BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

Fulabhai Khodabhai Patel

(Chagla, C.J. Tendolkar, J.)

06.02.1957

JUDGMENT

Chagla, C.J.

1. On a very few and short facts a very interesting question arises for our decision on this reference. The assessee went to East Africa in 1931. He had his father and brothers living in Bombay in the Kaira District. The father was possessed of immovable properties and in 1942, he made a gift of four of his houses to each one of his four sons including the assessee; and the evidence on the record shows that, as the father had no house left to stay in a and as there was no likelihood of the assessee coming to India as he had his business in Africa to look after, he permitted the father to continue to stay in the house which was gifted to her husband and in which her father-in-law was staying. She lived in India up to the 14th February, 1947, and in the meanwhile one of her sons got married on the 23rd of May, 1946. The assessee himself came to India on the 3rd of September, 1946, and stayed in this house up to the 31st December, 1946. On these facts the Taxing Department contended that for the assessment year 1947-48 the assessee was a resident; and the question that falls for our determination is whether the case of the assessee falls under section 4A(a)(ii).

2. Now, section 4A deals with residence in the taxable territories and it lays down various tests of residence; and the test with which we are concerned is the test set our in sub-clause (a) (ii), namely, "maintains or has maintained for him a dwelling place in the taxable territories for a period or periods amounting in all to one hundred and eighty-two days or more in that year, and is in the taxable territories foe any time in that year." Therefore, in order that this test should be satisfied, two conditions just be complied with : (1) there must be a dwelling place maintained in the taxable territories either by the assessee himself or by someone else for him; and (2) the assessee must live in the taxable territories for any time, the limit of time in the latter case not being specified. In the case of the dwelling place it must be maintained for a period of 182 days or more. The question that we have to consider is whether on the facts just mentioned it could be said that the assessee maintained or had maintained for him a dwelling place in the taxable territories for the requisiter period. If the house which was gifted to the assessee, and in which his

father stayed and in which for a short period he himself stayed in 1946 and also for a slightly longer period his wife and children stayed, can be considered to be a dwelling house maintained by him or maintained for him, then no difficulty arises with regard to the period in this case, because undoubtedly that dwelling place was therefore the whole of the accounting period.

3. When we look at the language used by the Legislature, it is clear that what is sought to be emphasized is that there must be not only a residence or a house for the assessee in the taxable territories, but there must be a home.

4. The connotation of a dwelling place is undoubtedly different from a mere residence or a mere house in which one finds oneself for a temporary or short period. A dwelling place connoted a sense of permanency, a sense of attachment, a sense of surroundings, which would permit a person to say that this house in his home. Undoubtedly a man may have more that on home : he may have a home at difference places; but with regard to each one of these he must be able to say that it is something more than a mere house or a mere residence.

5. Now it will be noticed that the Legislature also requires that it is the assessee himself who must maintain a dwelling place in the taxable territories, or if he does not maintain it, someone must maintain it for him. Therefore, it is clear that it is not sufficient in order to satisfy this test that there is a dwelling place in the taxable territories in which the assessee goes and lives. What is necessary and what is essential is that the dwelling place must be maintained for him. In other words, their must be set apart and made available for him, in which he could live if he so desired as a home. There must also be in him a right to live in such a dwelling place maintained for him, because without that right it could not be said that he has either maintained a dwelling place or a dwelling place has been maintained for him. The right need not be a proprietary right; it need not be a right in any particular property; but the right may the right of a licensee to live in a place so long as the licence is not revoked. Now it will be noticed that from this point of view the ownership of the house in immaterial. Just look at it from different points of view. The owner of a house may not maintain it as his dwelling place : he may keep it in a state of disrepair so that it would not be possible for him to reside there. On the other hand, he may maintain a house as a dwelling place of which he is not the owner : he may rent it; he may take a room in a friend's house, furnish it, spend money on it and keep it as his dwelling place. On the other hand, even though he may be the owner of a house, someone else may maintain it for him as a dwelling place ; and also a dwelling place may be maintained for him by someone else of which he is not the owner. therefore the vital fact to determine, in order to decide whether a case falls under section 4A(a)(ii) or not, is not the ownership of the property, but the right of the assessee to reside in a building which is ready and fit for his occupation and which intended to be used by him as his home. The building or a portion of the building must be available to him and must be at his disposal and he must be in a position to go and occupy it without the permission or leave of anyone. If that be the true view of the section in question, can it be said that the assessee maintained this house in Kaira or that his father maintained it for him as a dwelling place ? As

soon as the house was gifted to him, the son allowed the father to remain in that house. There is no suggestion that he made any preparation for setting aside any part of that house to be used as his dwelling place in the event of his ever going to India. As far as the father is concerned, he used the house as his own dwelling house. But again there is nothing on the record to show that he maintained that dwelling house, not only for himself, but for his son. There is no suggestion that consciously the father set apart and made available for the son any part of this dwelling house.

6. The Advocate-General has strongly emphasized two factors in this case. The first is that the house belonged to the son. As we have already pointed out, the fact that the son was the owner of the house does not lead to the inference that he necessarily maintained that house as his dwelling place. The other factor that the Advocate-General has emphasized is that both the assessee and his wife and children resided in the house with the father. Now, mere residence by itself is not sufficient for the purpose of drawing the inference that the residence was in a dwelling house maintained for the assessee : the residence may be as a guest, as a casual visitor, as a license. What we require is that, when the assessee and his family lived with the assessee's father, they were living in is dwelling house maintained for him; or, in their words, the son was not merely living in his own house, but he was living in his home.

7. Our attention was drawn to an Indian decision and two English decisions on this question. First, turning to the Indian decision, which is a judgment of the Madras High Court in Zackariah Sahib v. Commissioner of Income-tax the facts there were that the assessee was a Muslim merchant who carried on business in Ceylon and resided there. His parents lived in British India, as it then was, in a house owned by his mother. The assessee's wife also lived in British India - sometimes withe his parents and sometimes with her parents. The assessee was remitting monies now and then to his parents for this maintenance and he visited British India during the year of account and stayed his mother's house with his parents. The Appellate Tribunal held that the assessee was resident and this decision was reversed by the High Court of Madras; and what the court held was that the expression "maintains a dwelling place" connotes the ides that the assessee owns or has taken or rent or on a mortgage with possession a dwelling house which he can legally and as of right occupy if he is so minded, and the expression "has maintained for him a dwelling place" would cover a case where the assessee has a right to occupy or live in a dwelling place though the expenses of maintaining the dwelling place are not met by him in whole or in part. Now, if the right to occupy referred to by the Madras High Court means a proprietary right in the property in question, then, with respect, we find it difficult to accept the reasoning of this judgment. But if the right to occupy means not necessarily a proprietary right, but a right which may even be the right of a licensee, and if what the Madras High Court seeks to emphasize by this expression is that a particular premises must be available to the assessee and at his disposal without the permission of any person, then with respect, we agree with the decision. The Advocate-General has sought to distinguish this case by saying that in this case the house in which the assessee lived was the house of his mother and not of himself. But whether it was the

house of the assessee or of the mother, the ratio of the decision is that that house was not maintained as a dwelling place of the assessee in British India and that that house was maintained for the parents of the assessee.

8. Then there are two English decisions - both of Mr. Justice Rowlatt - which are rather significant. First is Pickles v. Foulsham, and the judgment of the learned Judge is at page 275. Now it is worth remembering that there is no statutory provision in England with regard to residence as we have in our taxing statute, and therefore what the English Courts are called upon to decide is whether on general principles certain conduct or certain set of facts constitutes residence for the purpose of payment of income-tax. At page 275 the learned Judge says :

> "A man, I suppose, may keep a house for his wife and come there merely as a visitor; he may keep a house for his mother, and, when he can get away, always go there to see her; but it may be that it is his mother's house, even if he is paying for it, and he is going there as a visitor. He keeps the house for his wife and children; it ma be that he is going there as going home; it may be that that is the centre really of his life, that he keeps many belongings there, and so on, and his time in Africa is really, in truth, a period of enforced absence from what is truly his residence. Now it may be one, or it may be the other."

9. Therefore, the test which the learned Judge laid down was that, when you go to a house you are really going home, then you are going to a dwelling house whether maintained by you or by someone else, and a house may be your home whether it belongs to you or belongs to someone else.

10. The other case is Loewenstein v. De Salis. In that case the assessee was a Belgian subject who had residence in Brussels, visited the United Kingdom each year, and occupied hunting box belonging to a company of which he was director and in which he held over 90 per cent. of shares. He could, without obtaining formal permission, use the hunting box at any time when in the United Kingdom. On these facts Mr. Justice Rowlatt held that, since the hunting box was de facto available for the assessee's occupation whenever he came to that country, notwithstanding that he was neither the owner not the lessee of the property, he was chargeable to income-tax as a person residing in the United Kingdom. Now it would be noticed that his hunting box was set apart and made available to the assessee as his dwelling place and although he had no proprietary right in that hunting box he had the right conferred upon him to occupy it as his dwelling place whenever he liked. At page 437 the learned Judge says :

> ".....when you are considering a question like residence, you are considering just a bundle of actual facts, and it seems to me that in a case like this you could quite well say that here this man had this house at his disposal, with everything in it for his convenience, kept going all the year round, although he only wanted it for a short time. Luckily, he was in relation with a company who were the owners of it, and he could do that without owning

it. It is an accident. It might have been that he could do that with a relations, or a friend, or a philanthropist, or anybody; but in fact there was this house for him; and a lease would not pout him in any better position so far as having the house and the availability of it, and the power of coming to it, were concerned."

11. In our opinion, therefore, on the facts of this case the house in Kaira was dwelling house of the father of the assessee and it has not been established by the Taxing Department that that house was maintained for the assessee as a dwelling house nor has it been established that the assessee himself maintained it as a dwelling house.
12. We must, therefore, answer the question submitted to us in the negative. Commissioner to pay the costs.

13. Question answered in the negative.