does not by itself bring him within the zone of consideration. He will be within the zone of consideration only if his name in the seniority list is within three times the number of vacancies. The view we have taken on this aspect of the matter, finds full support from a judgment of the Supreme Court in *Ashok Kumar Yadav and others* v. *State of Haryana and others* (10). In that case, the Supreme Court held that "Every candidate to be eligible for appearing at the *Viva Voce* must attain at least 45 per cent marks in the aggregate in the written examination. Obtaining of minimum 45 per cent marks does not by itself entitle a candidate to insist that the should be called for the *Viva Voce* test". We do not find any merit also in the contention raised on behalf of the appellants that since an officer belonging to the Scheduled Castes/Scheduled Tribes was not included as a member of the Selection Board, the selection of the officers was liable to be quashed. As stated earlier, all the writ petitioners had appeared before the Selection Board without raising any objection with regard to the constitution of the Selection Board. The appellants, therefore, cannot be allowed to approbate and reprobate.

(12) Since we do not find any merit in the appeals, we do not deem it necessary to decide the preliminary objection raised on behalf of the respondent-Bank that the appellants were not entitled to any relief as they had not impleaded affected parties.

(13) For the reasons recorded, both the appeals are dismissed. The parties, are, however, left to bear their own costs.

J.S.T.

Before Hon'ble G. S. Singhvi, J.

BIR DEVINDER SINGH SON OF MOHINDER SINGH RESIDENT OF BASSI PATHANA,—*Petitioner.*

versus

MANGAT RAM SON OF DIP CHAND RESIDENT OF SOHANA, ... *Respondent.*

Civil Revision No. 3937/94

5th December, 1994.

East Punjab Urban Rent Restriction Act (III of 1949) *S.* 13(2) *(iii) Eviction on grounds of Material impairment—Whether construction*

(10) 1985 (2) S.L.R. 482.

of Tin shed in front of shop amounts to material impairment of rented premises—Held no material impairment.

Held, that the Rent Controller as well as the Appellate Authority have concurrently held that the landlord has failed to prove his case that the tenant had constructed a room and had thus impaired the value and utility of the shop. The Appellate authority further held that putting up a temporary tin shed with the object of preventing rain showers and sun light can not be equated with construction of a room and such construction can not cause impairment in the utility and value and the disputed premises. In my considered view the aforesaid findings recorded by the Rent Controller and the Appellate Authority are absed on a correct appreciation of evidence and there is no reason for me to interfere with these findings.

(Para 5)

East Punjab Urban Rent Restriction Act, (III of 1949) S. 13 In absence of any agreement between Landlord and the Tenant as regards payment of property Tax—Tenant can not be held liable to pay such tax.

Held, that the Learned counsel has not been able to show that there was an agreement between the petitioner and the respondent whereby the respondent had agreed to pay the property Tax. In the absence of any such agreement, the tenant could not have been held liable to pay the property tax.

(Para 13)

Inderjit Malhotra, Advocate. *for the Petitioner.*

JUDGMENT

G. S. *Singhvi, J.*

(1) This Petition is directed against the judgment dated 7th June. 1994 of the Appellate Authority, Ropar in rent appeal No. 17 of 1992 which was filed by the petitioner against the order dated 17th October, 1992 passed by the Rent Controller, Kharar, dismissing an application filed by him under Section 13 of the East Punjab Rent Restriction Act, 1949 (hereinafter referred to as 'the Act').

(2) Brief facts of the case are that the petitioner had rented out a shop situated at Kharar to the respondent on 3rd August, 1979 with monthly rent of Rs. 250. In his application filed under Section 13 of the Act the petitioner raised two grounds of eviction. Firstly, he pleaded that the tenant had constructed a room on the vacant site and had, thus, materially impaired the utility of the shop. Secondly. it was pleaded that the tenant had not paid property tax amounting to Rs. 5,757. The tenant-respondent contested the application and pleaded that the alleged construction raised by him was nothing

except a tin shed which he had put in order to protect the shop from rain showers and light and that its projection was on the road. He pleaded that no construction was raised on the rented premises so as to materially impair the utility of it. He also disputed the claim of the applicant that he was liable to pay the property tax.

(3) Learned Rent Controller framed three issues on the basis of the pleadings of the parties and after considering their respective cases, the Rent Controller held that the applicant has failed to make out a case for eviction. On the issue of material alteration of the premises as well as on the issue of alleged liability of the tenant to pay the property tax, the learned Rent Controller recorded findings adverse to the petitioner. Appeal filed by the petitioner before the Appellate Authority, Ropar also failed. The Appellate Authority agreed with the findings of fact recorded by the Rent Controller that the so called construction made by the tenant was in the form of tin shed supported by pipes in front of the room and in fact, no pucca construction had been raised by the tenant which could affect the utility of the premises. Relying on a decision of the Supreme Court in *Om Pal* v. *Anand Swarup* (1), the learned Appellate Authority held that the so called construction raised by the tenant did not materially impair the utility of the premises. On the issue of property tax also, the learned Appellate Authority held that in the absence of any agreement indicating the liability of the tenant to deposit the property tax, order of eviction can not be passed merely because the tenant did not deposit the property tax.

(4) First argument of Shri Malhotra is that the Rent Controller as well as the Appellate Authority have exceeded the jurisdiction in holding that the construction of tin shed made by the petitioner was on the property of Public Works Department and therefore, the landlord had no right to seek eviction of the tenant from the rented premises. Learned counsel argued that this finding of the Courts below will seriously prejudice future rights of the petitioner. Second argument of Shri Malhotra is that finding recorded by the Courts below on the issue of material alteration is perverse. Shri Malhotra argued that the impairment in the value or utility of the property has to be looked from the point of view of the landlord and not from the point of tenant and therefore once the landlord has proved that

(1) 1988 (2) Pb. Law Reporter, 699.

the tenant had, in fact, made alteration in the disputed premises, it was the duty of the Rent Controller to have passed an order of eviction. Shri Malhotra submitted that the Appellate Authority has ignored the law laid down by this Court on the issue of material alteration and therefore the finding recorded by it is liable to be set aside by this Court. He also submitted that the finding recorded by the Rent Controller as well as the Appellate Authority on the issue of property tax suffers from material irregularity and therefore the impugned order passed by the Rent Controller as well as judgment of the Appellate Authority deserve to be set aside.

(5) Section 13 (2) (iii) of the Act reads as under :—

"A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant is satisfied :—

(i) * * * * *

(ii) * * * * *

(iii) that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land, or.....

Perusal of the above quoted provisions show that before a landlord can seek an order of eviction on the ground enumerated in Section 13 (2) (iii), he has to establish that the tenant has committed such acts as are likely to impair materially the value or utility of the building or rented land. The mere impairment of the value or utility of the building by the acts of the tenant is not sufficient. Such to be material. If the landlord fails to establish that there has to be material. If the landlord fails to establish that there has been a material impairment in the utility or value of the tenanted premises, he can not succeed in his application for eviction. The finding on the issue as to whether a particular construction made by the tenant has materially impaired the value or utility of the rented premises is a finding of fact and if the Rent Controller or the Appellate Authority record a finding of fact by following established legal principle, this Court will not in the exercise of its jurisdiction under Section 15 (5) of the Act interfere with such finding. What has been found by the Rent Controller as well as the Appellate Authority in this case is that the two rooms were let out by the petitioner to the respondent. A rent note was executed by the tenant-respondent

in favour of the petitioner. The so called construction raised by the tenant is in the form of tin shed which he has put in front of the shop. This according to the learned Rent Controller can not be construed as a room constructed on the tenanted premises. This finding has been reiterated by the Appellate Authority who has further observed that even the witnesses of the landlord admitted that no room was constructed and the tenant had merely put up a tin shed supported by pipes in front of the room. The Rent Controller as well as the Appellate Authority have concurrently held that the landlord has failed to prove his case that the tenant had constructed a room and had thus impaired the value and utility of the shop. The Appellate Authority further held that putting up a temporary tin shed with the object of preventing rain showers and sun light can not be equated with construction of a room and such construction can not cause impairment in the utility and value of the disputed premises. In my considered view the aforesaid findings recorded by the Rent Controller and the Appellate Authority are based on a correct appreciation of evidence and there is no reason for me to interfere with these findings. It is also relevant to mention that the landlord had not come with a specific plea that the tenant had put up a tin shed nor did he plead that putting up a tin shed has resulted in impairment of the utility or value of the tenanted premises. In *Bickmore* v. *Dimmer* (1903) 1 Ch. 158 it was held that :—

> "In a convenient, by a leassee of trade premises, not to make any "alteration to the premises" without the lessor's consent—"alteration" cannot be read without qualification, and means "such alterations as would affect the form or structure of the premises", therefore, a large clock (by way of advertisement out-side a watchmaker's shop) supported by iron stays bolted into the stonework of the front of the house (making holes in the stonework to restore which, on removal of the clock, would need fresh stone costing from £15 to £20), is not such an alteration."

(6) In *Babu Manmohan Das Shah* v. *Bishnu Das* (2). the Supreme Court while considering the expression 'material alterations' occurring in Section 3 (1) (c), U.P. (Temporary) Control of Rent and Eviction Act, 1947 observed :

(2) A.I.R. 1967 S.C. 643.

"Without attempting to lay down any general definition as to what material alterations mean, as such, the question would depend on the facts and circumstances of each case, the alterations in the present case must mean material alterations as the construction carried out by the respondent had the effect of altering the front and structure of the premises."

(7) In *Om Parkash* v. *Amar Singh and another* (3), their Lordships were examining the provisions of the U.P. Cantonments (Control of Rent and Eviction) Act, 1952. Section 14 (c) of that Act is more or less *pari materia* with the provisions contained in Section 13 (1) (c) of 1950 Act. After making reference to the decision in *Babu Manmohan Das Shah's case* (supra), the Supreme Court observed as under :—

"In determining the question the Court must address itself to the nature, character of the constructions and the extent to which they make changes in the front and structure of the accommodation, having regard to the purpose for which the accommodation may have been let out to the tenant. The Legislature intended that only those constructions which bring about substantial change in the front and structure of the building should provide a ground for tenants' eviction. It took care to use the word "materially altered the accommodation." The material alterations contemplate change of substantial nature affecting the form and character of the building. Many a time tenants make minor constructions and alterations for the convenient use of the tenanted accommodation. The legislature does not provide for their eviction instead the construction so made would furnish ground for eviction only when they bring about substantial changes in the front and structure of the building. *Construction of a chabutra, Almirah, opening a window or closing a varandah by temporary structure or replacing of a damaged roof which may be leaking or placing partition in a room or making similar minor alterations for the convenient use of the accommodation do not materially alter the building as inspite of such constructions the front and structure of*

(3) A.I.R. 1987 S.C. 617.

the building may remain unaffected. The essential element which needs consideration is as to whether the construction are substantial in nature and they alter the form, front and structure of the accommodation." (*Emphasis Supplied*)

(8) In that case, the disputed construction was in the form of a wall of six feet height in a hall converting it into two rooms and tin shed in the open land adjacent to the accommodation. Their Lordships held that the partition wall was made without digging any foundation of the floor of the room nor it touched the ceiling, instead, it was a temporary wall of six feet height converting the big hall into two portions for its convenient use, it could be removed at any time without causing any damage to the building. The partition wall did not make any structural changes of substantial character either in the form or structure of the accommodation. Similar observations were made by their Lordships regarding the tin shed put up by the tenant. Their Lordships specifically rejected the view of Full Bench of Allahabad High Court in *Sita Ram Sharan* v. *Johri Mal, Alld.* 3(A) to the effect that construction is permanent or temporary in nature, does not affect the question as to whether the construction materially altered the accommodation or not. Expressing its dis-approval to the view of the High Court, their Lordships observed :—

"The nature of constructions, whether they are permanent or temporary, is a relevant consideration in determining the question of 'material alteration'. A permanent construction tends to make changes in the accommodation on a permanent basis, while a temporary construction is on temporary basis which do not ordinarily affect the form of structure of the building, as it can easily be removed without causing any damage to the building." (Emphasis Supplied)

(9) In *Brijendra Nath Bhargawa and another* v. *Harsh Wardhan and others* (4), while allowing a tenant's appeal their Lordships of the Supreme Court reserved the judgment of the High Court of Rajasthan, in which the High Court had upheld the judgment and decree passed by the Courts below and held that the construction of balcony

(3A) A.I.R. 1972 Alld. 817.
(4) 1988 (1) W.L.N. 143 (S.C.).

or dochatti, which is a wooden construction, does amount to material alteration which gives a cause of action to the landlord for filing a suit for eviction. Their Lordships specifically held that question as to whether construction amounts to material alteration or not is undoubtedly a question of law.

(10) In *Ramji Virji and others* v. *Kadarbhai Esufali*, A.I.R. 1973 Gujrat 110, a Learned Single Judge of Gujarat High Court held as under :—

> "If from the material used by a tenant in making of the structure and from the way in which it is annexed to the main structure it is proved that the structure is easily removable then it can never be said that it is a lasting structure so as to offend the provisions of section 13 (1) (b) of the Saurashtra Rent Control Act, 1951."

(11) In *Om Pal* v. *Anand Swarup* (5), 1988 (2) P.L.R. 699, the Supreme Court considered the provisions of Section 13 (2) (*iii*) of 1949 *Act* and held that the act of tenant in putting up a parchhati in the shop for storing clothes before and after dry cleaning does not amount to material impairment within the ambit of Section 13 (2) (iii) of the Act. The Supreme Court held as under :—

> "Every act of waste by the tenant will not entitle the landlord to obtain an order of eviction under the provisions of Section 7 (Madras Buildings Lease and Rent Control Act), 1946. It cannot be laid down as a rule of law that a demolition of a wall in a building must necessarily be deemed to be an act of waste which is likely to impair materially the value or the utility of the building." *Govindaswamy Naidu* v. *Pushpalammal.*

> "A landlord, in order to be entitled to the grant or permission to terminate the tenancy, is required not only to prove an act of waste on the part of the tenant but also to prove that the said act is likely to impair materially the value or the utility of the house." *Smt. Savitri Devi* v. *U. S. Bajpai* and *Charan Singh v. Smt. Ananti and others.*

> "Drilling of a hole to let out smoke by the tenant who had taken the building for hoteliering business and removal

(5) 1988 (2) P.L.R. 699.

of a portion of parapet wall for temporarily accommodating the hotel employees housed in the adjacent building cannot be said to be acts which would impair the utility of the building or its value." *G. Natarajan* v. *P. Thandavarayan.*

"Mere construction of a false roof which is only wooden or the setting of a wooden stair or making of a few holes in the roof for letting out the smoke from the hotel, cannot be held to be such material alterations which may result in changing the character or nature of the premises." *Shri Anup Chand and others* v. *Shri Trilok Singh.*

"A wooden parchhati constructed by a tenant (tailor master) within the demised shop for the purpose of providing more accommodation to his employees and the opening up of a ventilator for that purpose and the putting up of a wooden stair-case to reach the parchhati would not constitute a material alteration attacting the operation of Section 13 (2) (iii) of the Act". *Gobind Ram* v. *Smt. Kauchalaya Rani and others.*

The Supreme Court also referred to its own judgment in *Om Parkash* v. *Amar Singh's case* (supra) and held that though in the said case the words "materially alter" had been interpreted by the Supreme Court, the principles laid down in that case would be fully applicable for the purpose of interpreting Section 13 (2) (iii) of the Act.

(12) In view of the above referred judgments and in the light of the findings recorded by the Rent Controller and the Appellate Authority, it must be held that the petitioner has failed to make out a case for eviction of the tenant on the ground specified in Section 13 (2) (iii).

(13) Argument of the learned counsel on the question of payment of property tax is without substance. Learned counsel has not been able to show that there was an agreement between the petitioner and the respondent whereby the respondent had agreed to pay the property tax. In the absence of any such agreement, the tenant could not have been held liable to pay the property tax.

(14) Argument of the learned counsel that the Rent Controller and the Appellate Authority have travelled beyond the scope of pleadings

in holding that the disputed construction has been raised on the land of Public Works Department now deserves a brief reference. Learn-Counsel is correct that no plea was raised by the tenant that the disputed construction is on the land of public Works Department and no issue was framed by the Rent Controller in this regard. However, what is necessary to be emphasised is that the observations made by the Rent Controller and the Appellate Authority about the location of construction can not operate to the prejudice of the petitioner because no issue had been framed by the Rent Controller in this regard. If, at all, any dispute arises between the petitioner and the Public Works Department about the title of the property, the observations made by the Rent Controller and the Appellate Authority will not any way prejudice the petitioner's case. However, this has no effect on the claim of the petitioner for eviction of the tenant on the grounds set out in his application.

(15) In the result. revision petition fails and the same is dismissed.

J.S.T.

Before Hon'ble G. S. Singhvi, J.

JOGINDER PAL,—*Petitioner.*

versus

RAJ RANI,—*Respondent.*

C. R. No. 3809 *of* 1994.

23rd January, 1995.

Code of Civil Procedure, 1908—*S.* 115—*Revision—Explanation to S.* 115 *of any case decided includes any order impugned in the course of a suit or any other proceedings—'Case decided' means even a part of the case and on such fulfilment of conditions laid down in proviso (b) of S.* 115 *interference can be made in interlocutory orders.*

Held, that a case may be said to be decided if the subordinate court decides it or adjudicates in a suit some right or obligation of the parties in controversy. Further explanation to S. 115, C.P.C. to my mind, makes it abundantly clear that the expression "any case which has been decided" also includes an order made in the course of a suit or other proceedings.

(Para 10)