
(1987) 06 BOM CK 0033

In the Bombay High Court

Case No : Writ Petition No. 228 of 1980 with W.P. No. 1166 of 1980

Parvati Kevalram Moorjani

APPELLANT

Vs

Madanlal Anraj Porwal and others

RESPONDENT

Date of Decision : 17-06-1987

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12, 13, 13(1), 13(1)(b), 13(1)(c)

Citation : (1987) MhLj 917

Hon'ble Judges : S.W. Puranik, J

Bench : Single Bench

Advocate : Ajit P. Shah in W.P. No. 228 of 1980, M.V. Paranjape with Rajendra Pai in W.P. No. 1166 of 1980, for the Appellant; M.V. Paranjape with Rajendra Pai in W.P. No. 228 of 1980, Ajit P. Shah in W.P. No. 1166 of 1980, for the Respondent

Final Decision : Dismissed

Judgement

S.W. Puranik, J.—These two Writ Petitions arise under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred as "the Bombay Rent Act").

2. The Writ Petition No. 228 of 1980 is filed by the Defendant-Tenant against the decree for eviction passed by the Joint Judge, Pune, on the ground that she has been guilty of conduct which is a nuisance or annoyance to the adjoining occupiers. The Writ Petition No. 1166 of 1980 is filed by the plaintiffs-Landlords which is in the nature of cross petition praying for a decree on the ground of bona fide personal requirement and also on the ground that the tenant has erected a permanent structure without the Landlord's written consent. For the sake of convenience the Petitioner in Writ Petition No. 228 of 1980 is referred to as "the Tenant" while the Petitioners in Writ Petition No. 1166 of 1980 are referred to as "the Landlords".

3. The Landlords are five brothers and they are owners of a bungalow at 4, Napier Road, at Pune. The tenant is in occupation of the suit premises comprising

of southern side portion of the ground floor of the said bungalow and also a toilet and garage on the adjoining open site. Originally the suit premises were let out to the tenant's deceased father in 1949 and since after his death the tenant is occupying the suit premises. The landlords after terminating the tenancy of the tenant by a suit notice dated 6th February 1974 filed suit No. 2034 of 1974 in the Court of the Small Causes. Pune, for eviction of the tenant mainly on three grounds : that the Landlords bona fide and reasonably require the premises for their personal use and occupation, that the Tenant has trespassed and encroached upon the southern side open portion of the bungalow by putting up a barbed wire fencing so as to deprive the other occupiers of the bungalow of their right to enjoy the said open portion and that the tenant has locked the gate from the southern side of the bungalow, as a result of which the other occupiers of the bungalow cannot use the said southern side gate and these acts on the part of the tenant amount to nuisance and annoyance within the meaning of Section 13(1)(b) of the Bombay Rent Act, and lastly, the Tenant has contracted a permanent structure i.e. a water tank without the written consent of the Landlords.

4. The Small Cause Court negated the ground of personal bona fide requirement but passed the decree for possession on the remaining two grounds i.e. causing nuisance and annoyance and erection of permanent structure. The tenant preferred Appeal No. 280 of 1978 to the District Court. Pune. The Landlords preferred cross objections against the rejection of their claim on the ground of personal requirement. The District Court confirmed the finding of the trial Court as far as the ground of personal requirement was concerned. The District Court reversed the findings of the Small Cause Court as far as the ground of erection of the permanent structure was concerned but confirmed the decree for possession on the ground of causing annoyance and nuisance.

5. As far as ground of erection of permanent structure is concerned, the District Court confirmed the findings of the Trial Court that the water tank erected by the tenant is a permanent structure within the meaning of Section 13(1)(b) but the District Court relying upon a judgment of learned Single Judge of this Court in Shantinath Ghongade vs. Rajmal Gugale reported in 1970 Mh L J. 229 held that as the cause of action accrued to Landlord's predecessor-in-title before the property was sold, the said cause of action was not available to the present landlords. The said Judgment is overruled by the Division Bench in Radhabai Shelar vs. Trimbak Shirole reported in 1981 Mh L. J. 967. The Division Bench inter alia held that the right of recovery of possession under sub-sections (a) and (b) of Section 13(1) of the Bombay Rent Act can be exercised by the successor-in-title of interest either by operation of law or act of parties, of the original landlord and such right is not restricted only to the person who was the landlord on the date of commission of the breach. Thus the view of the District Court that the cause of action in respect of the construction of water tank was not available to the Landlords is obviously erroneous.

6. The learned Advocate for the tenant fairly conceded that the view taken by the District Court that the cause of action as regards the erection of permanent structure was not available to the landlords cannot be supported in view of the Judgment of the Division Bench of this Court in Radhabai Shelar vs. Trimbak Shirole (1981 MLJ 967) but the learned advocate challenged the findings of the District Court that the construction of water tank amounts to a permanent construction within the meaning of Section 13(1)(b) of the Bombay Rent Act. He contended that the said finding is blatantly erroneous and perverse and cannot be sustained. He contended that the said finding is based upon conjectures and is contrary to the law laid down by this Court. He contended that as the water tank was constructed on the open site adjoining the leasehold premises the provisions of section 13(1)(b) are not attracted. According to him the said provision would be attracted only when alteration is to the leasehold premises. He also contended that the water tank was removable without causing any damage to the leasehold premises. According to him the construction in question did not change or alter the nature of the leasehold premises and therefore, the structure could not be said to be a permanent structure. He contended that the nature of the structure could not be ascertained merely by looking at the material used for the structure as has been done by the District Court. He contended that the District Court failed to consider the tests laid down by this Court for the purpose of ascertaining the nature of the structures and therefore, according to him the findings of the District Court are vitiated and deserve to be set aside. In support of his contentions, the learned advocate for the tenant relied upon 1983 (1) RCJ 730, 1981 Mh.L.J. 734, 1981 Mh.L.J. 290, Gopaldas Kishanchand Taireja Vs. Viyaysingh Bhimsingh Patil and Others, and Suka Ishram Chaudhari Vs. Jamnabai Ranchodas Gujarathi and Others, . He also relied upon the unreported judgment of the learned Single Judge of this Court (Rege, J.) in Special Civil Application No. 2738 of 1978 and particularly the tests laid down in paragraph 149 of the said judgment.

7. The learned advocate appearing for the landlords supported the finding of the Courts below that the water tank is permanent structure. Relying upon the Commissioner's report at Exhibits 29 and 33, he submitted that the water tank measuring 5' X 8' and having capacity of 800 gallons is a permanent structure within the meaning of Section 13(1)(b). He pointed out from the Commissioner's report that the water tank rests on cement concrete pillars which are embedded in the earth and the same therefore, should be regarded as the permanent structure. He contended that the various judgments cited and relied upon by the advocate for the tenant are not applicable in view of the nature and extent of the structure. He also relied upon the World Almanac to show the weight of water is 10 Lbs per gallon and as such the cement pillars and walls would definitely require a substantial foundation to bear the weight of at least 800 Lbs of water plus the weight of the cement tank. He contended that the open space where the water tank was constructed is a land appurtenant and therefore, the construction upon such land would amount to a permanent structure on the leasehold

premises and therefore, the case would squarely fall within the four corners of Section 13(1) (b) of the Bombay Rent Act. He relied upon the Judgment of this Court reported in *Moraji Goculdas Deoji Trust and Others Vs. Madhav Vithal Kudwa*, and also the judgment reported in *Sakeena and Others Vs. Kusumbi and Others*, . The learned Advocate also contended that the test as to whether a structure is permanent or not would differ in respect of the structure on the appurtenant land. He contended that test of removability would not apply to a construction on the appurtenant land and for this purpose he relied upon the judgment of this Court reported in 1985 Mh. L. J. 246. According to him the construction of water tank on the open space would amount to a material alteration and change the nature of appurtenant land and therefore, the tenant would be liable for eviction u/s 13(1)(b). Lastly the learned Advocate relied upon the Judgment of Gujarat High Court in *Khureshi Ibrahim Ahmed Vs. Ahmed Haji Khanmahomed*, and contended that the only relevant test is the intention of the tenant and if this test is applied to the facts of the present case, it would be clear that the construction of water tank is a permanent construction.

8. There is no dispute that the tenant has erected the water tank on the open space adjoining the premises in her possession. The question that falls for consideration is whether the construction of the water tank is a permanent construction within the meaning of Section 13(1)(b). The Commissioner's reports exhibits 29 and 33 show that the water tank admeasures 5" X 8" having a capacity of 800 gallons and is rested on cement pillars having 1" width and 6" height. The District Court recorded a finding that the open space on which the water tank was constructed was not let out to the tenant and this finding is not seriously disputed. The District Court however further held that the said open space is land appurtenant and, therefore, provisions of Section 13(1)(b) are attracted. The contention of the tenant that the provisions of Section 13(1)(b) are not attracted because the open space on which the water tank was raised was not let to the tenant, therefore, does not appear to be correct. Considering the situation of the premises it is clear that the open space where the tank was constructed was land appurtenant. The fact that the tenant is occupying the garage and bath room W.C. blocks in the open space and is using the open space also indicates that the open space is land appurtenant. However, it is not necessary to decide this question because the construction in question i.e. the water tank cannot be regarded a permanent construction. Applying the tests laid down by this Court, there is no manner of doubt that the construction of the water tank in the present case is not a permanent construction as contemplated by Section 13(1)(b). The evidence on record shows that an overhead cement concrete tank has been placed on cement pillars and those cement pillars have been embedded in earth. The structure appears to be only a temporary structure. The finding of the District Court on this issue is very cryptic. The District Court has merely stated that the pillars have been constructed in brick and cement and they are quite big in size as they had to stand the weight of overhead tank as also the weight of 1000 gallons of water and further according

to the District Court a deep foundation must have been dug for embedding the pillars and, therefore, the structure is a permanent structure. The findings of the District Court are thus mainly based upon the fact that bricks and cement have been used in the construction of water tank. Although the District Court had assumed that a deep foundation must have been dug for the purpose of embedding the pillars, there is not an iota of evidence to prove the extent of the foundation. This approach adopted by the District Court is clearly erroneous. Merely because the bricks and cement have been used for constructing the water tank that by itself would not render the water tank a permanent construction within the meaning of Section 13(1)(b). At this stage reference may be made to the various judgments of this Court. In Pitamberdas Bakotia vs. Dattaji Krishnaji, the learned Single Judge of this Court (Pendse J.) held that the construction of a kitchen platform does not amount to a permanent construction within the meaning of Section 13(1)(b) observing,

"The question as to whether a particular construction is a permanent structure must be decided with reference to the nature and the situs of the structure, the mode of annexation, the intention of the tenant and all the surrounding circumstances. The test of removability is not the conclusive test. If the structure can be removed without doing irreparable damage to the demised premises, then that would be certainly one of the circumstances to be considered for deciding the question of intention. If the object and purpose of annexation was only for better or more complete enjoyment of the demised premises such a structure cannot be treated as a permanent structure. It is also necessary to consider in this connection whether the structure brings about a substantial change in the character of the demised premises."

Applying these tests the learned Judge held that erection of a kitchen platform does not amount to permanent structure. In Ali Saheb Abdul Latif Mullah vs. Abdul Karim Abdul Reham Mullah and others reported in 1981 Mh. L. J. 734, another Single Judge, Tulpule J. elaborately considered the provisions of Section 13(1)(b). The learned Single Judge held that the provisions of Section 13(1)(b) of the Bombay Rent Act will not be attracted if the work has been effected so as to enable persons using the premises for a better enjoyment and beneficial use of the premises. If there is no change in the form of the structure, if there is no different use by the erection of the structure than the one which is already being carried out in the premises, then notwithstanding that the work was carried in durable material and is of such type of nature as is done in cases of permanent structure it would not follow what was done was the erection of a permanent structure. The learned Judge held that mere erection of a wall which is more in the nature of a screen to provide privacy to persons who had otherwise no privacy while bathing is not a permanent structure. The learned Judge also took into consideration the fact that the walls could be easily removed by dismantling and no damage is caused in such a process except of a superficial nature. The third relevant Judgment is Suka Ishram Chaudhari Vs. Jamnabai Ranchodas Gujarathi and Others, where erection of brick wall and partition walls with a

foundation of bricks and mortar was held not to be a permanent structure. As far as water tank is concerned there are two direct Judgments "of this Court. The first Judgment is Meghraj Jeswani vs. Babulal Bhandari and others, 1983 I RCJ 730 and the other judgment is 80 B.LR. 586. In the first Judgment the learned Single Judge Jahagirdar J. held that the construction of "houd" for storing water cannot be regarded as erection of permanent structure for the simple reason that the tank which is constructed for the purposes of storing water can be easily removed without damaging in the slightest degree the nature of the tenanted premises. In the second judgment the learned Single Judge (Vaidya J.) also held that the construction of water tank would not amount to a permanent structure. In an unreported Judgment in Special Civil Application No. 2738 of 1978, the tests laid down by this Court have been reaffirmed by Rege J. If the tests laid down in the above said Judgments are applied to the facts of the present case, it will not be possible to accept the landlords' case that the water tank erected by the tenant is a permanent structure. It cannot be disputed that the water tank erected by the tenant was for the better enjoyment and beneficial use of the tenanted premises. There is no change in the form of the structure and there is no change in the user which is already being carried out in the premises. Moreover the nature of the construction is such that it can be removed by dismantling and no damage to the demised premises would be caused in such a process. Even if the test of the intention of the tenant is applied, it will be difficult to conclude that the tenant intended to erect a permanent structure. What has happened in this case is only that the tenant had erected cement pillars in the open space and placed an overhead tank on the said pillars. The overhead tank and pillars are easily removable and there is no question of any damage being caused to the premises. Thus the District Court was clearly in error in holding that the water tank was a permanent construction.

9. The learned Advocate for the landlords submitted that the tests laid down in the abovesaid Judgment would not apply to a structure erected on appurtenant land. According to him the erection of any structure of appurtenant land would be a breach of Section 13(1)(b). It is not possible to accept this contention. The provisions of Section 13(1)(b) do not make any such distinction between the premises let and the premises appurtenant. Moreover, the record shows that the construction of water tank is on a very small and negligible portion of the open space. Surely the erection of the water tanks, cannot change the nature of the land appurtenant as tried to be contended by the learned Advocate for the landlords. The reliance placed on the Judgment of Mr. Justice S. J. Deshpande in Shridhar Natu vs. Ankush Sawant reported in 1985 Mh. L.J. 246 is totally misconceived. In that case, the premises let out to the tenant were on the first floor and the front gallery and the rear gallery were being used by the tenant and the tenant had put up permanent structures on the space in the gallery. The tenant had in fact constructed a bath-room in the gallery and this act of the tenant was held to be in breach of Section 13(1)(b). The facts of this case are clearly distinguishable and in any case do not support the contention of the

Advocate for the landlords that different tests would apply to a structure erected by the tenant in the appurtenant lands. The ground of erection of permanent construction thus cannot be accepted.

10. As regards the other ground of eviction namely nuisance or annoyance, the learned advocate for the tenant submitted that the finding of the District Court on this issue is totally erroneous and contrary to the evidence on record. He submitted that the District Court completely ignored the most material evidence on record and particularly the admissions of the landlords. He also submitted that there is no evidence whatsoever to prove the element of nuisance or annoyance. The finding of the District Court is based on evidence and, therefore, the same is liable to be set aside. According to him the District Court erroneously assumed that there was nuisance and annoyance and, therefore, the finding of the District Court is unsustainable in law. The learned Advocate for the Landlords supported the findings of the District Court. He also relied upon the judgment reported in 1984 Mh. L.J. 215 and contended that the acts of the tenant amount to trespass and, therefore, amount to nuisance and annoyance within the meaning of clause (c) of Section 13(1). The learned Advocate for the landlords also submitted that the plea of waiver was not open to the tenant in a suit u/s 12 or Section 13 of the Bombay Rent Act.

11. The case of the landlords is that the tenant has erected fencing of barbed wire enclosing a portion of the open space adjoining to the lease-hold premises and has also locked the western side gate thereby depriving the landlords and the other occupiers of the user of the open portion so enclosed by barbed wire fencing and the western side gate and this according to them allegedly amounts to causing nuisance and annoyance within the meaning of Section 13(1)(c). In the plaint the landlords alleged that the barbed wire fencing was erected by the tenant in 1973 and the tenant locked the gate at about the same time. One of the landlords namely Madanlal was examined and the previous owner of the property namely one Munga Seth was also examined. The tenant who examined herself deposed that she had erected the barbed wire fencing as long back as in 1961, enclosing a portion of the open space and that she used to lock the western side gate by about the same time. She stated that no action was taken by the previous landlords against her. She also stated that no other occupier of the bungalow can use the open space adjoining to her leasehold premises and from the beginning the open space was used by her only. She also stated that the western side gate was being used only by her and by no other occupier of the house. Other occupiers use only the gate on the other side of the bungalow and, therefore, there is no question of any nuisance and annoyance being caused to any occupier of the bungalow. In short the tenant's case was that there was no nuisance or annoyance and in any event there was complete waiver on the part of the previous landlords.

12. The depositions of Madanlal and Munga Seth show that they accepted the defence of the tenant. Munga Seth admitted that the barbed wire fencing was

erected sometime in 1961 and the western side gate was also exclusively being used by the tenant from about the same time. The deposition of Munga Seth shows that beyond a letter in 1961 no action whatsoever was taken by the previous landlords. Thus from 1961 till 1974 when the suit was filed no action was taken by the landlords against the tenants. Madanlal also admitted that the open portion of the western side gate could be used only by the tenant and by no other occupiers of the bungalow. It was also admitted that the other occupiers in the bungalow use only the gate on the other side of the bungalow.

Thus it is clear that there is no nuisance or annoyance whatsoever. A taint attempt was made by the landlords to contend that because of the fencing there was inconvenience for parking cars but considering the admitted fact that there is ample space on the other side of the bungalow for parking cars and the fact that the other occupiers cannot use the western side open space it is very difficult to accept the case of the landlords that the acts alleged on the part of the tenant amount to nuisance or annoyance within the meaning of Section 13(1) (c). It is pertinent to note that not a single occupier of the bungalow has been examined to prove the nuisance or annoyance. On the other hand the evidence of the plaintiff landlords' own witness namely Munga Seth shows that the open space adjoining the leasehold premises and the gate from the western side was exclusively used by the tenant and not by any other neighbouring occupiers. Moreover the landlords did not object to the erection of barbed wire fencing or the locking of gate for nearly 13 years. Under the circumstances, it is very difficult to see as to how the present landlords who had purchased the property in 1973 can maintain a suit on the alleged ground of nuisance and annoyance. This is a clear case of waiver. The contention of the learned Advocate for the landlords that the plea of the waiver cannot be raised in a suit u/s 12 or 13 of the Bombay Rent Act also cannot be accepted in view of the Division Bench Judgment reported in Radhabai Shelar vs. Trimbak Shirote and others in 1981 Mh. L.J. 967. The Division Bench held that it is open for the tenant to plead that the previous landlords had waived the ground u/s 13(1) Clauses (a), (b) and (c) and, therefore, the successor in title of interest of the original landlords cannot claim possession of those grounds. The facts in the present case show that the previous landlords clearly waived the so called breaches on the part of the tenant and, therefore, it is not open for the present landlords to maintain an action on the ground of nuisance and annoyance u/s 13(1)(c). In any case, the landlords cannot succeed on this ground inasmuch as there is no evidence to prove the nuisance or annoyance as required by Section 13(1)(c).

13. The District Court unfortunately proceeded on the assumption that the occupiers of the bungalow have been deprived of their right to use the open space enclosed by barbed wire fencing and western side gate. This finding of the District Court is not supported by any evidence on record. The District Court also erroneously brushed aside the fact that the previous landlords did not object to the putting of the barbed wire fencing or the user of the western side gate. In fact the District Court failed to consider the most material evidence of the

previous owner Munga Seth showing that there was a clear waiver on the part of the previous landlords. Finding of the District Court is based on no evidence at all and, therefore, the same is clearly vitiated. The finding of the District Court, therefore, cannot be sustained.

14. The learned Advocate for the landlords contended that the fixing of barbed wire fencing and the closing of the western side gate would amount to acts of trespass and, therefore, the same should be regarded as nuisance and annoyance. In support of this contention, he placed reliance on the judgment of Gulam Hussain Mirja vs. Laxmidas Premji reported in 1984 Mh. L. J. 215. After going through the said Judgment it is clear that it does lay down such a wide proposition. In any event the facts of the present case clearly show that there was a waiver and, therefore, the claim for possession on the ground of alleged nuisance and annoyance is untenable.

15. Lastly the learned Advocate for the landlords submitted that the decree for possession ought to have been placed on the ground of personal bona fide requirement. He placed reliance on Judgments in Lal Chand Khanna Vs. Dr. Parmod Kumar Sood and Others, and Om Prakash Tandon Vs. D.N. Kalia and Others, in support of this submission. The two Courts below have carefully considered the entire evidence on record and recorded a finding that the requirement is not at all bona fide and reasonable. The record shows that the landlords own extensive properties. They have also secured the vacant possession of a considerable portion of the suit bungalow. There is no manner of doubt that the landlords do not need the suit premises. There is no reason to interfere with the concurrent finding of facts recorded by both the Courts below.

16. The learned Advocate for the landlords also submitted that a decree for possession should be passed on the ground of acquisition of alternative premises. In the first place, there was no such issue before the two Courts below. This ground was not agitated before the trial Court. Before the Lower Appellate Court also this ground was not raised. It is pertinent to note that the landlords filed cross objections before the Lower Appellate Court and prayed for a decree on the ground of bona fide personal requirement but no such claim was made on the ground of alleged acquisition of the alternative premises by the tenant. Even in the cross petition filed by the landlords namely, the Writ Petition No. 1166 of 1980 this ground is not pleaded. Under the circumstances, it is not possible to accept the belated submission of the landlords on the ground of any alleged acquisition of suitable residence.

In the result therefore, the tenant's Petition No. 228 of 1980 succeeds and is allowed; while the Landlord's Petition No. 1166 of 1980 is dismissed. The suit for eviction filed by the Landlord stands dismissed.