



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2637 OF 2000

Hemant Bharat Kachare

}*Petitioner*
(*Ori. Plaintiff*)

: *Versus* :

1. Vasu Anna Shetty
2. Sham Bharat Kachare
3. Ajay Bharat Kachare

}*Respondents*
(*Ori. Defts.*)

Mr. Prasad Dhakephalkar, *Senior Advocate through VC with Mr. Yogesh G. Thorat i/b Mr. Ashok B. Tajane, for the Petitioner.*

Mr. Nitin P. Deshpande, *for the Respondents.*

CORAM : SANDEEP V. MARNE, J.
Reserved On : 18 October 2024.
Pronounced On : 24 October 2024.

JUDGMENT :

1) Petitioner has filed this petition challenging the judgment and decree dated 16 February 1999 passed by the Additional District Judge, Pune allowing Civil Appeal No.564/1996 and setting aside the eviction decree dated 30 March 1996 passed by the 3rd Additional Small Causes Court, Pune. The Appellate Court has dismissed Civil Suit No.253/1994 filed by Petitioner-Plaintiff seeking recovery of possession of the suit premises. Petitioner-landlord has accordingly filed the present petition challenging the decree passed by the Appellate Court on 16 February 1999.

2) Facts of the case, in brief, are that Plaintiff has inherited house property bearing CTS No.39/1 on Karve Road, Pune. Premises comprising a hall, tin shed adjoining the hall, kitchen and front open space totally admeasuring 1280 sq. ft. are the suit premises in which Defendant was inducted as a tenant under the Rent Agreement dated 1 April 1982. After his induction in the suit premises, Defendant commenced restaurant business therein. According to Plaintiff, Defendant started making permanent changes, alterations and erecting permanent structures in the suit premises. The Municipal Corporation therefore issued notice to the Defendant for demolition of unauthorized additions and alterations. Defendant filed Regular Civil Suit No.1191/1993 against Pune Municipal Corporation seeking injunction against demolition of such additions and alterations. The Suit came to be dismissed on 28 September 1993. Civil Appeal No.833/1993 preferred by Defendant-tenant was also dismissed by the District Court on 11 November 1998.

3) In the above background, Plaintiff served notice dated 7 June 1989 to Defendant alleging putting up unauthorized construction in the suit premises and demanding possession hereof. The notice was replied by the Defendant denying the allegations. Plaintiff thereafter instituted Civil Suit No.253/1994 in the Court of Small Causes at Pune seeking recovery of the suit premises on the ground of making permanent alterations and construction in the suit premises without landlord's consent. The suit was resisted by Defendants by filing Written Statement denying any additions and alterations and contending that the suit premises remained in the said condition as they were let out since inception. Based on the pleadings, the Small

Causes Court framed the issue of unauthorized additions and alterations in the suit property. Both the parties led evidence in support of their respective claims. After considering the pleadings, documentary and oral evidence, the Small Causes Court proceeded to decree the suit holding that the Defendant had constructed permanent structure in the suit premises without landlord's consent. The Defendant was directed to handover possession of the suit premises to the Plaintiff. Defendant filed Civil Appeal No.564/1996 challenging eviction decree dated 30 March 1996 before the District Judge, Pune. The Appellate Court has allowed Defendants' Appeal and has reversed the eviction decree by its judgment and order dated 16 February 1999. Plaintiff's suit for eviction is accordingly dismissed by the Appellate Court. Aggrieved by dismissal of his suit by the Appellate Court, Plaintiff has filed the present petition. By order dated 2 August 2000, this Court admitted the petition. The petition is called out for final hearing.

4) I have heard Mr. Dhakephalkar, the learned senior advocate appearing for the Petitioner/Plaintiff. He would submit that the Trial Court has erred in allowing the Appeal filed by the Defendants-tenants and in dismissing the eviction suit. That the reasonings adopted by the Appellate Court while allowing the Appeal are perverse. That the Appellate Court has erroneously set aside the eviction decree by recording a perverse finding that the Plaintiff did not plead details about the exact alterations and permanent structures made by the Defendant-tenant. He would take me through the plaint to demonstrate that there are specific pleadings about construction of toilet, construction of shed in open space. He would

therefore submit that the impugned judgment and decree passed by the Appellate Bench thus clearly suffers from the vice of perversity.

5) Mr. Dhakephalkar would further submit that the Appellate Bench has erroneously held that the rent agreement permitted the Defendants-tenants to raise construction in the suit premises. He would take me through the relevant clauses of the Rent Agreement to demonstrate that the Defendants-tenants were merely granted permission for renovation/decoration of the suit premises. He would submit that construction of toilet block or covering of open space in front of the tenanted premises etc. do not fall within the ambit of renovation/decoration. Mr. Dhakephalkar would submit that the Rent Agreement clearly provides for use of common toilet behind the suit premises whereas the Defendants-tenants, constructed common toilet block inside the suit premises which is clearly covered by the provisions of Section 13(1)(b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (**Bombay Rent Act**). He would submit that the Court Commissioner has given detailed report about the extent of unauthorized constructions put up by the Defendants-tenants. That Defendant filed *pursis* admitting the contents of report of the Court Commissioner. That in the Court Commissioner's Report, construction of storeroom by the Defendants was also noticed. He would take me through the cross-examination of Defendants' witness to demonstrate absence of shed, toilet block and storeroom in the Rent Agreement. He would therefore submit that these are additional constructions after creation of tenancy. That the Defendants specifically admitted erection of shed, a counter inside the shed as well as the rest room.

6) Mr. Dhakephalkar would further submit that though the Defendants initially pleaded in the Written Statement that he did not carry out any construction in the suit premises, he subsequently admitted putting of several constructions. That it is not the pleaded case of the Defendants-tenants that he carried out certain acts permissible under the Rent Act. However, the Appellate Court erroneously held that the constructions put up by the Defendants-tenants were permitted under the covenants of the Rent Agreement. He would pray for setting aside the decree passed by the Appellate Court and for restoration of eviction decree passed by the Trial Court.

7) The petition is opposed by Mr. Deshpande, the learned counsel appearing for the Respondents/Defendants. He would take me through the findings recorded by the Trial Court to demonstrate as to how the Trial Judge merely reproduced the pleadings and evidence of parties and did not record even a single finding while decreeing the suit. That the eviction decree passed by the Trial Court was cryptic and has rightly been set aside by the Appellate Court. Mr. Deshpande would further submit that the Plaintiff did not produce the plan in respect of the premises showing its condition at the time of execution of the Rent Agreement. That therefore there was nothing to compare the original position with the one observed by the Court Commissioner. That therefore the defence of the premises being in the same condition at the time of creation of tenancy has rightly been accepted by the Appellate Court. That few renovations and decoration activities carried out by the Defendants are clearly permissible under the Rent Agreement. That the Appellate Court has rightly held that the plaint lacks relevant pleadings about the exact additions and

alterations made in the suit premises. That it was incumbent for the Plaintiff to plead the original condition of the suit premises and the new additions allegedly made by the tenant therein. That in absence of such pleadings, the Appellate Court has reversed the cryptic eviction decree passed by the Trial Court. Mr. Deshpande would submit that there is no warrant for interference in exercise of extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India in absence of any perversity in the findings recorded by the Appellate Court. He would pray for dismissal of the petition. Alternatively, and without prejudice, Mr. Deshpande would submit that in the event of this Court finding any error in the reasons of the Appellate Court, the proceedings deserve remand to the Trial Court in absence of any findings recorded by the Trial Court.

8) Rival contentions of the parties now fall for my consideration.

9) Plaintiff filed suit for recovery of possession of the suit premises from the Defendant-tenant on the solitary ground of erecting permanent structure in the suit premises without his consent attracting the ground under the provisions of Section 13(1)(b) of the Bombay Rent Act. Perusal of the Plaint would indicate that following constructions by the Defendant were averred therein (i) new toilet block by use of bricks and cement leading to issuance of notice by the Municipal Corporation and (ii) shed admeasuring 22 ft 7 inches x 16 ft in the open space thereby covering the entire open space and transforming the same into extension of the original restaurant. Plaintiff contended that both the structures were of permanent

nature. He also pleaded that changes effected in the open space also amounted to change of user, encroachment and nuisance.

10) Before filing of the suit, Plaintiff's father served notice dated 7 June 1989 on Defendant objecting to the unauthorized construction and terminating the tenancy. The notice was responded by the Defendant in 1989 in which he contended that he had merely made decorations in the suit premises which existed right from the time when the tenancy was created. Additionally, it was contended that there was written permission of the Plaintiff for the purpose of effecting the decorations for carrying out the business of Restaurant in a more beneficial manner. It appears that before filing the eviction suit, Plaintiff instituted Civil Suit No.1313/1989 seeking injunction against the Defendant from carrying out construction in the front portion of the suit premises and for demolition of the construction already carried out. It appears that temporary injunction was granted in the said suit against the Defendant. As observed above, Defendant himself had filed Regular Civil Suit No.1191/1983 when Pune Municipal Corporation had issued him notice alleging unauthorized construction in the front open space and the said suit was dismissed on 28 September 1993. Since Municipal Corporation had already started taking action in respect of the unauthorized construction, Suit No. 1313/1989 filed by the Plaintiff was apparently disposed of on 31 March 1990.

11) Thus the eviction suit filed by Plaintiff was preceded by two rounds of litigation regarding the construction activities that Defendant carried out in the tenanted premises, one between

Defendant and Municipal Corporation and second one between the Plaintiff and the Defendant.

12) Defendant has taken twin defences that the Rent Agreement permitted him to carry out the alleged activities and that what is done by him is mere decoration/renovation. He also averred in the written statement that the premises continued to be in the same status as they were at the time of letting. It would therefore be necessary to take note of the covenants of the Rent Agreement dated 1 April 1982. The Rent Agreement described the tenanted premises as:

सदरची जागा 1 जागेचा तपशील येणे प्रमाणे :- पक्क्या विटांची भिंत असलेला हॉल मोज माप 31 - 0 बाय 10, पत्र्याची लगतची रोड 41-0 बाय 10-0 किचन, 21-0 बाय 10-0 व समोरील जागा 22-7" बाय 16-0.

13) Thus, as per the rent agreement, the suit premises comprised of a hall admeasuring 31 ft. x 10 ft., tin shed admeasuring 41 ft. x 10 ft., kitchen admeasuring 21 ft. x 10 ft. and front open space admeasuring 22 ft 7 inches x 16 ft. The Rent Agreement thus clearly refers to front 'open' space. The Rent Agreement further shows existence of common toilet and bathroom in the rear portion of the hotel and permitted Defendant and his customers to use the same. The relevant clause in the Rent Agreement regarding common toilet and bathroom is as under:

मागील बाजूस असलेली संडास व बाथरूम कॉमन ठेवण्याचे ठरले असून ते हॉटेल मधील लोकांनी त्याचा वापर करावयाचा आहे.

14) Clause-5 of the Rent Agreement permitted Defendant to carry out necessary renovations and decorations without separate

written permission of the landlord. Clause-5 of the Rent Agreement read thus:

5. सदरहू जागेतील हॉटेलचे मधील पार्टी नं. 2 यांच्या सोईसवलती प्रमाणे सन 1982 नुतनीकरण नुसार फक्त नवीन नकाशा, डेकोरेशन च्या गरजेप्रमाणे त्याच्यांकडे देण्यात आलेल्या जागेत आवश्यक ते सर्व बदल करण्यांत पार्टी नं. 1 यांची पूर्ण संमती आहे. त्यासाठी वेगळ्या लेखी संमतीची जरूरी नाही. से पार्टी नं. 1 व पार्टी नं. 2 यांनी उभयता मान्य केली आहे.

15) As against the above description of the tenanted premises in the rent agreement, the Court Commissioner, who visited the suit premises on 9 July 1995 in presence of the parties, observed existence of parapet walls around the open space on which ornamental plants were placed and the entire open space was covered by roof erected by use of iron girders embedded in the parapet walls on all the sides. The Commissioner observed placing of tables and chairs in the open space covered by shed as well as decorative lamps and various other decorative items. The Court Commissioner also noticed existence of toilet admeasuring 4 ft x 3 ft next to the main hall. He also noticed existence of a storeroom admeasuring 11 ft 4 inches x 7 ft. 4 inches.

16) As observed above, Defendant filed *pursis* on 13 March 1996 admitting Court Commissioner's Report. Thus, existence of the above constructions are not disputed by the Defendant. His pleaded case in the Written Statement that the suit premises stand in the same position as they were at the time of creation of tenancy thus got completely disproved by the Report of the Court Commissioner. Defendant clearly put up additional constructions of (i) toilet (ii) storeroom and (iii) shed covering front open space.

17) The issue that remained to be considered was whether such constructions are covered by Section 13(1)(b) of the Bombay Rent Act. Before proceeding to examine whether the structures are permanent in nature attracting the folly under Section 13(1)(b) of the Bombay Rent Act, it must be borne in mind that the Defendant never came up with a case in the Written Statement that he carried out the constructions, but the same are temporary and are removable in nature or that the same are not covered under Section 13(1)(b). On the contrary, both in the notice as well as in the Written Statement, Defendant adopted the false plea that he did not carry out any construction and that the suit premises still continue in the same position as they were at the time of creation of tenancy. In ordinary course, therefore it was not even necessary for any of the Courts to go into the nature of construction considering the fallacious defence adopted by the Defendant. However, since attraction of ground under Section 13(1)(b) of the Bombay Rent Act requires erecting of 'permanent' structure, it is necessary to examine whether construction put up by Defendant is of permanent nature or not.

18) As observed above, in the Court Commissioner's Report atleast three constructions are carried out by the Defendant after securing tenancy rights in respect of the suit premises. They are (i) construction of toilet block, (ii) construction of shed thereby converting the front open space into useable space for business if restaurant and (iii) construction of storeroom.

19) There is no dispute to the position that the toilet block is constructed by use of bricks and cement and the same is therefore

construction of permanent nature. So far as the storeroom is concerned the same is also constructed after creation of tenancy. The walls of the storeroom are made up of cement and bricks and thereafter by steel mesh. The Report of the Court Commissioner shows that the storeroom is also a pucca construction.

20) So far as shed constructed in the open front space is concerned, the same is constructed by embedding M.S. angles in the side parapet walls and are constructed in such a nature that the Defendant extended the useable area of the Restaurant by placing tables and chairs by serving customers in the said shed. The said shed is also found to be covered by parapet walls on all the sides. The nature of construction of shed, intention behind its construction, the purpose for which it is constructed leaves no manner of doubt that the same would amount to construction of permanent nature attracting the folly under Section 13(1)(b) of the Bombay Rent Act.

21) In *Binaifer Batiwala alias Binaifer Lovji Malegam Versus. Kadambagiri Estates Pvt. Ltd.*¹, this Court had an occasion to decide whether a shed constructed in front portion of outhouse by use of temporary material such as MS angles, fiber roof, asbestos sheets and mesh on sides could be treated as construction of 'permanent nature'. The shed in question was being used by the tenant as a livable room. This Court considered various judgments on nature of construction, including the judgment in *Purushottam Das Bangur and Ors. Versus. Dayanand Gupta*² and held that erecting of such shed amounted to

¹ Writ Petition No. 10462 of 2019 decided on 21 October 2024.

² (2012) 10 SCC 409

raising of permanent structure within the meaning of Section 13(1)(b) of the Bombay Rent Act. This Court held :

19) On the other hand, Mr. Thorat has relied upon following judgments in support of his contention that the purpose and intention behind putting up the structure must be borne in mind coupled with the factor of longevity of time for which the structure has stood and out to use:

(i) In *Purushottam Das Bangur* (supra) the Apex Court has revisited the tests for determining permanent nature of structure for attracting eviction under the Rent Control Legislations. The Court was considering eviction of tenant under the provisions of West Bengal Premises Tenancy Act, 1956. The allegation against the tenant was that he removed tin roof of kitchen and storeroom and replaced the same by cement concrete slab in addition to putting up a permanent brick and mortar passage which did not exist earlier. Though, eviction was ordered by the Trial Court, the High Court had reversed the eviction decree on the ground that the acts committed by the tenant did not violate Clauses-(m), (o) and (p) of Section 108 of the Transfer of Property Act. The High Court had relied upon judgment of the Apex Court in *Om Prakash* (supra). The Apex Court considered the ratio of its various judgment and held in para-20 as under :

20. To sum up, no hard and fast rule can be prescribed for determining what is permanent or what is not. The use of the word 'permanent' in Section 108 (p) of the Transfer of Property Act, 1882 is meant to distinguish the structure from what is temporary. The term 'permanent' does not mean that the structure must last forever. A structure that lasts till the end of the tenancy can be treated as a permanent structure. The intention of the party putting up the structure is important, for determining whether it is permanent or temporary. The nature and extent of the structure is similarly an important circumstance for deciding whether the structure is permanent or temporary within the meaning of Section 108 (p) of the Act. Removability of the structure without causing any damage to the building is yet another test that can be applied while deciding the nature of the structure. So also the durability of the structure and the material used for erection of the same will help in deciding whether the structure is permanent or temporary. Lastly the purpose for which the structure is intended is also an important factor that cannot be ignored.

The Appellate Bench has relied upon the findings of the Trial Court in *Purushottam Das Bangur* while reversing the decree of the Trial

Court. Thus in *Purushottam Das Bangur*, the Apex Court has held that use of the word 'permanent structure' in the provision does not mean that the structure must last forever. It is also held that the structure that lasts till the end of tenancy can be treated as a permanent structure. The Apex Court further held that intention of the parties putting up the structure is important for determining whether it is permanent or temporary. Though the tests such as (i) nature and extent of structure, (ii) removability of structure thereof and (iii) durability and use of material are also relevant, the Apex Court has held that the purpose for which the structure is intended is also an important factor which cannot be ignored.

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20) The conspectus of the above discussion is that while determining the permanent or temporary nature of structure, the Court must apply various tests of (i) use of material for erecting the structure, (ii) degree of annexation, (iii) removability of structure without causing any damage to the building, (iv) durability of the structure, (v) intention of the party who puts up the structure and (vi) the purpose for which the structure is intended to be used.

21) In the present case, the test with regard to the use of material, for erecting structure and its removability could be held to be in favour of the Defendant-tenant as the structure is erected by use of M.S. angles, asbestos sheets and fibre roof and main part of the structure is held to be removable by both the Courts. However, the structure is erected by use of 16 M.S. angles embedded in the earth and in respect of the Verandah, there is use of bricks and cement. The flooring of the entire disputed structure is covered by concrete cement. The test of degree of annexation would go against Petitioner to some extent. Also, if the tests of (i) durability of the structure, (ii) the intention behind putting it up and (iii) its purpose are applied, the inescapable conclusion that emerges is that the structure is of permanent nature. When the Appellate Court decided the Appeal on 26 August 2019, the structure had lasted for 17 long years. By now period of 22 long years has elapsed and the structure still stands good. Thus, the structure is erected in such a manner that the same is bound to last for several years. The structure is thus durable and cannot be termed as a mere temporary structure. If the intention of Defendant is taken into consideration, the structure is put up in such a manner that it provides additional useable space for the tenant. The structure is not constructed with the intention of protecting the tenanted structure or occupants thereof from heat or rain. It is intended to be used as a room and ultimately found to be used as room. Thus, the last test of purpose also goes against the Defendant-tenant, who has been using the structure as a room. Thus, the intention and action of extending the useable space by the tenant beyond the

tenanted premises by erecting the structure is clearly established. The size of the structure is also twice or thrice the size of the outhouse. It is erected in such a manner that it is put to use as a living space. Multiple entrances by construction of doors are provided at the structure. The Court Commissioner has also opined that the structure is permanent structure. In my view therefore, the Plaintiff has proved that the Defendant has put up the structure of permanent nature within the meaning of Section 16(1)(b) of the MRC Act.

22) Considering the tests discussed in Apex Court Judgment in *Purushottam Das Bangur* and by this Court in *Binaifer Batiwala alias Binaifer Lovji Malegam*, I am therefore of the view that the shed put up by the Defendant in the front open space of the suit premises is a permanent construction within the meaning of Section 13(1)(b) of the Bombay Rent Act. The purpose and intention of putting the shed in front open space is to extend the area of restaurant. The fact that the Court Commissioner observed laying of table and chairs in the front space covered by shed leaves no manner of doubt that the space is actually put to use for serving patrons of the restaurant. The shed has also lasted for a long duration.

23) In my view, therefore all the three additions made by the Defendant in the suit premises are permanent constructions within the meaning of Section 13(1)(b) of the Bombay Rent Act. The Appellate Court has grossly erred in holding that the Plaintiff did not plead the details about the said constructions. Perusal of the plaint would indicate that except the storeroom, there are specific pleadings about the shed in front open space as well as toilet room. Construction of storeroom was possibly not noticed by the Plaintiff as the suit premises are in Defendant's possession and this could be the reason why the construction of storeroom is not pleaded in the plaint.

Construction of store room got divulged only after the court commissioner paid visit to the premises. However, so far as shed in the front portion of the premises, as well as toilet block are concerned, there are specific pleadings in the plaint. Therefore, the findings recorded by the Appellate Court about absence of pleadings in support of the allegations of unauthorized additions and alterations are clearly perverse.

24) The Appellate Court has erred in holding that mere submission of report of the Court Commissioner did not mean that the whole alteration was done after filing of the suit. The Appellate Court ought to have compared description of the structure as reflected in the Rent Agreement with the Court Commissioner's report. The front open space did not have any shed as per the description of the premises in the Rent Agreement. Further, the description of the premises in the Rent Agreement does not include any toilet block and in fact the agreement contemplated use of common toilet and bathroom at the rear side of the premises. However, the Court Commissioner's report clearly indicates construction of toilet block inside the suit premises. Thirdly, the description of the premises in the Rent Agreement does not reflect existence of the storeroom which was found by the Court Commissioner during the course of his visit. The Appellate Court has completely misdirected itself by ignoring the absence of shed in the front portion, toilet block and storeroom in the Rent Note and has erroneously held that mere submission of Court Commissioner's report did not mean that the whole alteration was done after filing of the suit.

25) The Appellate Court has erred in recording a finding that *'after going through Exhibit-43 clearly show permission given to the tenant for raising the construction at the suit tenement'*. I do not find any permission granted in the Rent Note for putting up any construction. What is granted is only liberty to renovate and decorate the suit premises. Permission for renovation or decoration would obviously not include permission for construction of toilet block, shed in open space and storeroom.

26) I am therefore of the view that the findings recorded by the Appellate Court are unsustainable and liable to be set aside.

27) Mr. Deshpande has raised an alternate plea for remand of the proceedings to the Trial Court on account of the learned Judge of the Small Causes Court not recording any reasonings while decreeing the suit. While Mr. Deshpande is not entirely wrong in contending that the Trial Court did not record proper reasons while decreeing the suit, the same *ipso-facto* cannot be a reason for remanding the entire proceedings. This Court is not satisfied by the manner in which the learned Judge of the Small Causes Court has recorded the finding while decreeing the suit. The Learned Judge has merely discussed evidence led by the parties and has recorded one line finding that *'From the documents on record and from the Commissioner's Report, it is clear that defendant No.1 has carried out permanent construction in the suit premises without the permission of the landlord'*. The learned Trial Court could have couched its order in a better manner by recording findings on Defendant's defence about the activities carried out by him amounting to mere decoration. However, after considering the

nature of construction put up by the Defendant, this Court is unable to accept the defence of the Defendant of merely decorating the suit premises. Construction of permanent nature by the Defendant-tenant in the suit premises is writ large. The suit was instituted in 1994 and by now period of 30 long years has elapsed. In that view of the matter, no purpose would be served in remanding the proceedings after 30 long years. Pendency of proceedings has already enured to the benefit of Defendant-tenant, who has remained in occupation of the premises despite committing brazen acts of putting up construction of permanent nature in the suit premises. Defendant cannot be permitted to occupy the suit premises any further and time has come for the Defendant to vacate the same.

28) Resultantly, the Writ Petition succeeds and I proceed to pass the following order:

- (i) Judgment and decree dated 16 February 1999 passed by the VIII Additional District Judge, Pune in Civil Appeal No. 564/1996 is set aside and Civil Appeal No. 564/1996 is dismissed.
- (ii) Decree dated 30 March 1996 passed by the 3rd Additional Judge, Small Causes Court, Pune in Civil Suit No.253/1994 is confirmed.
- (iii) The Respondent shall handover possession of the suit premises to the Plaintiff on/or before 31 December 2024.

29) With the above directions, the Writ Petition is **allowed**.
Rule is made absolute.

[SANDEEP V. MARNE, J.]