

Surendra Kumar Jain

Vs

Royce Pereira

(S. B. Majmudar, M. Jagannadha Rao JJ)

19.11.1997

JUDGMENT

M.JAGANNDHA RAO, J.

1. Leave granted.

2. These two Civil appeals have been filed by the appellant against the judgment of the Bombay High Court in W.P.No.5106 of 1994.

3. The respondent filed L.E. & C. Suit No.86/116 of 1979 for possession against the appellant of one room adjoining the kitchen on the ground floor of the bungalow known as 'Carmel View' situated at 63, Mount Carmel Road, Bandra (W), Bombay and for arrears of paying guest charges of Rs.2500/- till 31.12.1978 at Rs.200/- per month and for mesne profits from 11.1.1979 till vacant possession is granted. The appellant filed R.A.D. Suit No.2041 of 1979, Small Causes Court, Bombay for a declaration that he was tenant in respect of the Hall cum dining hall, bed-room No.3 W.C., Pantry and Bathroom. According to the respondent-owner, the appellant was a 'Paying Guest' from February/March 1971 of Bed Room No.2 on an occupation charge of Rs.120/- per month. In December 1973, the appellant was married at Allahabad and before his wife joined him, executed a letter dated 31.1.1974 admitting that he was a paying guest and seeking permission to bring his wife. He was so permitted and was permitted to use the dining hall also. The occupation charges were increased to Rs.200/- per month. According to the appellant the respondent forcibly entered in the hall in October 1978. The respondent gave a notice dated 2.11.1978. The respondent gave a notice dated 2.11.1978, revoking the permission granted to the appellant to occupy as 'paying guest'. The appellant sent a reply on 19.12.1978 and claimed he was a licensee and did not claim that he was a tenant. The respondent sent a rejoinder on 19.12.78. The respondent filed an eviction case on 28.2.1979 as stated above and the appellant filed the other suit on 12.4.1979 for declaration that he was tenant.

4. The Trial Judge by judgment dated 27/28-6-1989 disposed of both suits by a common judgment holding that appellant was not a paying guest but was a tenant from the beginning. The appellant's suit was decreed and the respondent's suit was dismissed. The appellant Bench of the Small Causes Court, Bandra however allowed both appeals preferred by the respondent, by judgment dated 25.8.1994. The appellant filed two writ petitions Nos.5105 and 5106 of 1994 and they were dismissed by the High Court on 22.4.1997. These two appeals are filed by the appellant against the said judgments.

5. Learned senior counsel for the appellant contended that the appellant was in exclusive possession of the bed room No.3 and the dining hall, bathroom and Pantry as a tenant, that the letter dated 31.1.1974 wherein appellant admitted he was a 'paying guest' was obtained by the respondent by

pressure, and that the respondent had admitted in his evidence that in 1978-79 he had informed the Bombay Municipal Corporation, in tax assessment proceedings, that the appellant was a tenant to whom part of the ground floor was 'let' at Rs.200 (as distinct from one by other in ground floor as 'paying guest' at Rs.20/-) and this admission was not explained.

6.The appellate Court has found on a consideration of the letter dated 31.1.1974 and other evidence adduced by parties that the appellant, to start with was a 'paying guest' of bedroom No.3 even after appellant's wife joined, that the appellant's wife was permitted on compassionate grounds to cook in the pantry, that the hall was not given to the appellant when the charges were increased to Rs.200/- P.M., and that the dining hall was in occupation or control of the respondent for otherwise the respondent would not have been able to enter Bedroom No.2 on the left side or the kitchen on the north, beyond the Bedroom No.3 that was being used by the appellant.(The plan shows that the front closed verandah opens into the dining Hall, and on the left, there are Bed Room 1, 2 and 3 one after the other and beyond Bedroom 3 is the kitchen etc.).The finding is therefore that the dining hall and kitchen etc.and other Bed rooms 1,2 which were vacated by other paying guests were in the control of the respondent and that the respondent did not dispossess the appellant from the hall as alleged. So far as the statement of the appellant that he informed the Corporation that the portion was 'let' to appellant was concerned, it was observed by the first appellate Court that the appellant was not asked in cross-examination as to why he had so informed the Corporation and that, in any, event the letter dated 31.1.1974 executed by the appellant and other evidence showed that the real relationship of the appellant in respect of the room was as 'paying guest'.

7.These findings arrived at by the appellate Court are findings of fact and were not liable to be interfered with by the High Court under Article 226 of the Constitution of India.In fact, in *Rusi Dinshawji Deboo Vs.Cawasji Rustomji Patel & Others* [AIR 1987 SC 1771], a letter in which there was an admission that the person was occupying as paying guest was held binding on the parties under the Bombay Act, 1947.

8.So far as the contention of the appellant that the respondent informed the Corporation in tax proceedings that the appellant was paying rent of Rs.200/- P.M., we may state that the said statement even if true stood rebutted by the appellant's letter dated 31.1.1974 admitting he was in possession as a 'paying guest'.Apart from that as pointed out by the Privy council in *Venkatapathi Raju Vs. Venkatanarasimha Raju* [AIR 1936 PC 264 at 268-269]:

"It sometimes happens that persons make statements which serve their purpose, or proceed upon ignorance of the true position; and it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue".

The above observations were followed and applied by Subba Rao. J. (as he then was) in *Rukhmabai Vs.Lala Lakminarayan & Others* [1960 (2) SCR 253].

9.The Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (hereinafter called the Act) defines 'landlord' in section 5(3), licensee in section 5(4A), paying guest in section 5(6A), premises in section 5(B) and tenant in section 5(11).Under section 15(A) persons in occupation on 1.2.1973 as licensees becomes 'tenants'.

10.Section 5(6A) defines 'paying guest' as meaning "a person not being a member of the family, who is given a part of the premises, in which the licensor resides, on licence."

11. Under section 5(B), 'premises' means "(a) any land not being used for agricultural purposes, (b) any building or part of a building let or given on licence separately but does not include a room or other accommodation in a hotel or lodging house."

12. Under section 5(4A) a 'licensee', "in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge but does not include a paying guest, a member of a family residing together."

13. It will be noticed that a 'licensee' under section 5(4A) is described as a person who is in occupation of the premises or such part, under a subsisting agreement for licence, given for a licence fee or charge. A 'paying guest' is excluded from the definition of licensee and under section 5(6A), paying guest is described as a person-not being a member of the family-

"who is given a part of the premises, in which the licensor resides, on licence" The words 'in which the licensor resides' which are found in the definition of 'paying guest' in section 5(6A) are not found in the definition of 'licensee' under section 5(4A) which uses the words 'who is in occupation of the premises or such part', and those words are not found in the definition of 'paying guest' in section 5(6A) though the words 'given on licence' are found in the definition of paying guest. If a person is a 'paying guest' and thereby excluded from the definition of licensee then obviously he cannot become a tenant under section 15(A) for section 15(A) requires possession as a licensee on 1.2.1973.

14. The trial court, in the present case, came to the conclusion that in view of the language in section 5(6A) defining 'paying guest' and the requirement of the licensor must 'reside', the owner must establish that he was also residing in the very room in which the paying guest was staying. This view, according to us, is not warranted by the words in section 5(6A) defining 'paying guest'. In our opinion, all that is required to make a licensee answer the description of a 'paying guest' is that the licensor also 'resides' in the premises of which a part is in the possession of the paying guest and it is not required that the licensor should physically reside in the same room as the paying guest. The words 'in which the licensor resides' qualify the words 'premises' which immediately precede the said words and are not intended to qualify 'part of the premises' as wrongly assumed by the trial Court.

15. It was argued for the appellant that even if the words 'premises, in which the licensor resides' would not mean the very room, still the licensor must be using the remaining part of the premises for actual residence and that in this case, the remaining portion of the ground floor was not so occupied for residence because the owner was living in the first floor. In our view this contention cannot be accepted. If the ground floor and first floor of this building are to be treated as 'premises' then the occupation of the owner of the first floor for 'residence' would satisfy the requirement of section 5(6A). Even assuming that the ground floor of the building in which the appellant was residing in a 'room' is treated as the 'premises', the finding of the appellate Court as stated earlier is that from the front verandah on the ground floor, one enters the dining hall and this hall is retained by the owner, as per the finding and it is from this hall that the owner can reach the bedroom 1 and 2 on the ground floor on the left side or the kitchen which is beyond bedroom 3. Bed room No.3 is in the possession of the paying guest and using the toilet. His wife, was on compassionate grounds, allowed to cook in the pantry. The appellate Court positively found that the hall was not part of the paying guest accommodation. It follows that the respondent has control of the remaining

accommodation on the ground floor and hence section 5(6A) is satisfied. It is not necessary that the owner must physically reside in the remaining accommodation on the ground floor.

16. The position of a 'paying guest' is similar to the position of a 'lodger' in England. If the part is in the use of the 'lodger' and the owner retains the control of the whole house, that is sufficient (Helman Vs. Horsham & Wsoreniya Assessment Committee [1948(2) All ER 588]. The fact that its control, in fact, was not exercised by the owner, does not prove that he had not control, for many rights exist which nevertheless are not asserted until occasions arise to put them into force (Darling, J. in Kent Vs. Fitfall-1911 (2) KB 1102 at 1110). If the de jure control exists, there need not be de facto control. Where the owner under an agreement allowed the respondent to use two rooms and kitchen, while the owner was also residing in the same premises, it was held to be a paying guest arrangement, and not an agreement of tenancy (Clive Everard R. William Vs. Rajni Kripalani 1991 Bom. R. C. 35). Where a licensee was occupying the kitchen and room but the keys were held in duplicate both by the licensee and the licensor who occupied the remaining part of the flat (i.e. the licensor retained control), it was held to be a case of paying guest arrangement (Mrs. Dooga F. Bwrmii Shaw Vs. Mrs. Dolly J. Ramit 1988 (1) Bom. R. C. 70, 1980 Man. L. J. 1087). We are of the view therefore that the appellant was using part of the premises on licence and the respondent was residing in the remaining part of the same premises de jure in the ground floor and de facto in the first floor and whether the ground floor is taken as the 'premises' or both floors are taken as the 'premises' section 5 (6A) is satisfied. The appellant was only a paying guest. If so, he was not a licensee and as he was not a 'licensee on as 1.2.1973, he cannot claim to be a deemed tenant.

17. For the aforesaid reasons, the appeals fail and are dismissed without costs. In the peculiar circumstances of the case, time for vacating the premises is granted upto 31st May, 1998 on the appellant's filing usual undertaking within four weeks from today. If such undertaking is not filed as aforesaid or if there is a breach of any of the terms of the undertaking, the order granting time shall stand recalled.