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Exh. : 17

BEFORE THE 8TH ADDITIONAL DISTRICT JUDGE, AT RAJKOT

Regular Civil Appeal No.25 of 2020

Marhum Haptubhai Karimbhai Dharmada Trust
Registration No.B/27

Through : Trustee and Rent Collector

Shri Firozbhai Hatimbhai Sakir

Muslim, Age : Abou 48 Years

Occupation : Business

Resident : Diwanpara Street No.18

R A J K O T

... .. Appellant
(Original Plaintiff)

V E R S U S

Vishnukumar Amaralal Parwani

Hindu, Adult, Occupation : Business

Resident : Prince Dresses

Lakhajiraj Road

Opp. : Prahlad Cinema

R A J K O T

... .. Respondent
(Original Defendant)

Subject : Appeal filed under Section 29 of The Bombay Rent Control Act and under Section 96 of The Code of Civil Procedure, 1908, against judgment and decree dt.20-02-2020 passed by Learned Additional Judge, Small Causes Court, Rajkot, in Regular Civil Suit No.13/2012

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Appearance

Mr. M. R. Khokhar, Learned Advocate for the appellant.

Mr. D. G. Dhankani, Learned Advocate for the respondent.

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J U D G M E N T

Impugned Judgment of Learned Lower Court

1. The present appeal has been preferred by the appellant against the judgment dt.20-02-2020 and decree dt.24-02-2020 passed by the Learned Additional Judge, Small Causes Court, Rajkot, in Regular Civil Suit No.13/2012, whereby the suit preferred by the original plaintiff for declaration and permanent injunction and eviction of rental premises was dismissed.

Status of the Parties

2. The appellant herein is the original plaintiff, while the respondent is original defendant. Therefore, the parties are referred as plaintiff and defendant as per their original status in the suit, for the sake of convenience.

3. A shop out of the property situated on Lakhajiraj Road, opposite to Prahlad Cinema, Rajkot, is the property in dispute between the parties. Therefore, hereinafter referred as **“Suit Shop.”**

Facts of Suit and Appeal

4. The relevant facts which gives rise to the present appeal are that :-

The suit was filed by the landlord-plaintiff with the facts that plaintiff Marhum Haptubhai Karimbhai Dharmada Trust is a trust registered with Wakf Registration No.B/27 at Rajkot and plaintiff is a trustee, administrator of trustee and rent collector of suit shop. It is stated that trust has given right and authority to file present suit by resolution No.2 dt.04-03-2012. It is stated that property of plaintiff is situated on Lakhajiraj Road opposite to Prahlad Cinema at Rajkot and out of said property, a shop having one door and roof has been given on rent to the defendant at the monthly standard rent of Rs.330/- excluding taxes as per English calender month. It is stated that standard rent of suit shop has been decided in Civil Misc. Application No.10/2001 and defendant does business in the suit shop in the name and style of M/s. Om Dresses. It is stated that suit shop having wooden door and cement sheet roof, but without consent or permission

of plaintiff, the defendant has removed iron sheet roof and made construction of permanent nature and also installed rolling shutter in place of wooden door. It is further stated that defendant is also trying to remove wooden partition and making a wall of brick and cement and also installed iron grill on the otla in front of suit shop and made wall and trying to put shutter. It is also stated that after removing iron sheet roof, defendant has made construction of cement slab and then making further construction of walls, also trying to make a shop on the upper portion of suit shop. It is alleged that defendant has removed wooden partition and installed kota stone and permanent wall without the consent or prior permission of plaintiff or Rajkot Municipal Corporation, therefore, cause of action has arisen for the plaintiff to file this suit for declaration and permanent injunction as well as for eviction decree of suit premises on the ground of permanent construction made in the suit shop. Thus, plaintiffs have filed suit for eviction decree of suit shop.

5. The notice of the suit was duly served to the defendant, who appeared through his Learned Advocate and filed his written statement at Exh.13 and contended that plaintiff has suppressed the material facts and suit is barred by law of estoppel. The defendant has admitted the

relationship as landlord and tenant between plaintiff and defendant as well as standard rent of Rs.330/- per moth excluding taxes according to Civil Misc. Application No.10/2001, however, contended that he does not do business in the suit shop in the name of "M/s. Om Dresses", but does business in the name of "Prince". It is contended that there is shutter and sliding iron grill are there in front of suit shop from the beginning. It is also contended that on the above portion, there is wooden partition and iron sheet thereon from the beginning. The defendant has specifically denied that he has made any construction of permanent nature in the suit shop nor did any act against the provisions of the Bombay Rent Act. It is further contended that defendant has no other source of income except suit shop. Further contended that to avoid causing damage to goods and materials, damaged and termite wooden furniture has been replaced with aluminium bracket and glass, but not made any construction of permanent nature nor he intends to make any permanent construction in the suit shop. It is also denied that he has made any damage to the suit shop. Further contended that termite wooden furniture was causing damage to the entire suit shop more particularly Southern side wall, same has been removed and replaced with iron bracket and

glass. It is also contended that there was plastic carpet on the floor of suit shop which was very old and torn at some places, it has been removed but it has not caused any damage to suit shop and except aforesaid, no any change has been made in the suit shop. It is contended that no any construction is made in the suit shop, but with a view to hike the rent amount, false and frivolous suit is filed by the plaintiff. It is also contended that plaintiff is a new trustee of the trust and trying to misuse process of law by filing false and frivolous suit against old tenant of suit property. Therefore, the defendant prayed to dismiss the suit with compensatory cost.

Evidences led by parties

6. The plaintiff has produced following oral and documentary evidence before the Learned Lower Court.

Oral Evidence of Plaintiff

Sr. No.	Particulars	Exh. No.
1	Deposition of PW-1-Firoz Hatimbhai Sakir	42
2	Deposition of PW-2-Bharatbhai Vasudev Purohit	59
3	Deposition of PW-3-Ali Asgar Hatimbhai Sakir	66
4	Deposition of PW-4-Ketan Manharbhai Rana	81

Documentary Evidence of Plaintiff

Sr. No.	Particulars	Exh. No.
1	Copy of certificate	44
2	Resolution No.2 and 3 dt.05-01-2012 passed by the trust in favour of plaintiff Firoz Hatimbhai Shakir	45 & 50
3	Compromise pursis of C.M.A. No10/2001	46
4	Photographs	47 & 48
5	Register of plaintiff trust	49
6	Notice issued in C.M.A. No.10/2001	51
7	Photographs	52 & 53
8	Letter dt.25-07-2012 written by plaintiff-trust to Rajkot Municipal Corporation	54
9	Panchnama dt.08-03-2012 prepared by Court Commissioner	55
10	Commissioner patra	60
11	Notice issued by Court Commissioner	61
12	Revised assessment for the year 1992-93	82
13	Master data form of tax branch of Rajkot Municipal Corporation of plaintiff-trust	83
14	Form of assessment of property of plaintiff-trust	84
15	Extract of tax of Rajkot Municipal Corporation	85
16	Annum assessment / demand register of Rajkot Municipal Corporation	86

7. The defendant has examined himself vide Exh97, but not produced any documentary evidence in support of his defence.

Conclusion of Learned Lower Court

8. After considering the pleadings of the parties, the Learned Lower Court has framed the issues at Exh.18 and after hearing the Learned

Advocates of respective parties and perusing the evidence on record, the Learned Lower Court has dismissed the suit. Being dissatisfied and aggrieved, the appellant-original plaintiff has preferred this appeal on various grounds mentioned in the memo of appeal Exh.1.

Arguments of Learned Advocate for the appellant-plaintiff

9. The Learned Advocate Mr. M. R. Khokhar, for the appellant-original plaintiff, has contended in memo of appeal Exh.1 that impugned judgment and decree are not in accordance with the provisions of law and Learned Lower Court has not properly appreciated the averments and evidence of plaintiff and thereby committed serious error of law and facts in dismissing the suit. It is contended that Learned Lower has not properly appreciated or discussed the evidence produced by the plaintiff. It is specifically contended that Learned Lower Court has not considered relevant provisions of the Transfer of Property Act, Bombay Rent Act as well as Code of Civil Procedure and dismissed the suit of the plaintiff. It is contended that there is change in the suit shop by making construction of permanent nature and shop is now made double decker shop, but Learned Lower Court has committed error in not believing this fact. It is also submitted that defendant has made construction of permanent nature in the suit shop without

consent or permission of plaintiff as a result, defendant is not entitled for any protection under the provisions of the Bombay Rent Act, therefore, there is no alternative except to evict the suit shop, however, Learned Lower Court has not believed this fact and committed serious error in dismissing the suit. Further contended that according to admission of defendant, suit shop was taken on rent and as per panchnama prepared by the Court Commissioner, it is brought on record that now suit shop is made double decker shop, but Learned Lower Court has committed error in not believing this fact.

10. The Learned Advocate for the plaintiff has also submitted his written arguments vide Exh.14 wherein, he has mainly contended that according to panchnama of the suit shop, it has come on record that construction of permanent nature is made by the defendants, however, Learned Lower Court has not believed the same and believed that there is only minor alteration and thereby serious error has been committed by the Learned Lower Court. It is also contended that even defendant has admitted that suit shop having one door and iron sheet roof but according to evidence produced on record, it has come on record that there is construction of permanent nature slab made by cement, sand and iron in the suit shop and suit shop made double

decker shop, thus, Learned Lower Court ought to have allowed the suit of the plaintiff, but Learned Lower Court has committed serious error by dismissing the suit. It is further contended that it is admitted by defendant that suit shop was of iron sheet roof and now as per evidence, it is now double decker shop by making construction of permanent nature which is not removable without causing damage to suit shop, however, Learned Lower Court has committed error for not believing construction of permanent nature and believing that such construction is for the better use of suit shop. It is also argued that even no any permission of Rajkot Municipal Corporation has been obtained by the defendant, but this fact is also not considered by the Learned Lower Court. It is further argued that defendant has also not paid rent and taxes regularly and if the construction made by the defendant in the suit shop is appreciated according to law and photographs produced on record then it falls within the definition of permanent nature construction and as such, defendant has also admitted that photographs are of the suit shop, therefore, Learned Lower Court has not properly appreciated evidence of plaintiff and erroneously dismissed the suit. Also argued that Learned Lower Court has also not considered written arguments and citations submitted

vide Exh.106 and not assigned any reason for not believing the same, therefore, Learned Lower Court has committed grave error in dismissing the suit of the plaintiff. Hence, Learned Advocate for the plaintiff has prayed to allow this appeal and to set aside impugned judgment and decree of Learned Lower Court.

11. The Learned Advocate Mr. D. G. Dhankani, for the defendant, has contended that plaintiff has come with specific case that defendant has made construction of permanent nature in the suit shop which cannot be removed without causing damage to suit shop, but no any expert opinion or witness was examined in this regard. It is further argued that there was wooden partition and iron sheet roof on the suit shop from the beginning which were in dilapidated condition and causing damage to goods and materials, damaged termite wooden furniture has been replaced with aluminium bracket and glass, but not made any construction of permanent nature. It is also argued that plaintiff was under obligation to keep the suit shop in good condition, however, not kept suit shop in good condition, therefore, defendant has made tenantable repair in the suit shop by removing termite wooden furniture more particularly Southern side wall and replaced with iron bracket and glass which can not be said to be construction of

permanent nature. Further argued that defendant has neither made any construction of permanent nature in the suit shop nor intends to make any such construction. He has further argued that Learned Lower Court has properly appreciated evidence of both the sides and rightly dismissed the suit relying on the factual aspects of the matter. It is also argued that no any construction of permanent nature is made by the defendant, therefore, there is no requirement to obtain permission either of landlord or of Rajkot Municipal Corporation. It is argued that Learned Lower Court has properly considered evidence of plaintiff and panchnama prepared by the Court Commissioner and held that changes made in the suit shop by the defendant does not fall within the definition of construction of permanent nature. It is also argued that plaintiff has suppressed material facts and pleaded that defendant does business in the name and style of "M/s. Om Dresses" instead of "M/s. Prince". Also argued that except suit shop, defendant has no alternative source of livelihood. It is argued that impugned judgment and decree passed by the Learned Lower Court is just and proper, therefore, he prayed to dismiss this appeal and to confirm the judgment and decree.

12. On the basis of aforesaid submissions and pleadings of the parties, it

seems that there was no dispute with regard to relationship between plaintiff and defendant as landlord and tenant as well as monthly rent of suit shop, but plaintiff has filed suit for eviction decree of suit shop on the sole ground of construction of permanent nature made in the suit shop without consent or permission of plaintiff. Hence, following issues require to be framed for the adjudication of this appeal.

Issues For determination

1. Whether the plaintiff prove that defendant has made construction of permanent nature in the suit shop without consent or permission of plaintiff ?
 2. Whether the impugned judgment dt.20-02-2020 and decree dt.24-02-2020 passed in Regular Civil Suit No.13/2012 is illegal, perverse, capricious and requires to be set aside ?
 3. What order and decree ?
13. My findings on the above issues are as under with reasons thereof.
1. In the negative.
 2. In the negative.
 3. As per final order.

Re-appreciation of Evidence and Findings

14. On perusing pleadings of the parties and submission of both the sides, plaintiff has filed the suit for eviction decree on the sole ground of

construction of permanent nature alleged to have made in the suit shop by the defendant without consent or permission of plaintiff. Thus, it seems that entire suit is founded on the provisions of Section 13 (1) (b) of the Rent Act. On the other side, defendant has denied the averments and allegations of plaintiff and contended that no construction of permanent nature is made, but termite wooden furniture causing damage to the entire suit shop more particularly Southern side wall has been removed and replaced with iron bracket and glass. Also stated that he does not intend to make any permanent construction in the suit shop.

15. Thus, from the facts and evidence available on record, it reveals that there is no dispute that plaintiff is landlord and defendant is tenant of suit shop, thus, there is relationship of landlord and tenant between them. It is also not in dispute that monthly rent of suit shop is Rs.330/- as per English calender excluding taxes fixed in Civil Misc. Application No.10/2011.
16. To prove the case, the plaintiff No.1 has deposed vide Exh.42, also examined witnesses vide Exh.59, Exh.66 and Exh.81. On perusing oral evidence of the witnesses of plaintiff, it is admitted by plaintiff that plaintiff-trust passed a resolution and authorized him to institute this

suit. It is also admitted that he joined the plaintiff-trust in the year 2008 and he does not know when suit shop was let on rent and then voluntarily stated that his father had given suit shop on rent. He has also admitted by referring photographs produced at Exh.48 and Exh.52 that he cannot say that who has and in which year these photographs of suit shop were taken, but he has not taken these photographs. It is further admitted that he cannot about structure of suit shop prior to his induction as trustee. Further admitted that he has neither issued any notice to the defendant when construction work or the work of filling the slab in the suit shop was going on nor produced any photographs of such construction or slab. Also admitted that if he having such photographs then he would have produced in the suit.

17. On perusing oral evidence of witness Ali Asgar Hatimbhai, it reveals that he is trustee of plaintiff-trust and he has admitted that he having no knowledge that from when and on which name the defendant is doing business when he was inducted as trustee. Further admitted that he does know how the structure of suit shop was when he was inducted as trustee and denied that suit shop was double dacore. It is admitted by witness that all the trustees do sign in the resolution of

trustee and then stated that resolution can be passed after knowledge and permission of all the trustees. He has admitted that at present suit shop having iron roof and he entered into the suit shop at the time of panchnama and never entered in the suit shop prior to panchnama. Further admitted that old tenant was a barber and at that time, there was wooden floor in the suit shop and stair to go on the wooden floor. Also admitted that there is specific description of suit shop in the rent agreement executed with defendant, but he does not want to produce rent agreement.

18. The plaintiff has also examined Court Commissioner vide Exh.59 and tax inspector of Rajkot Municipal Corporation Mr. Ketanbhai Manharbhai Rana vide Exh.81. The Court Commissioner has produced panchnama prepared by him and witness Ketanbhai has produced tax register and assessment register etc. in respect of property of plaintiff-trust including suit shop.
19. For the defence, defendant himself has submitted his chief-examination by way of affidavit vide Exh.96, but subsequently not remained present for his cross-examination, hence, his affidavit on oath was discarded by order dt.17-01-2019.
20. It is pertinent to note that plaintiff has not produced any rent

agreement and it is also not the case of plaintiff that defendant has not paid any rent. The only ground for present suit is making construction of permanent nature in the suit shop by the defendant without permission or consent of plaintiff.

21. Now on perusing oral as well as documentary evidence, more particularly admission of plaintiff and witness, as stated above, there is no dispute regarding relationship and monthly rent of suit shop. The Only dispute is that defendant has made construction of permanent nature in the suit shop without consent or permission of the plaintiff. In this regard, it is profitable to refer provisions of Section 13 (1) (b) of the Rent Act which reads as under:

Section 13 (1) - Notwithstanding anything contained in this Act [but subject to the provisions of Section 15] a landlord shall be entitled to recover possession of any premises if the Court is satisfied :-

(a) xxx xxx xxx

(b) ***[that, save as otherwise provided in Section 23-A] the tenant has, without the landlord's consent given in writing, erected on the premises any permanent structure; or***

(c) xxx xxx xxx

22. Further, on plain reading of Section 13 of the Rent Act shows that it permits a landlord to evict a tenant only from the residential premises

and not from the non residential premises.

23. From perusing record of Regular Civil Suit No.13/2012, it reveals that plaintiff has also made an application dt.25-07-2012 to Rajkot Municipal Corporation for removing illegal construction alleged to have made by the present defendant in the suit shop and this application was received by Rajkot Municipal Corporation vide inward No.2684, but no any further action appears to have taken by the Corporation. It is also pertinent to note that plaintiff has produced photographs but as per evidence of witness, these photographs are very old and he does not know when and who has taken these photographs. Even only on these photographs, it cannot be decided that defendant has made construction of permanent structure. The plaintiff has also got prepared panchnama of the suit shop through Court Commissioner which is produced vide Exh.55. On perusing panchnama Exh.55, it reveals that there was no any board on the suit shop, but name of suit shop "Prince" was known through letter pad and bills lying in the suit shop. It is mentioned that there is vitrified tiles on the ground floor and there was a wooden floor in the suit shop. It is also mentioned that there is extra renovated roof of aluminium sheet and thereby suit shop having two floorings. It is further

mentioned that in the Eastern corner of suit shop, there is a staircase of marble fitting in iron angle for going on the upper portion and upper ceiling is made by plaster of parish and having glass door towards road side. It is also mentioned that suit shop is double decker shop and plywood is fitted in the Southern side wall of suit shop and glass is fitted with aluminium section. It is also mentioned that on the board of suit shop, there is new galvanize iron sheet.

24. Thus, according to panchnama prepared by the Court Commissioner, it seems that defendant has made some renovation or alteration in the suit shop, which has already been admitted by the defendant in his written statement, but no construction of permanent structure appears to have made by the defendant as alleged by the plaintiff. As the suit is filed on the ground that defendant has made construction of permanent nature without permission or consent of plaintiff, which would not be removed without causing damage to the suit shop, but plaintiff has not brought on record that defendant has made any construction of permanent nature which cannot be removed without causing damage to the suit shop. Of course, it has come on record that defendant has made some alteration or renovation in the suit shop, but such alteration or renovation was made with plywood and

aluminium which can be removed at any time without causing damage to the suit shop. Further, plaintiff has made a complain to Rajkot Municipal Corporation for removing illegal construction of permanent nature made in the suit shop, but not produced any evidence that Rajkot Municipal Corporation has taken any action. Further plaintiff has also not examined any expert witness to prove that alteration or renovation made by the defendant falls within definition of permanent structure which cannot be removed without causing damage to suit shop. According to provisions of Section 13 (1) (b) of the Bombay Rent Act, unless the landlord proves by evidence of expert witness that construction made by tenant is such which cannot be removed without causing damage to the property, no decree of eviction can be passed under Section 13 (1) (b) of the Rent Act. Here in the present case, plaintiff has proved, rather defendant has admitted, that defendant has made some alteration or renovation in the suit shop, but such alteration or renovation cannot be said to be construction of permanent nature which cannot be removed without causing damage to suit property. On the contrary, defendant has stated that due to dilapidated condition of old termite wooden furniture of suit shop, his goods were damaging and thereby he has changed the old wooden

furniture and made renovation by plywood and aluminium section with glass.

25. As the plaintiff has come with a case that defendant has made construction of permanent nature, therefore, burden is on the plaintiff to prove that whatever construction and/or alteration and/or renovation made by the defendant in the suit shop is of permanent nature, which cannot be removed without causing damage to suit shop. But the plaintiff has not examined any expert witness to prove that alteration or renovation made by the defendant is of permanent nature which cannot be removed without causing damage to suit shop. Hence, unless landlord not proves by evidence of expert witness that construction and/or alteration and/or renovation made by defendant-tenant is such which cannot be removed without causing damage to suit shop, no eviction decree can be passed under Section 13 (1) (b) of the Rent Act. Further alteration or renovation made by the defendant appears to have made for more beneficial use of the suit shop and such type of alteration does not cause damage to the suit shop. Thus, the Learned Lower Court has, after weighing evidence of both the sides, properly given finding that alterations made by the defendant are not of permanent alteration. Further neither any notice appears to have

issued by the plaintiff to the defendant for such alteration or renovation or change of position of suit shop nor any expert witness like architect or engineer, who can give opinion regarding alleged construction is of permanent nature or otherwise, is examined by the plaintiff. Thus, mere allegation of plaintiff that defendant has made construction of permanent nature in the suit shop is not tenable. Hence, the Learned Lower Court has not committed any error but rightly decided this issue.

26. Thus, on perusing the impugned judgment and decree of the Learned Lower Court, the Learned Lower Court has rightly appreciated the evidence on record and rightly held that the plaintiff has miserably failed to prove that defendant has made construction of permanent nature in the suit shop which cannot be removed without causing damage to suit shop. The Learned Lower Court has also rightly held that plaintiff is not entitled for eviction decree on the ground of permanent construction under Section 13 (1) (b) of the Rent Act . Therefore, the judgment and decree passed by the Learned Lower Court is just and proper which does not call for any interference and on re-appreciating the whole evidence, the plaintiff failed to prove that defendant has made construction of permanent nature and Learned

Lower Court has committed error in not believing his pleadings and proof, therefore, the issues No.1 and No.2 are held in **negative** and following final order is passed regarding issue No.3.

ORDER

1. Regular Civil Appeal No.25/2020 is hereby dismissed.
2. The judgment dt.20-02-2020 and decree dt.24-02-2020 passed by Additional Judge, Small Cause Court, Rajkot, in Regular Civil Suit No.13/2012 is hereby confirmed.
3. Looking to the facts and circumstances of the case, parties shall bear their own cost.
4. Decree be drawn accordingly.
5. Record and proceedings of Regular Civil Suit No.13/2012 is ordered to be sent back forthwith to concerned Leaned Lower Court with copy of this judgment and order.

Signed and Pronounced in the open Court today on this 20th day of February, 2023, at Rajkot.

R A J K O T
Date : 20-02-2023
//LGS//

[**Jayeshkumar Ishvarlal Patel**]
8th Additional District Judge
R A J K O T
CODE NO.GJ00646