**GUJARAT HIGH COURT**

Ramji Virji

Vs.

Kadarbhai Esufali

Second Appeal No. 60 of 1965

(J.B. Mehta, J.)

25.01.1971

**JUDGMENT**

**J.B. Mehta, J.**

1. The deceased defendant's heirs challenge in this appeal the eviction decree passed by the lower appellate Court on the ground that the defendant-tenant had without the landlord's consent in writing erected on the premises structures of permanent nature and was, therefore, dis-entitled from getting any protection under the Rent Act, in view of Section 13(1)(b) of the Saurashtra Rent Control Act, 1951.

2. The test for determination as to what is a permanent structure has now been evolved by the decision of the Division Bench consisting of Bhagwati, J. as he then was and myself in VI G.L.R. 27. While interpreting the said section in *Ibrahim v. Haji Khanmahomad*[1], Bhagwati, J. speaking for the Division Bench in terms pointed out that considering the scheme of Section 108(h) of the Transfer of Property Act which entitled 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 was obvious that when the Transfer of Property Act created this prohibition under Section 108(q), it contemplated permanent structures which would not be easily removable and the removal of which might injuriously affect the premises. The right to enjoy possession of the premises cannot include the right to erect permanent structures as they would also alter the character of the premises. it was therefore made a ground of eviction. That is why on p. 32 it was pointed out that while judging the permanent character of the structure what was material was 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 the question how long the tenant intended to make use of the structure. The Legislature contemplated an objective test and once it is shown that structure created 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. Therefore, to that extent, the objective test would prevail over the subjective intention of the tenant in that the structure which fulfils the objective test by having a permanent element would not cease to be a permanent structure merely because of the intention of the tenant, otherwise this objective

[1] VI GLR 27

test would have to be applied keeping in mind the intention of the tenant that he was putting a structure intended to be of a lasting character. That is why the bamboo and the iron sheets which were put up in that case on the open land were the nature of the material used even when two rooms were created were held to be not permanent structures so as to deprive the tenant of the protection under Section 13(1)(a). In *Surya Properties (Pr.) Ltd. v. Bimalendu Nath*[2], The Special Bench had also considered this question by holding that whether a particular construction is a permanent structure or not for the purpose of clause (p) of Section 108 T.P. Act depends on the facts of each case and no hard and fast rule can be laid down with regard to this matter. On p. 14 Mookerjee, J. in terms pointed out that what would be relevant would be the nature of the structure or construction in question and the intention with which it is made, and, almost in every case, they would be of prime importance, the situs, the mode of annexation and the surrounding circumstances being all appropriate matters for consideration on the above two basic and usually determinant elements. Therefore, as per the test laid down by the Division Bench the permanent nature of the structure would have to be found out by looking to the nature of the construction by applying the objective test where the intention of the tenant would also be a relevant factor whether he intended to put up a lasting structure by looking to the very nature of the construction, the materials used, the mode of annexation, the situs, and the removability of the structure when taken as a whole because of its loose annexation to the main premises. In the present case, the Commissioner's report at Ex. 12 shows that the dimensions of the room in which the Meda is constructed are 13'-3" x. 13'-2". The height of the Meda is 8'-1" and width thereof 4'-8 - 1/2". Meda has been constructed by fixing four pillars with the walls by means of nails, and putting planks over those pillars. Around one of the pillars, there is a plaster of cement. The gap between the planks rest on the four pillars and the ceiling is filled with planks on both the sides and a door is set up on the front side. The entire structure was a wooden structure which is admittedly resting on the four pillars which are also not embedded in the floor. The floor may be plastered by the cement but the whole annexation is so loose that this wooden structure would be easily removable. Looking to the nature of the main construction, this loft from the nature of materials used and the mode in which it was annexed to the main construction clearly pointed out that this was not a permanent structure. That is why even the plaintiff's carpenter, witness Jagjivan Kurji, Ex. 25, had to admit that this loft could be removed at any time. Therefore, the entire structure is an easily removable wooden structure which could never fall within the definition of a lasting structure so as to offend the provisions of Section 13(1)(b) of the Act. The lower appellate Court was entirely influenced by the fact that the Commissioner's report mentioned that there were rings for the swing and a swing of such weight could not remain on such a temporary structure. The Commissioner's report does not say whether there was actually a

swing there and what was the weight of the swing. The Commissioner's report only discloses that there were rings for the swing and the arrangement for fixing a tube light. Therefore, from this one cannot jump to the conclusion that this was a permanent structure ignoring the aforesaid test. The second offending construction was covering a part of the balcony 8' x 2'-10" by a bath-room 3'-7' x 2'-10". There is also no dispute that the bath-room is also constructed with sheets of cement. It is entirely a wooden frame structure. Only the floor of the bath-room is 3/4" higher than the other part of the floor in the balcony. The original drain passage of the hole for discharge of water has now been used closed because the floor was somewhat

[2] AIR 1964 Cal 1

raised in the bath-room and a new drain has been put up for discharge of water by means of a pipe whose diameter is 3". The pipe reaches upto the ground by the side of the wall. It is true that in the adjoining blocks there is no bath-room in the balcony. Such a bath-room, which is purely a wooden structure which could be easily removed, could never be said to be a permanent structure. Even the plaintiff's carpenter Jagjivan admitted that no part of the bath-room had been inserted in the wall. Therefore, this is also not permanent addition to the main building at all and would not satisfy the objective test.

3. Mr. Shah vehemently argued that this is a pure finding of fact. Mr. Shah ignores fact that the principles were for the first time settled by the aforesaid decision of the Division Bench and the lower appellate Court had not the benefit of this decision. The test for determination as to what is a permanent structure has now been evolved. This test was not applied by the lower appellate Court and, therefore, this finding of the mixed question of law and fact could be considered in the light of the settled legal position decision by this Court even in this appeal.

4. Mr. Shah next argued that as some plaster had been used for embedding one of the pillars in the floor, the construction had become a permanent structure and it was structure which would last till the tenant continued in the premises. Mr. Shah argued that a balcony portion is intended to be kept open and, if such a portion was closed by a bath-room, the tenant was changing the entire character and enjoyment of the property. Even the flooring had been changed in the bath-room and the whole of the drain had been closed and a new pipe had been put up. All these constructions were clearly permanent structures, which were injurious to the property and changed the very character and enjoyment of the property and therefore they must be held to be permanent structures, even as per the decision of the Division Bench. In this reasoning, Mr. Shah ignores the fact that the nature of the construction itself is a temporary structure looking to the materials used and the loose manner in which it was annexed. Besides, it could never be said that there was a change in the character and enjoyment because a part of the balcony portion was closed by a wooden partition so that it could serve as a bath-room. The tenant was making a reasonable use as residential premises and was not making any material alteration at all except for getting the ordinary amenities of a bath-room and the loft for storing mattresses, etc. Such wooden frame structures, which are of the kind of fixtures, which could be easily removed as one whole unit and are not of the nature permanent additions could never offend the provisions of

Section 13(1)(b).

5. In any event, Mr. Zaveri was also right in relying upon the Explanation, which has now been introduced by the Gujarat Act No. 57 of 1963 from December 13, 1963 which provides as under :-

> "*Explanation* - for the purposes of clause (b) no permanent structure shall be deemed to be erected on any premises merely by reason of the construction of a partition wall, door or latice work or the filling of kitchen-stand or such other alterations made in the premises as can be removed without serious damage to the premises".

By this explanation, the Legislature has created a fiction that for the purposes of clause (b) of Section 13(1) the alterations which could be removed without serious damage to the premises and which are of the same kind as construction of a partition wall, door or latice work should not be deemed to be permanent structure. Mr. Shah vehemently argued that the Saurashrtra Act of 1951 was repealded by this Gujarat Act 57 of 1968 and at that time the repealing Section 51 in terms provided in the second proviso that any such investigation, legal proceeding or remedy may be continued, instituted or enforced and any such penalty, forfeiture and punishment may be imposed, as if the aforesaid law had not been repleaded. It should be kept in mind that by this amendment, Section (2A) was added extending Part II of the Gujarat Rent Act to those areas to the Saurashtra area of the State of Gujarat to which Part II of the Saurashtra Rent Control Act, 1951, extended immediately before this Gujarat amendment on December 31, 1963. Section 3 of the Act provided in the proviso that in the areas to which the Gujarat Act was extended by this amendment in 1963, the Gujarat Act shall come into force on the date on which this amending Act came into force, namely, December 13, 1963. Therefore, it is clear that the Legislature has by this amendment, sought to make the law uniform in the entire Gujarat State. Therefore, during the pendency of this appeal, the Gujarat Act has now been extended by extending the Act throughout the Gujarat territory. So far as Section 13(1)(b) is concerned, the amendment is clearly declaratory in nature in view of the Supreme Court decision in *Chaman Singh and another v. Srimati Jaikaur*[3], Their Lordships stated that it is well settled that if a statute is curative or merely declares the previous law retro-active operation would be more rightly ascribed to it than the legislation which may prejudicially affect past rights and transaction. The whole legislation is for protecting the tenant by putting fetters on the landlord's rights. That is why the Explanation enacts a fiction by adding a clarification that the alterations as specified by the Legislature which are easily removable without serious damage to the premises would not fall within the meaning of permanent structure under Section 13(1)(b). The Legislature clearly intended to give retrospective effect to this provision so that whenever after the amendment an occasion arose to construe this section, it would be read in the light of this fiction. In the entire State this amendment was retrospective so that it would protect such a tenant whose alteration came within the scope of the Explanation, because when the decree is being passed, a Court would not deem such an alteration as a permanent structure ignoring this law. There being a

contrary intention necessarily implied in this provision, the pending litigation would easily be affected by this.

6. Mr. Shah next argued that, in any event, the Explanation would have to be read *Noscuntur-a-socisis* or on its corollary on the doctrine of *Ejusdem Generis*. Therefore, the expression such other alterations must be only different species of the same genus or the type of alterations mentioned in the Explanation, namely, a partition wall, door, latice work, filling of kitchen-stand, etc. They would give colour to the entire genus of these alterations which could be removed without serious damage to the premises. This construction of the Explanation was rightly accepted by our brother M.U. Shah, J., in *Ishwarbhai v. Parshottam*[4], at p. 673 by holding that the Explanation has reference to minor alterations in an existing structure for more beneficial enjoyment thereof and not major alterations. This limited construction must be implied because of the expression "such other alterations". Therefore, the Explanation, only provided that construction of a partition wall, door or latice work or the filling of kitchen-stand or such other minor alterations made in the premises as can be removed without serious damage to the

[3]1969(2) SCC 129 at p. 433

[4] VIII GLR 665

premises shall not be considered to be a permanent structure. In *Manmohan Das Shah v. Bisun Das*[5], at p. 646 the context was of U.P. (Temporary) Control of Rent and Eviction Act where the relevant ground of eviction was the construction by the tenant without the landlord's written permission which materially altered the accommodation or which was likely to diminish its value. Their Lordships stated the expression 'material alterations' in its ordinary meaning would mean important alterations, such as those which materially or substantially change the front of the structure of the premises. Their Lordships considered certain English decisions and approved the construction as laid down in *Bickmore v. Dimmer*[6], where a distinction was made between alterations intended for the proper user of leased premises and material alterations observing that some limitation must be put on the word "alteration" and that it could not be applied to a change in the wall paper of a room or to the putting up of a gas-bracket, or the fixing of an electric bell, though in fixing it some holes might have to be made in the wall and the covenant should be limited to something which alters the form or structure of the building. In that context, their Lordships observed that lowering the level of the ground floor by about 13 ft. by excavating the earth therefrom and putting up a new floor, the consequent lowering of the front door and putting up instead a large door lowering correspondingly the height of the Chabutra so as to bring it on the level of the new door-step, the lowering of the base of the staircase entailing the addition of new steps thereto and cutting the plinth hand on which the door originally rested so as to bring the entrance to the level of the new floor are clearly structural alterations which are such as to give a new face to the form and structure of the premises. On a parity of reasoning in the present case also the Explanation would have to be read as taking within its scope those minor alternations which are of no importance and which would not materially alter the premises. I would therefore, agree with the interpretation of our brother,

M.U. Shah, J., as regards the Explanation. The entire genus is not of material alterations but of only those minor alterations of the like nature like the partition wall, a door or latice work or to filling of kitchen-stand which could be removed without serious damage to the landlord's premises. The test of easy removability has now, therefore, received statutory recognition, while interpreting as to what is a permanent structure which would deprive a tenant of the statutory protection. The Legislature has expressly made this declaration, by way of a creative measure, so as to avoid any ambiguity as to the proper test to be applied for finding out what is a permanent structure, which deprives the tenant of his statutory protection. Such a curative or declaratory measure would always have a retrospective effect in the limited sense so as to be applicable whenever a question arose before the Court. In the face of this statutory provision no Court could now decree a landlord's claim, if the alteration is not a material alteration and which is easily removable without serious damage to the landlord's premises. In that view of the matter, Mr. Zaveri's alternative consideration would also succeed. In the present case, all the alterations like the loft, the wooden bath-room frame and putting up a new drain for that purpose are only minor alterations which are easily removable as one whole without any serious damage whatsoever to the premises. Even the plaintiff's carpenter admitted this fact. Therefore, even if such a construction was considered, by any stretch of imagination as falling within the definition of a permanent structure, the explanation would clearly save the tenant

[5] AIR 1967 SC 643

[6] 1903-1 Ch. 158

because in any event it was such a minor alteration which was easily removable without any serious damage to the landlord's premises. Therefore, the lower appellate Court has wrongly decreed the plaintiff's suit. In the result this appeal must be allowed. Accordingly, I allow this appeal and restore the trial Court's decree in so far as it dismissed the plaintiff's suit for eviction. There shall be no order as to costs in the circumstances of the case. Order accordingly.

7. Mr. Shah next argued that, in any event, Civil Application No. 1530 of 1969 should be allowed, because a new cause of action has arisen by reason of the conduct of the tenant, who had let out the whole or a part of the premises and transferred his interest and had not used the premises without any reasonable cause for a continuous period of six months immediately proceeding the date of the suit and also on the ground that the tenant had acquired vacant possession of a suitable residence. At this stage, Mr. Shah could not claim any amendment of the plaint. If a new cause of action has arisen nothing prevents the landlord from filing a fresh suit. That would not be a ground to allow this amendment at this stage by permitting this new question of law and facts, which would require further pleadings and evidence. In the result, Civil application No. 1530 of 1969 is also rejected. There should be no order as to costs.

Appeal allowed.