

**(1980) 01 BOM CK 0011**

**In the Bombay High Court**

**Case No : Writ Petition No. 1383 of 1979**

Balvantsingji Anand

APPELLANT

Vs

Bhagwantrao Ganpatrao Deshmukh

RESPONDENT

**Date of Decision : 17-01-1980**

**Acts Referred:**

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 11(4)  
Constitution of India, 1950 — Article 227  
Easements Act, 1882 — Section 52  
Transfer of Property Act, 1882 — Section 105

**Citation : AIR 1980 Bom 333 : (1980) MhLj 459**

**Hon'ble Judges : Sharad Manohar, J**

**Bench : Single Bench**

**Advocate : M.A. Rane, for the Appellant; V.V. Kamat, for the Respondent**

## **Judgement**

1. Though this Writ Petition is directed against a finding which appears to be concurrent finding regarding the nature of right had by the petitioner in the suit premises, I have found it necessary to examine the same in details and upon the examination I have no other option but to come to the conclusion that the ultimate finding cannot be sustained.

2. Prima facie the question appears to be very simple. By an agreement purported to be one of leave and licence dated 31-5-1969, the respondent allowed the petitioner to continue the use of the suit premises, which consists of a portion of open land for a period of 320 days. That licence was terminated by a notice dated 21-3-1970. I am told that thereafter the respondent has even filed a suit for recovery of possession of the said land. I am told that it is Spl. Civil Suit No. 69 of 1977, but long before that on 8-9-1971, the petitioner filed an application u/s 11(4) of the Bombay Rents, Hotel, and Lodging House Rates (Control) Act 1947 (hereinafter "the Rent Act") for fixation of standard rent of the suit premises contending that the rent of Rs. 3680/- charged for the contractual period which in turn amounted to Rs. 368 for 32 days was excessive rent.

3. Both the Courts below have recorded a concurrent finding that relationship evidenced by the said written agreement dated 31-5-1969 (Ex. 71) was not the relationship of a landlord and a tenant and that the right that was given to the petitioner pursuant to the said agreement was only in the nature of leave and licence. The application for fixation of the standard rent has been, therefore, dismissed by both the Court below, since at the relevant time no licensee had any right for getting a standard rent fixed at hands of the Court under the provisions of the Rent Act.

4. Mr. Rane, the learned Advocate appearing for the petitioner, has invited my attention to the various facts and circumstances and has also taken me through the entire agreement as also through the judgment of the Court below and has very strenuously contended that the view taken by the learned Judge that the petitioner was not given exclusive possession of the land in question is a finding erroneous on the face of the record. In the circumstances to which I will presently advert, I find that Mr. Rane's contention must be upheld.

5. The suit premises consist of an open piece of land, being part of S. No. 243/2A admeasuring 2111 sq. yards. The land S. No. 243/2A itself admeasures 24 Gunthas. The said land belongs to the respondent.

6. Initially one Narayandas was a tenant of the respondent in respect of the said land and he was paying rent of Rupees 40/- per month in that behalf. It is common ground that the respondent filed a suit against the said Narayandas for a recovery of possession of the said open plot of land admeasuring 24 gunthas. The proceedings in question reached right till to this Court and a decree for possession was passed in favour of the respondent. The petitioner carries on business of transport and has to maintain trucks for that purpose, At the relevant time his trucks used to be parked on the road and on that account he had to face a Municipal prosecution. The contention of the respondent is that in those circumstances the petitioner requested him to allow him to keep the trucks on the suit premises. It is common ground that from 1-10-1968 the petitioner started using the suit premises for the purpose of parking the trucks and vehicles belonging to the petitioner on the same. It is also common ground that an oral agreement in that behalf was entered into with effect from 1-10-1968. As per the said agreement, the petitioner was allowed the use of the suit premises for a period of 32 days only and for which use and occupation he was to pay Rs. 368/- to the respondent. It is not disputed that in spite of the fixed period having been provided for by the said oral agreement, the petitioner continued to be in use and occupation of the suit premises even thereafter. It is also common ground that after the respondent got possession of S. No. 243/2A from the said Narayandas a portion of the land admeasuring 40 ft. x 119 ft. was given by him to one Makhansingh. It is the contention of the respondent that the said Makhansingh was occupying the said portion of the land as a licensee. I am told that there is no dispute raised by the said Makhansingh as such in that behalf.

6A. On 31-5-1969 a written agreement was executed by the petitioner as well as

the respondent by virtue of which the petitioner was allowed the use and occupation of the suit premises for a further period of 320 days in all, at a total compensation of Rs. 3680/-. This turns out to be Rs. 368/- for a period of 32 days. The agreement was to be effective from 1st June 1969 to 16th April 1970. The terms and conditions of the agreement have been elaborately set out by the learned trial Judge in para. 6 of his judgment. The term relating to rent or compensation has been already mentioned hereinabove. Out of the other terms, the following clauses are material,

6B. Under Clause (5) it is provided that the licensee shall be entitled to use the suit premises only for the particular purpose, that is to say, for parking and repairing the petitioner's own trucks and cars and for placing removable wooden Mandani for the storage of motor parts, for repairing, overhauling and parking etc. of the petitioner's cars and trucks and for the purpose of its own business. Clause (7) provides for forfeiture of the petitioner's right under the agreement in case of default by the petitioner. By Clause (8) the petitioner is required to remove the Mandani and temporary shed upon expiration of the period of the agreement, and if he does not do so, the respondent is authorised by Clause (9) to do the needful in that behalf. Clause (10) of the agreement is rather significant. It provides that the petitioner who is consistently described in the agreement as a licensee, shall not be deemed to have any claim of any ownership in connection with the suit premises and that the respondent, licensor, shall have the right to enter and visit the suit premises at all times as of right. Clause (11) is equally significant. By the said clause the petitioner, though described as a licensee only, is required to share the local taxes payable by the respondent in connection with the suit premises. There is a default clause provided by Clause (12) in connection with the payment of the monthly amount of compensation; Clause (21) of the agreement also is very much significant. By the said clause the respondent, licensor, has stipulated that in case the petitioner wants to leave the suit premises before the end of the period stipulated by the said agreement, he shall give one month's notice to the respondent in that behalf.

7. Mr. Rane has also invited my attention to another significant circumstance. My attention has been invited to Clause (10) of the said agreement with reference to the original document filed in the trial Court at Ex. 71. The initial contemplation by the said clause was that the petitioner was not to keep "exclusive possession" as per the said agreement; but the words "exclusive possession" have been deleted and above these words, the words "claim of ownership" have been substituted. Mr. Rane also took me through other relevant evidence in this behalf, a detailed reference to which is not necessary. From the above circumstances. Mr. Rane contends that two things stand out unmistakably: viz. that;

(1) the possession, which the petitioner received in pursuance of this entire agreement consisting of the oral agreement dated 1-10-1968 and the written agreement dated 31-5-1969, was exclusive possession of the suit premises. Mr.

Rane contends that finding of the trial Court in this behalf that the petitioner was not put in exclusive possession of the suit premises is entirely unjustified. As a result, Mr. Rane contends, that exclusive possession being most important test, the petitioner must be deemed to be a tenant of the suit land.

(2) Alternatively, Mr. Rane contends, the entire tenor and gamut of the agreement show that it was a document brought about for the purpose of camouflage, the real intention of parties being nothing but to create a relationship of landlord and tenant. Mr. Rane invited my attention to the significance of three circumstances in this behalf, which are to be found in the agreement itself.

8. Mr. Rane pointed out the provisions of Clause (10) which rules out the claim of ownership by the petitioner. There is nothing in the said clause; in fact there is nothing in the entire agreement as a whole, by virtue of which specific exclusion of the rights of tenancy can be inferred. Mr. Rane contends that such a language is extremely unusual. Mr. Rane in this connection has invited my attention to the mistake committed by the trial Court in assuming that as per the said agreement no interest was to be deemed to have been created in favour of the licensee. What is ruled out by Clause (10), and that is the only relevant clause in that behalf, is the claim of ownership. The claim regarding tenancy is not even adverted to in the said clause. Mr. Rane contends next that the provisions of Clause (11) are equally significant. Mr. Rane says that under the said clause half the local taxes are to be paid by the petitioner. If the petitioner was not to have any interest in the suit premises as such, it is inconceivable, contends Mr. Rane, that the petitioner would have been made liable to pay even the taxes.

8-A. Nextly Mr. Rane points out the stipulation contained in Clause (21). In the case of a tenancy a landlord is entitled to expect a tenant to give a notice before he leaves the premises in question. The provision of giving a notice by a mere licensee, contends Mr. Rane, is incompatible with the agreement of leave and licence. In the case of a leave and licence all that the licensee gets is the right of use of the premises. u/s 52 of the Easements Act, if he was not given the right his use would have resulted in a trespass. All that the licensee, therefore, gets is the permission by the owner to use the suit premises. Whether to use or not to use the suit premises is entirely for the licensee. He may as well not use the suit premises and in that case the entire transaction comes to an end. No interest as such is created in favour of the licensee and hence there should be no question of his giving notice for termination of the interest. Incorporation of the clause such as Clause (21), contends Mr. Rane, is more compatible with the transaction being one of the tenancy rather than leave and licence.

9. Further, the fact that the document was only an effort to camouflage the real intention of the parties is, according to Mr. Rane, evident also from the history of this transaction. In the first place this very land had been admittedly let out to one Narayandas as a tenant for which the respondent was receiving only Rs. 40/- as rent and that too for the entire land admeasuring 24 gunthas. Secondly, the

petitioner was carrying on a business which, from the nature of things, has and required a continuity. In these circumstances, if the petitioner undertook to pay such a high rent to the respondent for the suit premises he would have normally done so upon the expectation that there should be continuity given to him in respect of the tenure on the basis of which alone a business could be carried on. Thirdly, Mr. Rane points out that the petitioner was initially inducted on the suit premises for a period of 32 days only by virtue of oral agreement dated 1-10-1968 but he continued even thereafter and he continues on the suit premises till today. Even the suit which was filed by the respondent for possession was filed as late as in the year 1977. It is, therefore, contended that all these circumstances do go to show that the real intendment of the parties must have been to assure continuance of the tenure, that such continuance of tenure could be brought about only by a transaction of lease and not by a transaction of leave and licence, and that, hence, the contemplation must have been to create a lease and not a mere licence. The present document of leave and licence is, therefore, evidently a camouflage to screen such a transaction. Moreover, Mr. Rane contends that taking into account the above facts and circumstances in conjunction with the fact that the possession of the petitioner was exclusive possession, the finding of the courts below that the transaction was one of leave and licence only could not be sustained.

10. Mr. Kamat, appearing for the respondent, was not in a position to invite my attention to any circumstance either in the document or in other part of the record to satisfy me that the finding of the trial Court, which was confirmed by the revisional court, viz. that the petitioner's possession of the suit premises was not exclusive possession, is correct. No doubt the trial Court has stated in paragraph 9 of the judgment that the document in question does not show that the applicant was put in exclusive possession of the premises in question; but the conclusion arrived at that the petitioner was not put in exclusive possession appears to be unjustified. No doubt the document does not say in so many words that the petitioner was put in exclusive possession. But reading the document as a whole and reading between the lines the conclusion is irresistible that the petitioner was put in exclusive possession of the suit premises.

11. As a matter of fact this is evident from the negative language in which Clause (10) of the agreement is couched. Relevant portion of Clause (10) states that the respondent shall at all times as of right and without interference or objections be entitled to enter and visit the said portion of the land. Such a provision unmistakably postulates that the respondent is not in possession of the land and that is the reason that he has himself reserved the right to enter the land and to visit the land. Right of entering or right to visit is something far different from possession in respect of the land. As a matter of fact even in the case of a lease the landlord does have a right to visit the premises in question. There is nothing in the said Clause (10) from which it could be inferred that the petitioner's possession of the suit premises could be anything other than exclusive possession. If at all, what can be legitimately inferred from the said

clause is the fact that the landlord does not have possession of the suit premises but has only right to enter the same and visit the same.

12. No other circumstance was brought to my notice to show that the respondent ever exercised his right of possession of the suit premises. The very circumstances that the petitioner has been allowed to construct a temporary shed on the suit premises and that the respondent gave permission to the petitioner to construct the shed and intimated his consent in that behalf to the Municipality shows that the respondent was not in possession of the suit premises at any time. The conclusion is, therefore, irresistible that the possession of the petitioner was exclusive possession.

13. As held by the Supreme Court in *Sohanlal v. Laxmidas* (1972) 74 Bom LR 144, the test of exclusive possession is an extremely important test for deciding as to whether a particular transaction is a lease and/or leave and licence. The trial Court had proceeded upon the assumption that the petitioner was not in exclusive possession and the revisional Court has just confirmed the finding without any real application of mind to the real question. One cannot but gather an indelible impression that the revision application was disposed of in just a cursory manner.

14. In these circumstances, it cannot be said that the ultimate conclusion arrived at by the Courts below is the only conclusion which could be arrived at. It is contended that in the ultimate analysis it is a question of appreciation of evidence. If the ultimate finding of fact is based upon a basically erroneous assumption and approach, such a finding cannot be allowed to stand.

15. However, this does not mean that I should exercise my jurisdiction under Article 227 of the Constitution to substitute my own finding in this behalf, To my mind this is pre-eminently a fit case where I should set aside the said finding recorded by the Courts below and I could remand the case to the trial Court for reconsideration of the entire question in the light of my finding that possession of the petitioner received in pursuance of the agreements in question was exclusive possession. The trial Court will no doubt be entitled to weigh this circumstance coupled with other circumstances, indicating inference of lease against the other circumstances, indicating absence of lease. The trial Court should come to its own conclusion regarding the real nature of the transaction after giving due weight to all the circumstances keeping in mind that the petitioner has been at all relevant time in exclusive possession of the suit premises.

16. I, therefore, allow the petition, The rule earlier issued is made absolute. The findings recorded by both the Courts below are set aside and the matter is sent back to the trial Court for giving its finding in the light of the discussion made above and to decide the case in accordance with the provisions of law.

17. I am informed that Special Civil Suit No. 69 of 1977 has been got stayed by the petitioner by an order of this Court. The stay shall stand vacated.

18. In the circumstances of the case, there shall be no order as to costs.

19. Petition allowed.