

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**WRIT PETITION NO.2506 OF 1992
WITH
CIVIL APPLICATION NO.6035 OF 2011
WITH
CIVIL APPLICATION NO.2635 OF 1995
WITH
CIVIL APPLICATION NO.4150 OF 2017**

M/s Jeevanram Bhagwandas Rathi,
through partner Manakchand
Jeevanram Rathi, age 45 years,
occupation business,
R/o Polan Peth, Jalgaon

**..PETITIONER
(Ori. Defendant)**

VERSUS

1. Narayandas Damodhardas Jhawar,
age : 36 years, occupation business,
2. Sow. Prabhawati Naryandas Jhawar,
age : 32 years, occupation household,

Both residents of Bhawani Peth,
Jalgaon

**..RESPONDENTS
(Ori. Plaintiffs)**

Mr S.S. Bora, Advocate for petitioner;
Mr V.S. Bedre, Advocate for respondents

**CORAM : NITIN W. SAMBRE, J.
DATE : 26th September, 2017**

ORAL ORDER:

. This petition is by tenant-defendant in Regular Civil Suit No.230 of 1982, filed by respondents-plaintiffs (landlords) for possession of Municipal House No.147, Polan Peth, Jalgaon, recovery of damages and inquiry into mesne profits.

2. It is the case of the present respondents that they purchased suit premises on 18th June, 1980, which was let out to the present petitioners-defendants for running a grocery shop. In the suit, it is claimed that the premises are required for bona fide use of the plaintiffs. It is further claimed that the defendant has closed his grocery business before 1-1/2 years of filing of the suit and had sub-let the same to third person wherein third person is carrying out different business. It is also claimed that some permanent construction, without written permission of the landlords was effected, resulting into closing of eastern open space of the shop by replacing the door by a permanent wall.

3. In the aforesaid background, a notice for termination of tenancy, with effect from 31st March, 1982, was issued on 17th February, 1982.

4. Arrears of rent were also demanded.

5. Vide reply dated 16th March, 1982, it is claimed by the defendant that the rent was remitted up-to 31st March, 1982.

6. The claim in the suit was for possession, arrears of rent from 1st April, 1982 to 31st May, 1982, notice charges, mesne profits, etc.

7. In response to the suit claim, the petitioner in written statement Exh.13 has alleged that the premises were taken by one Jivanram and his son Bhagwandas, whose heirs are running the business in the suit premises. The bona fide need was denied and it was further claimed that greater hardship would be caused to the tenant. It is further claimed that one Baheti, third person, named in the plaint, is the partner inducted in the firm, who is a tenant and further alleged that the business of the firm is still going on. A point is raised that since after alleged permanent repairs carried out by petitioner-defendant, the landlord has received the rent and as such, a case of acquiescence was sought to be established.

8. Having regard to the rival pleadings, the Trial Court framed following points and answered them :-

Sr. No.	ISSUES	FINDINGS
1.	Do the plaintiffs prove that they require the suit premises bona fide and reasonably for their personal use ?	Yes
2.	Do they prove that the defendant is not using the suit premises for the purpose for which	No.

	they were let out for over 1-1/2 years next before the filing of the suit ?	
3.	Do they prove that the defendant has sublet or otherwise assigned the suit premises to one Baheti for his business ?	Yes.
4.	Do they prove that the defendant has effected permanent alterations on the suit premises ?	Yes
5.	Does the defendant prove that the alteration was effected as per the notice of the Municipality about 9 to 10 years ago ?	No.
6.	Does the defendant prove that the plaintiff has accepted the rent even after that alteration reviving the defendant's tenancy ?	No.
7.	Do the plaintiffs prove that the tenancy of the defendant was duly terminated by a notice dated 17.2.82 w.e.f. 31.3.82 ?	No.
8.	To whom greater hardship will be caused, to the plaintiff, if decree of ejectment is refused or to the defendant, if it is passed ?	Plaintiff will suffer greater hardship if eviction is refused.
9.	What reliefs and costs ?	As per final order

9. The Trial Court, vide judgment and decree dated 12th February, 1985 decreed the suit directing delivery of possession of the suit premises, payment of Rs.136-60 ps. towards damages and notice charges and mesne profits of Rs.41-50 ps. per month.

10. Feeling aggrieved, the petitioner preferred Civil Appeal No.149 of 1985 before the Court of learned Additional District Judge, Jalgaon. The said appeal came to be decided on 14th August, 1992 by the learned District Judge, whereby the appeal preferred by the petitioner is dismissed. Thus, this writ petition.

11. Heard Counsel.

12. Learned Counsel appearing on behalf of the petitioner submits that there are subsequent developments in the proceedings in question, as according to him, the respondents-plaintiffs have obtained possession of commercial premises in the capacity of landlord, as is apparent from the judgment in Civil Appeal No. 37 of 1987, delivered on 24th October, 1991, by the Additional District Judge, Jalgaon. He has also moved Civil Application No.6035 of 2011, alleging that the respondents have become owners of the properties which were owned by their father to whom Respondent No.1 has gone in adoption. According to the Petitioner, on the date of filing of the suit Respondents were not in need of suit premises. He sought to rely upon certain revenue entries to that effect to canvass that Plaintiffs – Respondents are not in need of the properties.

13. The respondents-landlords, in their affidavit-in-reply have claimed in paragraphs 8, 9 and 12, that the tenant has secured alternate accommodation and has placed on record relevant documents in support of such claim.

14. Mr Bora, learned Counsel appearing on behalf of the petitioner, while inviting attention of this Court to the provisions of Sections 13 (1) (g)

and 13 (2) of the Maharashtra Rent Act (for short “Act”), would urge that in view of aforesaid subsequent developments, the Court should pass an order of remand for limited purpose, by keeping this petition pending. According to him fresh findings on the matter by the appellate court, on the issue as regards acquisition of alternate accommodation by the respondents-plaintiffs needs to be called. He would draw support from the judgment of the Apex Court, in the matter of **Jai Prakash Gupta (D), thr. L.Rs. vs. Riyaz Ahamad & anr.**¹, particularly paragraphs 16 and 17, which read thus :-

“16. It is true that a suit or an original proceeding is to be tried in all its stages on the cause of action as it existed on the date of its commencement. The only exception to this rule is that a Court may take notice of events, which have happened since the institution of the suit or the original proceeding and grant relief to the parties on the basis of the altered conditions, is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. [See *Rai Chand Mandal and another Vs. Biswa Nath Mandal and others*; XX CLJ 107]. This was the view expressed by Sir Ashutosh Mukherjee, J. (as His Lordship then was) on this question when subsequent developments should be taken into consideration by the Court during the pendency of a proceeding or of a suit or even at the appellate stage.

¹ 2009 (10) SCC 197

17. The same view has been expressed yet in a later decision of the Calcutta High Court to the effect that where it is shown that the original relief claimed by reason of subsequent change of circumstances become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. [See Nuri Mian Vs. Ambica Singh and another 24 CLJ 140]”

15. In addition, Mr Bora would invite attention of this Court to the judgment of the Apex Court, in the matter of **Mohd. Ismail vs. Dinkar Vinayrao Dorlikar**², particularly paragraph 13, which reads thus :-

“13. Having perused the impugned Judgment of the High Court and the orders of the Additional Collector and the Rent Controller, Nagpur, and after considering the subsequent events that had occurred in the eviction proceeding, in which it was brought to the notice of the Court that (1) one of his sons had expired (2) Second son had absconded for the last 8-9 years and (3) he had constructed two shop rooms where he has been carrying on business of Kirana, no order for eviction could be passed without considering the aforesaid aspects of the matter which was duly brought to the notice of the Court.”

16. In addition, Mr Bora would urge that the claim of carrying out permanent change in the tenanted structure is concerned, same are carried out pursuant to the notice issued by the local authority, since the

² 2009 (10) SCC 193

respondents-landlords failed to carry out such repairs. The Respondents – Landlords have prompted the petitioner to carry out repairs on his own and as such, the same cannot be read to the detriment of the petitioner. According to him, Section 23 of the Act casts an obligation on the landlord to maintain the suit premises in good condition and failure thereto, the tenant is not precluded from carrying out any repairs. He would then urge that repairs, as are carried out, were necessary and in the interest and safety of the business and the premises, which has not changed the structure of the premises. He submits that by replacing door with a permanent constructed wall, it was ensured that the business premises and the business is protected and safe which cannot be termed as permanent construction. So as to substantiate said contention, Mr Bora would draw support from the judgment of the Apex Court, in the matter of **Balmukund Narsingdas Somani & ors. vs. Prakash Jagdish Ambali & ors.**, decided on 10th March, 1980 in Special Civil Application No.3217/98 (MANU/MH.0255/1980), particularly paragraphs 6 and 7, which read thus :-

“6. That apart and even otherwise, it is pertinent to note that there was, even at the stage of the earlier suit, only an intended construction and not, really speaking, construction put up and completed. This is clear from the very issues framed therein. Judgment in the said suit produced at Exhibit 42 shows issue No. 1 to the effect whether the plaintiffs proved that the defendants "have started construction" and issue No. 2 whether the defendants proved that the said construction "is required to be made" to save and protect the remaining portion

from collapsing. Therefore, even at the stage of the earlier suit, the construction was still in the process. The instant suit based on section 13(1)(b) of the Bombay Rent Act must, therefore, fail not only on the initial ground that there was no surviving and subsisting cause of action but also on the ground that the said cause of action qua [section 13\(1\)\(b\)](#) was even otherwise not a completed cause of action because, as indicated, the work was still in progress and process and also because even that had been brought to an end by virtue of the decree in the earlier suit and its execution. The landlords, therefore, are not entitled to thereafter invoke the provisions of [section 13\(1\)\(b\)](#) of the Rent Act to evict the defendants-tenants from the suit premises.

7. Assuming that even so it is open to the landlords to invoke [section 13\(1\)\(b\)](#), facts, circumstances and context irresistibly lead to the conclusion that the work sought to be done by the tenants, after acquisition and demolition by the local authority and after failure of the landlords to fulfil their own statutory duty under [section 23](#) of the Rent Act, cannot be said to be a permanent construction within the meaning of the said [section 13\(1\)\(b\)](#). On the contrary, the work in question pre-eminently partook the character of "tenantable repairs" within the meaning of [section 23](#). Even the learned Judge decreeing the landlords Regular Civil Suit No. 237 of 1972 accepted the position that the tenant, after giving necessary notice under [section 23\(2\)](#), was entitled to carry out tenantable repairs and relying upon the ruling of the Madras High Court in [Doraipandi Konar v. P. Sundar Pathar](#), , it was observed that the basic idea underlying the concept of repairs was restoration of a situation to its original condition. Repairs would include retention of the

existing structure and its renovation from the damaged condition to its original sound state. In an exceptional case, repair will even imply renewal and substitution. It was on this reasoning that the learned Judge even in the earlier suit did not grant absolute injunction claimed by the landlords but only a restricted restraint. This thus being the position, it is not possible to accept the learned Advocate Mr. Kanade's contention that the work earlier sought to be carried out by the tenants was one falling within [section 13\(1\)\(b\)](#) of the Rent Act and not one within section 23 of the said Act.”

17. In addition, while relying upon the judgment of the Apex Court, in the matter of **M/s Hotel Rosalia (P.) Ltd. vs. M/s Metro Hotels & ors.**³, he would urge that for carrying out temporary repairs, no written permission of the landlord as contemplated under Section 13 (1) (b) under the Act was required. He would rely upon the observations made in paragraphs 15 and 16 of the said judgment. He would also draw support from paragraphs 8 and 15 of the judgment of the Apex Court, in the matter of **Ramchandra Dattatraya Gandhi vs. Sou Pushpabai Manohar Sheth**⁴, to substantiate the said claim.

18. Per Contra, Mr Bedre, learned Counsel appearing on behalf of the respondents would urge that the petitioner-defendant also owns various commercial properties. So as to substantiate the said claim, would invite attention of this Court to the pleadings in paragraphs 8, 9 and 12 of the

³ 2001 (3) Bom.C.R. 400

⁴ AIR 1990 Bom. 182

affidavit-in-reply. According to him, the claim of the petitioner that the respondents own various properties is specifically dealt with demonstrating the status of each property, which is not worth occupying by the respondents-landlords. He would then invite attention of this Court to the cross-examination of the defendant, wherein in paragraph 6, certain admissions are given by the petitioner-defendant. He would urge that between 1976 and 1980, additional construction carried out by the petitioner-tenant is not disputed. It is not disputed that such construction is carried out without prior written permission of the landlord. He submits that no notice to the landlord seeking such permission was issued or proved. According to him, both fact finding Courts have concurrently held against the petitioner by observing that nature of construction carried out is permanent and in such eventuality, this Court should be slow in re-appreciating the claim. He would urge that though a lame excuse is made, that construction was required to be carried out pursuant to the notice issued by the Municipal Council. According to him, perusal of the original record would demonstrate that, what was produced on record was a photo copy of such notice alleged to have been issued by Municipal Council, which was not proved by the defendant-tenant. Neither any permission from the landlords nor from the local authority was obtained before carrying out any permanent construction. He would submit that Section 23 of the Act contemplates a written permission from the landlord, which is held to be mandatory. According to him, the permanent structure of replacing the door with that of permanent cement concrete wall, was without

any authority or sanction. Burden was not discharged by the petitioner by proving a fact that the written permission from the landlord or from the local planning authority was obtained. So as to substantiate his contentions, he would draw support from the judgment of this Court, in the matter of **Najama Gulab Bagwan and others vs. Laxmibai Rangildas Gujar, since deceased, by her heirs and L.Rs. Vinodkumar Rangildas Gujar and others**⁵, particularly para 10, which reads thus :-

“10. In the present case, if we take note of the above legal position as a foundation for the purpose of deciding the issue following the undisputed position of facts, it further supports the reasoning given by the Court below. Even though, as contended that the permanent construction or alteration in question was only in the nature of repair and as the Commissioner's Report further supports the same and as the landlord failed to repair the roof in question inspite of oral request, the petitioner had no choice but to get it repaired without the written permission or consent of the landlord, the basic aspect of intimation and/or notice as contemplated under the provisions of [Section 13\(1\)\(b\)](#) read with [Section 23](#) cannot be overlooked. Admittedly, there is nothing on the record to suggest or is borne out from the record, in any way, that any written notice, as contemplated under [Section 23](#), was issued in the present case. The case was made out only of oral request by the tenant. As rightly pointed out by the learned counsel appearing for the respondents, [Section 23](#) read with [Section 13\(1\)\(b\)](#), contemplates that the tenant, in

⁵ 2006 (1) Mh.L.J. 273

such circumstances, before any such repairs and/or alteration or construction, must issue written notice and obtain written permission from the landlord. In the case in hand, except alleged oral request, not supported by any other witness, there is nothing to support the compliance of the said mandate of the provisions of law.”

19. In the wake of above, according to Mr Bedre, having proved greater hardship, the petitioner, who is fighting for his claim since last more than 35 years, sought dismissal of the petition.

20. In the backdrop of above referred submissions, it is required to be appreciated as to whether the petitioner-tenant has made out a case for partial remand, so as to order an inquiry to find out; (a) whether the claim of the landlord for *bona fide* requirement of the premises had been proved; (b) whether the *bona fide* need is extinguished, in view of subsequent developments; (c) whether the tenant has carried out any permanent alteration to the structure, contrary to the provisions of Section 23 of the Act; and (d) to whom the greater hardship would be caused ?

21. Considered rival submissions.

22. The Respondents' suit for possession, damages and inquiry into the mesne profits initiated on 7th June 1982 came to be decreed on 12th February 1985. The learned Civil Judge Junior Division, Jalgaon directed the Petitioner – Tenant to deliver the possession of the suit property by 30th April

1985 and pay damages to the Respondents – Plaintiffs at the rate of Rs. 136-60 Ps. from the date of filing of the suit. A mesne profits is directed to be paid at the rate of Rs. 41-50 Ps. per month.

23. So as to establish the claim put-forth by the Respondents – Plaintiffs, the Respondent No. 1 Narayandas Damodhardas Jhawar has examined himself. He has established his title through the evidence on record. He has also brought on record that his adoptive father Damodardas was in business so also his biological father. According to him, he has sufficient knowledge and experience to start his own business. He has also brought oral evidence to the effect that he is doing commission agency business and is operating from his adoptive father's office who is in possession of a shop block owned by one Suratwala. The said landlord Suratwala has also proceeded against his adoptive father for eviction. Based on above, he has tried to establish his *bona fide* need.

24. The Petitioner tried to establish its case through Manakchand Jivanram Rathi, who is examined at Exhibit – 45 being its partner. Through his evidence, it is brought on record that Respondents – Landlords owns buildings of which details are furnished, however, the Petitioner – Defendant has failed to establish that, of the premises, which are owned by the Respondents – Plaintiffs, how many of it are in possession of Respondents - Landlords. In reply Exhibit – 23, Petitioner – Defendant had admitted the title of the Respondents over the suit property.

25. The Respondents, so as to establish their title, have examined Kashinath Radhakisan Zavar at Exhibit – 42 being their predecessor in title. His evidence was not demolished by the Petitioner *qua* title of the Respondents to the suit property. Apart from above, DW-1 Manakchand in his evidence has admitted the desire of the Plaintiffs -Respondents to start their own business. After considering the pleadings and evidence brought on record by the Respondents – Plaintiffs as discussed herein above, both the courts below have rightly held that the Respondents – Plaintiffs have established their *bona fide* need. Both the courts below have gone into the details as regards the ownership of the other properties and its availability for the business to be commissioned by the Respondents – Plaintiffs. Both the courts below having recorded findings of fact upon appreciation of the evidence on record, this Court hardly noticed any serious infirmity or material irregularity so as to cause any interference in the finding of fact recorded. The pleadings and the evidence brought by the parties have rightly prompted the courts below so also this Court to reach to the conclusion that the Respondents – Plaintiffs – Landlords have established their *bona fide* need.

26. Based on the pleadings, it is also required to be appreciated that whether such *bona fide* need in view of subsequent developments has extinguished. From the record it depicts that the subsequent developments which have relied upon by the Petitioner *qua* the Judgment in Civil Appeal No. 37 of 1987 delivered on 24th October 1991 is pressed into service so as

to support the claim of extinguished *bona fide* need. If the said fact is appreciated, there is hardly any material on record to infer that the original relief claimed by the Respondents – Plaintiffs by reason of aforesaid subsequent developments or change in circumstances as rendered the *bona fide* need infructuous.

27. The altered circumstances which are sought to be relied upon against the Respondents – Plaintiffs by the Petitioner – Defendant are countered in similar manner by the Plaintiffs – Respondents. It is worth to note here that in an issue *qua* the claim for possession based on *bona fide* need of the landlord is concerned, landlord is a best judge in such a cause or eventuality. It is not within the domain of this Court to order the landlord to occupy any other premises. May be in a given case availability of premises during the pendency of the proceedings may not be suitable for such business or might not be viable for the landlord for carrying out the business, considering its nature, location etc.

28. As such, it is difficult to infer that the change in circumstances in the present case warrants remand to the appellate court for re-determination of the issue. The court below had in detail considered the other premises which are owned by the landlord and has recorded findings of *bona fide* need in favour of the Respondents. Unless it is established by the Petitioner - Tenant that change in circumstances resulting into handing over of possession of some other property to the landlord has extinguished his *bona*

fide need, this Court cannot go into the said issue in absence of any convincing material on record. In the case in hand, there does not appear to be any material to that effect. As such the claim put-forth by the Petitioner based on the case of **Jai Prakash Gupta** and **Mohd. Ismail** (*cited supra*) will be of hardly any assistance. As such, the said contentions are also rejected.

29. So far as the issue of comparative hardship is concerned, this Court has perused the original record, pleadings and the evidence of the parties. If the evidence of the Defendant *qua* the nature of business is carried out in the said premises if appreciated, the Petitioner - Defendant was non-committal in his evidence about the possession and person managing the business. It is to be noted that the Respondents – Plaintiffs are agitating their claim for *bona fide* need since last 35 years and Petitioner is successful in stalling such prayer for one or the other reason. The issue of comparative hardship is duly examined by the appellate court into its detail and has recorded findings of greater hardship to the Respondent – Landlord, which in my opinion, does not warrant any interference.

30. The next and last issue which required to be dealt with *qua* Section 23 of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 [hereinafter shall be referred to as 'the Act']. Though the Plaintiff has come out with a specific case that on the eastern side of the suit premises a door was fixed in the wall when it was originally rented. Subsequently, the said door was removed and permanent construction of wall was erected. As

a consequences of this permanent change in the structure of removal of door and construction of wall, it has completely blocked the eastern side passage. The owner of the premises in the wake of aforesaid permanent nature of alteration cannot use the suit premises from its back side i.e. from the eastern side.

31. The aforesaid change is very much established through the pleadings and evidence on record. The reliance is placed on the notice issued by the Municipal Council (Exhibit – 46) so as to demonstrate a cause for removal of door and construction of wall. Needless to say that the notice (Exhibit – 46) is a photocopy (xerox copy) and its original was neither produced nor proved by adducing primary or secondary evidence by the Petitioner. As such, the defence of the Petitioner that the permanent alteration was carried out pursuant to the notice issued by the Municipal Council which is at Exhibit – 46 is also liable to be rejected.

32. It is then to be noted that the right to carry out repair by the Petitioner is prescribed under Section 23 of the Act. The said Section provides for the duty of the Landlords – Respondents to keep premises in good condition. In case if the Landlord is duty bound to keep the premises in tenantable condition as provided under sub-section (1) of Section 23, the statute confers a right to the tenant like Petitioner under sub-section (2) to serve a notice upon the landlord calling upon him to carryout such repairs.

Failure to carry out repairs by the landlord entitles the Petitioner – Tenant to carry out the repairs and adjust the expenses of repair in the rent. The statute further provides for a joint repair to be carried out.

33. In the case in hand, if the evidence in the backdrop of pleadings if appreciated, I hardly noticed any compliance of Section 23 of the Act on the part of the Petitioner – Tenant, either through the Respondents or the predecessor in title Kashinath. Though the Petitioner had produced on record copy of the letter to the Chief Executive Officer of the Municipal Council (Exhibit – 53), Report of the Engineer of Municipal Council (Exhibit – 54), the extract of the outward register (Exhibit – 55), however, all these documents are photocopies and same are not proved by the Petitioner – Tenant. The original landlord Kashinath as in clear terms stated that notices were never issued to him *qua* repairs to be carried out and neither service of such notices on the Respondents was established and proved by the Petitioner. Hence, it has to be held that the nature of change in the structure is permanent which is carried out by the Petitioner – Tenant contrary to the scheme of Section 23 of the Act.

34. No fault could be noticed *qua* the findings recorded by both the courts below about the structural changes carried out by the Petitioner – Tenant. That being so, this Court hardly noticed any substance in the submissions made by the learned Counsel for the Petitioner. The case laws

produced as discussed herein above are also not supportive to the claim made. No interference is warranted in extraordinary jurisdiction qua the concurrent findings recorded.

35. As such, the Writ Petition stands dismissed.

(NITIN W. SAMBRE, J.)

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