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**(1996) 09 CAL CK 0027**

**Calcutta High Court**

**Case No:** Second Appeal No. 274 of 1984

Uma Dutta

APPELLANT

Vs

S.F. Mazda

RESPONDENT

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**Date of Decision:** Sept. 30, 1996

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Transfer of Property Act, 1882 - Section 108, 108P
- West Bengal Premises Tenancy Act, 1956 - Section 13(1)

**Citation:** (1996) 2 ILR (Cal) 319

**Hon'ble Judges:** Tarun Chatterjee, J

**Bench:** Single Bench

**Advocate:** Saktinath Mukherjee and Amal Kr. Saha, for the Appellant; Shyama Prasanna Roy Chowdhury, Nihar Ranjan Chatterjee and Kashinath Dey, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Tarun Chatterjee, J.

This appeal is by the tenant challenging the judgment of affirmance passed in a suit filed by the landlord for eviction whereby both the courts concurrently found that the tenant was liable to be ejected on the ground of Section 108(P) of the Transfer of Property Act which is a ground for eviction u/s 13(1)(b) of the West Bengal Premises Tenancy Act, 1956 (in short "the Act").

2. The case of the Plaintiff in the plaint may be summarised:

The Plaintiff is an owner of Premises No. 202, Rash Behari Avenue, Calcutta-700 029, (hereinafter referred to as the "said premises"). The Appellant who is the Defendant in the suit was a tenant under the Plaintiff/ Respondent in respect of the second floor front portion block of the said premises at a rental of Rs. 75 which includes Rs. 5 as electric charges payable according to English Calendar Month. On or about July,

1970, the Defendant/tenant by a letter addressed to the agent of the landlord informed that the southern terrace in the said premises became uncovered during monsoon and the entire varanda was flooded with water causing inconvenience and accordingly the tenant/Appellant sought permission from the landlord/Respondent to construct a temporary roof at his own cost.

3. The landlord/Respondent in good faith had agreed to the said proposal and it was intimated that such construction shall be done at the cost of the tenant and without damaging the main building in any way. The Plaintiff/Respondent further alleged that instead of doing according to the proposal of the landlord, the tenant erected a room on the southern terrace of the suit flat without getting permission of the landlord. In view of such illegal action taken by the tenant, a notice to quit was served by the landlord on the tenant/ Appellant in which the tenant was directed to be evicted from the said premises as he had made a permanent structure within the meaning of Section 108(p) of the Transfer of Property Act. Therefore, on the allegations as stated above, the suit was filed for eviction of the tenant/ Appellant on the ground of violation of Section 108(p) of the Transfer of Property Act.

4. The suit was contested by the Defendant/tenant by filing a written statement in which the case made out by the Plaintiff as noted in the plaint regarding the ground for eviction u/s 108(p) of the Transfer of Property Act was totally denied. According to the Defendant, he never started to erect any room on the southern terrace of the said flat and whatever constructions that were made were so made with the consent and permission of the Plaintiff/Respondent. It was further alleged in the written statement that the particulars of the alleged construction given by the agent of the Plaintiff and the report thereon were not correct. The Defendant categorically denied that he had constructed any room with doors and windows. Accordingly, in the written statement, he prayed for dismissal of the suit. Several issues were framed, but, the main issues that were really decided by the Courts below are as follows:

1. Has the Defendant made any unlawful or unauthorised construction as alleged ?

2. Whether the alleged construction is of permanent nature ?

5. From the above two issues, it is, therefore, clear that in the Courts below the questions that were decided whether the tenant had made unauthorised construction or whether the tenant had made construction beyond the permission given by the landlord and whether such construction was of permanent nature or not. Both the Courts below on construction of the evidence adduced by the parties came to a finding that the tenant had gone beyond the permission granted by the landlord and, therefore, the tenant had made unauthorized construction and that the structure that was made by the tenant/Appellant was a permanent structure and, therefore, the tenant was liable to be evicted u/s 13(1)(b) of the Act as the tenant/Appellant having made a permanent structure had violated Section 108(p) of

the Transfer of Property Act.

6. Feeling aggrieved by these concurrent judgments, the tenant has come up to this Court in Second Appeal.

Mr. Mukherjee, appearing on behalf of the tenant submitted that on the facts alleged and evidence adduced by the parties, the Courts below ought to have held that permission was granted to the tenant to construct on the disputed part of the suit flat and the tenant having constructed on the basis of such consent of the landlord, it could not be held that the tenant was liable to be evicted on the ground of Section 108(m)(o)(p) of the Transfer of Property Act. Mr. Mukherjee, further, contended that assuming that the construction that was made was not on the basis of the consent given by the landlord even then in the facts and circumstances of this case and the evidence on record, it could not be held that the structure that was made by the tenant was a permanent structure. In support of this contention, Mr. Mukherjee firstly relied on a decision of the Bombay High Court in [Alisaheb Abdul Latif Mulla Vs. Abdul Karim Abdul Rahman Mulla and Others](#), He also relied on several other decisions. They are reported in [Om Prakash Vs. Amar Singh and Others](#), , [Brijendra Nath Bhargava and Another Vs. Harsh Wardhan and Others](#), Ratanlal v. Kishorilal 1993 (1) C.L.J. 193 , [Om Pal Vs. Anand Swarup \(Dead\) by Lrs.](#), Ratnamala Dasi v. Ratan Singh Bawa 1988 (1) C.L.J. 468.

7. Mr. Roychoudhury, appearing for the Respondents, however, contested the submissions made on behalf of the Appellant. Mr. Roychoudhury has submitted that this appeal is concluded by the concurrent findings of fact. For such submissions, Mr. Roychoudhury had drawn my attention to paras.3 to 6 of the plaint and paras. 8 and 9 of the written statement. By drawing my attention to the aforesaid paragraphs of the written statement, Mr. Roychoudhury contended that the Courts below were fully justified in holding that the tenant/Appellant had made construction beyond the permission granted by the Respondent. Mr. Roychoudhury, further, contended that the finding with regard to permanent structure is a question of fact which cannot be interfered with in Second Appeal.

8. Having heard the learned lawyers for the parties and after giving my anxious consideration to their submissions, I am of the view that this appeal is concluded by the concurrent findings of fact which can not be upset in Second Appeal.

9. From Exhibits A" and A(1)" it is seen that the Defendant/tenant was permitted to construct coverings of the southern terrace of the flat by some tiles or other such light materials at the cost of the tenant/Appellant and without damaging the main building in any way. Therefore, this cannot be disputed that the tenant/ Appellant was permitted to take steps in the manner indicated in Exhibits \*A" and "A(1)" But, from the same, it does not appear that permission was granted to the tenant/Appellant by the Plaintiff/Respondent to make any construction. Since a dispute arose whether whatever construction that was made by the tenant/

Appellant was a permanent structure, the trial Court thought it fit to appoint a pleader Commissioner.

10. The pleader commissioner submitted his report. Exhibit "4" is the report of the Commissioner. From Exhibit "4" it is seen that there is a covered space measuring about 181 sq. ft. just to the east of the staircase and southern side of the passage abutting the living room. It also appears from Exhibit "4" that on the southern side also there are two openings measuring 5'4 1/2" each. There are wooden frames fitted with iron grills. On the western side of the covered space, there is an opening measuring 7'4" in width and in height 7'7". Above the said height upto reaching of the roof was covered by bamboo matting. On the northern wall, there were two openings without any window leaves. The eastern opening of the northern wall measures 7" in height and 9'9" in width. The other opening contiguous to the west was measuring 5" in height and 4'10" in width. The base was blocked by dwarf wall, measuring 2'1" in height and 4'10" in width. The roof of the covered space is constructed by R.C. tiles resting with the wooden frames consisting of 5 rafters and 12 battoms.

11. From the said report, it also appears that there is a concrete shelf 2'2" in thick and in breadth 1'4" of the entire length of the space and a pillar is at the middle portion of the shelf. The Commissioner also found that there is one R.C. Chajja measuring 14'2" in width above the two openings, in continuation of the tiled roof. The Commissioner also found that there is a wiring on the eastern wall of the covered space leading into one electric lamp. From the judgment of the Courts below, it appears that no dispute was raised over the Commissioner's report and, therefore, we are to proceed on the basis that the Commissioner's report depicted true state of affairs.

12. Considering this report and other materials on record, the Courts below came to a conclusion of fact that the Defendant/tenant had gone beyond the permission granted by the Plaintiff/Respondent. This conclusion arrived at on consideration of the materials and evidence on record by the Courts below cannot be touched by this Court in Second Appeal until and unless such finding of fact is found by this Court to be a perverse one.

13. In this view of the matter, I am unable to interfere with such concurrent findings of fact as I find that such finding of fact could not be said to have been arrived at by the Courts below on non-consideration of the evidence and other materials on record, nor it can be held by any stretch of imagination that such finding of fact was a perverse one. Whether or not the tenant had constructed beyond the permission granted by the landlord is a question of fact and that question had been determined by the Courts below.

14. The findings of the Courts below, as stated earlier, was undoubtedly in favor of the landlord/ Respondent. It would be, therefore, an error on my part to interfere

with such findings of fact arrived at by the Courts below. In *Azra Abdulla v. Asiatic Oxygen and Acetylene Co. Ltd.* 1995 Supple (4) S.C.C. 398 , it has been held by the Apex Court of our country that the findings of fact in respect of the above question is a question of fact which cannot be interfered with in Second Appeal. Again in [Venkatlal G. Pittie and Another Vs. Bright Bros. \(Pvt.\) Ltd.,](#) the Supreme Court held that when the Trial Court and the Appellate Court after examining the relevant evidence having regard to all the material factors came to a conclusion whether permanent structure raised by the tenant was without the consent of the landlord, such finding of fact was not open to be interfered with by the High Court. Accordingly, this branch of submission of Mr. Mukherjee is not accepted.

15. Next, the question whether the findings of fact arrived at by the Court below on the question of permanent structure can be interfered with in second appeal be taken up for consideration. In my view, this question is also concluded by the concurrent findings of fact arrived at by the Courts below. In support of this contention that in order to come to a finding on the question of permanent construction, Mr. Mukherjee argued that the Courts below had failed to take into consideration that unless a case of waste or damage was proved, it could not be said that there was any violation of Section 108(m)(o)(p) of the Transfer of Property Act.

16. In support of this contention, Mr. Mukherjee relied on a Special Bench decision of this Court in the case of *Ratanlal v. Kishorilal* (Supra) Reliance was also placed in this connection on *Om Pal v. Anand Swarup* (Supra). In the Special Bench decision of this Court at para 158, it was observed that the findings of the Courts below could not be interfered with as there was proper appreciation of evidence by the Courts below.

17. According to the Special Bench, the questions which were raised centering all the issues regarding violation of Section 108(m)(o)(p) of the Transfer of Property Act could not be said to be a question of law far less a substantial question of law to call for interference. The whole issue depends on appreciation of evidence and in the Special Bench decision, it as held that the Courts below arrived at its conclusion on due appreciation of evidence.

18. Be it mentioned herein that the decision of the Supreme Court in the case of *Om Pal v. Anand Swarup* (Supra), was also cited before the Special Bench of this Court. The contention of the Appellants relating to the submissions made regarding violation of Section 108(m)(o)(p) of the Transfer of Property Act was negated by the Special Bench in para."158" of the same on the ground that in Second Appeal, the High Court was not entitled to re-appreciate the evidence and come to its own conclusion when the appreciation of evidence by the Courts below was proper. That apart, from para."3" of the plaint, it appears that the Defendant by a letter suggested that for proper protection of the said house, tiled roof or a roof of such light material on the terrace should be put up at an early date.

19. From the plaint, it also appears that permission was granted to the Defendant to make a tiled roof or a roof of such light materials on the terrace. In para."4" of the plaint, the Plaintiff has alleged that instead of doing according to his own proposal, the Defendant-Appellant started to erect a room on the southern terrace of the suit house without the knowledge and permission of the Plaintiff. From para/5" of the plaint, it appears that the Plaintiff alleged that the Defendant illegally covered a space measuring about 181 sq.ft. by 6" brick walls with windows and doors having a tiled roof on wooden frame. In para."5" of the plaint, the Plaintiff, further, alleged that the Defendant further constructed a vat on the south-western corner with masonry structure and set up 3" wide concrete shelf and made electrical wiring inside the room and constructed R.C.C. Chajjah over the widow opening on the southern side of the said room.

20. So far as the allegations made in para "3" of the plaint are concerned, the Defendants -in their written statement admitted that the statements made in para "3" of the plaint were substantially correct. In view of such admission made by the Defendants in para "8" of the written statement, it must be held that permission was granted to the Defendants to make a tiled roof or a roof of such light materials on the terrace only and the same could be done without damaging the main building in any way.

21. In para "9" of the written statement, the Defendants have asserted that they put up the tiled shade over the southern terrace of the flat in question with very light materials and with necessary supporting columns built on the parapet. They have denied that they had, at any time, or in any manner constructed any room on the southern terrace as alleged. As noted herein earlier, a Commissioner was appointed to see whether any permanent structure was made by the Defendants and whether the Defendants had made construction beyond the permission granted by this Court.

22. As noted hereinabove, both the Courts below on consideration of the evidence on record concurrently found that the Defendants in violation of the consent letter given by the Plaintiff had made a permanent structure in the suit property. Both the Courts below considered the Commissioner's report and also the evidence on record and on appreciation of the Commissioner's report and also the evidence on record, came to a conclusion that the construction so made by the Defendants was in the nature of permanent one.

23. After going through the findings of the Courts below, I do not find anything from which it can be said that such concurrent finding of fact was reached by the Courts below without consideration and appreciation of the evidence and other materials on record. In my view these concurrent findings of the Courts below cannot be touched in Second Appeal. In view of the decision of the Supreme Court in the cases of Azra Abdutta v. Asiatic Oxygen & Acetylene Co. Ltd. (Supra) and Venkatlal G. Pittie v. Bright Bros. Pvt. Ltd. (Supra) as referred to herein earlier, I am of the firm opinion

that the findings of fact cannot be interfered with by the High Court in Second Appeal.

24. It is now well settled that in deciding whether a construction is permanent" or "temporary" for the purpose of Section 108(p) of the Transfer of Property Act, two factors are primarily important, viz. nature of the structure and the intention with which it is made. If the structure is such that it will endure for long time that is to say, so long as the tenant expects it to use it as long as he remains as a lessee, it will be regarded as "permanent" structure, even though the construction is removable without causing permanent damage to the leased premises.

25. In [Suraya Properties Private Ltd. Vs. Bimalendu Nath Sarkar](#), a Division Bench of this Court held that the word permanent" means "which lasts, till the end of the term of the term lease" and does not mean ever lasting". In that decision it was held that the words "permanent structure" would mean that the lessee intended that he could enjoy the structure that he raised as long as he continued to be in possession. D.W.(1) in his cross-examination specifically stated that "such construction has been made with the expectation that they would last for the duration of lease." The Courts below relied on the deposition of the D.W.1 himself and other evidence on record and came to a conclusion that the construction so raised by the Defendants must be considered to be for a permanent purpose within the meaning of Section 108(p) of the Transfer of Property Act. Therefore, the tenant was liable to be ejected on the ground of Section 108(p) of the Transfer of Property Act.

26. This being the position, I am unable to interfere with such finding of fact u/s 100 of the Code of Civil Procedure.

27. Before parting with this judgment, let me now consider the decisions cited by Mr. Mukherjee in support of his above two contentions. The first decision on which Mr. Mukherjee relied is a decision of Bombay High Court in the case of Abdul Latif v. Abdul Karim (Supra) This Single Bench decision of the Bombay High Court laid down certain principles for the Court to decide when a structure can be considered to be a "permanent" one. There is no inflexible rule for coming to such conclusion. Each case shall depend on the facts alleged by the parties.

28. That apart, in view of the aforesaid Special Bench decision of this Court in the case of Ratanlal v. Kishorilal (Supra), it is not necessary for me to deal with the said decision any further. The next decision is a decision of the Supreme Court in the case of Om Prakash v. Amar Singh (Supra). In that decision, it was held that question whether the constructions materially altered the accommodation was a mixed question of fact and law. From the facts disclosed in that decision, it was found that the partition wall was, in fact, a temporary wall of 6 ft. height covering the big wall into two portions for its convenient use which cannot be considered to be a permanent structure. In view of the facts involved in this appeal and the facts in that decision of the Supreme Court and in view of the findings arrived at by the Courts

below, it would not be fair on my part to rely on the aforesaid decision of the Supreme Court for the purpose of deciding this appeal.

29. So far as the decision in the case of Brijendra Nath v. Harsh Wardhan (Supra) is concerned, that was a case relating to material alteration of the tenanted premises by the tenant. In the present case we are concerned not with that question, but with the question whether the tenant had made permanent construction or not in the tenanted premises without the permission of the landlord. Such being the position, I am of the view that this decision of the Supreme Court cannot be of any assistance to the tenant/Appellant. Similar is the position in respect of the decision in Om Paul v. Anand Swarup (Supra). The last decision on which Mr. Mukherjee relied is a decision of the Division Bench of this Court in the case of Devokinandan Boobna v. Harasundar Sarkar 1988 (1) C.L.J. 278.

30. In my view, this decision is also of no help to the Appellant. In that case an air conditioner was put by the tenant to improve the premises. It was held in that Division Bench decision that such placement of an air conditioner improved the premises and the tenant was also entitled to remove the improvement and after such removal was made, the tenanted premises could be restored to the original condition, and, therefore the tenant was not entitled to be ejected on the ground of Section 108(o) of the Transfer of Property Act.

31. The facts of that case are totally different to the facts involved in this appeal. As discussed hereinabove, the nature of structure that has been made by the Appellant for the purpose of his stay till the Appellant is evicted, was not at all an issue before the Division Bench of this Court in that decision. In that view of the matter, I am unable to rely on this decision in the present appeal.

32. Similarly, I am unable to give any relief to the Appellant following the Division Bench decision of this Court in the case of Ratnamala Dasi v. Ratan Singh Bawa (Supra). Mr. Mukherjee relying on paras. 4 to 8 and 9 and 10 contended that the findings as regards permanent structure without the permission of the Respondent cannot be accepted.

33. In my view, in the said decision, a principle has been laid down that a combined reading of cls.(o) and (p) of Section 108, Transfer of Property Act indicates that though the tenant can not make any construction by way of addition or alteration which is a permanent structure or which is destructive of or permanently injurious to the tenanted premises, he can, within the limits of cls.(o) and (p). add to the premises and make alteration there to suit his necessities.

34. In my view, applying the principles laid down in the Division Bench decision, I can safely hold that the Courts below could not be said to have gone wrong by holding that the nature of construction that has been made by the tenant/Appellant without the permission of the Respondents was not a permanent structure within the meaning of Section 108(p) of the Transfer of Property Act.



35. In that decision only a collapsible gate at the entrance of the tenanted premises was fixed by the tenant/Appellant. The Division Bench of this Court in that decision held that such affixation of a collapsible gate to protect the tenanted premises would not amount to erection of a permanent structure. The facts involved in that decision and the facts involved in this appeal are completely different.

36. In view of this, I am unable to rely on this decision cited by Mr. Mukherjee. In any view of the matter the Division Bench of this Court has also held in principle that a tenant cannot erect a permanent structure in the demised premises without the permission of the landlord. Both the Courts below concurrently found that such permanent structure was made by the tenant for which the tenant was liable to be ejected. Therefore, there is no reason to accept the submission of Mr. Mukherjee on the basis of the aforesaid Division Bench of the Court.

37. Before I part, one more submission of Mr. Mukherjee may be dealt with. Mr. Mukherjee relying on a Supreme Court decision in the case of [Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others](#), contended that the intention of the parties to a document of grant has to be gathered by the words used by the parties themselves. Taking me through the words used in Exhibits A and "A", and relying on this decision of the Supreme Court, Mr. Mukherjee contended that the permission was granted by the landlord to the tenant to make construction in the manner the tenant had made.

38. In my view, this submission of Mr. Mukherjee cannot be accepted as it appears that the Defendants themselves have admitted the nature of construction that they have made in para."8" of the written statement. In any event, I am unable to agree with Mr. Mukherjee that the construction that has been made by the Appellants was not beyond the permission granted by Exhibit A or A"

39. From a plain reading of Exhibits A and A", and on consideration of the Commissioner's report and other evidence on record, it cannot be disputed that both the Courts below came to a conclusion of fact correctly that the tenants have made construction beyond the permission granted by the landlord. Accordingly, this submission of Mr. Mukherjee is also not accepted.

No other point was raised by Mr. Mukherjee on behalf of the Appellant.

For the reasons aforesaid, the appeal is dismissed

There will be no order as to costs.

40. Considering the facts and circumstance of this case I am of the view that the tenant should be granted one and half year's time to vacate the suit premises. Accordingly, the Appellants was granted one and half year's time to vacate the suit premises if the Appellant files an undertaking within two months from this date that they shall vacate and deliver peaceful possession to the landlord/Respondent on the expiry of the time fixed by this judgment and subject to the further condition that

the Appellants shall go on depositing the rent at the rate last paid in the executing court and also shall deposit arrears of rent, if there be any, within three months from the date of this judgment.