

GUJARAT HIGH COURT

Khureshi Ibrahim Ahmed

Vs.

Ahmed Haji Khanmahomad

Second Appeal No. 179 of 1962, from order of Asst. J., Jamnagar, in Civil Reg. Appeal No. 57 of 1961.

(P.N. Bhagwati and J.B. Mehta, JJ.)

19.06.1964

JUDGMENT

P.N. Bhagwati, J.

1. The short question which arises in this Second Appeal is as to what is a permanent structure Within the meaning of Section 13(1)(b) of the saurashtra Rent Control Act, 1951. The same expression, we find, has been used also in Section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates control Act, 1947, and the question as to what is the true connotation of that expression is, therefore, a question of some importance. In order to appreciate how the question has arisen, it is necessary to state briefly the facts giving rise to this Second Appeal.

2. One Gulamhussein Haji Dada was at all material times the owner of a piece of land situate in Jamnagar. There was an Ota i.e., a raised platform like structure on the piece of land as also a Fall in it. The piece of land together with the Ota and fall will hereafter be referred to by us as the suit premises. Gulamhussein Haji Dada was residing most of the time in Burma and one Nurmahmed was, therefore, looking after the suit premises on behalf of Gulamhussein Haji Dada. Sometime in 1952-53, the suit premises were let out to the defendant at the rent of Rs. 6/- per month. Soon after taking the suit premises on rent, the defendant erected three rooms and a cattle shed with a left over it on the suit premises. According to the defendant these structures were erected by him with the express consent of Nurmahmed and such express consent was given by Nurmahmed at the time when the suit premises were let out to the defendant. The consent relied on by the defendant was, however, merely an oral consent and not a written consent. The defendant continued as a tenant of the suit premises after the erection of these structures and regularly paid the rent of Rs. 6/- per month, which was accepted on behalf or Gulamhussein Haji Dada. Gulamhussein Haji Dada came down to Jamnagar on six or seven occasions after the suit premises were let out to the defendant and the defendant had erected the

said structures. The house in which Gulamhussein Haji Dada resided during his visits to Jamnagar was adjoining the suit premises with only a hedge dividing the said house from the suit premises and Gulamhussein Haji Dada, therefore, knew that the defendant had erected the said structures. Gulamhussein Haji Dada, however, did not at any time raise any objection to the erection of the said structures by the defendant nor did he take any steps for terminating the tenancy of the defendant and, evicting him from the suit premises. This stage of affairs continued until 15th August 1960 when Gulamhussein Haji Dada gave a notice terminating the tenancy of the defendant with effect from 30th September 1960. Notwithstanding the termination of the tenancy the defendant did not hand over possession of the suit premises to Gulamhussein Haji Dada. The plaintiff who was looking after the suit premises on behalf of Gulamhussein Haji Dada and was as such the landlord within the meaning of the definition of that term contained in the Saurashtra Rent Control Act, 1951, thereupon filed a suit for recovering possession of the suit premises from the defendant. There were three grounds on which possession was sought by the plaintiff. They were : (1) that the defendant had changed the user of the suit premises by using the suit premises for the purpose of residence though they were taken for the purpose of tethering cattle; (2) that the defendant had sub-let the suit premises to his elder brother; and (3) that the defendant had erected the said structures which were permanent structures without the written consent of Gulamhussein Haji Dada. All these three grounds were denied by the defendant in his written statement. The defendant contended that he had taken the suit premises on rent for the purpose of using them not only for the purpose of tethering cattle but also for the purpose of residence and that there was accordingly no question of change of user which would entitle the plaintiff to evict the defendant. The defendant also contended that the said structures were erected by the defendant with the express consent of Nurmahmed and that in any event Gulamhussein Haji Dada had seen the said structures several times when he came down to Jamnagar and had not raised any objection to the same and there was, therefore, acquiescence or implied consent on the part of Gulamhussein Haji Dada. The subletting alleged by the plaintiff was also disputed by the defendant. The defendant also raised a question as regards the validity of the notice to quit. On these contentions the defendant submitted that the plaintiff was not entitled to recover possession of the suit premises from the defendant.

3. On the pleadings of the parties various issues were raised by the learned trial Judge. Issue No. 2 brought out the controversy between the parties in regard to the, question whether any permanent structures were erected by the defendant and, if so, whether the defendant was liable to be evicted. The question as regards subletting and change of user was brought out in issue No. 3 and issue No. 4 related to the question whether even if any permanent structures were erected by the defendant the right of the plaintiff to recover possession of the suit premises on that ground was barred by reason of acquiescence or implied consent. There was also an issue as regards the validity of the notice. At the hearing of the suit the only evidence led on behalf of the plaintiff was that of himself. As against the evidence of the plaintiff the defendant led the evidence of himself and Nurmahmed. On this evidence the learned trial Judge held that the said structures erected by the defendant were not permanent structures and the plaintiff was, therefore,

not entitled to recover possession from the defendant on the ground that the defendant had erected permanent structures on, the suit premises without the written consent of the plaintiff. On this view the learned trial Judge came to the conclusion that there was no question, of acquiescence or implied consent and the issue as regards acquiescence and implied consent was, therefore, answered against the defendant. The learned trial Judge then proceeded to consider whether the defendant had sublet the suit premises and on the evidence he came to the conclusion that subletting was not proved. The change of user of the suit premises was also held not established by the learned trial Judge. The question of validity of the notice was also considered by the learned trial Judge and he came to the conclusion that the notice was valid. Since in his view no ground was made out by the plaintiff for recovering possession of the suit premises from the defendant the learned trial Judge dismissed the suit with costs.

4. The plaintiff thereupon preferred. an appeal in the District Court, Jamnagar. The learned Assistant Judge who heard the appeal reached the conclusion that it was not established on the evidence that the defendant had sublet the suit premises and the ground of subletting could not, therefore, avail the plaintiff. On the question whether the defendant was using the suit premises for as purpose other than that for which they were leased, the learned trial Judge came to the conclusion that the suit premises were let out to the defendant only for the purpose of tethering cattle and that the defendant had thereafter erected the said structures and started using them for the-purpose of residence, but this was done by the defendant with the consent of Nurmahmed and in any event Gulamhussein Haji Dada had acquiesced in this user by the defendant. The learned Assistant Judge accordingly held that the plaintiff was not entitled to take possession of the suit premises from the defendant on the ground of change of user. The learned Assistant Judge then considered the-question whether any permanent structures were-erected by the defendant without the written consent of Gulamhussein Haji Dada. The learned Assistant Judge examined this question in both its branches. The first was whether the said structures-erected by the defendant could be said to be permanent structures and on this question the learned Assistant Judge came to the conclusion, after applying certain tests formulated at page 223 of Mr. Dalal's book on Bombay Rent Act, that the said structures were permanent structures. The learned Assistant Judge then considered the second branch o? the question, namely, whether the erection of the Raid structures was without the written consent of Gulamhussein Haji Dada and since admittedly no written consent of Gulamhussein Haji Dada was-taken by the defendant for erecting the said structures the learned Assistant Judge held that the ground specified in Section 13(1)(b) of the Saurashtra Rent Control Act, 1951, was made out by the plaintiff. It was contended on behalf of the defendant that since oral consent was given by Nurmahmed and in any event there was acquiescence or implied consent on the part of Gulamhussein-Haji Dada, the defendant was not liable to be evicted under Section 13(1)(b) even if the said structures were erected by him without the written consent of Gulamhussein Haji Dada. This contention was negated by the learned Assistant Judge who took the view that once it was established that the defendant had erected permanent structures on the suit premises without the written consent of Gulamhussein Haji Dada, the plaintiff was entitled to recover possession of the suit premises

from the defendant under Section 13(1)(b). The learned Assistant Judge accordingly allowed the appeal, set aside the decree passed by the learned trial Judge and passed a decree for eviction against the defendant. The defendant thereupon preferred the present Second Appeal in this Court. The Second Appeal originally came up for hearing before M. J. Mody, J., and he referred it for decision to a Division Bench of this Court.

5. Now one thing is clear, namely, that three rooms and a cattle shed with a loft over it were erected by the defendant on the suit premises and this was done by the defendant without the written consent of Gulamhussein Haji Dada. The plaintiff contended that the said structures erected by the defendant were permanent structures and the case, therefore, fell within the terms of Section 13(1)(b). This position was disputed by the defendant who contended that the said structures were not permanent structures and that the terms of Section 13(1)(b) were, therefore, not satisfied. The main question which, therefore, arises for consideration is whether the said structures could be said to be permanent structures within the meaning of Section 13(1)(b). The determination of this question depends on the true connotation of the expression "permanent structure" in Section 13(1)(b). What is it that this expression exactly signifies? Does it mean a structure which is intended by the tenant to be put to use so long as he continues as a tenant irrespective of the nature of the structure and irrespective of the materials of which it is made or does it mean a structure which is a lasting structure and in which there is an element of permanence quite irrespective of the use intended to be made of it by the tenant. Mr. Mankad, learned advocate appearing on behalf of the plaintiff, contended that a permanent structure is one which is erected by the tenant not for a temporary use but for his use so long as he is a tenant and that the nature or character of the structure is quite irrelevant to the determination of this question. Mr. Joshi, appearing on behalf of the defendant, on the other hand contended that the test which is required to be applied for the purpose of determining whether a structure is a permanent structure is an objective test dependent not on the intention of the tenant as regards the length of time for which he wants to make use of the structure but on the nature of the structure and the character of the materials of which it is made. Now in order to decide which of these two rival contentions is correct. It is necessary first to examine the reason behind the enactment of Section 13(1)(b). Section 108(h) of the Transfer of Property Act entitles the tenant, on the determination of the tenancy, to remove, at any time whilst he is in possession of the premises, all things which he has attached to the earth, it would, therefore, follow that even if the tenant has erected any permanent structures, he would be entitled to remove them on the determination of the tenancy. Of course in doing so there would be an obligation on him to see that the premises are left in the same condition in which he received them but even so some amount of damage might in all probability be caused to the premises and if that happens, the only remedy of the landlord would be a claim for damages which, if not conceded, may have to be litigated in a Court of Law. Moreover the right to enjoy possession of the premises cannot include the right to erect permanent structures which would not be easily removable and the removal of which might injuriously affect the premises. The erection of permanent structures would also alter the character of enjoyment of the premises. The legislature, therefore, provided that if the tenant

erects permanent structures on the premises without the written consent of the landlord, the landlord should be entitled to recover possession of the premises from the tenant. If this reason behind the enactment of Section 13(1)(b) is borne in mind, it is not really difficult to arrive at a true meaning of the expression "permanent structure" in Section 13(1)(b), if the construction contended for by Mr. Mankad were correct, it is difficult to see why the Legislature should have made the erection of permanent structures on the premises by the tenant a ground for eviction at all. We do not see what difference could it make to the landlord whether the structure erected by the tenant was intended by the tenant to be used for a temporary period or for such period as he might continue in possession as a tenant. But the nature of the structure erected by the tenant on the premises would certainly be a matter of concern to the landlord, if the structure erected is of a permanent character in the sense that it is so constructed as to be lasting in duration, that might injuriously affect the premises and would also alter the character of enjoyment of the premises and would consequently affect the landlord and the Legislature, therefore, provided that if such a structure is erected by the tenant without the written consent of the landlord, the landlord should have the right to recover possession, of the premises. It is, therefore, clear that the structure in order to be a permanent structure within the meaning of the Section must have an element of permanence in it. It must be intended to be a lasting structure and that would depend on the nature of the 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 is erected and not on the basis of how long the tenant intended to make use of the structure. As a matter of fact 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 is thus an objective test and not a subjective one and once it is shown that the structure erected by the tenant is 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 he erected it for use for only a temporary period and it is, therefore, a temporary structure.

6. Before we part with this point we must refer to certain observations in Mr. Dalal's book on the Bombay rent Act on which considerable reliance was placed by Mr. Mankad. They are the same observations which were referred to by the learned Assistant Judge in his Judgment but we find that these observations do not help us in the determination of the question as to what is a permanent structure, because these observations are founded upon cases relating to the question as to what is a fixture and when can a fixture be said to be so attached as to form part of the demised premises. The cases cited by Mr. Dalal as authorities for these observations are all cases relating to the question as to who becomes the owner of the fixtures on the termination of the tenancy, whether the landlord or the tenant, and for that purpose the Court had to decide in those cases whether the fixtures became part of the demised premises or were put up merely for the purpose of enjoyment of the premises by the tenant. These observations do not touch the question as to what is a permanent structure within the meaning of Section 13(1)(b) and nothing that is stated in these observations in any way affects the validity of the test which we have

discussed above.

7. If this test is applied, it is clear that the structures erected by the defendant in the present case were not permanent structures. The defendant stated in his evidence that the said structures were made of bamboos and Iron sheets and this statement of the defendant was not challenged in cross-examination. Nurmahmad also described the said structures as "Chhapras" which would clearly indicate that they were not permanent structures. It is difficult to see how structures made of bamboos and iron sheets can be said to be permanent structures. There is no element of permanence in such structures and by their very nature they are temporary structures. We are, therefore, of the view that the structures erected by the defendant were not permanent structures and one of the necessary ingredients for the applicability of Section 13(1)(b) was consequently not fulfilled, it was contended before us by Mr. Joshi on behalf of the defendant that even though no written consent of Gulamhussein Haji Dada was obtained by the defendant for erecting the said structures, the plaintiff was not yet entitled to recover possession of the suit premises from the defendant since the right to recover possession of the suit premises under Section 13(1)(b) was waived by the plaintiff by reason of the express consent given by Nurmahmad at the time of giving the suit premises on rent as also by reason of acquiescence or implied consent on the part of Gulamhussein Haji Dada. But in the view we have taken as regards the nature of the structures erected by the defendant, it is not necessary for us to consider this contention of Mr. Joshi. Whatever be the validity of this contention it is clear that the structures erected by the defendant not being permanent structures the plaintiff could not claim to recover possession of the suit premises from the defendant under Section 13(1)(b).

8. Mr. Mankad made an attempt to persuade us to send the matter back on the question whether the structures erected by the defendant were permanent structures but the attempt was futile. He urged that the question as regards the nature of the structures erected by the defendant was not raised before the learned trial Judge and the attention of the parties was not focussed upon that question. at the hearing of the suit before the learned trial Judge and, therefore, if this question was allowed to be raised, the matter should be remanded to the learned trial Judge so that the parties may have an opportunity of leading such evidence as they like on this question. The contention is, however, not well founded and the premise on which it is based is not correct. If we turn to the judgment of the learned trial Judge, we find that the question whether the structures erected by the defendant were permanent structures was very much before the learned trial Judge and the learned trial Judge, on a consideration of the evidence, came to the conclusion that the said structures were not permanent structures. It is of course true that an issue in specific terms, whether the structures erected by the defendant were permanent structures or not, was not framed by the learned trial Judge, but the ground relied on by the plaintiff being the ground under Section 13(1)(b) the parties very well knew that unless the structures were shown to be permanent structures, the plaintiff could not recover possession of the suit premises from the defendant. The question whether the structures erected by the defendant were permanent structures or not was, therefore, agitated before the learned trial Judge and the learned trial Judge

gave a finding on that question. It is, therefore, not correct to say that the question as regards the nature of the structures erected by the defendant was not raised before the learned trial Judge. Even at the hearing of the appeal before the learned Assistant Judge, we find that this question was argued and the learned Assistant Judge actually devoted two pages in his judgment to this question. There is, therefore, no reason why the matter should be remanded to the learned trial Judge for enabling the parties to lead any further Evidence on the question whether the structures erected by the defendant were permanent or not.

9. Mr. Mankad then contended that in any event the findings of the learned Assistant Judge as regards subletting and change of user were not. Justified by the evidence on record. But it must be remembered that this is a Second Appeal and we cannot, therefore, permit Mr. Mankad to challenge these findings of the learned Assistant Judge which are findings of fact. We may, however, point out that we have gone through the evidence on record and we are of the view that these findings recorded by the learned Assistant Judge were fully Justified and even if we were to reappraise the evidence, we would have come to the same conclusion.

10. The last contention raised by Mr. Mankad was a contention of despair and it must straightway be rejected. He urged that we had no jurisdiction to hear this Second Appeal because the learned Judge who referred this Second Appeal to a Division Bench had no power to do so. The ground on which this contention was based was that a reference of a Second Appeal by a single Judge to a Division Bench would take away the vested right of the litigant to prefer a Letters Patent Appeal and this was not permissible; but this ground is not well-founded. We cannot accept the proposition that any litigant has a vested right to prefer a Letters Patent Appeal. A Letters Patent Appeal can be preferred by a litigant against a decision of a single Judge in second Appeal only if the learned Judge who decides the Second Appeal permits him to do so by giving him the necessary leave. No litigant can, therefore, be said to have a vested right to prefer a Letters Patent Appeal, and the contention based on the hypothesis that there is such vested right in a litigant must, therefore, be rejected.

11. This being the position we allow the appeal, set aside the decree passed by the learned Assistant Judge and restore the decree passed by the learned trial Judge. There will be no order as to costs of this Appeal.

Appeal allowed.