

Govind Ramchandra Patil (Since Deceased)]
Through LRs.] ... Petitioner

Gerald Joseph Almeida and Anr.] ... Respondents

CORAM :- M. S. SONAK, J.
DATE :- AUGUST 07, 2015

1. This petition challenges Judgment and Order dated 30/06/1994 made by the III Additional District Judge, Thane, directing the eviction of the Petitioner from the suit premises for having changed the user of the suit premises.

2. The landlord had instituted Regular Civil Suit No.1074 of 1986 against the Petitioner-tenant on various grounds. The suit was however dismissed by the Judgment and Order dated 31/07/1990. In Civil Appeal No.270 of 1990 instituted by the landlord, the landlord pressed for eviction only upon the ground contained in Section 13(1) (a) of The Bombay Rents, Hotel and Lodging House Rates Control Act,

1947 ('1947 Act'). This provision provides that a landlord shall be entitled to recover possession of any premises, if the Court is satisfied that the tenant has committed any act contrary to the provisions of clause (o) of Section 108 of the Transfer of Property Act, 1882 ('TP Act'). In this case, the eviction was applied for on the ground that the suit premises had been let out for using as a library and the tenant has begun to use the suit premises as a carpentry unit. Section 108 of the TP Act provides for rights and liabilities of lessor and lessee. The sub-clause has provided that 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 commit any other act which is destructive or permanently injurious thereto.

3. The Appeal Court, in the present case, has not at all addressed itself to the issue as to whether the tenant had indeed committed any act contrary to the provision of clause (o) of Section 108 of the TP Act. The Appeal Court has merely addressed itself to the issue as to whether or not there was any waiver on the part of the landlord and therefore, relying upon, mainly, the decision of this Court in the case of *Kasturchand Panachand Doshi and Ors. Vs. Yeshwant Vinayak Sainkar and Anr.*¹, proceeded to hold that acquiescence or waiver by a landlord cannot save a tenant from a decree of eviction under Section 13(1)(a) of the Rent Act.

¹ AIR 1980 (Bom.) 270

4. In the aforesaid circumstances, Mr. K. K. Malpathak, learned Counsel for Petitioner, submitted that the Appeal Court has failed to exercise jurisdiction vested in it by not even addressing itself to the issue as to whether the tenant had committed any act contrary to the provisions of Section 108(o) of the TP Act.

5. Further, Mr. Malpathak pointed out that this Court, in the case of *Suresh Vasant Malegaonkar Vs. Ramabai Keshav Gokhale and others*², has held that the decision rendered in the case of *Kasturchand Doshi Vs. Yeshwant Sainkar (supra)*, is no longer good law in view of the decision of the Hon'ble Apex Court in the case of *Gurdial Batra Vs. Raj Kumar Jain*³. Therefore, Mr. Malpathak submitted that the decision of the Appeal Court is required to be set aside.

6. Ms. Leena Patil, learned Counsel for Respondents, defended the impugned order by pointing out that there was no dispute that the user of the suit premises was changed from that of library to carpentry purpose. In such circumstances, the grounds under Section 13(1)(a) of the Rent Act read with Section 108(o) of the TP Act was clearly made out and only what was left to be decided was whether there was any waiver or acquiescence on the part of the landlord so as to disentitle to a decree of eviction. Ms. Patil pointed out that the approach of the Appeal Court was right and there was no error of jurisdiction involved.

² 2002(1) Mh.L.J. 933

³ AIR 1989 SUPREME COURT 1841

7. Having heard the learned Counsel for parties and perused the record, in my judgment, it is necessary to set aside the impugned Judgment and Decree dated 30/06/1994 and to remand the matter for reconsideration before the Appeal Court. There are two reasons for adopting such a course of action.

8. The first is that the Appeal Court has really not gone into the issue as to whether the tenant had committed any act contrary to the provisions under Section 108(o) of the TP Act. This Court, in the case of *Dattatraya Ramchandra Sapkal Vs. Gulabrao Tukaram Bhosale*⁴, in the context of the provisions contained in Section 13(1) (a) of the Rent Act and Section 108(o) of the TP Act, held that in order that the landlord is entitled to secure a decree of eviction, the landlord has not merely to show that the property was granted for a particular purpose and that it was now being used for an other purpose but the landlord has further to show that the changed user is destructive or permanently injurious to the property. The decision in the case of *Dattatraya Vs. Gulabrao (supra)* was overruled by the Division Bench of this Court in the case of *Bright Brothers Vs/ Venkatlal*⁵. However, in the case of *Suresh Vs. Ramabai (supra)*, the learned Single Bench of this Court, by placing reliance on the decision of the Hon'ble Apex Court in the case of *Gurdial Batra Vs. Raj Kumar Jain (supra)*, ruled that *Bright Brothers Vs/ Venkatlal (supra)* does not lay down correct position in law. The Hon'ble Apex Court, in the case of *Gurdial Batra Vs. Raj Kumar Jain (supra)*, at

4 1978 Mh.L.J. 545

5 1979 Mh.L.J. 894

para nos.6, 7 and 8, has observed thus :-

“6. Letting of a premises can broadly be for residential or commercial purpose. The restriction which is statutorily provided in Section 13(2)(ii)(b) of the Act is obviously one to protect the interests of the landlord and is intended to restrict the use of the landlord's premises taken by the tenant under lease. It is akin to the provision contained in Section 108(o) of the Transfer of Property Act dealing with the obligations of a lessee. That clause provides: 'the lessee may use the property and its products, if any, as a person of ordinary prudence would use them if they were of 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....' A house let for residential purpose would not be available for being used as a shop even without structural alteration. The concept of injury to the premises which forms the foundation of Clause (o) is the main basis for providing Clause (o) in Section 13(2)(ii) of the Act as a ground for the tenant's eviction. The Privy Council in *U Po Naing v. Burma Oil Co.* : AIR 1929 PC 108 adopted the same consideration. The Kerala High Court has held that premises let out for conducting trade in gold if also used for a wine store would not amount to an act destructive of or permanently injurious to the leased property (1977 Ker LT 417). Similarly, the Bombay High Court has held that when the lease deed provided for user

of the premises for business of fret work and the lessee used the premises for business in plastic goods, change in the nature of business did not bring about change of user as contemplated in Section 108(o) of the Transfer of Property Act (1970 Mah LJ 545).

7. *The landlord parts with possession of the premises by giving a lease of the property to the tenant for a consideration. Ordinarily, as long as the interest of the landlord is not prejudiced, a small change in the user would not be actionable.*

8. *In this case, the premises was let out for running of a repair shop. Along with the repair business, sale of televisions was temporarily carried on. We do not think this constituted a change of user within the meaning of Section 13(2)(ii)(b) of the Act so as to give a cause of action to the landlord to seek eviction of the tenant.”*

9. Accordingly, it was necessary for the Appeal court to address itself to the issue as to whether the tenant had indeed committed any act contrary to the provision contained in Section 108(o) of the TP Act before any decree could be made under Section 13(1)(a) of the Rent Act. This having not been done, remand is the option.

10. Secondly, even in the context of waiver of acquiescence, the Appeal Court has based its decision on the ruling of this Court in

the case of *Kasturchand Doshi Vs. Yeshwant Sainkar (supra)*. In the case of *Suresh Vs. Ramabai (supra)*, this Court, again relying upon the decision of the Hon'ble Apex Court in the case of *Gurdial Batra Vs. Raj Kumar Jain (supra)*, has held that the law laid down in the case of *Kasturchand Doshi Vs. Yeshwant Sainkar (supra)* does not represent the correct position in law. It is not quite clear as to whether this is in the context of interpretation of Section 108(o) of the TP Act or in the context of the submission post waiver or acquiescence. Accordingly, this is a matter which shall have to be looked into by the Appeal Court, in case the Appeal Court is satisfied that the tenant has indeed committed any act contrary to the provision contained in Section 180(o) of the TP Act.

11. For the aforesaid two reasons, the impugned Judgment and Decree dated 30/06/1994 is set aside. The Civil Appeal No.270 of 1990 is restored to the file of the Appeal Court and the Appeal Court is directed to dispose of the same in accordance with law as expeditiously as possible and in any case, within a period of one year from the date of production of authenticated copy of this order.

12. The Petitioner has instituted Civil Application Nos.1903 of 2014 and 1904 of 2014 in this Writ Petition. The same shall be deemed to have been instituted in the Civil Appeal No.270 of 1990 and accordingly it shall be for the Appeal Court to decide the same in accordance with law and on its own merits. The Respondents shall be granted liberty to file their replies in response to the Civil Applications within the time limit to be determined by the Appeal Court.

13. The parties to appear before the Appeal court for directions on 31/08/2015 at 11.00 a.m.

14. Rule is accordingly made absolute to the aforesaid extent. There shall be no order as to costs.

(M. S. SONAK, J.)