(1982) 12 BOM CK 0002

Bombay High Court

Case No: Writ Petition No. 112 of 1982

Sakeena and Others		APPELLANT
	Vs	
Kusumbi and Others		RESPONDENT

Date of Decision: Dec. 22, 1982

Acts Referred:

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 13(1)
- Constitution of India, 1950 - Article 226, 227

Citation: AIR 1983 Bom 384 : (1983) 2 BomCR 9

Hon'ble Judges: Dharmadhikari, J

Bench: Single Bench

Advocate: K.J. Abhyankar, Owen J. Menezes and A.K. Abhyankar, for the Appellant; Veri and S.R. Chitnis, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. In this writ petition the legal representatives of the original tenant have challenged the order passed by the appeal bench of the Small Cause Court at Bombay dated 26th of November 1981 in appeal No. 99 of 1973.

2. It appears from the record that the original plaintiff Abdullakhan filed a suit against the original defendant-Ali Mohamed for recovery of possession of the land bearing Nos. 85, 85A and 241 (2) (part) situated appurtenant 49--C Pali Naka, Bandra, Bombay together with the structures. It was the case of the plaintiff that he was the owner the property whereas the defendant was the tenant in respect of the structures and the plots. The structure on the plot No.85 was the main building of permanent nature and there was also a coal shed bearing Nos. 49-C, 49-D respectively.

3. Short history of the litigation shows that originally Dr. J. F. Henriques and in the year 1934 he let out these two plots to the original defendant. The 3rd plot viz. hissa

No. 2 of S. No. 241 was given to the original defendant on lease by Dr. J. F. Henriques in the year 1937. Thus the original defendant became the lessee in respect of the all these 3 plots i. e. 85, 85-A and 241 (2) part. The original plaintiff before the court is the purchaser of these properties under a registered conveyance dt. 1-6-1965. The suit was filed by the original plaintiff u/s 13(1)(ii) of the Bombay Rent Act on the ground that the land is required by the landlord for erection of a new residential building which the local authority has approved and permitted him to build up thereon.

4. In the defence the original defendant asserted that the original plaintiff was the landlord in respect of the structure bearing Municipal No. 49 CDEF only and the rest of the structures on the plot belong to him (defendant). According to him Dr. J. F. Henriques as the owner in respect of the open piece of land bearing N. A. No. 85 measuring 948 sq. yds. At that time there was a permanent building bearing Municipal No. 49-C and coal shed bearing No. 49-D. The lease was also in respect of adjoining piece of land bearing No. 85-A admeasuring 430 sq. yds. According to the defendant the coal shed No. 49-D was pulled down and the defendant made construction on the plot with the consent of the deceased lessor. This construction now bears municipal No. 49-D. This lease expired on 30th September 1937 and the defendant continued to be in possession as monthly tenant in respect of two pieces of land and a building then bearing No. 4XC and now bearing No. 49 CDEF. Dr. J. F. Henriques purchased the adjoining piece of land S. No. 241 Hissa No. 2 admeasuring 21/2 gunthas and it was also included in the monthly tenancy of the original defendant. Thus according to the defendant he is a tenant of the piece of land bearing Nos. 85A and 241 (hissa No. 2). According to him, he was given a composite rent receipt in respect of all those three premises. He denied the claim made by the plaintiff and contended that the lands in his possession are not covered by the expression ''appurtenant'' used in Section 13(1)(ii) of the Rent Act. He also raised some other contentions in his written statement with which we are not concerned in this writ petition.

5. The trial court after appreciating all the evidence on record found that the plots are not covered by the expression ''lands appurtenant to a building'' as used in Section 13(1)(ii) and therefore the trial court dismissed the suit filed by the plaintiff. Against this order the plaintiff-landlord filed an appeal before the appeal bench of the Small Cause Court, Bombay . The appeal bench took a view that these vacant lands are adjoining to the main building and therefore are lands appurtenant to the building as envisaged in Section 13(1)(ii) of the Rent Act. In view of this the appeal bench allowed the appeal filed by the plaintiff and decreed the suit. It is against this order of the appeal bench present writ petition is filed by the legal representatives of the original tenant.

6. Shri Abhyankar the learned counsel appearing for the petitioner-tenant contended before me that having regard, the building and the area covered by it as

well as the dimension of the open plots, it will have to be held that the vast area covered by the plots Nos. 85, 85-A and S. No. 241 is not a land appurtenant to the building within the meaning of the said expression in Section 13(1)(ii) of the Act. It is also contended by Shri Abhayankar that having regard to the purpose and object of the legislation, which is intended for giving protection to the tenant, the expression used in Section 13(1)(ii) will have to be given a restricted meaning and therefore should be construed in its primary sense. If so construed, only those lands could be treated as appurtenant to the building which are necessary for beneficial enjoyment of the house properties. Unless such a land is an integral part of the building and is necessary for the beneficial enjoyment of the house properties, the said land cannot be treated as appurtenant to the building within the meaning of Section 13(1)(ii), of the Act. He also contended that the appeal bench of the Small Cause Court, Bombay committed an error in construing the said expression in a secondary and non-technical sense. In support of this contention Shri Abhayankar has placed strong reliance upon a decision of the Supreme Court in Maharaj Singh Vs. State of Uttar Pradesh and Others,

7. On the other hand it is contended by Shri Abhayankar, the learned counsel appearing for the landlords that the expression used in section 13(1)(ii) should be construed in a secondary and non-technical sense. In this sense the lands which are adjunct or adjoining to the building are included within the said expression as used in Section 13(1)(ii) of the Act. He also contended that having regard to the object of the legislation the words will have to be construed in a secondary sense so as to advance the remade and curtail the mischief. Under the provisions of the Rent Act a landlord cannot file a suit for part of the suit premises and therefore if the construction advanced by the petitioners is accepted then in no case the landlords will be able to get back the lands which were leased out together with the house properties. According to the learned counsel in the present case the lands covered by the plot No. 85, 85-A and S. N. 241 are adjoining the main building and therefore the appeal bench was perfectly right in decreeing the suit filed by plaintiffs. According to the learned counsel in the present case the tenancy is a consolidated one. It is not possible to enjoy the benefit of open plots independent of the building. The plots were leased out together with the buildings i. e. houses and coal shed. In these circumstances the appeal bench was wholly justified in coming to the conclusion that having regard to the facts and circumstances of the present case, the lands of which possession is sought by the landlords are lands appurtenant to the building within the meaning of Section 13(1)(ii) of the Rent Act. He also contended that in any case this is not a fit case wherein any interference is called for in the extra-ordinary jurisdiction of this court under Article 227 of the Constitution of India which the findings of fact recorded by the appeal bench of the Small Causes Court appurtenant Bombay.

8. For properly appreciating the controversy raised before me it will be worthwhile if a detailed reference is made to Section 13(1)(ii) of the Act which reads as under :--

"That where the premises or land in the nature of garden or grounds appurtenant to a building or part of a building, such land is required by the landlord for the erection of a new residential building which a local authority has approved or permitted him to build thereon;"

The provision was introduced in the Statute Book by the Bombay Act 61 of 1953. From the objects and reasons for introducing this clause, it appears that this independent clause was inserted with a view to encourage construction of new residential buildings and to make it possible for the landlords to recover possession of appurtenant gardens and grounds. The landlords can claim resumption of these premises if the land is required by the landlord for erection of new residential buildings thereon. As to in what sense the expression used i. e. "land in the nature of garden or grounds appurtenant to a building or part of a building" should be construed, was a matter of lengthy debate before me. However in the meantime the division bench of this court in a Letters Patent Appeal No. 7 of 1979 (reported in Moraji Goculdas Deoji Trust and Others Vs. Madhav Vithal Kudwa, decided on 23rd November 1982 by Pratap and Sharad Manohar JJ. had an occasion to consider similar provisions incorporated in Section 5(8)(b) of the said Act. While construing the said provision the division bench held that it is not possible to formulate a precise and singular test or a principle of universal application for determining what is appurtenant. The division bench also held that there can be no fixed, invariable or strait-jacket approach or formula in this regard and the question as to whether a thing is appurtenant and if so, to what extent, would be a mixed question of fact and law. The resultant answer must, in each case, turn and depend upon the facts and circumstances of that case and the context in which the question arises. Then after making a reference to various dictionary meanings this is what the Division Bench has observed in para 7 of the judgment:
"In the context of Section 5(8)(b) of the Act, the term "appurtenant" has to be construed not in its primary sense but in its secondary non-technical sense such as "usually enjoyed with". The concept indicates something appurtenant to the lease and not the lease itself. So construed, it would mean "relating to", "adjoining", "an adjunct or an accessory" to the premises let. Plain meaning of the provisions simplicities indicates a nexus between the premises leased and the premises appurtenant thereto. There has to be a fair and rational correlation between the two. Premises to be appurtenant must be premises inevitably implied in and essential to the use and enjoyment of the premises let. Not a constituent part of the lease and, therefore intended to be "premises" within its definition in Section 5(8)(b) of the Act."

Then after considering the authorities cited before it, in para 11 of the judgment division bench observed:

"11. As in Trim''s case 1938 2KB 508, so also in this case, it is difficult to see how it supports the defendant. On the contrary and shorn of factors and elements not

relevant hereto the decision and ratio thereof favours the plaintiffs. There is, indeed, a world of differences between a land adjoining or adjacent to or underneath a structure as in the Madras ruling and land on the ground floor in relation to a room on the first floor as in the present case. The former is a clear instance of land being appurtenant to the structure and the latter equally so clear instance but to the contrary viz. the land on the ground floor by no stretch being appurtenant to the room on the first floor. Again, as in the Madras ruling, here also the word "appurtenant" is used in the secondary sense. Thus, the authorities sought to be relied help him but rather aid the plaintiffs. The principle of both these authorities runs counter to his case. His case is also not based on any recognised principle of law. It also stands unsupported by any binding authority. It also cannot be reconciled with justice. We, therefore, conclude this aspect against him and hold that the open space in the compound of the suit building is not appurtenant to the leased suit room on the first floor and, therefore, does not constitute "premises" within the meaning of Section 5(8)(b) of the Act."

Therefore it is quite obvious that the division bench has construed the said expression as used in S. 5(8)(b) of the Act in the secondary and non-technical sense and not its primary sense. Hence the controversy involved in this writ petition will have to be decided in the light of the decision of the division bench in this behalf.

9. So far as the facts and circumstances of the present case are concerned, it appears to be an admitted position that at least from the year 1937 the building and the plots were treated as consolidated property for the purpose of tenancy. A common and joint receipt of rent was issued for the land and the building. However a contention was raised by Shri Abhayankar that vide lease deed dated 23rd October 1934 what was leased out by the landlord was a piece of land and together with it a house standing thereon was also leased out. According to Shri Abhayankar if the recitals in the lease deed are read with the schedule of the property attached to the said lease deed it is quite clear that the dominant purpose of the lease was open piece of land and not the building standing thereon. It is not possible for me to accept this contention of Shri Abhayankar. It is by now well settled that while construing a document of lease it is the substance of the matter which should be taken into consideration and not mere form. If the lease deed is read as a whole it is quite clear that by Cl .2 of the lease deed the lessee was to pay in addition to the rent the water charges and electricity charges. By clause 5 it was laid down that the lessor shall not do any repairs to the said premises during the period of the lease save and except the heavy repairs including the title turning and hammering of the roofs and gutters and also the repairs to pipes, flushing tanks etc. By clause 8 a liberty was granted to the lessee to build any temporary structures on the lands with the permission of landlord. If the dominant purpose of the lease was to lease out the vacant land then all these clauses relating to the repairs to the building were not necessary. It also appears to be an admitted position that plot No. 85 consists of building as well as coal shed. In these circumstances it cannot be said that the

dominant purpose of the lease was to lease out the open plots and not the building as such. This position is further clear from the evidence on record. Abdullakhan who was examined on behalf of the plaintiff stated in his deposition that Dr. Henriques let out to the defendant in the year 1934 three plots and the building standing on them. According to him there were building and sheds on these plots. Then he stated that some 8 or 10 temporary structured by Corporation for payment of taxes. He stated that he was residing in the structure on the said property. He denied the suggestion that what was let out was open plots. Joseph Bernal Fernandes an Architect was examined on behalf of the plaintiff and he stated in his deposition that the proposed construction covers the area of three plots and each plot is adjoining to each other. According to him it is not possible to develop any individual plot. Each plot is irregular in shape, narrow and if it is decided to develop each plot the difficulty for access will arise, and in that case full advantage of F. S. I. cannot be taken. Then he has spoken about the distance from the centre of the existing building and the plots. According to him this distance is about 170 to 200 ft. The access to the existing building is from the main road and not from the plots Nos. 85-A or S. No. 241. Then he has spoken about the sanction received from the local authorities. The tenants have not examined any body on their behalf. Therefore if a cumulative view of the evidence is taken it is quite clear that all these open plots and buildings were treated as part and parcel of the whole and are adjoining each other. This is precisely what has been found by the appeal bench of the Small Cause Court, Bombay when it held that at least from the year 1937 these three plots were treated as a common property for the purpose of tenancy and the open area is adjoining the building. If the expression used i. e. "land appurtenant to a building" is construed in the secondary and non-technical sense, then obviously such an adjoining land be included a its import.

10. It cannot be said that the protection envisaged by the Rent Act will be wholly defeated if expression used in Section 13(1)(ii) is interpreted in a secondary and non-technical sense. It appears that principle of live and let live is incorporated in this section. In Section 13(1)(ii) tenant''s occupation qua a residential building is not disturbed. The landlord is only given a right to claim possession of the land which is in the nature of garden or grounds appurtenant to a building or part of a building. It appears that the Legislature wanted to encourage construction of new residential buildings without disturbing the occupation of the tenants and therefore in such cases the question of hardship will not arise. The land resumed could be used for erection of a new residential building and that too after approval and permission from the local authorities. Therefore sufficient safeguards are provided in the section itself.

11. It is well known that on account of conditions which the II World War had created there was a great demand for accommodation, particularly in big cities like Bombay and towns in districts. The low level of constructional activities and the absence of proper maintenance and repairs also contributed to a large extent to the

inadequacy of residential accommodation. It became apparent that the landlords were exploiting the situation to their advantage. Not only rent racketing was in vogue but several malpractices were employed to enhance the rent and evict the tenants if they were not amenable to pressure. In order to check such exploitation and to bring the situation under control present Act was enacted. However if various provisions of the Act are read together and harmoniously it is quite clear that the Act discloses a well-knit composite policy of regulating the leases, controlling the rent and preventing unreasonable eviction and appurtenant the same time not affecting the new construction of buildings which would help in solving the house shortage problem. This policy is easily deducible from the recent trend of amendments to the Act.

12. The statement of objects and reasons of the principle Act clearly indicate that it was essential that the effective control should be continued until sufficient progress has been made with building operations to provide adequate and suitable accommodation for the largely increased populations of the areas concerned. Section 13(1)(i) was added to enable the landlord to resume the lands if it is reasonably and bona fide required by the landlord for the erected of the new buildings. Section 13(1)(bb) was brought on the statute book with an intention to encourage the fullest developments of plot with a view to provide maximum number of tenements. Appurtenant the same time to prevent abuse of this right on the part of landlord certain conditions were imposed Section 13(5) was also inserted in furtherance of the same object.

13. u/s 13-A a landlord is entitled to recover possession of terrace and structure for raising floor or floors. Such a provision was made to enable the landlord to build more floors and flats to house as large a number of people as possible. Section 13(1)(ii) with which we are concerned was introduced to give a right to the landlord to get possession of the land which is in the nature of gardens and grounds appurtenant to a building or part of a building if it is required for the erection of new residential building which the local authority has approved or permitted to build thereon. Therefore, it is quite clear from the various provisions that the legislature has made this provision with an intention to encourage construction of new buildings which would be helpful in solving the house shortage problem. If the provisions of S. 13(1)(ii) are not liberally construed then the very purpose of the legislation will be frustrated, because in that case the landlord will not be able to get possession of land adjoining to or adjunct to the building even for erecting new residential buildings. If the provisions of S. 13(1)(ii) are strictly construed as suggested by Shri Abhayankar the landlord will be entitled to get possession of those lands only which are essential for beneficial enjoyment of house property. Resumption of these lands is bound to result in some hardship to the tenants, because that will adversely affect the beneficial enjoyment of the property itself whereas he will not be entitled to resume those lands resumption of which is not likely to result in any hardship to him, because his occupation qua building is not

disturbed. Such a narrow construction obviously runs counter to the very intention of the legislature.

14. It is by now well settled that when a word is not defined it must be construed in its popular sense if it is a word of every day use. As said by Lord Atkinion in Keates v. Lewis 1911 AC 641:

"In the construction of a statute it is of course, appurtenant all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed, and to the evils, which as appears from its provisions, it was designed to remedy. If the words are capable of one meaning alone; then it must be adopted, but if they are susceptible of wider import, we have to pay regard to what the statute or the particular piece of legislation had in view".

In my opinion the provisions of Section 13(1)(ii) will have to be construed having regard to this well settled legal position.

15. A contention was also raised by Shri Abhayankar that the lands of which possession is sought are not ''grounds'' since they are not enclosed nor are used as play grounds or for the purpose of recreation. On the other hand it is contended by Shri Andhyarujina that such a plea was not raised either before the trial Court or in the appeal court and therefore petitioners should not be permitted to raise such a contention for the first time in this writ petition. In the alternative it is contended by him that words "garden and grounds" are preceded by words "in the nature of" which expression has wide import. If the lands are such which are capable of being used as garden and grounds then such lands are included within the expression "in the nature of". In support of this contention he has placed reliance upon High decision of the Supreme Court in Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, wherein it is observed by the Supreme Court that the scope is widened by the use of expression "nature", which expression does not equate but only draws an anology. In my opinion there is much substance in this contention of Shri Andhyarujina.

16. The word "grounds" is not defined in the Act. It is a word used in the common parlance. Therefore it will not be fair to construe the said word in a technical sense but it will have to be construed and understood as in common parlance or in its popular sense. The word ''grounds'' has various shades of meaning depending upon the context in which it is used. It is to be interpreted in the light in which it was intended to be used by the Legislature that is in a popular and wider sense. In a wider sense grounds will include a land in its natural and unmade condition. An open area appurtenant to a building or part of a building could in a loose sense be described as a ground. However, it is not necessary to probe into this question in details in the present writ petition since this question was not put in issue either before the trial court or before the appeal Bench. In any case this is a mixed question of law and facts and therefore it will not be fair to permit the defendants to

raise it for the first time in this writ petition.

17. From the evidence on record and particularly that of the architect it is clear that plots are irregular and cannot be developed independently. It is further clear that they are adjoining each other. In this case we are dealing with the land in municipal area which is to be used for building purposes and the area of the plots is not vast. These plots are adjoining each other. Initially when the plot No. 85 was leased out two structures were standing on it, i. e present building and a coal shed. Therefore the open lands and the building have a nexus and correlation with each other and therefore could safely be said or termed as land appurtenant to the buildings.

18. A contention was also raised by Shri Abhayankar that in view of the decree passed by the appeal Bench of the Small Cause Court, Bombay which excludes the building standing on the land, construction of residential premises in the present form is not possible. According to him no open space has been left out around the building in the plan submitted to the local authorities and in view of the partial decree passed by the appeal Bench which is accepted by the landlords, the construction as per the plan submitted to the local authorities is not permissible under building rules. He has also drawn my attention to the evidence of Shri Rajadhyaksha Sub-Engineer of Municipal Corporation who has stated in his deposition, that the plan is Valid for one year, and after expiry of said period sanction is required to be renewed. He has further stated that since Dec. 1966, building regulation have been changed and certain additional conditions are prescribed. It is not necessary to deal with this aspect of the matter appurtenant this stage as it is not shown that the approval or permission granted by the local authority, is either cancelled or modified. As and when such a contingency will arise, petitioners can approach proper authorities in accordance with law. They can also approach this court by filing a review petition, if legally possible.

19. Therefore having regard to the peculiar facts and circumstances of the present case, it cannot be said that the view taken by the appeal Bench is not a possible view of the matter, so as to call for an interference in this writ jurisdiction of this court under Act. 227 of the Constitution of India.

20. Hence Rule is discharged. However in the circumstances of the case there will be no order as to costs.

21. Rule discharged.