

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

**WRIT PETITION NO.6037 OF 2004**

Vasantrao Haribhau Dedgaonkar  
Since deceased, through L.Rs.

1. Anil Vasantrao Dedgaonkar  
Age 56 years, Occ. Business,  
R/o 608, Sadashiv Peth,  
Pune.

2. Pradip Vasantrao Dedgaonkar  
Age 52 years, Occ. Business,  
R/o Juna Kapad Bazar,  
Ahmednagar.

3. Sanjay Vasantrao Dedgaonkar  
Age 50 years, Occ. Business,  
R/o 608, Sadashiv Peth,  
Pune.

4. Pravin Vasantrao Dedgaonkar  
Since deceased through L.Rs.

4A. Ranjana Pravin Dedgaaonkar  
Age 50 years, Occ. Household,  
R/o Juna Kapad Bazar  
Ahmednagar.

4B. Amol Pravin Dedgaaonkar  
Age 24 years, Occ. Nil  
R/o as above.

5. Sushilabai Vasantrao Dedgaonkar  
Age 75 years, Occ. Household,  
R/o As above.

..Petitioners

Versus

1.Govind Sadashiv Madadgaonkar,  
Since Deceased through L.Rs.:-

(a) Smt. Chhabubai w/o Govind  
Madadgaonkar, Age 55 years,

Occupation Household,

(b) Bandu Govind Madadgaonkar,  
Age about 40 years, Occ. Service,

(c) Shivaji Govind Madadgaonkar,  
Age about 36 years, Occ. Trader

2. Rajaram Sadashiv Madadgaonkar,  
Age about 60 years, Occ. Trader,

Nos.1(a) to 1(c) R/o Maliwada,  
Sherkar Galli, Ahmednagar

No.2 R/o Saraf Bazar, Ahmednagar.

..Respondents

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Advocate for Petitioner : Shri S. S. Bora  
Advocate for Respondents 1(C) & 2 : Shri A.K.Gugale  
h/f Smt. C.S. Deshmukh

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**CORAM : RAVINDRA V. GHUGE, J.**

Dated: March 14, 2019

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**ORAL JUDGMENT:-**

1. The petitioner / original plaintiff / landlord is aggrieved by the judgment and order dated 20.10.2003, delivered by the appellate Court in RCA No.244 of 1999, by which, the findings of the trial Court in RCS No.25 of 1989, delivered on 8.7.1999, have been quashed and set aside.

2. The petitioner has argued mainly two grounds before this Court. Firstly, that the landlord requires the suit property for his personal and bonafide use and secondly, that the tenant has caused a

structural change in the said suit property. It is an admitted position that the landlord claims to have let out one shop, admeasuring 33x6 feet and after renovation / reconstruction, a lesser sized shop, admeasuring 22x6 feet has been let out. Per contra, the defendant / tenant claims that two shops, admeasuring 3x22 feet each, were let out by the landlord.

3. When this Court admitted this petition on 30.9.2004, the final hearing in this matter was expedited.

4. I have heard the learned Advocates for the respective sides at length. With their assistance, I have gone through the record and proceedings received from the trial Court.

5. The petitioner relies upon the following judgments:-

- (1) Kamgar Kalyan Kendra Chalisgaon Vs. Kashinath Brindavan Bundelkhandi - Writ Petition No.4178 of 2001, dt. 2.8.2018,
- (2) Anil Bajaj and another Vs. Vinod Ahuja [(2014) 15 SCC 610],
- (3) Bhupinder Singh Bawa Vs. Asha Devi [(2016) 10 SCC 209],
- (4) Motor Cycle House and Metro Cottage Industries Vs. Kamalabai Dattatraya Kale - [2005 (3) Mh.L.J.1109],
- (5) Gaya Prasad Vs. Pradeep Srivastava - AIR 2001 SC 803,
- (6) Dwarkaprasad Vs. Niranjana - AIR 2003 SC 2024,
- (7) Rajendrakumar Sharandas Sharma Vs. Shrikrushna

Babanrao Guhe - 2010 (4) All MR 7 and

(8) Gopaldas Kumandas Ved Vs. Ghevarchand G. Chordiya-  
Writ Petition No. 3071 of 1992 and another dt.17.2.2016.

6. The respondents rely upon the following judgments:-

(1) Venkatlal G. Pittie Vs. M/s Bright Bros. (Pvt.) -  
AIR 1987 SC 1939,

(2) Suka Ishram Chaudhari Vs. Jamnabai Ranchodas Gujarathi -  
AIR 1972 Bom.273,

(3) Pitambardas Kalyanji Bakotiya Vs. Dattatraya Krishnaji -  
AIR 1981 Bom. 388,

(4) Kumari Parvati Kevalram Moorjani Vs. Madanlal Anraj  
Porwal and others - AIR 1988 Bom.354,

(5) Somnath Krishnaji Gangal Vs. Moreshwar Krishnaji Kale -  
[1995 (1) Mh. L.J. 675] and

(6) Khureshi Ibrahim Ahmed Vs. Ahmed Haji Khanmahomad  
AIR 1965 Guj.152.

7. It is, therefore, obvious from the impugned judgments that two issues were canvassed by the plaintiff. I would, therefore, prefer to deal with these two issues by segregating them for the sake of convenience.

**Erecting of a permanent structure:-**

8. It is undisputed that the suit property, which is a shop, was first let out to the defendant in 1965. In 1986, RCS No.558 of 1986 was filed by the landlord. Before a written statement could be

entered by the defendant / tenant, the parties agreed to submit their compromise terms and seek disposal of the said suit. By the compromise terms, it was decided that the suit be disposed off. The reduced size of the shop would be 6x22 feet and which would be constructed within two months as per the plan approved by the Municipality. It was agreed that the shop would be located on the ground floor having width of 6 South-North and depth of 22 feet on the East-West side. The remainder portion of 6x11 feet on the East side may lateron be given to the tenant, though the possession would be maintained by the landlord. No where in the said compromise terms, has it been mentioned that the landlord would convert the shop size of 6x22 feet in to two shops admeasuring 3x22 feet each. It is also not mentioned in the compromise terms that there would be two shutters for operating two shops or that there should be independent electricity meters and independent electrical boards for operating the switches in the said shops. These compromise terms dated 12.9.1986 have been placed on record in the suit at issue at Exhibit 59.

9. The strenuous contention of the tenant is that though earlier it was only one shop, after the reconstruction, the size of the shop was reduced from 6x33 feet to 6x22 feet. The landlord has handed over two shops of 3x22 feet each, though this is not borne out from the

terms of settlement Exhibit 59.

10. It appears from the record that the moment the landlord realized that the tenant had erected a partition and created two shops out of one, he preferred RCS No.25 of 1989 on 9.1.1989. Prior thereto, a notice was issued to the tenant, alleging the erection of a partition and creation of two shops out of one. The tenant denied the said allegation by submitting a reply on 20.1.1986. The litigation, therefore, has its foundation in the said notice and the reply given by the tenant.

11. It is thus an admitted fact that there are two shops standing on the date of the lodging of the suit by the landlord. Issue is, as to whether the two shops were created out of one by the landlord or by the tenant, keeping in view the admitted position that the shop earlier let out to the same defendant in the same premises, was 6x33 feet. The answer to this dispute would therefore, depend upon circumstantial evidence and attending circumstances so as to trace out the probable date of creation of the two shops.

12. Exhibit 59, by which, RCS No. 558 of 1986 was compromised, in my view, is an eye-opener and a decisive factor. In this suit of 1986, the landlord has not complained of creation of two shops out

of one, by erection of a wall. It is admitted by the parties that the shop was in a dilapidated condition and the landlord wanted to carry out certain repairs so as to improve the structure of the property. The record relating to RCS No.558 of 1986 does not indicate that there was more than one shop let out to the tenant. In fact, it indicates that after the reconstruction, as per the approved plan by the Municipality, the tenant would get one shop admeasuring 6x22 feet. This record of civil litigation can neither be disputed, nor can be ignored.

13. An additional factor is the filing of the suit in 1989. The written statement filed by the tenant in RCS No.25 of 1989, does not indicate that the two shops are a part of the original construction made by the landlord before handing over the property to the tenant. As such, the terms of compromise, which mandated the landlord to handover one shop of 6x22 feet to the tenant, seems to be a crystallized position.

14. One more feature indicates that the second shop was not in existence earlier. One of the defendants obtained a shop license under the Bombay Shops and Establishments Act, in 1987. These properties being within the limits of the Municipality, would not permit opening of a new shop without a registration and a shop

license. The tenant does not contend that the second shop was being operated illegally and without a registration and a shop license prior to 1987. This would, therefore, clearly establish that the second shop was opened in 1987 after acquiring the shop license, prior to 1987.

15. This then takes the case forward to the stage of the nature of the construction, by which, a partition wall was erected, rendering the original size of 6x22 feet being converted into two shops of 3x22 feet each.

16. The issue, therefore, is as to what was the type of partition that was constructed and whether it would amount to substantially changing the nature of the property. This Court has concluded in Gopaldas (supra) that construction of a compound wall to protect the property from trespassers, who were hutment dwellers adjacent to the property, cannot be said to be a permanent structure, as it was aimed at protecting the property and was not aimed at changing or converting the property. It was also held that if columns and beams below the slab were not erected, thereby creating a new structure, a mere erection of the protective compound wall would not amount to erecting a new structure. While drawing this conclusion, this Court has relied upon the several judgments cited by the litigating sides.

17. The tenant relies upon Venkatlal (supra), wherein, the Honourable Apex Court has held in paragraph Nos.18, 19 and 20 as under:-

"18. In this connection reference may be made to a decision of the Special Bench of the Calcutta High Court in the case of *Surya Properties Private Ltd. and Ors. v. Bimalendu Nath Sarkar and Ors.* AIR 1964 Cal 1 which dealt with Clause (p) of Section [108](#) of the Transfer of Property Act, 1882 and held that this question was dependent on the facts of each case and no hard and fast rule can be laid down with regard to this matter. In the absence of any relevant materials, therefore, the Full Bench found that no answer could be given, in a slightly different context, before Calcutta High Court in the case of *M/s. Suraya Properties Private Ltd. v. Bimalendu Nath Sarkar.* AIR 1965 Cal 408, Chatterjee, J., one of the judges of the Division Bench observed that the phrase 'permanent structure' for purposes of Clause (p) of Section 108 of the Transfer of Property Act meant a structure which was capable of lasting till the term of the lease and which was constructed in the view of being built up as was a building. In that context the learned judge observed that a reservoir D was not, however, a permanent structure for purposes of Clause (p) of Section 108 of the Transfer of Property Act. Sen, J. of the same Bench was of the view that no hard and fast tests could be laid down for determining the question whether a particular structure by the tenant was a permanent structure for the purpose of Clause (p) of Section 108 of the Transfer of Property Act. The answer to the question depended on the facts of each case. Chatterjee, J., however, took the view that where the tenant

*created a permanent structure in the premises leased to him, as the lease continued in spite of the disputed structure and the landlord continued to receive rent till the determining of the lease by notice to quit or thereafter till the passing of the decree for eviction and the fact that he accepted rent with full knowledge of the disputed structure did not disentitle him to a decree for eviction.*

19. *In Khureshi Ibrahim Ahmed v. Ahmed Haji Khanmahomad. AIR 1965 Guj 152 , in connection with Section 13(1)(b) of the Rent Act, Gujarat High Court held that the permanent structure must be one which was a lasting structure and that would depend upon the nature of structure. The permanent or temporary character of the structure would have to be determined having regard to the nature of the structure and the nature of the materials used in the making of the structure and the manner in which the structure was erected and not on the basis of how long the tenant intended to make use of the structure. As a matter of fact, the Court observed, the nature of the structure itself would reflect whether the tenant intended that it should exist and be available for use for a temporary period or for an indefinite period of time. The test provided by the Legislature was thus an objective test and not a subjective one and once it was shown that the structure erected by the tenant was of such a nature as to be lasting in duration lasting of course according to ordinary notions of mankind-the tenant cannot come forward and say that it was erected for temporary purpose.*

20. *The question was again considered in the case of Ramji Virji and Ors. v. Kadarbhai Esufali, AIR 1973 Guj 110 . It was*

*observed that whether the structure was a permanent structure was a mixed question of law and fact. It was held in that case that alterations made by a tenant like constructing loft, wooden bathroom, frame and putting up a new drain being minor alterations which were easily removable without causing any serious damage to the premises would not amount to permanent structure leading to the forfeiture."*

18. The test, therefore, would be of an objective character and not subjective, though, a specific test cannot be laid down to determine the question as to whether, a particular structure could be said to be a permanent structure. On these premises, the Honourable Apex Court concluded in paragraph Nos.21 and 22 in Venkatlal (supra) as under:-

*"21. There are numerous authorities dealing with the question how the structure is a permanent structure or not should be judged. It is not necessary to deal with all these. One must look to the nature of the structure, the purpose for which it was intended and take a whole perspective as to how it affects the enjoyment, the durability of the building etc. and other relevant factors and come to a conclusion.*

*22. Judged in the aforesaid light on an analysis of the evidence the trial court as well as the appellate court had held that the structures were permanent. The High Court observed that in judging whether the structures were permanent or not, the following factors should be taken into consideration referring*

*to an unreported decision of Malvankar J. in special civil application No. 121 of 1968. These were (1) intention of the party who put up the structure; (2) this intention was to be gathered from the mode and degree of annexation; (3) if the structure cannot be removed without doing irreparable damage to the demised premises then that would be certainly one of the circumstances to be considered while deciding the question of intention. Likewise, dimensions of the structure and (4) its removability had to be taken into consideration. But these were not the sole tests. (5) the purpose of erecting the structure is another relevant factor. (6) the nature of the materials used for the structure and (7) lastly the durability of the structure. These were the broad tests. The High Court applied these tests. So had the Trial Court as well as the appellate bench of Court of Small causes. "*

19. Considering the law laid down in Venkatlal (supra), it would have to be noticed as to (i) what was the intention of the party, which put up the structure, (ii) whether the purpose of erecting the structure is to create more shops out of one and (iii) the durability of the structure. Apparently, one shop has been converted into two shops and these two shops have been granted independent legal existence as there are two shops licenses obtained for operating the two shops. The test of functional integrity, which is though applied in industrial jurisprudence, will have to be applied to find out whether one shop could be open on any given date, when the other shop keeper has kept the second shop closed. Is it the case that both

the shops have to remain open or closed at a particular time and that they do not have their independent existence. It is admitted that two persons are operating the two shops under the plea that the original tenant has a joint family. It is, however, conceded that each of these shops has an independent legal status and each has an independent shutter for opening and closing the shop. The intention of the parties, in the light of Venkatlal (supra), would be established that the two shops were sought to be operated independently and separately or else there would have been no reason to seek two shop licenses and render independent legal status to each of the shop keepers.

21. The structure of the separation wall between the two shops naturally has to have such a durability that the frame of each shop would hold a shutter, which has two vertical continuous hinges. It is by these two metal hinges / angles by which the shutter can be rolled open and rolled down to lock the shop. A wafer thin plywood partition cannot sustain the pressure of two hinges since both the shutters of the two shops would be fixed side by side on the partition wall. The partition would, therefore, have to be a sturdy structure to hold two hinges of two shutters. The record that a wooden partition was erected dividing the frontage of the shop in equal parts so as to fix the shutters of the two shops by using the strength of such a wall.

This, therefore, satisfies the test stated in Venkatlal (supra), as regards the durability of structure.

22. I find that this Court has taken a landmark view in Suka Ishram (supra), while dealing with the issue of permanent structure under Section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ('Bombay Rents Act'). Issue was as regards the tenant protecting himself and his goods, from preventing thieves from breaking open the shade. He had built a wall in brick and mortar, calling it to be of a temporary character. This Court concluded that the open plot of land will never lose its identity in the process of the removal of the wall. The wall is but an insignificant part of the temporary shade. The original nature of the open plot of the land is not materially altered or interfered with. In view of this conclusion, I find that the said test can be advantageously made applicable to the case in hand. Whether the erection of the partition wall would not affect the identity of the shop or whether the shop let out to the tenant would not lose its identity, notwithstanding whether the wall is standing or removed. The answer is quite logical. By erecting a sturdy partition wall, may be by a wooden structure, and which can be conveniently dismantled, the identity of one shop is converted into two independent legal shops.

23. Considering all the above factors, I am of the view that the trial Court was right in concluding that the erection of the partition wall has resulted in conversion of one shop into two. It requires no debate that such commercial complexes have a basic structure of columns, beams and a slab. Even if a 4" or 9" cement brick wall is erected to create multiple shops in such galas or complexes, these walls are always meant to be like partition walls or curtain walls. These walls can be conveniently removed without affecting the basic structure of the building and the structural designing and engineering of such complexes or galas are meant to accommodate such partition walls. This could not have been lost sight of by the appellate Court, which has erroneously considered the material used for erecting the partition wall. It has failed to assess the durability factor and the intention and purpose of erecting the said wall. Even otherwise, a finding on facts arrived at by the trial Court cannot be casually interfered with by an appellate Court or even by this Court, unless it appears that the impugned judgment is perverse, erroneous and likely to cause gross injustice.

24. Considering the above, the impugned judgment of the appellate Court upsetting the findings on facts, arrived at by the trial Court is unsustainable to the extent of Section 13(1)(b) of the Bombay Rents Act.

**Bonafide and personal use:-**

25. I am conscious of the fact that both the Courts have held against the plaintiff as regards the personal and bonafide use of the suit property. In so far as the properties held by the plaintiff are concerned, there is no dispute that he has one building in a particular area of Ahmednagar town, besides the shop let out to the tenant and a similar shop in Pune. His eldest son by name Anil, is said to have moved out of Ahmednagar and has relocated to Pune for carrying out the work of a goldsmith. His another son Sanjay runs his business in Ahmednagar, as well as at Pune. The plaintiff also oscillates between the shop at Pune and the shop in Ahmednagar. It also appears that the business of goldsmith is an ancestral business and probably the second or the third generation is in to the said business. His one son Pravin has unfortunately passed away in an accident, untimely and his widow Ranjana who is rearing two children, is also said to be conducting a business of goldsmith by residing with her parents in law at Ahmednagar.

26. The learned counsel for the tenant has strenuously supported the concurrent findings of the two Courts on the ground that the landlord has several properties and can easily accommodate his widowed daughter in law in any of the properties, if she desires to

operate a shop. There was no previous partition recorded in any document in between the landlord plaintiff and his brother Laxman. Though both may have acquired independent shop licenses and have registered these shops independently, it is only a make believe picture. In the absence of any documentary evidence indicating an actual partition through any Deed of Partition, it cannot be presumed that the plaintiff has parted ways with his brother on the basis of both operating different shops with different shop licenses.

27. Normally, in the face of concurrent findings, this Court would be extremely slow and cautious if called upon to cause an interference in the concurrent judgments on a particular point, in the light of the law laid down by the Honourable Apex Court in the matters of Syed Yakoob Vs. K.S. Radhakrishnan and others [AIR 1964 SC 447] and Surya Dev Rai Vs. Ram Chander Rai [(2003) 6 SCC 682].

28. It appears that the Honourable Apex Court, in Bhupender Singh Bawa (supra), relied upon its earlier judgment in Anil Bajaj Vs. Ahuja (supra) and affirmed the view that a landlord was free to choose out of his properties, a more suitable premises for the business of the son and a landlord cannot be dictated by the tenant as to which shop the son should be allotted for starting his business.

It was held that the freedom of the landlord to use his own property as he deems appropriate to suit his necessity, cannot be subjected to the desire of the tenant. It was held that the tenant cannot dictate or suggest alternatives to a landlord. This was a landmark change in law applicable to landlords and tenants.

29. It requires no debate that the widowed daughter in law of the landlord has to sustain herself. Two sons of the landlord are busy arranging their businesses and sharing various properties amongst themselves. Their late brother Pravin, who was the husband of Ranjana, being no more, has practically isolated the widow. It also appears that the plaintiff, who is now deceased, was making efforts to rehabilitate Ranjana, who is herself about 58 years of age today. With one small shop being allotted to her, would enable her to sustain her daily needs and nurture growing children. The son Amol has also now attained adulthood. In my view, the anxiety of the deceased plaintiff has been to take care of the widowed daughter in law, considering that the other two sons, namely, Anil and Sanjay, who are also in their early sixties, may not give preference to the rehabilitation of Ranjana.

30. Keeping in view the change in law, considering the judgment of the Honourable Apex Court in Anil Bajaj (supra) and Bhupinder

Singh (supra), I find that this bonafide need and necessity to enable Ranjana to utilize the tenanted premises, could be considered as a good ground. It is in these peculiar set of facts and in view of the law laid down, that I deem it appropriate to set aside the findings of the Courts below, concluding that the plaintiff may allocate any of his other properties to Ranjana as suggested by the tenant.

31. As such, this petition is allowed. The impugned judgment of the appellate Court dated 20.10.2003 is quashed and set aside. RCA No. 244 of 1999 stands dismissed. The cross-objections filed by the original plaintiff are upheld and the judgment of the trial Court dated 8.7.1999 stands modified to the extent of the bonafide requirement for personal use. Consequentially, RCS No.25 of 1989 stands allowed on the grounds of bonafide need for personal use and on the ground of erecting a structure, under Sections 13(1)(b) and 13(1)(g) of the Bombay Rents Act.

32. Rule is made absolute in the above terms. R & P be returned to the Courts below.

33. Learned Advocate for the defendants submits that the defendants are present in the Court and they intend to approach the Honourable Apex Court. It is prayed that the execution and

operation of this judgment may be stayed for the period of eight weeks. Learned counsel for the plaintiff raises a strong objection on the ground that the suit was of 1989 and three decades have been spent by the landlord in seeking a right to utilize his own property. He, therefore, prays that the request of the tenants may be rejected.

34. Considering that the impugned judgment of the first appellate Court had protected the tenants, this judgment shall be made effective after six weeks from today.

( RAVINDRA V. GHUGE, J. )

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