committee cannot enforce any of the provisions of the Gulam Mohammad Act or the rules or the bye-laws framed by it and cannot issue licences till the market is properly estab. state of Bombay lished in law.

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We therefore allow the petition partly and direct the respondents not to enforce any of the provisions of the Act, the rules and the bye-laws against the petitioners with respect to the market till a market is properly established in law for this area under s. 5AA and not to levy any fees under s. Il till the maximum is prescribed under the Rules. In the circumstances we order parties to bear their own costs.

Petition allowed in part.

DR. GOPAL DASS VFXRMA

May z.

DR. S. K. BHARDWAJ AND ANOTHER

(P. B. GAJENDRAGADKAR, K. N. WANCHOO and K. C. ms GUPTA, JJ.)

Tenancy—Created or used both for residential and Professional Purposes—Termination of—Delhi and Ajmer Rent Control Act, 1952 (Act XXXVIII of 1952), ss. 2(g), 13(1)(e).

The respondent as a tenant of the appellant was occupying a portion of the premises in question for residence and the other major portion for his professional work as an ear, nose, throat specialist. The appellant sued for the ejectment Of the respondent on the grounds that (i) he required the premises for his own residence and that (ii) the respondent had built a suitable residence for himself in another locality. The first plea was based on the ground mentioned in s. and the second plea on s. of the Delhi and Ajmer Rent Control Act, 1952. The trial court decreed the suit but the appellate court and the High Court dismissed it on the finding that from the beginning of the tenancy a substantial part of the premises was used by the respondent for his professional work obviously with the consent of the appellant.

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Held, that premises let for residential purposes but used by the tenant with the consent of the landlord incidentally for commercial, professional or other purposes cease to be premises let for a residential purpose alone and as such the landlord would not be entitled to eject the tenant under s. 13(1)(e) of the Act. Nor can such a tenant be ejected independently under s. 13(1)(h) because a tenancy created or used both for residence and profession cannot be terminated merely by showing that the tenant bad acquired a suitable residence.

Premises let both for residence and commercial purposes do not cease to be premises undec s. 2(g) and continue to be so under the last clause of s. 2(g).

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 278 of 1959.

Appeal by special leave from the judgment and order dated April 2, 1957, of the Punjab High Court, in Civil Revision No. 239 of 1956.

C. K. l)aphtary, *Solicitor-General* of India, S. N. Andiey, Rameshwar Nath and P. L. vohra, for the appellant.

S. T. Desai a,nd Naunit Lai, for the respondents.

1961. May 2. The Judgment of the Court was delivered by

GAJENDRAGADKAR, J.—The appellant Dr. Gopal Das Varma owns a double-storeyed house known as 28, Barakhamba Road, New Delhi* The ground floor of this house consists of block of omces and the first floor consists of four flats; threo of these are in the occupation of the appellant while the fourth has been let out to respondent l, Dr. Bhard waj. Dr. Bhardwaj is an ear, nose, throat specialist, and in one of the four rooms of the flat he and his wife, respondent 2, reside, while the three other rooms are used by him for the purpose of his profession. Respondent I appears to have taken the premises on lease as early as 1934 although he executed an agreement of tenancy in

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tenancy could be renewed on terms to be settled later. In fact the tenancy has been renewed from year to year and the flat is still in possession of respondent I.

favour of the appellant on November 8, 1935. This agreement shows that the appellant agreed to let out his flat to respondent I on a, rent of Rs. 90 per month payable in advance. The tenancy was to commence from October l, 1935, and was intended to continue up to September 30, 1936. Parties agreed that the said

V. S. K. In October 1953 the appellant sued the two responBhardwajdents for ejectment on two grounds. He alleged that

he required the premises in question for occupation as Gajendvagadkar J.residence for himself and for the members of his family and that respondent 1 had recently built a suitable residence for himself in Golf Link Area, New Delhi. The first plea was made under s. of the Delhi and Ajmer Rent Control Act, 1952 (Act xxxvlll of 1952) (hereafter called the Act), while the second was raised by reference to s. 13(l)(h) of the Act. According to the appellant, since both the requirements of the Act were satisfied he was entitled to obtain a decree for ejectment against the respondents. The claim thus made by the appellant was denied by the respondents. Respondent; 2 pleaded that she was not the tenant of the appellant and ghe alleged that it was she and not respondent I who had built the house in Golf Link Area. Respondent I admitted that he was a tenant under the appellant. He, however, contended that the appellant did not require the premises bona fide for his personal use, and he urged that he was using the premises for carrying on his medical profession and as such the appellant was not entitled to eject him. He supported his wife in her plea that the house built in Golf Link Area belonged to her and not to him.

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On these pleadings the learned trial judge framed appropriate issues. He found that respondent I alone was the tenant of the appellant and that the premises in question had been let to respondent 1 for residential purpose. According to the trial judge the premises in suit had been constructed for residential purposes and the flat in question was let out to respondent exclusively for that very purpose. The trial judge further held that the fact that a portion of the premises was used by respondent I for his profession or business would not make the tenancy one for nonresidential purposes. In that view he rejected the

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argu ment raised by respondent I on the explanation to s. 13(l)(e) of the Act. The trial judge also held that it was respondent I who had built a house in Verma Golf Link Area and since the Eid house was suitable for hig residence the requirements of s. 13(l)(h) were satisfied* On the question about the bona fide require. Bhß'dwaj ments of personal residence pleaded by the appellantGajendvagadkar J. under s. 13(l)(e) the trial court made a finding against him. Even so, as a result of his conclusion under s. 13(l)(h) the trial judge passed a decree for ejectment in favour of the appellant.

Both the respondents challenged this decree by preferring an appeal before the Senior Sub Judge at Delhi. The appellate Court held that on the facts proved in the case it cannot be inferred that the pre. mises in suit were built for residential purposes alone, and that evidence did not show that the premises in question had been let to respondent I for residence alone. The appellate judge exa,mined the conduct of the parties and held that it was proved beyond any shadow of doubt that respondent I was using the premises both for his residence and his professional work since the inception of the tenancy without any objection on behalf of the appellant, and 80 in his opinion the premises could not be said to have been let for residence alone. He also found that under the proviso to s. 13(l)(e) it cannot be said that the premises were used incidentally for profession without the consent of the appellant; in that view s. 13(l)(e) did not apply to the case. Since the appellant had failed to prove that the premises were residential premises within the meaning of s. 13(l)(e) and (h) the appellate Court hold that respondent I could not be ejected. In the result the appeal preferred by the respondents was

allowed and the decree for ejectment passed by the trial Court against thena was set aside.

The appellant then took the dispute before the High Court of Punjab by his revisional application. The High Court has in substance agreed with the view taken by the appellate Court, confirmed its main findings and has dismissed the revisional application. The High Court has observed that in its opinion the
Gopal appellate judge was fully justified in holding that the premises were let out to the tenant for the
v. purpose of Vermo residence and for the
Dr. S. K. Bhardwaj purpose of his work as a member of the medical profession. 1b has mbde an alternative finding that even if ib was assumed that the premises j were let out to respondent for the purpose of resiGajendvagadkar J.dence the plea of bona fide requirement made by the appellant was not proved and the argument based upon s. 13(1)(h) was not available to the appellant because the Golf Link building which respondent I hod acquired cannot be said to be suitable for the conduct Of business if the neighbourhood or the locality in which it is situated is not suitable for that purpose. In the result the High Court dismissed the appellant's revisional application. It is against this decision that the appellant has come to this Court by special leave.

It is relevant to refer to the material provisions of the Act before dealing with the points raised for the appellant by the learned Solicitor-General in the present appeal. The Act applies to premises which are defined by s. 2(g) as meaning, inter alia, any building or port of a building which is, or is intended to be, let separately for use as a residence or for commercial use or for any other purpose. Section 13(1) provides that notwithstanding anything to the contrary contained in

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any other law or any contract, no decree or order for the recovery of possession of any premises shall be passed by any Court in farvour of the landlord against any tenant including a tenant whose tenancy is t.errninated. This provision is, however, subject to the exceptions provided under the several clauses of the proviso. We are concerned with two of these. Section 13(1)(e) allows a decree for ejectment to be passed if the Court is satisfied that thc premises let for residential purposes are required bona fide bv the landlord who is the owner of such premises for occupation as a residence for himself or his family and that he has no other suitable accommodation. The explanation to this clause provides that for the purpose of this clause 'residential premises' include any prem ises which having been let for use as a residence a,re, without the consent of the landlord, used incidentally for com. mercial or other purposes; and s. 13(l)(h) provides for ejectment in a case where the Court is satisfied that the tenant has whether before or after the commencement of this Act built, acquired vacant possession of, or has been allotted, a, suitable residence. It is with these three provisions that we are concerned in the present appeal.

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It would be noticed that as soon as it is found that the premises in question have been used by respondent I incidentally for professional purposes and it is further established that this use is made with the consent of the landlord then the case goes outside the purview of s. 13(l)(e) altogether. In the present case it has been found by the appellate Court and the High Court that right from the commencement of the tenancy a substantial part of the premises is used by respondent I for his professional

purpose, and they have also found that this has been done obviously with the consent of the landlord. It is unnecessary to refer to the evidence on which this finding is based, Even the trial Court was apparently inclined to take the same view about this evidence but it did not fully appreciate the effect of the explanation; otherwise it would have realised that the professional use of a substantial part of the premises with the consent of the appellant clearly takes the cage outside s. 13(1)(e). In other words, where premises are let for residential purposes and it is shown that they are used by the tenant incidentally for commercial, professional or other purposes with the consent of the landlord the landlord would not be entitled to eject the tenant even if he proves that he needs the premiseß bona fide for his personal use because the premises have by their user ceased to be premises let for residential purposes alone. This position cannot be seriously disputed.

Faced with this diffculty the learned SolicitorGeneral attempted to argue that the very finding made by the Courts below about the nature of the tenancy takes the premises outside the purview of s. 2(g) of the Act. The argument is that the premises cannot 901 then be said to have been let for use as a residence or for a commercial use and so they ceased to

G opal be premises under the Verna Act. It is suggested that any other use which is specified by s. v. S. K 2(g) would not include a . combination of residence with comtnercial or profes. Bhøydwæj sional purposes. The other use there referred to may

be use for charity or something of that kind which is Gajendvagadkar J•

different from use as residence or commercial use. In our opinion this argument is not well-founded. The three kinds of user to which the definition refers are

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residence, commerce and any other purpose which necessarily must include residence and commerce combined. It may also include other purposes as suggested by the learned Solicitor-General. As soon as it is shown that the premises have been let both for tlje, use of residence and for commercial purposes it does not follow that the premises cease to be premises under s. 2(g); they continue to be premises under the last clause of s. 2(g). This position is wholly consistent with the division of the premises made with reference to their user in paragraphs 3, 4 and 5 of Part A in the Second Schedule to the Act. Therefore, in our opinion, the argument urged by the learncd Solicitor-General on the construction of s. 2(g) cannot be sustained. It will be recalled that the present suit has been filed by the appellant himself praying for the respondent's ejectment under the proȩisions of the Act, and so the brgument that the Act does not apply to the premises in question can be justly characterised as an argument of desperation.

Then it is contended that even if the appellant may not be entitled to claim ejectment under s. 13(l)(e) he would be justified in claiming a decree for ejectment against thé respondent independently under s. 13(l)(h). It is urged that as soon as it is shown that respondent 1 has acquired a suitable residence he can be ejected even though s. 13(l)(e) may not apply to his tenancy. In our opinion, even this argument is fallacious. Section 13(l)(h) applies to tenancies which are created for essential purposes, and it provides that in the case of such tenancies even if the landlord may not be able to prove his cose under s. 13(1)(e) he would neverthelees be entitled to eject the tenant once it is shown that the tenant, has acquired another suitable resi- 1961 dence. The requirement is thiit the tenant must, have ___ suitable residence. Both words of the requirement

Vetma are significant; what he has acquired must be residence, that is to say the premises which can be used for residence and the said promises must be suitable for that purpose. If the premises from which eject- ___*nent is sought are used not only for residence but *Gajendragadkar J.* also for profössion how could s. 13(l)(h) come into operation? One of the purposes for which the tenancy is acquired is professional use, and that cannot be satisfied by the acquisition of premises which are suitable for residence alone, and it is the suitability for residence alone which is postulated by 8. 13(1)(h). Thereforo, in our opinion, it would be unreasonable to hold that tenancy which has been created or used both for residence and profession can be successfully terminated merely by showing that .the tenant has acquired a suitable residence. That is the view taken by the High Court and we see no reason to differ from the conclusion of the High Court.

The last argument urged by the learned SolicitorGeneral is that respondent 1 should not be allowed to approbate and reprobate as he has done in the present case. This argument is based on the conduct of the respondent at the previous stages of the dispute. It is true that in 1941 and onwards respondent I has successfully urged that the tenancy was for residence, and in consequence has secured the extension of tenancy under cl. IIA of the New Delhi House Rent Control Order, 1939, issued under r. 81(2)(bb) of the Defence of India Rules. The statements made by respondent 1 in that behalf indicate that he exercised his option of obtaining extension of the lease on the ground that the premises were let out to him for residence. The argument is that since by the said representations he had actually obtained an advantage he cannot be permitted now to contend that the lease is not only for residence.

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On the other hand the conduct of the appellant himself is also inconsistent with the stand taken by

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demanded an increased rent from respondent I he

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made out a case which is inconsistent with his present that were let 1

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him in the present proceedings. In 1942 when he

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story the premises out to respondent only for residence. The case then made out by him Bhavdwaj appears to be that the tenancy fell under paragraph 4 of Part A in the Second Schedule to the Act, and that

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would mean that the premises had not been let only for residence. Indeed the conduct of both the parties has been actuated solely by considerations of expediency and self-interest in this case, and so it would prima facie be idle for the appellant to contend that respondent 1 should not be allowed to approbate, and reprobate. But, aport from this fact, it is obvious that the appellant cannot be allowed to raise this contention for the first time before this Court. The plea sought to be raised can be decided only after relevant evidence is adduced by the parties, and since this plea has not been raised by the appellant at the proper stage respondent 1 has had no opportunity to meet the plea and that itself precludes the appellant from contending that though the lease may not be one for residence alone respondent 1 should not be permitted to urge that it iB not for residence but for residence and profession. It is the settled practice of this Court that new pleas of this kind which need further evidence are not allowed to be raised in appeals under Art. 136 of the Constitution.

Dr. Gopal Duss

The result is the appeal fails, but in the circumstances of this case we direct that the parties bear their own costs throughout.

Appeal dismissed.