

RAJASTHAN HIGH COURT

State of Rajasthan

Vs.

Municipal Council

D.B. Civil Spl. Appeal No. 474 of 1995
(Arun Kumar, CJ. with Prakash Tatia, P.P. Naolekar, JJ.)

17.05.2002

JUDGMENT

Arun Kumar, C.J.

1. In order to appreciate the legal question involved in this batch of special appeals it is necessary to give a brief background. The Municipal Council, *Hanumangarh* (referred to hereinafter as 'the Council' in short) had constructed some shops in a market known as Kamla Nehru Market. The writ petitioners are vegetable vendors who used to sell vegetables on the foot-path in the market. During the period from 1976 to 1978 about 66 shops were constructed in the market. The market was named as Kamla Nehru Market, *Hanumangarh* Junction. The size of the shops is 10'x10'. While allotting the shops to the petitioners and others agreements were executed between the Council and the allottees. Copy of agreement is annexed to the petition. As per the agreement, the allottees were liable to pay at the rate of Rs. 80/- per month for the shops allotted to them. In the year 1983, the State Government issued an order dated 10.08.1983 the contained guide-lines regarding sale and settlement of properties belonging to the State Government or the respective Municipal Councils/Boards. Copy of the order was also annexed to the petition. In pursuance of the Government order dated 10.08.1983 the Council in its meeting held on 29.10.1983 increased the charges for the shops allotted to the writ petitioners by 10 per cent and further directed that there will be a 10 per cent increase every subsequent year. The petitioners feeling aggrieved by the said order challenged the same by filing writ petitions in this Court which came to be decided by the impugned judgment of the learned Single Judge dated 25.02.1991. By the impugned judgment, the learned Single Judge held that action of the Council in increasing the charges by 10 per cent and further directing 10 per cent annual increase for every subsequent year was illegal and without

jurisdiction. The writ petitions were, therefore, allowed. However, the Council was left free to take a decision regarding increase in rent of the shops in accordance with law. These appeals are directed against the said judgment of the learned Single Judge.

2-3. When the appeals came up for hearing before the Division Bench it was noticed that by a more or less non-speaking order another appeal had been dismissed by another Division Bench. The Bench in the present case found itself unable to persuade itself to agree with the view taken by the other Division bench and, therefore, referred the matter to a larger Bench. The main question referred for consideration by the larger Bench is whether the notification dated 10.08.1983 as issued by the State Government really confers jurisdiction on the Municipal Councils to increase the rent at the rate of 10 per cent every year and whether such an enhancement is lawful ?

We have heard learned counsel for the parties.

4. It was contended on behalf of the appellant that the order dated 10.08.1983 was passed by the State Government in purported exercise of power under Section 297 (2) (f) of the Rajasthan Municipalities Act, 1959 (referred to hereinafter as 'the Act' in short). The learned Addl. Advocate General argued that the document in question whereby the agreement was entered into between the Council and the allottee is a license-deed and under Section 138 of the said Act the State Government can issue directions to increase the license fee.

5. In our view, the foremost question for consideration in the present case is about interpretation of the document Ex.-1 which is an agreement entered into between the appellant Council and respondent allottee. It has to be seen with reference to the said agreement as to whether it creates a lease or license in favor of the allottees. The law on the subject is fairly well settled. The apex Court had occasion to deal with the subject several times. The land-mark judgment of the Supreme Court in *Associated Hotels of India Ltd. v. R.N. Kapoor*,¹ continues to hold the field. Various decisions of the Supreme Court rendered after the said judgment have followed the principles laid down in *Associated Hotels'* case. The relevant and oft-quoted observations contained in the said judgment are re-produced as under :-

"Where the question is whether the document is a lease or a license it is the substance of the agreement that matters and not the form, for otherwise clever drafting can camouflage the real intention of the parties.

There is a marked distinction between a lease and a license.

The following propositions may be taken as well established : (1) to ascertain whether a document creates a license or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties whether they intended to create a lease or a license; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a license, and (4) if under the document a party gets exclusive possession of the property, *prima facie*, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

Applying these tests, held upon the terms of the document that the document was a lease and not a license. The solitary circumstance that the rooms let out in the present case were situated in a building wherein a hotel was run could not make any difference in the character of the holding. Under the document there was transfer of a right to enjoy the rooms, and, therefore, it created a tenancy in favor of the tenant."

6. Applying these tests to the facts of the case particularly the document Ex.-1, the substance of the document is to be seen. The agreement is styled as a 'Kirayanama' i.e., lease-deed. The possession of the shops was given to the allottees i.e., the Council has parted with the possession of the shops completely. The deed contains clauses that the allottees will not part with possession of the shops nor sub-let them. This shows that the Council had completely divested itself of the possession of the shops and the same stood vested in favor of the allottees. A further condition was imposed that the premises could be used only as shops. Thus the document creates an interest in the property in favor of the allottees. As against this, a license is a mere privilege to carry out some activity at the premises the lawful possession whereof remains with the owner. Till the vendors like the petitioners in the writ petitions were selling their vegetables on the foot-path they were mere licensees. However, on construction of the pucca shops they were required to make a fixed monthly payment and possession of the shops was completely left within their control. It is recorded in the document itself that the allottees had received possession of the shops from the Council. It is further stated in the agreement that the allottees will maintain the shops in good condition and will not cause any damage to the shops. It is also stated in the agreement that the allottees will not carry out any material construction in the shops and they will vacate the shops on one month's notice and if the allottee does not deliver possession of the shop on the expiry of one month notice period he will pay rent at a penal rate. At

various places in the agreement the amount payable by the allottee for the shops to the Council has been described ad rent. In our view, it is a lease-deed and not a license-deed. Thus, we agree with the learned Single Judge that the basic document in this case is a lease-deed.

7. In view of our finding that relationship between the parties is that of landlord and tenant and the document executed between the parties is a lease- deed, our task is rendered simple. Learned counsel of the appellant relied on Section 138 of the Act to justify the power of the State Government in issuing the impugned notification dated 10.08.1983. Section 138 which is reproduced as under deals only with cases relating to license:

"138. *Board may charge fee for certain licenses* - When any license is granted by the Board under this Act or when permission is given by it for making any temporary erection or for putting up any projection or for the temporary occupation of any public street or other land vested in the Board, the Board may charge a fee for such license or permission.

(2) The Board may charge a higher fee by way of penalty for any erection or projection, or for the use or occupation of any public street or other land vested in the Board by any person without its permission or license. Such fee shall be leviable irrespective of any other penalty or liability to which the person liable to pay the same may be subject under any other provision of this Act or any other law for the time being in force. The rates of such higher fees shall be determined by rules.

(3) The Board may also charge such fees as may be fixed by bye-laws under clauses (a), (q) and (r) of sub-section (1) of Section 90 for the use of any such places mentioned in that sub-section as belong to the Board.

(4) It shall be lawful for the Board to lease the levy of any fee that may be imposed under sub-section (3) by public auction.

(5) When any fee has been leased under sub-section (4), any person employed by the lessee to collect such fees or the lessee himself may, subject to the conditions of the lease, the use of which the fee is payable any person who is liable to pay the fee but refuses to pay it."

The present being a case of lease-deed the said Section has no application.

8. Then, learned counsel for the appellant tried to find the source of power for issuing

the impugned Notification dated 10.08.1983 in Section 297(2)(f) of the Act. The provision is re-produced as under :-

"297. *Power of Government to make rules and orders* - (1) The State Government may make rules or orders generally for the purpose of carrying into effect the provisions of this Act and prescribe forms for any proceeding for which it considers that a form should be provided.

(2) In particular, and without prejudice to the generality of the foregoing power, the State Government may make rules or orders -

.....

.....

(f) for prescribing the fees payable for such licenses and the conditions on or subject to which such licenses may be granted, refused, suspended, revoked or withdrawn."

While sub-section (1) of Section 297 is in general terms, sub-section (2)(f) alone has to be seen. The said provision also deals with licenses. The present being not a case of license the impugned circular and consequent revision of rent cannot be justified on the basis of the said provision.

9-10. We have been taken through the impugned notification which makes a reference to leases granted by the State Government. The said notification makes reference to Rajasthan Municipalities (Disposal of Urban Land) Rules, 1974 as a source of power for issuing the same. As the title of the Rules itself suggests these rules deal with urban land. the expression "urban land" is defined in the Rules as under :-

"Urban land means any land -

(a) which has become vested in a Board under clause (c) of Sub- section (2) of Section 92; or,

(b) which is a Nuzzul Land as defined in Section 3 of the Rajasthan Land Revenue Act, 1956 (Act No. 15 of 1956); or

(c) which may be placed at the disposal of a Board by the State Government."

The facts of the present case as already noted leave no manner of doubt in our mind that the said Rules cannot be invoked in the present case. It is not a case of allotment of land.

11. The present is a case of lease. The impugned notification being without jurisdiction, cannot provide source of power to the appellant to revise the rent and the impugned action is wholly without jurisdiction.

12. Having held that this is a case of lease it follows that the revision of rent has to be in accordance with the lease-deed or in accordance with law, if it so permits. We agree with the learned Single Judge that the State Government or the appellant can revise the rent in accordance with law; but, the impugned revision of rent based on the circular dated 10.08,1983 cannot be upheld. The decision of the appellant revising the rent of the shops in question was, therefore, rightly quashed by the learned Single Judge. We agree with the view taken by the learned Single Judge. These appeals are, therefore, dismissed.

13. We hold that the notification dated 10.08.1983 issue by the State Government does not confer jurisdiction on the Council to increase rent at the rate of 10 per cent every year and the said enhancement is unlawful. The reference is answered accordingly.

Appeals dismissed.

Cases Referred.

1. AIR 1959 SC 1262