

(1992) 03 BOM CK 0026
In the Bombay High Court
Case No : L.P.A. No. 9 of 1989

Dr. Francisco Marion de Jesus Lopes

APPELLANT

Vs

Caetano Jose de Souza and others

RESPONDENT

Date of Decision : 03-03-1992

Acts Referred:

Constitution of India, 1950 — Article 15, 226, 227, 5

Citation : AIR 1993 Bom 40

Hon'ble Judges : M.L. Dudhat, J;E.S. Da Silva, J

Bench : Division Bench

Advocate : Mr. V.B. Nadkarni and Mr. S. Vahidullah, for the Appellant; Mr. M.S. Usgaonkar and Mr. S.S. Usgaonkar, for the Respondent

Judgement

Dr. E. S. DA Silva, J.—This Letters Patent Appeal arises out of the judgment of the learned single Judge of this Court, dated 24th June, 1988 allowing the Writ Petition No. 186 of 1987 filed by the respondent No. 1 (hereinafter called "the respondent") against the appellant and others.

2. The appellant had filed eviction proceedings against the respondent before the Rent Controller with regard to a building leased to him and situated at 31st January Road, Panaji, alleging that the premises had been let out to the respondent for commercial purposes and to run a "Hospedaria". However, the respondent changed the user of the premises and instead started occupying the same for his residential use as well as for the purpose of running a Bar and a Hotel. He has further alleged that the appellant required the premises for his personal use and occupation. The Additional Rent Controller by his judgment and order dated 20th September, 1979 allowed the said application and directed the respondent to deliver vacant possession of the premises to the appellant. In appeal the said Order was affirmed by the Administrative Tribunal vide judgment dated 30th June, 1987. Aggrieved by the judgment of the Administrative Tribunal the respondent moved this Court with a Writ Petition No. 186/87 challenging the decisions of both the Rent Controller and the Administrative Tribunal which was

summarily allowed by the learned single Judge of this Court by the impugned judgment dated 24-6-1988.

3. Shri Usgaonkar, learned counsel appearing for the respondent, raised a preliminary objection with regard to the very maintainability of this appeal under Clause 15 of the Letters Patent. It was urged by the learned counsel that admittedly the impugned Order was passed in a writ petition meant to challenge the judgment of the Administrative Tribunal which has upheld an Order of the Rent Controller directing the eviction of the respondent from the suit premises. Therefore, the Court while passing the Order has done so in the exercise of its supervisory powers under Art. 227 of the Constitution and hence no appeal would lie against such decision under Clause (15) of the Letters Patent.

4. Shri Nadkarni, learned counsel for the appellant, while vehemently contesting this proposition has pointed out to us that first of all when the writ petition was moved before the learned single Judge the respondent cleverly failed to make any mention as to whether the same was being filed under Art. 226 read with Art. 227 of the Constitution, the reason why it could not be said that prima facie the jurisdiction exercised by the learned single Judge was in fact under Art. 227 of the Constitution. The learned counsel urged that, on the contrary, the facts of the case and the bare perusal of the impugned judgment would clearly reveal that the learned single Judge had no occasion to deal with the matter under his supervisory powers and whatever jurisdiction he might have exercised could be only under Art. 226 of the Constitution. Reliance was placed on the case of Umaji Keshao Meshram and Others Vs. Radhikabai and Another, which was interpreted by a decision of the Full Bench of this Court in Sushilabai Laxminarayan Mudliyar v. Nihalchand Waghajibhai Shaha (1989 Mah Law Journal 695) wherein certain guidelines were given so as to be followed for the purpose of deciding about the maintainability of appeals in terms of clause 15 of the Letters Patent against the judgment of the single Judge in writ petitions challenging orders of subordinate Courts or Tribunals under Art. 226 read with Art. 227 of the Constitution. These principles were also applied in a subsequent judgment of a Division Bench of this Court in Purushottam and Another Vs. Avinash Vasudeo Javdekar and Another, which has again laid down that the real test to ascertain as to whether an order of the single Judge is appealable or not under Clause 15 of the Letters Patent was that the substance and not the form of an order should be the guiding factor. But in a recent judgment of the Supreme Court in case of Sushilabai Laxminarayan Mudliyar and others Vs. Nihalchand Waghajibhai Shah and others, while reiterating the ratio of the earlier ruling of that Court in Umaji's case virtually reversed the Full Bench decision and held it not as good law on the ground that the same had wrongly understood the above decision in Umaji Keshao Meshram and Others Vs. Radhikabai and Another, .

5. We were taken by Shri Nadkarni through the impugned orders of the Additional Rent Controller and the Administrative Tribunal and we are of the opinion that no specific finding appears to have been given by the concerned

authorities on the exact definition and scope of the expression "Hospedaria" vis-a-vis the allegation made by the appellant regarding the purported change of user of the premises by the respondent. We are satisfied, however, that there is also nothing in the impugned judgment which may justify us to draw an inference that the learned single Judge has exercised his jurisdiction under Art. 226 of the Constitution. Hence in the normal course the said judgment would have to be deemed as passed in the exercise of his supervisory powers on the subordinate Courts or Tribunals under Art. 227 of the Constitution and therefore no appeal would lie under Clause 15 of the Letters Patent. Hence the further reliance placed by Shri Nadkarni on the decisions in. Waryam Singh and Another Vs. Amarnath and Another, , Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, , Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, and Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, , in support of his proposition that the power of interference under Art. 226 is limited to seeing that the Tribunal or subordinate Courts functions within the bounds of its authority and that under Art. 226 the power of interference may also extend to quashing an impugned order on the ground of an error or mistake apparent on the face of the record, seems to be of no avail for the appellant in the special circumstances of the case.

6. However, in view of the above mentioned reason that the orders under challenge have apparently missed the main issue about the correct definition and qualification of the actual concept of the word "Hospedaria", we are inclined to entertain the appeal, with the concurrence of the learned counsels for both the parties so as to adjudicate the same on merits afresh on the basis of the evidence available on record and adduced by them in support of their rival stands.

7. With this regard it was first contended by Shri Nadkarni that the respondent on his own admission that he was using part of the building rented to him exclusively for commercial purposes to run an "hospedaria", as his and his family members' residence, has no doubt caused a change of user of the leased premises thus attracting the provisions of S. 22(2)(b) of the Rent Control Act (herein-after called "the Act"). The learned counsel urged that after both the Additional Rent Controller and the Administrative Tribunal having given concurrent findings on this point, otherwise based on the very acknowledgement made by the respondent that he was residing in the rented building with his wife and children, the change of user from commercial purpose to residential one is to be deemed as established beyond doubt and could not be thus interfered with by the learned single Judge in the exercise of his writ jurisdiction. Further, even assuming that single Judge had exercised in this case powers under Art. 227, still in the case of an error of law, as it was held by the Supreme Court in Mohan Lal Vs. Jai Bhagwan, , if two interpretations were available no interference would be justified.

8. Shri Usgaonkar, on his turn, disputed this proposition by alleging that nowhere the Administrative Tribunal gave any finding to the effect that the use of the

premises by the respondent for his residence would amount to a change of user and that the only finding recorded in the impugned judgment was with regard to the change of user by the respondent consequent upon the fact of his purportedly turning the Hospedaria into a Bar and Hotel. The learned counsel contended that the alleged use of the premises by the respondent for his and his family residence or occupation was no more a ground made out by the appellant for the respondent's eviction since this ground, although initially pleaded, was ostensibly abandoned by the landlord in his subsequent deposition given during the course of evidence and in spite of the fact that the respondent had expressly averred in paragraph (1C) of his written statement that earlier to the tenancy given to him the premises were being leased to one Januario who was running therein the Hospedaria Santo Antonio and wherein also the owner was living along with his family. The appellant did not even make any attempt to deny this specific plea of the said respondent. Shri Usgaonkar took us to the deposition of the appellant before the Additional Rent Controller wherein he has stated that the suit premises are being used by the respondent for the purpose of running a hotel and bar and there exists a long board displayed at the main entrance under the name and style of "Bar and Hotel Venite", that the respondent is residing in the suit premises in the first floor with his family, that he had filed the suit application because he requires the premises for his personal occupation and also because the respondent is not using the same for the purpose for which it was let, i.e., for Hospedaria but instead for the purpose of Hotel and Bar.

9. In our view, irrespective of the controversy around the question as to whether the ground of residential change of user was or not abandoned by the appellant in the course of the proceedings, the fact remains that unless it was shown in this case that the residence of the lessee was ancillary or incidental to the main purpose for which the premises were rented by the landlord, i.e. for commercial use and running of an Hospedaria, the change of user is to be deemed as established on the basis of the very admission of the respondent in this case.

10. Shri Nadkarni invited our attention to the very contents of the original deed of lease in Portuguese language, copy whereof was also supplied for easy reference of the Court, wherefrom it flows that the main, primary and dominant purpose of the lease is "commercial" being this commercial purpose further qualified as meant for the running of an "hospedaria".

11. We are, however, unable to accept the appellant's first contention that the fact of the respondent's residence in the rented building amounts in this case to a change of user in the suit premises on his part. Both in his written statement as well as in his evidence before the Additional Rent Controller the respondent has explained in detail in what circumstances he and his family were living in the leased house. In paragraph 3 of the written statement the respondent denied the appellant's plea that the suit premises were not being used for "Hospedaria" but instead for his and his family residence except one room/compartiment on the first floor allegedly used for "Bar and Restaurant". In paragraphs 3(D) 3(E) and

3(F) the respondent expressly pleaded that the major portion of the premises is used for Hospedaria, that there are rooms for lodging of the guests and there are also two halls where meals are served to the customers, that only a small portion of the premises is used by the family of the respondent, that the respondent and his family are personally looking after the business and their residence in the premises is a must. In paragraphs 3(G), 3(H) and 3(I) the respondent again averred that the residence of the owner of an hospedaria is implied in the "Hospedaria", that the appellant is a neighbour residing next door of the building and he was very well aware of the situation that the occupation was done by the respondent from the inception for his business as well as for his residence, that in spite of this knowledge he had received the rent knowing fully well the above situation, that the use for the purpose of hospedaria is done as per the needs, that when there was no demand for lodging the major portion was used for serving the meals and that when there was demand for lodging more rooms were used for lodging and others for serving the meals. Finally in paragraph 3(J) the respondent took to position stand that even the one room occupied for residence contains also materials used for running of the business and therefore in the entire premises there is no part exclusively used for residential purpose of the respondent and the members of his family.

12. All these pleadings were reiterated by the respondent during his deposition before the Rent Controller wherein he has stated that he is still running the Hospedaria in the leased premises and that on an average, excluding the rainy season, about 30 to 40 visitors are being lodged per month. He has further stated that there are two halls on the first floor being one smaller than the other, that this smaller hall has been separated by a partition dividing it into two parts or rooms, that one such room is bigger than the other and the living room is on the road side, that the big room is given by him to the lodgers and the small room is occupied by him and all the members of his family for their residence.

13. It is true that in cross-examination the appellant sought to challenge the statement of- the respondent that all the members of the family were using or residing in the small room made by putting a partition in the smaller hall, but all the suggestions put up by him in this regard were promptly denied by the respondent. Further the appellant also failed to prove that except one room wherein allegedly the respondent was running the Bar and Hotel, as contended by him, any other compartment of the suit premises was being occupied by him or his family for their residential purpose.

14. We are therefore satisfied that, in fact, the respondent is using only one room of the premises for his and his family residence and therefore the occupation of this sole compartment by no means can lead to the conclusion that there has been any change of user of the leased premises wherein, otherwise, as per the oral submission of the appellant, the respondent still continues to run his Hospedaria contrary to what the appellant has pleaded in his application for eviction and in the subsequent statement given before the Additional Rent

Controller. We therefore, hold that the residence of the respondent and his family members in the leased premises is not inconsistent with their running of the Hospedaria, that this residence is implied in the very concept of an Hospedaria which is a type of a homely hotel or guest house primarily run by the owner with the help of the members of his family who for this reason, are required to reside in the same premises in order to render professional services, and meet the personal needs of his guests although the additional employment of some staff other than members of the owner's family is not to be ruled out in certain cases.

15. The reliance placed by Shri Nadkarni on the decision in Sant Ram Vs. Rajinder Lal and Others, as well as in Hari Vs. Waqf of Jalal Haji Abdul Kareem Sahib, is not going to drive the appellant's case any further and on the contrary seems to strengthen the respondent's plea that the residence of the owner of the Hospedaria as well as of the members of his family in the rented premises is a necessity for them to help running his commercial enterprise. In the first case, which was referring to a shop leased to a cobbler, its purpose was held not exclusively commercial or incompatible with residential use only because the lessee used the premises on some days for cooking and staying at night and the Court ruled that there was no diversion of purpose. In the second case which was also dealing with a lease for running a business in clocks and watches the fact that an additional space was utilized as a resting place provided for the accommodation for the guard to keep watch over valuables in the shop was also held as could not be taken to be a diversion of the tenancy from commercial to residential use. Similarly another decision of the single Judge of this Court cited by Shri Nadkarni in Shri Vithal Vishnu Mchandale v. Kisan Dnyanu Mane 1990 (2) R C J 667 wherein it was held that a change of user stands proved where the premises were let out for business but the tenant was occupying the same for residential purpose appears also to be totally different on facts and as such not at all attracted in this case. That was a case wherein a tenant started using a shop premises rented for commercial use for residence after he closed his saloon business and joined as driver. The Court then held that it was obvious that in the circumstances the tenant had changed user by occupying the ship as his residence. This is certainly not the the situation in the instant case wherein the running of the Hospedaria is still on and the residence of the lessee is confined only to one of the rooms of the premises.

16. It was next contended by Shri Nadkarni that the change of the Hospedaria into a Bar and Hotel would also necessarily amount to a change of user. The learned counsel submitted that a Bar is a place in which drinks are freely served to customers and wherein any member of the public can come, liberally consume liquor, even abuse consumption of drinks and thus cause nuisance in the premises. This fact by itself would mean change of user which was likely to cause injury to the landlord. Reliance was placed by the learned counsel on the observations of the Supreme Court in the case of Mohan Lal Vs. Jai Bhagwan, wherein emphasis was laid on the element of injury, mischief or detriment to the demised premises which the shifting of the commercial activities by the lessee in

the premises was likely to be created to the landlord to the extent that it would not be possible to bring the new use in the premises within the meaning or scope of an allied business in the expanding concept of the commercial activities. He also relied on another decision in *Gurdial Batra Vs. Raj Kumar Jain*, which had dealt with a case of premises let out for running a cycle/rickshaw repair shop and wherein sale of television sets also started being carried on temporarily along with repair business. In this case the Court held that it was not a case of change of user within the meaning of the concerned law (East Punjab Urban Rent Restriction Act, 1949) and that such small change of user is not actionable when the interest of the landlord was not prejudiced.

17. In the instant case it was urged by the learned counsel for the appellant that the fact of the respondent having started the business of serving drinks not only to the guests of the Hospedaria but also to outsiders as its regular customers would mean a change of the purpose for which the premises were leased to the respondent, in the instant case, exclusively for running of a guest house (hospedaria). Thus it could not be said, learned counsel further urged, that the opening of a Bar in the rented premises in clear violation the terms of the agreement was not going to cause annoyance, injury and actual prejudice to the landlord, besides the eventual detriment which the running of a Bar in the premises was likely to cause to the very leased building of the appellant.

18. We are again afraid that it is not possible for us to subscribe, even on facts, the submissions of Shri Nadkarni with this regard also. We must observe, at the very outset, that essentially there is no difference between a "hospedaria" which is a guest house meant to accommodate guests on payment of monthly retribution for the purpose of giving them the services of loading and boarding or any of these things and a "hotel" which ultimately aims at the same purpose. An hospedaria is a hotel with less sophistication and amenities and the ultimate stress on both these categories lies on the nature and quality of the services rendered to the customers. It is a question of nuance or gradation only which defines and qualifies the various types of establishments meant to cater the needs of the tourism industry and which, at the relevant time, i.e., when the deed of lease was executed on 25-4-1957, was being regulated by the Diploma Legislative No. 1420 dated 17-4-1952.

19. Article 5 of the said Diploma provides that the establishments for lodging are to be categorized as under:--

- (a) Hotels, or guest houses, lodging houses
- (b) restaurants, eating houses
- (c) Coffee houses, bars, tea rooms, beer houses and taverns.

It follows therefore that hotels, guest houses and lodgings (hospedarias) are all set out in the eye of law in the same type or species of establishments meant to accommodate guests (tourists). There is therefore no doubt that for the reason of

changing of the name in the board from Hospedaria into Hotel the nature of the establishment was not least changed also once Shri Nadkarni has fairly conceded I that the respondent is still running an hospedaria or guest house in the premises although partly occupying the same for their residence with the addition of the Bar where meals and drinks are also served not only to the inmates but also to outside customers who are not staying or living in the premises as its paid guests. Hence there is no question of any change of user of the purpose for which the suit premises were leased to the respondent. In our view the availability of drinks in the guest house, besides meals, either to its inmates or to customers from outside is not incompatible or inconsistent with the concept and scope of an Hospedaria not only according to its common parlance and the usual connotation of this expression as it is understood by the general public but also within the meaning of the definition of this type of establishment in Article 5 read with Article 15 of the above mentioned Legislative Diploma No. 1420 dated 17-6-1952.

20. The appellant in his application for eviction before the Rent Controller has averred in its para 3 that the suit premises are not being used for Hospedaria by the respondent but instead for the residence of the respondent and his family except one room compartment on the first floor which is used for Bar and Restaurant, thus excluding the fact that besides the residence of the lessee even the business of loading was being carried on by the respondent in the leased premises. This averment was specifically denied by the respondent who in paragraphs 3A and 3B of his written statement expressly stated that it was not true that the premises were not used for Hospedaria and that it was false that only one room was utilized for Bar and Restaurant. He further explained in paragraph 3C that initially the designation was "Hospedaria Venite Goa" and after Liberation the, word "Hospedaria" was misinterpreted and not properly understood by the customers and therefore it was replaced "Bar/Hotel Venite". In his deposition before the Additional Rent Controller the appellant has stated that the suit premises are being used for the purpose of running a Hotel and Bar and that by Hotel he means serving meals to customers. This again shows that according to the appellant no hospedaria or guest house activity was being run by the respondent in the suit premises. It is exactly in this context that the admission of Shri Nadkarni that the Hospedaria business of the respondent is still carried on or is being run in the building assumes relevance and shows up to what extent the appellant came to the Court with unclean hands by not disclosing the whole truth thus exposing also the shifting stand sought to be taken by him with regard to the ground advanced by his learned counsel that the change of user as far as the running of the Bar and Hotel in the premises is concerned arises from the fact that liquor and meals are being served in the Hospedaria not only to its customers and guests but also to the general public in breach of the express terms of the lease agreement.

21. We have already seen how this submission of the appellant's learned counsel is unacceptable and devoid of any merit. We have also acknowledged that there

is a lot of substance in the contention of Shri Usgaonkar that being the nature of Hospedaria and Hotel basically and essentially the same there is no question of change of user consequent upon a change of designation of the establishment in the board affixed at the entrance of the premises naming it "Bar and Hotel" instead of "Hospedaria". We are also in agreement with the respondent's learned counsel that only in case the business of Hospedaria in the leased premises had been discontinued by the respondent then it could be said that the running of a Bar and Hotel in the rented building would be inconsistent with the terms of the agreement and leading to a change of user of its aimed purpose.

22. The respondent in his deposition before the Additional Rent Controller has stated that he had got the licence for the Bar 10 to 12 years back, that he has licence to serve meals for customers from public, that he never asked for permission from the appellant to serve meals to the public and that because the customers were misunderstanding the name of Hospedaria and were taking it as Hospital he had changed the name of Hospedaria to Bar and Hotel Venite. He also stated that he considered Hospedaria and Hotel as same thing and that there is no difference between the two, Hospedaria including also the word Bar.

23. It follows therefore that in spite of all this evidence available on record the judgment of the Administrative Tribunal failed to give a clear finding not only on the point of the exact meaning or amplitude of the definition of the word Hospedaria included in the lease agreement dated 25-4-1957 but also on the plea expressly raised by the respondent that the residence of the lessee as well as of the members of his family was implied in the concept of Hospedaria being necessary for the purpose of running the establishment. Instead the Administrative Tribunal without adverting or discussing the evidence adduced by the parties seems to have gone on the wrong assumption that in case Hospedaria was meant for the purpose of lodging and boarding of guests on payment of charges this was to be done only in relation to lodgers or inmates of the guest house and not to cater the needs and requirements of any outsiders or public in general. Shri Usgaonkar is therefore justified when he makes a grievance that the order of the Rent Controller was upheld by the Tribunal on the ground of change of user in respect of the running of the Bar and Hotel only and not on the point of residence of the respondent in the leased premises and therefore it could not be said that there were any concurrent findings of both the authorities which could not be interfered with by the learned single Judge in the exercise of his writ jurisdiction.

24. We are fully conscious that the impugned judgment of the learned single Judge is quite cryptically in substance and unhappily worded and that no sound reasoning (if we can speak of any reasoning at all in this case) appears to have been recorded by the learned single Judge to support his ultimate conclusion that the findings given by the Additional Rent Controller and Administrative Tribunal were to be interfered with and unsettled in the exercise of his writ jurisdiction. But at the same time we are of the opinion that in view of the manifest

perversity of the findings recorded by both the Courts either on facts or in law the appellant is left with no chance to succeed on the merits of this case its a result whereof the impugned judgment of the learned single Judge is to be upheld.

25. We therefore dismiss the appeal with no order as to costs.

26. Appeal dismissed.