

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 533 OF 1995

Shripad Vishnu Agnihotri
(since deceased, by his heirs & Lrs)
1-A) Smt. Usha S. Agnihotri and ors. ..Petitioners
vs.
Madhusudan G. Shingnapurkar ..Respondent

WITH

WRIT PETITION NO. 5201 OF 1995

Madhusudan G. Shingnapurkar
(since deceased, by his heirs & Lrs)
1. Smt. Vaishali M. Shingnapurkar & ors. ..Petitioners
vs.
1-(a) Smt. Usha S. Agnihotri and ors. .. Respondents.

Mr. Rahul Deodhar h/f. Mr. S.M. Kamble for the Petitioners in Writ Petition No. 533 of 1995 and for the Respondents in Writ Petition No. 5201 of 1995.

Mr. S.V. Sadavarte for the Respondent in Writ Petition No. 533 of 1995 and for the Petitioners in Writ Petition No. 5201 of 1995.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 18 June 2015.
Date of Pronouncing the Judgment : 25 June 2015.

JUDGMENT :-

- 1] These two petitions can be disposed of by common order.
- 2] Writ Petition No. 533 of 1995 has been instituted by the tenant impugning the judgment and order dated 5 July 1989 made by Joint Civil Judge, Junior Division Kolhapur and the judgment and order dated 11 October 1994 made by the Additional District Judge at Kolhapur, ordering the eviction of the tenant on the ground of

erection on the suit premises any permanent structure without written consent of the landlord.

3] The aforesaid impugned judgments and orders have also held that the landlord has made out the ground of reasonable *bona fide* requirement, however, holding that comparative hardship that would occasion the tenant, is greater, declined to order eviction on the said ground. Accordingly, the landlord has instituted Writ Petition No. 5201 of 1995 questioning the aforesaid impugned judgments and orders, to the extent they deny order of eviction on the ground of reasonable *bona fide* requirement of the landlord.

4] The landlord had instituted Regular Civil Suit No. 1144 of 1982 against the tenant seeking, *inter alia*, perpetual injunction restraining the erection of the latrine on or appurtenant to the suit premises. The suit was disposed of together with Regular Civil Suit No. 816 of 1983, in which the eviction of the tenant was ordered on the ground of erection of permanent structure without the landlord consent. Regular Civil Suit No. 1144 of 1982 was, however, dismissed by observing that the construction of latrine is complete and further, in Regular Civil Suit No. 816 of 1983, the eviction of the tenant has already been ordered. In such circumstances, it was observed that there is no question of grant of any effective relief.

5] Section 13(1)(b) of the Rent Act enables the landlord to recover the possession where it is established that the tenant has, without landlord's consent given in writing, erected on the premises any permanent structure. The explanation provides that the expression "*permanent structure*" does not include the carrying out of any work with the permission, wherever necessary, of the local authority, for providing a wooden partition, standing cooking platform in kitchen, door, lattice work or opening of a window necessary for ventilation, a false ceiling, installation of air-conditioner, an exhaust outlet or a smoke chimney.

6] The Trial Court as well as the Appeal Court have recorded the concurrent findings of fact to the effect that the tenant, without landlord's written consent, erected the permanent structure. The permanent structure, *inter alia*, included the conversion of bathroom into a latrine by way of installation of latrine pot and erection of walls upto 2 to 3 feet, upon the walls of bathroom. In this manner, the two Courts have recorded that the tenant brought about a substantial change or alteration in the original structure. Such findings of fact, concurrently recorded by two Courts are normally immune from judicial review under Article 227 of the Constitution of India, unless ofcourse, the same are vitiated by perversity, non-

application of mind or errors apparent on face of record. As noted hereafter, none of such vices apply to findings of fact concurrently recorded.

7] The defence of the tenant was broadly two fold:

(a) That the structure in CTS No. 2820/A was originally a latrine. Its user as a latrine was discontinued, in view of alternate arrangements made by the predecessor-in-title of the landlord. Upon the alternate arrangements having ceased, the tenant, by means of some minor alterations, restored bathroom into a latrine; and

(b) In any case, in light of law laid down by this Court in case of *Somnath Krishnaji Gangal vs. Moreshwar Krishnaji Kale & ors.* - 1995 (3) Bom. C.R. 327 and *Alisaheb Abdul Latif Mulla Vs. Abdul Karim Abdul Rahman Mulla and ors.*- 1981 Mh.L.J. 734, the erection in question, being for beneficial use of suit premises does not constitute any permanent structure for the purposes of Section 13 (1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Rent Act).

8] The Trial Court as well as Appeal Court has disbelieved the case of the tenant that the structure in CTS No. 2820/A was

originally latrine. This finding of fact is based upon assessment list, deletion of the extract in the order of the Corporation Commissioner as well as appreciation of oral evidence. In addition, both the Trial Court as well as the Appeal Court have relied upon the averments made by the tenant in Reg. C.S. No. 5/68 instituted by the tenant for determination of standard rent, to the effect that the suit premises had no independent latrine either in it or appurtenant to it. The finding of fact concurrently recorded by the two Courts can neither be regarded as perverse nor contrary to the weight of evidence on record. As such, in exercise of writ jurisdiction, there is really no scope to interfere with the same.

9] In case of *Somnath K. Gangal (supra)*, this Court in the context of provisions contained in Section 13(1)(b) of the Rent Act has recorded the following conclusions at paragraph 21.

“21. In view of the decisions of the Hon'ble Supreme Court and of this Court, my conclusions are as under :

(i) In deciding the question as to what is a "permanent structure", it is necessary to consider the mode and degree of annexation as also the intention of the party putting up the structure. The creation of such a work or addition thereof in order to amount to a permanent structure must cause and bring about a substantial improvement and change in the nature and form of accommodation.

(ii) If what has been done is by way of minor repairs for the better enjoyment and use of the premises, it cannot be regarded as a permanent structure. Similarly, if the object and purpose of annexation was only to better the mode of enjoyment of the demised premises as in the case of

construction of the kitchen platform, it does not amount to a permanent structure within the meaning of section 13(1)(b) of the said Rent Act.

(iii) The essential element which needs consideration is as to whether the construction is substantial in nature and whether it alters the form, front and structure of the accommodation.

(iv) If what the tenant does in large scale renovation like replacement of the entire roof, covering it with marble tiles, without obtaining permission of the landlord, it may amount to permanent structure within the meaning of section 13(1)(b) of the Rent Act.

(v) Similarly, if the tenant constructs a bathroom in the gallery which puts additional burden in the gallery which is harmful to the structure of the building, it would amount to a permanent structure.”

10] In case of *Somnath Gangal (supra)*, this Court was concerned with closing the opening of 2' x 2' in the window of the western wall of the premises, which was damaged due to theft resulting in the removal of the window frame itself. This Court, in such circumstances, held that such closure does not amount to erecting on the premises a permanent structure within the meaning of Section 13(1)(b) of the Rent Act. In the present case, however, the fact situation, offers no parallel. The structure which was originally a bathroom, has been converted into a latrine, *inter alia*, by increase in height of walls as also installation of a latrine pot. There is, in the present case, a substantial alteration in the nature of the suit structure, which is to be regarded as part of the suit premises.

11] In case of *Alisaheb Adbul Latif Mulla (supra)*, the tenant while making use of existing *mori* erected a wall to provide privacy while bathing which wall came to be constructed without any foundation so as to facilitate the user of existing *mori* for the purposes of bathing, cleaning of utensils and washing of clothes. In such a fact situation, this Court ruled that the provisions of Section 13(1)(b) were not attracted. Again, the fact situation in the present case offers no parallel to the fact situation in the said case. In the said case, there was no dispute about existence of the original *mori*. The wall so erected, was in the nature of a screen which could be easily removed by dismantling. No damage was caused in the process, except of a superficial nature. Apart from, such finding of fact, this Court also noted that the original *mori* continued in existence and was used as a *mori*. Such is not the position in the present case.

12] If the provision, as contained in Section 13(1)(b) of the Rent Act, together with the explanation appended thereto is considered, then it is possible to urge that whatever has been done for the better enjoyment in use of the premises, cannot be regarded as a permanent structure. In judging whether the structures were permanent or not, the factors like intention of the party putting up of the structure; the mode and degree of annexation; possibility of removal of structure without irreparable damage to the suit

premises; dimensions of the structure, nature and material used for the structure, durability of the structure are required to be considered. This list, is by no means exhaustive, but only illustrative. The two Courts have been alive to such factors. This is not a case where the tenant did not have the facility to latrine at all. The record indicates that common latrine for use of tenant and his family members was available. The contention that bathroom, which the tenant converted into a latrine, was originally a latrine has been found to be false. The tenant perhaps desired to avail an exclusive or independent latrine. The erection of permanent structure, was in pursuance of the same. There is no explanation, however, as to why no written consent of the landlord was obtained before the tenant proceeded to erect such permanent structure. In such circumstances, the landlord has succeed in making out a ground under Section 13(1)(b) of the Rent Act. The concurrent findings of fact recorded by the two Courts warrant no interference from exercise of powers of judicial review under Article 227 of the Constitution of India.

13] On the aspect of reasonable and *bona fide* requirement of the landlord, again, the Trial Court as well as the Appeal Court have recorded have recorded concurrent findings of fact that the requirement of the landlord is both reasonable and *bona fide*. It does not appear that any evidence as such was laid by and on behalf of

the tenant on the aspect of comparative hardship. The two Courts, have however, proceeded upon the sole premise that the landlord, at the time of institution of the suit was residing in premises ad-measuring about 250 sq. ft with his wife and three daughters, whereas the tenant was residing in suit premises with his wife, two sons and three daughters. The suit premises ad-measure about 450 sq ft. Although, the number of family members may be one of the relevant considerations, the same cannot be sole consideration in the matter of determination of comparative hardship. As noted earlier, the tenant had led no evidence on the aspect of comparative hardship. There was neither any pleading nor any evidence that the tenant made attempts to secure alternate premises upon receipt of notice of termination, but was unsuccessful. There is no evidence with regard to financial capacity of the tenant or his family members. The onus of establishing hardship is upon the tenant and in this case, it cannot be said that such onus was duly discharged by the tenant by leading any cogent evidence. In such circumstances, the impugned judgments and orders are required to be interfered with to the extent they deny the landlord eviction on the ground of reasonable and *bona fide* requirement.

14] Inasmuch as a finding on the aspect of comparative hardship entails denial of eviction order to the landlord, despite concurrent

findings as to reasonable and *bona fide* requirements of the suit premises by the landlord, the onus on the aspect of comparative hardship is on the tenant. It was, therefore, for the tenant to raise the necessary pleadings and adduce evidence in support thereof. Even if, the circumstance that the tenant has not raised any significant pleadings in this regard is to be ignored, it was for the tenant to at least produce some material on record to establish that the hardship likely to be suffered by the tenant, far exceeds the hardship which the landlord may suffer due to denial of an eviction order. The onus, in this regard cannot be placed upon the landlord to demonstrate that lesser disadvantage will be suffered by the tenant or that the disadvantages which the tenant may suffer are remediable. The mere circumstance that eviction will occasion hardship is really not the hardship as contemplated by Section 13(2) of the Rent Act. In this case, the onus, on the aspect of comparative hardship has not been discharged by the tenant.

15] The learned counsel for the landlord submitted that the original tenant has since expired, his two daughters have married and three sons and wife have secured alternate accommodation and therefore, there is no person residing in the suit premises. The learned counsel for the tenant on the other hand submitted that the original landlord has expired and his three daughters are married.

There does not appear to be any dispute that the widow of original landlord is living and resides in the same premises, in which the original landlord and his family members resided when the suit for eviction was instituted.

16] Be that as it may, there is no scope to take cognizance of the aforesaid contentions of the learned counsel for the parties, in absence of any material brought on record. Accordingly, the aforesaid contentions are not taken into consideration for the purposes of deciding these two petitions.

17] In the result, Writ Petition No. 533 of 1995 is dismissed and landlords, i.e., respondents in Writ Petition No. 533 of 1995 and petitioners in Writ Petition No. 5201 of 1995 are permitted to withdraw the arrears or other amounts, if deposited in this Court alongwith interest, if any that may have accrued thereon.

18] Writ Petition No. 5201 of 1995 is allowed and the impugned judgments and orders, to the extent they had denied order of eviction on the ground of reasonable and *bona fide* requirement are interfered with. Accordingly, there shall be, in addition to the ground under Section 13(1)(b) of the Rent Act, an order of eviction on the ground under section 13(1)(g) of the Rent Act as well.

19] Rule is accordingly discharged in Writ Petition No. 533 of 1995 and made absolute to the extent indicated in Writ Petition No. 5201 of 1995. There shall, however, be no order as to costs.

(M. S. SONAK, J.)