

(1980) 03 BOM CK 0025

In the Bombay High Court

Case No : Special Civil Application No. 3217 of 1978

Balmukund Narsingdas Somani and Others

APPELLANT

Vs

Prakash Jagdish Ambali and Others

RESPONDENT

Date of Decision : 10-03-1980

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1),
13(2), 23, 23(2)
Constitution of India, 1950 — Article 227

Citation : (1980) 03 BOM CK 0025

Hon'ble Judges : S.C. Pratap, J

Bench : Single Bench

Advocate : M.D. Gangakhedkar, for Ashok V. Valsangkar, for the Appellant; V.M. Kanade, for K.M. Kanade, for the Respondent

Judgement

S.C. Pratap, J.—This petition by the original defendants-tenants is directed against the judgment and decree dated 23rd October, 1978, passed by the learned District Judge, Sholapur, in Civil Appeal No. 331 of 1977. Original proceedings were instituted by the plaintiffs-landlords for possession of the suit premises u/s 13(1)(b) (permanent structure), section 13(1)(e) (sub-letting) and section 13(1)(g) (bona fide requirement) of the Bombay Rent Act. The trial Court decreed the suit on all these grounds. The Appellate Court reversed the finding of the trial Court on the question of unlawful sub-letting consequently disentitling the plaintiffs from possession of the suit premises u/s 13(1)(e) of the Bombay Rent Act. The Appellate Court, however, confirmed the decree passed by the trial Court u/s 13(1)(b) and section 13(1)(g) of the Bombay Rent Act. Hence, this petition.

2. Hearing Mr. M. D. Gangakhedkar, the learned Advocate for the petitioners-tenants, Mr. V.M. Kanade, the learned Advocate for the respondents-plaintiffs and going through the judgment of the two courts below and considering the question of alleged permanent structure in the light of the decided cases of this Court and also considering the question of plaintiffs" case u/s 13(1)(g) in the

light of section 13(2). I am of the view that (a) plaintiffs' claim for possession u/s 13(1)(b) is liable to fail; (b) plaintiffs' reasonable and bona fide requirement within the meaning of section 13(1)(g) is established; and (c) in the light of the mandatory provisions of section 13(2) the plaintiffs are entitled to possession of part of the suit premises and the defendants are entitled to continue as tenants of the remaining part.

3. The premises originally leased to the defendants consisted of the entire basement of eleven khans as also seven khans on the ground floor and seventeen khans on the first floor of the suit house No. 745. The plaintiffs purchased the entire suit house from the original owner in the year 1970. Upon such purchase, the plaintiffs' original occupation as tenants of part of the ground floor became occupation thereof as owners. The position after the plaintiffs' purchase thus was that the plaintiffs were in possession of part of the ground floor and the defendants were tenants in possession of the basement together with seven khans on the ground floor and seventeen khans of the first floor. In this situation, the local authority acquired part of the property for a public purpose viz., for widening of the public road in question. After acquisition, the local authority demolished the acquired portion. On such demolition, the entire front portion of the suit house became open, the external walls having stood demolished as a result of the aforesaid action of the local authority. In this view, the defendants-tenants requested the plaintiffs-landlords to repair the suit premises. The plaintiffs not having responded and having thus failed to keep the surviving suit premises in good and tenantable repairs, as indeed they were bound to do u/s 23 of the Rent Act, the defendants-tenants sought permission of the local authority to do so. After obtaining the said permission, the tenants started repairing the suit premises. At that stage, however, the landlords sued the tenants for injunction restraining them from doing the said work. They also claimed mandatory injunction for demolition of the work in progress till then. Further work was stopped by interim injunction. The said suit was decreed and in execution, the plaintiffs got demolished the work earlier partly carried out by the tenants.

4. It is thereafter that the landlords-plaintiffs gave the present suit notice and filed the instant suit for possession inter alia on the ground that the defendants erected permanent structure. Now, facts and circumstances show that no permanent structure as such had been actually put up by the tenants. The tenants were in the process of carrying out certain works which consequently were sought to be effected by the tenants after obtaining Municipal permission. Here, therefore, is a case where, as a result of the local authority acquiring and demolishing part of the suit house for a public purpose, the front portion of the suit house became all open. Here further is a case where the defendants-tenants having failed to get the plaintiffs-landlords comply with their statutory duty of keeping the suit premises in tenantable repairs as contemplated by section 23 of the Rent Act, the defendants-tenants had to perforce seek to carry out the said repairs themselves after permission from the local authority. This lawful action of

the tenants was, however, terminated by the landlords by their earlier suit and even part repairs which were being carried out was obliterated and the property remained open with not external walls at all.

5. Turning in this light to section 13(1)(b), we find that the cause of action for possession thereunder is to the effect that "the tenant has... erected on the premises any permanent structure". When the suit notice was given and when thereafter the present suit was filed, there was no permanent structure at all on the suit premises. Whatever repairs were sought to be done by the tenants were also not in existence. The alleged cause of action, if any, in favour of the landlords, therefore, stood obliterated not only in the sense that the structure itself was not there but also by the fact that the landlords had themselves based their earlier suit on the said cause of action, had obtained a decree thereon and had also executed the same. When the alleged construction itself was thus not even in existence, decree nevertheless in eviction against the tenants cannot be validity passed. The suit must fail for want of a subsisting cause of action at the date of the suit.

6. That apart and even otherwise, it is pertinent to note that there was, even at the stage of the earlier suit, only an intended construction and not, really speaking, construction put up and completed. This is clear from the very issues framed therein. Judgment in the said suit produced at Exhibit 42 shows issue No. 1 to the effect whether the plaintiffs proved that the defendants "have started construction" and issue No. 2 whether the defendants proved that the said construction "is required to be made" to save and protect the remaining portion from collapsing. Therefore, even at the stage of the earlier suit, the construction was still in the process. The instant suit based on section 13(1)(b) of the Bombay Rent Act must, therefore, fail not only on the initial ground that there was no surviving and subsisting cause of action but also on the ground that the said cause of action qua section 13(1)(b) was even otherwise not a completed cause of action because, as indicated, the work was still in progress and process and also because even that had been brought to an end by virtue of the decree in the earlier suit and its execution. The landlords, therefore, are not entitled to thereafter invoke the provisions of section 13(1)(b) of the Rent Act to evict the defendants-tenants from the suit premises.

7. Assuming that even so it is open to the landlords to invoke section 13(1)(b), facts, circumstances and context irresistibly lead to the conclusion that the work sought to be done by the tenants, after acquisition and demolition by the local authority and after failure of the landlords to fulfil their own statutory duty u/s 23 of the Rent Act, cannot be said to be a permanent construction within the meaning of the said section 13(1)(b). On the contrary, the work in question pre-eminently partook the character of "tenantable repairs" within the meaning of section 23. Even the learned Judge decreeing the landlords Regular Civil Suit No. 237 of 1972 accepted the position that the tenant, after giving necessary notice u/s 23(2), was entitled to carry out tenantable repairs and relying upon the

ruling of the Madras High Court in Doraipandi Konar Vs. P. Sundara Pathar, it was observed that the basic idea underlying the concept of repairs was restoration of a situation to its original condition. Repairs would include retention of the existing structure and its renovation from the damaged condition to its original sound state. In an exceptional case, repair will even imply renewal and substitution. It was on this reasoning that the learned Judge even in the earlier suit did not grant absolute injunction claimed by the landlords but only a restricted restraint. This thus being the position, it is not possible to accept the learned Advocate Mr. Kanade's contention that the work earlier sought to be carried out by the tenants was one falling within section 13(1)(b) of the Rent Act and not one within section 23 of the said Act.

8. The learned Advocate for the tenants invited my attention to three judgments of this Court viz., (1) judgment dated 9th April, 1964 by Chandrachud, J. (as the learned Chief Justice of India then was) in (Appeal from Order No. 65 of 1964 with Appeal from Order No. 66 of 1964); (2) judgment dated 12th November, 1968 by Kantawala J. (as the former learned Chief Justice of this High Court then was) in (Civil Revision Application No. 114 of 1965, with Special Civil Application No. 356 of 1966); and (3) judgment dated 1st September, 1971 by Bhole J. in Special Civil Application No. 1098 of 1967 Suka Ishram Chaudhari Vs. Jamnabai Ranchodas Gujarathi and Others, .

In the first ruling aforesaid it was observed by Mr. Justice Chandrachud that sub-section (1) of section 23 requires the landlord to keep the premises in good and tenantable repair and that it was indisputable and abundantly clear from the conduct of the landlords preceding the notice of demolition, that the landlords had failed to keep the premises in good and tenantable repair. What the tenants proposed to do was to carry out such repairs to the property as will put the premises in good and tenantable repair as required by sub-section (1) of section 23 of the Rent Act. In the second ruling aforesaid, it was observed by Mr. Justice Kantawala as follows :---

"Under this clause section 13(1)(b), in order to get the decree for recovery of possession the landlord has to establish that a tenant without his written consent created a permanent structure on the demised premises. Such permanent structure should be on the demised premises. It presupposes that it must be in addition to or different from the original demised premises. If by any reason the demised premises are damaged or destroyed and under any provisions of law such demised premises are restored to their original stage or condition, it cannot be said that a permanent structure had been erected on the demised premises. It is implicit in the language of this clause that the permanent structure referred to in this clause must be in addition to the demised premises."

Proceeding further and referring to the provisions of section 23 of the Rent Act it was observed as follows :

"Under this section the landlord is under an obligation to keep the demised

premises in good and tenantable repair. The section further provides that when a landlord neglects to carry out such repairs within a reasonable time after a notice is served upon him the tenant may himself carry out such repairs and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord. The provisions of this section are, therefore, also to be taken into account while construing the provisions of section 13(1)(b) of the Act.

Under section 10-D(4) of the Act, in a given case with the approval of the local authority a tenant may execute the work of additions, alterations, improvements and amenities on the demised premises upon the failure of the landlord to do so. Such execution of the work cannot be availed of by a landlord as a ground for ejecting the tenant u/s 13(1)(b) of the Act. "Similarly u/s 23 of the Act, upon the failure of the landlord to keep the demised premises in a good and tenantable repair, it is open to a tenant to carry out the repairs so as to keep the demised premises in good and tenantable repairs."

9. In the third ruling viz. Suka Ishram Chaudhari Vs. Jamnabai Ranchodas Gujarathi and Others, Mr. Justice Bhole (as His Lordship then was) observed as follows :---

"What is the nature of these walls and the degree of annexation ? What was the intention of the tenant when he constructed these walls ? The nature and mode, therefore, of annexation of its degree can be gathered by the intention with which the tenant had built the wall through in brick and mortar. It is done to prevent the thieves from breaking open the shed which was exposed to the road. The intention, therefore, was not to have a permanent structure but to save himself and his goods in that temporary shed. The whole shed is still there. It is all of a temporary character. The walls are but small annexations-In this view of the matter, therefore, it appears to me that the legal inference drawn by the learned Assistant Judge from the proved facts is not correct. On the other hand the inference should be that the wall in the peculiar circumstances of the case cannot be said to be permanent structure erected by the tenant within the purview of section 13(1)(b) of the Rent Act. If this is so, then the order passed by the learned Assistant Judge has to be set aside."

10. Considering the situation herein the light of the aforesaid cases, the emerging position is that the landlords, admit that the tenant had given a notice for effecting repairs and for supporting the remaining construction. The landlords further admit that they were not willing to give the said support. The landlords again further admit that the tenant had taken permission from the Corporation for constructing the support wall. As observed by the trial Court hearing, in this connection, Regular Civil Suit No. 237 of 1972 :

"On account of the demolition of the acquired portion, the iron pillars on the southern side of the building will have to be removed. The West-East wall on the southern side and South-North wall on the eastern side will be demolished. As a result of this the building will collapse unless some sort of support is given. It is,

therefore, apparent that the construction with a view to give support to the remaining building will have to be made. There is no doubt about it and it is not disputed."

Thus, taking into account the factual and also the legal position and also the legal position and also bearing in mind the further and important relevant circumstance that in the present case no permanent construction had been ultimately put up and that in the process of the impugned work being carried out, mandatory injunction was obtained by the landlords and even the part works consequently stood demolished, it is not possible to even so pass and/or sustain an eviction decree against the tenants u/s 13(1)(b) of the Rent Act. Claim for eviction on this ground will, therefore, have to be rejected.

11. Coming to the next ground of eviction viz. bona fide and reasonable requirement u/s 13(1)(g) of the Rent Act, it is not possible to reverse the finding thereon of the courts below in favour of the landlords. This, indeed, is a case where the landlords have been rightly held to have established their claim u/s 13(1)(g) of the Rent Act. Just as the tenants suffered as a result of the local authority's acquisition and demolition, the landlords also suffered thereby. If, in these circumstances, they claim possession u/s 13(1)(g) of the Rent Act, such a claim cannot be said to be not bona fide and not reasonable. I would, therefore, confirm the finding of the courts below in favour of the landlords holding their claim for possession u/s 13(1)(g) of the Rent Act to be bona fide and reasonable.

12. That, however, does not end the matter because the Rent Act itself lays down a further condition and an obligation by virtue of section 13(2) which, to quote, runs as follows :---

"No decree for eviction shall be passed on the ground specified in Clause (g) of sub-section (1) if the Court is satisfied that, having regard to all the circumstances of the cause including the question whether other reasonable accommodation is available for the landlord or the tenant, greater hardship would be caused by passing the decree than by refusing to pass it.

Where the Court is satisfied that no hardship would be caused either to the tenant or to the landlord by passing the decree in respect of a part of the premises the Court shall pass the decree in respect of such part only."

Considering the matter in the light of this statutory mandate, one finds that the requirement of the landlords as disposed to by Jagadish, the father of the plaintiff, is to the following effect :---

"In the suit premises the plaintiffs have decided to open shop on the ground floor and to reside on the first floor by making construction."

The requirement thus is ground floor for shop and first floor for residence. But this very witness admits that the landlords already have in their possession residential accommodation of 4,000 (four thousand) square feet in another three storeyed building belonging to them not far away from the suit building. Record

further shows that even after acquisition and demolition by the local authority, the landlords obtained the local authority's permission for construction only of the ground floor. The landlord's reply to the tenants' notice for repairs also makes it clear that they do not intend to carry out any construction or renovation of the first floor for a few years. Cumulative effect thus is that the landlords are not keen on utilising the first floor presumably because, as indicated, they already have in their possession extensive residential accommodation of 4,000 square feet. If this is the position, to whom then can greater hardship within the meaning of section 13(2) of the Rent Act be said to be caused qua the first floor premises ? To the landlords who are in no present need at all of the first floor premises and who are already in possession of another 4,000 square feet of residential accommodation or to the tenants who are having their long established business for nearly half a century on the first floor premises ? The answer, in my view, would be positively in favour of the tenants. Here is a case where refusal of decree for possession of the first floor is not going to cause any hardship to the landlords, but eviction of the tenants from the first floor is going to cause very great hardship to them. So far as the first floor is concerned, this, therefore, is a case of no hardship to the landlords but greater hardship to the tenants. To nevertheless evict the tenants from the first floor premises would not be just and legal and would be in breach of section 13(2) of the Rent Act.

13. Coming to the remaining suit premises, these consist of part of the ground floor and the entire basement. The defendants are also the tenants of the ground floor being already in the possession of the landlords. Now the record indicates that the tenants are in possession of another shop (though with an altogether different business) on the ground floor of their own adjoining house. The landlords do not appear to have any other business premises except part of the ground floor of the suit buildings. The tenants did try to establish that the landlords also have additional business premises in their possession in the other house of their ownership viz., house No. 196/1, but it is difficult to come to any positive finding in favour of the tenants on that aspect. The landlords' case has been that after the local authority acquired and demolished part of the suit building, they had perforce to shift their business temporarily to their said other house No. 196/1. It is, therefore, not possible to accept the contention of the tenants and one must proceed on the basis that the landlords have only one business premises in their possession viz., part of the ground floor of the suit building. This being the position and having held that the requirement of the landlords u/s 13(1)(g) is bona fide and reasonable. I am of the view that applying the tests and principles embodied in section 13(2) of the Rent Act, greater hardship would be caused to the landlords if decree for possession of the basement and the remaining part of the ground floor is not awarded to them. By passing such a decree in eviction against the tenants, no hardship will be caused to them particularly when they are permitted to retain the first floor premises. The landlords also will not suffer any hardship if they are awarded possession of the entire basement and the ground floor premises and not awarded possession

of the first floor which was claimed by them only for residential needs and that too not in present, but after some years. The landlords already have in their possession residential accommodation of as large as 4,000 square feet. Considering all the circumstances, partial eviction decree aforesaid would strike a just balance between the landlord and the tenants without any resultant greater hardship to either side. Such a decree, when put in the scale, will not tilt the balance of greater hardship on either side. In this context, where the Court is satisfied that no hardship would be caused either to the tenant or to the landlord by passing decree in respect of a part of the premises, then in terms of section 13(2) of the Rent Act, "...the Court shall pass the decree in respect of such part only." This thus being a mandatory statutory requirement, the decree passed by the Courts below in favour of the landlords in respect of the entire suit premises will have to be modified by a decree in eviction against the tenants in respect of the entire basement and ground floor premises.

14. Mr. Kanade submitted that this Court should not interfere in its jurisdiction under Article 227 of the Constitution. I am afraid, it is not possible to accept this submission. The courts below had no jurisdiction to pass a decree in eviction u/s 13(1)(b) of the Rent Act. The courts below had not given effect to section 23 of the said Act. Consistent view of this Court in the light of the three rulings referred by supra must be given effect to. Impression cannot be said to be unfounded that here is a case where the landlords are seeking to take undue advantage of demolition of part of the suit premises by the local authority and the consequent miserable plight of the tenants. Here is a case where the landlords were taking advantage, if I may say so, of the helplessness of the tenants whose tenanted premises were rendered exposed and open after acquisition and demolition. When the tenants called upon the landlords to repair, the landlords refused. When the tenants sought to themselves, repair after obtaining permission of the local authority, the landlords obstructed. Even in their earlier suit the landlords failed to obtain absolute injunction. Even in that suit the Court protected the rights of these tenants u/s 23 of the Rent Act, Furthermore, the provisions of section 13(2) of the Bombay Rent Act have also not been given effect to. On any rational construction of this provision, the Court had no jurisdiction to pass a decree in eviction against these tenants of the entire suit premises. As observed in Suka Ishram Chaudhari's case supra :

"In my view this is not a finding of fact but is an inference as to the legal effect of certain proved facts.In my view if the Court draws an improper inference as to the legal effect of proved facts, this Court could correct because that is a question of law. In Ahmedabad v. Motilal Hirabhai Spinning and Manufacturing Co. Ltd., Ahmedabad, AIR 1936 PC 77 Their Lordships have observed that the High Court in a second appeal is bound by the District Judge's finding of fact. But where the matter in question is to the proper effect of legally proved facts that is a question of law. Now, it is true that this Court has to interfere only when there is a manifest and patent error of law on the face of the proceeding when there is clear ignorance or disregard of provisions of law. In my view the legal

effect of an inference as regards a provision of law can also be looked into by this Court in its supervisory jurisdiction. This will have to be done in the interests of justice if the subordinate Court has stepped beyond its bounds. This will, therefore, be a fit and proper circumstance to intervene."

Same is my view in the instant case. Justice and protection of exploited tenants pre-eminently requires interference in my jurisdiction under Article 227 of the Constitution. Contention of Mr. Kanade against interference, therefore, fails.

15. In the result, this petition partly succeeds. The impugned decrees passed by the courts below, in so far as they relate to possession of the entire suit premises are set aside and in their place it is ordered and decreed that the landlords do recover possession of the entire basement and the entire remaining ground floor suit premises from the tenants-defendants Nos. 1 to 3. Suit for possession of the first floor premises is dismissed. Suit for possession of the entire basement and the ground floor is decreed. Rule earlier issued on this petition is made partly absolute. Parties, however, will bear their own respective costs throughout.