Brijendra Nath Bhargava and Another

Vs

Harsh Wardhan and Others

Civil Appeal No. 10747 of 1983

(Sabyasachi Mukharji, G. L. Oza JJ)

02.12.1987

JUDGMENT

OZA, J. –

1. This is an appeal filed by the tenant after obtaining leave from this Court against a decree for eviction granted by the trial court and ultimately affirmed in second appeal by the High Court of Rajasthan by its judgment dated August 26, 1983. It appears that the appellants became tenants in 1947 but in 1958 the predecessors-in-title of the respondents one Shri Bhonri Lal, Surender Kumar and Rajinder Kumar purchased the property and thereafter in 1959 they became the tenants of Bhonri Lal and others. It is alleged that originally the rent was Rs. 135 but later on was raised to Rs. 145. The premises in question is a showroom and apparently is a business premises.

2. In the year 1974, Bhonri Lal, Surendra Kumar and Rajinder Kumar filed a suit for eviction against the present appellant in respect of this show room which is situated at M.I. Road, Jaipur, on the ground of bona fide need, material alterations in the premises and default in payment of rent. During the pendency of this suit the present respondent purchased the property from Bhonri Lal and others in 1979. In substance the present respondent Harsh Wardhan Himanshu and Smt. Ritu Kasliwal purchased this property during the pendency of the suit and continued with the suit but the only ground on which eviction was granted and which was pressed before us and also before the High Court was the ground that the tenant present appellant without the permission of the landlord has made material alterations in the premises. The learned judge of the High Court has maintained the finding of the construction of a balcony (dochatti) and maintained the order of eviction on the ground that it is material alteration in the premises. The decree has been passed under Section 13(1)(c) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 which reads as under :

> 13(1)(c) that the tenant has without the permission of the landlord made or permitted to be made any such construction as, in the opinion of the court, has materially altered the premises or is likely to diminish the value thereof;

It is only on this ground that the decree has been passed which has been challenged by the appellant before us.

3. It is contended by learned counsel for the appellant that in the plaint what was alleged by the plaintiff was as stated in para 5 :

Para 5. That the defendants had constructed one dochatti as balcony which is covering good area and is utilizing this dochatti for his business. This work done by defendant is material alternation in

the rented premises and this being without permission of plaintiffs is against the law and on this count the plaintiffs are entitled to get eviction decree for tenanted property.

In the written statement this para 5 after amendment reads thus :

> Firm Oriental Engineering Co. constructed a storey like balcony over the disputed show room in 1958 with the permission of the plaintiff.

4. It was contended by learned counsel that what the courts below have tried to infer on the basis of some inspection note and some affidavit filed at the back of the appellant and on the basis of no other evidence is that it is a structure permanent in nature and that it has been affixed in the wall and that it has also been affixed on the floor; this according to learned counsel, is all based on no evidence at all. It was contended by the learned counsel that the only pleading was that this wooden balcony (dochatti) has been raised by the tenant. It is significant that even this is not alleged in the plaint when this was done whereas in the written statement it was clearly stated that this dochatti was made in 1958. It was further contended that in fact there is not material or evidence to come to the conclusion that this was constructed at what time. It is significant, according to the learned counsel for the appellant, that the two notices which were given before filing of the suit by the predecessors-in-title of the respondent this was not alleged as one of the grounds of eviction and in his own statement in cross-examination what was stated has significantly been omitted from the consideration by the three courts, the trial court, the appellate court and the High Court of Rajasthan. Learned counsel referred to this part of the statement and contended that it is clear that in the notice this was not made as a ground. In this cross-examination he stated that when the tenant assured that it will be removed when he will vacate, he gave up and that was not taken as a ground for eviction in the notice. Apart from it, it was contended that in fact in 1964 a window was opened just to give sufficient light and air to this dochatti or balcony which is alleged to have been constructed by the tenant and for this purpose the expenses were borne by the landlord which is admitted by the predecessors-in-title of the respondent in their own statement and which is not disputed in these proceedings. On the basis of this it was contended that in fact the finding reached by the three courts is not based on evidence. It is also contended that the material evidence has not been looked into at all and that the material which could not be said to be evidence in the case has been looked into to reach this conclusion.

5. It was further contended that apart from this the inference that this is a material alteration is contrary to the principles laid down by this Court in number of decisions. According to the learned counsel, it could not be said to be a construction which materially altered the premises in question. On the basis of the statement of the respondent predecessor-in-title Bhonri Lal in cross-examination, the absence of this being a ground of eviction in the two notices issued by the respondent Bhonri Lal before filing of the suit and the payment of the expenditure incurred for opening a window to provide light to this balcony by the landlord himself are circumstances, according to the learned counsel, which clearly go to show that this dochatti or balcony was constructed with the permission of Bhonri Lal and others who were the predecessors-in-title. It is also clear that for all these years this was present in the show room as is clear from the evidence that it is visible from outside. Therefore it could not be said that the landlord did not notice it and still no objection was raised. Learned counsel for the appellant further contended that the making of the balcony which is the wooden structure supported on wooden pillars and supported on wooden beams could not in any manner be said to be material alteration of the building itself and in support of this contention the learned counsel placed reliance on the decision of this Court in Om Prakash v. Amar Singh (AIR 1987 SC 617 : (1987) 1 SCC 458). It was also contended that the landlord having seen the balcony

constructed and not having raised any objection in so much so that even in the notice he did not raise an objection nor it is made a ground for eviction clearly goes to show that it was with the implied consent of the landlord that this dochatti or balcony was constructed. It is also clear from the circumstances that in order to provide light and air to this balcony in the upper portion a window was made in the show room and the cost of construction of this window was paid by the landlord as is admitted by him. This also goes to show that this balcony or this wooden cabin was constructed or made with the implied consent of the landlord.

6. The statement made by Bhonri Lal in cross-examination clearly shows, according to the learned counsel, that even if any right accrued to him on the ground of this alteration he waived it and for this purpose learned counsel placed reliance on Dawsons Bank Ltd. v. Nippon Menkwa Kabushihi Kaish (Japan Cotton Trading Co. Ltd.) (AIR 1935 PC 79). On the question of waiver, learned counsel for the appellant also referred to certain observations in Maxwell : Interpretation of Statutes and also to certain observations from the American Jurisprudence.

7. Learned counsel for the respondents, on the other hand, referred to the plaint para 5 quoted above and also the written statement para 5 after amendment and contended that on these allegations the courts below came to a finding of fact. However it was not disputed that what construction has been made is a finding of fact but whether it amounts to material alteration or not is undoubtedly a question of law. It was further contended by the learned counsel that as all the three courts have concurrently come to the conclusion on question of fact, it is not open to this Court to reopen that question. It was also contended by learned counsel that the inspection note by the learned trial judge, no doubt, has been relied upon but it is contended that as observed by the learned judge of the High Court it is relied upon only for purposes of appreciating evidence but unfortunately the learned counsel for the respondents himself could not refer to any other evidence except the statement of the tenant the appellant himself and apart from it even the allegations contained in para 5 of the plaint do not clearly made out that how this construction is such which was affixed on the wall and on the basis of which an attempt was made to contend that in fact it could not be removed unless the walls are demolished. This argument and the inferences drawn by the courts below apparently are not based on any evidence at all. The learned counsel contended that the balcony is strongly annexed to the walls with the beams and the structure is 10' x 25' to the entire breadth of the show room and also contended that it could not be removed without damaging the walls and thereby damaging the property itself but unfortunately learned counsel could not refer to any evidence in the case which could suggest these facts which were alleged by the learned counsel during the course of his arguments. Counsel in support of his contentions placed reliance on the decision of this Court in Om Prakash case (AIR 1987 SC 617 : (1987) 1 SCC 458) and also on Babu Manmohan Das Shah v. Bishun Das ((1967) 1 SCR 836 : AIR 1967 SC 643) and it was also contended that question of waiver does not arise, according to the learned counsel, as if the landlord wants not to raise any objection, he could grant a permission to the tenant but in absence of that the question of waiver could not be raised. Learned counsel attempted to contend that Bhonri Lal who filed this suit in 1974 filed the suit on that ground and thereafter it could not be said that he waived the right to file a suit on this ground. Learned counsel did not refer to the statement of Bhonri Lal himself in cross-examination.

8. It was contended that it was in 1972 that the landlord for the first time came to know about the construction of this balcony and in 1947 suit was filed. It was therefore contended that the appeal deserves to be rejected.

9. The first notice given on behalf of Bhonri Lal is through an advocate and in this notice it is clear

that this objection about any construction or material alteration is not at all mentioned. Another notice which is given just a little before the filing of the suit is a notice dated August 13, 1974 and in this notice also there is no mention of any material alteration or construction of the dochatti or balcony. Although in this there is a reference to some damage to the floor of show room which was also made as one of the grounds which later on was not pressed and given up. It is therefore plain that if this dochatti or balcony which is a wooden construction put on was a matter which was without the permission of the landlord and about which the landlord had not consented, he would have made it as a ground for termination of the lease or a ground of eviction in any one of these two notices if not in both. It is very clear that this fact has not at all been alleged in these notices given to the tenant-appellant. In the cross-examination of Bhonri Lal, it is clearly stated when he was asked as to why in the notices which he gave before the filing of the suit this was not made a ground for termination of the lease, he plainly stated

no notice was given for the reason that the defendant had said that when they would vacate the show room they would remove the balcony. On their saying so, I did not have any objection about the balcony. On the eastern side there is a window. I do not know its length and breadth. This is correct that this window was constructed in the year 1964. The cost of construction of the window amounting to Rs. 199.85 has been paid by me to the defendant. The balcony gets light and air through this window.

It is significant as referred to above that in the two notices this was not made as a ground. It is also significant that when this was brought to the notice of Bhonri Lal the landlord who filed this suit originally he gave the above explanation.

10. The present respondent in fact purchased during the pendency of the suit this property and indirectly purchased this litigation. Statement which has been quoted above goes to show that he gave up his objection to the balcony, it is also clear from his evidence that a window which was opened to give light and air to this balcony, the cost of it was also borne by the landlord himself. In the context of this evidence it is significant that even in the plaint it was not clearly stated that this balcony was made in the year 1972 as is now alleged. It is also significant that what is now alleged that this balcony is supported on beams which have been fixed in the walls and pillars which have been fixed in the floor is also not alleged in the plaint at all. It is also not alleged in the plaint as to how this structure which is a wooden structure easily removable according to the defendant-appellant could be said to be a material alteration or as to how it has impaired or damaged or lowered the value of the property of the appellant. It is no doubt true that the section as it stands does not require that in addition to material alteration it should be to lower or reduce the value of the property as was clearly observed by the learned judge of the High Court and on that count there appears to be not much controversy. It is significant that all the three courts neither considered the omission of this allegation in the notices nor the statement made by Bhonri Lal quoted above and discrepancies in pleadings referred to above and have come to conclusions which could not be reached. The only possible conclusion from these facts could be that either this balcony was constructed with the implied consent of the landlord or that after seeing it and understanding and on assurance given by the tenant the landlord decided to waive his objection to it and therefore did not make it as a ground for termination of the lease in his notice before the suit and even in the earlier notice which was given by him if at all there is any doubt it is clear that the landlord waived his right to file a suit on this ground. Unfortunately all the three courts failed to look into these conclusions appearing in evidence and failed to appreciate the matter in this light. On the question of waiver, in Maxwell : Interpretation of Statutes it is observed as under :

> In Stylo Shoes, Ltd. v. Prices Tailors, Ltd. (1960 Ch 396 : (1959) 3 All ER 901) a notice to determine an existing tenancy under the Landlord and Tenant Act, 1954 had not, it was argued, been served "by leaving it for the tenants at their last known place of abode in England" as required by Section 23(1) of the Act. The tenants had in fact received the notice, had intimated to the landlords that they would not be willing to give up possession of the premises, and had issued an originating summons for a new tenancy. On the facts, Wynn-Parry, J. held that the notice had been properly served; but he added that, even if it had not been duly served, the tenants must in the circumstances be taken to have waived any invalidity in the service.

It clearly goes to show that if a party gives up the advantage he could take of a position of law it is not open to him to change and say that he can avail of that ground. In Dawsons Bank Ltd. case (AIR 1935 PC 79) their Lordships were considering the question of waiver as a little different from estoppel and they observed as under :

> On the other hand, waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement on behalf of his principal agrees to waive his principal's rights then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract . . . .

But in the context of the conclusion that we have reached on the basis of circumstances indicated above that it could not be held that the tenant had constructed this dochatti or balcony a wooden piece without the consent express or implied of the landlord, in our opinion, it is not necessary for us to dilate on the question of waiver any further and in this view of the matter we are not referring to the other decisions on the question of waiver.

11. It was contended on behalf of the respondents that the finding about the construction without the consent of the landlord is a finding of fact and therefore could not be gone into in this appeal on leave under Article 136 of the Constitution but it is clear that if the courts below while coming to a conclusion of fact have omitted to consider material pieces of evidence and have drawn inferences without looking into the material pieces of evidence which proved circumstances on the basis of which a contrary inference could be drawn, such findings are not binding on this Court and in this view of the matter therefore in our opinion the conclusion reached by the courts below could not be accepted.

12. The next question which was debated at length by learned counsel for parties is as to whether the said construction of the wooden dochatti or a balcony is a material alteration within the meaning of Section 13(1)(c) of the Act quoted above and in this regard it is undisputed that what has been constructed is a wooden structure which makes in the show room a cabin and on the roof of the cabin a kind of balcony with a wooden staircase from inside the cabin to go to this balcony. Admittedly this all is a wooden structure built on beams and planks inside the show room itself and in order to come to the conclusion whether such a wooden cabin made up inside the show room could be said to be a material alteration or not, we can draw much from Om Prakash case (AIR 1987 SC 617 : (1987) 1 SCC 458) where it was observed : (SCC pp. 462-63, para 5)

The Act does not define either the word 'materially' or the word 'altered'. In the absence of any legislative definition of the aforesaid words it would be useful to refer to the meaning given to these words in dictionaries. Concise Oxford Dictionary defines the word 'alter' as change in character,

position. "Materially" as an adverb means 'important' essentially concerned with matter not with form. In Words and Phrases (Permanent Edition) one of the meanings of the word 'alter' is to make change, to modify, to change, change of a thing from one form and set to another.

The expression "alteration" with reference to building means "'substantial' change, varying, change the form or the nature of the building without destroying its identity". The meaning given to these two words show that the expression 'materially altered' means "a substantial change in the character, form and the structure of the building without destroying its identity". It means that the nature and character of change or alteration of the building must be of essential and important nature. In Babu Manmohan Das Shah v. Bishun Das ((1967) 1 SCR 836 : AIR 1967 SC 643), this Court considering the expression 'material alterations' occurring in Section 3(1)(c) of U.P. (Temporary) Control of Rent and Eviction Act, 1947 observed :

> Without attempting to lay down any general definition as to what material alterations mean, as such a question would depend on the facts and circumstances of each case, the alterations in the present case must mean material alterations as the construction carried out by the respondent had the effect of altering the form and structure of the accommodation.

It is no doubt true that in the last part of this passage quoted above it has been clearly stated that no definition could be drawn of the material alteration but it will have to be decided on the basis of facts and circumstances appearing in each case but the material consideration would be whether the construction carried out by the tenant alters the front show or the structure of the premises and considering this aspect of the law it was further observed : (SCC p. 463, para 6)

In determining the question the court must address itself to the nature, character of the constructions and the extent to which they make changes in the front and structure of the accommodation, having regard to the purpose for which the accommodation may have been let out to the tenant. The legislature intended that only those constructions which bring about substantial change in the front and structure of the building should provide a ground for tenants' eviction, it took care to use the word "materially altered the accommodation". The material alterations contemplate change of substantial nature affecting the form and character of the building. Many a time tenants make minor constructions and alterations for the convenient use of the tenanted accommodation. The legislature does not provide for their eviction instead the construction so made would furnish ground for eviction only when they bring about substantial change in the front and structure of the building. Construction of a chabutra, almirah, opening a window or closing a verandah by temporary structure or replacing of a damaged roof which may be leaking or placing partition in a room or making similar minor alterations for the convenient use of the accommodation do not materially alter the building as in spite of such constructions the front and structure of the building may remain unaffected. The essential element which needs consideration is as to whether the constructions are substantial in nature and they alter the form, front and structure of the accommodation.

Here it has been observed that the essential element which needs consideration as to whether the constructions are substantial in nature and they alter the elevation or the front and the structure of the building itself and it is in the light of this that ultimately in his decision what was constructed has been held not to be material alteration as it was observed : (SCC p. 464, para 7)

The partition wall was made without digging any foundation of the floor of the room nor it touched the ceiling, instead, it was a temporary wall of 6 feet height converting the big hall into two portions

for its convenient use, it could be remove at any time without causing any damage to the building. The partition wall did not make any structural change of substantial character either in the form or structure of the accommodation.

The question as to whether the construction is of a permanent nature or a temporary nature also was considered by this Court in the decision quoted above and it was observed : (SCC pp. 465-66, para 9)

The High Court observed that the fact that a construction is permanent or temporary in nature does not affect the question as to whether the constructions materially alter the accommodation or not. We do not agree with this view. The nature of constructions, whether they are permanent or temporary, is a relevant consideration in determining the question of 'material alteration'. A permanent construction tends to make changes in the accommodation on a permanent basis, while a temporary construction is on temporary basis which do not ordinarily affect the form or structure of the building, as it can easily be removed without causing any damage to the building.

It is thus clear that what is alleged to have been constructed in the present case, in the light of the test laid down by this Court in the decision referred to above, could not be said to be material alteration in the premises in question. In Venkatlal G. Pittie v. M/s. Bright Bros. (Pvt.) Ltd. ((1987) 3 SCC 558) the question was not about material alteration but the question was whether the construction carried out by the tenant were permanent in nature and were such which has diminished the value of the property and further that the construction has been made after encroaching on the land which was not the part of the lease and in that context the question as to whether the structures raised were permanent or temporary have been considered and the nature of the things as appeared in that case apparently is of no avail so far as the case in hand is concerned as it was observed in that case : (SCC p. 560, para 2)

Two questions arise for consideration in these appeals - (i) whether the structure constructed by the tenant in the premises in question amounted to permanent structure leading to the forfeiture of the tenancy of the tenant; (ii) what is the scope and extent of the jurisdiction of the High Court under Article 227 of the Constitution on questions of facts found by the appellate Bench of Small Cause Court.

In Babu Manmohan Das Shah case ((1967) 1 SCR 836 : AIR 1967 SC 643) the question which was before this Court was not as to whether the construction made was such which could be said to be a material alteration but the real question which was raised before the court was whether it is necessary further to hold that this construction diminishes the value of the accommodation although in the section it was material alteration or such construction which diminishes the value of the accommodation used but it was contended that it will amount to 'and' and considering this aspect of the matter in this judgment it was observed :

> As already stated, even if the alterations did not cause any damage to the premises or did not substantially diminish their value the alterations were material alterations and on that basis alone the appellants were entitled to evict the respondent.

It is thus clear that even this judgment is of no assistance so far as the present case is concerned. In the light of the discussions above and in the light of the test laid down by this Court in Om Prakash case (AIR 1987 SC 617 : (1987) 1 SCC 458), it is clear that this construction of the balcony or dochatti which is a wooden structure does not amount to material alteration which could give a

cause of action to the respondent landlord for filing a suit of eviction. No other question was pressed. In the light of the discussions above therefore the appeal has to be allowed. It is therefore allowed. The judgment and decree passed by the courts below are set aside and the suit filed by the respondent is dismissed. In the circumstances of the case parties are directed to bear their own costs so far as this court is concerned.

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