

(1997) 03 GUJ CK 0001
In the Gujarat High Court

Bai Hariben Ambashanker and Others	APPELLANT
Vs	
Shantilal Jadavji Shah	RESPONDENT

Date of Decision : 05-03-1997

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(1), 13, 13(1)(a), 13(1)(a), 13(1)(k)
Constitution of India, 1950 — Article 133(1)
Contract Act, 1872 — Section 63
Transfer of Property Act, 1882 — Section 108, 108(o), 111(g)(1)(2)

Citation : (1997) 2 GLR 1108

Hon'ble Judges : M.S. Parikh, J

Bench : Single Bench

Judgement

M.S. Parikh, J.—The petitioners, original plaintiffs, filed Regular Civil Suit No. 401 of 1972 in the Court of Civil Judge (J.D.), Bhavnagar against the opponent-original defendant for obtaining relief of eviction of the suit premises and recovery of arrears of rent and mesne profits. The learned trial Judge by his judgment and order dated 12-7-1976 dismissed the petitioners' suit with no order as to cost. The petitioners, therefore, carried the matter in Regular Civil Appeal No. 2 of 1977 in the Court of the District Judge at Bhavnagar. The learned Assistant Judge, Bhavnagar, who was assigned the matter, by the judgment and order dated 16-2-1978 dismissed the appeal with cost holding on the construction of the rent note Exh. 35 that the suit premises was let for the purpose of business only, but accepting the evidence of rent receipt Exh. 46 and the oral evidence with regard to user of the suit premises prior to letting thereof to the respondents, came to the conclusion that the suit premises were being used for the composite purpose of residence and business from the very beginning to the knowledge of the petitioner/s and her predecessors and there being no term prohibiting the use of suit premises for the purpose of residence, it could not be held that the suit premises were let to the respondents for the purpose of business only and that he has made change of user by using 2nd and 3rd floors of the suit premises for residence.

2. The petitioners subjected the aforesaid decision to challenge u/s 29(2) of the Bombay Rents, Hotel & Lodging House Rates Control Act (for short "the Rent Act") in this revision application, which was at first allowed by decision dated 16-1-1980 (Coram: M.K. Shah, J. as His Lordship was then). The matter then went before the Hon"ble Supreme Court in Civil Appeal No. 784 of 1980. The Hon"ble Supreme Court by order dated 5-4-1984 remanded the matter to this Court with a direction to consider the rent receipt Exh. 35 and to dispose of the matter afresh, while keeping it open to the parties to canvass the correctness on the other points as well.

3. xxx xxx xxx 4. It was the plaintiffs' case that the defendant was the tenant in respect of the 1st, 2nd and 3rd floors of their property situated on Mahatma Gandhi Road, Bhavnagar consisting of ground and three upper floors. It was further the plaintiffs' case that the premises were let to the defendant for business purpose and that there was change of user because the defendant was using the 2nd and 3rd floors of the premises for residence. The defendant accordingly committed breach of the terms and conditions of the tenancy and rendered himself liable to be evicted from the suit premises.

5. The defendant, inter-alia contended that the premises was let for the purpose of business as well as residence and from the very inception of the tenancy he was using 2nd and 3rd floors for the purpose of residence and 1 st floor for the purpose of business.

6. On the evidence led before him the learned trial Judge came to the conclusion that the suit premises were let to the defendant for the purpose of business and residence and he, therefore, found that there was no change of user. He, therefore, dismissed the suit. In appeal the learned Assistant Judge upheld the dismissal of the suit, but with a rider that on the true construction of the rent note Exh. 35 it could not be said that the suit premises were let for composite purpose of business and residence and it could be said that the suit premises were let for business only.

7. After the remand from the Hon"ble Supreme Court the parties have placed their respective evidence on the record of the case in respect of subsequent event, namely, that the whole of the suit premises have been kept closed and the respondent was neither doing the business of electric goods nor residing in any part of the suit premises and was keeping the same closed since 1990-91 and that the respondent is not desirous of using the suit premises for either of the purposes as alleged by him. The respondent, however, contended that he had two heart attacks and when the Doctor advised him not to climb the staircase and his condition was very bad, he used to stay in the house of his sister only temporarily alongwith the family of his sister. Since this Court has been called upon to adjudicate upon this subsequent event, it would be appropriate to deal with the same in the first instance.

8. It can be seen from the aforesaid brief facts with regard to subsequent event

that the respondent's eviction is sought on the ground that the suit premises are not at all used. The provision in that respect is contained in Section 13(1)(k) of the Rent Act, which reads as under:-

13. When landlord may recover possession:- (1) Notwithstanding anything contained in this Act but subject to the provision of Section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied -

(k) that the premises have not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit;"

It might be noticed from the aforesaid provision that the cause of action as might be available to a landlord under the aforesaid clause would require non-user of the premises for the purpose for which it has been let for a continuous period of six months immediately preceding the date of the suit. Thus, such non-user during the pendency of this revision application cannot relate back to the date of filing of the suit and six months prior thereto and that would provide a fresh cause of action to the plaintiffs. In that view of the matter the plaintiffs' learned Advocate's request for granting decree for eviction, impliedly under the aforesaid ground of eviction, cannot be entertained in this revision application even if it might be prima-facie found from the material on record that the defendant no more requires the suit premises.

9. Turning to the questions which arise in this revision application now, the first question which has been raised by Mr. Trivedi, learned Advocate for the respondent is that this Court will not exercise the revisional jurisdiction by re-appreciating the evidence and will decide the same as if it is a second appeal, both standing on the same plateau. It is not in dispute that the revision application came to be admitted years back and the questions of law which arise in this revision application primarily rest upon the construction of the rent note Exh. 35. In that view of the matter, the submission of Mr. Trivedi about disposal of this petition on the technical ground of non-maintainability thereof cannot be accepted.

10. The main question which arises in this revision application is - As to whether the premises were let for the purpose of business only, as contended by the plaintiffs followed by further question - As to whether there was any change of user by virtue of putting second and third floors of the property to the use of residence. The rent note which has been placed on record at Exh. 35, after reciting that the three floors of the property were let out on a monthly rent of Rs. 35/- and that possession was handed over to the tenant, further provides thus:

Translated into English it would read: "and in respect thereof, I am executing this rent note today after stipulating the following conditions." 14 conditions are thereafter set out and condition No. 4 thereof, on which reliance has been placed in support of the plaintiffs' case, provides as under:-

Translated into English it would read: "The tenanted portion has been taken on rent by me for the purpose of selling articles in connection with our electric and also for storing articles and for sitting".

Reading this as a whole, an impression which is conveyed is that the premises are let for the specific purpose of storing articles and selling electrical goods and for sitting. That means for business purpose only excluding any residential use, and as rightly held by the lower appellate Court the expression "for the purpose of sitting" read in the context of the words preceding would not convey the meaning, as has been sought to be canvassed on behalf of the tenant-defendant, that the property was also occupied for the purpose of residence. Thus viewed, the said words are capable of one meaning, for the purpose of sitting or use in connection with the business earlier referred to. The substance of the document as reflected in the aforesaid clause would clearly indicate that the premises were let out for the purpose of business only and the intention of the parties can also be spelled out from the said clause. The clause is not ambiguous in any manner and hardly needs any aid of other evidence and ordinarily would exclude oral evidence proposed to be adduced or has been adduced for saying that the premises were let out for a composite purpose of business and residence. Legal position in this respect can hardly be disputed.

11. However, the lower appellate Court, the learned Assistant Judge, has made reference to Exh. 46, which is receipt dated 20-4-1970. It is no doubt true that reference has been made to Exh. 35 in the remand order rendered by the Hon'ble Supreme Court. But it is jointly submitted that Exh. 35 is the rent note and not the rent receipt and the rent receipt which is required to be considered by this Court as per the direction of the Hon'ble Supreme Court is Exh. 46.

12. Exh. 46 is the hand written receipt on letter-head of Sushil Electric Stores, Prop. Shantilal J. Shah (respondent herein) showing receipt of rent of Rs. 630/-. Though it has been apparent on the face of the document produced on the record of the suit that printed receipts were being passed, this is a hand written receipt. The ink of the signature of Devendrabhai K. Oza for Narhari Ambashankar and the date 20-4-1970 written on the revenue stamp of Rs. 00.10 paise apparently differs from the ink of the body writing. The first line of the body writing indicates that 46. This is clear non-application of mind to the evidence as well as the document itself and the admitted circumstances. If Exh. 46 was not relied upon then the only inescapable conclusion would have been that the suit premises came to be let out for business purpose only. Even if Exh. 46 is considered in its true perspective as aforesaid, the only conclusion would have been that Exh. 46 was obtained subsequent to the notice of eviction given by the plaintiffs with a view to defeat the plaintiffs' case for eviction. It will be interesting to note that the plaintiffs have produced counter-foil of receipt dated 20-4-1970 at Exh. 20. It is a printed counter-foil with the blanks filled in with particulars regarding the amount of rent of Rs. 630/- and the period. This counter-foil was exhibited with the consent of the parties. Such a printed counter-

foil could not be for a hand written receipt Exh. 46. In my opinion, the Courts below have failed to focus their attention on the fraud apparent on the face of the record alleged to have been practised in obtaining Exh. 46. Had the matter been approached from the true and correct perspective in respect of Exh. 46 as stated above, the fate of the matter would have been entirely different even at the stage of trial of the suit as well as hearing of the appeal. Hence, in my opinion, Exh. 46 will not help the defendant. But, on the appreciation of the circumstances concerning Exh. 46 it would go to hit the very defence that the suit premises were either let out for the twin purposes of business and residence or that it was right from the inception used for such twin purposes. In any event a receipt/a writing passed on behalf of a dead person would be apparently without authority and cannot help the defendant's cause as stated above. The result is that it is an inescapable conclusion from the rent note Exh. 35 that the suit premises were hired for the purpose of business only.

13. It has then been contended on behalf of the respondent-original defendant that there is no specific term in the rent note to the effect that the premises cannot be used for any other purpose. In the absence of a negative covenant it cannot be said that the defendant had agreed to use the suit premises exclusively for the purpose of business and not to use the same for any other purpose. I am unable to accept this contention raised on behalf of the respondent. It would be significant to note that the stamp paper for the rent note was purchased in the name of and under the signature of defendant on June 9, 1959. A couple of days before that, as is the case of the defendant himself, he had occupied the premises, which would be on June 7, 1959. The rent note was executed few days later, on June 17, 1959. If, therefore, as the defendant says that the premises were taken on rent for twin purpose of residence as well as business and if they were put to the said use from the very beginning, i.e., from the date of occupation, which would be from June 7, 1959, then it would be unnatural to find such a term as a condition embodied in Clause 4 of Exh. 35 which in terms, says that the premises were taken on rent for the purposes mentioned therein which indicated business purposes. It has also to be borne in mind that the purposes are mentioned in the body of the document and in the operative part of the document which contains terms on which the premises were taken on lease. This would positively indicate that the premises were let out for a specific purpose, viz., a business purpose. There are as many as 14 conditions and all of them refer to the conditions and obligations which the tenant has agreed to abide by and fulfil specifically. The document has been executed unilaterally by the defendant specifically recording that he has taken possession of the premises on June 7, 1959 as a tenant on a monthly rent of Rs. 55/-. He was executing a document in the form of rent note or an agreement entered into by the tenant with the landlord after fixing terms and conditions enumerated at serial Nos. 1 to 14. Condition No. 4 is, therefore, an integral part of the obligations to be performed by the tenant and the same would form part of the terms and conditions on which the premises were taken on rent by the tenant.

The lower Courts, therefore, were clearly in error in holding that the premises were not let exclusively for the purpose of business, but that they were let for the purposes of both residence as well as business.

14. It has then been contended that, as the evidence shows, the premises were initially let out to and used for a residential purpose by the previous tenant Pritamlal Vrajlal Exh. 25, and, therefore, it would be breach of Section 25 of the Rent Act, if later in the year 1959, the landlord had let out the premises for non-residential purpose to the defendant. It has, therefore, been submitted that such an agreement in breach of law would not be enforceable. Now, in the first instance the point which has been raised before this Court was never raised in this form before any of the lower Courts. No such contention was taken in the written statement and no such plea in terms of Section 25 of the Rent Act could be found in the written statement. No issue was, therefore, raised in these terms, no evidence led and no point urged before the lower Courts. Mr. Trivedi, therefore, could not be permitted to raise this point which would involve controversial questions of fact with regard to initial letting out and use of the premises. As there was no pleading and no issue, the parties' attention could obviously not have been focussed on such an issue and no evidence, barring such an issue would be expected to be led by the plaintiffs. In this state of affairs, this Court in a revision application, would not enter into such a controversial question of fact, particularly when there was no pleading and no issue raised with regard thereto. Again, Pritamlal's evidence does not inspire confidence and merely rests on his bare word. Though he refers to the rent note and the premises having been let out to him at the rate of Rs. 20/- per month and the rent note being executed by him, no rent note was produced. I have, therefore, no means to find out the purpose for which the premises were let to him, which purpose can be determined from the condition of the rent note. He even could not produce a single receipt to show that he was paying Rs. 20/- as rent, nor has he stated that he himself was using the premises for residential purpose and that the same were let out to him for residential purpose. He merely refers to the defendant coming in occupation of the premises after the witness vacated them and he then says that they were hired by the defendant for residence as well as business and that he was also using the same for the said two purposes. Thus, in any view of the matter, particularly bearing in mind the circumstances revolving round Exh. 46, there is no substance in the point raised by Mr. Trivedi.

15. It has also been submitted that from the very beginning and for a very long period the premises were in use for business as well as residence to the knowledge of the plaintiffs or their agent Devendrabhai, who was collecting rent on behalf of the landlord. It has, therefore, been submitted that the plaintiffs were estopped from contending that there was change of user by virtue of provision contained in Section 63 of the Contract Act. The same provision would read:-

Every promisee may dispense with or remit wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

In order that there may be remission or waiver or estoppel as contemplated by Section 63, it has to be shown that it is a voluntary act on the part of the promisee which would result in dispensing with the performance by promisor. A mere omission on the part of the promisee to assert his right cannot amount to such waiver. Mr. Trivedi has referred to the case of D.C. Oswal v. V.K. Subbiah, reported in . It was undisputed there that there had been a change of user from residential to mixed residential and commercial user of the premises in question for a long period of 7 years. No objection was raised for D.C. Oswal Vs. V.K. Subbiah and other, Such a change of user for such a long period of 7 years. Under such circumstances while considering Section 10(2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 the plea of waiver was accepted by the Apex Court. On the other hand in Shrinavas Kasherlal Palod v. Vital Shivagiri Gosavi, reported in AIR 1996 (2) CJ 126 the Apex Court ruled in the context of Section 13(1)(a) of the Rent Act that change of user for 47 years not complained of by the landlord for such a long period, would not lead to acquiescence so as to save the tenant from decree of eviction. In that case the land was leased out for a non-agricultural purpose, viz., for storing onions on the basis of yearly rent. A Regular Suit for eviction was filed inter-alia on the ground of change of user u/s 13(1)(a) of the Rent Act. The trial Court answered the issue with regard to the applicability of the provisions of the Rent Act in favour of the tenant. In appeal, the provisions of the Rent Act were held to be applicable and it was further held that decree for eviction could be passed under the provisions of the Rent Act. The appellate Court rejected the plea of acquiescence and waiver holding that in a suit under the Rent Act mere acquiescence would not bar the landlord for seeking a decree for eviction. The appellate Court relied upon a decision of the Bombay High Court in the case Kasturchand Panachand Doshi and Others Vs. Yeshwant Vinayak Sainkar and Another, . The Apex Court accepted the conclusion of the appellate Court and quoting the provision of Section 13(1)(a) of the Rent Act, negated the arguments of acquiescence/waiver made by the learned Counsel appearing for the appellants:-

If the Court is satisfied that the tenant has committed any act contrary to the provision of Clause (o) of Section 108 of the Transfer of Property Act can order eviction.

Following observations of the Apex Court might be noted:-

Therefore, a long use of the premises for the purpose other than the one for which it was originally let out cannot bar Section 13(1)(a) being applied in a suit under the Bombay Rent Act. For these reasons, we see no merit in this appeal. It is accordingly dismissed.

16. Reference has been made once again to a decision in Phoenix Mills Ltd. v.

M.H. Dinshaw & Co., 48 BLR 313 wherein, while referring to the law with regard to the waiver as contained in Section 63 of the Contract Act, the High Court of Bombay observed that "a promisee can only dispense with the performance of the promise by a voluntary conscious act. It must be an affirmative act on his part. A mere omission to assert his rights or insist upon his rights cannot amount to a dispensation within the meaning of the section. The High Court even went to the length of observing that "even negligence to assert his rights, although it might in certain cases result in estoppel, cannot amount to a dispensation within the meaning of the section. An estoppel can only come into play if by the plaintiffs conduct, the defendant has changed his position in any way to his prejudice". In another decision in the case of Narayan Badlaji Sali v. State of Bombay, 59 BLR 532, a Division Bench of the Bombay High Court observed as follows:-

Waiver is a matter of intention and can be either express or implied. Whether it is one or the other, it must be deliberate in the sense that the party waiving a right should after applying his mind to the matter decide to abandon the right. In order to infer a waiver some positive act on the part of the party which is supposed to have waived is necessary. A mere delay in doing a particular act or in raising a particular objection would not of itself justify an inference of waiver.

Now, in the instant case, as we find, there is no such evidence showing that there was any voluntary, conscious, deliberate or positive act on the part of the plaintiffs to dispense with the requirement with regard to the user of the premises as contained in the rent note. There is no overt act established on the part of the plaintiffs which may in law amount to waiver as contemplated u/s 63 of the Contract Act and 1, therefore, do not find any substance in this contention of Mr. Trivedi.

17. Mr. Soparkar, learned Counsel for the plaintiffs made a reference to a decision of the Apex Court in the case on Pulin Behari Lal Vs. Mahadeb Dutta and Others, . Hon"ble Supreme Court was dealing with Section 13(1)(a) of the West Bengal Premises Tenancy Act; the ground for eviction pressed into service was sub-letting without the previous consent in writing of the landlord. One of the defences was that of waiver. The Court held that in view of clear mandate in Section 13(1)(a) of West Bengal Premises Tenancy Act, the protection against eviction to the tenant would not be available in case the tenant transferred, assigned or sub-let in whole or in part the premises held by him without the previous consent in writing of the landlord. It has been observed that waiver is a question of fact which would depend upon facts and circumstances of each case and in the case of waiver of any provisions of the statute it would be necessary to prove that there was conscious relinquishment of the advantage of such provision of the statute.

Mr. Soparkar then referred to Nathubhai Vamalidas v. Ramanlal, (1976) 17 GLR 468, for saying that breach of condition of tenancy regarding user of the premises would be a continuous breach and even if rent was accepted it would

not amount to waiver.

In view of what is said above, the submissions made on the question of waiver on behalf of the respondent-tenant cannot be accepted.

18. It has then been submitted on behalf of the respondent that the aforesaid stipulation contained in Clause 4 of Exh. 35, the rent note, refers to intention and cannot be termed as a term or condition of tenancy. It is merely a personal obligation breach of which would not result in forfeiture and would not result in eviction under any of the provisions of the Rent Act. In the first place reliance has been placed on the same decision on which reliance was placed earlier, namely, *Glamour Cleaners Vs. Chandrakant Chhotalal Gandhi and Another*, . It is no doubt true that the party will have to establish that a breach complained of was a term and condition of the tenancy and not merely a covenant incidental to the grant of tenancy not amounting to a term or condition of the tenancy. On a reference to the rent note Exh. 35 it can be seen that the same contains all the stipulations and obligation to be performed by the tenant, who executed the same unilaterally in clear terms reciting that he was tenant of the premises on conditions mentioned in the operative part of the document. Along with that condition No. 4 contains a positive obligation on the part of the tenant to observe and perform the condition with regard to the purpose for which the said premises were to be used. It is true that there is no negative covenant to the effect that the premises are not to be used for residential purpose or any other purpose. However, reading the document as a whole, it is manifest that the tenant has entered into a condition with the landlord that he has taken on rent the premises for the purpose set out in the clause, viz., business purpose and this clause having been made as one of the conditions of the tenancy, it would necessarily follow that the suit premises are not to be used for a purpose other than the purpose of business. Besides, the condition as aforesaid is touching the very right of enjoyment of the premises and hence it would amount to a condition of tenancy apart from the fact that it has been specifically referred to as a condition of tenancy and not as a mere personal obligation. Earlier a reference was made to *Kantilal Ishwerlal Shah Vs. Dr. Mukundrai Keshavlal Parikh and Others*, .

19. Mr. Trivedi, however, placed reliance upon a Bench decision of this Court in the case of *Bhabhutmal Rikhbaji v. Manubhai*, reported in (1980) 21 GLR 252. It has been ruled that a clause in a rent note providing that the premises were not to be used for residence or for storing any inflammable article, etc., causing nuisance to the neighbour would not entitle the landlord to recover possession unless it would result in substantial injury or damage to the property such covenant being personal and co-lateral to the tenancy and not arising out of tenancy and having no relation with prudent user of the property. In the first place the Bench considered the provisions of Sections 12(1) and 13 of the Rent Act in the context of the relevant grounds for eviction pressed into service in that case. In para 6 it has been observed as under:-

In other words, all the restrictive covenants positive as well as negative enjoins

the tenant to do acts of commission and omission would continue to operate against the tenant but he would not be entitled to enforce the terms and conditions of the original tenancy in his favour. We have, therefore, to reject the first contention of Mr. Desai for the tenant that the restrictive covenants in the present rent note enjoining the petitioner-tenant to use the premises only for the business in metal scrap and not to use it for any other business and also obliging him not to use premises for residential purpose would not continue to operate after the determination of the tenancy in the present case by efflux of time.

Accordingly, the Bench came to the conclusion that in view of Section 12(1) of the Rent Act all the restrictive covenants positive as well as negative enjoining the tenant to do acts of commission and omission would continue to operate against the tenant. This may be visualised from the provisions contained in Section 12(1) and Section 12(1) of the Act merely recognises a tenant's right to remain in possession so long as he pays or is ready and willing to pay the standard rent and permitted increases and perform the other conditions of tenancy. See *Anand Nivas (Private) Ltd. Vs. Anandji Kalyanji Pedhi and Others*, . As a necessary consequence it is also clear from the said provision that the protection which is conferred upon a tenant by the said statute, namely, Rent Act will not be available if there is violation of Section 12(1). It is, therefore, clear to find that if a tenant does not observe terms and conditions of the tenancy, he would be liable to be evicted from the premises in question occupied by him as a tenant thereof. However, the Division Bench in *Bhabhutmal's case* (supra) had dealt with the nature of the restrictive covenants for coming to the conclusion as aforesaid. The Bench accordingly ruled that a covenant whether positive or negative with regard to the user of the premises would be purely personal and co-lateral to tenancy and, therefore, would be personal obligation not amounting to condition of tenancy. The Bench, however, felt that the revision application filed by the tenant which was being allowed by the Bench, involved substantial questions of law of general importance which in the opinion of the Bench were required to be decided by Hon'ble Supreme Court. The Bench accordingly granted leave to appeal under Article 133(1) of the Constitution of India. This decision was relied upon by a learned single Judge in *Rabari Prabhat Harji v. Chandulal*, reported in (1980) 21 GLR 734. In that case before His Lordship the restrictive covenant in the rent note provided that the tenant shall use the demised land and not the land adjacent thereto. His Lordship relying upon the aforesaid Bench decision in *Bhabhutmal's case* (supra) held that restrictive covenant, breach whereof was complained of in the case before His Lordship, was in the nature of a personal obligation and not a condition of tenancy within the meaning of Section 12(1) of the Rent Act and, therefore, it could not be held that a breach of term of tenancy was committed resulting in eviction u/s 12(1) of the Rent Act. This matter was carried before the Hon'ble Supreme Court in *Patel Chandulal Trikamlal and others Vs. Rabri Prabhat Harji and another*, . The Apex Court reversed the aforesaid decision holding as under:-

Such a condition is not severable from the terms of the tenancy looking to the

nature of the tenancy which was granted. It relates to the manner in which the demised land was to be used by the tenant.... Hence, the obligation contained in rent note is not a personal obligation of the respondents. It is an obligation which has been cast on them in their capacity as tenants of an open piece of land which was given to them for tethering cattle. It is directly linked with the manner in which the demised land is to be enjoyed by the tenants and is an integral part of the rent note.

It might be noted that in the citation it is written "(from Bombay)" and "decision of Bombay High Court". "Reversed." However, on comparing the facts of the very case before this Court and the facts of the very case before the Apex Court there appears to be printing or some other error. The Apex Court's decision is clearly from the aforesaid Gujarat decision. In that view of the matter, the Apex Court's decision in Patel Chandulal's case (supra), in my humble opinion, would clearly hold the field. Hence, both the Gujarat decisions pressed into service by Mr. Trivedi will not go to lead to a conclusion that a positive condition regarding the purpose of letting for doing business would amount to personal obligation. It is clearly a condition of tenancy breach of which would necessarily result in eviction as in the case before the Apex Court in Patel Chandulal Trikamlal v. Rabari Prabhat Harji (supra).

20. Mr. Soparkar, learned Advocate appearing on behalf of the petitioners-plaintiffs referred one more decision of the Apex Court in Dashrath Baburao Sangale and others Vs. Kashimath Bhaskar Data, . In that case the landlord leased out a piece of open land on 1-1-1953. The tenant executed a rent note mentioning the purpose for which the land was leased out. The purpose indicated that the premises were taken on rent for sugarcane crushing with the help of an ox and for the shop thereof and that a temporary shed of tin-sheet was to be constructed at the tenant's cost. In 1978 the landlord instituted proceedings for eviction on the ground that the tenant had been using the said premises for a purpose other than the one for which it was leased out. Instead of sugarcane juice business, the tenant was using the premises for selling and ready-made clothes. While denying the allegation the tenant asserted that the sugarcane juice business was a seasonal business and it could not be carried on throughout the year. It was asserted that during the off season the tenant was doing the other business in the premises and he was entitled to carry on such business. The trial Court accepted the landlord's case and directed eviction of the premises in question there. The appellate Court also dismissed the appeal. The tenant filed a writ petition before the Bombay High Court and the said writ petition also met with the same fate. The Apex Court dealt with the provisions of Section 13(1) (a) of the Rent Act providing that if the tenant has committed any act contrary to provision of Clause (o) of Section 108 of the Transfer of Property Act, he renders himself liable for eviction. Reference then has been made to Clause (o) of Section 108 of the Transfer of Property Act saying that the tenant must not use the property for a purpose other than that for which it was leased. The Apex Court held that in the face of the clear stipulation in the lease deed, the Courts below

as well as the High Court refused to countenance the plea of the tenant. The Apex Court considering the aforesaid provisions of the Rent Act and the Transfer of Property Act found that there was no reason to disturb the findings of the Courts below under the Act. The Apex Court accordingly dismissed the appeal.

21. Both the aforesaid decisions of the Apex Court arising under the relevant provisions of the Rent Act provide binding precedent and there being admittedly a breach of the condition of the tenancy committed by the respondent-tenant, he has rendered himself liable to a decree for eviction.

22. Mr. Trivedi, however, has placed reliance upon a decision of the Hon'ble Supreme Court in the case of Gurdial Batra Vs. Raj Kumar Jain, . That was a case u/s 13(2)(ii)(b) of E.P. Urban Rent Restriction Act, 1949. It was a case where the premises were let out for cycle and rickshaw repair without any stipulation in rent note not to do any other business. The tenant carried on business of selling television sets temporarily side by side the business of rickshaw repair. In the context of such facts the provision of Section 13(2)(ii)(b) of the E.P. Urban Rent Restriction Act, 1949 was considered and was said to be akin to the provision contained in Section 108(o) of the Transfer of Property Act. The Apex Court firstly observed that letting of a premises can broadly be for residential or commercial purpose and secondly that a house let for residential purpose would not be available for being used as a shop even without structural alteration. The Apex Court then proceeded to consider the concept of injury as found to be inbuilt in the provision of Section 13(2)(ii)(b) of the E.P. Urban Rent Restriction Act and applying the Privy Council decision of U Po Naing v. Burma Oil Company, reported in AIR 1929 PC 108: 56 1A 140 held that the temporary running of business of selling of television sets alongwith repair business would not provide a cause of action to the landlord under the aforesaid provision of the E.P. Urban Rent Restriction Act, 1949 to seek eviction of the tenant. In my opinion in the face of the aforesaid decisions of the Apex Court under the very provisions of the Rent Act, this decision under the E.P. Urban Rent Restriction Act will not be applicable to the facts of the present case.

Even u/s 13(2)(ii)(b) of the E.P. Urban Rent Restriction Act, the Apex Court has said in Bishamber Dass Kohli (Dead) by Lrs. Vs. Satya Bhalla (Smt), , that the object behind the provision is that the parties must remain bound by the terms on which the building is let out, including the condition relating to its use for the purpose for which it was leased.

23. Mr. Trivedi then made a reference to a decision in the case of Guru Amarjit Singh Vs. Rattan Chand and others, . It is a decision basically considering the provision of Section 111(g)(1)(2) of the Transfer of Property Act and dealing with forfeiture of tenancy and can have hardly any application to the present case.

24. As earlier, this time also reliance has been placed on a decision in the case of Sant Ram Vs. Rajinder Lal and Others, for submitting that there was no change of user. Sant Ram's case (supra) was a case decided on its own peculiar facts

showing that a cobbler by vocation, was a petty tenant of the eastern half of a shop in Ram Bazar, Simla. The lease deed disclosed no purpose. The landlord filed eviction petition u/s 13(2)(ii)(b) of the East Punjab Urban Rent Restriction Act, 1949 on the ground that the premises were being used for a purpose other than the one for which the same has been let out. The appellant on some days cooked his food and stayed at night in the rear portion of the shop. In the background of such facts the Apex Court concluded:

It could not be held that the purpose was exclusively commercial and incompatible with any residential use, even of a portion. The legal inference to be drawn from a lease deed was conditioned by the prevailing circumstances. The intention of the parties from which the purpose of the lease was spelled out was to be gathered from the social milieu.

The Supreme Court further held:

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

It would be seen that the case was decided on a finding that the main use of the premises, viz., carrying on of a trade of a cobbler continued and that the tenant stayed at the shop at night on days when he was running his shop but left for home on shop holidays. In the case at hand it had to be held that the premises consisted of three floors which were let out exclusively for business purpose and were substantially converted and put to residential purpose by using the same for residential purpose, so far as two out of the 3 floors are concerned. Substantially, therefore, the place which was let out for business purpose was converted into residential accommodation. This decision, therefore, will not help the defendant.

25. It has finally been contended that a partial change in user will not provide a ground for eviction in favour of the plaintiffs. Reliance firstly is placed upon *Bhagwati Spinning and Wvg. v. New Cotton Mills*, reported in (1979) 20 GLR 932. That was essentially a case u/s 13(1)(k) of the Rent Act, which has been quoted hereinabove. That was not a case arising u/s 12(1) read with Section 13(1)(a) of the Rent Act. In the context of the provision contained u/s 13(1)(k) of the Rent Act learned single Judge of this Court held that the expression "the premises" used in Section 13(1)(k) would mean the entire premises and not a part of it.

26. Even the Bench decision in *Bhabhutmal*'s case (*supra*) cannot be applied to the facts of the case in view of what is stated above.

27. In the result, it has to be held that when there is a positive condition with regard to the particular user of the premises (business or residence or storage) a tenant has to observe such condition and commission of breach thereof would result in withdrawal of protection under the Rent Act and would also result in eviction of the tenant from the premises in question u/s 12(1) of the Rent Act read with Section 13(1)(a) thereof.

Following order is, therefore, required to be passed in this case:-

Both the decisions of the Courts below dismissing the plaintiffs' suit are hereby quashed and set aside and the defendant-respondent-tenant is directed to vacate the suit premises on or before 21-7-1997. Decree for possession shall accordingly be drawn. There shall also be a decree for rent and mesne profits as per the prayer in the suit and the amount of rent and mesne profits deposited and/or withdrawn by the plaintiffs shall be adjusted towards such decree.

There shall be no order as to cost throughout.

Rule made absolute in the aforesaid terms.