

(1973) 02 GAU CK 0009
In the Gauhati High Court
Case No : S. A. 71 of 1969

Banwarilal Chokhani

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 28-02-1973

Acts Referred:

Easements Act, 1882 — Section 52
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1973 Guw 123

Hon'ble Judges : R.S. Bindra, J

Bench : Single Bench

Advocate : J.P. Bhattacharjee, S.N. Medhi, for the Appellant; A.R. Barooah and M.R. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Bindra, J.—This Second Appeal arises out of a suit instituted by Banwarilal Chokhani against the Union of India in its capacity as the owner of North-East Frontier Railway, hereinafter called the N. F. Railway, and 12 others. The reliefs claimed in the suit were, (a) for a declaration of plaintiffs' tenancy right, with possession over the lands in dispute, (b) grant of a lease or leases to him by Union of India of the same lands, (c) withdrawal and cancellation of the licences granted by the N. F. Railway to the defendants Nos. 2 to 13, (d) permanent injunction restraining Union of India from evicting the plaintiff from the lands in dispute pursuant to the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958, hereinafter called "the Act". (e) confirmation of the plaintiff's possession as a tenant over the suit lands, and (f) for cancellation of licences issued by the N. F. Railway in favour of defendants Nos. 2 to 13, besides the costs of the suit. The suit was dismissed by the trial Court on the findings that the agreement entered into between the plaintiff and the N. F. Railway was in the nature of a licence and not of a lease, that that licence had long since been terminated, that the lands in dispute were presently in occupation of defendants Nos. 2 to 13 and not of the plaintiff, and that as such

the suit was altogether misconceived. The plaintiffs' appeal against the trial Court's decree taken to the Court of Assistant District Judge proved abortive. The learned Assistant District Judge affirmed the finding of the trial Court that the agreement between the parties created a licence and not a lease, and held, in addition, that the suit filed by the plaintiff Banwarilal was not maintainable inasmuch as the contracting party was Joharmal Murlidhar and Co. and not Banwarilal personally.

2. Shri J. P. Bhattacharjee very fairly stated at the bar, while arguing the appeal on behalf of Banwarilal, that the fate of the appeal hangs by the finding whether the contract made between the parties was in the nature of licence or of lease. To appreciate the parties' respective contentions it is necessary that I should read the definitions of the expressions "lease" and of "licence" as given respectively in Section 105 of the Transfer of Property Act and Section 52 of the Indian Easements Act. Section 105 of the Act reads:-

"A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

Section 52 of the Easements Act is in the following terms:-

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such a right does not amount to easement or an interest in the property, the right is called licence."

The most conspicuous distinction between the lease and the licence brought out by the respective definitions is that whereas in the case of lease there is a transfer of right to enjoy the immovable property concerned, no such transfer comes about in the case of licence. However, it is common experience that in case of leases no words are specifically used to show that there is a transfer of a right to enjoy the demised property but such a transfer is always deducible from the terms of the agreement if studied carefully. It is for the reason of that peculiarity that it is quite often said that the dividing line between lease and licence is rather thin and occasionally blurred. However, certain guiding principles have been laid down in various judicial pronouncements that help and aid in distinguishing a lease from the licence.

3. An accepted principle both in England and India, for finding out whether an agreement between the parties creates the relationship of lessor and lessee or merely that of licensor and licensee is to determine what was the intention of the parties. To quote the words of Lord Dering in *Cobb v. Lane*, (1952) 1 All ER 1199 at p. 1202: "The question in all these cases is one of intention: Did the circumstances and conduct of the parties show that all that was intended was

that the occupier should have a personal privilege with no interest in the land." The same view was expressed, though in somewhat different words by Lord Greene M. R. in *Booker v. Palmer* (1942) 2 All ER 674. He observed: "There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind." Another guiding principle which appears to be well settled is that the substance of the document rather than the form in which it is couched should be looked into for determining the character of relationship established by it. The artifice or skill or ingenuity of the document writer, on his own or at the instance of any interested party, cannot be permitted to cloud the real intention of the parties which alone is material for settling the issue whether the contract creates a lease or a license. The test of exclusive possession as indicative of relationship of landlord and tenant no longer holds the field though it is still recognised that a person who is let into exclusive possession of the property is *prima facie* considered to be a tenant. The rider added to the last mentioned proposition is that the circumstances may be established which negative the intention to create a lease. Reference in this connection is invited to *Konchada Ramamurthy Subudhi and Another Vs. Gopinath Naik*, . In this judgment the Supreme Court cited with approval the following observations of Subba Rao, J. as he then was, made in *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, .

"The following propositions may, therefore be taken as well-established: (1) To ascertain whether a document creates a licence 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 licence; (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 licence, 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."

It remains to be said that whereas lease creates an estate in the premises, an estate that is heritable, a licence does not. Licensee gets only a personal right to enjoy the property without transfer of any right to him and it comes to an end with his death, or earlier at the sweet will, or even at the caprice, of the owner once the latter expresses his intention to terminate it.

4. It is in the light of these well settled principles that I proceed to examine the terms of the agreement concluded between the parties with a view to find out whether it creates a lease or a licence.

5. The first agreement available on record is dated 10-4-1924 and the last one, marked Ext 34, is dated 11th March, 1944. The parties' counsel were agreed that the terms of Ext. 34 alone should be looked into to find out what was the character of relationship created between the parties. I think that was the only

right course for the parties" counsel to adopt because all the previous agreements will be taken to have been superseded by the one marked Ext. 34. This document contains 13 clauses and it is mentioned in it at the very outset that the agreement shall be for a period of one year, beginning from 1st April 1943. The summary of various clauses is as under:-

(a) The tenant agrees to pay to the landlord yearly rent of Rs. 132/12/- and also to pay the local rates, taxes and assessments excepting the Government revenue;

(b) The tenant agrees "in all things to be subject to the reasonable orders and directions of the Landlord who may enter and view the state and condition of the said premises at all reasonable times";

(c) The tenant agrees to keep the land and premises clean and fenced and to keep the shop and the buildings, if any erected on the demised land in good repair condition;

(d) The tenant agrees to carry on his trade for cash and allow no credit whatsoever to any of the labour force or employment, whether European or Indian, of the landlord;

(e) The tenant agrees that all food-stuffs and other goods stocked or exposed for sale or sold shall be of good quality and be sold at prices not exceeding the market rate, that he will not stock or expose for sale or sell any food-stuffs or other goods of a deleterious nature or which are unfit for human consumption, and that he will permit the landlord or his representative to inspect at all reasonable time in the day all food-stuffs or other goods at the premises and permit the destruction or removal by the landlord or his representative of all such food-stuffs and other goods which in the opinion of the landlord or his representative are deleterious or unfit for human consumption, without making any claim for loss or damage;

(f) The tenant agrees with the landlord that he will book all the goods required by him in connection with the business from outside places with the Dibru-Sadiya Railway owned by the landlord;

(g) The tenant will not assign, underlet or otherwise part with the possession of the premises, shop and building or other erections thereon or any part thereof without the previous consent in writing of the landlord;

(h) The tenant shall not raise any brick, iron or pucca buildings on the demised land without the consent in writing of the landlord;

(i) The tenant agrees to vacate and give up peaceable possession of the land and premises at the expiration of the term of one year without notice or at any other time on receiving a month's notice in writing requiring him to give up possession;

(j) At the expiration of the period of one year or sooner determination of the said term on notice, the tenant shall remove within one month, at his own cost and

responsibility, all buildings and erections then standing on the demised land;

(k) If the rent shall be in arrear for the space of one calendar month, or in the event of a breach of any of the clauses and conditions of the agreement, the landlord may re-enter and thereupon the agreement shall determine, and the tenant shall thereupon give up quiet and peaceable possession to the landlord, though the landlord shall be at full liberty to waive all or any breach of the agreement without in any way affecting his right to enforce this clause (k) on any subsequent breach; and

(1) The landlord agrees that so long the tenant carries out the reasonable orders and directions of the landlord and pays the rent and observes and performs the terms of the other clauses, he (tenant) may peaceably hold the land and premises without disturbance by the landlord during the demise, of course, subject to the provisions of clause (e).

Undoubtedly, the expressions used in the document repeatedly are "landlord", "tenant" and "rent", but, as stated earlier, there is no charm about the use of any particular phraseology in the agreement for it is the substance of the document and the real intention of the parties, rather than the form in which the document is framed, which are the determining factors. There are instances where the document described the agreement as a licence and the Supreme Court declared it to be a lease, as in the case of Associated Hotels (supra), and, conversely, the agreement was held to be a licence though the expressions used were "landlord", "tenant" and "rent", vide the decision in the case of Konchada Ramamurty (supra). The Supreme Court held in the case of State of Punjab and Another Vs. British India Corporation Ltd., , that "in its wider sense rent means any payment made for the use of land or building and this includes the payment by a licensee in respect of the use and occupation of any land or building. In its narrower sense it means payment made by a tenant to landlord for property demised to him." It follows that the use of the three aforementioned terms in Ex. 34 cannot be decisive of the nature of the agreement made between the parties.

6. Now coming to the substance of Ext. 34 I find that it nowhere records or recites transfer of any right in the demised land by the Assam Railway and Trading Company, called the landlord in the document, to Joharmal Muralidhar Agarwalla, described in the document as the tenant nor can I spell out from the terms of the document that exclusive possession of the land in dispute had been made over to the so-called tenant. Per clause (b) the tenant had agreed "to be subject in all cases to the reasonable orders and directions of the landlord" and the latter was given the right "to enter and view the state and conditions of the said premises at all reasonable times. Again cl. (e) gives right to the landlord or his representative "to inspect at all reasonable time in the day all food-stuffs or other goods at the said premises and permit the destruction or removal by the landlord or his representative of all such food-stuffs and other goods which in the opinion of the landlord or his representative are deleterious or unfit for human consumption without making any claim for loss or damages thereof....." It is

repeated in clause (e) that the tenant shall be bound to carry out "the reasonable orders and directions of the landlord." Clause (k) authorises the landlord to re-enter the premises, and obliges the tenant to deliver peaceable possession thereof, in case the tenant falls in arrears of rent even for one month or if he commits breach of any of the clauses and conditions of the agreement. This clause (k) meseems clearly negatives the plaintiffs' claim of his being a lessee and reinforces the stand of Union of India.

7. These excerpted parts from the various clauses of the document leave no room for doubt that the Railways never meant to give exclusive possession of the land in dispute to the so-called tenant, that the latter was bound to carry out the directions of the landlord in the matter of stocking of the goods on the premises, and that the landlord had the right to enter upon the land at all reasonable times on any day to find out if reasonable orders and directions issued by it had been complied with and if the food-stuffs and other goods stocked on the lands were not of deleterious nature or unfit for human consumption. Clause (e) of the agreement, yields the clear conclusion that the tenant could enjoy the lands and hold the same peaceably only if the reasonable orders and directions of the landlord were carried out. It follows that if such orders and directions were not complied with, the tenant would not be able to retain the possession. It is equally clear from that clause and clause (b) that the orders and directions could be issued by the landlord during the entire period of the contract. This privilege reserved by the landlord negatives the contention of the plaintiff that he had complete control over the lands, and if so the conclusion must follow that it was a license and not a lease which the parties contemplated and had given shape to in the form of document Ex. 34. Therefore I have no doubt in my mind that the document Ex. 34 created a licence rather than a lease. As such, I affirm the findings of the two Courts below that the plaintiff had failed to make out that he was a lessee.

8. The expression "premises" means, according to clause (c) of Section 2 of the Act. any land or any building or part of the building. The expression, "public premises", according to clause (e) of the same section means any premises belonging to or taken on lease or requisitioned by or on behalf of the Central Government. Clause (g) of the same section defines "unauthorised occupation" to mean, in relation to any public premises, the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever. It was not disputed by Shri Bhattacharjee that the land in dispute is the ownership of the Central Government and that the licence comes to an end no sooner the licensor makes his intention to determine it clear. It was admitted in the plaint itself that the plaintiff had been given one month's notice to vacate the land in dispute. Therefore the licence of the plaintiff determined on the expiry of the period mentioned in that notice. It was also admitted in the

plaint that the Railways had issued licences to defendants 2 to 13 with effect from 1-4-63 respecting the land in dispute and that the Railways had realised from those licensees not only the fee for the period 1-4-63 to 31-3-64 but also the arrears from 1-4-45 to 31-3-64, vide para 19 of the plaint. Therefore the plaintiff is at present not in occupation of the lands and so I feel safe in holding that the licence in favour of the plaintiff had run out much before the date when the plaintiff filed the suit culminating in this appeal.

9. In the result the appeal fails and is dismissed with costs in favour of the Union of India which alone has come forward to contest It.