

(1983) 09 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition No. 2137 of 1979

Waman Limbaji Ashtekar and Co. and another

APPELLANT

Vs

Kantilal Maganlal Parekh and others

RESPONDENT

Date of Decision : 20-09-1983

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1),
13(1)(a), 13(1)(b), 15, 15A
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 114
Transfer of Property Act, 1882 — Section 103(o), 108, 108(o)

Citation : (1984) MhLj 228

Hon'ble Judges : M.N. Chandurkar, Acting C.J.

Bench : Single Bench

Advocate : Bhimrao N. Naik with S.M. Mhamane, for the Appellant; M.B. Baadkar with H.S. Deshpande, for the Respondent

Final Decision : Allowed

Judgement

M.N. Chandurkar, Actg.C.J.

1. This petition under Article 227 of the Constitution of India is filed challenging the decree for eviction passed against the petitioners by the Small Causes Judge, Poona, and confirmed by the IV Extra Assistant Judge, Pune. The premises in question are admittedly shop premises in which the defendants carry on sarafi business. The plaintiff-landlord sought possession of the suit premises on several grounds, namely :

(1) that the suit premises were bona fide and reasonably required for his son's business;

(2) that the defendants-tenants, without written consent or permission of the plaintiff, made several alterations and constructions in the suit premises as described in sub-paras (i) to (iv) of paragraph 2 of the plaint;

(3) that the defendants were in arrears of rent from 1st October 1972 to 31st January 1973; and

(4) that the rent of the suit premises was Rs. 55 per month plus education cess.

While enumerating the structures of a permanent nature and the alterations said to have been carried out by the defendants therein the plaintiff had stated that the defendants had put up show cases by reducing the thickness of the pillars by two inches and the said pillars were fixed within the wall and were protruding to the extent of two inches. Three other acts committed by the defendants were enumerated, which consisted of removal of the flooring, about 100 square feet; fixing coba in its place, lowering the level of the shop by about four inches; and fixing of rolling shutters after removing the framework of the wooden doors.

2. The defendants denied all the allegations of the plaintiff. According to them, the front portion of the shop was acquired for the purpose of road widening, which necessarily required the plaintiff to fix rolling shutters in place of the wooden shutters, because they dealt in gold and silver, and that these alterations were made with the consent of the plaintiff. The dispute as to standard rent was also raised because of the deduction in the estimate of the suit premises available.

3. The trial Court held in favour of the plaintiff on the ground of bona fide and reasonable requirement of the suit premises for the purposes of the business of the plaintiff's son. The second issue framed by the trial Court was as follows:

Does the plaintiff prove that the defendants made material alterations and permanent constructions in the suit premises as described in para 2 (i) to (iv) of the plaint?

On this issue the trial Court held in the negative, except that the fixing of rolling shutters was held to be proved. It also held that the plaintiff was estopped from making a grievance about the fixing of the rolling shutters, because that was done with his consent. Having held that the notice was proper, the trial Court passed a decree for possession in favour of the plaintiff. The defendants went in appeal against this decree to the learned Assistant Judge, Pune, who reversed the finding of the trial Court on the issue of bona fide and reasonable requirement of the plaintiff. The learned Assistant Judge, however, while framing the points which arose for his consideration, framed point No. 2 as follows:

Whether it is proved that the defendants have done certain acts which are destructive or permanently injurious to the suit premises?

On this point the learned Assistant Judge held in favour of the plaintiff. Having reversed the finding on the issue of bona fide and reasonable requirement and on the ground of arrears of rent, the Appeal Court negative the claim of the plaintiff u/s 13(1) (b) and (g) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter the Bombay Rent Act), but confirmed the decree for eviction in view of the finding u/s 13 (1) (a) of the Bombay Rent Act.

This petition is now filed by the tenants.

4. The only contention which is relevant for the purposes of this petition and to which the argues on both sides are restricted is whether on facts found a claim for possession u/s 13 (1)(a) of the Bombay Rent Act could have been decreed by the Appeal Court. According to Mr. Naik who appears on behalf of the petitioners-defendants Nos. 1 and 2, the case which is pleaded by the plaintiff is not that the defendants have committed acts which are destructive or permanently injurious to the suit premises which fell within the last clause in section 108 (o) of the Transfer of Property Act, 1882, and the contention of the learned counsel is that what is averred in sub-para (i) of paragraph 2 of the plaint is that the tenants have made a construction, which is of a permanent nature, and alterations in the suit premises. Therefore, according to the learned counsel, the Appeal Court could not have made out a new case for the plaintiff, when the case before the trial Court was not one of any act which is destructive or permanently injurious to the suit premises, but was expressly a case of an alteration which really fell u/s 13 (1)(b) of the Bombay Rent Act. Mr. Baadkar, appearing on behalf of respondent No. 1-plaintiff, vehemently urged that the case which is brought to the Court by the plaintiff is that the defendants, by reducing the thickness or width of the pillars in the premises in the occupation of the defendants, have caused damage, which is of a permanent and injurious nature. According to the learned counsel for the plaintiff, there is no error in the decree passed by the Appeal Court, and in any case, according to the learned counsel, if this Court comes to the conclusion that the finding recorded by the Appeal Court has any infirmity, then the matter should be remanded back to the trial Court for appointment of a proper Commissioner and with a further direction that the defendants should remove the show cases so as to make it possible for the Commissioner to find out the extent of the damage which has resulted from the chopping off of two inches of thickness of the wooden pillars in the walls.

5. It is necessary at the outset to point out that the grounds specified in clauses (a) and (b) of section 13(1) of the Bombay Rent Act are independent of each other. Clauses (a) and (b) of section 13(1) read as follows:

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

(a) that the tenant has committed any act contrary to the provision of clause (o) of section 108 of the Transfer of Property Act, 1882; or

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

... ..

It will be convenient at this stage to reproduce the provisions of section 108, clause (o) of the Transfer of Property Act. Section 108 (o) reads as follows: -

108. In the absence of a contract or local usage to the contrary, the lesser and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :-

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lesser, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto.

A bare perusal of section 13 (1)(a) and (b) of the Bombay Rent Act and section 108 (o) of the Transfer of Property Act will show that the grounds on which it is permissible to recover possession as contained in section 13(1)(b) is not covered expressly by any part of the provisions of section 108(o), which is almost incorporated by reference in section 13(1)(a). The real question in the instant case is, under what provisions does the claim made by the landlord fall ? On the issue framed by the trial Court, which I have reproduced above, the trial Court has treated the averments in the plaint as one making out a case u/s 13 (1)(b) of the Bombay Rent Act. The Appeal Court, from the tenor of the point framed for determination, which also I have reproduced above, as well as of the judgment, shows that it treated the case as one falling u/s 13 (1)(a) of the Bombay Rent Act.

6. Now before I refer to the manner in which this matter has been handled differently by the trial Court and the Appeal Court it has to be made clear that on a plain reading of the averments in the plaint the case pleaded appears to be one u/s 13 (1)(b) of the Bombay Rent Act. Before the setting out the nature of the alterations made, it is necessary to mention that the plaintiff in his plaint, which is in Marathi, has stated, " ? ? ? ? ? " Plainly read in simple language, there is no doubt that what the plaintiff wanted to set out was the extent of the permanent construction " ? ? " and alterations "" carried out by him. Before the plaintiff was examined in this case, it appears that he had asked for an appointment of a Commissioner. A lawyer by name Mr. Garode was appointed as the Commissioner. He made his report Ex. 29. In the report he gives the description of the suit premises as follows : -

The shop premises appear to be irregular inasmuch as it is 25 feet east-west, and its width north-south is 4 feet and 9 inches to the extent of 15 feet, and thereafter for the remaining depth the width is 7 feet and 3 inches.

He found that on the inner side of the shop the defendants had fixed a show case made of sunmica and that it was not possible to ascertain whether any pillars had been cut. The show case is 9" x 3" 6". He, however, mentioned that in the walls there were wooden pillars. We are not concerned with the other features of the premises. Now, when the Commissioner forwarded this report the plaintiff

made a second application to the trial Court, which is at Ex. 31, stating that the Commissioner was appointed in order that he should be able to make a report with regard to the alterations made by the defendants, but the Commissioner did not have the show cases removed and has made no report about the alterations. The plaintiff, therefore, prayed that the Commissioner should be called upon to make a fresh report.

7. The trial Court then appointed an expert Commissioner, namely, Mr. Gokhale, who was an engineer, at the suggestion of the plaintiff. The expert Commissioner once again went to the shop premises and made his report Ex. 34. In his report the Commissioner stated that except for ascertaining as to whether any pillars were chopped off, he had seen everything else. According to him, because of the show cases fixed to the walls he was not able to ascertain how much part of the pillars had been chopped off. In his report he stated that when he asked the counsel for the defendants whether it would be possible to remove the show cases, the counsel told him that the interior decoration was permanently fixed and since expenses were involved in the same it was not possible to remove the show cases. The Commissioner was, therefore, not able to complete the work. He requested the Court to make an order that the defendants should remove the interior decoration, as was desired by the Commissioner, and should co-operate with the Commissioner. On this report the Court made an order that the defendants should comply with the requirements of the Commissioner without fail.

8. The expert Commissioner once again went to the shop premises and made his report Ex. 35. In this report the Commissioner stated that the defendants had not kept any carpenter present, and he expressed his inability to remove the show cases. Nothing further was, therefore, possible to be done by the Commissioner, and after referring to other parts of the shop the Commissioner in his report stated that on the question as to whether the wooden pillars were chopped off because they obstructed the interior decoration, he was not in a position to make any specific statement, because in spite of the order of the Court the defendants had not made the necessary arrangements to remove the interior decoration and show to the Commissioner the wooden pillar inside. The Commissioner in his report, however, made a further addition that the pillars which were inside the walls were from the engineering point of view "structural members" of the building and that the building, which was an old one, was standing on "wooden structural framework". According to the Commissioner, these pillars were columns on which the building was standing and, therefore, they were of great importance. He stated that it was necessary to ascertain whether they had been chopped off and if so how much, but he was not able to give any decisive opinion.

9. I have referred extensively to these reports of the Commissioner because a large part of the judgment of the Appeal Court is devoted to what transpired after the Commissioner was appointed and to the conduct of the defendants in

refusing to remove the show cases in order to enable the Commissioner to ascertain whether the wooden pillars had been chopped off and if so how much. Now before I go to the judgments of both the Courts, it is necessary to state the plaintiff's version so far as his claim in paragraph 2 of the plaint is conceded. In his examination-in-chief he stated, "The defendant narrowed down the width of the "guardur" (sic) and fixed cupboards in the premises. Those were wooden poles. They reduced the thickness of the wooden poles by about 2"." In cross-examination he stated, "There is no evidence except my word that the defendants cut the pillars as alleged by me."

10. In so far as the plaintiff was concerned, therefore, there is nothing in his evidence to indicate that the alleged chopping off of the pillars was an act which was destructive or permanently injurious to the property.

11. Now when we come to the judgment of the trial Court we find that the trial Court took the view that the purpose of the Commissioner was frustrated by the unco-operative attitude of the defendants and there was room to infer that in the circumstances the defendants had materially tampered with the pillars in the framework of the building and had undoubtedly committed acts of damages within the meaning of section 108(o) of the Transfer of Property Act. The trial Court drew an adverse inference against the defendants and held that the case u/s 13 (1)(a) of the Bombay Rent Act was proved. The trial Court seems to have been influenced by the fact that the defendants should have removed the show cases at their own cost, and since they did not do so an adverse inference should be drawn.

12. The Appeal Court, after noticing the direction of the trial Court that the defendants should comply with the requirements of the Commissioner, found that the trial Court was perfectly justified in drawing an adverse inference against the defendants that the defendants must have broken the wooden poles, thereby causing damage within the meaning of section 108(o) of the Transfer of Property Act. The Appeal Court proceeded further to draw another adverse inference that scraping of wooden poles is destructive or permanently injurious to the suit premises, and the Appeal Court confirmed the finding of the trial Court.

13. Two questions arise for determination in this petition. The first question is, is the claim made by the plaintiff in the plaint the one which falls within section 13 (1)(a) of the Bombay Rent Act? The other question is, even assuming it does so fall within section 13(1)(a), were the trial Court and the Appeal Court justified in relying on the principle of adverse inference even to the extent of holding that the chopping off of two inches of the pillars was injurious to the premises in question? Now, so far as the first question is concerned, it is difficult to see how the trial Court and the Appeal Court could have relied on the provisions of section 13(1) (a). I have reproduced the material part of the plaint, and it is difficult to see how, when the case is expressly made of a permanent construction and alterations, a case u/s 108 (o) of the Transfer of Property Act could be made out at the stage of evidence. The words "?" and "" are repeated in the plaint, and it

is obvious that "?" and "" were intended to be referred to in the plaint in the context of a further statement that as a result of the permanent construction and alterations the premises have undergone a permanent change "? ? ? ?" and there is not even a whisper in the plaint about any damage to the building caused. Both the Courts were clearly not justified in converting a case expressly pleaded u/s 13 (1)(b) into one u/s 13 (1) (a) of the Bombay Rent Act. A bare look at the plaint leaves nobody in doubt that the reason why the plaintiff felt impelled to serve a notice of termination of the suit premises was that the defendants had made a permanent construction and alteration in the building. I have already referred earlier to the evidence of the plaintiff. The plaintiff himself does not even refer to the fact that he treated these constructions and alterations as damage to the building or being injurious to or destructive of the building. As a matter of fact, Mr. Baadkar was very fair in conceding that the case of the plaintiff did not fall within the last part of section 103(o), but according to the plaintiff it fell under the third clause of section 108 (o) of the Transfer of Property Act. The last part requires a finding that the act committed by the tenant is "destructive or permanently injurious" to the premises. This is a question of fact, and unless a plaintiff pleads in the plaint that a particular conduct or act on the part of the defendant was destructive or permanently injurious to the premises, the plaintiff cannot be permitted to canvass such a case at the stage of arguments, more so when in his own evidence he does not even refer to this aspect. The Appeal Court has expressly found in paragraph 14 that, "The adverse inference also would be further to hold that scraping of the wooden poles is destructive or permanently injurious to the suit premises" This finding is obviously intended to bring the plaintiff's case within the last part of section 108(o). On the argument advanced before me that the case of the plaintiff does not fall within the last part of section 108 (o) but within the third category in the second part of section 108, this finding must be held to be completely vitiated.

14. It must, therefore, be held that the plaintiff had failed to prove his case that there was any permanent construction or alteration which enabled him to invoke the provisions of section 13 (1)(b) of the Bombay Rent Act. Assuming for a moment, notwithstanding what I have said earlier, that the plaintiff was entitled to urge his case which, according to Mr. Baadkar, was one which fell in the third category in the latter part of section 108(o) of the Transfer of Property Act, I fail to see how even that case can be said to be proved. Section 108 (o) is really in two parts. The first part refers to the general obligation of the tenant to use property in the same manner as a person of ordinary prudence would use it, if the property was his. The second part is a negative mandate to the tenant, setting out that he shall not do any acts specified in the latter part of section 108(o), and the relevant clause is that the tenant must not "pull down or damage buildings belonging to the lessor". Here, Mr. Baadkar contended that what the plaintiff wanted to show by asking the Commissioner to go to the spot and make a report was that the defendants had damaged the building. This

damage consisted, even according to the plaintiff, of cutting or reducing the thickness of the wooden pillars by two inches in order to enable the defendants to fix the show cases. For recording a finding about the damage, according to the learned counsel for the plaintiff, the lower Courts were justified in taking recourse to the doctrine of adverse inference. The defendants had denied the very fact that they had reduced the thickness of the wooden pillars. Two facts were, therefore, required to be independently established by the plaintiff. The first basic fact was that the defendants had so cut the pillars that the thickness thereof was reduced by two inches. A further fact had to be proved, if reliance was to be placed on section 108(o), and that fact was that this cutting of the pillars has damaged the building.

15. Now it is not necessary for me to go into the argument as to whether the defendants should have been compelled by the Commissioner to remove the show cases and that it was for the plaintiff to have brought his own carpenter to get the show cases removed. Even assuming for a moment that an adverse inference could be drawn against the defendants for not cooperating with the Commissioner in having the show cases removed, can this adverse inference be drawn in this case ? The only relevant provision is section 114 of the Indian Evidence Act, 1872. The only relevant Illustration in the said section 114 would be Illustration (g) which says that the Court may presume that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it. Now it is extremely doubtful whether the alleged failure of the defendants to get a carpenter and have the show cases removed can be equated with his failure to produce evidence. But even assuming for a moment that the defendants avoided to remove the show cases, I fail to see how the Court was entitled to draw the presumption against the defendants that a part of the pillars was cut. The plaintiff himself does not know anything personally about the cutting of these pillars. He does not say that he has seen the pillars before and after the fixation of the show cases. He has, therefore, no personal knowledge about the cutting of the pillars. There is no other evidence of any person whatsoever to show that the pillars had been cut. In the absence of any evidence of the pillars having been cut, the alleged refusal on the part of the defendants could not have been made the basis for drawing any adverse inference against the defendants.

16. There is a further difficulty in the way of the plaintiff, because assuming on the basis of the adverse inference it is said to be established that some part of the pillars has been chopped off, there can be no further adverse inference in respect of the effect of this act on the part of the defendants. Section 108 (o) of the Transfer of Property Act requires inter alia that a tenant may not pull down or damage the building belonging to the lessor. The question is, do the provisions of section 13 (1)(a) of the Bombay Rent Act read with section 108 (o) of the Transfer of Property Act contemplate that even a small damage will entitle the landlord to ask for a decree for eviction ? Undoubtedly, in view of the decision of a Division Bench of this Court in *Bright Brother (Pvt.) Ltd. and Company v.*

Venkatlal G. Pittie and others 1979 Mh. LJ 894, it is not possible to contend that the damage must be destructive or permanently injurious, because the Division Bench has taken the view that the words "which is destructive or permanently injurious thereto" qualify only the words "commit any other act" and that those words do not contemplate a requirement of all the other earlier categories of acts which are prevented to be done by the tenant. In paragraphs 7 and 8 of the said decision the Division Bench has observed as follows : -

7. It will be, firstly, noticed that the five categories of the prohibited acts under the second part of the clause (o) are distinct in nature and independent of each other. Secondly, first four categories are self-descriptive. The concluding words are obviously intended to furnish identity of the fifth category of undefined "any other act". Thirdly, all the five categories of these acts are separated by commas and disjunctive "or" restricting the application of the descriptive concluding wording to the last category and disconnecting it from the earlier other four categories.

8.....The concluding portion of the clause is thus wholly inapt to the context of the first four categories of the prohibited acts.

17. Notwithstanding the fact that the clause "with regard to the act being "destructive or permanently injurious thereto" is not an ingredient of the clause relating to pulling down or damaging the buildings, it appears to me that that clause does not take in every kind of damage, however small and inconsequential it may be. Section 108(o) of the Transfer of Property Act is to some extent an embodiment of the doctrine of waste under the English common law. Section 108 (o) thus deals with voluntary waste, and as observed by Mulla in his Transfer of Property Act, Sixth Edition, at page 727, "An act which a person of ordinary prudence using his own property would commit is not waste although it damages the property" Dealing with "voluntary waste", it is observed in Halsbury's Laws of England, Fourth Edition, Volume 27, in paragraph 278, at pages 217-8, as follows:-

Voluntary waste implies the doing of some act which tends to the destruction of the premises, as by pulling down houses, or removing fixtures; or to the changing of their nature, as the conversion of pasture land into arable, or pulling down buildings and erecting new buildings even though of greater value.....

In order to constitute voluntary waste by destruction of the premises, the destruction must be wilful or negligent; the destruction of a building in the course of using it in what was apparently a reasonable and proper manner, having regard to its character and to the purposes for which it was intended to be used, is not waste.

18. Mr. Baadkar, appearing on behalf of the plaintiff, has brought to my notice a decision of the Madras High Court in P. Damodaram v. K. Loganatha Chettiar and another AIR 1956 Mad 54, in which the learned Judge has taken the view that to constitute voluntary waste by destruction of the premises, the destruction must

be wilful or negligent, and it is not waste if the premises are destroyed in the course of reasonable user, and any user is reasonable if it is for a purpose for which the property was intended to be used, and if the mode and extent of the user is apparently proper, having regard to the nature of the property and what the tenant knows of it, and, in the case of business premises, to what, as an ordinary business-man, he ought to know of it. In the same decision the learned Judge further observed as follows: -

It is not every act of waste on the part of the tenant which will entitle the landlord to obtain an order of eviction and what should be the nature and extent of the waste will depend on the circumstances of each case:- R. Govindaswami Naidu Vs. G. Pushpalammal and Another, . The principle is that a lessee is bound to take care of the demised premises as a man of ordinary prudence would under similar circumstances take of his own property.

It is, therefore, clear that every act of waste does not result in a liability of the tenant being evicted. In a case where reliance is placed on section 108(o) of the Transfer of Property Act, the damage must be a wilful damage, and if the damage is of a minor nature resulting from doing something which is necessary for the proper user of the property for which it has been let, it is difficult to hold that the plaintiff will be entitled to a decree for eviction. The premises in question were admittedly let out for business purposes. Admittedly the shops in the locality are all sarafi shops. One must take judicial notice of the fact that in a sarafi shop articles are normally exhibited in show cases. Putting up of show cases is, therefore, necessary for normal use of the premises, and indeed for a proper use of the premises as a sarafi shop show cases are normally an absolute necessity. If for the purposes of such user a tenant has cut a part of the pillars and there is no evidence to show that this had the effect of in any way making the pillars unsafe or infirm, it is difficult to hold that the plaintiff can rely on this act of the defendant to seek a decree for eviction u/s 13 (1)(a) of the Bombay Rent Act. It has to be noted that it is not the plaintiff's case in the plaint that as a result of the reduction in the thickness of the pillars the strength of the pillars has been reduced. Apart from this, the damage cannot be said to be wilful, in the sense that the pillars were cut with a deliberate motive to damage the pillars themselves. This is not even alleged in the plaint. Indeed, the case put up by the plaintiff that the pillars were cut in order to fix the show cases itself negatives the case of damage being caused wilfully.

19. Now, undoubtedly, there is no evidence of the pillars having become weak or infirm, and the only statement which is relied upon both by the trial Court and the Appeal Court and the learned counsel for the plaintiff appearing before me is the statement made in the Commissioner's report Ex. 35 where he has stated that the pillars were structural members and the building is supported on a wooden structural framework. Mr. Naik, appearing on behalf of defendants Nos. 1 and 2, has raised an objection to this part of the report. According to the learned counsel, the Commissioner was appointed only to verify and report on the fact

whether the pillars have been cut and the Commissioner has exceeded his authority while making his observations. I do not see much substance in this objection. If the Commissioner has noticed that the whole building stands on a wooden framework and the pillars were structural members, he was bound to so mention this fact in the report, but I fail to see how this takes the case of the plaintiff further. What was necessary was evidence to show that the pillars, if they were cut by reducing their thickness, had become infirm. This is a matter of evidence and the plaintiff should have given independent expert evidence to prove this fact. Even so far as this fact was concerned, both the Courts seem to have drawn an adverse inference. The learned Assistant Judge has expressly observed in the end of paragraph 14 of his judgment that the scraping of the wooden poles is destructive or permanently injurious to the suit premises. Putting a construction favorable to the plaintiff on this observation and assuming it to mean that what is intended to be pointed out was that an inference of damage to the building could be drawn, I fail to see how this is a matter of an adverse inference. The burden to prove this fact was on the plaintiff, and unless the plaintiff discharged this burden there was no question of the defendants being called upon to produce any evidence, and there was, therefore, no question of drawing any adverse inference against the defendants.

20. The Commissioner in the instant case, has obviously been appointed under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908, for a local investigation. Under Order XXVI, Rule 9 a Commissioner can be appointed if the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute. The Commissioner's report can undoubtedly be treated as evidence, but so far as the extent of the damage and the effect thereof were concerned it had to be independently established, because in the Commissioner's report there was nothing to show the extent of the damage or the effect thereof. In my view, therefore, the evidence of both the Courts is wholly vitiated by an entirely erroneous approach on the facts of the present case.

21. At this stage, Mr. Baadkar argued that the matter should be remanded back with a proper direction to the Commissioner and to the defendants to make the necessary facilities available for inspecting the suit premises. I do not think in view of my finding with regard to the nature of the claim originally made by the plaintiff any useful purpose would be served by remanding the matter. It is not, therefore, possible to accede to the request of Mr. Baadkar for a remand, in the view which I have taken, the judgments and decrees of both the Courts below have to be set aside and the plaintiff's claim for possession of the suit premises on the ground stated in section 13 (1)(a) of the Bombay Rent Act must stand rejected. These were the only contentions advanced before me.

22. The petition is thus allowed with costs.