
(2010) 05 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No's. 1223 of 1992 and 5266 of 1993

A-1 Engineering Works and Others

APPELLANT

Vs

Rajendra Kasturchand Vora and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)
Constitution of India, 1950 — Article 227

Citation : (2011) 5 ALLMR 215 : (2011) 3 BomCR 856

Hon'ble Judges : Oka A.S., J

Bench : Single Bench

Advocate : D.S. Sabnis, in W.P. No. 1223/1992, Avinash Avhad and Amit Nikam, in W.P. No. 5266/1993, for the Appellant; Avinash Avhad and Amit Nikam, in W.P. No. 1223/1992 for Respondent Nos. 1A and 1B and D.S. Sabnis in W.P. No. 5266/1993 for Respondent Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Oka A.S., J.—These two petitions under Article 227 of the Constitution of India can be disposed of by a common judgment as the same arise out of the same suit. For the sake of convenience, the parties have been hereinafter referred to with reference to their status before the trial Court. A suit for eviction was filed by the Plaintiffs under the provisions of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (hereinafter referred to as the said Act of 1947). The suit relates to a shop premises admeasuring 23 ft X 17 ft in an Industrial Estate on Plot No. 427/46 at Gultekdi, Pune. The Defendants are the tenants who are the partners of the firm M/s. A-1 Engineering Works. The allegation in the suit is that the Defendants have made a permanent cabin for their office in the suit premises without consent and knowledge of the Plaintiffs. Another allegation made in the plaint is that there is an open space in front of the suit premises in which the Defendants are illegally and unauthorisedly storing goods thereby obstructing the Plaintiffs and their customers while approaching the office of the Plaintiffs. It is alleged that by demolishing two pillars of the

compound gate, damage has been caused by the Defendants to the Plaintiffs' property. It is alleged that the Defendants have constructed a cabin for their office in the suit premises. The suit was filed on the ground that the Defendants have carried out permanent construction. Another ground pleaded was of bona fide requirement on the ground that the Plaintiffs are not possessing sufficient premises and though they have purchased a new machinery, the same was required to be kept in a temporary shed. It was alleged that the Plaintiffs are unable to install the machinery due to lack of availability of the premises. The third ground for eviction is causing nuisance and annoyance.

2. The Defendants contested the suit. The Defendants contended that the claim of bona fide requirement was not genuine. It was pointed out that the Plaintiffs have foundry premises on which two floors have been constructed. It is alleged that by accepting high rent, the Plaintiffs have let out the said new floors. Even second floor above the suit property has been let out. The Defendants stated that only one wooden cabin is made in the suit premises and its channels and angles are not embedded into any of the walls of the suit premises. It is contended that the said office cabin was made with the consent of the Plaintiffs. The suit was dismissed by holding all issues against the Plaintiffs. An appeal was preferred by the Defendants against the decree.

3. The plaint was amended during the pendency of the appeal. It was pointed out that further changes of permanent nature were made in the suit premises in April/May 1987. It was pointed out that the wooden cabin was shifted on the mezzanine floor which was erected by the Defendants by using mild steel channels and angles rested on T beams. It is alleged that wooden cabin was completely shifted from the ground floor to the mezzanine floor. It was alleged that the same was resting on channels and angles. It is alleged that I Beams are fixed in concrete foundation. It is alleged that the aforesaid channels/angles are embedded in walls in concrete. It was further alleged that a spiral staircase has been made for entering the cabin. It is stated that all these additions are of permanent nature. It was alleged that the Defendants have increased the area of cabin. It is alleged that all these changes have been effected without the consent of the Plaintiffs. It is further alleged that the changes cannot be removed easily and if any attempt is made to remove the same, the building is likely to get damaged. In the amended plaint, the Plaintiffs contended that they were in possession of rented premises bearing House Nos. 358 359 and 360 in Shukrawar peth Pune. It was stated that in the said premises totally admeasuring 146.3 square meters, the Plaintiffs had started their business by installing six lathe machines, three drilling machines and three vending machines. It is alleged that about 15 to 16 persons are employed in the factory of the Plaintiffs. It is pointed out that a suit for eviction was filed by the landlords in respect of the said premises against the Plaintiffs. A writ petition arising out of the suit for eviction filed by the landlords against the Plaintiffs was pending in this Court wherein the Plaintiffs have challenged the decree of eviction. The additional written statement was filed by the Defendants. It was contended that

the Defendants have merely made a platform of temporary nature on the eastern side of suit premises with the help of mild steel channels and angles. It is alleged that the said channels and angles are not embedded into any of the walls of the suit premises. The Defendants contended that the platform can be easily removed without causing any damage to the suit property or the suit premises or any part thereof. It is contended that the changes are of temporary nature. The Defendants denied that the suit premises was required by the Plaintiffs for bone fide use.

4. After the amendment of the plaint was permitted by the Appellate Court, by keeping the appeal pending, the parties were directed to appear before the trial Court and were permitted to lead further evidence. After allowing the parties lead further evidence, the trial Court was directed to record findings on the issue of permanent construction, bona fide requirement and comparative hardship. Accordingly parties adduced evidence before the trial Court. The parties examined their respective experts. The trial Court recorded a finding that the Defendants have without consent of the Plaintiffs erected construction of permanent nature. However, the trial Court held that the Plaintiffs have failed to establish the bona fide need. being aggrieved by the finding of the trial Court on the issue of permanent construction, the Defendants filed cross objections in the pending appeal. The Appellate Court held that the Plaintiffs have proved that the Defendants have carried out construction of permanent nature without their consent in writing. The Appellate Court passed a decree on the said ground. However, the findings of the trial Court on the issues of bona fide requirement and nuisance and annoyance were confirmed. Writ Petition No. 1223 of 1992 has been preferred by the Defendants for challenging the decree on the ground of carrying out permanent construction. Writ Petition No. 5266 of 1993 has been preferred by the Plaintiffs for challenging the findings on the issue of bona fide requirement.

5. The learned Counsel appearing for the Defendants has made detailed submissions. He submitted that even taking the case made out by the Plaintiffs as it is, there was no construction of permanent nature carried out by the Defendants. He submitted that the platform erected by the Plaintiffs is made up of vertical steel sections and horizontal steel sections which are welded together. He pointed out that the vertical members are embedded in ground and horizontal members are welded together which are resting on steel-based plates provided on each vertical member. He submitted that vertical sections which are embedded in the ground can be removed easily without damaging the structure of the suit premises. He pointed out that staircase has been embedded in the horizontal member and it is supported by a steel tripod which was resting on the ground. He submitted that as the staircase was not embedded or fixed in the ground, the same can be easily removed. He submitted that the platform is made up of wooden planks which are fixed in horizontal steel frame-work. He stated that the wooden flooring has not disturbed the side walls of the suit premises. He pointed out that the front side of the platform is provided with

wooden partition with aluminum frame-work having glass shutter in it. He submitted that the aluminum and timber members are attached to the ceiling by screws. He submitted that the entire structure can be dismantled and removed without causing any damage to the main structure of the suit premises. He submitted that the Appellate Court has not considered the nature of the structure made in the suit premises. He submitted that it in no way affects the main structure and it can be easily removed. He submitted that the structure has been erected for beneficial enjoyment of the suit premises. He placed reliance on decision of this Court in the case of Alisaheb Abdul Latif Mulla Vs. Abdul Karim Abdul Rahman Mulla and Others, . He submitted that this Court held that even erection of a wall by using cement and bricks does not amount to work styled as a permanent construction. He submitted that this Court held that if the work has been carried out so as to enable the person using the premises for better enjoyment and if there is no change in the form of the structure, it cannot be held to be a permanent structure. He also placed reliance on a decision of this Court in the case of (Lucky Restaurant and Anr. v. Deccan Talkies, Poona) 1985 BomRC 370. He submitted that this Court has made a distinction between erection of a permanent structure and the permanent use of a temporary structure. He submitted that this Court held that even if a temporary structure is put up by the tenant for permanent use, Section 13(1)(b) of the said Act of 1947 is not attracted and the said provision will be attracted only if what is erected is a permanent structure. He submitted that this test has not been considered by the Appellate Court. He submitted that the decision of the Appellate Court is based on surmises and conjectures. The learned Counsel appearing for the Plaintiffs supported the impugned judgment and order in so far as ground of permanent structure is concerned. He placed reliance on a decision of this Court in the case of C.C. Yi Vs. Janakidevi Anantlal Gupta and Others, . He submitted that this Court held that if the construction carried out by the tenant brings about a substantial improvement and change in the nature and form of the accommodation, it amounts to permanent construction. He submitted that the Defendants have constructed a platform inside the suit premises and on the said platform, office cabin has been erected. He pointed out that there is a staircase is attached to the platform which is embedded in the earth. He submitted that considering the drastic nature of the structure which has brought about a complete change in the nature and form of the suit premises, the Appellate Court was justified in passing a decree on the ground of permanent construction. He submitted that the courts below have committed an error by not passing a decree on the ground of bona fide requirement. He submitted that what was brought on record was the fact that there was no place available for installing machinery acquired by the Plaintiffs. He submitted that there is no finding recorded that any other premises are available for installing the machinery. He submitted that the need pleaded was for proposed diversification by starting plastic project in the suit premises. He submitted that the landlord was the best Judge of his need. The learned Counsel appearing for the Defendants submitted that even assuming that there is a change in the form of the suit premises by

reason of carrying out alterations, that itself is not sufficient to prove the ground of permanent accommodation. He invited my attention to the material on record to show that the other properties are available to the Plaintiffs. He submitted that there is no merit in any of the grounds incorporated in the plaint.

6. I have given careful consideration to the submissions. I have perused the judgments of the courts below. The Plaintiffs examined one Shri Bapaye, an architect who inspected the suit premises in presence of the parties. The said Mr. Bapaye submitted a report as regards the nature of the construction carried out. The Defendants' expert witness Mr. Rajendra Mogli also inspected the suit premises and submitted a report. In the report submitted by Mr. Bapaye he has stated as under:

(1) Mezzanine floor is provided with verticle steel Sections (150X75X6 m.m) and horizontal steel Sections (75X75X6 m.m) welded together. The verticle members are embedded in flooring with concrete foundation. All horizontal members are welded to each other resting on steel base plates provided on each verticle member to get more stability to this structure. Welding of all members to each other has created one homogeneous self standing structure.

(2) Being longitudinal structure the spiral staircase in steel which is provided in the centre is acting as bracing keeping the entire structure in position. Main member of the staircase is residing on the steel tripod embedded in the flooring.

(3) In addition to above the timber flooring is fixed on the framework which is in steel "C" section with nut and bolts. The same flooring is touching the side walls on three sides whereas front side is provided with wooden partition having aluminum members for glass shuttering. The same aluminum members for are fixed to the ceiling along with the timber members. Touching of the timber flooring to the side walls and connecting aluminum members to the ceiling creates compact unit supported to the main structure along with the verticles. As the verticle member and horizontal member are welded together and verticle members are embedded in the flooring, the structure in question cannot be a temporary structure as it cannot be dismantled and shifted easily without causing damage to the flooring and the structure.

(4) Dimensions: Ground floor 19" X 9" X 6 (-1" Mazinine floor 19" X 9 X 5) with N.S. Spiral staircase.

In the report submitted by Mr. Mogli, the witness examined by Defendants it is stated as under:

1. The platform is at height of 6" from ground and has been made with verticle steel Sections 150 X 75 X 6 m.m and horizontal steel Sections 75 X 75 X 6 m.m welded together there which are not disturbing the side walls. The verticle members are embedded in ground. All horizontal members are welded to each other resting on steel base plates provided on each verticle member.

2. Verticle sections are embedded in the ground which can be removed easily.

3. The spiral staircase is in steel which is at the centre. The staircase has been welded to the horizontal steel framework at its base. The main member of the staircase is resting on the steel tripod which rests on the ground. It is not embedded or fixed in the ground.

4. The platform is made of wooden planks which are fixed on the horizontal steel frame work with nuts and bolts. The wooden flooring is not disturbing the side walls on three sides whereas front side is provided with wooden partition with aluminum frame work with glass shuttering. The aluminum members and timber members are attached to each other and to ceiling by screws.

5. The structure which can be easily dismantled and shifted with the help of gas cutter and after removing screws, nuts and bolts, without disturbing and causing any damage to the side walls and ceiling or ground of the premises or main building. The structure has not caused any damage to premises/main structure/building.

7. It must be necessary to note that after remand to the trial Court, one of the Defendants entered the witness box. He stated that he removed the old cabin and installed a new platform of steel frame. He stated that the steel frame is resting on channels of steel. He stated that the steel frame is made by welding steel members and vertical channels where embedded in the earth. He stated that there were four such vertical channels on which the steel frame was resting. He stated that the said vertical channels were embedded in the ground. He stated that wooden planks are fixed in the frame. He stated that a wooden cabin has been installed on the said platform which is partly made of wood and partly of aluminium. He stated that height of the platform was 6 feet from the ground. He stated that by using a gas cutter the entire structure can be dismantled. He stated that main building will not be affected by dismantling of the structure. The expert examined by the Defendants in the cross-examination stated that the dimension of the cabin was 8 feet x 17 feet. He stated that the structure which is above the platform can be called as a loft and not as a cabin. In the cross-examination of the expert appointed by the Plaintiffs it was brought on record that the vertical members can be taken out by digging the flooring. It was also brought on record that the tripod of the stair case was embedded in the flooring. He also admitted that the entire structure can be dismantled by using gas cutters.

8. Even going by the report and evidence of the expert appointed by the Defendants, it appears that during the pendency of the suit, the Defendants elected a platform having height of 6 feet from the ground. The platform is made up of vertical steel sections and horizontal steel sections. The vertical and horizontal sections are welded together. The vertical sections are embedded in the ground of the suit premises. A spiral stair case made up of steel is provided at the centre of the platform. The staircase has been welded to the horizontal steel framework at its base. The main member of the staircase is resting on a steel tripod which rests on the ground. The platform is made up of wooden planks which are fixed on the horizontal steel framework with nuts and boards. A

cabin made up of aluminium and timber has been made on the said platform. The cabin has been attached to the ceiling by screws. What both the experts have opined is that the structure can be removed by using gas cutters. The expert appointed by the Plaintiffs has given area of mezzanine floor as 19 feet x 9 feet having height of 5 feet. The height of the mezzanine floor is 6 feet from the ground. The expert appointed by the Plaintiffs stated that vertical members of the steel frame work can be removed by digging the flooring and the flooring can be thereafter repaired for bringing it to its original condition. In the cross-examination he stated that the tripod of the staircase is embedded in the flooring. One of the Defendants who was examined before the trial Court after remand admitted that he had removed the old cabin and installed a new platform of steel frame over area of 17 feet x 8 feet. It must be remembered that the structure consisting of mezzanine floor and a cabin has been erected in the shop premises admeasuring 23 feet x 17 feet. Thus, a superstructure consisting of a mezzanine floor and a cabin above the mezzanine floor has been erected by the Defendants during the pendency of the suit. Admittedly, the vertical steel members of the mezzanine floor and the staircase made up of steel have been resting on the floor of the suit premises. The substantial area of the suit premises is occupied by the superstructure of mezzanine floor and the cabin which has been admittedly fixed by screws to the ceiling of the suit premises.

9. In the case of the case of Lucky restaurant (supra), this Court held that what is prohibited u/s 13(1)(b) of the said Act of 1947 is the erection of permanent structure, not the permanent use of a temporary structure. In the case of Alisaheb Abdul Latif Mulla (supra), this Court held that extension of existing mori and erection of walls for converting into a regular bathroom will not amount to carrying out construction of permanent nature as the construction was for the better enjoyment of the premises let out and the same was being put to the same use as before. In the case of Dr. C.C. Yi (supra), this Court considered various decisions on the subject. This was a case where the finding of the courts below was that the entire set up and get up of the suit premises was changed by the tenant. This Court held that if the work carried out by the tenant brings about substantial improvement and change in the nature and form of accommodation, it will amount to carrying out permanent construction. In the case of Somnath Krishnaji Gangal Vs. Moreshwar Krishnaji Kale and Others, , this Court held that the essential element which needs to be considered while determining whether a construction is a permanent construction is as to whether the construction is substantial in nature and whether it alters the form, front and structure of the accomodation.

10. Now coming back to the facts of the case, the area of the suit shop premises is 23 feet x 17 feet. The area of the loft made in the suit premises is 18 feet x 9 feet having height of more than 6 feet. The area of the cabin is nearly the same having height of 5 feet. The vertical steel members of the loft are embedded in the ground of the suit premises. The tripod of the steel staircase is resting on the floor of the suit premises. Thus a major part of the suit premises is occupied by a

loft having substantial size made by the tenant during the pendency of the suit. Major part of the suit premises has been occupied by the structure of the loft/mezzanine floor and the cabin thereon. The suit premises are shop premises. The construction of this magnitude certainly brings about a substantial change in the form and front of the suit premises. It has brought about a substantial improvement and change in the nature and form of the suit shop premises.

11. After amendment was carried out to the plaint during the pendency of the appeal, the Appellate Court permitted parties to adduce evidence before the trial Court and the said Court was ordered to record a finding on the issue a permanent construction. After detailed consideration of evidence, the trial Court held that the construction was of permanent nature. The Appellate Court after consideration of the entire evidence has confirmed the said finding. The Appellate Court held that the fact that the structure erected in the suit premises can be removed is not an invariable test. The Appellate Court observed that it was admitted by the Defendants that the structure of platform has been made by using steel members and office cabin has been fixed by screws and nuts and bolt to the ceiling of the suit premises. The Appellate Court found that the expert examined by the Defendants admitted that the platform cannot be dismantled without use of a gas cutter. The Court found that the witness admitted that the vertical members will have to be removed by digging the floor. The Appellate Court observed that the intention of the Defendants was to enjoy the structure permanently and the nature of the structure was such that it substantially changes the character of the suit premises. The Appellate Court observed that the Defendants have not adduced evidence to show that the use of office cabin was absolutely essential for them. In short, the Appellate Court held that the structure has been erected with the intention of using it permanently and that the same brings about a complete change in the structure of the suit premises. The Appellate Court extensively referred to the reports submitted by experts appointed by both the parties. The Appellate Court observed that the photographs which are admitted in evidence show that concrete foundation has been taken for vertical members. The Appellate Court has minutely examined the reports and the evidence of experts examined by both the parties. After having considered the pleadings and evidence on record and the reports of the experts, it is not possible to find fault with the concurrent findings of fact recorded by the courts below on the issue of permanent construction. The said findings of fact cannot be interfered in writ jurisdiction.

12. That takes me to the ground a bona fide requirement alleged by the Plaintiffs. By amending the plaint, a contention was raised that the Plaintiffs are running an engineering unit in a rented premises at Shukrawar peth at Pune where the number of machines have been installed and about 15 or 16 persons have been employed. It was contended that the landlord of the Plaintiffs has obtained a decree for possession in respect of the said premises and a writ petition filed by the Plaintiffs in this Court for challenging the decree for possession was pending for final hearing. It was contended that if the petition is

dismissed, the Plaintiffs will have no place for their manufacturing process. However, both the courts noted the admitted position that the Plaintiffs were also having a workshop at Gultekdi, Pune. In fact the finding of the trial Court which is confirmed by the Appellate Court is that one of the Plaintiffs Rajendra admitted in evidence that during the pendency of the suit, he constructed first and second floor on his own property and has let out the same to one Mr. Shah. The Court found that the construction of the said floors was for industrial use and the area of each floor was 2200 sq.ft. Apart from construction of two additional floors, two more rooms were constructed on the ground floor adjacent to the suit premises and admittedly the said rooms were not let out. The trial Court observed that decree for possession was passed in respect of the premises of the Plaintiffs in Shukrawar Peth Pune in the year 1980. It was observed that though the said ground was available at the time of institution of the suit, it was taken during the pendency of appeal. Moreover, it was observed that the petition in the High Court was not disposed of. The aforesaid findings of fact recorded by the trial Court after remand have been affirmed by the Appellate Court. The action of the Plaintiffs of letting out newly constructed first and second floors to a tenant during the pendency of the suit defeats the plea of bona fide requirement and hence it is not possible to interfere with the findings of fact recorded by the courts below on the said issue. Hence, there is no merit in the petition filed by the Plaintiffs.

13. Hence, I pass the following order:

WRIT PETITION No. 1223 OF 1992:

- (a) Writ petition is rejected.
- (b) Rule is discharged with no orders as to costs.
- (c) Decree for possession shall not be executed for a period of four months from today.

WRIT PETITION No. 5266 OF 1993:

- (a) Writ petition is rejected.
- (b) Rule is discharged with no orders as to costs.