

(1975) 08 BOM CK 0027

In the Bombay High Court

Case No : Special Civil Application No. 1797 of 1971

Bhupatrai Maganlal Ghia and Others

APPELLANT

Vs

Rajaram Ghai Ors.

RESPONDENT

Date of Decision : 01-08-1975

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 13(1)

Citation : AIR 1976 Bom 258 : (1976) MhLj 242

Hon'ble Judges : Hajarnavis, J

Bench : Single Bench

Advocate : S.J. Sorabji and I.M. Chagla, instructed by Matubhai Kamietram and Madan, Attorneys, for the Appellant;

Judgement

1. This is a landlord's petition under Article 227 of the Constitution against the decision of the Appellate Bench of the Court of Small Causes allowing defendant's appeal and dismissing the plaintiff's claim for possession of the suit premises.

2. It is not necessary for the purpose of this petition to enumerate all the facts in detail. It is enough to state that the ground-floor of the building, known as "Ghia Mahnsion", on Carmichael Road, Bombay, was let out to respondent No. 1 on a monthly rent of about Rs. 426/-. The premises consisted of 28 rooms the total area of which was 5570.18 sq.ft. At the relevant time when the premises were in his occupation, the family of respondent No. 1, consisted of himself, his wife and his daughter. On 29th August 1961 notice to quit was given by the petitioners to respondent No. 1 terminating his tenancy on various grounds, one of the grounds being that the suit premises were let out by the petitioners to respondent No. 1 for residential purposes only and that he was using them for non-residential purposes. As respondent No. 1 did not comply with the notice, a suit was filed in October 1961 by the plaintiffs on various grounds one of which, as stated earlier, was the change of user, namely, that the premises were let out for residential purposes while respondent No. 1 was using the premises for non-

residential purposes, I. e., that he was inducting a number of persons as boarders on those premises. While the suit was pending, respondent No. 1 inducted between October 1961 and March 1964, a number of persons as boarders who were shown as defendants Nos. 4 to 10. Issues were framed by the learned trial Judge and the parties led evidence and on considering all the material that was placed by the parties before him, the learned trial Judge found that the plaintiffs had established that the suit premises were let out for residential purposes and respondent No. 1 was using them for non-residential purposes, namely, he has been inducting a number of persons as boarders and lodgers on the suit premises. Consistent with these findings, the trial Court decreed the plaintiffs' claim on 28th October 1965. Aggrieved by the decision, respondent No. 1 (defendant No. 1) alone filed an appeal on 20th January 1966. He obtained a conditional stay on 18th April 1966. As he did not fulfil the conditions of the stay, namely payment of arrears and costs of the trial Court, the stay was vacated and the decree was executed by the petitioners who obtained on 5th July 1966, possession of 51/2 rooms from the defendant No. 1. Between May 1967 to January 1968 possession of some more rooms was obtained. The possession of the remaining portions was obtained from various obstructionists who claimed to be sub-tenants, between January 1968 to April 1968. the appeal was heard by the Bench of the Small Cause Court who confirmed the findings of the trial Court that the suit premises were let out for the purposes of residence only but reversed the finding regarding the change of user of the premises. The Appellate bench held that respondent No. 1 was not using the premises for business purposes. The Bench held that respondent No. 1 was deriving any income more than the rent that he was paying. The Bench further observed that mere inducting of a few and occasional paying-guests or boarders would not amount to carrying on business on those premises. The Bench held that respondent No. 1 has not changed the nature of the user of the premises for which they were let out. The bench, therefore, allowed the appeal and dismissed the claim of the petitioners for possession. It is against this judgment that the present petition has been filed.

3. Mr. Sorabjee, the learned Counsel for the petitioners, urged that the Appellate Court has committed an error in holding that it was necessary for the petitioner to prove that the respondent-tenant derived profit or received monetary consideration from the boarders and the lodgers. he further submitted that even on facts there is enough material to show that respondent No. 1 has been doing this as business, inasmuch as, he has been inviting boarders and lodgers by issuing advertisements in the newspaper and also by responding to the advertisements issued by persons who wanted accommodation. He also submitted that there is evidence on record to show that he has been receiving much more income than the rent that he was paying. In my view, his submissions are well founded and deserve to be accepted. So far as the finding that the suit premises were let out for the purpose of residence, the Appellate Bench observed:-

"..... Looking to the user of the suit premises made by Sir (Shanawaz) Bhutto and after him by defendant No. 1 and the acquiescence by the plaintiffs therein would clearly spell out and lend support to us on the point that the premises are required to be held to have been let for the purpose of residence. This is clear from so to say rule No. 3 as also rule No. 4 in the quotation given above. So both the actual user of the premises as also the structural design and the antecedent and current user of the rest of the building of which the suit premises are only a portion, tend to show for certain that the premises were let to Sir Bhutto for the purpose of residence and consequently even to defendant No. 1."

That is a finding of fact recorded by the Courts below, but the Appellate bench reversed the finding of the trial Court regarding the change of user of the premises. The Appellate Bench has observed:-

"..... What according to us is lost sight of by the trial Court is the nature of the user of the entire premises not only by so called lodgers or the paying guests but also by the first defendant himself. There are about 28 apartments in the suit flat and they included even the passages, W. Cs., and baths. A plan of the suit flat can be found at Ex. C. However, out of them rooms Nos. 5 to 18 were and have been in exclusive possession of the first defendant, not only according to him, but even as unambiguously stated by the plaintiff's manager Purohit who has been in the management of the entire building. At the outset he has sworn that rooms Nos. 5 to 18 as shown in Ex. C are with defendant No. 1 only. So not only more than half but even in particular major part of the suit premises has been in use of defendant No. 1" These observations of the Appellate bench are contrary to the evidence on record. Purohit has not at all stated that rooms Nos. 5 to 18 were in exclusive possession of defendant No. 1 (respondent No. 1). On the contrary, he has stated that they were in possession of different persons. What he has stated is that on the date of the suit, all the premises Nos. 5 to 18 were in occupation of the defendant. This sentence seems to have been taken into consideration by the Appellate bench without taking into consideration what he has stated subsequently. He has stated subsequently that:

"..... During the pendency of the suit premises Nos. 15 to 18 were occupied by defendant No. . Now, these premises are occupied by someone else.

Premises shown as Nos. 12 to 14 were occupied by defendant No. 8 during the pendency of the suit. Now these premises are in occupation of someone else.

The Remises shown as Nos. 5 to 9 and half portion of item No. 11 were occupied by defendant No. 10 The premises shown as item No. 10, part of 11, 12, 13 and 14 are at present in possession of one Veining."

This clearly that Purohit has not stated that Rooms Nos. 5 to 18 were in exclusive possession of defendant No. 1. The observations of the Appellate Bench were not only unwarranted but totally erroneous. There is also no record that the possession of Rooms Nos. 10 to 18 was recovered from obstructionists Nos. 1 and 2, viz., Veining and Schoder. Even defendant No. 1 has in his evidence

admitted that defendants Nos. 2, 3, 4 and 5 occupied rooms Nos. 5 to 18. The observations made by the Appellate Bench that rooms Nos. 5 to 18 were in exclusive possession of the first defendant, were therefore not correct. As a matter of fact, on defendant No. 1's own showing he has been putting a number of persons in possession of different rooms in the suit premises right from 1950 upto the disposal of the suit and even thereafter till possession was taken by the petitioners under the decree. The Appellate Bench has also reversed the finding of the trial Court regarding the change of user by observing as follows:-

"..... In order to observe that a small portion would be sufficient for the occupation of defendant No. 1 leaving lot of space to accommodate lodgers, it was essential to bring on record the way of living of defendant No. 1 and his financial capability. In the absence of such particulars it would be hazardous to conclude that the family of the three had enough space to accommodate the paying guests. Not only this but even though there was no an iota Order evidence regarding the income of defendant No. 1 still the learned trial Judge has observed "they (Lodgers and paying guests) are kept by him not casually, but by way of business in order to maintain himself wholly or partially therefrom." In this behalf it is worthy to note that the said defendant is a person who, it must be said, has been in a financial position to pay rent of Rs. 426.81 per month. The amount must have been round about the same figure even when he was inducted into the suit premises in 1947, except the amount of permitted increases, Going through the alleged payments made by so-called lodgers to defendant No. 1 it would be found that except in case of Veining, at no particular time did any of the lodgers or two lodgers or more at a time paid an amount more than Rs. 426/- or so to defendant No. 1. Thus these amounts were not even sufficient to cover the whole of the rent of the suit premises. If that is so, can it possibly be said that the first defendant was keeping these lodgers to maintain himself wholly or at least partially. This circumstance therefore, goes a long way against the plaintiffs.

There was no dispute that the family of defendant No. 1 was consisting of himself, his wife and his daughter. There is also no dispute that there are 28 rooms. There is also no dispute that defendant No. 1 has himself admitted that right from 1950 he has been inducting different persons as paying guests in the suit premises. The Appellate Bench was, therefore, not right in holding that 28 rooms were required by defendant No. 1 for his residential use and occupation. It is true that there is no evidence led by the parties to show what was the financial status of defendant No. 1 but that, in my opinion, is totally irrelevant. What is relevant, is to find out to what use he was putting these premises to. Was he inducting paying guests casually or occasionally to accommodate his friends, relatives or acquaintances? Was he doing it only to keep the premises occupied or to relieve him from the pressure of payment of rent or was he doing it as a regular business? In my opinion, the manner in which he was inducting the persons, namely, by advertising in newspapers and the frequency with which he was inducting persons and the fact that lodgers came from different strata of

society and from different nationalities, clearly indicates that he was doing it as a regular business. Some of the lodgers were Bengalis and some were even foreign nationals. He has also admitted in his evidence that he was inducting these lodgers from 1950. From his evidence it will be seen that sometime at least 3 lodgers were staying on those premises. He admitted that defendant No. 2 occupied the suit premises from July 1960 to November 1963 and defendant No. 9 occupied the suit premises from November 1962 to February 1964 and defendant No. 10 occupied the suit premises from January 1963 to February 1964. This clearly shows that at least three persons used to occupy the premises as lodgers. It is true that he stated that he was not charging anything to defendant No. 9 as he was his old personal friend but he used to charge defendant No. 2 Rs. 208/- and defendant No. 10 Rs. 325/- per month. On his own admission he was deriving income of Rs. 533/- from these two persons. It is, therefore, difficult to understand that such a man would not charge any rent to defendant No. 9. Why he was not charging any rent to defendant No. 9, was a matter entirely known to him and defendant No. 9. It is difficult for the plaintiffs to prove what defendant No. 1 was charging each of his lodgers but on defendant No. 1's own showing he was charging every one of the lodgers something for their use and occupation of the premises. That being the position, there is no manner of doubt that he was inducting the persons as lodgers and doing this as a regular business. The frequency with which he was doing this and the fact that he was giving advertisements in the newspapers and responding to the advertisements given in the newspapers clearly shows that he was doing this as a business. The Appellate Bench has, therefore, committed an error in holding that this was not a business only because the plaintiffs have not been able to establish that defendant No. 1 was getting more income than the rent that he was paying. I am fortified in my view by the decision of *Rolls v. Miller* (1884) 27 Ch D 71, where it was held:

"that a charitable institution called 'Home for Working Girl's, where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of the covenant.

It is not essential that there should be payment in order to constitute a business; nor does payment necessarily make that a business which without payment would not be a business."

To the effect are the observations in *Thorn v. Madden* (1925) 1 Ch D 847 where Tomlin J. has observed:

"I think that, where, as here, a lady is of set purpose occupying a house which she is aware is beyond her means and, for the purpose of supplementing her means and enabling her to live in the house, is securing, to use a neutral term, visitors to come and live there for short or long periods upon payment for board and residence, it is impossible to say that the house is being used as a private residence only. It seems to me to be used by her in precisely the same way as it would be used by one who kept a lodging house or a boarding house (whatever

the strict distinction between them may be,) although there may be some differences in the actual methods employed. This is not lie a case between two friends, when to the one desiring to pay a visit the other says: "I cannot afford to keep you, but I shall be delighted to see you if you will pay". Here what is being done is to keep the house permanently available for the accommodation of any approved person who cares to come and stay there and pay for doing so. I think that such a case as this falls into a different category, and amounts to carrying on a business. It does not seem to me to be a necessary quality of a business that it should be advertised in an obtrusive manner or at all. For carrying on a business all that is necessary, I apprehend, is to take the steps required to secure the necessary customers, and I think that it is plain from the letter I have read that the defendant takes steps, by the means which she thinks most adequate, to secure customers, when she wants them....."

Here, in this particular case, this is exactly what respondent No. 1 had done. He has advertised, invited customers and had kept the premises available for anyone who came to him. The fact that people from different national were occupying the premises, clearly shows that he was doing this as a business and that being so, the findings recorded by the Appellate Bench are clearly untenable and deserve to be set aside.

4. In the result, the petition is allowed. The order passed by the Appellate Bench is set aside and the one passed by the trial Court is restored. The rule is made absolute with costs.

5. Petition allowed.