**SUPREME COURT OF INDIA**

Achintya Kumar Saha

Vs.

M/s. Nanee Printers

C.A.No.6203 of 1999

(P.Venkatarama Reddi and S.H.Kapadia JJ.)

30.01.2004

**JUDGMENT**

**S.H. Kapadia, J.**

1. Ashok Kumar Bose (since deceased) was the owner of the premises No. 119/1A, Harish Mukherjee Road, Bhowanipore, Calcutta-700026. He died leaving behind him his wife Smt. Madhuri Bose, (since deceased), Shri Ajoy Kumar Bose (son) and a daughter. Ashok Kumar Bose left a Will dated 1st March 1974 bequeathing all his properties to his widow Smt. Madhuri Boas for the period of her natural life, but with no right to alienate the property and thereafter to his son Ajoy Kumar Bose (respondent No. 4 herein). On 5th July, 1976 Smt. Madhuri Bose executed an agreement of licence for 11 years in favour of M/s Nanee Printers, a proprietary firm carried on by one Ranaji Ganguly (respondent Nos. 1 and 2 herein). On 10th October, 1980, the appellant herein bought the entire property No. 119/1A including the suit premises consisting of a Printing Press in a Katcha shed from Ajoy Kumar Bose (respondent No. 4) to which the deceased Smt. Madhuri Bose was a confirming party. On 7th July, 1981, the present appellant filed a Title Suit for eviction against respondent No. 1 and 2 herein and sought possession of the suit premises. In the Title Suit, a declaration was sought to the effect that M/s Nanee Printers were in unauthorised occupation of the suit premises as trespassers on revocation of the leave and licence agreement dated 5th July, 1976. M/s Nanee Printers contested the Title Suit. In the written statement, they alleged that they were monthly tenants in the suit premises; that the purported agreement dated 5th July 1976 was a tenancy in disguise of a licence; that Shri Ajoy Kumar Bose (respondent No. 4 herein) was a consenting party to the agreement dated 5th July, 1976 and since respondent No. 2 herein was in need of accommodation, he had no option but to sign the agreement dated 5th July, 1976. By the written statement, M/s Nanee Printers denied that Smt. Madhuri Bose (since deceased) had no right to let out the suit premises on rest. It was further alleged by M/s Nanee Printers that under the agreement dated 7th July 1976, M/s Nanee Printers were permitted to install electricity and telephone in the premises and under the circumstances they were tenants in respect of the premises. In the alternative it was alleged that even if they were held to be licensees, the said licence was irrevocable and therefore, the suit was liable to be dismissed with costs.

2. In the said suit, the following issues were framed by the trial court:

*"1. Is this suit maintainable?*

*2. Has the suit been properly valued?*

*3. Has the Court fees been paid sufficient?*

*4. Has this Court jurisdiction to try the suit?*

*5. Are the defendant Nos. 2 and 3 thika tenants in respect of the suit premises?*

*6. It there any relation of landlord and tenant between the parties?*

*7. Are the defendants tenants or licensees in respect of the suit premises?*

*8. If the defendants nos. 2 to 3 are found to be licensees, whether the said license is revocable or not?*

*9. Is the plaintiff entitled to get a decree as prayed for?*

*10. To what other reliefs, the plaintiff is entitled?"*

3. By judgment and order dated 29th August 1992, the trial Court came to the conclusion that respondent Nos. 1 and 2 herein were licensees and not tenants; that the licence was for 11 years for running a Printing Press with liberty to the licensor to renew the licence for further 11 years and therefore, respondent Nos. 1 and 2 were not trespassers as alleged by the appellant (plaintiff) herein. The trial Court further found that Shri Ajoy Kumar Bose 9respondent No. 4) was fully aware of the agreement dated 5th July, 1976 between his mother Smt. Madhuri Bose on one hand and respondent Nos. 1 and 2 herein on the other hand and that he had consented to the agreement dated 5th July, 1976 by his conduct. However, the trial court found that respondent Nos. 1 and 2 have failed to prove monthly tenancy. The trial court further found that the licence was irrevocable as respondent Nos. 1 and 2 had raised a permanent construction and extension over the existing structure by 50 feet with the consent of Smt. Madhuri Bose and her son respondent No. 4. The trial court further found that Shri Ajoy Kumar Bose (respondent No. 4) was an important witness and yet he was not examined by the appellant herein. In the circumstances, the trial court dismissed the Title Suit filed by the appellant.

4. Being aggrieved by the judgment and order of the trial court, the appellant herein filed an appeal before the 9th Additional District Judge, Alipore vide Title Appeal No. 132 of 1993. By judgment and order dated 10th May 1996, the Appellate Court allowed the appeal holding that Smt. Madhuri Bose had a limited ownership right and she was not competent to create any right in property and transfer the same in favour of respondent Nos. 1 and 2. The

first Appellate Court further found that there was no evidence of a irrevocable licence in favour of respondent Nos. 1 and 2 and, therefore, the judgment of the trial court was reversed and a decree of eviction was passed in favour of the appellant herein and against respondent Nos. 1 and 2 herein. Although the first Appellate Court allowed respondent Nos. 1 and 2 to argue on the question of tenancy, the Court did not adjudicate upon that question.

5. Being aggrieved by the judgment and order of the first Appellate Court dated 10th May 1996, respondent No. 1 and 2 herein preferred an appeal before the High Court being Second Appeal No. 510 of 1996 inter alia on the ground that the first Appellate Court had failed to adjudicate the question of tenancy; that the first Appellate Court had failed to appreciate that the licence in question was tenancy in disguise. At this stage, it may be noted that in the Second Appeal preferred by respondent Nos. 1 and 2 before the High Court, the plea of irrevocable licence was given up. At this stage, it may be pointed out that during the pendency of the appeal before the High Court, respondent Nos. 1 and 2 herein had moved an application under Section 107 Civil Procedure Code (C.P.C) and under Order XLI Rule 23 C.P.C. for amendment of the written statement filed by respondent Nos. 1 and 2 in the trial court. But judgment and order dated 31st January 1997, the application for amendment of the written statement was dismissed by the High Court pending the hearing the final disposal of the Second Appeal.

6. By judgment and order dated 16th September, 1998 passed by the High Court in Second Appeal No. 510 of 1996, the High Court came to the conclusion that since exclusive possession of the suit premises was given for business purposes in a residential area for consideration to respondent Nos. 1 and 2 with a right to make further construction, the agreement dated 5th July, 1976 was a tenancy and not a licence. The High Court further found that under the agreement dated 5th July 1976, respondent Nos. 1 and 2 were entitled to bring in electricity and telephone connection which also indicated that the object of the agreement was to create a tenancy. The High Court further found that the purported licence was for 11 years with authority given to the licensor Smt. Madhuri Bose to renew the licence for further 11 years also indicated that the agreement was that of a tenancy and not a licence. The High Court came to the conclusion that the agreement was given a nomenclature of leave and licence in order to avoid the provisions of *West Bengal Premises Tenancy Act, 1956* (hereinafter referred to as "the said Act 1956"). In the circumstances, the High Court came to the conclusion that the suit instituted by the appellants for eviction of respondent Nos. 1 and 2 as trespassers was not maintainable. That in this case, respondent No. 4 was an important witness and yet he was not examined by the appellant and in the circumstances, the First Appellate Court ought to have drawn an adverse inference against the appellant. The High Court further observed that even municipal taxes were payable and paid by respondent Nos. 1 and 2 which circumstance supported the case of tenancy in favour of respondent Nos. 1 and 2. While allowing the appeal, the High Court further observed that the tenancy for 11 years came within the purview of the said Act 1956 and in the absence of notice under Section 13(6)(g) of the said Act 1956 and in the absence of any of the grounds of eviction under Section 13(1) of the said Act 1956, the impugned decree was a nullity. Accordingly, the High Court allowed the Second Appeal No. 510 of 1996 filed by respondent Nos. 1 and 2 and set aside the judgment and order passed by the First Appellate Court and dismissed the

suit filed by the appellant herein. Being aggrieved by the judgment and order passed by the High Court, the appellant has come to this Court by way of special leave.

7. Before coming to the arguments, we may point out that in cases where courts are required to consider the nature of transactions and the status of parties thereto, one cannot go by mere nomenclatures such as, licence, licensee, licensor, licence fee etc. In order to ascertain the substance of the transaction, we have to ascertain the purpose and the substance of the agreement. In such cases, intention of the parties is the deciding factor. In order to ascertain the intention, we have to examine the surrounding circumstances including the conduct of the parties. In the present case, the High Court was right in examining the terms of agreement coupled with the circumstances surrounding the agreement in question like exclusive possession of the premises being given to respondent Nos. 1 and 2 for monetary consideration for 11 years with a clause of renewal of the licence for further 11 years; payment of municipal taxes by respondent Nos. 1 and 2, the rent receipts issued by Smt. Madhuri Bose, the premises being let out for business purposes in a residential locality and conduct of the plaintiffs in not examining Ajoy Kumar Bose (respondent No. 4) who is held to have consented to the agreement in question. All the above circumstances taken together show that respondent Nos. 1 and 2 were not trespassers. They show that the agreement was a tenancy in disguise of a licence.

8. Mr. Sanyal, learned senior counsel for the appellant contended that a bare look at Section 100 C.P.C. shows that the jurisdiction of the High Court to certain the second appeal is confined to appeals which involve substantial question of law specifically set out in the Memo of Appeal and formulated by the High Court. He contended that in the presence case no such question has been set out in the Memo of Appeal and nor is the question so formulated and the High Court was, therefore, not justified in entertaining the Second Appeal. He further contended that in second appeal, the High Court proceeded to entertain a new plea of tenancy under the West Bengal Premises Tenancy Act, 1956 and even rendered its decision on the said point without following the mandatory provisions of Section 100 C.P.C. He submitted that tenancy under the said Act 1956 was never in issue. He submitted that the judgment of the High Court was illegal and in excess of its jurisdiction for deciding a new point taken up for the first time in second appeal and, therefore, not sustainable and deserves to be set aside. In this connection, reliance was placed by him on the judgment of this Court in the case of Kshitish Chandra Purkait vs. Santosh Kumar Purkait and Others reported in 1, Mr. Sanyal further contended that on 6th April 1992 an application was moved by respondent Nos. 1 and 2 to amend the written statement pending the hearing and final disposal of second appeal before the High Court which was expressly rejected by the High Court vide its order dated 31st January 1997. In this connection, it was pointed out that respondent Nos. 1 and 2 had applied for amendment of the written statement vide application dated 6.4.1992 in the Title Suit of 1981 and by that application they attempted to raise a new plea of statutory under the said Act 1956 which was rejected by the High Court in second appeal, and yet by the impugned judgment, the High Court has held that respondent Nos. 1 ad 2 were the tenants under the said Act 1956. Mr. Sanyal, therefore, contended that the High Court had erred in entertaining a new plea for the first time in second appeal and that it had erred in rendering a decision on a new point without even prior notice thereof to the

appellants which was not permissible under Section 100 C.P.C. and consequently, the impugned judgment deserves to be set aside. Learned counsel for the appellant further contended that the High Court had erred in invoking Section 103 C.P.C. in this case. He contended that section 103 C.P.C. had no application to the facts of this case as respondent Nos. 1 and 2 had given up the plea of tenancy (issue No. 6) before the trial Court. He further contended that the trial court in the Title Suit had categorically come to the conclusion that respondent Nos. 1 and 2 were not the tenants of the suit premises and despite that declaration on cross objection was filed before the First Appellate Court. He further pointed out that even the plea of irrevocable licence was given up by respondent Nos. 1 and 2 in second appeal before the High Court. Mr. Sanyal, learned senior counsel for the appellant contended that in order to attract section 103 C.P.C., the appellate Court must be satisfied that an issue necessary for the disposal of the appeal had arisen before the lower appellate court which has not been decided by the lower appellate court or which has been wrongly decided by the said Court. in the circumstances, he submitted that the High Court had erred in invoking section 103 C.P.C. in this case.

9. We do not find any merit in the arguments advanced on behalf of the appellant. The main issue around which the entire case evolves is: whether the agreement dated 5.7.1976 was a license or a tenancy. This issue was there before the trial court and the agreement was held to be a license. It was there also before the lower Appellate Court but it was not adjudicated upon. When the core issue is not adjudicated upon, it results in a substantial question of law under section 100 C.P.C. In the case of Santosh Hazari v. Purushottam Tiward (Dead) by Lrs. reported in, it has been held that whether a question of law is a substantial question of law in a case will depend on facts and circumstances of each case, the paramount consideration being the need to strike a balance between obligation to do justice and necessity to avoid prolongation of any dispute. In the matter, this Court found that an important issue had arisen for determination before the first appellate court: whether dependent had made out the case of adverse possession and whether the suit filed by the plaintiff was liable to be dismissed as barred by time under Article 65 of the Limitation Act 1963, which issue was decided by a cryptic order passed by the first appellate court and in the circumstances this Court took the view that failure to decide the core issue gives rise to a substantial question of law. In our view, the judgment of this Court in the case of Santosh Hazari (supra) applies to the facts of this case. Although the core issue of tenancy arose before the first appellate court the same was not adjudicated upon and in the circumstances the High Court was right in invoking Section 103 C.P.C. Moreover as can be seen from the record, the plea of tenancy was allowed to be argued before the first appellate court but the said point was not adjudicated upon. Lastly, in the High Court in second appeal, this point was argued by both side whereupon the High Court gave its finding to the effect that respondent Nos. 1 and 2 were tenants and their tenancy cannot be terminated without notice under Section 13(6) and the failure of appellant making out any of the grounds under Section 13(1) of the said Act 1956. Hence, the judgment of this Court in the case of Kshitish Chandra (supra) has no application. It is now settled by the judgment of this Court in the case of V. Dhanapal Chettiar vs. Yesodai Anumal reported in that in order to get a decree of eviction against the tenancy under any State Rent Control Act, determination of a lease in accordance with the T.P. Act is unnecessary and surplusage as the landlord cannot get the eviction of the

tenant even after such determination and the tenant continues to be the tenant even thereafter till the landlord makes out a case under the Rent Act. This position is also indicated by the definition of the word 'tenant; under section 2(h) of the said Act 1956.

10. Lastly, it has been contended on behalf of the appellant that agreement dated 5th July 1976 has since expired by afflux of time during the pendency of proceedings and in view of subsequent even the High Court should have moulded the relief and granted decree for eviction on that ground alone. We do not find any merit in this argument. The Title Suit filed by the appellant was on the basis that the agreement dated 5th July, 1976 was a licence which stood revoked and on revocation the said respondent Nos. 1 and 2 became trespassers. However, in view of the above finding of the High Court that the said agreement dated 5th July, 1976 was a contract of tenancy and that the said respondents were tenants, the entire substratum of the original Title Suit falls. Hence, we do not find any merit in the above argument.

11. The contention of the appellant's counsel that Issue No. 6 having not been pressed before the trial Court, the plea of tenancy could not have been raised by the respondents is equally untenable. Issue No. 7 is comprehensive enough to cover that point. The fact that petition for amendment of written statement raising the plea at statutory tenancy was rejected during the pendency of Second Appeal cannot also be considered to be fatal to the respondents' case. The issue whether the respondents were tenants or not was very much alive throughout the proceedings, though the appellate Court did not deal with that aspect. The High Court, therefore, assumed its powers under Section 103 and found that issue against the appellant.

12. For the foregoing reasons, this civil appeal fails. We, accordingly, dismiss the same, but in the facts and circumstances of the case, direct the parties to bear their own costs throughout.