the pleading as pleaded by the plaintiff, the plaintiff has only pleaded regarding the construction of door between the common wall and divided the suit premises into two portion and save and except how the defendant tenant altered and change the identification of the suit premises for that there is no pleading pleaded by the plaintiff. Even save and except the said fact what other construction of permanent nature constructed by the plaintiff in the suit premises for that the plaintiff has not pleaded. Even the plaintiff has not pleaded what consisting in the suit premises. Even how many rooms in the suit premises and what other facilities are available in the suit premises but it appears from the record that without any pleading the plaintiff in his examination-in-chief on affidavit vide Exh. 80 in para 6 deposed that “the defendant No. 1 has made illegal construction and alteration of permanent nature in the suit premises without consent*

*and permission of the plaintiff and the defendant No. 1 has put one door between the suit premises and divided the suit premises in two portion during the pendency of the present suit by removing loft as situated in the first room made a construction of 'U' shape RCC loft by the defendant No. 1 and also by removing the flooring by dawning the one foot of plinth level fitted the Kota stone and also constructed platform as well as Chokdi and fitted the cabin and in another room also the defendant No. 1 by removing the stone as fixed on flooring down the plinth level by one foot and the wooden loft as situated in that room, same was removed and made a construction of 'U' shape RCC loft and also made a construction of Chokdi and also plaster all walls earlier on North side one open space of the suit premises there was one latrine after demolishing the same said defendant No. 1 has constructed two latrine and by that way the defendants made a construction of permanent nature and made a latrine of permanent nature which cannot be removed without causing serious damage to the suit premises and by that way the defendant No. 1 change the identity of the suit premises." Therefore, while considering the fact as deposed by the plaintiff in his examination-in-chief in para 6 entirely same is not pleaded by the plaintiff in his plaint. Therefore, as per the settled principle of law the parties should not be permitted to travel beyond the pleading and if there is no pleading then same would not be acceptable as an evidence then also it appears that without*

*amendment of the pleading plaintiff has traveled beyond its own pleading and deposed the facts which are not pleaded in its plaint and it appears that the fact as deposed by the plaintiff in his examination-in-chief on the basis of report as second Panchnama as submitted by the court commissioner which is on record vide Exh. 153 but there is no iota of evidence adduced by the plaintiff on the record that what was the earlier structure in condition of the suit premises. Not only that even regarding the structure of the suit premises, the plaintiff has not examined the erstwhile landlord. Not only that even while appreciating the oral as well as documentary evidence on the record along with suit, the plaintiff has also moved an application vide Exh. 8 for appointing the court commissioner and as per order as passed by the Hon'ble Court below Exh. 8 the court commissioner made local inspection and prepared the Panchnama as well as drawn the map which are on record vide Exh. 151 and Exh. 152 and though there is two latrine in the suit premises then also the court commissioner is not noted above both the latrine as situated in the suit premises in the Northern side of the suit premises. But while considering the report of the court commissioner as a whole the court commissioner is specifically noted about door between both the rooms as well as Osla, loft, Chokdi in both the rooms. Not only that two latrines are situated in the suit premises, said fact was knowing very well by the plaintiff landlord and while considering the document*

*vide Exh. 108, a copy of the registered sale deed on page No. 6 of the said registered sale deed vide Exh. 108 in the same on the ground floor it means the suit premises it is mentioned regarding the two latrines it means WC then also it appears that the court commissioner in its report vide Exh. 151 only noted about one latrine in the suit premises though the plaintiff has purchased the suit premises in which two latrines are available. Therefore, as per the provision as envisaged under Indian Evidence Act the documentary evidence having more relevancy then the report as prepared by the court commissioner and report of the court commissioner should not be considered as conclusive prove but it is only required to be read as an evidence and same is required to be proved by corroborative evidence but the plaintiff has not examined the court commissioner intentionally to hide its own malice intention.*

42. *He further argued that the plaintiff in his plaint not pleaded about what structural change by the defendant tenant in the suit premises but first time in his examination-in-chief vide Exh. 80 against its own pleading the plaintiff has come with the new case that defendant has made construction of two latrines and also made a construction of 'U' shape loft in the suit premises, but as he argued what was the actual structure of the suit premises at the time of inspection for that the plaintiff has not examined the erstwhile*

*landlord. Even the plaintiff has not adduced any iota of evidence on the record regarding the original condition of the suit premises. On the contrary, even while considering the report of the court commissioner vide Exh. 151 and the Panchnama as drawn by the court commissioner which is on record vide Exh. 152, the court commissioner has noted about the loft in the suit premises and merely the earlier court commissioner has not made any specific clarification regarding the actual position of the loft it could not be said that there was no 'U' shape loft was available in the suit premises. On the contrary, the court commissioner has noted that RCC loft in the rooms of the suit premises on which the defendants tenant have put their household articles and same is noted by the second court commissioner report which is on record vide Exh. 153 but it appears that the second court commissioner by noting the fact regarding the 'U' shape loft by taking the disadvantage the plaintiff came with the new case in his deposition regarding the construction of loft in the suit premises. Therefore, as per settled principles of law the plaintiff should not be permitted to travel beyond its own pleading. Not only that even while considering the fact as deposed by the plaintiff in his cross-examination on oath below Exh. 80 the plaintiff has admitted and deposed that "it is true that on the Western side it means the back side there is one gallery admeasuring 6 feet, it is true that on Eastern side of the suit premises public road, it is true that in front of*

*main door of the suit premises for come down there is the space, thereafter, footpath situated, thereafter, on Eastern side public road situated, it is true that footpath is admeasuring two feet, it is true that there is ladder situated in the Northern side for coming and out on the first floor and there is gallery also situated and by that passage we are coming on the public road which is situated in first floor, it is true that ladder situated in the Northern side save and except there is no other way to go on the first floor, it is true that passage which is situated in the Northern side, same is 8 feet broad and thereafter. other houses situated, it is true that Northern side of the suit premises there is no door situated, I have been shown the photographs vide Exh. 82, on perusal of the same I depose that said photographs is of passage which is situated in the Northern side which I am using for coming and down, it is true that suit premises have been purchased by registered sale deed in the said registered sale deed name of the tenant is not written, I have been shown document vide Exh. 108, same is copy of registered sale deed by which I purchased the suit premises, it is true that the premises as shown and mentioned on page No. 6 of the document vide Exh. 108 said premises have been purchased, it is true that suit premises which I purchased same is of two part, it is true that on ground door there is two part and the similar manner and situation premises situated on first floor, it is true that the wall as situated on the ground floor the*

*same type of wall is on first floor, it is not true that in the ground floor between both the portion there was door situated and by using the said door one can enter into both the portions, it is true if there is no door situated in the passage northern side to enter into the suit premises, it is true that if there is no door between both the portions then if anybody wants to enter into the second portion then he has to go outside, save and except is not possible to enter into the second portion, it is true that to enter into the second portion one can only enter by moving from chawl it means by moving from passage, it is true that on Eastern side of the suit premises before public road there is one Chokdi it means washing area, it is true that there is water connection in said wash area and in latrine, it is not true that there is no water in Chokdi in washing area situated in West side of the suit premises, it is true that chokdi it means wash area situated West side of the suit premises, same is situated prior to premises purchase by him, it is true that there is only one electricity connection in the suit premises, it is true that on South Side of the suit premises there were other rooms Punjalal Sheth's Chali situated, it is true that in the said rooms are also situated like the suit premises as situated in West and East side and I am not knowing whether in those rooms between two rooms there is common wall and similar situation is on first floor also or not? It is true that in the suit premises room and kitchen is situated, it is not true there is one kitchen in the suit premises for*

*defendant No. 1 and 2, it is true that flooring of the Otla was rough stone and after that Otla first room situated in the suit premises in the plinth level of both in the same, it is true that plinth level of inside of another room also same it is not true that today also plinth level of first room and second room is same he clarified that plinth level of first room is down the Otla level as per my knowledge and information said level is 8 to 10 inch down, it is not true that plinth level inside room is similar as flooring level of Otla as per my knowledge same is also 8 to 10 inch down the Otla, it is no true that I have not entered into the suit premises, it is true that at the time of filing of the suit the fact as mentioned by the court commissioner in his Panchnama regarding the flooring of the suit premises, same fact is also mentioned and noted by the second court commissioner, it is true that first court commissioner made a local inspection of the suit premises and prepared the Panchnama and in the said Panchnama court commissioner has noted that from first room to enter into the second room the door which is situated above that there is RCC loft and commissioner has written madiya as loft, it is true that room situated inside, same is shown by the court commissioner as 'B' portion and above the door mentioned as loft, it is not true the Panchnama as prepared by the court commissioner first time of the suit premises and drawn the map, in the said map the measurement of the loft as written similar measurement of loft noted by the second*



*court commissioner in Panchnama and in map he clarified that in first map size of loft written as 5 feet and in second map breadth of the loft written as 5 feet 6 inch, it is not true that one and half Chajali in front of loft, it is true that by constructing of Chajali there is no external or internal identification change of the suit premises, he clarified that defendant has constructed loft not Chajali, it is not true that by constructing loft wall of suit premises not damaged, it is true that suit premises situated in the similar manner as premises situated in the first floor, it is true that after purchasing of the suit premises as per first floor, he has made a construction of second floor, it is true that due to the strength of wall as situated in ground floor on the first floor, he has made a construction of second floor, he made a clarification that on second floor adjoining and along with wall also made a construction of te-guard on pillar and constructed RCC roof, it is true that at the time of constructing of second floor from the ground floor, he has not made construction of any pillar, it is true that the plaster of the suit premises as situated at the time of filing of the suit, same is situated till day, it is true that at the time of filing of the suit in the first room standing kitchen available same standing kitchen is today also it is not true that at the time of purchasing of the suit premises the registered sale deed there was two latrines situated and similar manner the WC it means latrine situated, he clarified that when he purchased the suit premises at that time one WC it*

*means latrine available.” He further argued that, therefore, while considering the fact as admitted by the plaintiff in his cross-examination, it becomes crystal clear that suit premises as situated at the time of purchasing in the similar manner suit premises is situated present also and from the inspection of tenancy there was door between the common wall of the both portion of the suit premises and from that door only one can enter into the second room which is situated in the suit premises which is shown as a ‘B’ portion in both the map as drawn by the court commissioner. Not only that even the plaintiff has also admitted regarding the loft as situated in the suit premises. Not only that even while considering the document vide Exh. 161 and Exh. 162 photographs as adduced by the defendants on record in both photographs the loft as situated in the suit premises clearly appears. He further argued that both photographs vide Exh. 161 and Exh. 162 are photographs dated 18/04/1999 was clicked at the time of marriage of daughter of defendant No. 1. Not only that even while considering the fact as admitted by the plaintiff in his cross-examination there is only one electricity connection available in the suit premises which clearly corroborates from the documents vide Exh. 138 to Exh. 143. Therefore, also if there is only one electricity connection in the suit premises then it could not be said that the suit premises is divided by common wall and there was no door between both ‘A’ and ‘B’ portions*

*room. On the contrary as per fact as admitted by the plaintiff if any person wants to enter into the second room it means 'B' portion room then he has to enter in that room from the door as lies on the common wall between 'A' and 'B' portion room otherwise if there is no door between both the rooms one has to be walked from outside and only enter into the 'B' portion room. Therefore, considering the fact as admitted by the plaintiff in its cross-examination it becomes crystal clear that the door between both the rooms are lies since inspection of the tenancy and similar situation of the rooms available on the first floor in which the plaintiff is residing along with his family. Not only that as he argued even regarding availability of two WC in the suit premises, same is from the beginning and said fact is specifically pleaded by the defendants in their written statement as well as deposition on oath below Exh. 160 and said fact was not specifically rebutted and controverted by the plaintiff during the cross-examination of the defendant No. 1. Even regarding the availability of two WC in the suit premises corroborated from the plaintiff document vide Exh. 108, a copy of registered sale deed. Not only that to falsify the fact as pleaded and deposed by the defendant regarding the availability of two WC in the suit premises, the plaintiff has not examined erstwhile landlord or any independent witnesses or any neighbour that defendant tenant has made a construction of second latrine after plaintiff becomes landlord and*

*same was not situated since the inspection of tenancy. Therefore, while considering the provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act, the plaintiff has failed to prove the defendant has made a construction of permanent nature in the suit premises. On the contrary, while considering the explanation of the provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act that the defendant tenant made only repairing work in the suit premises and said repairing does not fall under the definition permanent nature of construction. Even it will be considered that the plaintiff has made a construction of standing kitchen or made a construction door between both the rooms it means 'A' and 'B' portion rooms then the same will fall under the definition of explanation of provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act and if it would be closed the room or standing kitchen removed that it will be not caused any serious damage in the suit premises. Therefore, while considering the provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act, the five tests of the permanent nature of construction as laid down by the Hon'ble Supreme Court as well as Hon'ble High Court in the numerous of judgments in the said five tests the suit of the plaintiff does not fall, even the plaintiff has failed to prove the said five tests to prove the permanent nature of the construction. Therefore, he prays to answer the issue No. 2 in the negative.*

43. *He further argued that the judgment of the Hon'ble Supreme Court on which the learned advocate for the plaintiff placed reliance facts before the Hon'ble Supreme Court is not similar fact as before your Hon'ble Court in the instant case. Therefore, the ratio as laid down in those judgments are not applicable in the instant suit. Therefore, also he prays to answer the issue No. 2 in the negative.*

44. *I have gone through the lengthy arguments as advanced by the learned advocates for the parties and also gone through the oral as well as documentary evidence as adduced by the party on record, further while considering the discussion as held above at the relevant time while deciding the other issues, it is admitted fact that the plaintiff landlord purchased the suit premises by the registered sale deed from the erstwhile landlord on dated 26/03/1993, a copy of the said registered sale deed is on record vide Exh. 108. Further it is also admitted fact on the record that the suit premises was let out by the erstwhile landlord to Chhotubhai Bhikhubhai Lodha father of the defendant No. 1 and grandfather of the defendant No. 2 and it is also become crystal clear from the record that said original deceased tenant Chhotubhai Bhikhubhai Lodha was died on dated 18/10/1972, a death certificate as issued by the competent authority is on record vide Exh. 131. Further it is also become undisputed fact*

*that the defendants are legal heirs of the deceased original tenant then also the discussion as held the plaintiff while filing HRP Suit No. 473/2008 came with specific pleading that the defendant No. 1 is only tenant and defendant No. 2 is a sub-tenant, but as discussed at the relevant time the defendants while filing the written statement vide Exh. 23 came with the specific defence and made a clarification that both the defendants are statutory tenant as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, and it appears that though the defendant tenant came with the specific defence that how they become the statutory tenant of the suit premises as per the provision as envisaged under Section 5 (11) (c) (i) of the Bombay Rent Act, then also during the pendency of HRP Suit No. 473/2008 another HRP Suit No. 13/2017 as filed by the plaintiff landlord on dated 16/01/2017 the plaintiff again came with the case that the defendant No. 1 is statutory tenant and the defendant No. 2 is sub-tenant though it becomes clear that the plaintiff landlord is having a knowledge regarding the fact as pleaded by the defendants in their written statement vide Exh. 23 as filed in HRP Suit No. 473/2008, then also as discussed the plaintiff again pleaded that the defendant No. 1 is tenant and defendant No. 2 is sub tenant. Not only that again in HRP Suit No. 13/2017 the defendants have filed the written statement vide Exh. 13 and in said written statement also defendants have reiterated the same fact as they have pleaded in their*

*written statement vide Exh. 23 and nothing transpires from the record to controvert and to rebut and to falsify the said fact of the defendants, the plaintiff has adduced any cogent and corroborative evidence on the record. On the contrary, while considering the document vide Exh. 132 and Exh. 133 and Exh. 134, a death certificates of deceased Shankarlal Chhotalal, Mukeshbhai Shankarbhai Lodha and Jankiben Chhotalal Lodha, son of original deceased, who died on dated 24/01/1980 and while considering the document vide Exh. 133, a death certificate of deceased Mukeshbhai Shankarbhai Lodha it means the brother of defendant No. 2 and while considering the document vide Exh. 134, a death certificate of deceased Jankiben Chhotalal Lodha who died on dated 05/01/2000 she was widow of original deceased tenant Chhotubhai Bhikhubhai and from all the death certificates it clearly and ostensibly transpires that rest of legal heirs of deceased original tenant Chhotubhai Bhikhubhai were died in the suit premises. Not only that even while considering the document vide Exh. 136, a copy of death certificate of deceased Kalpesh Bhikhabhai it means a death certificate of deceased son of the defendant No. 1 who died on dated 05/08/2010 in the suit premises. Not only that even as discussed even while considering the document vide Exh. 137, a school living certificate of defendant No. 2 from that it becomes crystal clear that the defendant No. 2 from the beginning was/is residing in the suit premises and though all the*

*above documents adduced by the defendants on the record then also nothing transpires that during the cross-examination of the defendant No. 1 who deposed on oath vide Exh. 160, the plaintiff has rebutted and controverted the said fact. Therefore, while considering the discussion as held above at the relevant time it becomes crystal clear on the record that both the defendants are statutory tenant under Section 5 (11) (c) (i) of the Bombay Rent Act.*

45. *Further while considering the documents vide Exh. 117 to Exh. 124 and the documents vide Exh. 125 and Exh. 130 from that it becomes crystal clear that the defendants were paid the monthly rent at the rate of Rs. 17 per month to the landlord till 19/08/1993 and regarding the rate of monthly rent of the suit premises. Even it appears that the plaintiff has also come with the specific pleading that the monthly rate of the suit premises is at the rate of Rs. 17/- and it also appears from the record though at the earlier point of time liability to pay the municipal tax as well as education cess is not upon the tenant, but said liability was upon landlord but it appears that subsequently the defendant tenant accepted the liability to pay the municipal tax as well as education cess of the suit premises and it is not a case of the plaintiff landlord that the defendants tenant have failed to pay the municipal tax but it appears that the plaintiff has come with the specific case that the defendant tenant is in arrears of*



*rent, but while considering the discussion as held above at the relevant point of time it becomes comes crystal clear that the defendants tenant have not in arrears of rent and the plaintiff landlord is not entitled for eviction decree under the provision as envisaged under Section 12 (3) (a) and Section 12 (3) (b) of the Bombay Rent Act.*

46. *Further while considering the facts as pleaded by the plaintiff in HRP Suit No. 473/2008, while reading the same not in isolation but as a whole the plaintiff has not pleaded any fact that how many rooms and what other facilities are available in the suit premises. Not only that even it appears that the plaintiff in his examination-in-chief on affidavit vide Exh. 80 also have not deposed that how many rooms and what other facilities in the suit premises, even there is no iota of evidence adduced by the plaintiff on the record, what was situation of the suit premises at the time of inspection of tenancy or at the time of purchasing the suit premises by the plaintiff by registered sale deed on dated 26/03/1993, but while considering the document vide Exh. 108, a copy of registered sale deed bearing registration No. 5895 from that it appears that on page Nos. 4, 5 and 6 description of property as purchased by the plaintiff landlord from the erstwhile landlord described and it appears that at page No. 6 of the said document vide Exh. 108 description regarding the demise premises described and*

*further it appears from the said document that the plaintiff has purchased the suit premises with sitting tenant and it appears that regarding the said fact the plaintiff in his cross-examination on oath below Exh. 80 admitted and though while considering the document vide Exh. 108 in the said document it is specifically described that in the ground floor it means the suit premises one wash area, two WC it means latrine, Ota, water connection and electricity service No. 304611 available. But while reading the said document vide Exh. 108 as a whole nothing mentioned or described that how many rooms and what other facilities are available and what will be exact position and situation of the suit premises from inside then also it can be gainsaid that the plaintiff landlord after becoming the landlord of the suit premises might have been knowledge regarding the actual position of the suit premises from inside then also nothing transpire from the plaint of the plaintiff that how many rooms and what other facilities are available in the suit premises and what will be the actual position and situation of the suit premises from inside, but it appears that in para 4 of the plaint, plaintiff has pleaded that “without permission or consent of the plaintiff the defendant No. 1 has made illegal construction, alteration in the suit premises and defendant No. 1 has put one door between the suit premises and divided the suit premises into two portion and made alteration or permanent nature which cannot remove without causing serious*

*damage to the suit premises and by that way cause a serious damage to the suit premises.” Therefore, while considering the above facts as pleaded by the plaintiff from that it appears that the plaintiff has only pleaded that without prior permission or consent of the plaintiff landlord the defendant No. 1 tenant made alteration or permanent nature and defendant No. 1 put one door between suit premises and divided the suit premises into two portion and made alteration, which cannot remove without causing serious damage to the suit premises. Therefore, while considering the above facts as pleaded by the plaintiff, the plaintiff has only pleaded and made alteration or permanent nature in the suit premises but save and except what other construction or change or alteration made by the defendant tenant in the suit premises for that there is no specific fact pleaded by the plaintiff landlord. Not only that even while considering the description of the suit premises as pleaded by the plaintiff in the plaint, the plaintiff has pleaded that on Eastern side of the suit premises that public road and on Western as well as Northern side there is gallery it means passage and on south side there was common wall and after said wall house of Mohammad Sabirbhai situated and it appears that save and except said description the plaintiff landlord has not made specific description that how many rooms is in existence in the suit premises and what other facilities are available in the suit premises. Therefore, while considering the*

*provision as envisaged under Order 7 Rule 3 of the Code of Civil Procedure “ **Whether the subject-matter of the suit is immovable property.** - Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers”. Therefore, while considering the provision as envisaged the entire measurement of the demise premises is not necessary to plea in the plaint, but it is only required that the plaintiff must identify the demise premise by its number or by four boundaries and it appears that regarding the four boundaries of the suit premises, the plaintiff has specifically pleaded and also plaintiff described and pleaded about the survey number as well as municipal census number and the tenement number of suit premises and from the fact as pleaded by the plaintiff it becomes crystal clear that there is only tenement number giving to the suit premises. Not only that even as discussed in registered sale deed vide Exh. 108 also there is only one electricity service number in the suit premises it means that the suit premises is not of two portion or two different identified tenement numbers or there is no two electricity connection in the suit premises. On the contrary while considering the fact as pleaded by the plaintiff in its plaint as a whole not in isolation it becomes crystal clear that the suit premises is only identified by*

*only tenement No. 0113-35-0062-001-E and there is no other tenement number. Not only that even as discussed there is one electricity connection in the suit premises. Therefore, from the above fact itself it could be gainsaid presume that the suit premises is not divided into two parts and there is no entirely closed common wall between two rooms as situated in the suit premises then also it appears that the plaintiff in its para 4 of the plaintiff pleaded that the defendant No. 1 has put one door between the suit premises and divided the suit premises into two portion and made alteration or permanent nature, which cannot be removed without causing serious damage to the suit premises. Therefore, it appears that the said pleading of the plaintiff as pleaded in para 4 is altogether different facts pleaded plaintiff by himself against the fact as pleaded regarding the description of the suit premises by the plaintiff. Not only that even while considering the facts as admitted by the plaintiff in his cross-examination below Exh. 80, the plaintiff has admitted that there is only one electricity connection in the suit premises. Not only that even while considering the document vide Exh 138 to Exh. 143 from those documents which bills of consumption of electricity issued by the torrent power and the electricity service number as mentioned in those bills regarding the said service number, it is not a case of the plaintiff that by the said service number there is no electricity connection comes in the suit premises. Therefore, considering the document vide Ex. 138 to Exh.*

*143 and the fact as mentioned in the copy of registered sale deed which is on record vide Exh. 108 it becomes crystal clear on the record that there is only one electricity connection in the suit premises. Therefore, if there is only one electricity connection in the suit premises then also it is very hard to believe that at the time of inspection of tenancy suit premises was divided into two portion and there was a common wall without any door in the suit premises. On the contrary from the above facts it could be presumed that since inspection of the tenancy there is door between both the rooms in the suit premises and from one room to another room through the door as situated the defendants are entering in the second room and it appears that the said facts is specifically pleaded by the defendants in their written statement vide Exh. 23 as filed in HRP Suit No. 473/2008 and came with the specific defence that since the inspection of the tenancy there was/is door between both the rooms as situated in the suit premises, then also as discussed contrary to the above facts the plaintiff came with the pleading that the defendants by putting the door between suit premises divided the suit premises into two portion. On the contrary, it could be gainsaid that due to the door in the suit premises is to be considered as one room and not to be considered two portion and as discussed if there is only one tenement number given to the suit premises and if there is only one electricity connection in the suit premises then it could not be said that the suit*

*premises divided into two part or portion. On the contrary it could be said without any hesitation that the suit premises is entirely one premises.*

47. *Further while considering the facts as pleaded by the plaintiff and the discussion as held above the plaintiff has not specifically pleaded what will be situation of the suit premises from inside at the time of purchasing the suit premises by the plaintiff by registered sale deed on dated 26/03/1993 from the erstwhile landlord. Not only that even the plaintiff has not specifically pleaded that when the defendant tenant put the door between suit premises and divided the suit premises into two portion, even there is no specific fact pleaded by the plaintiff that the description of the premises as described in the registered sale deed vide Exh. 108 regarding the facilities are available in the suit premises, same is not true and correct it means the the plaintiff has not came with the specific pleading that when in which year in which month the defendant tenant without consent of the plaintiff landlord made a alteration of permanent nature in the suit premises and put one door between the suit premises and divided the suit premises into two portion and it is settled principle of law that the pleading is foundation source of any litigation and what is to be considered as pleading is defined in Order 6 Rule 1 of the Civil Procedure Code and pleading which means “plaint or written*

*statement” the pleading shall mean it means that the facts as pleaded in the plaint as well as in the written statement is to be considered as a pleading and as discussed it is settled principles of law that the pleading is the foundation source of any litigation and no parties are allowed to go beyond or travel beyond the pleading as pleaded in the plaint as well as in the written statement. Further while considering the provision as envisaged under Order 2 of Order 6 of the Civil Procedure Code which is as under.*

***“Pleading to state material facts and not evidence –***

*(1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.*

*(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained i a separate paragraph.*

*(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.”*

*Therefore, while considering the provision as envisaged the pleading to state material facts and not evidence and the plaintiff must contain each allegation on which the plaintiff or the defendant filed the suit as defence and as discussed the plaintiff has not specifically pleaded that how many rooms are situated in the suit*



*premises what other facilities are available in the suit premises and what permanent alteration or construction carried out by the defendant tenant in the suit premises without prior permission of the plaintiff landlord. Therefore, it appears that regarding the alteration of permanent nature and the construction of permanent nature in the suit premises save and except putting one door between suit premises there is no specific fact pleaded by the plaintiff in the plaint or made any specific allegation against the defendant tenant regarding the unlawfully alteration or construction or permanent in the suit premises.*

48. *Further, while considering the ratio as laid down by the Hon'ble High Court in the case of **RANA BHARATSINH JASUBHA V/S. HEIRS OF VALAND LALJIBHAI ARJANBHAI & ORS.**, reported at **2014(2) GLR 1688**, in the above judgment, Hon'ble High Court has laid down the ratio as under:*

*“Leading evidence contrary to case pleaded was clearly not permissible in law. Pleadings are the foundation. A case in the suit is always founded in the pleadings.*

*It is well settled that evidence contrary to the pleading cannot be relied on. In Ramesh Kumar V/s. Furu Ram, 2011(8) SCC 613.*

*When the evidence which was led, was in a different direction, it prejudiced the case of the appellant. When the evidence*

*was led to show that father had died after coming into force of the Hindu Succession Act, it was not a minor variance with the pleading but the evidence led was diametrically opposite to what was specifically pleaded. It materially changed the complexion of the controversy and the rights of the parties in the suit. The first appellate Court, therefore, could not have passed decree by accepting the evidence which was de hors the case pleaded by the plaintiff. Only if it were to be a minor variance in the evidence compared to the pleading, it could have been overlooked". Therefore, while considering the ratio as laid down by the Hon'ble Supreme Court in the above judgment same will be squarely applicable in the instant case on hand.*

49. *Further while considering the ratio as laid down by the Hon'ble Supreme Court in the case of **NATIONAL TEXTILE CORPORATION LTD. V/S. NARESHKUMAR BADRIKUMAR JAGAD & ORS.**, reported at **AIR 2012 SC 264**, the Hon'ble Supreme Court has laid down the ratio as under :*

*"(A) Civil P. C. (5 of 1908), O.6, R.1 – Pleadings and particulars – Necessary to enable court to decide rights of parties in trial.*

*Pleadings and particulars are necessary to enable the Court to decide the rights of the parties in the trial. Therefore, the pleadings*

*are more of help to the Court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that “as a rule relief not founded on the pleadings should not be granted”. A decision of a case cannot be based on ground outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ.”*

*Therefore, considering the ratio as laid down by the Hon’ble Supreme Court in the case of **VINOD KUMAR ARORA V/S. SMT. SURJIT KAUR** reported at **AIR 1987 SUPREME COURT 2179**, in Head Note ‘B’, Hon’ble Supreme Court has laid down the ratio as under :*

*“(B) Civil P. C. (5 of `908), O.6, R. 2 – Variance between pleadings and proof – Effect.*

*The pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case”.*

50. *Therefore, while considering the ratio as laid down by the Hon’ble Supreme Court as well as Hon’ble High Court in the above judgments, it is not open to the party to give up the case set out in the pleading and propound a new and different case. Not only that*

*even the parties has not permitted to travel beyond the pleading as pleaded and come with new case at the time of deposition and deposed the facts which are not pleaded in the plaint as well as in the written statement. Not only that even it is also settled principles of law that the Court of law could not travel beyond the pleading of the party but the Court of law should decide and adjudicate between the parties on the basis of what they are pleaded in the plaint as well as in the written statement and it is restricted on the subordinate court, trial court should not travel beyond the pleading of the party. Further, while considering the ratio as laid down by the Hon'ble Supreme Court in the case the **Kalyansingh Chouhan V/s C. P. Joshi**, has highlighted the importance of pleadings in civil proceedings. Further while considering the ratio as laid down by the Hon'ble Supreme Court in the case of **Gajanan Krishnaji Bapat & Anr. V/s Dattaji Raghobaji Meghe & Ors. AIR 1995 SC 2284**, the Hon'ble Supreme Court has held that the "Court cannot consider any fact which is beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality the result of the election has been materially affected." Further, pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the Court in narrowing the*

*controversial involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is settled legal proposition that as a rule relief not founded in the pleadings should not be granted. Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. Further while considering the ration as laid down by the Hon'ble Supreme Court in the case of **Ram Sarup Gupta (dead) by L.Rs. V/s Bishun Narain Inter College & Ors., AIR 1987 SC 1242**, the Hon'ble High Court has laid down the ratio that "it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question". Further in the case of **Bachhaj Nahar v. Nilima Mandal & Ors., AIR 2009 SC 1103**, the Hon'ble Supreme Court, held as under: "The object and purpose of pleadings and issues is to ensure that the litigants come*

*to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration". "The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the pleadings, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief". Therefore, while considering the ratio as laid down by the Hon'ble Supreme Court in the above judgments regarding the pleading it becomes settled principles of law in the absence of pleading, evidence, if any produced by the parties cannot be considered as a evidence. Further it is also settled principle that nobody should travel beyond its pleading and also it is also restricted by the Hon'ble Supreme Court that the court should not focus the attention of the parties or his own attention it means that the facts which are not part of the pleading of the plaintiff that part is not required to be highlighted by the court to draw the attention of the*

*plaintiff regarding certain facts. Therefore, while considering the above settled principle of law and while considering the facts as pleaded by the plaintiff landlord in his plaint, from that it becomes undisputed fact that the plaintiff has come with a specific pleading in its para 4 of plaint that “without permission or consent of the plaintiff that the defendant No. 1 has made illegal construction, alteration in the suit premises and defendant No. 1 has put one door between the suit premises and divided the suit premises into two portion and made alteration of permanent nature which cannot remove without causing serious damage to the suit premises and by that way cause a serious damage to the suit premises.” Therefore, considering the facts as pleaded, the plaintiff has only pleaded that the defendant No. 1 without consent and prior permission of the plaintiff landlord made a construction and alteration of permanent nature in the suit premises and defendant No. 1 has put one door between the suit premises and divided the suit premises into two portion which cannot be removed without any causing serious damage to the suit premises. Therefore, while considering the fact as pleaded by the plaintiff and the discussion as held above against its own pleading as pleaded in the para one of the plaint regarding the identification description and the number of the suit premises from that it becomes crystal clear that there is only one tenement number entirely given to the suit premises and there is no two tenement and*

*there is no two electricity connection in the suit premises. On the contrary as per the discussion as held above, there is only one electricity connection of the suit premises and said fact is also admitted by the plaintiff in his cross-examination below Exh. 80. Therefore, as discussed if there is only one electricity connection then the premise should not be considered was in existence since inspection of tenancy of the two part or portion, but as discussed on the basis of above fact, it could be said without any hesitation that the suit premises is one premise and the door between both the rooms is situated since inspection of the tenancy and while considering the facts as admitted by the plaintiff in his cross-examination on oath below Exh. 80, the plaintiff has admitted that if there is no door between 'A' portion and 'B' portion room then if anyone wants to enter into the 'B' portion room then he has to be moved from passage of the Chowl from which is situated outside and then enter into the 'B' portion and also admitted that there is no door on the North side of the 'B' portion of the suit premises. Therefore, while considering the facts as deposed by the plaintiff from that it also becomes crystal clear that the door between the 'A' portion and 'B' portion room is situated since inspection of tenancy and the said door was not put by the defendant No. 1 after the plaintiff becomes the landlord.*

51. *Further as discussed regarding the fact as pleaded by the*



*plaintiff in para-4 of plaint and ratio as laid down by the Hon'ble Supreme Court and the Hon'ble High Court in the above judgments, parties are not permitted to travel beyond their pleading and put forward a new case then also it appears that without any specific pleading the plaintiff in his examination-in-chief on affidavit vide Exh. 80 in para-6 deposed that "the defendant No. 1 has made illegal construction and alteration of permanent nature in the suit premises without consent and permission of the plaintiff and the defendant No. 1 has put one door between the suit premises and divided the suit premises two portion, during the pendency of the present suit by removing loft as situated in the first room made a construction of 'U' shape RCC loft by the defendant No. 1 and also by removing the flooring by dawning the one foot of plinth level fitted the Kota stone and also constructed platform as well as Chokdi and fitted the cabin and in another room also the defendant No. 1 by removing the stone as fixed on flooring down the plinth level by one foot and the wooden loft as situated in that room, same was removed and made a construction of 'U' shape RCC loft and also made a construction of Chokdi and also plaster all walls, earlier on North side on open space of the suit premises there was one latrine after demolishing the same said defendant No. 1 has constructed two latrine and by that way the defendants made a construction of permanent nature and made a latrine of permanent nature which cannot be removed without*

*causing serious damage to the suit premises and by that way the defendant No. 1 change the identity of the suit premises.” Therefore, while considering the facts as deposed by the plaintiff, same appears the said facts deposed regarding the subsequent development during the pendency of the suit and further it appears the plaintiff has submitted in his examination-in-chief on affidavit vide Exh. 80 on dated 10/08/2018 and as discussed prior to submitted his examination-in-chief on affidavit by the plaintiff, the plaintiff has filed another HRP Suit No. 13/2017 against the defendants but in the said suit also the plaintiff has not pleaded regarding the subsequent development as deposed in his examination-in-chief. Further it appears from the record that in the HRP Suit No. 13/2017 as filed by the plaintiff on dated 16/04/2017, it means before more than one year and 7 months of filing of his examination-in-chief on affidavit and as discussed the parties in both the suits are similar and the disputed premises is also same and to consolidate both the suits, the plaintiff has moved an application vide Exh. 76, the said application of the plaintiff was allowed and both the HRP suits it means HRP Suit No. 473/2008 and HRP Suit No. 13/2017 were consolidate and order to record the evidence in HRP Suit No. 473/2008 and it appears that by passing the impugned order below Exh. 76 on dated 19/06/2018 both the suits were consolidated and it appears that thereafter, the plaintiff on dated 10/08/2018 submitted*

*in his examination-in-chief on affidavit vide Exh. 80 and as discussed in para 6 of his examination-in-chief, the plaintiff has deposed the facts which are not pleaded by the plaintiff in its plaint. Not only that even regarding the subsequent development during the pendency of the suit, the plaintiff has not moved any application to incorroborate the pleading regarding the subsequent development as per the provision as envisaged under Order 6 Rule 17 of the Code of Civil Procedure. Therefore, while considering the facts as deposed by the plaintiff in its para-6 of examination-in-chief regarding the subsequent development during the pendency of the suit, the said facts deposed by the plaintiff to be considered as the plaintiff has travelled beyond its own pleading regarding the construction or permanent nature as deposed in para-6 during the pendency of the suit. Therefore, as per the ratio as laid down by the Hon'ble Supreme Court and the Hon'ble High Courts in the above judgments the subsequent facts as deposed during the pendency of the suit is not required to be considered because on the basis of said fact as deposed the defendants tenant were not got the opportunity to deny the said fact by filing further written statement.*

52. *Further while considering the facts as pleaded and deposed by the plaintiff landlord in its plaint as well as in the deposition regarding the construction, alteration or permanent nature in the suit*

*premises by the defendant tenant though as discussed save and except the putting door between the suit premises what other construction, alteration and permanent nature carried out by the defendants tenant, same was not pleaded by the plaintiff landlord and as discussed regarding the door as situated between the two rooms, same appears is in existence since inspection of the tenancy because there is only one tenement and there is only one electricity connection and as discussed if there is only one tenant number and one electricity connection then it could be said without any hesitation that the entire suit premises is one premise and not divided into two part or two portion.*

53. *Further as discussed though the plaintiff has not pleaded in its both the complaints that the loft as situated in the first room, the said loft removed by the defendants tenant and made a construction of 'U' shape loft, but as discussed the said fact deposed first time by the plaintiff in its examination-in-chief on affidavit vide Exh. 80 and for that it appears that the plaintiff has placed reliance on the two court commissioner reports as well as map drawn by the two court commissioners at different times it means first court commissioner carried out the local inspection of the suit premises on dated 04/03/2008 and prepared the Panchnama in the presence of the parties and also drawn the map which is on record vide Exh. 151 and*

*Exh. 152 and from the report of court commissioner it means for Panchnama it appears that the first time it comes on the record on dated 07/03/2008 that the suit premises consisting of two rooms, two Chokdi it means wash area, otla, loft in both the rooms, one WC and it also comes on the record that in 'A' portion of the suit premises kitchen platform situated and also there is RCC loft and in 'B' portion room there is one Chokdi it means wash area and there is also loft and while considering the map as drawn by the court commissioner after making the local inspection on dated 04/03/2008 which is on record vide Exh. 152 in the same map on Eastern side of the suit premises after footpath there is one Chokdi it means wash area, thereafter Otla and through that Otla one can enter into the 'A' portion room and in 'A' portion room there is one Chokdi as well as standing kitchen it means platform and there is loft on Eastern side and there is also one door on South and West side of the room 'A' to enter into room 'B' and there is one Chokdi it means wash area in 'B' room and on Eastern side in the room 'B' there is loft and on North and South side of room 'B' there is one door to go back side and also noted one latrine it means WC on North side of Otla and it appears from the record that against the report of the court commissioner neither of the parties filed their objection and raised any dispute that the Panchnama prepared and map as drawn by the court commissioner on dated 04/03/2008 is not true and correct. Not only*

*that even nothing transpires from the record that the plaintiff to prove the fact as mentioned by the Court commissioner in the Panchnama vide Exh. 151 and map as drawn vide Exh. 152 examined the court commissioner as a witness, even it appears that the defendant tenant has also not examined the first court commissioner as a witness. Further it appears from the record that during the pendency of the present suit, the defendant tenant moved an application vide Exh. 37 for tenantable repairing in the suit premises under Section 23 of the Bombay rent Act, and it appears that after heard both the parties, said application was allowed and defendants permitted to carried out the tenantable repairing of the latrine it means WC from his own cost as well as repaired the wall. Further it appears from the record that the defendants have carried out the tenantable repairing in the suit premises. Further it also appears from the record that vide Exh. 52, the plaintiff has moved an application for appointing the court commissioner under Order 26 Rule 9 of the Code of Civil Procedure for making a local inspection of the suit premises and to brought the correct and subsequent development in the suit premises at the time of repairing and it appears that the said application of the plaintiff was allowed and the court commissioner was appointed to carried out the local inspection and prepared the Panchnama as well as drawn the map of the suit premises and while considering the document vide Exh. 153*

*Panchnama as prepared by the court commissioner in the presence of the parties after completion of local inspection of the suit premises on dated 20/07/2017 and also drawn the map, which is on record vide Exh. 154 and it appears that Panchnama as prepared by the second court commissioner and he noted regarding the 'U' shape loft in both the rooms of the suit premises and the second WC it means latrine in North side of the 'A' portion room and it appears that the plaintiff deposed that the defendant tenant under the guise of repairing carried out construction of permanent nature of 'U' shape loft in both the rooms and it appears that in support of said fact the plaintiff has placed reliance on photographs vide Exh. 84 to Exh. 106, but as discussed regarding the fact as deposed regarding the construction of 'U' shape loft in the suit premises by the defendant tenant for incorporation the said fact in the plaint, the plaintiff has not moved any application for amendment in the plaint as per Order 6 Rule 17 of the Code of Civil Procedure, and without pleading though having a knowledge regarding the Panchnama as prepared by both the court commissioners. Therefore, it appears that the plaintiff has travelled beyond the pleading. Not only that it appears that the plaintiff has come with the specific deposition that the 'U' shape loft carried out by the defendant tenant in both the rooms during the pendency of the suit. But while comparing both the Panchnama as well as map drawn by the court commissioner, which are on record vide Exh. 151*

*and Exh. 153 as well as map is on record vide Exh. 152 and Exh. 154, it crystal clear on the record that there is loft in both the rooms but to prove the fact that 'U' shape loft in both the rooms carried out by the defendant tenant during pendency of the present suit under the guise of tenantable repairing order as passed by the court, the plaintiff landlord has not examined the first court commissioner who carried out the local inspection and prepared the Panchnama as well as drawn map of the suit premises on dated 04/03/2008 which is on record vide Exh. 151 and Exh. 152 that at that time there was no 'U' shape loft in the suit premises, but there was said loft in both the rooms. Not only that even to prove the said fact the plaintiff has not examined the erstwhile landlord regarding the situation of the suit premises at the time of inspection of the tenancy or during the period of when the erstwhile landlord was a defendant tenant. Not only that even as discussed the plaintiff has not pleaded that what was actual situation inside the suit premises when he purchased the suit premises on dated 26/03/1993 by registered sale deed. Not only that even as discussed the plaintiff has not pleaded or deposed that there was straight loft in both the rooms of the suit premises. Therefore, in the absence of such pleading and in the absence of any structural engineer report or evidence that after the impugned order as passed below Exh. 37 for tenantable repairing in the suit premises the defendants tenant have made a construction of 'U' shape RCC loft in*



*both the rooms of the suit premises. Not only that though the plaintiff has adduced the photographs on the record vide Exh. 84 to Exh. 106, but, to prove the fact of the photographs, the plaintiff has not examined the photographer who have clicked. Therefore, in the absence of any independent witness merely by adducing photographs on the record, same could not be considered as an evidence. Not only that even to prove the fact as appeared in photographs vide Exh. 84 to Exh. 106 nothing transpires that during the cross-examination of the defendant No. 1 on oath vide Exh. 160 by showing the photographs to the defendant tenant, the plaintiff tries to brought the fact as deposed by the plaintiff which is not a part of pleading. Not only that even to prove the fact that the defendant tenant made a construction of 'U' shape loft in both the rooms of the suit premises even the plaintiff has not examined any neighbour or any other independent witness. Therefore, in the absence of any cogent and corroborative evidence, I am of the view that the plaintiff has failed to prove that 'U' shape loft constructed by the defendant tenant in both the rooms. On the contrary, it appears from the record it means from both the maps as drawn by the Court Commissioner which are on record vide Exh. 152 and Exh. 154, there was loft in both the rooms of the suit premises, but to prove the shape of loft in both the rooms on dated 04/03/2008, the plaintiff has not examined the first court commissioner who made a local inspection because in that Panchnama vide Exh. 151 the first*

*court commissioner noted regarding the RCC loft in both the rooms, but he has not noted regarding shape of the said loft. Further it appears that the map as drawn by both the court commissioners at the relevant time both the court commissioners in their map vide Exh. 152 and vide Exh. 154 measurement of breadth of the loft shown different. Therefore, what was the exact measurement it means size of breadth of the loft in both the rooms of the suit premises, the plaintiff has not examined any structural engineer or any expert. Not only that even the plaintiff has not adduced any iota of evidence that by which method both the court commissioners have noted regarding length and breadth of loft in both the rooms. Therefore, as per the settled principles of law if there is variance in measurement and maps drawn by the court commissioners at the different point of time, the said fact is required to be proved by the plaintiff landlord that during the pendency of the suit the defendant tenant by increasing the measurement it means the length and breadth of the loft constructed RCC loft which is a permanent nature, but as discussed the plaintiff has not examined any witnesses in support of his fact as deposed first time in his examination-in-chief on affidavit vide Exh. 80. Therefore, in the absence of any cogent and corroborative evidence, I am of the view that regarding the loft as situated in the suit premises it means both the rooms, the plaintiff has failed to prove that the defendant tenant erected loft in both the rooms in 'U' shape and same would fall*

*under the definition of erection it means construction of permanent nature in the suit premises.*

54. *Further while considering the facts as deposed by the plaintiff in his para-6 of examination-in-chief on affidavit vide Exh. 80, the plaintiff has also deposed that the defendant by removing flooring plinth by down the surface one feet, fitted the Kota stone and also made a construction of platform and also made a construction of Chokdi as well as fitted the kota stone and in another room also the defendant No. 1 removed the stone flooring and down the surface by one feet and also made a construction of one Chokdi, and carried out the plaster of all the four walls and by that way the defendant No. 1 carried out the construction and alteration of permanent nature in the suit premises. Therefore, while considering the above facts as deposed by the plaintiff in his examination-in-chief on affidavit vide Exh. 80, same is not part of pleading it means same is not pleaded by the plaintiff in its both the complaints and even as discussed at earlier point of time to incorporate the said facts in the complaint as a pleading the plaintiff has not moved any application under Order 6 Rule 17 of the Code of Civil Procedure, but without pleading the plaintiff by travelling beyond the pleading deposed the above fact and for that it also appears that the said fact deposed by the plaintiff on the basis of second court commissioner report which is on record vide Exh. 153,*

*but as discussed to prove the Panchnama vide Exh. 153 the plaintiff landlord has not examined the court commissioner as a witness. Not only that even as discussed the plaintiff has not adduced any iota of evidence on the record that what was exact situation and position of the suit premises at the time of inspection of tenancy or at the time when the plaintiff has purchased the suit premises from the erstwhile landlord, then also while appreciating the entire oral as well as documentary evidence on the record, it is clearly and ostensibly transpired that the first court commissioner in his report vide Exh. 151 noted about the fact that the standing kitchen it means standing cooking platform in kitchen is in the 'A' portion of the suit premises and the said fact is also noted by the second court commissioner in his Panchnama which is on record vide Exh. 153 and even it appears that in both the maps as drawn by the court commissioners at the different point of time which are on record vide Exh. 152 and Exh. 154 the Chokdi it means the wash area is situated in both the rooms. Further though the plaintiff has deposed that the defendant tenant by removing flouring stone, down one feet surface and fitted the Kota stone on the flooring, but in support of his above deposition the plaintiff has not adduced any iota of evidence on the record that the defendant tenant down the surface of both the suit premises by one feet. Not only that even there is no iota of evidence adduced by the plaintiff landlord that what was actual hight of both the rooms from*

*flouring to ceiling. On the contrary while considering the fact as admitted by the plaintiff in his cross-examination on oath below Exh. 80, the plaintiff had admitted that the flouring level of both the rooms are the same level as of Osla flouring. Therefore, considering the above fact as admitted by the plaintiff landlord, I am of the view that the plaintiff has also failed to prove that the defendant tenant merely by removing flouring stone and by fitting Kota stone down the surface of the suit premises by one feet and using one feet more space from ceiling hight. Therefore, in the absence of any cogent and corroborative evidence, I am of the view that merely by changing the stone of the floor by replacing the damaged flooring stone by fitting Kota stone, same does not fall under the definition of permanent nature of construction. On the contrary while considering the explanation of the Section 13 (1) (b) of the Bombay Rent Act, same falls under the explanation and if any construction falls under the explanation of Section 13 (1) (b) of the Bombay Rent Act, same could not be considered that the tenant has not made a construction and permanent nature. Not only that even while comparing both the Panchnama vide Exh. 151 and Exh. 153, it is crystal clear that there is one kitchen it means standing cooking platform kitchen in the suit premises and there is no iota of evidence adduced by the plaintiff landlord that the said standing cooking platform in kitchen constructed by defendants tenant after filing of the present suit. On*

*the contrary while considering the explanation of Section 13 (1) (b) of the Bombay Rent Act, constructing of standing cooking platform kitchen does not fall under the definition of permanent nature and construction. Therefore, also I am of the view that, the plaintiff has also failed to prove the fact as deposed regarding the removing of flooring stone and down the surface of the suit rooms by one feet and also fails to prove that defendants have made a construction of standing cooking platform in kitchen also made a construction of wash area it means Chokdi.*

55. *Further it appears that the plaintiff has also deposed that the defendant No. 1 tenant after demolishing one WC made a construction of two WC it means latrine in the suit premises and as discussed the fact as deposed by the plaintiff in para-6 regarding the construction of WC, said fact is also not incorporated in the plaint, but first time without any pleading the plaintiff has deposed the said fact and it appears that on the basis of Panchnama as prepared by both the court commissioners at the relevant time which are on record vide Exh. 151 and Exh. 153 and the map as drawn by both the court commissioners which are on record vide Exh. 152 and Exh. 154 from that it appears that in the first report of the court commissioner, the court commissioner has noted regarding the one WC it means latrine in the suit premises which is situated in the North side of Othla of the*

*suit premises but during the pendency of the suit the second court commissioner after making the local inspection of the suit premises prepared the Panchnama and also drawn map which is on record vide Exh. 153 and Exh. 154 in the said Panchnama as well as map the second court commissioner noted about two WC it means latrine in the North side of Osla as well as the North side of 'A' portion room and it appears that in support of the said fact the plaintiff has placed reliance on photographs which are adduced on record vide Exh. 84 to Exh. 106, but as discussed to prove the photographs the plaintiff has not examined photographers as a witness and also not examined and in other independent it means neighbour as a witness that from the beginning there was no two WC it means latrine situated in the suit premises and the second latrine was constructed by the defendants tenant during the pendency of the present suit under the guise of tenantable repairing in the suit premises. Not only that even to prove the said fact the plaintiff have also not examined the erstwhile landlord and as discussed regarding the availability of the WC in the suit premises the plaintiff has not pleaded fact in the plant, but it appears that the more particularly plaintiff has placed reliance on the Panchnama as prepared by both the court commissioner at different point of time. But while considering the document vide Exh. 108, a copy of registered sale deed by which the plaintiff landlord has purchased the suit premises from the erstwhile landlord on page No.*

*6 of the document vide Exh. 108, it is specifically mentioned that there is two latrine it means WC in the suit premises and there is no iota of evidence adduced by the plaintiff on the record that to rectify the said fact any rectification deed executed by the plaintiff with erstwhile landlord. Therefore, while considering the document vide Exh. 108, which is a copy of registered sale deed suit premises which is executed on dated 26/03/1993 it means in the year 1993 when the plaintiff becomes the landlord at that time there is two WC it means latrine available in the suit premises and it is settled principles of law the documentary evidence is having more importance then the Panchnama prepared and the map drawn by the court commissioner. Therefore, considering the above facts and circumstances and documents and while considering the fact as mentioned in the document vide Exh. 108, regarding the availability of two WC in the suit premises, I am of the view that the plaintiff has failed to prove that the defendant tenant under the guise of tenantable repairing order as passed by this Court below Exh. 37, the defendant tenant made a construction of another WC it means latrine in the suit premises and by that way the defendants have changed the identity of the suit premises.*

56. *Further while considering the provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act and the explanation of the*



*above provisions which is as “that the tenant has, without the landlord’s consent given in writing, erected on the premises any permanent structure;*

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

*Therefore, while considering the provision as envisaged under Section 13 (1) (b) of the Bombay Rent Act and the explanation of the above provision, it is required to be taken into consideration that the construction and alteration as alleged by the plaintiff was of permanent nature and change the originality and identity of structure of the demise premise or not or whether the said construction falls under the definition of repairing and while appreciating the oral as well as documentary evidence and discussion as held above, the plaintiff has not adduced any iota of evidence that regarding the actual position or situation of the suit premises and also not adduced any iota of evidence what exact construction and alteration carried out by the defendant tenant due to that identification of the suit premises is changed and said construction*

*will remove without causing serious damage to the suit premises. Therefore, while appreciating the entire oral as well as documentary evidence on the record, I am of the view that the plaintiff has failed to prove that the defendant tenant has made a construction and alteration of the permanent nature in the suit premises which cannot be removed without causing serious damage to the suit premises. Even while considering the five tests as defined by the Hon'ble Supreme Court as well as the Hon'ble High Court in the numerous of judgments as well as in the ratio as laid down by the Hon'ble Supreme Court on which the learned advocate for the plaintiff placed reliance whether the structure is permanent or not for the purpose of Section 13 (1) (b) the Hon'ble Supreme Court as well as Hon'ble High Court characterized five tests which may apply for permanent nature for the purpose of Section 13 (1) (b) of the Bombay Rent Act which are as (i) The material used in the structure, durability of the structure and the very nature of it are dependable criteria (ii) What may be called as "the damage test" or "the test of removability". This test emanate from the provision of section 13(1)(b) itself, more particularly from the Explanation thereof. If structure in question cannot be removed without causing a serious damage to the premises, such structure will be categorized as permanent structure; (iii) The identity test. If the structure changes the whole identity of the rented premises, the same is also a test applicable. In other words, it is a test*

*of offending structure vis-a-vis original structure of the premises. In this, the manner and method of structure erected and the dimensions of the structure, etc., would become relevant in addition to the type of structure itself; (iv) The intention of the tenant in erecting the structure. It is also a criteria whether the use of the structure / construction is intended to last-till-tenancy-lasts; (v) The structure erected is without landlord's consent given in writing. Therefore, while considering the above five tests for the application of Section 13 (1) (b) of the Bombay Rent Act, in the instant case on hand also the discussion as held above, the plaintiff has not proved that when the door between the rooms 'A' and 'B' was put by the defendant tenant. Even the plaintiff has also failed to prove that 'U' shape loft constructed by the defendant tenant under the guise tenantable repairing during the pendency of the present suit, even the plaintiff has also failed to prove that defendant tenant down the surface of both the rooms by one feet and also fails to prove that defendants made a construction of standing cooking platform in kitchen and also constructed the another Chokdi it means wash area during the pendency of the present suit and also failed to prove that there was no two WC it means latrine in the North side of the suit premises available in the suit premises. On the contrary the plaintiff landlord in his cross-examination admitted that he has no evidence to show the actual position and situation of the suit premises at the time of*

*inspection of tenancy and also admitted that the flouring level of both the rooms at the time of first Panchnama is same at the time of second Panchnama by the Court commissioner. Therefore, considering the above fact as admitted by the plaintiff and the discussion as held above at length, I am of the view that the plaintiff has failed to prove all the above five tests which are required to apply while adjudicating the alleged fact by the plaintiff under Section 13 (1) (b) of the Bombay Rent Act. On the contrary, I am of the view that if any construction or repairing the suit premises carried out by the defendant tenant then same will fall under the explanation of the Section 13 (1) (b) of the Bombay Rent Act. Therefore, considering the above facts and circumstances and the discussion as held above and the ratio as laid down by the Hon'ble High Court in the above judgment on which the learned advocate for the plaintiff placed reliance, I am of the view that the plaintiff has failed to prove that defendant tenant has made permanent alteration in the suit premises and change the identity of the suit premises. Therefore, considering the above facts and circumstances and discussion as held above and the facts as admitted by the plaintiff landlord in his cross-examination on oath below Exh. 80, I answer issue No. 2 in negative.*

**Issue No. 5B in H.R.P. Suit No. 473/2008 :**

57. *The learned advocate for the plaintiff Mr. I. B. Mev argued that the plaintiff landlord along with the HRP Suit No. 473/2008 as filed on dated 04/03/2008 also moved an application vide Exh. 6 for ad-interim injunction against the defendants and on the same day below Exh. 6, the Hon'ble Court was passed the ex-parte ad-interim injunction against the defendants as "Heard learned advocate for the plaintiff. Read the pleadings and documents on record. It appears that the plaintiff has prima facie case and delay in granting the application will defeat the ends of justice. Hence ad interim injunction as prayed for in para 9 (a) except bracket portion of this application is granted on dated 13/03/2008. the plaintiff to comply Order 31 Rule-A and B of CPC. Issue urgent process and notice on payment of emergent process fees." He further argued that the said ad-interim injunction order was passed by the Hon'ble Court below Exh. 6 on dated 04/03/2008, thereafter, on dated 11/03/2008 summons notice and the ad-interim injunction order as passed Hon'ble Court was duly served to the defendants and the defendants having knowledge that the defendants were restrained by the Hon'ble Court not to carry out any permanent nature of construction and alteration in the suit premises. He further argued that, thereafter, the defendants were appeared and filed their written statement vide Exh. 23 and after heard both the parties, the Hon'ble Court was pleased to*

*allow the ad-interim injunction as granted at the time of filing of the suit till final disposal of the suit by passing an order below Exh. 6 on dated 02/05/2009. He further argued that though the defendants are having knowledge that the defendants were restrained by passing order below Exh. 6 by the Hon'ble Court not to carry out any permanent nature of construction or alteration in the suit premises till final disposal of the suit then also it appears that by moving an application vide Exh. 37 for tenantable repairing of the suit premises, the defendant tenant carried out the construction of the permanent nature and made alteration in the suit premises of the permanent nature and by that way defendants tenant has committed breach of order of ad-interim injunction as granted by the Hon'ble Court and the said fact is clearly appeared from the report of the court commissioner it means Panchnama which is on record vide Exh. 153 and map as drawn by the court commissioner which is on record vide Exh. 154. He further argued that the defendants tenant committed the breach of order and disobedience of the ad-interim injunction as granted by the Hon'ble Court till final disposal of the suit. Therefore, as per the provision as envisaged under Order 39 Rule 2 of the Code of Civil Procedure, the plaintiff moved an application vide Exh. 60 and thereafter, the defendant tenant by filing reply vide Exh. 66 resisted the application for taking the action against the defendant tenant for flouting and disobedience of ad-interim injunction as*

*passed.*

58. *He further argued that, thereafter, by adducing the cogent and corroborative evidence it means the photographs of the suit premises vide Exh. 84 to Exh. 106 and from the Panchnama vide Exh. 153 as well as the map as drawn by the court commissioner vide Exh. 154, the plaintiff landlord has proved that the defendant tenant without consent or permission of the plaintiff landlord carried out the construction of permanent nature and alteration in the suit premises and carried out loft of the 'U' shape in both the rooms by using the cement, concrete, iron road and sand and said loft constructed by the defendant tenant is of RCC and said fact is specifically pleaded and deposed by the plaintiff in his plaint as well as in his deposition on oath below Exh. 80 and said fact was not specifically controverted and rebutted by the defendant tenant during the cross-examination of the plaintiff. Not only that even during the cross-examination of the plaintiff, the plaintiff has specifically deposed that the defendant tenant without prior permission or consent of the plaintiff landlord made a construction of permanent nature and altered the suit premises under the guise of repairing and also made a construction of another latrine which is not available at the time of filing of the suit which clearly appears from the document vide Exh. 151 and 152 and Panchnama as well as the map as drawn by the court commissioner*

*then also it appears that when the second time court commissioner carried out the Panchnama and prepared the map which is on record vide Exh. 153 and Exh. 154 in the said court commissioner in the presence of the party noted that there is two WC it means latrine in the suit premises it means that under the guise of the tenantable repairing as impugned order as passed by the Hon'ble Court below Exh. 37 by flouting and disobedience and by breach ad-interim injunction as passed below Exh. 6 on dated 04/03/2008, the defendant tenant made a construction of permanent nature and said fact specifically proved by the plaintiff landlord and said fact is not specifically denied by the defendant tenant. On the contrary, it appears that the defendants have admitted that earlier there was no loft on both the sides of both the rooms it means that there was no loft on both sides of the wall of both the rooms, but it appears that the 'U' shape loft noted by the court commissioner in its Panchnama vide Exh. 153 and same was also appeared from the document vide Exh. 154 map as drawn by the court commissioner. Therefore, also it becomes crystal clear that the defendant tenant by committing the breach of ad-interim injunction as granted by the Hon'ble Court made a construction or permanent nature which falls under Section 13 (1) (b) of the Bombay Rent Act. Therefore, while cogent and corroborative evidence the plaintiff has proved that the defendant No. 1 has breached the injunction and as per the provision as envisaged*



*under Order 39 Rule 2 (a) of the Code of Civil Procedure, defendant No. 1 tenant is guilty of such disobedience of breach of ad-interim injunction. Therefore, he is required to be detained in the civil prison. Therefore, he prays to answer the issue No. 5B in negative.*

59. *In the support of his above argument he placed reliance in the case of **Tayabbhai M. Bagasarwalla & Anr. V/s Hind Rubber Industries Private Limited** reported in **JT 1997 (2) S.C. 699**, and argued that in the above judgment Hon'ble Supreme Court has laid down the ratio that, "Order 39 – Rule 2A read with C.P.C. (Maharashtra Amendment) – Section 9a – Held interim injunction passed by Civil Courts is effective even when jurisdiction of Civil Courts is under challenge as per Section 9A and a person who disobeys such an interim injunction has to be punished as violations are those committed before decision of High Court holding Civil Court to be without jurisdiction – A mere objection to jurisdiction does not disable the Court – While in force orders passed have to be obeyed – Appeal allowed."*

60. *He placed reliance in the case of **Mohammad Ahmad & Anr. V/s Atma Ram Chauhan & Ors.** reported in **AIR 2011 Supreme Court 1940**, and argued that in the above judgment Hon'ble Supreme Court has laid down the ratio that, "According to our considered view majority of these cases are filed because landlords do not get reasonable rent akin to market rent, then on one ground or the other litigation is initiated. So*

*before saying omega, we deem it our duty and obligation to fix some guidelines and norms for such type of litigation, so as to minimise landlord-tenant litigation at all levels. These are as follows:*

*(i) The tenant must enhance the rent according to the terms of the agreement or at least by ten per cent, after every three years and enhanced rent should then be made payable to the landlord. If the rent is too low (in comparison to market rent), having been fixed almost 20 to 25 years back then the present market rate should be worked out either on the basis of valuation report or reliable estimates of building rentals in the surrounding areas, let out on rent recently.*

*(ii) Apart from the rental, property tax, water tax, maintenance charges, electricity charges for the actual consumption of the tenanted premises and for common area shall be payable by the tenant only so that the landlord gets the actual rent out of which nothing would be deductible. In case there is enhancement in property tax, water tax or maintenance charges, electricity charges then the same shall also be borne by the tenant only.*

*(iii) The usual maintenance of the premises, except major repairs would be carried out by the tenant only and the same would not be reimbursable by the landlord.*

*(iv) But if any major repairs are required to be carried out then in that case only after obtaining permission from the landlord in writing, the same shall be carried out and modalities with regard to adjustment of the*

*amount spent thereon, would have to be worked out between the parties.*

*(v) If present and prevalent market rent assessed and fixed between the parties is paid by the tenant then landlord shall not be entitled to bring any action for his eviction against such a tenant at least for a period of 5 years. Thus for a period of 5 years the tenant shall enjoy immunity from being evicted from the premises.*

*(vi) The parties shall be at liberty to get the rental fixed by the official valuer or by any other agency, having expertise in the matter.*

*(vii) The rent so fixed should be just, proper and adequate, keeping in mind, location, type of construction, accessibility with the main road, parking space facilities available therein etc. Care ought to be taken that it does not end up being a bonanza for the landlord.”*

*He further argued that therefore, considering the ratio as laid down in the above judgment same are squarely applicable in the instant case and prays to answer the issue No. 5B in the affirmative.*

61. *The learned advocate for the defendants Mr. J. N. Ahmedi argued that it is undisputed fact that at the time of filing of the suit, the plaintiff has also moved an application vide Exh. 6 for obtaining ad-interim injunction during the pendency of suit and it appears from the record that save and except the construction of Kachha*

*construction in the suit premises, the defendant tenant restrained by the Hon'ble Court not to make a construction of permanent nature in the suit premises and it appears that the ex-parte ad-interim injunction was granted by the Hon'ble Court on dated 04/03/2008 and thereafter, the said ex-parte ad-interim injunction was conveyed to the defendant tenant along with summons notice as issued in the said suit and after heard both the parties, the Hon'ble Court was pleased to confirm the ex-parte ad-interim injunction as granted on dated 04/03/2008.*

62. *He further argued that, thereafter, during the pendency of the present suit the defendant tenant moved an application vide Exh. 37 under Section 23 of the Bombay Rent Act for tenantable repairing of the suit premises and it appears that after heard both the parties, the Hon'ble Court was pleased to allow the said tenantable repairing application of the defendant tenant and on the basis of impugned order as passed by the Hon'ble Court below Exh. 37, the defendants tenant carried out the tenantable repairing work in the suit premises and the defendants tenant has not made any construction of permanent nature or made any alteration in the suit premises which falls under the definition of permanent nature of construction. On the contrary, the defendants tenant have only done the work of repairing the suit premises and they have not made any construction of*

*permanent nature and to prove the fact that the defendant tenant made a construction of permanent nature in the suit premises, the plaintiff landlord has failed to prove. Not only that even plaintiff landlord has also failed to prove to adduce cogent and corroborative evidence that the defendant tenant breached the ad-interim injunction as granted by the Hon'ble Court below Exh. 6. Even the plaintiff landlord is also failed to prove that the defendants tenant made a construction of second WC it means latrine in the suit premises. On the contrary while considering the facts as admitted by the plaintiff in his cross-examination below Exh. 80, the plaintiff has admitted that two WC it means latrine is mentioned in registered sale deed which is on record vide Exh. 108 and even two WC in the suit premises is in existence, same fact is also noted by the court commissioner at the time of making a local inspection of the suit premises and prepared the Panchnama which is on record vide Exh. 153 and also it appears same fact is also noted by the court commissioner in the map as drawn which is on record vide Exh. 154. Not only that even the plaintiff landlord has also failed to prove that the defendant tenant by removing the flooring from both the rooms of the suit premises down the surface of both the parties by one feet. Therefore, plaintiff landlord has failed to prove regarding the any permanent construction or alteration made by the defendant tenant in the suit premises as per the provision as envisaged under Section*

*13 (1) (b) of the Bombay Rent Act. Therefore, once the plaintiff has failed to prove that the defendant tenant during the pendency of the present suit in question made any construction of permanent nature in the suit premises and alter the suit premises in such circumstances it could not be said that the defendant tenant flouted ad-interim injunction order as passed by the Hon'ble Court below Exh. 6. On the contrary, it is evident on the record that at the time of carrying out repairing it means tenantable work in the suit premises, the defendants tenant have complied all the terms and conditions and have not made any construction which falls under the definition permanent nature. Therefore, considering the above facts and circumstances, the plaintiff has failed to prove that the defendant No. 1 has committed the breach of injunction and the defendant No. 1 is a guilty of disobedience of the ad-interim injunction as granted by the Hon'ble Court. Therefore, he prays to answer the issue No. 5B in negative.*

63. *I have gone through the arguments as advanced by the learned advocates for the parties and oral as well as documentary evidence on the record, while appreciating the oral as well as documentary evidence, it is undisputed fact on the record that the plaintiff has filed the HRP Suit No. 473/2008 on dated 04/03/2008 and along with plaint plaintiff has also moved an application vide Exh. 6 for*

*ad-interim injunction and it appears from the record that on the date of filing of the suit my learned predecessor has passed ex-parte ad-interim injunction below Exh. 6 on dated 04/03/2008 and save and except bracket portion of the relief para 9A was granted till final disposal of the injunction application vide Exh. 6 as per the provision as envisaged under Order 39 of the Code of Civil Procedure. Therefore, it appears from the above order ex-parte ad-interim injunction was granted against the defendant No. 1 tenant by my learned predecessor. Further it also appears from the record that after heard both the parties, said ex-parte ad-interim injunction was confirmed by my learned predecessor on dated 02/05/2009 it means that the ex-parte ad-interim injunction as granted against the defendant No. 1 tenant, same was confirmed till final disposal of the suit and it appears that regarding the ex-parte ad-interim injunction and the final ad-interim injunction as granted by my learned predecessor, same is within the knowledge of defendants tenant. Further, while appreciating the entire oral as well as documentary evidence on the record nothing transpires that defendant tenant made any construction of permanent nature in the suit premises and even the plaintiff has not made any allegation that prior to impugned order as passed below Exh. 37 the defendant tenant has carried out any permanent nature of construction in the suit premises, but it appears from the record that vide Exh. 37, the defendant tenant*

*moved an application for tenantable repairing under Section 23 of the Bombay Rent Act in the suit premises and it appears that after heard both the parties, said application for tenantable repairing was granted on dated 04/03/2017 and it appears that, thereafter, the defendant tenant carried out the tenantable repairing work in the suit premises, but it appears that being aggrieved and dissatisfied the repairing work as done by the defendant tenant in the suit premises, the plaintiff landlord came with the application that the defendant tenant instead of carrying out repairing work in the suit premises carried out the construction of permanent nature and to brought the present situation of the suit premises the plaintiff has moved an application vide Exh. 52 for appointing the court commissioner and it appears that after heard both the parties, the said application vide Exh. 52 was allowed and court commissioner was appointed for making a local inspection of the suit premises. Further it appears from the record, thereafter, the court commissioner on dated 20/07/2017 in the presence of the parties carried out the local inspection of the suit premises and prepared the Panchnama which is on record vide Exh. 153 and also drawn the map of the suit premises which is on record vide Exh. 154 and thereafter, it appears that the plaintiff landlord moved the application vide Exh. 64 initiating the contempt proceedings it means initiate the proceedings against the defendants tenant for disobedience and breach of*



*ad-interim injunction as granted below Exh. 6 and it appears that the plaintiff has placed reliance on the report of the court commissioner which is on record vide Exh. 153, but while considering the discussion as held above while appreciating the issue No. 2, I am of the view that the plaintiff has failed to prove that the defendant tenant has carried out any construction or alteration of permanent nature in the suit premises. Therefore, once it is held that while deciding the issue No. 2 that the plaintiff landlord failed to prove that the defendant tenant under the guise of tenantable repairing made a construction of permanent nature in the suit premises and alter the identification of the suit premises. On the contrary, while considering the facts as admitted by the plaintiff landlord in his cross-examination on oath below Exh. 80 the plaintiff has admitted that there is no repairing work or construction made by the defendant on the outside of the suit premises and have not changed the identity of the suit premises. Not only that even the plaintiff has also admitted that the due to the strength of the wall of ground floor, he has made a construction of second floor. Not only that even he has also admitted that the plaster on the wall of the suit premises is also the similar as plaster was at the time of making the local inspection by the court commissioner on dated 04/03/2008, even also admitted that premise is shown in the report of the first court commissioner in the similar situation that the suit premises is also noted by the second court*

*commissioner in his Panchnama on dated 28/07/2017. Therefore, considering the above facts and circumstances and the discussion as held above while deciding the issue No. 2, I am of the view that the plaintiff has failed to prove that the defendant tenant has carried out any permanent nature of construction or alteration in the suit premises and once the plaintiff has failed to prove by adducing cogent and corroborative on the record that the defendant tenant carried out construction of permanent nature and alteration in suit premises in such circumstances, I am of the view that merely by carrying out tenantable repairing in the suit premises as per the provision as envisaged under Section 23 of the Bombay Rent Act, the defendant tenant has flouted and committed the breach of ad-interim injunction and also not guilty of ad-interim injunction as passed by my learned predecessor. Therefore, while considering the above facts and circumstances and discussion as held above, I am of the view that the plaintiff landlord has failed to prove that the defendant No. 1 has committed the breach of injunction. Therefore, I answer the issue No. 5B in the negative.*

**Issue No. 1 in H.R.P. Suit No. 473/2008 & Issue Nos. 2, 3 in H.R.P. Suit No. 13/2017.**

64. To prove above issues, the plaintiff has submitted his

*examination-in-chief on affidavit under the provision of Order-18, Rule-4 of the Civil Procedure Code and reiterated the same facts as pleaded in both the suits, thereafter the ld. advocate for the plaintiff Mr. I. B. Mev, argued that plaintiff has purchased the suit premises on dtd. 26<sup>th</sup> March, 1993 with sitting tenants by registered sale deed from the erstwhile landlord, a copy of the sale deed on record vide Exh. 108. He further argued that the suit premises was let out by the erstwhile landlord to the original tenant Chhotubhai Bhikabhai Lodha at the monthly rent of Rs. 17/- for the residential purpose and liability to pay municipal tax is upon the landlord but later on the defendant as tenant accepted the liability to pay the municipal tax of the suit premises. He further argued that the plaintiff became landlord of the suit premises from 26<sup>th</sup> March, 1993 on that day the erstwhile landlord by issuing attornment notice informed the defendant no. 1 tenant that ownership of the suit premises is transferred in favour of the plaintiff and to pay the monthly rent to the plaintiff, copy of the said attornment notice is on record vide Exh. 135. He further argued that though the attornment notice as issued by the erstwhile landlord was duly served to the defendant no. 1 tenant, then also the defendant no. 1 tenant had failed to pay the monthly rent of the suit premises to the plaintiff landlord and inspite of several demands have been made by the plaintiff-landlord but the defendant no. 1 tenant have not paid rent of the suit premises to the*

*plaintiff-landlord from 26<sup>th</sup> March, 1993 onwards. He further argued that the defendant no. 1 tenant who has not paid monthly rent to the plaintiff-landlord from the 26<sup>th</sup> March, 1993 onwards, said facts specifically pleaded and deposed by the plaintiff in his plaint as well as deposition on oath below Exh. 80 and it appears that the defendants in their written statement at Exh. 23 also admitted that they are not paid monthly rent to the plaintiff-landlord from 26<sup>th</sup> March, 1993 but came with specific defence that the defendants have paid, deposited, tender the monthly rent in the Court but regarding depositing of monthly rent in the Hon'ble Court, the defendant-tenant has not informed the plaintiff'-landlord therefore, on dtd. 15<sup>th</sup> April 2014, the plaintiff has issued statutory demand notice as envisaged under the provisions of Sec. 12 (2) of the Bombay Rent Act, demanding arrears of rent and written demand of monthly rent of Rs. 17/- per month from the defendant no. 1 tenant and also terminated the tenancy right of the defendant no. 1 tenant, copy of said demand notice is on record vide Exh. 109. He further argued that said demand notice was sent by the plaintiff-landlord by registered post A.D. and postal receipt is on record vide Exh. 110, and said statutory demand notice was duly served to the defendant no. 1 which corroborate the documents at Exh. 111, postal acknowledgment. He further argued that though the said demand notice as issued by the plaintiff on 15<sup>th</sup> April, 2014 was duly served to the defendant no. 1*

*but within a period of 30 days the defendant-tenant had not paid the arrears of rent amount as demanded by the plaintiff-landlord and also failed to file the application for fixation of the standard rent and have also failed to raise any dispute regarding permitted increase of rent within a period of 30 days from the service of notice but on dtd. 22nd April, 2014, on the basis of the false, frivolous and vexatious facts, the defendant no. 1 sent a vague and evasive reply which is on record at Exh. 112. He further argued that though the defendant no. 1 tenant was in arrears of rent and failed to comply statutory notice as issued by the plaintiff-landlord within 30 days, therefore, inter alia on the different grounds and on the ground of arrears of rent the plaintiff-landlord has filed H.R.P. Suit No. 13/2017 against the defendant-tenant on dtd. 16 January, 2017 and in the said suit plaintiff has specifically pleaded and deposed that the defendant no. 1 tenant is in arrears of rent and has not paid rent of the suit premises from 1<sup>st</sup> April, 1993 to 31<sup>st</sup> March, 2014 for 252 months at the monthly rent of Rs. 17/- total amounting to Rs.4,284/- and also pleaded and demanded mesne profit from 1<sup>st</sup> April, 2014 to 31<sup>st</sup> December, 2016 at the rate of Rs. 5000/- per month and total mesne profit Rs. 1,65,000/- and by adding arrears of rent as due total Rs. 1,69,284/- is due and payable by the defendant no. 1 tenant to the plaintiff-landlord and it appears that on service of summons/notice of the said suit the defendants were appeared*

*alongwith their ld. advocate and filed their written statement vide Exh. 13 and in the said written statement also the defendants have not specifically denied the facts as pleaded by the plaintiff-landlord regarding arrears of rent as demanded. Not only that though the plaintiff has specifically deposed the facts as alleged in both the suits in his examination-in-chief on affidavit at Exh. 80, at the time of cross-examination of the plaintiff, the defendants have not rebutted and controverted the facts as pleaded and deposed by the plaintiff-landlord. Not only that the defendant no. 1 in his cross-examination on oath below Exh. 160 admitted that "It is true that after filing H.R.P. Suit No. 473/2008 before filing H.R.P.Suit No. 13/2017, the plaintiff has issued demand notice demanding arrears of rent, he clarified that they have deposited, paid, tender the entire rent amount in the Hon'ble Court. It is true that by issuing of the statutory demand notice the plaintiff has demanded arrears of rent from 1<sup>st</sup> April, 1992 to 31<sup>st</sup> March, 2014 for 252 months at the monthly rent of Rs. 17/- per month rent, the total arrears of rent amount Rs. 4,284/- and also demanded mesne profit at the rate of Rs. 5000/- per month from 1<sup>st</sup> April, 2014. It is true that the amount as demanded and mentioned in the notice same was not paid by him to the plaintiff. It is true that suit premises is situated in Raikhad area, Ahmedabad City". Therefore, while*

*considering the facts as deposed, the defendant in his cross-examination, it becomes crystal clear that though the said statutory demand notice demanding arrears of rent was duly served to the defendant no. 1 tenant then also within a period of 30 days from the service of notice, but defendant failed to pay arrears of rent as demanded therefore, while considering the facts as admitted by the defendant no. 1 and the provisions as envisaged under Sec. 17 to 21 of the Indian Evidence Act, admitted fact need not requires to be proved therefore, while considering the provisions as envisaged under Sec.12 (3) (a) of the Bombay Rent Act, the plaintiff has proved that the defendant no. 1 tenant in arrears of rent for more than six months prior to filing of the suit and plaintiff has also proved that the defendant no. 1 has not paid rent from 26<sup>th</sup> March, 1993 onwards and though the defendant-tenant has deposited, paid, tender monthly rent of the suit premises in the Hon'ble Court but once the defendant-tenant failed to comply the provisions as envisaged under Sec. 12 (3) (a) of the Bombay Rent Act. Under such circumstances, even the defendant-tenant pay, tender, deposit arrears of rent in the Hon'ble Court, under such circumstances also it could not be said that the defendant-tenant is ready and willing to pay rent and protection of eviction decree as envisaged under Sec.12 (3) (a) of the Bombay Rent Act, therefore,*

*considering the above facts and circumstances, he prays to answer issue no. 1 in H.R.P. Suit No. 473/08 in the affirmative and issue no. 2 in H.R.P. Suit No. 13/17 in the affirmative and prays to answer issue no. 3 in H.R.P. Suit No. 473/08 in the negative.*

65. *The ld. advocate for the defendant Mr. J. N. Ahmedi argued that though the plaintiff-landlord in his plaint in H.R.P. Suit No. 473/08 pleaded that the defendant no. 1 has not paid rent from 26<sup>th</sup> March, 1993 onwards to the plaintiff-landlord but there is no iota of evidence produced by the plaintiff-landlord on record that the plaintiff-landlord has informed defendant-tenant that he became landlord of the suit premises and purchased the suit premises from the erstwhile landlord and it appears that the said suit was filed by the plaintiff-landlord on dtd. 4<sup>th</sup> March, 2008 and there is no iota of evidence the plaintiff-landlord on record that prior to filing of the suit at any point of time, the plaintiff-landlord either in writing or orally informed the defendant-tenant and demanded monthly rent from the defendant-tenant and it appears that due to not having knowledge regarding ownership of the plaintiff-landlord and defendant-tenant had not paid monthly rent to the plaintiff and the defendant came before the Court with clean hands and*



*specifically pleaded in the written statement at Exh. 23 that due to not having knowledge the defendant has not paid monthly rent to the plaintiff-landlord. Not only that though the plaintiff came with specific case that erstwhile landlord by attornment notice dtd. 23 March, 1993, informed defendant-tenant regarding change of ownership of the suit premises, but said attornment notice was not served to the defendant-tenant in the year 1993 but said attornment notice was served to the defendant no. 1 on dtd. 14<sup>th</sup> July 1996 which is crystal clear that from the cover of the registered A.D. not only that the attornment notice was not issued by the erstwhile landlord Lagirchand Punjalal Sheth in the name of the defendants but same was issued in the name of the deceased Chhotulal Bhikabhai Lodha and though the erstwhile landlord was having knowledge that original tenant Chhotulal Bhikabhai Lodha was died on dtd. 18<sup>th</sup> October, 1972 then also instead of issuing attornment notice to the legal heirs of the deceased original tenant, attornment notice was issued in the name of the Chhtulal Bhikabhai Lodha which clearly appears from the attornment letter which is on record at Exh. 135. Not only that though the name of the owner/plaintiff, on the said attornment notice mentioned but whether the plaintiff-landlord was residing or doing his business, address of the plaintiff was not mentioned and due to that reasons the*

*defendant-tenant had not paid monthly rent to the plaintiff-landlord. He further argued that the defendant-tenant having no malafide intention not to pay monthly rent on the contrary while considering the documents vide Exh. 117 to 130, earlier rent as well as monthly rent was sent by the defendant to the erstwhile landlord by money order and while considering the documentary evidence at Exh. 129 and 130, original receipt of money order, same are of the date 15<sup>th</sup> April, 1993 and 19<sup>th</sup> August, 1993 on that dates also the defendant-tenant have sent monthly rent to the landlord and same was accepted by the landlord. He further argued that the facts as pleaded by the defendant-tenant in the written statement vide Exh. 23, same is also specifically deposed by the defendant no.1 in his examination-in-chief on affidavit vide Exh. 160 but the plaintiff has controverted, rebutted the same facts. Not only that even the plaintiff has not adduced any iota of evidence on record that defendant-tenant are not ready and willing to pay monthly rent even the plaintiff has not examined erstwhile landlord as a witness denying the facts that monthly rent as sent by the defendant-tenant by money order on dated 15<sup>th</sup> April, 1993 and 19<sup>th</sup> August, 1993, said monthly rent was not received by the erstwhile landlord therefore, while considering the documents at Exh. 129 and 130 from that, it becomes crystal clear that the*

*defendants have paid monthly rent of the suit premises to the landlord even after 26<sup>th</sup> March, 1993. Not only that even the defendant-tenant have also paid, tender, deposited entire arrears of rent in the Hon'ble Court in H.R.P.Suit No. 473/08 and said facts specifically deposed by the defendant no. 1 in his examination-in-chief on affidavit that on dtd. 10<sup>th</sup> March, 2008 deposited amount of Rs. 3060/- and on dtd. 7<sup>th</sup> April, 2008 deposited Rs. 408/- and deposited Rs.1020/- on dtd. 17<sup>th</sup> March, 2010 and on dtd 1<sup>st</sup> April, 2015 amount of Rs.1020/- and also deposed that defendant has deposited monthly rent of the suit premises up to 31<sup>st</sup> March 2020, it means the defendants have deposited entire monthly rent in the Court but to falsify said facts during the cross-examination of the defendant no. 1 the plaintiff has not brought any facts on the record that defendant-tenant has not paid, tender, deposit monthly rent as deposed in the Hon'ble Court, not only that the plaintiff-landlord having knowledge that defendant-tenant on dtd. 1st April, 2015 deposited monthly rent of the suit premises up to 31<sup>st</sup> March, 2020 and the defendant-tenant is not in arrears of rent then also it appears that on the basis of the false, frivolous and vexatious averment and to harass the defendant-tenant, the plaintiff has issued statutory demand notice on dtd. 15<sup>th</sup> April, 2014, copy of the same is on record vide Exh. 109 and the said demand notice*

*the defendant has sent proper reply a copy of the reply is on record at Exh. 112 and in the said reply the defendant has informed the plaintiff-landlord that defendants are not in arrears of rent but they have already deposited monthly rent of the suit premises up to 31<sup>st</sup> March 2015 by depositing Rs. 1,020/- on dtd. 17<sup>th</sup> March, 2010 in H.R.P. Suit No. 473/08 and notice as issued is vague, evasive and with intention to harass the defendant-tenant and though the plaintiff-landlord having knowledge that defendant-tenant tender, pay, deposit entire monthly rent in the Hon'ble Court, and they were not in arrears of rent then also it appears that, on the basis of false, frivolous and evasive averments and with intention to harass the defendant-tenant, the plaintiff-landlord has filed H.R.P. Suit No. 13/17 and in the said suit by filing written statement vide Exh. 13, the defendants have disclosed the correct facts on record regarding deposit of monthly rent in the Hon'ble Court then also it appears that without adducing any cogent evidence against the documentary evidence, the plaintiff has deposed regarding arrears of rent in his examination-in-chief on affidavit vide Exh. 80 therefore, it appears that against the pleadings and documentary evidence on record, the plaintiff has deposed regarding arrears of rent therefore, while considering the oral as well as documentary evidence on record and the facts as*

*admitted by the plaintiff-landlord in his cross-examination at Exh. 80, the plaintiff failed to prove that the defendant has not paid rent from 26<sup>th</sup> March, 1993 onwards and the defendant is tenant in arrears of rent for more than six months prior to filing of the suit on the contrary, while considering facts as pleaded and deposed by the defendant, the defendants proved that defendants are ready and willing to pay rent and protected from eviction decree under Sec. 12 of the Bombay Rent Act, therefore, prays to answer issue No. 1 in H.R.P. Suit No. 473/08 in the negative, and prays to answer the issue no. 2 in the H.R.P. Suit No. 13/17 in the negative and prays to answer issue no. 3 in H.R.P. Suit No. 13/17 in the affirmative.*

66. *I have gone through the lengthy arguments as advanced by the ld.advocates for the parties and also gone through the oral as well as documentary evidence on record and while appreciating of the oral as well as documentary evidence on record, and the discussion as held above at the time of deciding above issues. It is admitted facts on record that the plaintiff became landlord of the suit premises on 26<sup>th</sup> March,1993 and he has purchased the suit premises with sitting tenants by registered sale deed from the erstwhile landlord. Further, it is also admitted fact on record that after becoming landlord of the suit premises the*

*plaintiff-landlord has not issued any attornment notice informing the defendant-tenant to pay monthly rent of Rs. 17/- onwards to the plaintiff but while considering facts as admitted by the defendants, erstwhile landlord has issued attornment notice which is on record vide Exh. 135, it is also evident on record that the attornment notice vide Exh. 135 is of dtd. 26<sup>th</sup> March, 1993, but, there is no iota of evidence on record produced by the plaintiff on record that whether said attornment notice as issued by the erstwhile landlord same was sent by the registered post A.D., on 26<sup>th</sup> March, 1993, but, while considering the facts as pleaded and deposed by the defendants in their written statement as well in examination-in-chief on affidavit at Exh. 160 from the same it clearly transpires that the defendant came with specific defence that attornment notice dtd. 26<sup>th</sup> March, 1993 was served by registered post A.D, on dtd. 14<sup>th</sup> July, 1996, which clearly transpires from the postal receipt as affixed on cover, which is on record alongwith attornment notice vide Exh. 135, therefore, while considering postal receipt as affixed with the cover alongwith document at Exh. 135, it becomes crystal clear that on dtd. 26<sup>th</sup> March, 1993, erstwhile landlord not informed the defendant-tenant by attornment notice that the plaintiff became landlord of the suit premises but as discussed, it appears that the said attornment notice was send by*

*registered post and served on dtd. 14<sup>th</sup> July, 1996. Further while considering document at Exh. 135 attornment letter from the same it clearly and ostensibly transpires that same was not issued in the name of the defendant no. 1 or defendant no. 2 or in the name of any other legal heirs of the deceased original tenant Chhotubhai Bhikabhai Lodha, but it transpires that said attornment notice was issued in the name of the original tenant Chhotubhai Bhikabhai Lodha and it appears that the said fact is specifically pleaded and deposed by the defendant-tenant in their written statement as well as in his examination-in-chief on affidavit vide Exh. 160.*

67. *Further while considering the document vide Exh. 131 from that it clearly transpires that the Chhotubhai Bhikhabhai Lodha was died on dtd. 18<sup>th</sup> October, 1972 but while considering the original rent receipt as adduced by the defendant-tenant on record vide Exh. 121 & 122, from that, it appears that rent receipts was issued by the landlord in the name of Chhotubhai Bhikabhai Lodha. Further while considering the documents at Exh. 123 & 124 original rent receipts dtd. 29<sup>th</sup> September, 1990, 14<sup>th</sup> March, 1991, from that it is clearly transpires that after receipt of rent of the suit premises from the widow of the original tenant Chhotubhai Lodha, erstwhile landlord issued a rent*

*receipt and in the said rent receipt Jankiben wd/o original tenant Chhotubhai Lodha as a tenant made her thumb impression. Not only that even while considering the document vide Exh. 125, 126, 127, 128 and original receipts of the money order from that it transpires that the widow of the original deceased tenant Jankiben by money order sent a monthly rent to the erstwhile landlord and while considering document at Exh. 121 to 128 from that it gainsaid presume that erstwhile landlord was having knowledge that original tenant Chhotubhai Jodha was died then also the reasons best known by the erstwhile landlord issued attornment notice on dtd. 23rd March, 1993 which was sent by registered post A. D, on 14<sup>th</sup> July 1996, in the name of Chhotubhai Lodha and while appreciating oral and documentary evidence on record, nothing transpires that erstwhile landlord having no knowledge regarding death of original tenant Chhotubhai Lodha, not only that even the plaintiff has not examined the erstwhile landlord or rent collector of the erstwhile landlord in support of the said fact therefore, while appreciating the document vide Exh. 121 to 126 are receipts regarding payment of monthly rent and the document at Exh. 135, it becomes crystal clear on the record that though erstwhile landlord having knowledge regarding death of original tenant, then also he has issued attornment notice in the*



*name of the said deceased original tenant and nothing transpires from the record that by any attornment notice either erstwhile landlord or present plaintiff landlord informed the defendant-tenant that plaintiff became landlord, not only that even while appreciating the document vide Exh. 135, the address of the plaintiff not averred and it appears that the defendant came with specific defence at Exh. 23 that due to not having knowledge regarding plaintiff becomes owner of the suit premises they have not paid monthly rent to the plaintiff but not to pay monthly rent they do not have any malicious intention but they are ready and willing to pay monthly rent and it appears that the defendants immediately on service of summons/notice in H.R.P. Suit No. 473 /08 on dtd. 10<sup>th</sup> March 2008, deposited amount of Rs. 3,060/- from 1<sup>st</sup> April 1993 to 31<sup>st</sup> March 2008 and further it appears that, on dtd. 7<sup>th</sup> April, 2008 deposited Rs. 408/- towards monthly rent for the period 1<sup>st</sup> April 2008 to 31<sup>st</sup> March 2010 and thereafter, deposited Rs. 1,020/- on dtd. 17<sup>th</sup> March, 2010 towards rent for the period 1<sup>st</sup> April 2010 to 31<sup>st</sup> March 2015 and while considering the facts regarding deposit of monthly rent in H.R.P. Suit No. 473/08 in the Court, the defendant tenant on dtd. 7<sup>th</sup> March 2010 deposited, pay, tender amount of Rs. 1,020/- up to 31<sup>st</sup> March 2015 at the rate of Rs.17/- per month then also it appears that, on dtd. 15<sup>th</sup> April,*

*2015 the plaintiff has issued the statutory demand notice demanding arrears of rent up to 31<sup>st</sup> March, 2014 from the 1<sup>st</sup> April, 1993 for 252 months at the rate of Rs. 17/- total amount of Rs. 4,284/-, a copy of the said demand notice is on record vide Exh. 109 and it appears that said demand notice demanding arrears of rent as sent by the plaintiff landlord was sent by the registered post A.D. and postal slip is on record at Exh. 110. Further, it is also admitted fact on record that said demand notice demanding arrears of rent under the provisions as envisaged under Sec.12 (2) fo the Bombay Rent Act, was duly served to the defendant-tenant which corroborate from the document vide Exh. 111, original postal acknowledgment, further it transpires from the record that after service of said demand notice on dtd. 15<sup>th</sup> April, 2014, on dtd. 22nd April, 2014, it means, within a period of 30 days from the service of notice the defendant-tenant sent reply to notice of the plaintiff and copy of the same is on record vide Exh. 112 and it appears that in the said reply, the defendant has specifically denied all the facts as contended by the plaintiff-landlord and also disclosed the facts that the defendants have already deposited arrears of rent in H.R.P. Suit No. 473/08 as demanded by the plaintiff and it appears that the said facts is also specifically pleaded by the defendant in the written statement vide Exh. 23 and specifically*

*defendant no. 1 in his examination-in-chief on affidavit vide Exh. 160 and there is no iota of evidence adduced by the plaintiff that facts as pleaded and deposed by the defendants same is not true and correct but same is false, frivolous and evasive. Not only that even there is no rebutted evidence adduced by the plaintiff on record that defendant-tenant has not paid, tender, deposit monthly rent as pleaded and deposed in the Court therefore, while considering the documentary evidence vide Exh. 129 and 130, the original receipts of money order and other documentary evidence such as rent receipts, receipts of money order and documents at Exh. 135 attornment notice and cover alongwith Exh. 135, I am of the view that the plaintiff failed to prove that defendant has not paid rent from 26<sup>th</sup> March, 1993 onwards and also failed to prove that the defendant-tenant in arrears of rent for more than six months prior to filing of the suit. On the contrary I am also of the view that the defendants proved that they are ready and willing to pay rent and discussion as held above, it is evident on record that the defendant has already paid, tender or deposited arrears of rent even in advance up to 31<sup>st</sup> March, 2020 in the Court, therefore, I am of the view that the plaintiff is not entitled for eviction decree on the ground of arrears of rent as envisaged under Sec.12 (3) (a) & 12 (3) (b) of the Bombay Rent Act, hence, I answer issue no. 1*

*in H.R.P. Suit No. 473/08 in the negative and I answer issue no. 2 in H.R.P. Suit No. 13/17 in the negative and I answer issue no. 3 in H.R.P. Suit No. 13/17 in the affirmative.*

**Issue no. 6 in H.R.P. Suit No. 13/17**

68. *To prove above issue, the plaintiff has submitted his examination-in-chief on affidavit vide Exh.80 as per provision as envisaged under Order-18, Rule-4 of the Code of Civil Procedure and reiterated the same facts as pleaded in the plaint in H.R.P. Suit No. 13/17, thereafter, the ld. advocate for the plaintiff Mr. I. B. Mev has argued that defendant no. 1 tenant was in arrears of rent and inspite of several demands made by the plaintiff-landlord defendant no. 1 tenant failed to pay the monthly rent, therefore, on dtd. 15<sup>th</sup> April, 2014 the plaintiff has issued statutory demand notice as envisaged under Sec.12 (2) of the Bombay Rent Act, a copy of the same is on record vide Exh.109, said notice was sent by the plaintiff by registered post A.D., and postal slip is on record vide Exh. 110 and said notice was duly served to the defendant-tenant which clearly appears from the document vide Exh. 111 postal acknowledgment and it appears that regarding said fact, the defendant in his written statement vide Exh. 13 admitted, and it is also admitted by the*

*defendant no. 1 in his cross-examination at Exh. 160. He further argued that the said demand notice as issued by the plaintiff demanding arrears of rent as envisaged under Sec. 12 (2) of the Bombay Rent Act, was duly served to the defendant-tenant then also within period of 30 days the defendant no.1 was not complied with notice and not paid arrears of rent as demanded by the plaintiff. Not only that even the defendant has not adduced any cogent documentary evidence on record to prove that notice dtd. 15<sup>th</sup> April, 2014 as issued by the plaintiff at Exh. 109 same is not legal and valid therefore, plaintiff by cogent and corroborative documentary evidence proved that the legal and valid notice was served to the defendant no. 1, therefore, prays to answer issue no. 6 in the affirmative.*

69. *The ld. advocate for the defendant Mr. J. N. Ahmedi, has argued that the defendant-tenant are not denying that notice dtd. 15<sup>th</sup> April, 2014 was not served to the defendant-tenant but while considering the facts as contended by the plaintiff in notice vide Exh. 109, the plaintiff has demanded arrears of rent at the rate of Rs. 17/- per month which was already paid, tender and deposited by the defendant-tenant in the Hon'ble Court in H.R.P. Suit No. 473/08 and though the said fact is knowing very well by the plaintiff-landlord then also with malicious intention to*

*harass the defendant-tenant the plaintiff has issued said notice therefore, merely the said demand notice issued by the plaintiff-landlord that is not suffice but whether legal demand made by the plaintiff or not by way of the statutory notice under Sec. 12(2) of the Bombay Rent Act, that is required to be taken into consideration but while considering the evidence on record, the plaintiff-landlord failed to prove his legal and valid demand of arrears of rent as demanded by way of the statutory notice vide Exh. 108, not only that even both the defendants are statutory tenants of the suit premises and said facts is specifically pleaded by the defendants tenants in their written statement vide Exh. 23 as submitted in H.R.P. Suit No. 473/08, then also to fulfill his own malicious goal with intention to harass the defendants, the plaintiff has issued a said demand notice only against the defendant no. 1 and he further argued in the said notice the plaintiff has not demanded legal and valid arrears of rent therefore, considering the facts and circumstances, the plaintiff failed to prove that legal and valid notice is served to the defendant no. 1, therefore, prays to answer issue no. 6 in the negative.*

70. *I have gone through lengthy arguments as advanced by the ld. advocates for the parties and also gone through the oral*

*as well as documentary evidence on record and while considering the discussions as held at length while deciding issue nos. 2, 3 as framed in H.R.P. Suit No. 13/17 and deciding issue no. 1 as framed in H.R.P. Suit No. 473/08 it becomes crystal clear on record that prior to filing of H.R.P. Suit No. 473/08 on dtd. 4<sup>th</sup> March, 2008, the plaintiff has not issued statutory notice as envisaged under Sec.12 (2) of the Bombay Rent Act, demanding arrears of rent from the defendant-tenant but it appears that during the pendency of the H.R.P. Suit No. 473/08 on dtd. 15<sup>th</sup> April, 2014, the plaintiff has sent said demand notice demanding arrears of rent at the rate of Rs. 17/- per month from 1<sup>st</sup> April, 1993 to 31<sup>st</sup> March, 2014 it means for 252 months, the plaintiff has demanded arrears of rent amount total Rs. 4,284/- and also demanded mesne profit from 1<sup>st</sup> April, 2014 to 31<sup>st</sup> December, 2016 at the monthly rent of Rs. 5,000/- it means total Rs. 1,65,000/- plus arrears of rent amount total amount of Rs. 4,284/- total Rs. 1,69,284/- demanded by the plaintiff by issuing statutory demand notice which is on record vide Exh. 109 from the defendant no. 1.*

71. *Further while considering the notice as issued by the plaintiff landlord on dtd. 15<sup>th</sup> April, 2014 which is on record vide Exh. 109 same was sent by the plaintiff by registered post*

*A.D., to the defendant no. 1, original postal slip is on record vide Exh. 110 and said notice was duly served to the defendant no. 1 which corroborates from the document vide Exh. 111, that is postal acknowledgment and it appears that after service of notice vide Exh. 109, defendant sent reply to the plaintiff landlord dtd. 22- April, 2014, copy of said is on record vide Exh. 112. Further, it transpires from the record that on the basis of the said demand notice as sent by the plaintiff landlord on 15<sup>th</sup> April, 2014, which was duly served to the defendant and defendant has sent reply to the said notice to the plaintiff, the plaintiff landlord has filed H.R.P. Suit No. 13/2017 on dtd. 16<sup>th</sup> January, 2017, it means almost after more than two and half years on the basis of Exh. 109 the plaintiff has filed H.R.P. Suit No. 13/2017, but, while considering the provisions as envisaged under Article 67 of the Limitation Act, the plaintiff-landlord even for obtaining the vacant and peaceful possession of the suit premises, on the ground of arrears of rent have a right to file suit within a period of 12 years therefore, while considering the Article 67 of the Limitation Act, though the suit is filed by the plaintiff after two and half years after reply of the defendant-tenant, I am of the opinion that the suit of the plaintiff is maintainable but while considering the legality and validity of notice as served by the plaintiff to the defendant no. 1 for that while considering*



*discussion as held above, while deciding above issues, it is evident on the record that both the defendants became statutory tenants under the provisions as envisaged under Sec. 5 (11) (c) (i) of the Bombay Rent Act, after death of original deceased tenant then also it appears that the facts as pleaded by the defendants in their written statement at Exh. 23 as filed by the defendants in H.R.P. Suit No. 473/2008 and as discussed in the said suits up to 31<sup>st</sup> March, 2015, the defendants have deposited, paid and tender monthly rent of the suit premises on dtd. 17<sup>th</sup> March, 2010 and it could be presumed that regarding arrears of rent as paid, tender, deposited by the defendant-tenant in the Court in above suit as filed by the plaintiff, the plaintiff having a knowledge then also it appears that the plaintiff by issuing notice under Sec. 12 (2) of the Bombay Rent Act, demanded arrears of rent from 1<sup>st</sup> April 1993 to 31<sup>st</sup> March 2014, but, while considering the arrears of rent as deposited by the defendant, from that it appears that the defendant has deposited arrears of rent amount up to 31<sup>st</sup> March, 2015 on dtd. 17<sup>th</sup> March, 2010 and as discussed regarding the deposit of the said amount the plaintiff having a knowledge then also by issuing of the notice Exh. 109 the plaintiff has demanded arrears of rent for the above period, not only that even it is also admitted fact on record that till date defendant was not declared that defendants are in*

*illegal possession of the suit premises or even no eviction decree was passed against the defendants as per provisions as envisaged under the provision of the Bombay Rent Act. Even while considering the provisions as envisaged under Order-20 Rule-12 of the Civil Procedure Code, which is as "Decree for possession and mesne profit" (1) where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree.*

- (a) for the possession of the property;*
- (b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;*
- (ba) for the mesne profits or directing an inquiry as to such mesne profits;*
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until:---*
  - (i) the delivery of possession to the decree-holder.*
  - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or*
  - (iii) the expiration of three years from the date of the decree, whichever event first occurs.*

**2** *Where an inquiry is directed under clause (b) or clause (c), a*

*final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.*

72. *Therefore, while considering above provision as envisaged and while considering the definition of the **mesne profit** as envisaged under Sec. 2 (12) of the Code of Civil Procedure, “**mesne profit** of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.”*

*Therefore, while considering the above definition of the mesne profit and the discussion as held though the plaintiff landlord filed H. R. P. Suit no. 473/2008 against the defendant in the said suit, the defendants were not declared that they are in the wrongful possession of the suit premises even there is no eviction decree was passed against the defendants-tenants then also it appears that the plaintiff landlord issued notice vide Exh. 109 demanding mesne profit at the rate of Rs. 5,000/- per month from the defendant-tenant from 1<sup>st</sup> April, 2014 to 31<sup>st</sup> December 2016 and it appears that notice as issued by the plaintiff after service of said notice, defendant-tenant by reply vide Exh. 112 on dtd. 22nd April, 2014, specifically denied all the contention of*

*the notice of the plaintiff and while appreciating oral and documentary evidence on record, the plaintiff has not proved that on date of the issuance of notice vide Exh. 109, defendant-tenant was became arrears of rent even as discussed, though both the defendants are statutory tenants of the suit premises but the plaintiff has issued notice against the defendant no. 1 and not issued any notice to the defendant no. 2, even there is no notice was served to the defendant no. 2 then also it would be considered that issuance of notice as envisaged under Sec.12 (2) of the Bombay Rent Act, against any one of the defendant, it means tenant that would be considered valid but while considering the discussion as made legality and validity it means regarding legality and validity arrears of rent demanded by notice, it clearly transpires that the plaintiff landlord has not demanded legal and valid arrears of rent therefore, merely by issuing notice under Sec.12 (2) of the Bombay Rent Act, same would not be considered legal and valid notice issued by the plaintiff landlord but the facts as averred and contended in the said statutory notice as envisaged under Sec.12 (2) of the Bombay Rent Act, whether the said fact are true and correct or whether the demand as made by the plaintiff is legal and valid that is required to be proved by the plaintiff landlord but the discussion as held above and while appreciating the oral as well*

*as documentary evidence on record, I am of the view that the plaintiff failed to prove that defendant-tenant is in arrears of rent for more than six months prior to filing of the suit. Therefore, while considering the facts and circumstances and discussion as held above, I am of the view that plaintiff failed to prove legality and validity of notice as issued vide Exh. 109. Hence, I answer the issue no. 6 also in the negative.*

**Issue No. 6 in H.R.P. Suit No.473/2008 :**

73. *So far as issue No. 6 is concerned, it is pleading of the plaintiff that the defendant No. 1 is trying to sublet, transfer, assign the suit premises to any third party and as per mandate of the Bombay Rent Act, the tenant has every right to enjoy his tenanted premises but is under obligation to observe and follow the mandate given in the provision of the Bombay Rent Act with respect to the premises being rented to the tenant and plaintiff being landlord has every right to protect his premises being damaged by anyone or transfer or assign by anyone therefore, as such the prayer for injunction prayed by the plaintiff-landlord is in consonance with Section 13 (e) of the Bombay Rent Act and under this circumstances, if the permanent injunction is granted in favour of the plaintiff it would not cause any prejudice to the*

*right of the defendants-tenants therefore, plaintiff is entitled for permanent injunction as prayed in para-9 (b) of the plaint. So, the answer of issue No. 6 is given in the affirmative.*

**Issue No. 9 in H.R.P. Suit No. 473/2008 and Issue No. 9 and 10 in H.R.P. Suit No. 13/2017 :**

74. *So far above issues are concern in the both suit's, while considering the discussion as held above save and except the permanent injunction is concern the plaintiff landlord is not entitled for any other relief as prayed for in the both suit's. Therefore, considering the above facts and circumstances in the larger interest of the justice I answer the issue No. 9 in the H.R.P. Suit No. 13/2017 in the negative and in the larger interest of justice for issue No. 9 in H.R.P. Suit No. 473/2008 and issue No. 10 in H.R.P. Suit No. 13/2017 I pass the following final order as follows :*

**ORDER**

1. *The H.R.P. Suit No. 473/2008 and H.R.P. Suit No. 13/2017 as filed by the plaintiff-landlord is hereby ordered to be dismissed accordingly.*
2. *The defendants in both the suits, their men, persons, power of attorneys etc. are hereby restrained permanently from transfer,*

*assign, sublet the suit premises to any third person in any other manner. The defendants further restrained permanently from making any type of kaccha - pucca construction, destruction, structural alteration etc. in the suit premises.*

- 3 *Plaintiff of both the suits shall bear the costs of his own as well as cost of the defendants.*
- 4 *Copy of this judgment be kept in the record and proceedings of H.R.P. Suit No. 13/ 2017.*
- 5 *Decree to be drawn accordingly.*

*Pronounced and signed in open court today on this 02<sup>nd</sup> day of April, 2019.*

***Date: 02-04-2019***

***Place: Ahmedabad***

***(Prem Hansraj Singh)  
Judge (Code No.GJ00746)  
Small Cause Court No. 5  
Ahmedabad***