Khalil Ahmed Bashir Ahmed

Vs

Tufelhussein Samasbhai Sarangpurwala

Civil Appeal No. 1377 of 1982

(Sabyasachi Mukharji, G. L. Oza JJ)

13.11.1987

JUDGMENT

SABYASACHI MUKHARJI, J. –

1.This appeal by special leave arises from the judgment and order of the High Court of Bombay dated November 17, 1980. The main question involved in this appeal is whether the appellant was a licensee or a tenant and also incidentally the question whether the Court of Small Causes, Bombay had jurisdiction to deal with the eviction petition in this case. The premises in question belongs to the Bombay City Weavers' Co-operative Limited. They filed ejectment proceedings against one Sugrabhai Mohammed Husain, their tenant and obtained a decree. It is stated that the appellant was a monthly tenant of the suit premises since about February 2, 1965. On or about February 9, 1965 a fresh document of that date, was executed and it is alleged that the appellant continued by virtue of that agreement. It is alleged that this agreement was entered into between the parties since the respondent wanted to charge more rent or mesne profits. This agreement is in writing and this was for a period of five years, i.e., from September 1, 1965 to August 31, 1970. The main contention involved in this appeal is whether the appellant was a tenant or a licensee ? The answer would be dependent upon the construction of the aforesaid document. It is necessary, therefore, to refer to the said agreement in little detail. The agreement is described as an agreement of 'leave and licence' entered into between the respondent on the one hand and the appellant on the other wherein the respondent had been described as the 'licensor' and the appellant had been described as the 'licensee' and the recitals therein recite that the licensor was seized and possessed of and was otherwise well entitled as the monthly tenant of the workshop premises situated at 231, Ripon Road, Cooperative Building, Bombay, being the premises in dispute, and whereas the licensee had approached the licensor to allow him to occupy and use the said premises for the purpose of carrying out his business of workshop for a period of five years and whereas the licensor had agreed to allow the licensee to use the premises under the said leave and licence of the licensor for a period of five years from September 1, 1965 till August 31, 1970, that agreement was being executed. It was stated that the licensor gave and granted his 'leave and licence' to the licensee to use and occupy the said premises for the period of five years. Clause 2 of the said agreement recites that the licensee had agreed to use the premises as above and merely for the purpose of workshop business. It further goes on to state that the "licensee shall not under any circumstances be allowed to use the premises for the residential purposes or any other purpose save and except specified therein". The period of leave and licence was to commence from September 1, 1965 to August 31, 1970 and it was further submitted that the licensee and the licensor shall not terminate the said agreement earlier save and except on the ground of breach of any of the terms and conditions written therein. The licensor was entitled to terminate the agreement earlier notwithstanding the fact that the period of the agreement might not have expired. It further stipulated that the licensee should deposit a sum of Rs. 2500 for

the due performance of the terms and conditions of the agreement. The said deposit was to be kept free of interest and the same was to be refunded to the licensee on the licensee surrendering possession of the said premises by removing himself and his belongings on the expiry of the period of the agreement or sooner termination of determination thereof after deducting all the dues if any for payment of compensation. It further stipulated that the licensee shall pay to the licensor a monthly compensation of Rs. 225 per month. It is further stipulated that the licensee would be entitled to keep the keys of the said premises with him and shall be at liberty to work in the said premises for twenty hours subject to restriction of rules and regulations imposed by the municipal or any other local authority or authorities. It is further provided that the licensee shall be alone responsible and liable for any breach or contravention of any rule or regulation of the said authorities and he shall indemnify the licensor therefor. The document further stipulated that the licensee shall be at liberty to construct loft and electric fittings and apparatus and tools and shall be entitled to the ownership thereof and shall be free to carry away such articles and the licensor agreed and undertook that he shall not obstruct the removing of such articles at the time of the delivery of the possession of the said workshop. It is further mentioned in the said agreement that it was agreed by the licensee that if he commits any default of any terms and conditions or fails to pay the compensation for two months or if the licensee at any time puts up false or adverse claim of tenancy or sub-tenancy the licensor shall be entitled to terminate the agreement and cancel and revoke and withdraw the leave and licence granted earlier and shall be entitled to take possession forthwith of the said premises. It is further stipulated that the licensee shall pay the electric charges in respect of consumption of electricity and the rent of the said premises should be paid by the licensor only. The agreement recited that the licensee shall not allow any other person to use and occupy the said premises and shall not do any unlawful or illegal business therein. The agreement further recited that the licensor shall have the full right to enter upon the premises and inspect the same at any time. In setting out the terms of the agreement the emphasis has been supplied to the relevant clauses to highlight the points in controversy.

2. On or about November 9, 1970, the respondent herein filed an ejectment proceeding against the appellant under Section 41 of the Presidency Small Cause Courts Act, 1882. It is well to refer to Section 41 of the said Act which is in Chapter VII and deals with summons against person occupying property without leave and provides that when any person has had possession of any immovable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at rack-rent did not exceed two thousand rupees, as the tenant, or by permission, of another person, or of some person through whom such other person claims, and such tenancy or permission has been determined or withdrawn then a suit can be filed by a summons against the occupant calling upon him to show cause therein. It was only when the person was in occupation by permission of the grantor that after the recovery of the permission a suit for possession could have been instituted under Section 41 of the said Act.

3. On or about November 9, 1970 the owner of the premises filed an ejectment proceeding against one Sugrabhai Mohammed Husain and obtained a decree. The trial Judge in the instant case passed a decree in ejectment petition filed by the respondent and ordered the appellant to vacate the premises before January 31, 1975. Before the Judge, Court of Small Causes the points of defences were filed in which the appellant had stated that the application was not maintainable and the plaintiff was himself occupying the premises under one Sugrabhai Mohammed Husain who himself had adopted ejectment proceedings against the respondent. The appellant was contending that he was a direct tenant of the respondent. Without prejudice to the above contention it was contended by the appellant that the respondent was not the owner of the workshop and also denied that he had given the workshop to respondent for conducting business. The submission was that there was sub-

tenancy by the respondent in favour of the appellant as a monthly tenant of the business with the articles and machinery belonging to the appellant and not to the respondent. On those grounds it was contended that ejectment proceeding was liable to be rejected.

4. It was recorded by the court with the expression "BC", a term of some ambiguity as explained later, that the appellant was not claiming protection as a sub-tenant under the Rent Act but only the sub-tenancy as such and therefore, it was recorded that as agreed 'BC' no preliminary issue was to be framed. The learned Judge, noted that the only point that arose for consideration was whether the appellant proved that he was a sub-tenant as such or not. It is interesting to note that in the judgment of the Small Cause Court and also of the High Court at several places the expression "BC" was used; this is intriguing as we find that it intrigued Vaidya, J. because he stated in his judgment dated December 9, 1975 what the expression "BC" was meant by court. He recorded further that he thought that "BC" meant 'by consent'. The learned Judge recorded further that it was a practice in the Court of Small Causes, Bombay of using the expression "BC". The said learned Judge, however, observed that the use of the words in the paragraph which we have stated hereinbefore made the entire paragraph meaningless. We could not agree more.

5. In order to go back to the findings of the learned Judge of the Court of Small Cause and the learned High Court Judge found that the appellant had failed to prove that he was a sub-tenant of the respondent and the learned Judge found him to be a licensee. On an analysis and examination of evidence recorded and in the background of the documents in question the learned Judge came to the conclusion factually that it was an agreement for leave and licence and the appellant was a licensee and not a sub-tenant. It was an agreed position as the learned Judge noted that the respondent therein was a tenant of the entire suit premises and had produced a rent receipt for the month of April 1971 for a monthly rent of Rs. 56.25 p.m. inclusive of municipal taxes and had also produced light bill for the period October 20, 1965 and November 19, 1965. The learned Judge observed that from the evidence it would be seen that it was not the case of the appellant even that he had gone to occupy the suit premises any time before that date and the dispute started only from the date of the agreement. In the light of the legal position and also the fact that the rent, light bill stood in the name of the respondent showed that there was no desire to create any lease by the document mentioned hereinbefore and the appellant regarded him as a mere licensee. There was no error of fact as such on that. To this finding our attention was drawn and great reliance was placed. To go back to the narration of events, the appellant filed special civil application in the High Court of Bombay under Article 227 of the Constitution. The High Court of Bombay allowed the special civil application on December 9, 1975. Thereafter in 1977 a special leave petition to this Court under Article 136 of the Constitution was filed being SLP No. 274/77 and an order was passed in Civil Appeal No. 2181 of 1977 by which the case was sent back to the High Court for a fresh decision, keeping in view the decision of this Court in D. H. Maniar v. Waman Laxman Kudav ((1977) 1 SCR 403 : (1976) 4 SCC 118 : AIR 1976 SC 2340). Thereafter the High Court disallowed the special civil application by its order dated November 17, 1980.

6. That decision was a case where the appellants therein had granted a licence in respect of certain shop premises in Bombay to the respondent under a Leave and Licence Agreement which expired on March 31, 1966. Thereafter the appellants had served a notice upon the respondent calling upon him to remove himself from the said premises. The respondent refused to do so. In July 1967 the appellants filed an application for eviction under Section 41 of the Presidency Small Cause Courts Act. The contention of the respondent that he was a tenant was negatived by the Small Cause Court, Bombay. The respondent approached the High Court under Article 227 of the Constitution. The High Court refused to interfere with the finding of the Small Cause Court that the respondent was a

licensee and not a tenant. The Bombay Rent Act was amended by Maharashtra Act 17 of 1973. By the amending Act, Sections 5(4-A) and 15-A were introduced in the parent Act confer on the licensee, who had a subsisting agreement on February 1, 1973, the status and protection of a tenant under the Bombay Rent Act.

7. The respondent in that case by an amendment had taken the plea of protection under the Maharashtra Amendment Act 17 of 1973 on the ground that he was in occupation of the premises on February 1, 1973 under a subsisting agreement for licence. The Small Cause Court, Bombay negatived the plea on the ground that there was no subsisting agreement for licence on February 1, 1973 as there was nothing on record to show that after March 31, 1966 the leave and licence agreement between the parties was renewed or any fresh agreement was entered into. The respondent had filed a revision petition under Section 115 of CPC in the High Court. The High Court allowed the revision on the ground that the licence was not put an end to by the appellants and that in any event by filing the application for eviction the appellant licensor had granted an implied licence to the respondent licensee to continue in possession till a decree of eviction was passed in his favour. This Court allowing the appeal held that in order to get the advantage of Section 15-A of the Bombay Rent Act, the occupant must be in occupation of the premises as a licensee as defined in Section 5(4-A) on February 1, 1973. If he was such a licensee, the non obstante clause of Section 15-A(1) gave him the status and protection of a tenant in spite of there being anything to the contrary in any other law or in contract. But if he was not a licensee under a subsisting agreement on February 1, 1973, then he did not get the advantage of the amended provision of the Bombay Rent Act. It was further held that a person continuing in possession of the premises after termination, withdrawal or revocation of the licence continued to occupy it as a trespasser or a person who had no semblance of any right to continue in occupation of the premises. Such a person could not be called a licensee at all. It was further held that a person continuing in occupation of such premises after revocation of the licence was still liable to pay compensation or damages for its use and occupation. It was further held that filing an application under Section 41 of the Presidency Small Cause Courts Act might in certain circumstances have the effect of putting an end to the licence if it was subsisting on the date of its filing. But that cannot possibly have the effect of reviving the licence as opined by the learned Judges. Such a proposition of law, it was further concluded by this Court, was both novel and incomprehensible. It was further held that it was right that the court should act in consonance with the spirit of the Maharashtra Amending Act 17 of 1973, but the court cannot and should not cast the law to the winds or twist or stretch it to a breaking point amounting to almost an absurdity. It was observed that the finding of the High Court that the respondent was in occupation of the premises under a subsisting licence was wholly wrong and suffered from serious infirmities of law and fact and deserved to be set aside.

8. The High Court disallowed the special civil application under Article 227 of the Constitution on November 17, 1980 and that is the judgment impugned in this appeal. The High Court in the judgment under appeal noted that if it was held that the document created a lease rather than a licence then the tenant would be entitled to protection. The Bombay High Court in Miss Mani J. Desai v. M/s. Gayson & Co. Ltd. ((1970) 73 Bom LR 394) had held that the Court of Small Causes would have no jurisdiction to proceed with the application filed under Section 41 of the Presidency Small Cause Courts Act. The learned Judge rejected the contention of the appellant that he was a tenant and having found that the period of licence had come to an end, he passed an order of eviction against the appellant. The High Court in the judgment under appeal noted the facts mentioned hereinbefore by this Court in the decision of D. H. Maniar ((1977) 1 SCR 403 : (1976) 4 SCC 118 : AIR 1976 SC 2340) and allowed the appeal. This decision was remanded back to the High Court and it was directed that the appellant should be heard afresh in accordance with law

because in a previous decision Vaidya, J. by the judgment dated December 9, 1975 as mentioned hereinbefore had allowed the appellant's appeal. The learned Judge referred to the several decisions and background of the facts and affirmed the decision of the learned trial judge that the payment to be made to the respondent for the use and occupation was compensation and not rent. The High Court affirmed the decision of this Court and upheld the order of the Court of Small Causes and ordered eviction.

9. In support of this appeal Sree R. F. Nariman very laboriously took us through the documents. He submitted that the document in question in the instant case read as a whole was lease and not a licence. He referred us to the decision of this Court in the case of Associated Hotels of India Ltd. v. R. N. Kapoor ((1960) 1 SCR 368, 383 : AIR 1959 SC 1262) where at page 383 this Court noted that there was a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act, 1882 defined a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration of a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease involves a transfer of an interest in land, Subba Rao, J. as the learned Chief Justice then was, observed in that case. This Court referred to the well-known decision in the case of Errington v. Errington ((1952) 1 All ER 149, 155), where Lord Denning reviewing the case law on the subject summarized the position as follows :

> The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.

The Court of Appeal in England again in Cobb v. Lane ((1952) 1 All ER 1199) considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. Somervell, L.J., had observed :

> the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.

Denning, L.J. also reiterated the same decision. Reviewing these decisions Denning, L.J. had observed at page 384 of the report (1) that to ascertain whether a document created a licence or lease, the substance of the document must be preferred to the form; (2) the read test was the intention of the parties - whether they intended to create a lease or a licence; (3) if the document created an interest in the property, it is a lease; but if it only permitted another to make use of the property, of which the legal possession continued with the owner, it was a licence; and (4) if under the document a party got exclusive possession of the property, prima facie, he was considered to be a tenant; but circumstances might be established which negative the intention to create a lease.

10. Mr. R. F. Nariman very strenuously relied on the decision of this Court in Mrs. M. N. Clubwala v. Fida Hussain Saheb ((1964) 6 SCR 642, 653 : AIR 1965 SC 610). This Court emphasised that if the exclusive possession to which a person was entitled under an agreement with a landlord was coupled with an interest in the property, the agreement would be construed not as a mere licence but as a lease. Mr. Nariman's point was that the facts of the case were identical to the facts of the present case. Our attention was drawn to a decision of the Bombay High Court in the case of Sohanlal Naraindas v. Laxmidas Raghunath Gadit ((1966) 68 Bom LR 400) where Tarkunde, J. observed that the intention of the parties and exclusive possession were important elements. This decision was approved in appeal by this Court in Sohan Lal Naraindas v. Laxmidas Raghunath Gadit ((1971) 3

SCR 319 : (1971) 1 SCC 276) where this Court reiterated that the test of exclusive possession was important point. He drew our attention to the observations of Shah, C.J. at page 321 of the Report (SCC p. 279, para 5). Reliance was also placed on the observations of Krishna Iyer, J. in the decision of Qudrat Ullah v. Municipal Board, Bareilly ((1974) 2 SCR 530 : (1974) 1 SCC 202 : AIR 1974 SC 396) where at page 533 of the Report (SCC p. 208. para 7) Krishna Iyer, J. observed that there is no simple litmus test to distinguish a lease as defined in Section 105, Transfer of Property Act from licence as defined in Section 52 of the Easements Act, but the character of the transaction turns on the operative intent of the parties. To put it precisely if an interest in immovable property entitling the transferee to enjoyment was created, it was a lease; if permission to use land without exclusive possession was alone granted, a licence was the legal result. We are of the opinion that this was a licence and not a lease as we discover the intent. For this purpose reference may be made to the language used and the restrictions put upon the use of the premises in question by the appellant. In the document in question the expression "licence" was introduced and clause (2) said that it was only for the business purposes. The licence fee was fixed. It permitted used only for 20 hours. Restriction in the hours of work negates the case for a lease. Clause (12) is significant which gave to the licensor the right to enter upon the premises and inspect the same at any time. In our opinion the background of the facts of this case and the background of the entire document negate the contention of the appellant that it was a lease and not a licence.

11. A good deal of submission was made before us that if it was a lease and not a licence, then this point could be taken in aid of the submission that the court had no jurisdiction, and there was no estoppel. It was contended that estoppel was a plea in equity and that there was no equity in favour of the respondent. We were invited to embark upon the treaded field of estoppel and equity and very many learned passages from judgments of eminent judges of Calcutta, Bombay and of this Court were cited. But in this case we had (sic have) not been tempted. Our attention was drawn to several decisions but in the view we have taken we cannot say that the view taken by the High Court or the Court of Small Causes was incorrect. It was a possible view. That is sufficient for us.

12. The distinction between leave and licence has been well summarised in Halsbury's Laws of England, Fourth Edition, Volume 27 page 13. In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. Lord Greene, M.R. had observed this in Booker v. Palmer ((1942) 2 All ER 674, 676-77). This is a salutary test.

13. The intention here is manifest. In any event this is a possible view that could be taken. This Court in Venkatlal G. Pittie v. M/s. Bright Bros. (Pvt.) Ltd. ((1987) 3 SCC 558) and M/s. Beopar Sahayak (P) Ltd. v. Vishwa Nath ((1987) 3 SCC 693) held that where it cannot be said that there was no error apparent on the face of the record, the error if any has to be discovered by long process of reasoning, and the High Court should not exercise jurisdiction under Article 227 of the Constitution. See in this connection the observations of this Court in Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale (AIR 1960 SC 137 : (1960) 62 Bom LR 146). Where two views are possible and the trial court has taken one view which is a possible and plausible view merely because another view is attractive, the High Court should not interfere and would be in error in interfering with the finding of the trial court or interfering under Article 227 of the Constitution over such decision.

14. In the aforesaid view of the matter, we are clearly of the opinion that in view of the intention of the parties in the document and the facts and circumstances of this case, it was a licence and not a lease. We need not detain ourselves with the question of estoppel upon which very interesting

arguments were advanced before us by Mr. Nariman as noted above.

15. In the aforesaid view of the matter this appeal must fail as we find no ground to interfere with the decision of the High Court. The appeal fails and is dismissed. In the facts and circumstances, there will be no order as to costs.

16. In view of the fact that the appellant has been carrying on business for some time, we give the appellant time up to March 31, 1988 to give up and deliver vacant possession provided the appellant files the usual undertaking with the Registrar of the Court of Small Causes, Bombay within three weeks from this date.

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