

(1922) 04 BOM CK 0021
In the Bombay High Court
Case No : O.C.J. Suit No. 1279 of 1921

The Indian Hotels Company Ltd.

APPELLANT

Vs

Phiroz Sorabji Contractor

RESPONDENT

Date of Decision : 10-04-1922

Acts Referred:

Bombay Rent (War Restrictions) Act, 1918 — Section 2(1)(b)
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1923 Bom 228 : (1923) 25 BOMLR 84

Hon'ble Judges : Fawcett, J

Bench : Single Bench

Judgement

Fawcett, J.—The plaintiffs, the Indian Hotels Co. Ltd., are the owners of the Immovable property known as the "Wellington Mews." This consists of a ground floor and one upper floor, and is used as a mews and motor garage. The ground floor provides stabling accommodation for about one hundred and ninety horses in stalls and loose boxes shown in blue in the Plan. It also provides accommodation for about one hundred and fifty carriages, which are kept on open spaces shown in pink in the Plan.

2. The evidence of the plaintiffs' representative, Dr. Vakharia, which is not disputed, is that no definite space is allotted to any particular carriage, but that carriages are placed as they happen to come in, so that they are not invariably on the same spot but change their position from time to time.

3. Then, on the ground floor, there are nine single cubicles or lock-up rooms, each of which is able to contain one motor car. These are shown in green in the Plan. Each cubicle has a door with a lock, the key of which is supplied to the chauffeur of the car kept inside. The upper floor is entirely used for motor cars. About eighty cars are accommodated on the open spaces, which are shown brown on the Plan; and the same rule applies to the position of cars on these open spaces as I have mentioned in the case of the carriages on the ground floor. Then there are never cubicles shown in yellow in the Plan, each of which

accommodates more than one car, varying in number from four to ten cars. The key of each of those cubicles is kept by a supervisor employed by the plaintiffs; and here, again, no particular portion of the cubicle is allotted to a particular car, but the cars kept inside take up their position as they happen to come in. Then there are about forty single cubicles for cars, shown in green in the Plan. Each of these contains one car. The chauffeur has the key as in the case of single cubicles on the ground floor.

4. The defendant has, since February 1920, kept a horse in a stall on the ground floor and a carriage on the open space there. He has also three cars, one of which is kept on the open space on the upper floor, the second is kept in one of the bigger cubicles shown in yellow in the Plan, and the third car has been kept in the same single cubicle throughout.

5. The question between the parties is whether their relationship is that of landlord and tenant, or merely of licensor and licensee.

6. The defendant pleads that the former is the relationship: the plaintiffs say it is the latter.

7. From the correspondence, Exh. A to the plaint, it appears that in 1920 the Rent Controller in Bombay took action under the Bombay Rent (War Restrictions) Act (No. II of 1918) and fixed standard rents in respect of the accommodation provided by the Mews. The plaintiffs sent out a circular in October 1920 saying that they were advised that the action of the Controller was ultra vires and contrary to law. They, therefore, proposed to have his decision set aside by filing an action for the purpose. The present suit is a test case which raises this point.

8. The figures given in the plaint are not disputed. The plaintiffs claim to be entitled to charge the defendant for one horse and carriage Rs. 18 a month as against Rs. 14-5-0 fixed as standard rent; for one car in the open space Rs. 25 as against Rs. 16-8-0; and for each of the other two cars Rs. 30 as against Rs. 22. The difference for the months of August 1920 to January 1921 amounts to the sum of Rs. 137-2-0, and the plaintiffs claim to recover this from the defendant, and also ask for declaratory and consequential reliefs.

9. The substantial facts alleged by the plaintiffs and deposed to by Dr. Vakharia are not disputed; but the contention raised by the defendant is that he is a tenant of the plaintiffs, and, that, therefore, the premises in question are premises, to which the Bombay Rent Act applies under the definition contained in Section 2, Sub-section (1), Clause (b), of that Act.

10. The issues raised are:

(1). Whether the premises in suit are premises as defined by the Bombay Rent Act?

(2). Whether the relation between the plaintiffs and the defendant is that of licensor and licensee, as alleged by the plaintiffs, or that of landlord and tenant,

as alleged by the defendant?

(3). Whether any actual space of the ground floor or upper door of the premise was exclusively reserved for the defendant?

(4). Whether payments made by the defendant for the spaces actually occupied by him are "rent" within the meaning of the Bombay Rent Act?

(5). Whether the plaintiffs are entitled to claim from the defendant the sums of Rs. 18, RS. 25 and Rs. 30 mentioned in the plaint?

11. The case really turns upon whether the agreement between the parties is one of lease or merely of license. This follows from the definition of "premises" in the Bombay Rent Act, to which I have already referred. That definition says that "premises" means any building or part of a building let separately for any purpose whatever including any land let therewith. And, therefore, to constitute such premises the part of the Wellington Mews, for which the defendant pays, must have been let to him.

12. Now, the ordinary distinction between a lease and a license is laid down as follows in Halsbury's Laws of England, Vol. XVIII, p. 337, Article 770:

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the pre-mises without exclusive possession operates as a license, and not as a lease.

13. The test, therefore, is whether there is a right to exclusive possession. In India we must of course first refer to the statutory definitions of lease and license. That of lease is contained in Section 105 of the Transfer of Property Act, under which a lease of immovable property is a transfer of a right to enjoy such property, etc. A license is defined in Section 52 of the Indian Easements Act, viz.,

Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the Immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

14. Having regard to these definitions, there is no substantial difference between the Indian and the English law on the subject. The words "right to enjoy" in Section 105 of the Transfer of Property Act, when read with the rights of the lessee laid down in Section 108 of the same Act, clearly show that there should also be a right to exclusive possession to constitute a lease under the Transfer of; Property Act. Therefore, I take it that the test of exclusive possession is the main one to be applied in deciding this case.

15. I first take up the case of the defendant's carriage and car which are kept not in the separate cubicle but on the open spaces I have mentioned. In regard to these, Mr. Wadia for the defendant contends that though the particular portion

of space that is occupied by his client's car and carriage from time to time varies, yet he does have exclusive possession of some portion of this area, and the fact that that portion varies is immaterial. The ordinary case of a lease of Immovable property is, of course, one where defined piece of land or a defined building, or part of a building, is transferred to the lessee; and having regard to the rights of a lessee, which are specified in Section, 108 of the Transfer of Property Act, in particular the rights to growing crops and to put up structures, it seems difficult to say that there could be a valid lease not of a definite area of Immovable property but of an area the position of which varies from time to time. On the other hand, it may be said that "immovable property" (as defined in the General Clauses Act) includes not only land but benefits to arise out of the land so that there can be a lease of the benefit of keeping chattels, such as a car and a carriage, within certain specified limits, although the place occupied by the Chattels might vary from time to time, That would correspond to a lease of an incorporeal hereditament such as is referred to in Halsbury's Laws of England, Vol. XVIII, p. 340, Article 774. A careful conveyancer might, no doubt, draw out an agreement which would constitute such a lease, although the particular portion of space occupied varied in the same manner as it does in this case. Consequently I am not prepared to say that there cannot be a lease of that description; but at the same time it seems obvious that the burden of showing that there has been such a lease in a case of this kind lies upon the lessee, and ordinarily the law takes it that a case of that kind is not one of a demise, but that of license, I think there is clear authority for this afforded by the case of *London and North Western Railway Co. v. Buckmaster* (1874) L. R. 10 Q B 70. That was a case of rating ; but it is pertinent to the present point, because the question whether a person is to be rated or not in England raises the question of exclusive occupation in the same way that it arises in the distinction between a lease and a license. In that particular case the plaintiffs, the Railway Company, were rated in respect of certain lines of railway and certain stables. The facts as regards the lines of railway will be found at pp. 72 and 73 of the report as follows, omitting immaterial matter:

The twelve lines of rails and sidings...were and are...used exclusively for the reception of trucks and the storage of coal, stone, etc, belonging not to the plaintiffs, but to various coal-owners and merchants, and to a lone merchant. In these trucks are brought coals from collieries connected with the plaintiffs' system of railways. The space appropriated to one coal-owner, when not fully occupied by him, is appropriated by the servants of the plaintiffs to other coal-owners.

16. It is, therefore, a case somewhat similar to the present case, where no car-owner can say any definite space is allotted to him alone. The stables were also used by coal-owners under a certain agreement in writing. In the judgment of Blackburn J., he says (p. 76):

The occupier of any property Is the person who has the sole and exclusive

possession of it, and he is the person who ought to be rated Whenever the owner of property demises it to another giving him the exclusive possession and occupation, so as to make him tenant of it, it is the tenant who should be rated and not the landlord. In this case, however, I do not think what was done did amount to a demise of any portion of this property, but merely to a giving of a license to have the easement and use of it, analogous to the case of a lodger. The more important part of the case consists of the lines of rails and portions of property adjoining which are part of the company's premises, and it appears that it has been the practice of the company to let them out to coal-owners and stone merchants to store their coals and their stone on, particular spots there. It does not appear from the ease that there is the slightest ground for saying that these spots are irrevocably appropriated to the particular persons; on the contrary, it appears when one spot is not occupied by a particular person, and his coal or goods are not there, that the company's servants move the boundaries and allow another to occupy the spot. Therefore there is no pretence for saving that there is any more than an easement, and on that part of the case the plaintiffs fail.

17. The word "easement" is, of course, here used not in its strict sense but in the sense of a license. There was an appeal from that decision, in which the two other Judges concurred and this is reported in the same volume at p. 444. This appeal was heard by a Bench of six Judges, who were equally divided in regard to the question of the stables, which I need not go into here, but who were unanimously of opinion, on hearing the appellants' counsel only, that so far as related to the lines of railway, the plaintiffs were liable to be rated (p. 445), Therefore, the argument in Blackburn J.'s judgment was Unanimously approved.

18. Following that view, I hold that, so far as the open spaces are concerned, in the absence of any documentary or reliable evidence to the contrary, it must in the circumstances be taken that the defendant had a license simply to keep his carriage and car on such open spaces; and, therefore, the relationship is not one of landlord and tenant.

19. I may here refer to Mr. Wadia's contention that the nature of the case was such that exclusive possession could not be given. I do not think that is true. It would be possible for the plaintiffs, if they were so minded, to mark out by whitewash or otherwise, particular strips or spaces and to number them and definitely assign them to each particular car or carriage.

20. I next take the other extreme, viz., the case of p. car being kept in the same single cubicle, of which the chauffeur had the key. Here, at first sight it certainly does seem that there is clear ground for saying that the defendant has a right to exclusive possession. The giving of a key is generally the symbol of this. I was at first inclined to take that view, but further consideration has altered my opinion. There is this important point to be borne in mind that the mere fact that the defendant has had the exclusive use of this particular cubicle for two years and that it was the intention of the parties that no one else should use that cubicle so

long as the defendant kept his car on the premises, is not in law sufficient to show that the agreement was a demise or a lease and not a license. As authority for this, I think perhaps the most relevant case is that of *Watkins v. Overseers of Milton-Next Gravesend* (1867) L. R. 3 Q. B. 350. This is another rating case. The conservators of the Thames were owners of the soil and bed of the river, and of moorings fixed to the soil of the river. W. used the moorings to moor his hulk, as a floating coal depot, under a document in writing. It was held that the document was not a demise but only granted to W. a license to use the moorings, and that he was therefore not the occupier, and not liable to be rated. I need not go into the terms of the particular document in that case. What I wish to refer to is the portion of the judgment of Blackburn J. at pp. 356 and 357. After giving his opinion that *prima facie* the agreement would not be a demise, but merely a license he goes on as follows:

Against that contention it is said the appellant has the sole and exclusive possession of the moorings. It seems, during five years, the appellant has been the sole person who has used them, and I think if any rival hulk were moored there it would have been contrary to what the parties intended, but it does not follow from this that the appellant is liable to be rated as the sole occupier. There may be a grant of many easements which are conveyed solely to one person, and yet do not confer any occupation, such as a way leave to carry coals from a colliery to the seashore; as important right confined to that colliery alone; that does not make the person who has the sole use of a private way over the land rateable; or in the more familiar case of a lodger, who has the sole right to the use of certain rooms in a house, he is not made by that means rateable if the agreement is that the tenant of the house shall retain the possession, as in the general case of a lodging he does, for the purpose of looking after the management of it; the lodger is merely the inmate.

21. And the case of the lodger there referred to is certainly a very striking one. The lodger has, we will say, a separate room to himself. He has the key of that room, and yet in the case where the lodging house keeper retains the general control of the house, he is not a tenant but is merely a licensee. And that particular aspect of the law is recognised also in the definition of "premises" in the Bombay Rent Act. For it concludes by saying that the expression does not include a room in an hotel or boarding house. The law in regard to the case of a lodger is summarised in Halsbury's Laws of England, Vol. XVIII, p. 339, Article 772:

A lodger who has no separate apartment is only a licensee, and, even though he has a separate apartment, he has not in law an exclusive occupation, and is therefore in the position of a licensee, if the landlord retains the general control and dominion of the house, including the part occupied by the lodger.

22. The Rent Act of 1918 is an encroachment upon the ordinary property-owner's right to freedom of contract, and, therefore, it is an enactment which must be strictly construed. I, therefore, think that if, as is plainly shown, the

definition of "premises" excludes the cases of lodger, to which I have referred it must also be taken to exclude the analogous case of a single cubicle reserved not for the occupation of a human being but for the occupation of a chattel, viz., a motor car: at any rate in the absence of some document or reliable oral evidence, showing that the agreement between the parties was other wise, and provided of course that the owner of the premises does exercise a general right of control such as I have referred to. In this particular case there is no document or other evidence, which would rebut the presumption that I think arises. And another thing that favours the plaintiffs' case is that it is not suggested theft any body else but the plaintiffs is liable to execute repairs of the premises. That is a circumstance, which is of some importance in a case of this kind, for, as was said by Blackburn J. in the judgment that I last referred to, *prima facie* the person who repairs is the person in possession (see p. 356). So that where you get such a position, it favours the relationship of licensor and licensee, rather than that of landlord and tenant. Therefore, on the facts of this case, I think that the law favours the plaintiffs' contention.

23. It is, no doubt, true that the form of the bill used by the plaintiffs, Exh. B. mentions the word "rent" in regard to the charges for stalls for horses, carriages or motor cars. But that is at most an admission which is not conclusive. It is, also, natural that the word "rent" should be used under such circumstances, and there are many cases where the same expression has been used in the agreement between the parties and where, notwithstanding that, it has been held that the relationship between them under the document was merely that of licensor and licensee. Two such cases are: *Wilson v. Taverer* [1901] 1 Ch. 578 and *Taylor v. Caldwell* (1863) 32 L. J. Q. B. 164. Therefore, in my opinion, Exh. B does not affect the view I take.

24. Then, there are the two intermediate cases: first of the defendant's horse, which is kept in a stall or loose box, and secondly, of the car, that is kept in one of the bigger cubicles. In the first of these cases, there is no basis for saying that there is exclusive possession from such symbols as a lock and key ; and Dr. Vakharia deposes that as a matter of fact the defendant's horse was shifted from the stall it occupied to another. On the other hand, he admits that that is rarely, done, and it is natural that that should be the case, for the syce in charge of the horse would be likely to keep his things in the stall for grooming the horse etc, and would, therefore, generally go to the same stall. In the second case, the key of the cubicle did not remain with the defendant's chauffeur but with the supervisor, and the spaces the car occupies vary. It is obvious that if the plaintiffs succeed as to the single cubicle, these two cases must fall with that. Therefore, I think that in all the cases that arise, the plaintiffs' contention is correct.

25. I may perhaps add that I certainly sympathise with the defendant, and should have been glad if I could have come to a contrary decision, for I believe that there has been considerable profiteering with regard to motor garages in Bombay. But I have come to the conclusion that the law is with the plaintiffs.

26. There must, therefore, be a decree for the plaintiffs in terms of prayers (a) and (b) of the plaint.

27. In regard to prayer (c), I am not disposed to declare that the plaintiffs were entitled to demand from the defendant "such consideration as they think fit per month in respect of the premises in the occupation of the defendant". That is, in my opinion, far too wide, But there will be a declaration that the plaintiffs are entitled to demand from the defendant at the monthly rates of Rs. 18, Rs. 25 and Rs. 30, mentioned in the plaint and to continue to demand such payments till such time as the license is legally revoked or surrendered, or other terms are agreed upon by the parties.

28. The defendant must also pay the plaintiffs the sum of Rs.137-2-0 plus the difference between the rates actually paid and the rates I have referred to in prayer (c) from February 1, 1921, till March 31, 1922.

29. Interest on judgment at six per cent, per annum.

30. The plaintiffs do not pray for costs, so I pass no order as to costs.