

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6268 OF 1999

Hiraben Popatlal Parekh (deceased) through her LRs
Jeetendra P. Shah @ Parekh and others ... Petitioners

Versus

Vimla Bhogilal Shah (deceased) through her LRs
Nitin Bhogilal Shah and others ... Respondents

Mr. Surel S. Shah i/b. Mr. Nachiket V. Khaladkar for Petitioners.
Mr. Prafulla B. Shah for Respondents.

CORAM : R. G. KETKAR, J.

RESERVED ON : 22nd JULY, 2019

PRONOUNCED ON: 31st JULY, 2019

JUDGMENT :

Heard Mr. Surel Shah, learned Counsel for the petitioners and Mr. Prafulla Shah, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, who are the heirs and legal representatives of original defendant - Hiraben Popatlal Parekh (for short 'Hiraben'), and shall hereinafter collectively be referred to as 'defendants', have challenged the judgment and decree dated 25.03.1983 passed by the learned trial Judge in R.A.E.Suit No.812/5991 of 1967 as also the judgment and decree dated 22.07.1999 passed by the Appellate Bench of the Small Causes Court at Bombay in Appeal No.289 of 1983. By these orders, the Courts below decreed the Suit instituted by the original plaintiff - Vimla Bhogilal Shah (for short 'Vimla'). Respondents are the heirs and legal representatives of Vimla shall hereinafter be collectively referred to as 'plaintiffs'. The Courts below directed the defendants to

handover vacant and peaceful possession of flat No.13 situate on the 3rd floor in building known as 'Vineeta' at plot No.21/3 at Wadala, Mumbai (for short 'suit premises'). The facts giving rise to filing of the present Petition, briefly stated, are as under:

3. Vimla instituted Suit some time in October 1967 against Hiraben inter alia contending that until her tenancy was determined by Vimla's letter dated 26.06.1967, Hiraben was the monthly tenant in respect of the suit premises. The monthly rent of the suit premises is Rs.165.75/-. The tenancy of Hiraben commenced on 01.01.1967 in pursuance of the agreement dated 28.04.1966 by which she agreed to advance loan to Vimla, which was agreed to be granted to Hiraben in respect of the suit premises and embodied the terms and conditions of the tenancy.

4. The plaintiffs further contended that clause 9 of the agreement laid down that the tenant agrees and binds himself not to make any changes, alterations to the fittings or fixtures and to the flat during the period of his tenancy without obtaining a previous written consent of the landlady and that, all such changes, alterations and addition to the fittings or fixtures so made shall become and be considered the property of the landlady and the tenant shall have no right to remove the same after the expiration of period of tenancy. If however any unauthorized construction is put up, it will be a ground available to the landlady to evict the tenant from the premises and also to claim damages suffered by the landlady.

5. Clause 12 of the agreement provided that the tenant agrees and binds herself to allow the landlady, her servants and agents with or without workmen with necessary appliances, and at all reasonable times, to view and

inspect the premises to take an inventory of fixtures and to carry on repairs.

6. The plaintiffs alleged that in breach of clause 9 of the agreement, Hiraben has made alterations and has constructed permanent structures in the suit premises. In particular, she had pulled down a portion of the wall between the living room and the bed room and has erected a door therein some time in or about May or June 1967. Hiraben had also removed the wash basin from the bath room and installed the same outside the bath room in the passage leading to the kitchen. The said act of the defendant is in breach of the terms of the tenancy. Even otherwise, the said act of Hiraben in pulling down the wall is an act of waste or act contrary to Section 108(o) of the Transfer of Property Act, 1882 (for short 'T.P. Act') and Section 13(1)(a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'Act'). The plaintiffs further contended that the erection of the new door is also in breach of the terms of tenancy and provisions of Section 13(1)(b) of the Act. The said act amounts to erection of a permanent structure. The plaintiffs further contended that removal of the wash basin is in breach of terms of tenancy and also an act of waste under the provisions of Section 13(1)(a) of the Act.

7. The plaintiffs further contended that having come to know about Hiraben making several alterations and erection of permanent structures in the suit premises, Vimla by her letter dated 20.09.1967 intimated Hiraben that she desired inspection of the premises and appointed Saturday, the 23rd September 1967 at 5.00 p.m. for that purpose. On 23.09.1967 at 5.00 p.m., Vimla's representative accompanied by her Advocate went to the premises for inspecting the suit premises. However, the inspection was not allowed. Hiraben's son who was present stated that Hiraben was advised not to allow

inspection. By not allowing Vimla to take inspection of the suit premises, Hiraben committed breach of clause 12 of the agreement. The plaintiffs, therefore, sought possession of the suit premises.

8. Hiraben resisted the Suit by filing written statement dated 14.02.1968. She contended that the agreement dated 28.04.1966 was merely a document created in order to offer her a guarantee that she will get the suit premises on the construction of Vinita Building being completed. She denied that the said agreement was intended for the purpose for which it purports to be and denied that it is binding on her.

9. Hiraben denied about making any alteration in the suit premises or construction of permanent structure as alleged or otherwise at any time after the commencement of the tenancy on 01.01.1967. She further contended that the tearing down of the wall and the creation of a door and the installation of a wash basin was done by or at the instance of Vimla prior to the commencement of the Hiraben's tenancy. Without prejudice to this contention, in any case, Hiraben contended that such acts are of a minor nature and are not contrary to the provisions of the T.P.Act or any other Act or even the agreement dated 28.04.1966. She contended that Vimla had acted in pursuance of a well laid plot to defraud Hiraben of tenancy rights as well as her money. Vimla had attempted to cheat Hiraben by incorporating alterations in the flat before giving it out to Hiraben for consideration and then she is seeking to evict Hiraben on this very ground of alterations, referred hereinabove. Hiraben contended that she had already lodged a complaint against Vimla before the learned Presidency Magistrate, Court at Dadar, Bombay under Sections 18 and 24 of the Act and Section 420 Indian Penal Code, 1860 in respect of illegal acts of Vimla in the matter of the tenancy.

Hiraben contended that letter dated 20.09.1967, purportedly issued by Vimla, did not reach her before the date of appointment i.e. 23.09.1967. Hiraben denied that Vimla had either come for inspection or was refused entry into the suit premises or that there was breach of the terms of tenancy.

10. On the basis of pleadings of the parties, the learned trial Judge framed the necessary issues. Vimla examined her husband Bhogilal Shivraj Shah (P.W.1), her Architect Uttanchand Maganlal Jain (P.W.2) and Narayan Balkrishana Dharmadhikari, Sub-Engineer of Mumbai Municipal Corporation (for short 'Corporation') (P.W.3). In rebuttal, Hiraben examined her son - Jitendra Popatlal Shah (D.W.1) and her Architect, Pratap P. Lalka (D.W.2). The parties produced documentary evidence on record. After considering the evidence on record, by order dated 25.03.1983, the learned trial Judge decreed the Suit in terms of prayer clause (a). The learned trial Judge held that-

- (i) tenancy was created by agreement dated 28.04.1966;
- (ii) tenancy of the defendant was terminated by legal and valid notice;
- (iii) defendant has, without the consent of the plaintiff, made alterations of permanent nature, as alleged;
- (iv) defendant has prevented the plaintiff from taking inspection of the suit premises thereby contravened provisions of Section 108(o) of T.P.Act and those of the Rent Act; and
- (v) defendant has caused waste of the property or committed acts contrary to the provisions of Section 108(o) of the T.P.Act and Sections 13(1)(a) and (b) of the Act.

11. The learned trial Judge further held that defendant failed to prove that-

- (a) the terms and conditions of the tenancy agreement were only by way of guarantee that he would get the suit premises on the

construction of Vinita building being completed and those terms and conditions are not binding on her;

- (b) the alterations were effected by or at the instance of the plaintiff prior to the commencement of the defendant's tenancy and they do not fall under the preventive terms of the agreement; and
- (c) Suit has been filed by acts of fraud and with dishonest motive.

12. Aggrieved by this order, the defendant preferred Appeal No.289 of 1983. By order dated 22.07.1999, the Appellate Court dismissed the Appeal. The Appellate Court held that-

- (I) the additions and alterations complained of by the plaintiff are proved to have been carried out by the defendant that too after the commencement of her tenancy;
- (II) the defendant has committed breach of terms of tenancy agreement thereby rendering herself liable to be evicted from the suit premises;
- (III) the acts complained of by the plaintiff cannot be said to be a work of additions and alterations of permanent nature as contemplated under Section 13(1)(b) of the Act;
- (IV) the plaintiff also failed to prove that defendant has committed acts of waste to the property in dispute.

It is against these orders, Hiraben has instituted the present Petition.

13. Mr. Surel Shah submitted that the first plan was submitted in May, 1965. The second amended plan was submitted on 20.05.1965. On 28.04.1966, registered agreement was entered into between Vimla and Hiraben. Under the agreement, Vimla had taken loan for construction of

building from Hiraben. On 01.11.1966, application for Building Completion Certificate was made. Occupation Certificate was issued on 29.03.1967. He submitted that Hiraben had instituted Suit for recovery of loan amount. She had also instituted Suit being Suit No.469/2604 of 1967 for declaration. She had also filed criminal complaint against Vimla. As a counter-blast to these proceedings, Vimla had instituted Suit against Hiraben.

14. Mr. Surel Shah invited my attention to clause 9 of the agreement dated 28.04.1966. Clause 9 thereof is in two parts. Under the first part, the tenant agreed and bound himself not to make any changes, alterations to the fittings or fixtures and to the flat during the period of his tenancy without obtaining previous written consent of the landlady and all such changes, alterations and additions to the fittings or fixtures so made was to become and consider the property of the landlady and tenant shall have no right to remove the same after the expiration of the period of tenancy. The other part is “if however any unauthorized construction is put up, it will be ground available to the landlady to evict the tenant from the premises and also to claim damages suffered by the landlady. He submitted that in so far as the first part is concerned, this does not give rise for filing Suit invoking grounds under Section 13(1)(a) of the Act read with Section 108(o) of the T.P. Act or Section 13(1)(b) of the Act. It is only in the event the tenant puts up the unauthorized construction, it will become a ground for eviction of the tenant. In the present case, it is not the case of Vimla or plaintiffs that Hiraben or defendants have put up unauthorized construction. The learned trial Judge was not justified in passing the eviction decree under Section 13(1)(b) of the Act. The learned trial Judge was also not justified in holding that by preventing Vimla from taking inspection of the suit premises, Hiraben had contravened the provisions of

Section 108(o) of the T.P.Act and Sections 13(1)(a) and (b) of the Act and as such rendered herself liable for eviction. The learned trial Judge was also not justified in holding that Hiraben has caused waste of the property or committed acts contrary to Section 108(o) of T.P. Act and Sections 13(1)(a) and (b) of the Act.

15. Mr. Surel Shah has invited my attention to the discussion of the trial Court in paragraphs 15 to 18 while answering issues No.4 to 7. He submitted that while answering these issues, the learned trial Judge did not hold that the alleged additions and alterations made by Hiraben has caused any damage to the suit premises, or that because of the alleged additions and alterations carried out by Hiraben, the value of the suit premises is diminished. The learned trial Judge also did not record a finding that the alleged additions and alterations are of permanent nature.

16. In so far as the Appellate Court is concerned, he submitted that the Appellate Court committed error in holding that Vimla had proved additions and alterations complained of were carried out by Hiraben after commencement of her tenancy. Though the Appellate Court held that act complained of cannot be said to be work of addition and alteration of permanent nature as contemplated by Section 13(1)(b) of the Act and that Hiraben has not committed act of waste of the property, the Appellate Court committed error in holding that Hiraben has committed breach of tenancy agreement and in particular clause 9 thereof.

17. In so far as the Appellate Court judgment is concerned, he submitted that the Appellate Court has considered points No.1 to 6 from paragraph 10

onwards. After considering the explanation to Section 13(1)(b) of the Act, the Appellate Court recorded a categorical finding in paragraph 19 that removal of portion of a wall and fixing door do not amount to construction of permanent nature. He submitted that points No.1 to 3 were answered against Vimla and the only point answered against Hiraben was point No.4. The Appellate Court held that Hiraben has committed breach of clause 9 of the tenancy agreement rendering herself liable to be evicted from the suit premises. He submitted that after having answered points No.1 to 3 in favour of Hiraben, the Appellate Court could not have recorded a finding against Hiraben in respect of point No.4. The Appellate Court held that Hiraben has not committed breach of clause 12 of the agreement dealing with Vimla's right to inspect the suit premises.

18. Mr. Surel Shah submitted that neither Vimla nor the plaintiffs have filed cross-Petition in this Court challenging the finding recorded by the Appellate Court against points No.1 to 4. Vimla or plaintiffs ought to have filed cross-Petition for seeking additional eviction decree on the grounds under Sections 13(1)(a) and (b) of the Act read with Section 108(o) of the T.P.Act. In support of his submissions, he relied upon the following decisions:

- a. ***Biswajit Sukul Vs. Deo Chand Sarda*, (2018) 10 SCC 584;**
- b. ***Hasanate Vs. Mahesh*, 2014(2) Mh.L.J.884;** and
- c. ***Chandrakala Krishna Dhole Vs. Bhimrao Dattu Kadam*, (2019) 3 Bom.C.R.382.**

19. On the other hand, Mr. Prafulla Shah supported the impugned orders. He submitted that Hiraben has committed breach of clause 9 of the agreement dated 28.04.1966. Hiraben had pulled down a portion of the wall between the living room and bedroom and had erected a door in that place some time in or

about May or June, 1967. This amounts to construction of a permanent nature. In addition, Hiraben had removed wash basin from the bathroom and installed the same in the passage leading to kitchen. For that purpose, Hiraben had to change the system of drainage. Hiraben had put up the drainage pipeline upto Mori from the passage. For that purpose, she had to dig up a hole for draining out the water into the bathroom. This removal of basin from bathroom to the passage was done without the permission of Vimla. This also amounts to construction of a permanent nature without permission in writing of Vimla. Hiraben has thus rendered herself liable for eviction under Section 13(1)(b) of the Act. Carrying out additions and alterations has also caused waste and damage to the suit property rendering Hiraben liable for eviction under Section 13(1)(a) of the Act read with Section 108(o) of the T.P.Act.

20. Mr. Prafulla Shah submitted that Hiraben committed breach of clauses 9 and 12 of the agreement dated 28.04.1966, and thus, has rendered herself liable for eviction under Section 12(1) of the Act. He has invited my attention to the notices dated 26.06.1967, 20.09.1967 and reply dated 05.09.1967 given by Hiraben to notice dated 26.06.1967 through Advocate Vidyadhar Tilak. In this reply, Hiraben did not come with the case that the work complained of was carried out by Vimla or the same was carried out at the instance of Vimla. He submitted that Hiraben had pulled down part of wall between living room and bedroom and in its place, installed door. In the process, Hiraben had damaged the wall between living room and bedroom. He submitted that installation of door also amounts to construction of permanent nature. He submitted that without filing cross-Petition, Vimla or plaintiffs can support the eviction decree and attack the findings recorded by the Appellate Court against them. He submitted that after considering the evidence on record, the

Courts below have decreed the Suit and therefore, no case is made out for interfering with the impugned orders. He relied upon the following decisions:

- a. ***Haji Suleman Haji Ayub Bhiwandiwalla Vs. Narayan Sadashiv Ogale*, 1982 (84) Bom.L.R. 122;**
- b. ***Sudha Sumant Barve Vs. Ranjana Ramesh Padhye*, Writ Petition No.5202 of 2002 decided on 10.05.2013;**
- c. ***Waingana Bahu-Uddeshiya Vikas Sanstha Vs. Diwakar Maloji Kamble*, 2012 (6) ALL M.R. 701; and**
- d. ***Prafulkumar Damaji Gala Vs. Narayan Govind Gavate*, 2018 (4) Bom.C.R. 523.**

21. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record as also the original record. As noted earlier, Vimla has instituted Suit alleging breach of clauses 9 and 12 of the agreement dated 28.04.1966 and has thus invoked Section 12(1) of the Act. Vimla has alleged that Hiraben has not observed and performed the conditions of tenancy. Vimla has also alleged that Hiraben has pulled down a portion of the wall between the living room and the bed room and has erected a door therein some time in or about May or June 1967. Hiraben had also removed the wash basin from the bath room and installed the same outside the bath room in the passage leading to the kitchen. For that purpose, Hiraben had to change the system of drainage. Hiraben had put up the drainage pipeline upto Mori from the passage. She had to dig up a hole for draining out the water into the bathroom. This removal of basin from bathroom to the passage was done without the permission of Vimla. Thus, Vimla has invoked grounds under Section 13(1)(a) of the Act read with Section 108(o) of the T.P.Act as also Section 13(1)(b) of the Act. As mentioned earlier, the learned trial Judge held that-

- (i) tenancy was created by agreement dated 28.04.1966;

- (ii) tenancy of the defendant was terminated by legal and valid notice;
- (iii) defendant has, without the consent of the plaintiff, made alterations of permanent nature, as alleged;
- (iv) defendant has prevented the plaintiff from taking inspection of the suit premises thereby contravened provisions of Section 108(o) of T.P.Act and those of the Rent Act; and
- (v) defendant has caused waste of the property or committed acts contrary to the provisions of Section 108(o) of the T.P.Act and Sections 13(1)(a) and (b) of the Act.

22. The Appellate Court, while dismissing the Appeal preferred by Hiraben, held thus,

- (I) the additions and alterations complained of by the plaintiff are proved to have been carried out by the defendant that too after the commencement of her tenancy;
- (II) the defendant has committed breach of terms of tenancy agreement thereby rendering herself liable to be evicted from the suit premises;
- (III) the acts complained of by the plaintiff cannot be said to be a work of additions and alterations of permanent nature as contemplated under Section 13(1)(b) of the Act;
- (IV) the plaintiff also failed to prove that defendant has committed acts of waste to the property in dispute.

23. The learned trial Judge has considered issues 4, 5 and 6 from paragraphs 15 to 18. In paragraph 15, the learned trial Judge noted that Hiraben had pulled down the wall to the size of the door and installed door in that portion. The

defendant had also shifted the wash basin from the bath room and placed it outside in the passage leading to the kitchen. For that purpose, Hiraben had to change the system of drainage. Hiraben had put up the drainage pipeline upto Mori from the passage. For that purpose, she had to dig up a hole for draining out the water into the bathroom. These alterations are of permanent nature and in the process, Hiraben had contravened Section 13(1)(a) of the Act and Section 108(o) of the T.P. Act. In paragraph 16, the learned trial Judge dealt with the contention advanced on behalf of Hiraben. Hiraben denied that she had made any additions or alterations in the suit premises or made permanent construction as alleged or otherwise at any time after commencement of tenancy on 01.01.1967. According to her, tearing down of the wall and the creation of a door and the installation of a wash basin was done by or at the instance of Vimla prior to the commencement of tenancy.

24. Without prejudice to this contention, Hiraben contended that such acts, in any case, were of a minor nature and were not contrary to the provisions of the Act or the T.P. Act. In paragraph 16, the learned trial Judge dealt with these pleas and observed that Hiraben herself did not step into the witness box to corroborate the same. No good reason was assigned for not stepping into the witness box. The learned trial Judge referred to the deposition of her son Jitendra, who admitted that Hiraben was taking a fairly active part in briefing the counsel and in the proceedings before the Court. Though defendant's witness Jitendra examined by Hiraben claimed that he was conversant with all facts, his ignorance was exposed in the matter. The evidence of witnesses examined by Hiraben is vague in material particulars and also evasive answers were given to the crucial questions.

25. In paragraph 17, the learned trial Judge noted that the construction made was in accordance with the approved plans, and therefore, occupation certificate was issued. The learned trial Judge, therefore, concluded that the changes or alterations were made by Hiraben subsequent to her induction and without written consent of Vimla. This was clear breach of terms and conditions of the agreement. In paragraph 18, the learned trial Judge answered issues 4 to 7 in favour of Vimla.

26. In so far as the Appellate Court judgment is concerned, the Appellate Court also held that changes, additions and alterations were made by Hiraben. The Appellate Court observed in paragraph 14 that the evidence of plaintiffs' witness is most convincing piece of evidence which suggested that the building in question was constructed as per the approved plans. It is crystal clear that there is absence of inter-connecting door in question or wash basin in the passage in the suit premises as per the approved plan.

27. In paragraph 16, the Appellate Court affirmed the findings recorded by the learned trial Judge as regards additions and alterations. The Appellate Court thereafter proceeded to consider whether the acts complained of are permanent structure. The Appellate Court referred to several decisions. In paragraph 18, the Appellate Court observed that all the decisions referred in paragraph 17 lay down that facts and circumstances in each case are required to be considered for finding out whether any particular structure is a permanent structure within the meaning of Section 13(1)(b) of the Act. In paragraph 19, the Appellate Court proceeded to consider demolishing part of the wall between living room and bedroom and installing door in that place and referred to explanation to Section 13(1)(b). The Appellate Court held that

removal of portion of a wall and fixing door in that place do not amount to construction of permanent nature.

28. In the case of **Sudha Sumant Barve** (*supra*), the learned Single Judge referred to decision in the case of **Dr. C.C. Yi vs. Jankidevi Gupta, 2001 (3) ALL MR 324**, and reproduced paragraph 25 thereof, which is to the following effect:

“25. The second item of construction i.e. removal of wooden doors and replacement thereof by plywood doors; even if considered separately, the result cannot be different. Once the door is fitted to the permanent structure, it becomes part of the immovable property, viz. building. It does not remain a movable item or a distinct item of furniture. Therefore, removal of door or replacement thereof is nothing but a change in the permanent structure. The judicial note can always be taken of the fact that durability of wooden doors is much more than that of the plywood doors. Life of the plywood doors cannot match with that of wooden doors. Thus, this act of tenant has also been prejudicial to the interest of the landlord and has diminished the value and life of the doors and consequently of the suit premises. As such, the act of replacement of the wooden doors with that of plywood doors that too without written permission of the landlord has rightly been treated as an act in violation of Section 13(1)(b) of the Act by both the Courts below.”

29. In that case, wooden doors were replaced by plywood doors and in that context, the learned Single Judge held that it amounted to permanent construction. In view thereof, I do not find any merit in the submission of Mr.Surel Shah that removal of portion of a wall and fixing door does not amount to construction of permanent nature. A perusal of paragraph 25, extracted hereinabove, shows that once the door is fitted to the permanent structure, it becomes part of the immovable property namely, building. It does not remain a movable item or a distinct item of furniture. Therefore, removal of door or replacement thereof is nothing but a change in the permanent

structure. The Courts below have also concurrently held that the additions and alterations have been made by Hiraben without obtaining written consent of Vimla. In view thereof, I find merit in the submission of Mr. Prafulla Shah that the Appellate Court committed error in holding that demolition of part of wall between the living room and bedroom and installation of door in that place does not amount to construction of permanent structure.

30. That apart, the Appellate Court unfortunately did not deal with the other additions and alterations that have been held to be proved, namely, shifting of basin from the bathroom and installing it in the passage leading to the kitchen, changing the system of drainage, putting up up the drainage pipeline upto Mori from the passage, and for all these, digging up a hole for draining out the water into the bathroom.

31. In Special Civil Appeal No.164 of 1968 decided on 25/26.01.1972 by Hon'ble Mr. Justice P. S. Malvankar, the learned Judge therein had laid down three criterion for determining whether a particular structure or work is a permanent structure coming within the mischief of clause (b) of section 13 sub-section (1). The first of that criteria was that the intention of putting up a structure, the mode and degree of annexation to the existing structure and whether such annexation considered from the point of view of the structure during removal smaller or greater damage would be done to the premises. The purposes for which the structure was erected was also considered as a further criteria. Whether the structure was of such a kind that it would last for long and was not intended for the purposes of temporary enjoyment of the premises but was a permanent addition is also a consideration. The third criteria, which was laid down, was the nature of the materials in which the work was carried

out, and lastly, which is also a part of the third criteria the time for which the structure likely to endure.

32. Applying the tests laid down in the above decision to the facts of the present case, it has to be concluded that Vimla has established grounds under Section 13(1)(a) read with Section 108(o) of T.P.Act and also Section 13(1)(b) of the Act.

33. Mr. Surel Shah submitted that Vimla did not file cross-Petition challenging the finding recorded by the Appellate Court. Vimla or the plaintiffs are, therefore, precluded from assailing those findings without filing cross-Petitions. He relied upon the decisions in **Biswajit Sukul** (*supra*) and **Hasanate** (*supra*). In the case of **Banarsi Vs. Ramphal**, 2003 (9) SCC 606, the Apex Court has observed in paragraphs 9 to 11 thus,

“9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in *Sahadu Gangaram Bhagade v. Special Deputy Collector. Ahmednagar and Anr.*, [1971] 1 SCR 146 that the right given to a respondent in an appeal to file cross objection is a right given to the same extent as is a right of appeal to

lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross objection though certain finding may be against him. Appeal and cross-objection both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was well-settled position of law under the unamended CPC.

10. CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

- (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;
- (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;
- (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not

entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.”

34. In view thereof, Vimla or plaintiffs can support the eviction decree without filing cross-Petition. The Appellate Court has also passed eviction decree against Hiraben. Thus, while supporting the eviction decree passed by the Appellate Court, Vimla or plaintiffs can attack the findings recorded by the Appellate Court without filing cross-Petitions. In view thereof, the reliance placed by Mr. Surel Shah on the above decisions does not advance the case of Hiraben. Hence, the Petition fails and the same is dismissed. Rule is discharged. There shall, however, be no order as to costs.

35. At this stage, Mr. Surel Shah orally prays for continuation of interim order for the period of twelve weeks from today. He assures that within two weeks from today, defendants and all adult family members residing in the suit premises will file usual undertaking with advance copy to the other side, incorporating therein that,

(a) they are in possession and nobody else is in possession of the suit

premises;

- (b) they have neither created third party interest nor parted with possession;
- (c) they will hereafter neither create third party interest nor part with possession;
- (d) they will go on paying Rs. 12,000/- per month to the respondents;
- (e) in case they are unable to obtain suitable orders from the higher Court within twelve weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents.

36. In view thereof, notwithstanding dismissal of the Petition, subject to the defendants filing undertaking in the aforesaid terms within two weeks from today, ad-interim order granted earlier shall remain in force for a period of twelve weeks from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within two weeks from today and/or in case defendants commit breach of any of the conditions of the undertaking, interim order shall stand vacated without further reference to the Court. In case, defendants are unable to obtain suitable orders from higher Court within a period of twelve weeks and do not hand over possession of the suit premises to the plaintiffs, the respondents will be at liberty to proceed with the matter in accordance with law. List the Petition for reporting compliance after three weeks.

37. At this stage, Ms Shah submits that petitioners have deposited rent in this Court. The respondents may be permitted to withdraw the amount so deposited.

38. In view thereof, the respondents are permitted to withdraw the amount deposited by the petitioners in this Court unconditionally. Order accordingly.

(R. G. KETKAR, J.)