

(1994) 07 BOM CK 0038

In the Bombay High Court

Case No : Writ Petition No's. 2205 of 1981 and 3057 of 1989

Vasant Shankar Choudhari

APPELLANT

Vs

Laxman Balaji Ambore through his legal heirs

RESPONDENT

Date of Decision : 18-07-1994

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1), 13(2)
Evidence Act, 1872 — Section 115

Citation : (1995) 2 BomCR 273 : (1995) 97 BOMLR 889 : (1996) 1 MhLj 41

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

Bench : Single Bench

Advocate : Sudhir D. Kulkarni, for the Appellant; V.J. Dixit, for the respondent
Nos. 1-A to a.C, for the Respondent

Final Decision : Allowed

Judgement

M.S. Vaidya, J.—The petitioner-landlord's suit for possession of the rented premises which was decreed by the trial Court for possession, arrears of rent and costs of the suit, came to be dismissed by the Appellate Court in appeal under a decree dated 17th January, 1981. Having felt aggrieved by that decision, the petitioner has filed this writ petition.

2. An open plot admeasuring about 20 ft. x 12 ft. and bearing House No. 988/2 of Kopargaon was let out to the original respondent Laxman Balaji Ambore, sometime in 1945, on a monthly rent of Rs. 3.50 ps. According to the petitioner-plaintiff, the original defendant Laxman Ambore had made a permanent construction on the suit property without permission of the landlord and had, thus, lost his right to continue on the premises, in view of the provisions contained in section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (in short, the "Bombay Rent Act"). It was also contended that the petitioner-plaintiff required the said plot reasonably and bona fide for construction of a new building thereon and that, therefore, the tenant

was bound to deliver the possession of the plot to the petitioner u/s 13(1)(i) of the Bombay Rent Act. The trial Court had found favour with the petitioner's case on both points but, had negated the case made out by the petitioner on the ground of default. Holding that the tenancy was terminated by valid notice, the learned trial Judge had decreed the suit for possession along with arrears of rent, mesne profits, costs of the suit etc.

3. In Appeal No. 96 of 1980 filed in the District Court, Ahmednagar, the learned Assistant Judge held that the property leased out was an open plot and that the tenant, on his own admission, had made a construction on the suit property. He did not record a finding that any written permission of the landlord was obtained for making the construction. But, it was contended that the construction was made by the tenant soon after he had taken the plot on lease. The learned Appellate Judge, therefore, held that the conduct of the plaintiff showed that he had not taken any action immediately after the structure was built and that, therefore, the landlord was not entitled to get a decree for possession. The learned Appellate Judge found that the petitioner-plaintiff had made out a case of reasonable bona fide requirement of the landlord for the use of the suit premises. He found that the case of the petitioner-plaintiff that the premises were required for construction of a new building, was not satisfactorily, proved. Therefore, he negated the case of the plaintiff-petitioner on that count also. Consequently, the decree passed by the trial Court was set aside after allowing the appeal and the suit was dismissed with costs throughout.

4. Shri. S.D. Kulkarni, the learned Counsel for the petitioner, submitted that it is evident from the appellate judgment itself that the learned Assistant Judge had wrongly considered the case of the plaintiff u/s 13(1)(g) of the Bombay Rent Act, instead of considering it u/s 13(1)(i) of the Act. He pointed out the learned Assistant Judge had wrongly dwelt on the question of greater hardship when section 13(2) of the Bombay Rent Act, had no application to a case made out u/s 13(1)(i). He submitted, further, that the learned Assistant Judge was wrong in holding, in the face of the evidence tendered by the petitioner, that he did not require the premises reasonably and bona fide for the erection of a new building. He submitted that the negative finding recorded by the learned Assistant Judge on this point, was recorded without due application of mind and without assessing, according to law, the weight of the evidence tendered by the petitioner-plaintiff. As regards the ground u/s 13(1)(b), Mr. Kulkarni submitted that when the suit required the landlord's consent given in writing, the learned Assistant Judge had erred in dispensing with that statutory consideration for considering the case in favour of the original defendant and had taken an erroneous view of law on the point that the conduct of the petitioner-landlord was relevant in that behalf. He submitted that this was not a case of annexation to a tenement, but this was a case of making a new construction altogether on an open plot before the subject matter of the lease. Mr. Kulkarni, thus, concluded by saying that the findings recorded by the learned Assistant Judge on both the material issues could not be sustained at law and that they were on the border

line of perversity resulting from non-application of mind to the relevant facts and relevant law points.

5. During the pendency of the writ petition, the original tenant Laxman Ambore died and his legal representatives were brought on record under the Court's order dated 7-10-1991 passed in Civil Application No. 2130 of 1991. Mr. V.J. Dixit, who appeared on behalf of the legal representatives, supported the judgment of the Court below and submitted that the conduct of the landlord was relevant in the matter and that the lower Appellate Court had rightly dismissed the suit for possession. He relied upon some rulings to which we will refer in the course of the judgment.

6. It was not in dispute that the property which was subject matter of the oral lease between the plaintiff and the defendant, was an open plot only. It was not even the contention of the defendant that the lease was made prior to the commencement of the Bombay Rent Act. In his written statement, he had vaguely said that he had his business on the suit premises for about 35 years. One of his contentions was that the construction made by him on the suit plot was made with the permission of the Kopergaon Municipality but, he did not tender on record and document showing that such a permission was obtained. Apart from that fact, his next admission in the cross-examination was that the Municipality of Kopergaon came into existence on 15th August, 1947. Impliedly, therefore, the two admissions put together would indicate that even according to the defendant, the construction which he had made on the suit plot was made after 15th August, 1947 and the vague plea taken in the written statement that he had his business on that plot for 35 years or so at the time of his (sic) deposition was not very correct. The Bombay Rent Act received the assent of the Governor General on 13th January, 1948 and the same was published in the Bombay Government Gazettee on 19th January, 1948. In the absence of the specific contention on the part of the defendant that the constructions were made by him prior to the date of coming into enforcement of the Act and in the light of the aforesaid two admissions, it was reasonable to suppose that the construction which was made by the defendant on the suit premises, was made after the Bombay Rent Act came into force. Section 13(1)(b) of the Bombay Rent Act, as it is on the Statute Book now was in the same form as it was when the Bombay Rent Act was first made applicable to the state. The said section provided,

"13(1) Notwithstanding anything contained in this Act (but subject to the provisions of section 15 and 15A), landlord shall be entitled to recover possession of any premises if the Court is satisfied-

(a)

(b) that the tenant has, without the landlord's consent given in writing, erected on the premises any permanent structure."

The words "but subject to the provisions of sections 15 and 15A" were additions

made by Bombay Act 3 of 1949 and the modification made by Maharashtra Act 17 of 1973. They are not relevant for the purposes of this writ petition. It is, thus, clear from the bare wording of the section itself that the Rent Act looked upon very jealously on a permanent structure made by the tenant on an open plot which was the subject-matter of the lease. The legislature had anticipated that the plea of oral consent, that the plea of estoppel by conduct etc. would invariably be set up in such matters. The intention of the legislature, as expressed by the aforesaid sub-section itself, would make it clear that the legislature did not want to leave any margin for such pleas and it was for that purpose that it was provided that the permission to be obtained from the landlord by the tenant for making a permanent construction, must be in writing. The learned Assistant Judge was certainly wrong in holding that inaction on the part of the landlord since the construction of the permanent structure by the tenant on the suit plot could estop, explicitly or implicitly, the landlord from bringing a suit for possession, on the ground contained in section 13(1)(b). It may be noted here that the defendant had made the construction on the suit plot for running his business and, on his own admission in the cross-examination, it was a permanent structure. His contention in the written statement (Exh. 13) that he had constructed only a shed covered by tin-sheets on the suit plot, has been disproved by him only by giving an admission in his cross-examination that whatever structure he had made on the suit plot, was a permanent structure. Thus, it was clearly proved by the petitioner-plaintiff that the subject matter of the lease was an open plot, that a permanent structure was constructed thereon by the original defendant/tenant and that there was no written permission of the landlord obtained by the defendant/tenant for making such a construction and, further, that the construction was made after coming into force of the Bombay Rent Act. Thus, all the material ingredients required for application of section 13(1)(b) of the Bombay Rent Act, were duly proved by the plaintiff. The finding recorded, in that behalf, by the learned Assistant Judge, can hardly be said to be a reasonable finding on the basis of the material that was available on the record.

7. Mr. V.J. Dixit, relied upon several rulings and the observations made therein in support of his contention that the doctrine of "beneficial enjoyment" was attracted to the facts of the case and that the question of estoppel also was relevant for the purposes of decision of this case. We may, now, refer to those rulings :

In *Suka v. Ramchodas*, 1972 Mah.L.J. 477, the petitioner-tenant had taken a plot on lease in 1957 and had put up a tin-seed for running his shop. Thereafter, on account of a theft in his shop, he constructed a brick and mortar wall towards the road-side in his tin-seed sometime in 1963 as a protection from theft and also put up a partition wall for storing goods on one side of the shop. As a matter of fact, this Court (Bhole, J.,) found that the walls were but small annexations and that the original nature of the plot was not altered at all. It was held, further, that that was not a case of substantial improvement and no injury was caused to the plot and, therefore, the structure could not be said to be a permanent

structure within the meaning of section 13(1)(b) of the Bombay Rent Act. On the face of it, this ruling has no application to the facts of the case because of the factual findings recorded in that case. If the construction made by the tenant on the open plot was not of a permanent nature, section 13(1)(b) had hardly any application to the facts before the High Court. Such is, obviously, not the case of the facts, now in hand because, here, as admitted by the tenant himself, the construction made by him was a permanent construction.

8. The next ruling referred to before us was *Pitambardas Bakotiya v. Dattaji Krishnaji*, 1981 Mah.L.J. 290. In that case, a cooking platform was constructed in a flat which was the subject matter of the suit. This was not a case at all of a construction made on an open plot, which was subject-matter of the suit. It was, in that context, that the doctrine of "beneficial enjoyment" was considered by the Court (Pendse, J.,) and it was held that the construction of kitchen platform which was an essential requirement of modern day cooking, could not held to be a permanent structure so as to attract the provisions of section 13(1)(b) of the Bombay Rent Act. The facts of the case being not similar to the facts of the present case, there is no question of invocation of doctrine of "beneficial enjoyment" for the decision of the facts that are now in hand. It was not the case even of the defendant-tenant in his written statement that to the knowledge of the plaintiff-petitioner, he had hired the open plot for constructing a shop thereon for running his own business.

9. In *Parvati Moorjani v. Madanlal Porwal*, 1987 Mah.L.J 917, the tenant had constructed a water tank on the open space adjoining the premises in possession without the permission of the landlord. In that case also, the subject-matter of the lease was the residential tenement and not an open plot. The doctrine of "beneficial enjoyment" was invoked and, on facts, it was held that the construction of a water-tank on the adjoining open space was not a permanent structure within the meaning of section 13(1)(b) of the Bombay Rent Act. The principle laid down in that case, has no application to the facts of the present case.

10. In *Noorali Mody v. Mrs. Pasha Bhusheri and Suresh Talera*, 1989 Bom.R.C. 276, the subject matter of the lease was a residential tenement and the tenant had encroached the verandah and made a separate passage for the kitchen sometime in October 1975. The suit for possession was filed in 1984 for eviction of the tenant u/s 13(1)(b) of the Bombay Rent Act. The trial Court as well as the lower Appellate Court had held that the constructions made were permanent in their nature. The High Court (Tated, J.) concurred with those findings and dismissed the writ petition preferred by the tenant.

Our attention was invited to observations in para 21 of the report (page 296) wherein the Court considered the question which type of constructions could be held permanent for the purposes of section 13(1)(b). In the present case, the question of determination, whether or not, the structure constructed by the tenant was permanent or temporary, does hardly survive, in view of the specific

admission given by the tenant that whatever he had constructed was a permanent structure. Therefore, we need not delete much on the observations that were relied upon before us for that purpose.

11. In *Lucky Restaurant v. Deccan Talkies*, 1985 Bom.R.C 370, the tests of what could be a permanent structure for the purposes of section 13(1)(b) were discussed and, on application of those tests, it was held that a pan-stall consisting of timber hollow box like structure, which was detached from the building, could not be described as a permanent structure. Section 13(1)(b) of the Bombay Rent Act was therefore, held inapplicable.

12. On the ground of estoppel against the landlord, reliance was strongly placed on the decision in *Ramchandra Gandhi v. Pushpabai Sheth*, 1990 Mah.L.J. 485. In that case, the subject-matter of the lease was a residential tenement and the tenant had made a window and a wall in the kitchen and had constructed a shed in the open space. Factually, it was held that the tenant was in occupation of the tenement since 1961-62 and it was at about that time that the tenant had to carry out the repairs and alternations at the cost of Rs. 9,000/-. The landlady, at the time when the premises were let out to the tenant, had gifted property to her sister in March, 1977 and, thereafter, the suit came to be filed in 1977 raising a ground u/s 13(1)(b) of the Bombay Rent Act. While negating the case made out by the plaintiff, this Court (Suresh, J.,) observed, "there is no prohibition under the law against erection of a permanent structure as such. What section 13(1)(b) says is that if a permanent structure is put up without the written consent of the landlord, that gives a right to the landlord to file a suit against the tenant. It is open to the landlord to avail of that right or not to avail of that right. He can always waive that right. In the present case, the conduct is so clear that at no point of time the landlord had ever objected to the construction. It was all done with the knowledge of the then landlord. He himself was supervising some of the repairs and alterations. Certainly in such a case it is not open to the landlord, that too after several years, to turn round and say that after allowing the defendant to make all such repairs and alterations and after incurring sufficient expenditure in that behalf, that he should vacate on the ground that he had carried out the repairs. The conduct of the landlord clearly indicates that whatever rights he had, he had not availed of it at all."

These observations are clearly made on the facts which were before the Court. For the purposes of invoking the provisions of section 13(1)(b) of the Bombay Rent Act, the question was not, whether or not, the expenses for the alterations were incurred by the tenant or by the landlord on account of the adjustment of the rent. The landlord may himself get certain permanent construction made on the suit plot at the cost of the tenant to suit the convenience of the tenant. The finding of fact that the former landlady herself had supervised the construction made by the tenant at the tenant's expenses could mean that the landlord himself had got the construction made at the cost of the tenant. If so, it was certainly not open to the landlord to bring the suit for possession on the ground

that the tenant had made the construction without the written consent of the landlord. The estoppel is on account of the fact that the landlord himself had got the construction made to suit the convenience of the tenant and that too, at the cost of the tenant. The aforesaid ruling does not lay down a rule that for section 13(1)(b) the requirement was not the landlord's consent in writing. In the present case, it was not the plea of the defendant also that before taking the plot on lease, he had apprised the landlord of his intention to construct a permanent shop on the suit plot. The exact period at which the permanent construction was made, was not indicated by the tenant also, in his deposition though a vague statement was made in the Written Statement (which as noted above is found to be incorrect) that the shop was constructed about 35 years ago.

13. The landlord, in the present case, had filed a suit on 14-8-1975 and the notice for termination of the tenancy was issued on 7-4-1975. There is hardly any material on record to show that during that period, the landlord had ignored the construction or that he had done something to waive the right conferred by the Statue in him u/s 13(1)(b). The principle laid down in the above mentioned ruling has, thus, no application to the facts of the present case.

14. Consequently, we have to come to the conclusion that the landlord had, in fact, succeeded in proving against the original tenant and his legal representatives the ground contained in section 13(1)(b) of the Bombay Rent Act. The landlord would, therefore, be entitled to possession on that point.

15. The second ground which was taken by the petitioner-landlord, namely, the requirement of the open plot for erection of new building, the case of the petitioner/plaintiff was still stronger. The tenant, by his conduct, was certainly not entitled to change the nature of the leased premises from an open plot to a permanently built tenement. Admittedly, what was let out to the tenant was only an open plot. Section 13(1)(i) of the Bombay Rent Act was incorporated in the Act to encourage the building activities so as to reduce the strain on the problem of inadequacy of accommodation. There was, therefore, no provision similar to the section 13(2) of the Bombay Rent Act, which is to be read with section 13(1)(g) of that Act. Section 13(1)(g) enables the landlord to recover the premises if he reasonably and bona fide requires the same for accommodation by himself or by any person for whose benefit the premises were held or where the landlord was a trustee of a Charitable Trust, that the premises were required for the accommodation for the purpose of the Trust. The possession of a permanent construction can be sought on the ground that the provision contained in section 13(1)(g). Therefore, the landlord is under an obligation under the Act to prove that he reasonably and bona fide required the premises for accommodation by himself or by any person for whose benefit the premises are held, or where the landlord is public Trust, the premises were required for the purposes of the Trust. It is in that eventuality that the Court is required to advert to section 13(2) for decision of the question, whether or not, greater hardship would be caused to the landlord if the decree for possession was denied to him. Such is not the

consideration where the landlord proves that he requires the premises, which are an open plot, reasonably and bona fide for the erection of a new building". It may be noted, here, that initially section 13(1)(i) contained an expression "for the erection of new building". The word "residential" was deleted by Act 61 of 1953. Since then, the question, whether or not, the premises to be constructed were business premises or residential premises, has fallen in the background.

16. At a fast developing place like Kopargaon, erection of a new building on an open plot could certainly be a very beneficial proposition for the landlord, whether he himself used the same or whether the same was to be used by his tenants. The dearth of accommodation is sought to be redressed by incorporation of section 13(1)(i). As regards the bona fides of the landlord, the Court has to ascertain :-

(i) Whether or not, he has taken adequate steps as per the law for obtaining permission from the local authority;

(ii) Whether or not, the landlord has capacity to erect a new building; and

(iii) Where or not, the landlord has really an intention to act upon on his proclaimed design of erecting a new building.

In the present case, it is admitted by the defendant himself in the cross-examination that the petitioner-landlord has adequate means for erecting a new building. It is admitted that the petitioner-plaintiff has been getting ample rent from the tenants and his earnings also are large. It is also admitted by the tenant in his cross-examination that the plaintiff had been constructing properties and the construction work had been in progress at other places since 1971 till the date of the deposition of the defendant in the Court. The plaintiff had placed on record the permission obtained by him from Kopargaon Municipal Council. There appeared no reason whatsoever from the evidence on record to think that the petitioner/landlord had no intention on acting upon his proclaimed declaration of intention to erect a new building. At the end of his cross-examination, the defendant, himself admitted that it was correct to say that the plaintiff wanted to construct on the suit premises as well as on some space which was in his possession and which was adjoining the suit property. Under such circumstances, we can hardly concur with the finding recorded by the learned Assistant Judge that the petitioner-plaintiff has failed to prove satisfactorily that he required the open plot bona fide and reasonably for making construction. It cannot be said that the requirement was unreasonable for any reason whatsoever. Under such circumstances, we find that the finding recorded in that behalf by the trial Court was a more considered finding.

17. Admittedly, the defendant has his business in the suit premises for several years. But, it is also admitted that the defendant himself had since purchased some property which was abutting a road which was in front of the side of the weekly bazar. The dimensions of those premises are 7 x 12" as told by the defendant himself in his cross-examination. Therefore, it could hardly be said

that the defendant deserves any more consideration from the point of view of granting him time to vacate the suit premises. The enforcement of the claim of the plaintiff has been delayed since the institution of the suit in 1975 till the year 1994. Under such circumstances, we do not think it necessary to grant any further time to the defendant to vacate the suit premises.

18. In result, we allow the writ petition, quash and set aside the decree passed by the learned Assistant Judge in Regular Civil Appeal No. 96 of 1980 and restore the decree dated 18-12-1979 passed by the learned Joint Civil Judge, Jr. Dn. Kopargaon.

19. Rule made absolute accordingly.

20. The costs of the petitioner shall be borne by the respondents/tenants.