Vayallakath Muhammedkutty

Vs

Illikkal Moosakutty

Civil Appeal No. 8255 of 1996

(B. L. Hansaria, G. N. Ray JJ)

09.05.1996

JUDGMENT

G. N. RAY, J.-

1. Leave granted. Heard learned counsel for the parties.

2. The defendant in two suits being OS No. 633 of 1984 and OS No. 47 of 1985 filed in the Court of learned Munsif, Kozhikode, is the appellant in this appeal. The respondent instituted Suit No. OS 47 of 1985 against the defendant appellant for a mandatory injunction restraining him from entering the suit premises by contending that the said defendant was given licence to run a hotel business in the suit premises for a prescribed period and such leave and licence having expired, the defendant had been illegally carrying on the business of hotel in the suit premises belonging to the plaintiff. The other suit being OS No. 47 of 1985 was instituted against the defendant-appellant for recovery of an amount of Rs 4082 being the balance licence fee and interest. The defendant appellant contested both the suits by contending that the defendant was not a licensee for running the plaintiffs hotel business but he was inducted as a tenant on payment of daily rent as stipulated. The defendant-appellant also contended that he had regularly paid the rent which was revised from time to time and after adjusting the airier rent against deposit lying with the plaintiff, the balance amount was tendered but plaintiff having refused the same, the plaintiff landlord was not entitled to claim any interest on the outstanding arrears.

3. Both the said suits were analogously heard by the learned Principal Munsif, Kozhikode. By the common judgment dated 3-4-1986, the learned Munsif dismissed OS No. 633 of 1984 on a finding that the defendant was a tenant in respect of the suit premises and hence case for eviction of a licensee must fail. The learned Munsif, however, decreed the other suit namely OS No. 47 of 1985 in part and passed a decree for recovery of a sum of Rs 1472 as arrears of rent with interest at 6% per annum from the date of decree till payment. The plaintiff unsuccessfully challenged the said decrees in the Court of the learned Subordinate Judge, Kozhikode in AS Nos. 150 and 151 of 1986. By a common judgment dated 28-11-1990 the appellate court dismissed both the said appeals.

4. The plaintiff-respondent thereafter preferred SA No. 69C3 of 1991 F and 1014 of 1992 D before the Kerala High Court. By a common judgment dated 2-3-1995, the High Court allowed both the appeals and decreed OS No. 833 of 1984 by holding that defendant's possession of the suit premises on the basis of agreement between the parties (Err. A-1) was that of a licensee and the defendant was not a lessee or tenant. Accordingly, the plaintiff was entitled to recover possession of the suit premises. The High Court also decreed the other suit by holding that the plaintiff was entitled to realise arrear licence fee as claimed by him with future interest at 6%.

5. Mr Sukumaran, learned Senior Counsel appearing for the appellant, has contended that the concurrent findings of the trial court and appellate court that the defendant was a tenant and not a licensee as alleged by the plaintiff should not have been interfered with by the High Court in a second appeal. It has also been contended by Mr Sukumaran that law is well settled that description of the occupier of a premises as a licensee by itself will not determine the real status of the person in possession. If there is any written agreement between the parties which governs the terms for occupation of the disputed premises, then such document together with other available evidences are required to be considered for the purpose of finding out the real intention of the parties. Mr Sukumaran has submitted that exclusive possession is one of the important incidences of a lease. It has been contended by Mr Sukumaran that although in the document of agreement between the parties, the defendant was stated to be a licensee empowered to run the hotel business of the plaintiff, but if the document is considered intrinsically, it will be quite evident that it was a document of lease. The defendant was given exclusive possession of the disputed premises for running the hotel business. The defendant was not given the right of sub-leasing the premises in question. Such clause in the agreement was totally unnecessary if defendant was a mere licensee. The question of sub-lease may arise if a leasehold interest is created in respect of the disputed property.

6. Mr Sukumaran has submitted that although it was mentioned in the document of agreement that daily payment out of the collection from the hotel business was to be made to the plaintiff, such term was in reality fixation of mode of payment of rent on daily basis. Such mode of payment on daily basis does not mitigate against the incidence of lease. Mr Sukumaran has also submitted that if the intention of the parties was to create a licence, the defendant should not have been allowed to appoint his own employees to run the business according to his liking. Admittedly, the plaintiff had removed his employees f before handing over possession of the disputed premises so that the defendant, on getting lease, could run the business in his own way with the help of his employees.

7. Mr Sukumaran has further contended that the evidence adduced in the case reveals that the plaintiff was unable to run the business. He had no time to come and even occasionally supervise the business. On account of such fact, the plaintiff leased out the suit premises in favour of the defendant. Mr Sukumaran has submitted that after the expiry of the period of lease, the defendant was allowed to continue the said business of restaurant. The plaintiff had agreed to increase the rate of rent and according to such fresh agreement, after expiry of initial period of contract, the defendant had paid rent at the enhanced rate as agreed between the parties by depositing such rent in the bank account of the plaintiff according to the plaintiff's direction. Even if the initial agreement is : construed as a document of licence, the subsequent possession of the defendant of the suit premises on agreement of higher rate of rent coupled with the factum of payment and acceptance of rent had, in law, created a fresh lease, in any event. The courts below on consideration of such facts, came to the finding that the defendant being lessee in respect of the disputed premises, the suit as framed for his eviction and recovery of possession by the plaintiff was not maintainable. Mr Sukumaran has referred to a decision of this Court in Capt. B. V. D'Souza v. Antonio Fausto Fernandes. [(1989) 3 SCC 574 : AIR 1989 SC 1816] In the said decision, it has been indicated that mere description of a party as a lessee or licensee does not determine the real status. The intention of the parties is required to be considered for determining the status. It has been observed that exclusive possession, though not a conclusive evidence, is a relevant factor for determination of the dispute as to lease or licence. This Court, in the said decision, has also indicated that a clause in the ! agreement prohibiting sub-lease is consistent with a case of lease and not with a case of licence. Mr Sukumaran has submitted that if the cumulative effect of the aforesaid facts are considered in the proper perspective, there is no difficulty in finding that the defendant was a lessee. Such finding having

been concurrently made by the courts below, should not have been interfered with by the High Court. He has submitted that the appeal should be allowed by setting aside the impugned decision of the High Court.

8. Mr Iyer, learned Senior Advocate appearing for the respondent, disputed the aforesaid submissions made by Mr Sukumaran. Mr Iyer has submitted that the defendant has come with inconsistent case. In his original written statement which was filed on 10-12-1984, the defendant stated that the business known as "Forest View Restaurant" was owned by him absolutely and he was in exclusive control of such business. The defendant even denied that he was permitted by the appellant on 18-8-1982 to run the business for a period of 12 months as per agreement Ext. A-1. It was the specific case of defendant that such permission was irrelevant and could not have been granted by the plaintiff on that date because the defendant was the full owner of the said Forest View Restaurant ever since 1971. The defendant in his first written statement averred that one Moosakutty let the building to one Abdul Sathar. The said Abdul Sathar in turn transferred his right to the defendant and he was running the restaurant even prior to 1971. After the plaintiff got the rights of the landlord, the defendant attorned to him and paid the premium of Rs 2000 and daily rent was increased from 12-3-1976. Thereafter, the rent was increased from time to time and in 1983 the rent stood increased to Rs 16 per day. In the additional written statement filed on 28-3-1985, the defendant deviated from his original case and it was stated that the appellant was not in possession of the restaurant at any time. On 18- 8-1983, rent was raised to Rs 16 per day and Rs 4000 was fixed as premium. Such increase of the rent and also the stipulation of the said advance of Rs 4000 were oral. Mr Iyer has submitted that it is not correct to contend that finding of fact by the trial court that Ext. A-1 or even Ext. B-2 under which the defendant had admittedly run the business of hotel, was a document of lease, was upheld by the appellate court. The appellate court did not come to the finding that document Ext. A-1 was a document of lease. On the contrary, the appellate court had examined the provisions of Err. A-1 in detail and found that Ext. A-1 was an extension of Ext. B-2 and the arrangement under both the said documents was not by way of lease but by way of licence. Even exclusive possession of the property in favour of the defendant was not found by the court of appeal below. As a matter of fact, the appellate court observed that the defendant had only such rights as were available to a licensee and not to a lessee. But the appellate court, on consideration of some of the statements made by the appellant and on consideration of Ext. B-2, came to an independent finding that a lease was created in favour of the defendant. Mr Iyer has submitted that correctness of such finding made by the appellate court was considered by the High Court and by indicating cogent reasons, the erroneous finding of the appellate court has been set aside by the High Court. Mr Iyer has also submitted that construction of a document is essentially a question of law and the High Court in second appeal was justified in considering the legal import of the said document Err. A-1 by making proper construction of the document. Mr Iyer has also submitted that Ext. A-1 clearly indicates that it was a case of licence. By the said document, the plaintiff reserved his right in the business in the disputed property and only entrusted the defendant to carry on business and out of the profit being earned by him, to pay a particular sum on daily basis. The High Court, therefore, has rightly construed the said document Ext. A-1 as a document of licence. My Iyer has submitted that the terms and conditions under which the said business was to be carried on by the defendant were mentioned in Ext. A-1. Accordingly, there was no reason to have an oral agreement between the parties for giving the disputed property on lease. The defendant tried to make out a new case of an oral lease on 18-8-1983 but failed to prove such oral agreement by leading any convincing evidence. He has, therefore, submitted that the finding of the High Court that the defendant was a licensee, whose period of licence had come to an end, cannot be held to be contrary to the evidences adduced in the case. Accordingly, no interference is called for in this

appeal.

9. We have considered the document Ext. A-1 containing the terms and conditions under which the defendant was allowed to run the said business and, in our view, the said document is consistent with the case of licence. In D'Souza case', this Court has indicated that for a consideration as to whether a document creates a licence or lease, the substance of the document must be preferred to the form. It is not correct to say that exclusive possession of a party is irrelevant, but at the same time it is also not conclusive. The other tests, namely, intention of the parties and whether the document creates any interest in the property or not, are important considerations. Mr Sukumaran has very strongly relied on the embargo put against sub-letting by the defendant in the said document Err. A-1 and referring to D 'Souza case has submitted that such embargo of sub-lease can arise only in a case of tenancy and for the purpose of proper construction of the document, the said embargo cannot be lost sight of. Although, normally in a case of licence, question of sub-letting does not arise, but simply for giving such clause in an agreement, an agreement cannot be held to be an agreement for lease. The pith and substance of the document are required to be considered for the purpose of finding out the true import of a document, namely, whether a document creates a lease or a licence. Mr Iyer, the learned counsel appearing for the respondent, has drawn our attention that the defendant came with inconsistent cases as made out in his initial written statement and the subsequent written statement. He even denied that the document of lease was created in his favour by Ext. A-1. On the contrary, the defendant came out with a case that even before 1971 he became a lessee in respect of the disputed property by an assignment from the erstwhile tenant and when the plaintiff got superior interest of the landlord, he attorned in favour of the plaintiff and had paid rents to the plaintiff. If he had already been a tenant of the disputed premises from 1971 onward and he had attorned the tenancy in favour of the landlord there would not have been any occasion for executing the document Ext. A-1. By the subsequent written statement the defendant wanted to make a new case of a fresh tenancy after the expiry of the period of contract under Ext. A-1. Such agreement, according to the defendant, was oral. In our view, such case of oral tenancy has been rightly rejected by the High Court by indicating cogent reasons. There is no convincing material on record on the basis of which oral agreement of lease created on 18-8- 1983 and consequential acceptance of payment of enhanced rent and payment of the premium for Rs 4000 have been established by the defendant. In the aforesaid circumstances, the finding made by the High Court against the defendant that he was not inducted as a lessee on revised terfns on the basis of an oral agreement between the parties w. e. f. 18-81983 is fully justified and no interference by this Court is called for. The appeal is accordingly dismissed.

10. The learned counsel for the appellant has, however, submitted before us that since the appellant had been running a business of restaurant in the disputed premises for a long time, reasonable time should be granted to him for vacating the said premises on filing an undertaking before this Court. The suit was instituted in 1984 for getting the possession of the disputed premises. In the aforesaid circumstances, we do not think that it will be proper to grant too long a time to the defendant to vacate. However, we stay the execution of the decree passed against the defendant till 31-8-1996 provided within four weeks from today an usual undertaking is filed by the appellant to vacate the disputed premises and to hand over the peaceful and vacant possession of the same to the appellant within the said period of 31-8-1996.

11. The appeal is accordingly dismissed with no order as to costs.