

BOMBAY HIGH COURT

Kasturchand Panachand

Vs.

Yeshwant Vinayak

Writ Petn. No. 1879 of 1979

(Jahagirdar, J.)

25.03.1980

ORDER

Jahagirdar, J.

1. The facts involved in this petition are very few though the scope of the inquiry has been widened by the considerable industry which Shri Ajit P. Shah, appearing for the first petitioner, has brought to bear on this matter. The first petitioner was a tenant of a room measuring 19' x 14' and situated in building No. 427/428A at Budhwar Peth in Pune City. He came into possession of the suit room, hereinafter referred to as "the suit premises", pursuant to a rent note executed on 1st of October 1957. The said rent note has specifically mentioned that the first petitioner, hereinafter referred to for brevity's sake as "the petitioner", was to conduct the business of milk in the suit premises. The second petitioner is the son of the first petitioner while the third petitioner is the firm of the first two petitioners. Respondents Nos. 1 and 2 are the owners of the building in which the suit premises are situated and, therefore, the landlords of the petitioners.

2. Having noticed that the petitioners were about to use the suit premises for the purpose of workshop by installing heavy machinery in the same, the respondent sent a notice to them on 13th of March 1975 terminating the tenancy of the petitioner. By the said notice the petitioner was also called upon not to use the suit premises for the purpose contemplated by him. Despite this it was found by the respondents that the petitioner installed the machinery and started using the suit premises for a purpose other than the one for which it has been originally let out. The respondents, therefore, filed a suit, being Civil Suit No. 2947 of 1976 in the Court of Small Causes at Pune on 20th of October 1976.

3. In the said suit the second and the third petitioners were added as defendants Nos. 2 and 3 on the ground that the first petitioner had illegally sublet the suit premises in their favor. Though in the trial Court several grounds were urged in support of the prayer for eviction and the trial Court

itself accepted some of them for passing the decree for eviction, ultimately the ground which remains for consideration by me is the ground which is mentioned in Section 13(1)(a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, hereinafter referred to as "the Bombay Rent Act", read with Section 108(o) of the Transfer of Property Act. It means that the petitioner has used the suit premises for a purpose other than the one for which it was leased. From the discussion in the judgment of the appeal Court below I also notice that the decree is further based upon a finding that the petitioner has not used the suit premises without reasonable cause for the purpose for which they were let out for a continuous period of 6 months immediately preceding the date of the suit. These two grounds, namely using the suit premises for a purpose for which they were not let out as mentioned in Section 108(o) of the Transfer of Property Act, and not using the suite premises for a period of 6 months or more immediately preceding the date of the suit for the purpose for which they were let out and that too without a reasonable cause are apparently overlapping and Shri Shah has justifiably advanced some arguments upon the same.

4. The learned trial judge by his judgment and order dated 9th of June 1978 decreed the suit for possession. He also passed certain consequential orders. This decree of the trial Court was challenged by all the three petitioners in Civil Appeal No. 298 of 1978 which was heard and dismissed by the learned Extra joint Judge of Pune by his judgement and order dated 15th of July 1978. I would mention here again that the learned Extra Joint Judge upheld the decree for eviction on the ground mentioned in Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act as well as the ground mentioned in Section 13(1)(k) of the Bombay Rent Act. It is this decree which is the subject matter of the challenge in this petition.

5. Shri Shah contended that the decree is not supportable on the ground mentioned in Section 13(1)(k) of the Bombay Rent Act. According to Shri Shah, it is not the case of the respondents that the petitioner has not used the suit premises at all. The total non-user of the premises for which they were let out is one of the three essential conditions to attract the provisions of Section 13(1)(k) of the Bombay Rent Act. I find that there is considerable substance in this contention of Shri Shah. If this were not so, then the provisions of Section 108(o) relating to the non-user of the premises for the purpose for which they were let out and the non-user of the premises mentioned in Section 13(1)(k) would be operating to some extent on same field. The recent Division Bench Judgement of this Court in *Bright Brothers (Pvt.) Ltd. and Company v. Venkatlal G. Pittie*¹, has held that the mere act of change of purpose of user even if it does not happen to be destructive or permanently injurious to the leased property would amount to breach of clause (o) of Section 108, Transfer of Property Act. Under Section 13(1)(k) of the Bombay Rent Act, if the suit premises are used for a purpose other than the one for which the premises were originally let out a decree cannot be passed unless it is further proved that they have not been used for the original purpose without reasonable cause and that too for a period of six months before the institution of the suit. If this is so, then the landlord will necessarily resort to Section 13(1)(a) of the Bombay Rent Act read with Section 108(o) of the Transfer of Property Act because in that

case using the suit premises for a purpose other than the one for which they were let out even for a short cause and even with reasonable cause may still invite a decree for eviction. If, as it was formerly understood, an element of injury was necessarily involved in the change of user under Section 108(o) of the Transfer of Property Act, then the provisions of Section 108(o) of the Transfer of Property Act and of Section 13(1)(k) of the Rent Act would have been mutually exclusive but since the Division Bench has now laid down that injury need not be involved in the act of change of purpose mentioned in Section 108(o) of the Transfer of Property Act, the

¹1979 Mah LJ 894

apparent overlapping of the two provisions in the Transfer of Property Act and the Rent Act can be resolved by holding, as Shri Shah has contended, that the latter clause deals with a total non-user of the premises whereas the former deals with the change of purpose of user.

6. This, however, does not in any way make the path of Shri Shah simple. Admittedly, there is a change of purpose for which the suit premises are now being used. They were let out for the purpose of carrying on milk business; they were, at the time of filing of the suit, being used for the purpose of workshop. This alone should be sufficient to support the decree of eviction passed by the Court below. Shri Shah, however, has invited my attention to what he called an important part of the evidence which changes the complexion and the nature of the inquiry with which we are concerned. He pointed out that in the deposition of the landlord it has been clearly admitted that the first petitioner closed down the business of milk 7-8 years after the premises were taken on lease. It has also been admitted that thereafter the first petitioner used the premises as a godown. The landlord has further mentioned that he accepted the rent from the tenant right up to Oct 1976 without any protest and that he had no trouble due to the use of the suit premises as a godown. He has further mentioned that it was because the first petitioner started using the suit premises as a workshop that he decided to terminate his tenancy.

7. From this evidence Shri Shah has spelt out that there was acquiescence on the part of the respondents in the user of the suit premises for a purpose other than that for which the suit premises had been let out. Shri Shah says that for nearly 10 years after the suit premises had ceased to be used for the original purpose the respondents accepted the rents and in fact did not think it necessary to terminate the tenancy of the petitioner. This shows, according to Shri Shah, that there was an acquiescence on the part of the respondents. It even shows that the respondents waived their right to take action against the petitioner though they regarded it as a breach of the conditions of the lease.

8. I have great difficulty in accepting this proposition of Shri Shah. One must remember that the suit premises are governed by the Bombay Rent Act which imposes restrictions unknown to the common law on the powers of the landlords to recover premises from their tenants. Correspondingly several obligations have been imposed upon the tenant. The rights and obligations of the landlords and the tenants of the premises governed by the Rent Acts must be worked out within the four corners of the Rent Act. Bearing this in mind I will briefly refer to the

authorities relied upon by Shri Shah.

9. In the first place he invited my attention to paragraph 174 in the Hill and Redman's Law of Landlord and Tenant wherein it has been pointed out that if the lessor is aware of a continuing breach and acquiesces in it for a long period - where, for instance, with full knowledge, he receives rent - it will be presumed that he has either released the covenant or granted a licence for the user. This proposition which was first laid down in *Gibson v. Doeg*² has been subsequently followed in *Hepworth v. Pickles*³ and some other decisions which have been referred to in the above mentioned paragraph of Hill and Redman. Shri Shah took me through the original judgments also but it is not necessary for me to refer to them in details because the central proposition as mentioned by me above remains intact.

²(1857) 2 H and N 615

³(1900) 1 Ch 108

10. There is a somewhat detailed discussion on this aspect of the law in *New Garage Ltd. v. Khuswant Singh*⁴, The decisions mentioned in Hill and Redman have also been referred to in the case of New Garage. I may, however, point out that in the New Garage case it was found that the landlord had by continuously acquiescing in the change of the purpose other than the one for which the premises were let out impliedly consented to the tenant using the premises for a different purpose. On the language of Section 9 of Delhi and Ajmer Merwara Rent Control Act, 1947, a change of user with the consent of the landlord was permissive. Clause (b) of Section 9(1) was as follows :

"(b) that the tenant without the consent of the landlord has whether before or after the commencement of this Act.

(i) used the premises for a purpose other than that for which they were let." On the facts of that case, therefore, it was found that the landlord had consented to the change of purpose for which the premises were to be used and this was permissible under the provisions of the Act which governed the facts of that case. This judgment, therefore, will not be of any assistance to Shri Shah except for the purpose of showing that Punjab High Court has approvingly cited the other English decisions which lay down that by acquiescing in the change of the user for a different purpose the landlord may lose his right of evicting the tenant.

11. The English law on the subject has also been summarized in paragraph 1326 of Halsbury's Laws of England and Volume 23 3rd Edition. Briefly state it mentions that a covenant restricting the user of premises is a continuing covenant and, there is a new breach everyday while the premises are used in violation of it; but the landlord may waive the covenant partially, so as to allow of the carrying on of a particular trade. It was further mentioned that the landlord may release the tenant of the covenant and such a release need not be express. Thereafter the following is to be found :

"If the landlord is aware of a continuing breach and acquiesces in it for a long period,

where, for instance, with full knowledge, he receives rent, it will be presumed that he has either released the covenant or granted a license for the user."

12. In my opinion, these decisions and the law summarized in Hill and Redman are not relevant for determination of the rights and liabilities arising under the Rent Restriction Acts such as the one with which we are concerned. Those decisions only point out that where there is a condition attached to a covenant governing the lease the breach of that condition may give a right to the landlord of re-entry. In such a case if the landlord acquiesces in the breach of the condition for any considerable length of time or knowingly waives his right of re-entry then the right of re-en cannot be enforced by the landlord. Those decisions do not, and indeed could not, lay down that if the landlord could determine the tenancy even where he has acquiesced in the breach of the condition of the tenancy in some way he cannot recover possession of the leased premises from the tenant. The landlord's right to obtain possession of the leased premises under other provisions such as Sections 12 and 13 of the Bombay Rent Act is in no way impaired by his acquiesced in the breach of the condition which would under the Transfer of Property Act unable him to re-enter the leased premises. What is denied to the landlord by his

⁴ AIR 1952 Punj 82

acquiescence in the breach of the condition are by the waiver is the right of re-entry and not other remedies open to him under the law. The provision which is by incorporation included in Section 13(1)(a) of the Bombay Rent Act is the user of the suit premises for a purpose other than the one for which the premises had been originally let out. This provision does not permit change of the purpose of the user or continued use for a changed purpose by acquiescence or the waiver of the landlord. In my opinion, the concepts arising under the general law, including the provision under Section 111 of the Transfer of Property Act, are not relevant for working out the rights and liabilities of the parties under the Bombay Rent Act. The rights and obligations of the landlords and the tenants must be found within the four corners of the Rent Act itself. If a search is made with this end in view, it will be easily seen that the acquiescence or waiver does not save the tenant from the decree of eviction if he has used the premises for a purpose other than the one for which they were originally let out.

13. With the view which I have thus taken it is not necessary to refer in details to the judgement of the Gujarat High Court in *Mahamad Umar v. Manilal*⁵ on which naturally Shri Shah placed great reliance. The facts of that case disclose that the premises were let out for conducting a shop and it was found later that they were used as a place of storage of the goods in relation to cloth business. The argument was that this amounted to a change of purpose of user within the meaning of Section 108(o) of the Transfer of Property Act. The argument advanced on behalf of the tenant that the landed noticed that there was a change of user, fresh rent not was executed. With this fact in mind the learned Single Judge proceeded to observe as follows :

"Therefore, in my view, this document does constitute an overt act which would indicate

the fact that the lessors, though they knew about this user did not want to exercise their right of evicting the present opponents from the suit premises on the ground of the premises being used for a different purpose. I, therefore, find that the Courts below were not wrong when they held that the suit of the lessor was barred under the principles of waiver and acquiescence."

With respect, I do not agree with this view for reasons which I have already mentioned above.

14. Shri Shah then proceeded to contend that there is no change of the purpose for which the suit premises are now being used. For the meaning of the word "purpose", says Shri Shah, one must look to the other provisions of the Rent Act itself and when one does so it would be noticed that if the premises which are leased for one type of business are used for another business, there would be no change of user. In this connection Shri Shah referred to Section 6 of the Bombay Rent Act which is in the following terms :

"6(1) In areas specified in Schedule I, this part shall apply premises let or given on license for residence, education, business, trade or storage".

According to Shri Shah, if some premises are let out for residence and if they are subsequently used for the purpose of education or business or trade or storage then it

⁵(1968) 9 Guj LR 104

would be a change of the purpose for which they are used. In other words, each of these purposes mentioned in Section 6(1) of the Bombay Rent Act must be regarded as a complete purpose by itself and it is only when the use of the premises is changed from one of those purposes to another then it should be regarded as a change of the purpose of the user.

15. In support of this interpretation which he intended to put upon the word "purpose", Shri Shah relied upon an unreported judgement of a single Judge of this Court in *Ishwaribai Jamnadas v. Dr. Narottamdas V. Mody*⁶ In this case the premises had been leased for the purpose of storage. The landlord filed a suit for eviction of the tenant on the ground that the latter had started using the premises for storing a car while it was originally let out for the storage of goods. V.S. Desai J. who decided the case opined as follows :-

"The actionable ground contemplated by Section 13(1)(a) by its reference to clause (o) of Section 108 of the Transfer of Property Act is a change of purpose or user from one kind of user to another from amongst the several users as are specified in Section 6 of the Rent Act, except in cases where by a specific restrictive covenant in the lease the user is still further restricted."

While one may broadly agree with Shri Shah when he says that the meaning of the word "purpose" has to be gathered by reference to Section 6 of the Rent Act one cannot further agree

with him that the broad purposes mentioned in Section 6 are final and complete. Each of the purposes mentioned in Section 6 of the Bombay Rent Act may consist of several species of purposes in itself V.S. Desai, J. has in fact emphasized that in a given case a lease may contain a specific restrictive covenant and in that case the purpose of the use may still further be restricted. Thus in a case where the premises are leased for the purpose of "business", if instead of carrying on milk business, the tenant carries on the business of selling some other articles then there would not be a change of the purpose of the user. If, however, the lease itself mentions that the demised premises should be used for the selling of milk and if the tenant uses the premises for the selling of alcoholic drinks, then it must necessarily mean that there is a change of the purpose of the user though both the purposes, namely the purpose of selling milk and the purpose of selling alcoholic drinks, may be included in the larger genus of business. The purpose mentioned in Section 108(o) of the Transfer of Property Act may consist of a purpose which is a part of one of the purposes mentioned in Section 6 of the Bombay Rent Act. So viewed on the facts of this case, it must be held to be a change of user when the petitioner started using the premises for a purpose other than the one for which it was let, namely dairy business.

16. A variation of the argument which was earlier based by Shri Shah on the doctrine of waiver or acquiescence was then put forth by him. He said that by the landlord's failure to take any action after finding that the tenant has been using the premises for a purpose other than that for which it was let out, the landlord must be deemed to have consented to the changed purpose for which the tenant is now found to be using the suit premises. The quotation from Halsbury which I have earlier reproduced was again sought to be pressed into service by Shri Shah. When the landlord acquiesced in the breach of a condition for a long period, says Shri Shah, it must be presumed that he has granted a licence for the

⁶(Special Civil Appln.No. 431 of 1966 decided on 23rd of August 1968)

changed user. Even this, in my opinion, will not be sufficient to be used as a protection to the tenant. In order to acquire protection from a possible decree of eviction the evidence must be such that it should be reasonable to infer that the landlord not only acquiesced in the change of the purpose of the user but in fact concurred with the same. If this is established then naturally the purpose of the lease itself will be regarded as a new purpose for which the premises are being used. In such a case, there would be no change of purpose for which the premises are being used. I am satisfied that on the facts of this case the evidence does not disclose that the landlord concurred with the purpose for which the tenant had started using the premises.

17. At this stage I must make mention again of the three purposes for which the suit premises have been used from time to time. Originally, the premises were used for dairy business; after 7-8 years the premises were used as a godown to the knowledge of the landlord; and thereafter in the year 1975 the suit premises were put to the use as a workshop. Even if one accepts Shri Shah's case that the landlord having acquiesced in the use of the suit premises for the godown and thus concurred in the changed purpose of the user, the tenant cannot avoid decree of eviction.

Accepting Shri Shah's argument it can at the most be said that the purpose of the lease was changed from one of dairy to one of godown. What has been found by the two Courts concurrently in this case is that the purpose for which the suit premises are being used is one for workshop. If it is so, there is again a change of purpose from one of godown to one of workshop. It cannot be said, though it was vehemently contended by Shri Shah, that once the landlord has acquiesced in the change of purpose other than the one for which the suit premises are to be used, the tenant is free to put it to any other purpose, Such a blank licence cannot be inferred by the acquiescence, if any, by the landlord in the changed purpose other than the one for which the suit premises are let. It was not possible for me to agree with Shri Shah when he argued that unless the change of the purpose of the user is destructive or permanently injurious to the leased property it would not attract the provisions of Clause (o) of Section 108 of the Transfer of Property Act in view of the Division Bench decision of this Court in Bright Brothers' case.

18. The view which I have taken is found to be analogous to the view taken by V.V. Joshi J. in *Abdul Sattar v. Mulchand Upashya*⁷ in a case arising under C.P. and Berar Letting of Houses and Rent Control Order, 1949.

19. In the result, this petition must fail. Rule is discharged with costs.
Petition dismissed.

⁷1979 Mah LJ 726