

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 3789 OF 1998

1.Janardan Bhaurao Kelkar since deceased
through his legal heirs.

1a. Smt.Meena Janardan Kelkar

1b. Shri.Rajendra Janardan Kelkar

1c. Sou.Shilpa Aniruddha Ketkar

...Petitioners

Versus

Mukund Laxmikant Mudras

...Respondent

Mr.Girish Paryani, for the Petitioners.

Mrs.Prabha Badadare with Mr.Omkar Nagvekar, for Respondent no.1.

CORAM : G.S.Kulkarni, J.

DATE : 24th July, 2017

Judgment :

1. This is a petition of a tenant who though succeeded before the trial court in view of the dismissal of the eviction suit (Regular Civil Suit No.23 of 1994), instituted against him by the landlord, now suffers an eviction decree, in view of the appellate court, decreeing the landlord's suit, by the impugned judgment dated 21 April 1998. During the pendency of the proceedings the

petitioner-tenant has expired. This Writ Petition is thus being pursued by his legal heirs and representatives.

2. In nutshell the facts are:-

The respondent is the landlord of house bearing No.208(1) situated at Malvan (suit premises). The petitioner – Janardan was a tenant of the suit premises at a monthly rent of Rs.50/-. The tenancy was created sometime in the year 1963. It is not in dispute that the suit premises had become quite old. In the month of January,1994, father of the respondent had visited the suit premises and found that there is newly constructed septic tank in the suit premises. In the inquiry, it was revealed that the petitioner-tenant had not only undertaken construction of a septic tank as well as latrine of a permanent nature, constructed in the living room of the suit premises. This construction was undertaken sometime in the month of November,1993.

3. The respondent interalia on the assertion that the tenant had no right and authority to undertake such construction of a permanent nature, without the permission of the respondent-landlord which resulted into the tenancy rights of the petitioner having extinguished, as per Section 13(1)(b) of the Bombay Rents, Hotel

and Lodging House Rates Control Act, 1947 (for short 'the Bombay Rent Act'), instituted Regular Civil Suit No.23 of 1994 before the Civil Judge, Junior Division, Malvan.

4. The petitioner appeared in the suit and resisted the same by filing his written statement. The case of the petitioner in the written statement was that the suit premises were about 100 years old. He contended that in the year 1989 Malwan Municipality had given directions to the respondent-landlord as also the petitioner for conversion of basket latrine into septic latrine. He further contended that in November 1986, one Rajaram Shirodkar, a power of attorney holder of the respondent had executed an affidavit in favour of the petitioner, authorising him to construct a new septic latrine and to deduct the expenditure from the rent. The petitioner contended that on 8 December 1993 he had suffered a severe heart attack and was hospitalised for the said illness. On his discharge from the hospital he was advised three months bed-rest. The petitioner's case was that as old latrine was at a distance of about 60 meters away from the suit premises, the doctor had advised him not to attend such latrine but to arrange new latrine in the suit premises. The defendant further pleaded that as the roof and beam of the suit premises had become old, for protection of the same, he had undertaken construction of

new wall without foundation admeasuring 4 ft. in length, 3 ½ ft. in breadth and 6 ½ ft. in height and thereafter he undertook construction of latrine of a temporary nature. He pleaded that the construction of the latrine as undertaken was not of permanent nature so as to extinguish his tenancy rights as Section 13(1)(b) of the Bombay Rent Act would provide. The petitioner accordingly contended that the respondent is not entitled to recover possession of the suit premises on the alleged ground under Section 13(1)(b) of the Bombay Rent Act.

5. The learned Trial Judge considering the rival pleas, by his judgment and order dated 23 July 1996 dismissed the respondent's suit. The learned trial Judge accepted the case of the petitioner that the latrine though was installed in the living room, taking advantage of the support wall and the original wall of the suit house and though it had installation of wooden door from the front side, nonetheless it was a temporary latrine. The learned trial Judge observed that the construction of the latrine was undertaken by the petitioner on the advice of the doctor and that the said construction could be removed by him. The learned trial Judge has also referred to the evidence as adduced on behalf of the petitioner namely that of a mason and a carpenter who deposed that the construction as

undertaken by the respondent was of a permanent nature which was of cement and lacerated stones. The learned trial Judge also recorded a finding that there was no consent granted by the respondent-landlord to the petitioner to undertake such construction, as also observed that there was no specific permission granted by the municipal authority. On the principal consideration that the tenant had suffered a severe heart attack and that it was on doctor's advice that he had undertaken the construction of latrine, the learned Trial Judge held that it was not a construction of permanent nature and it can be removed. The learned trial Judge also observed that such construction was for the beneficial use of the suit premises and which would not cause any loss to the house. The learned trial judge thus concluded that the respondent was not entitled to an eviction decree on the ground of the petitioner undertaking construction of a permanent nature as Section 13(1)(b) would provide.

6. The respondent-landlord being aggrieved by the judgment, approached the appellate Court in Regular Civil Appeal No.98 of 1996. The learned appellate Judge considering the evidence as brought on record opined that there was no dispute that the latrine in question was constructed in the living room, which fact was admitted by the respondent. It is observed that even the

witnesses which were examined on behalf of the petitioner had deposed that the cement construction was of a permanent nature as the wall which was constructed was of rocky stones. According to the learned appellate Judge, these admissions of the witnesses were sufficient to show that the cement wall as constructed was of a permanent nature. The learned appellate Judge further observed that the petitioner overlooked that the construction interalia of the latrine and the suit wall was required to be undertaken with the permission of the respondent-landlord in writing, as the law would contemplate. It was further observed that the contention of the petitioner that the Malvan Municipality had called upon the parties to have a latrine of the nature as installed, was also not proved by adducing any evidence in that regard. The case of the petitioner – tenant that he was permitted under an agreement executed on behalf of the respondent-landlord to undertake such construction was also not accepted, as there was no evidence to accept such a plea. The learned appellate Judge observed that Section 13(1)(b) of the Bombay Rent Act read with the 'Explanation' below it, was clear to conclude that it would not include construction of a latrine as a permissible construction, so as to non-suit the respondent-plaintiff in the facts of the present case. It was observed that admittedly there was no permission which was granted either by the respondent-

landlord or the Malvan Municipality for construction of the wall and the latrine. Also as regards the contention (though not relevant) that the petitioner-tenant on medical advice, had undertaken construction of latrine, also was not accepted for lack of evidence in that regard. Accordingly, the learned appellate Judge allowed the appeal thereby setting aside the judgment and decree passed by the learned trial Judge thereby dismissing the respondent's suit. The petitioner being aggrieved by the judgment and decree of the learned appellate Judge, is before this Court in the present proceedings.

7. During the pendency of this petition, certain developments have taken place and the same are placed on record by an affidavit filed on behalf of the respondent, namely that the suit premises have collapsed. In paragraph 4 of the affidavit it is stated that the suit premises were locked since the year 2002. The original tenant (defendant- Janardan Baburao Kelkar) also expired in 2007 at Pune. The legal heirs-petitioner Nos.1a and 1b are residing in separate bungalows at Dhuriwada, Malvan. Further petitioner No.1c is settled in her matrimonial home at Pune. It is stated that the petitioners have permanently shifted from the suit premises by removing their belongings, and thus since 2002 the petitioners are not in use and occupation of the suit premises. It is stated that the

respondents' parents are very old and do not have a home at Malvan and they are thus residing at Kalwa, Dist Thane, in very small premises. The affidavit further sets out the reasons as to why the suit premises had become necessary for the respondents. The affidavit is supported by photographs which show that the suit structure is partially collapsed. The averments as made in this additional affidavit filed on behalf of the respondents are not disputed by the petitioners and therefore the contents are required to be accepted as admitted by the petitioner.

8. Now coming to the contentions as urged on behalf of the petitioner, the learned Counsel for the petitioners would submit that the learned appellate Judge is in an apparent error to come to a conclusion that the latrine which was being objected by the respondent-landlord was a permanent structure. His submission is that the latrine was not a permanent structure and that it could have been removed by the petitioner-tenant at any time. It is submitted that there is no damage to the structure of the suit premises or the front of the suit premises, so as to accept the respondents' case under Section 13(1)(b) of the Bombay Rent Act read with the 'Explanation' thereunder. Learned Counsel for the petitioners would submit that the latrine was constructed in view of the circumstances which were

created due to the ailment of the petitioner-tenant of having suffered a heart attack on 8 December 1993. It is submitted that in undertaking the construction of this latrine, apart from the medical requirement there was also a requirement of the Malvan Municipality to have latrine of this nature inside the suit premises. Learned Counsel for the petitioner then submits that the evidence as led on behalf of the petitioners was sufficient to come to a conclusion that the construction was of a temporary nature. In support of his submission, learned Counsel for the petitioner has placed reliance on the decision of the learned Single Judge of this Court in the case *“Somnath Krishnaji Gangal Vs. Moreshwar Krishnaji Kale & Ors.”*¹. to contend that if the norms as formulated in paragraph 21 are applied then the respondent-landlord would not be entitled to a decree under section 13(1)(b) of the Bombay Rent Act.

9. On the other hand, the learned Counsel for the respondent-landlord in supporting the judgment of the learned appellate Judge, would submit that there are findings of fact, as recorded by the learned trial Judge that the construction of latrine in the living room was of a permanent nature, as there was construction of a cement concrete wall of the dimensions set out in paragraph 8 of

¹ 1995(1) Mh.L.J.675

the impugned order. The learned Counsel for the respondent would lay emphasis on the deposition of the mason and the carpenter who were examined on behalf of the petitioner to submit that these witnesses have deposed that the construction as undertaken by the petitioner was in cement concrete and was strong and of a permanent nature. It is submitted that the learned appellate Judge is correct in making the observation that the admission of the petitioner – tenant and his witnesses was sufficient to show that the new wall constructed in cement foundation was of a permanent nature. He would submit that in any case, it is an admitted fact that no prior permission was obtained by the petitioner before undertaking such construction, from the respondent-landlord. The learned Counsel for the respondent would submit that the learned trial Judge had completely mis-directed itself in coming to a conclusion that the construction undertaken was not of a permanent nature. The learned Counsel would thus urge for dismissal of this petition.

10. I have heard the learned Counsel for the parties and with their assistance, I have gone through the judgments of the courts below, as also the relevant documents from the record.

11. On perusal of the record, at the outset, it may be

observed that there is no dispute that the petitioner had undertaken construction of a latrine in the living room of the suit premises. Further the evidence on record is absolutely clear, to show that as construction of a toilet was undertaken by installing a cement concrete wall. The petitioner in the written statement has also admitted that he had built one support wall. Thereafter, to create a latrine, he took the advantage of the support wall and used the original wall of the suit house. Further the petitioner had put up a wooden door to the latrine from the front side. The petitioner also caused a pit to be dug for installing what is called as a Gopuri toilet system and put cement tiles on the said pit. The mason and the carpenter who were employed by the petitioner for this construction in their evidence deposed that the construction was of a permanent nature being of cement and lacerated stones. As regards the case of the petitioner, as urged before the trial Court, that on medical advice he was in need of a toilet in the house, the learned appellate Judge would be correct in recording a finding that this was not substantiated as there was no evidence in that regard. Further the petitioner's case, that in the year 1989 Malvan Municipality had required the respondent and the petitioner to have latrine of this nature, also stood unsubstantiated due to lack of evidence. The learned appellate judge rightly held that the petitioner's case that it

was a temporary toilet was not a true and correct, inasmuch as the petitioner-tenant had recovered from the ailment and attended his service since 10 March 1994 and was traveling seven kilometers from the suit house, which showed that the intention of the petitioner was to use the said latrine permanently. The rigour of this contention as made on behalf of the respondent-landlord had completely missed the attention of the learned trial judge, in coming to the conclusion that the respondent would not be entitled to a relief in the suit. In any event, the requirement of law that the prior permission of landlord is necessary, before putting construction of a permanent nature as Section 13(1)(b) of the Bombay Rent Act would contemplate, was also completely overlooked by the learned trial Judge, only on assumption that the petitioner had undertaken such construction on medical advice though the construction was of permanent nature. Such approach was truly erroneous leading to a perversity. It appears that the learned trial judge was swayed away by the contention of the petitioner on medical issues rather than the implication and requirement of law in the clear facts which had emerged on record.

12. Having perused the judgment and decree as passed by the learned appellate Judge, it is clear that the findings as recorded

are based on evidence. The learned appellate Judge has appropriately held that the nature of the construction in question as undertaken by the petitioner was a permanent construction. Further, it is rightly observed that there was no permission sought by the petitioner either from the respondent-landlord or from the municipality to undertake the construction. More significantly as observed by the learned appellate judge, such construction clearly offended the requirement of Section 13(1)(b) of the Bombay Rent Act, as the construction was very peculiar namely of a latrine in the living room. It may be observed that to undertake construction of a toilet in the living room, as proved, was sufficiently a serious act on the part of the petitioner-tenant leading to a damage and waste of the suit premises. Such construction would have ill-effects as rightly held by the appellate court, on the structure of the suit premises. The clear contents of the “Explanation” to Section 13(1)(b) in this context, would become relevant which in no uncertain terms exclude construction of a latrine. The legislature has categorically excluded certain constructions which could be said to be permissible constructions protecting the tenants from rigors of Section 13(1)(b) of the Bombay Rent Act. In view of the clear statutory mandate flowing from the said provision, the learned appellate judge has appropriately criticized the approach of the learned trial Judge in

dismissing the suit. Thus it may be observed and with certitude that the conclusion of the learned trial Judge was offending the legal requirements and was rightly reversed by the appellate Court. I do not find any perversity in the findings as recorded by the learned appellate Judge, on any count.

13. As regard the reliance on behalf of the petitioner on the decision of the learned Single Judge of this Court, in ***Somnath Krishnaji Gangal Vs. Moreshwar Krishnaji Kale & Ors.*** (supra), in my opinion, this decision would not be applicable in the facts of the present case. The decision arose in the context where the issue concerned removal of a window on the western wall of the premises occupied by the petitioner-tenant therein. There was a prior history that on the night between 19 and 20 July 1976, there was a theft and this resulted in removal of the window. The tenant had done so, with a view to have additional safety and security, and thus closed the window, it in this context the Court set out in paragraph 21 as to which constructions can be said to be of a permanent nature so as to attract the provisions of Section 13(1)(b) of the Bombay Rent Act. There cannot be any dispute on the propositions set out by the Court in paragraph 21 of the said decision. The question is as to whether any of them would be applicable in the facts of the case. As discussed

above, the construction undertaken by the petitioner in the present case was of a latrine in the living room which by no stretch of imagination on the evidence as come on record could be said to be of a temporary nature so that the provisions of Section 13(1)(b) of the Bombay Rent Act would not get attracted.

14. In the light of the above discussions and taking an overall view of the matter, this Writ Petition is devoid of any merit. It is accordingly dismissed. No order as to costs.

(G.S.Kulkarni, J.)