

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CIVIL APPELLATE JURISDICTION

## Writ Petition NO. 4467 OF 1996

Shri. Parashram @ Purshottam Jethanand  
Thakur (since Deceased) By His LH & LR.s.)

1A. Tulsidas P.Thakur.

1B Vishindas P.Thakur

1C.Harish P.Thakur

1D. Gopal P.Thakur

1E. Laxmi C.Adnani.

...Petitioners

*Versus*

Rambai.S.Gaikwad

...Respondent

---

*Mr.S.P.Kanuga i/b. Ms.Sapna Nath, for the Petitioners*

*Mr.Akshay Chikhale i/b. Mr.P.B.Shah, for the Respondent.*

-----

**CORAM : G.S.Kulkarni, J.**

**RESERVED ON : 19 JULY, 2017**

**PRONOUNCED ON : 12 OCTOBER, 2017**

----

**JUDGMENT:**

1. The petitioner/original defendant who suffers an eviction decree dated 7 December 1990 in Regular Civil Suit No.589 of 1986 decided by the Joint Civil Judge, Senior Division, Nashik as confirmed by the learned Second Extra Joint District Judge, Nashik, dismissing the petitioners appeal by the impugned judgment dated 25 June 1996, is before this Court in the present proceeding under

Article 227 of the Constitution, being aggrieved by the concurrent finding of the courts below.

2. In nutshell the facts are :-

The petitioner's father Parashram alias Purshottam Jethanand Thakur was the tenant of the premises being Shop No.4, Municipal House No.12/173 situated at Ambedkar Road, within the municipal limits of Nashik Municipal Corporation (for short 'the suit premises'). The petitioner's father expired during the pendency of this appeal. The petitioners are legal heirs of deceased Parsharam who are pursuing this petition. For convenience the parties are referred as petitioner and the respondent as they originally stood when this petition was filed. The respondent is the landlady. The suit premises were let out by the respondent to the petitioner on a monthly rent of Rs.75/- per month excluding the facility of electricity and water, with permitted increases. The petitioner conducts business of a photo studio in the suit premises.

3. The respondent filed the suit in question against the petitioner (Regular Civil Suit No.589 of 1986) praying for decree of ejectment and possession on two grounds available under Section 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act,

1947 (for short 'the Bombay Rent Act') firstly that the petitioner had defaulted in payment of rent from the year 1984 and the permitted increases. The rent was due and payable from 1984 upto June, 1986 which despite several demands, was not paid by the petitioner to the respondent. The second ground was of the petitioner constructing illegal structure in the open space of the suit property without the consent of the respondent. The construction was of a shed by installing iron poles surrounding iron mesh as described in the plaint. The respondent claimed that the petitioner deserved to be evicted on the said breaches of the petitioner.

4. The petitioner contested the civil suit by filing a written statement. Both the above grounds on which the respondent prayed for a eviction of the petitioner were denied by the petitioner. The petitioner's defence can be seen from paragraphs 15 to 13 of the written statement. The contention is that the structure as objected by the respondent was constructed before the petitioner occupied the suit premises as a tenant and the suit shop was conducted alongwith the shed to protect the premises from sunlight and rain water. The shed was also necessary for proper utilization of the suit shop. As the wooden pillars of the shed were damaged, before the shed collapsed and as the respondent failed to repair the same, the petitioners

restored the shed to its original stage. Accordingly, the case of the petitioner was that the petitioner had not constructed any permanent structure. It was also contended that the respondent had filed Regular Civil Suit No.60 of 1985 before the civil court seeking injunction against the respondent to undertake the repairs, and that the injunction which was granted was subsequently vacated. It was contended that there was no damage or waste caused to the suit premises by restoration of the shed. It was also pleaded that the petitioners had taken on rent the shop (suit premises) and the open space in the front, and the rent was Rs.60/- per month and Rs.15/- as permitted increase. As regards the default in payment of rent, the petitioner contended that the standard rent was already fixed in the proceedings of Regular Civil Appeal No.749 of 1975 at Rs.75/- per month and the rent was paid upto November 1984 and thereafter, from time to time the petitioner had gone to the respondent to pay the rent but the respondent had refused to accept the rent on one pretext or another. The petitioner had also sent a money order in March,1985 for Rs.225/- but the respondent had refused to accept the money order.

5. On these rival pleas, the parties went on trial. The parties also led oral evidence of their respective witnesses who were

cross examined by the opposite side. The trial Court by its judgment and order dated 7 December 1990, accepting the case of the respondent-plaintiff, on the issue of the petitioner making a permanent construction decreed the suit interalia directing the petitioner, to hand over possession of the suit premises to the respondent within one month from the date of the order. The learned trial Judge had framed specific issues firstly issue no.6 *“as to whether the respondent(plaintiff) proves that the defendant had constructed a permanent structure over the suit premises without the permission of the landlord (respondent)”*. The other issues were issue nos.7 and 8. Issue no.7 being whether the petitioner/ defendant proved that the owner prior to the respondent-Mr.Sadashiv Gaikwad, had in fact let out premises, admeasuring 10 ft. X 30 ft to the petitioner. The issue no.8 was *“as to whether the defendant proves that the shop premises which are let out to him would include the shed in front of the shop premises”*. These issues were answered collectively. The contention of the petitioner on not undertaking the construction in question, was repelled by the learned trial Judge interalia considering the compromise between the parties in Regular Civil Suit No.749 of 1975, which did not show that any such shed was in existence, or that it was part and parcel of the area let out to

the petitioner (defendant). The learned Judge observed that although according to the petitioner, the suit premises i.e. shop no.4 and the shed constructed on the east of the suit premises admeasures 10 ft. x 30 ft, however, in the evidence, the petitioner had testified that the studio premises were admeasuring 10 ft. X 20 ft. while the shed premises were admeasuring 10 ft. X 10 ft.. The learned trial Judge observed that this admittedly amounted to improvement by the defendant of his case in the evidence. In view of this inconsistency, the learned Trial Judge appointed a Commissioner to verify the measurement of the suit premises, so as to ascertain the actual measurement, comparing the same to the area as recorded in the compromise, in the Regular Civil Appeal No. 749 of 1975. The Court Commissioner made his report at Exhibit 46. The Commissioner recorded that the measurement of the shed premises were 11 ft. 8 inches east-west and 10 ft 2 inches north-south. The petitioner did not raise any objection to the report of the court commissioner. The said report was accordingly accepted and read in evidence. The learned trial Judge thus observed that from the report of the commissioner, it was clear that the shop/suit premises in which the studio was conducted was admeasuring 27 ft. 6 inches east-west and 9 ft 4 inches north-south and considering the breadth

of the walls, the measurement of the shop premises would be about 28 ½ ft. X 10 ft. The learned Judge thus observed that considering these measurements, it was clear that as per the compromise pursis placed on record of Regular Civil Appeal No.749 of 1975, the petitioner/defendant was let out only the shop premises admeasuring 10 ft. X 30 ft. and the petitioner had made encroachment to the extent of 12 ft X 10 ft. on the eastern side vacant premises owned by the respondent. Thus, the contention of the petitioner that the shed situated on the east of the suit premises and that the premises totally admeasures 10 ft. X 30 ft. was not accepted. The learned trial Judge also relied on the photographs which came to be proved by examining the photographer as also the negatives of the photographs were placed on record, which were also admitted by the petitioner. The learned trial Judge has recorded a finding based on evidence that a completely new shed as an extension was constructed by the petitioner which was not in existence at the time of letting out the suit premises. Photographer Vishal Narendra Sharma had testified on the submission that prior to 1985, there was no shed. The learned trial Judge also commented on the nature of construction of the shed. It is observed that the shed in question was erected by the petitioner by rooting iron pillars in the earth and fixing them with cement and

mortar. The petitioner had also installed iron grills on the north and south side of the shed and its roof was made up of tiled roof sheets. The iron grills are permanently fastened to the wall of the suit shop by welding as also the petitioner had installed a tiled flooring. It was thus observed by the learned trial Judge that, it was clear that the petitioner had made substantial change in the character of the demised premises by erecting the shed which is closed from north and south side and which also holds a display board of the studio. It was thus held that the construction was of a permanent nature. The learned trial Judge considered the provisions of Section 5(8)(b)(i) and (iii) of the Bombay Rent Act which defines the 'premises' to mean (i) *the garden, grounds, garages and out-houses, if any, appurtenant to such building or part of a building;* (iii) *any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof, but does not include a room or other accommodation in a hotel or lodging house;* and the provisions of Section 13(1)(b) of the Bombay Rent Act which provide that the tenant without the landlord's consent given in writing cannot erect on the premises any permanent structure. The learned trial Judge thus considering the evidence on record and the said provisions of the Bombay Rent Act, concluded that the open space used by the petitioner, by extending the suit

shop by the said permanent structure fastened to the suit premises, it can be treated as a “structure appurtenant” as defined under Section 5(8)(b)(i) & (iii). The learned trial Judge accordingly decreed the suit in the following terms:-

ORDER

- “(1) The suit of the Plaintiff is decreed with costs.*
- (2) Defendant do make over possession of the suit premises to the plaintiff within one month from the date of this order.*
- (3) Plaintiff is at liberty to withdraw the amount of rent deposited by the defendant in the Court.*
- (4) Enquiry into future mesne profit be held under O.XX,R.12 (1) (c) of the Code of Civil Procedure.*
- (5) Decree be drawn up accordingly.”*

6. The petitioner being aggrieved by the above judgment and decree passed by the learned trial Judge, approached the appellate court by filing civil appeal No.138 of 1991. By the judgment and order dated 25 June 1996 the learned Joint District Judge, Nasik dismissed the appeal, confirming the judgment and decree passed by the learned Trial Judge. Learned appellate Judge agreed with the findings of the learned trial Judge that the petitioner had undertaken construction of permanent nature and which very well fell within the definition of the 'premises' under Section 5(8) of the Bombay Rent Act. The appellate Court observed that there was a

compromise in a previous suit (Regular Civil Appeal No.749 of 1975) which clearly showed that the portion which was let out to the petitioner was only 10 ft. X 30 ft and it did not include the open site in front of the shop. The learned appellate Judge took into consideration the Commissioner's Report which indicated that the suit premises/shop had a tiled roof which included the shed in question and was of a measurement  $27 \frac{1}{2} \times 9 \frac{1}{4}$  ft. The appellate Court reached to a conclusion that the alteration/construction undertaken by the petitioner showed that it was a construction so as to fall within the premises under Section 5(8) of the Bombay Rent Act and that it was intended to be permanent alteration to the suit premises. It was observed that the nature of the structure and affixing of a sign board on the front side of the shop clearly demonstrated the nature of the alteration being of a permanent character to the suit premises, as also intention of the petitioner to use the said premises and that it was nothing but encroachment made by the tenant to the suit premises illegally. It was also observed that the petitioners construction was permanently injurious to the structure as also to the rights and interest of the respondent and thus Section 13(1)(b) of the Bombay Rent Act, had become applicable. Accordingly, the appellate Court dismissed the petitioners

appeal. The petitioner being aggrieved by the concurrent findings of the Courts below has filed the present petition. This petition was admitted by an order dated 20/09/1996 and by way of interim relief there was a stay to the execution of the decree.

7. Learned counsel for the petitioners in challenging the concurrent findings of the Courts below would submit that both the Courts below, are in an error in reaching to the conclusion that the installation of the shed in question was of a permanent nature and which would cause damage to the tenanted premises. It is submitted that, as can be clearly seen from the Commissioner's Report as also the photographs as relied upon Exhibit-A, page-13 that, the construction was not of a permanent nature and it was only a iron grilled structure with a tiled roof as constructed at the entrance of the suit premises for better utilization of the suit premises. He submits that the construction/alteration was not of a permanent nature which would cause any act or waste or damage to the tenanted premises. In referring to the definition of premises under Section 5(8) of the Rent Act, it is submitted that such a construction cannot be referred as premises appurtenant to such building or part of the building. The contention as urged on behalf of the petitioner is that both the Courts below are in an error in holding that the construction in question as

undertaken by the petitioner is illegal. It is submitted that the construction of shed though is of iron pillars fastened to the walls of the tenanted premises, cannot in any manner be said to be a construction of a nature which would entitle the respondents to a decree of eviction under Section 13(1)(b) of the Rent Act. In support of his submissions, the learned counsel for the petitioners has placed reliance on the photographs at Exhibit-A, Page-13 of the petition, which would show that it can be said to be temporary structure for better utilization of the premises. It is submitted that it is only a structure which is constructed to support the name board of the premises and which is to merely provide to rest the name board. It is submitted that there is no alteration to the old premises. It is submitted that merely because the iron pillars embedded in the earth, it cannot be said that the construction is permanent. It is submitted that it can be considered to be a weather shed and even the municipal law allow a weather shed to be made which would be of a temporary nature and which can be dismantled without damaging or affecting the premises. In support of these submissions on behalf of the petitioner, reliance is placed on the decision of the Supreme Court in the case of “*Om Prakash Vs. Amar Singh and Ors.*”<sup>1</sup> and

---

<sup>1</sup> (1987) 1 SCC

*“Pitambardas Kalyanji Bakotiya Vs. Dattatraya Krishnaji”*<sup>2</sup> and *“Somnath Krishnaji Gangal Vs. Moreshwar Krishnaji Kale and Ors.”*<sup>3</sup> .

8. On the other hand, learned counsel for the respondent has supported the findings of the Courts below. It is submitted that the petitioner had installed illegal structure fastened to the suit premises as also extending the open space, without the written consent of the respondent. The construction is of a permanent nature by installing iron poles, grills attached to the walls of the suit premises, which was clearly would attract the provisions of Section 13(1)(b) of the Act and thus the respondent was rightly entitled for a decree as observed by both the Courts below. It is submitted that the contention as urged on behalf of the petitioner that the alteration/construction of the roof at the entrance of the premises, is not in any manner damaging the tenanted premises is erroneous and in fact contrary to the evidence on record. It is submitted that the iron pillars are attached to the walls of the tenanted premises and removing the said iron pillars which are embedded in the walls, certainly would damage and cause any waste of the suit premises. It is thus submitted that the petition is required to be dismissed.

---

<sup>2</sup> AIR 1981 BOM 388

<sup>3</sup> 1995(1) MH.L.J

9. I have heard learned counsel for the petitioner and learned counsel for the respondent with their assistance, I have also perused the impugned orders and documents as placed on record. As also I have perused the records and proceedings.

10. This is a case where there are concurrent findings of facts of both the Courts below against the petitioner. The scope of interference in proceedings under Article 227 is well settled to be very limited. The Court in exercising its jurisdiction under Article 227 of the Constitution of India would not wield powers of an appellate Court hence the court would not substitute its own view on the appreciation of evidence for the view taken by the Courts below, except when the findings are based on no evidence or apparent perversity, resulting into grave miscarriage of justice. Even in case that there are errors of fact the same cannot be corrected in exercise of the writ jurisdiction under Article 227.(See Sayed Yakoob Vs. K.S.Radhakrishnan (AIR 1964 SC 477). Consistence with this legal position the case in hand needs to be considered.

11. A perusal of the impugned judgments of both the Courts below in my opinion do not persuade me to accept the submissions as made on behalf of the petitioner. The learned trial Judge after

considering the evidence on record and after examining the commissioner's report has reached a categorical finding firstly that, the premises admeasuring 10 X 30 sq.ft. were the actual tenanted premises and that the additional premises as noted above are the unauthorised extension which was constructed/installed by the petitioner appurtenant to the tenanted premises. It is also clearly seen that the extended premises are used as permanent premises. The construction undertaken is embedded to the walls of the suit premises through poles/iron grills permanently fastened to the suit premises, as also there is roof as also permanent tiling made on the ground. This clearly shows the nature of the alteration/construction. There is no material on record to show that such construction was existing when the premises were let out to the petitioner by the respondent or prior thereto.

12. The contention of the petitioner is that the construction is only to support the sign board/name board, of the shop premises, also cannot be accepted. This Court cannot come to any different finding of fact reversing the findings of fact as recorded by the Courts below. In any event, the report of Court Commissioner as also other plentiful material on record would show that the construction is of a permanent nature which is being utilized fully for commercial

purposes by the petitioner. If this be the situation and admittedly when it is not part and parcel of the original suit premises, as let out and that the construction undertaken by the petitioner is embedded to the walls of the suit premises, with a roof and proper tiling on the floor/ground, these are sufficient factors to come to a conclusion, that the Courts below were correct in recording a finding that the structure is of a permanent nature constructed without prior written permission of the respondent, which would entitle the respondent to a decree under Section 13(1)(b) of the Bombay Rent Act. If the contentions as urged on behalf of the petitioner are accepted then the very sanctity of the original tenancy and the portion of the premises as let out and put to use by the petitioner would be lost. It is clear from the facts that the petitioner had materially altered and brought about a substantial change in the character and of form in the tenanted premises. The construction as undertaken by the petitioner certainly cannot be removed without causing any damage to the tenanted premises. It is in these circumstances that the Courts below have come to a conclusion that it was a construction of a substantial nature which altered the tenanted premises.

13. The reliance on behalf of the petitioners on the decision of the Supreme Court in “*Pitambardas Kalyanji Bakotiya Vs.*

***Dattaraya Krishnaji***”, in my opinion would not assist the petitioner.

This was a case where the petitioner therein had extended a pre-existing tin shed on the open land adjacent to the accomodation, by constructing wall made of bricks and mud and bamboo without the consent of the respondents. The facts are completely distinct.

14. The decision of the learned Single Judge of this Court in ***“Somnath Krishnaji Gangal Vs. Moreshwar Krishnaji Kale and Ors.”*** (Supra) would also not assist the petitioner as it was a case that, the tenant following a theft had removed a window frame on the western wall of the premises, for the purpose of additional safety and security to close the window. It was complained by the landlord in the suit that he was entitled to a decree under Section 13(1)(b) of the Rent Act. The Court in this context reached a conclusion that the removal of the window was for better utilization of the tenanted premises and was a minor alteration not of a permanent nature. It is in this context, the Court had made observations in Paragraph 21. The facts are completely different and would not assist the petitioner.

15. The decision in ***“Pitambardas Kalyanji Bakotiya Vs. Dattatraya Krishnaji*** (Supra) would also not assist the petitioner as the contention of the landlord in the said case was that the petitioner

constructing a kitchen platform in the premises let out to him without prior permission of the respondent, given in writing, which had resulted into damage or waste to the building. It is in these circumstances, the Court had made the observations in paragraph 11 of the decision as relied upon by the petitioner that such a construction would not be of a nature which would damage or waste the suit premises.

16. In view of the above deliberation, I find no perversity in the findings as recorded by the learned trial Judge as also the learned appellate Judge.

17. The petition is devoid of merits. It is accordingly dismissed.

18. The petitioner is directed to hand over the vacant possession of the premises to the respondents within a period of eight weeks from today. No costs.

(G.S.Kulkarni, J.)