

(1953) 07 BOM CK 0016

In the Bombay High Court

Case No : Second Appeal No. 127 of 1951

Bavasaheb Walad Mansursaheb Kotri and Another	APPELLANT
Vs	
West Patent Press Co. Ltd. and Others	RESPONDENT

Date of Decision : 20-07-1953

Acts Referred:

Transfer of Property Act, 1882 — Section 105, 108(J), 8

Citation : AIR 1954 Bom 257 : (1954) 56 BOMLR 61 : (1954) ILR (Bom) 448

Hon'ble Judges : Gajendragadkar, J;Chainani, J

Bench : Division Bench

Advocate : K.G. Datar, for the Appellant; Murzban J. Mistry, Crawford Bayley and Co., Purshottam Tricumdas and N.M. Hungund, for the Respondent

Judgement

Gajendragadkar, J.—The short question which arises in this appeal is as to the nature and the extent of the lessee's rights under the lease in question.

2. This question arises in this way. The property in suit which is S. No. 66 at Bagalkot was leased out for 30 years to West Patent Press Co., Ltd., Bagalkot. This company is defendant No. 1 in the suit. Before the period of 30 years stipulated in the lease had expired, another lease was executed in supersession of the first between the same parties on April 26, 1900. This was for 30 years. On July 8, 1910, the lessee assigned his rights under the lease to Dodveerappa. Defendants Nos. 2 and 3 are successors in title of Dodveerappa. In the present suit which was filed by the lessors on June 14, 1947, they alleged that the lessee was holding under a tenancy at will and so he was not entitled to transfer his rights to a third party.

The said transfer according to the plaintiffs terminated the tenancy in question and so they claimed possession of the property. This claim was resisted by the assignee principally on the ground that the tenancy in question was not a tenancy at will, but was a permanent tenancy. Both the Courts below have upheld this plea and have dismissed the plaintiffs' suit. That is how in the present appeal on behalf of the plaintiffs Mr. Datar has urged before us that the

Courts below were wrong in not treating the lease in question as constituting tenancy at will.

If the tenancy is held to be a tenancy at will, the assignment would be invalid and the plaintiffs would be entitled to a decree for ejectment. On the other hand if the document of lease creates either a permanent tenancy or a tenancy for the lifetime of the tenant then the assignment would be valid and the plaintiffs would not be entitled to claim possession.

3. The forms in which tenancy rights are created in India are not uniform and they do not conform to precedents known to conveyancing; sometimes the words used are not precise and it is not easy to understand from the said words the intention of the parties in executing the documents. Leases are often executed without legal assistance; and the aid that the parties obtain from professional scribes does not always contribute to make the terms clear or precise. The nature of the tenancy created by any document must nevertheless be determined by construing the document as a whole.

If the tenancy is for a building purpose, *prima facie* it may be arguable that it is intended for the life-time of the lessee" or may in certain cases be even a permanent lease. *Prima facie* such a lease is not intended to be tenancy at will. But whether it is a tenancy for life or a permanent tenancy must ultimately depend upon the terms of the contract itself. And in construing the terms of such contracts, the Courts must look at the substance of the matter and decide what the parties really intended to do.

4. It would be convenient to refer to a decision of our Court in this connection. In --"Navalram v. Javerilal", 7 Bom LB 401 (A), where the land was let out for building purposes Jenkins C. J. and Aston J. held that it was a permanent lease. The head-note to the case reads as if the Court decided that wherever any land is let out for building purposes for no fixed period, there is always a presumption of the tenancy being permanent without reference to the words of the grant itself. It seems to us, however, that the broad proposition which the head-note sets out cannot be said to have been laid down in the judgment itself. In fact, the learned Chief Justice was at pains to point out that the words used in the lease clearly indicated the intention of the lessor to confer upon the lessee the rights of a permanent tenant. The clauses in the lease were subjected to a close examination.

Even the scheme of punctuation was considered. Ultimately, on a construction of all the clauses read together, the learned Chief Justice came to the conclusion that the lessor's intention was to create permanent and hereditary tenancy rights in favour of the lessee. It is true that the learned Chief Justice added in support of his conclusion that the Court was entitled to have regard to the purpose for which the land was originally let and called in aid the presumption in favour of a permanent tenure for which there was authority in the earlier decisions of this Court in -- "Ramchandra v. Tukaramshet", 1884 PJ 250 (B) and

-- "Armugum v. Durgappa", 1898 PJ 318 (C).

It would thus be seen that though in the case of a lease granted for building purposes the Court may be disposed to draw an inference in favour of the tenant obtaining permanent tenancy rights-the question may still have to be determined not solely on such a presumption, but in the light of the words used in the document itself.

5. If the lease is for a definite period and before the period is over, the lessee dies, during the remainder of the period, the leasehold rights enure for the benefit of his heirs, unless the document clearly stipulates that in case of the lessee's death before the expiration of the period the rights of the lessee are not to enure for the benefit of his successors. If the lease is for an indefinite period, it does not enure for the benefit of his heirs. It is usually for the life-time of the lessee himself, unless again it clearly appears from the contract that the benefit of the lease is intended to accrue to the successor of the lessee.

If the lease provides that the lessee would continue in possession of the property so long as he pays rent, it is usually regarded as a lease for an indefinite period and as such for the life-time of the lessee. The condition that the lessee will remain in possession so long as he pays rent gives the tenant the right to continue in possession on payment of rent and imposes an obligation on the landlord to accept the said rent and to allow the tenant to remain in possession so long as the rent is thus paid. If the lease is expressed to be terminable at the option of the lessor or at the option of the lessee it creates a tenancy at will and such tenancy is determined at the option of either party to the contract.

A tenancy at will is necessarily determined by the death of the lessee. It can be determined by the lessee creating a lease in favour of another person or by the lessee assigning his right to a stranger. There is no dispute about these general principles.

6. Let us, therefore, first try to consider the present lease in the light of these principles apart from judicial decisions. As I have already mentioned, before the period prescribed by the first lease expired another lease came to be executed between the parties on April 26, 1900. This latter lease refers to the earlier lease and purports to cancel it. The lease then goes on to say that at the end of the remaining years out of the agreed period of 30 years, the lessee may continue on the premises so long as he chooses or desires, provided he went on paying the lessor Rs. 40 as rent every year. The lease authorised the lessee to erect buildings or lay out lanes on the premises with the permission of the Government. It added that in case the lessee wanted to quit and leave the premises he should remove the wood work and machinery and leave the walls on the land for the benefit of the lessor.

This is how the material portion of the lease reads :

"(A)....At the end of the remaining years out of the agreed period of 30 years,

you may continue on the premises, so long as you choose or desire, provided you go on paying me Rs. 10 as rent every year. You may erect buildings or lay out lanes on the premises and I have no objection for the same, if you do so, with the permission of the Government. In case you want to Quit and go, you should remove your wood-work and machinery and leave the walls on the land for us....."

Mr. Datar contends that the only change which was effected in the terms of the first lease by the second lease was that it left an option to the lessee at the end of the stipulated period to decide whether to continue on the premises or leave. I should have stated that in the first lease option was given to the lessor to continue the lease so long as he pleased after the expiration of the stipulated period of 30 years. Mr. Datar emphasises the fact that the lease clearly gives - the lessee the option to continue on the land as long as he liked and according to Mr. Datar if after the stipulated period the lessee is given the option to determine the lease, the option must enure for the benefit of the lessor as well and the lease must be considered as creating tenancy at will.

As I have already indicated the decision of this question must ultimately depend upon the construction of the lease read as a whole. In construing this lease, it would be relevant to bear in mind that the plot was let out to the tenant for building purposes. It is also necessary to remember that the period stipulated under the lease was 30 years and what is more important is that even at the expiration of this period of 30 years the lessee was allowed to remain in possession of the property so long as he paid Rs. 40 as rent every year to the landlord. Besides we have the clause giving the lessee the option to determine the lease.

Mr. Datar wants to concentrate on the last clause in construing this lease and his argument is that the other clauses are in a sense subsidiary and the most important clause is the clause which gave the lessee the option to determine the lease at his pleasure. We are not prepared to accept this contention. It is perfectly true that there is a clause which seems to give the option to the lessee to vacate the premises when he likes. But reading the lease as a whole we think that the lessee is given the right to continue on the plot so long as he pays the rent.

In other words, we take the view that the words "so long as you choose or desire" must be read along with the proviso which gives the lessee the right to remain in possession of the land as long as he pays the rent and the effect of reading the two clauses together is to emphasise the lessee's right to remain in possession for an indefinite period subject only to the condition that he pays the agreed rent every year. The dominant intention of this document appears to be to allow the tenant to remain in possession so long as he pays rent. It is of course true that under this clause itself the tenant may refuse to pay rent and make himself liable to be evicted.

The subsequent clause which gives him the option to determine the lease must be read in the light of the principal clause which permits him to remain in possession so long as he pays the rent. The emphasis is on the right of the tenant to remain in possession subject to payment of rent and the subsequent clause giving him the option to terminate the lease is merely incidental and subsidiary. In our opinion, therefore, on a fair and reasonable construction of this document, it must be held that the lessee was entitled to remain in possession of the property as lessee for his life.

7. It is now necessary to consider the several authorities which have been cited before us by Mr. Datar. Mr. Datar has strongly relied upon the decision of the Madras -High Court in --"Karam Manicka v. Chinnappa", 36 Mad 557 (D), in which it has been held that

"A lease by which the lessees are to hold for such time as they require or wish is a tenancy at the will of the lessee which in law is a tenancy at the will of the lessor also."

To the same effect is the decision of the Patna High Court in -- Ram Lal Sahu and Another Vs. Mt. Bibi Zohra and Others, .

There can be no dispute, we think, that if a tenancy is made determinable at the option either of the lessee or of the lessor, it is in law a tenancy at will and as such is determinable at the option of either party.

" "A tenancy at will", says Halsbury in 2nd edn., Vol. XX, para. 130, "is a tenancy under which the tenant is in possession, and which is determinable at the will of either landlord or tenant; and although upon its creation it is expressed to be at the will of the landlord only or at the will of the tenant only, yet the law implies that it shall be at the will of the other party also; for every lease at will must in law be at the will of both parties."

But we must point out that this position arises when the lease clearly and unambiguously contains a clause leaving it to the option either of the landlord or of the lessee to determine the lease. In such cases we generally do not find any clause permitting . the lessee to remain in possession of the leased premises so long as he continues to pay the agreed rent. The lease stipulates for the payment of rent, describes the premises let out and as to the duration of the lease it merely provides that it shall be determinate either at the option of the lessee or at the option of the lessor. In the two decisions to which Mr. Datar has referred the lease was exactly on these lines.

8. The question as to how and when a lease at will is determined arose for decision, before this Court in a narrow and limited form in three reported judgments to which our attention has been invited: -- "Gopalrao v. Ehavanrao", (1874) PJ 279 (F); -- "Suleman v. Asmed", (1877) PJ 177 (G) and -- "Vaman Shripad v. Maki", 4 Bom 424 (H). And in all these three cases it was held that a tenancy at will is determined on the death of the lessee for the obvious reason

that after his death his will cannot be exercised. These three decisions are, in our opinion, not inconsistent with the view that a tenancy at will is also determinable at the option of either the lessor or the lessee.

It must be pointed out that in all these three decisions the Court had no occasion to consider the larger question as to all the modes in which a lease or tenancy at will can be determined and on what terms a tenancy at will can be said to be created. They were dealing in each one of these cases with contracts which clearly amounted to tenancies at will and they held that such tenancies at will were determined by the death of the lessee. It is obvious that these decisions do not mean that tenancies at will can be determined only by the death of the lessee and in no other manner.

9. This view was consistently followed in this Court until Macleod C. J. and Crump J. dissented from it in -- *Bai Sona Vs. Bai Hiragavri*, . In this case the Court was dealing with a lease which stipulated that "so long as the tenant goes on paying rent to the landlord, the landlord will not be entitled to get the demised premises vacated" and it was held that such a lease created a permanent lease and it cannot be put an end to by the death of the lessee. In coming to this conclusion Macleod C. J. referred to the three decisions which I have already cited and observed that he was not inclined to follow them.

It may be relevant to point out further that having regard to the terms of the contract with which the Court was dealing in -- "*Bai Sona's case (I)*", there was no occasion to apply the principle laid down in the three earlier decisions because in the said three decisions the stipulation that a tenant was to remain in possession of the premises let out to him so long as he continued to pay the rent was absent. In other words the learned Judges who had decided the three earlier cases had no occasion to consider the effect of the clause, which assures to the tenant the right to remain in possession of the premises so long as he continues to pay the rent.

Even so it was assumed that the ratio in the said three decisions was inconsistent with the view which the Court was taking in -- "*Bai Sona's case (I)*", and Macleod C. J. expressed his inability to follow that reasoning. Incidentally with respect it may be pointed out that it was not correct to have assumed that the tenancy rights which are transferable u/s 108(j) of the Transfer of Property Act are necessarily heritable. We can well imagine cases of rights which are transferable and yet which may not be heritable.

The decision in -- "*Bai Sona's case (I)*", has been dissented from in several reported judgments of this Court, and it has been held that where-ever by the terms of a lease a tenant is given the right to remain in possession of the premises let out to him so long as he pays rent, the tenancy is a tenancy for an indefinite period and as such for the lifetime of the tenant. The rights of the tenant are transferable but they do not survive after his death.

10. In -- *Totaram Ichharam Wani Vs. Dattu Mangu Wani*, , Beaumont C. J. and

Wassoodew J. had occasion to construe a lease exactly similar to the lease which fell to be construed in "Bai Sona's case (I)". A house had been let out to the tenant & the tenant was authorised to remain in possession of the house so long as he continued to pay rent. The lease provided that in any year if the tenant failed to pay the annual rent, he would give up possession after paying the arrears of rent. The learned Judges came to the conclusion that the tenancy created by this contract was a tenancy for life. It was transferable but not heritable.

When the decision in -- "Bai Sona's case (I)" was cited before this Bench they expressed their emphatic disapproval and indeed the learned Chief Justice went to the length of observing that he could not help thinking that it was unfortunate that that decision was reported. With respect we may be permitted to point out that the dissent could have been expressed in less strong words. But even Beaumont C. J. seems to have assumed that the earlier decision of 4 Bom 424 (H)" was relevant to the point which he was deciding.

Again, with respect, it was not appreciated that neither -- "Vaman v. Makl (H)" nor the two decisions in printed Judgments on which in terms it was based expressly dealt with a contract -by which the tenant was allowed the right to remain in possession of the premises let out to him so long as he paid rent. As I have already pointed out the said decisions were dealing with a tenancy at will and the only question which they had so consider was whether the rights of a tenant at will could be said to survive the death of the tenant,

The position, therefore, is that subsequent to the decision of this Court in -- "Donkangouda v. Revanshiddappa (J)" this Court has always taken the view that the contract of tenancy which authorises the tenant to remain in possession of the property on payment of rent is a contract for an indefinite period and therefore must be treated to be a contract valid during the life-time of the tenant.

11. The rule of construction, by which a grant of any property to the lessee on condition that he should remain in possession so long as he pays rent amounts to a lease for the lifetime of the lessee, has been laid down by the Privy Council in -- "Lakhraj Roy v. Kunhya Singh", 4 I A223 (PC) (K). Their Lordships of the Privy Council were dealing with a pottah which had been granted In 1808 to the respondents' ancestor, "to continue during the term of the" mokurruri of the grantor." It appeared from the evidence that the grantor's kabulayat dated 1788 acknowledged the power of the Government to put an end to the lease of that date at the end of one year.

The Privy Council held that the grant to the ancestor of the respondents was not of an indefinite nature, enuring only for the life of the grantee, but passed to the heirs the whole of the interest of the grantor.

While dealing with the question of construing this grant, their Lordships observed that (p. 225) :

"..... .If it can be ascertained definitely what that term (of the lease) is, the rule of construction that a grant of an indefinite nature enures only for the life of the grantee would not apply. If a grant be made to a man for an indefinite period, it enures, generally speaking, for his life-time, and passes no interest to his heirs unless there are some words showing an intention to grant an hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained."

12. In the present case we are dealing with a contract which is somewhat complex as I have already indicated. It contains three different clauses, the first clause refers to the period of 30 years already stipulated for. The second clause gives a right to the tenant to continue in possession of the premises so long as he pays the rent and the third clause gives him the option to determine the tenancy at his pleasure.

A contract of lease very similar to this contract came for decision before this Court in -- "Abdul-rahim v. Sarafalli", AIR 1929 Bom 66 (L). It was a building lease for a term of 25 years and it stipulated that after the expiration of the said period, the lessor would go on taking the agreed rent as long as the field would remain in possession of the tenant. Then the contract went on to say that on the day on which the lessee would hand over the field into the lessor's possession, on that day he should remove the building of his factory and the lessor would take the field and the repaired well into his possession. Patkar and Baker JJ. held that this lease was not intended to expire at the end of 25 years. The lessee was to remain in possession so long as he pleased and so long as he paid the rent, that is, it was to enure during the lifetime of the lessee.

Mr. Justice Patkar who delivered the judgment of the Bench considered the previous decisions bearing on the point and came to the conclusion that in dealing with a lease which provides in the first instance for a stipulated period and then gives the tenant the right to remain in possession of the land so long as he pays the rent and also adds that he may vacate it at his option, the option must be deemed to be exercisable for the benefit of the lessee alone and not for the benefit of the lessor. The principle of reciprocity which is applicable to a tenancy at will properly so called cannot be invoked in the case of such a contract. With respect, we think this conclusion is right.

In coming to this conclusion Patkar J. cited .1 passage from Halsbury, Vol. XVIII, para. 931, where it is observed that in cases in which a landlord lets a house and agrees not to raise the rent as long, as the tenant pays it regularly, the tenant is regarded as a tenant for life. If the agreement is for life it operates as an agreement to lease for the life of the tenant subject to regular payment of rent, and for most purposes it is equivalent to a formal lease by deed for the tenant's life.

13. One of the cases cited in support of this statement of law is -- "Zimble v. Abrahams", 1903 1 KB 577 (M). Mr. Datar has invited our attention to the fact

that this passage is not reproduced in the present edition of Halsbury in the main body of the text, but it is cited in the foot-notes. That is so, because the statement of law which was contained in the earlier edition of Halsbury is affected in part by the provisions of the English Property Act of 1926. The footnote where the same proposition is stated itself makes this position clear.

The foot-note to para. 163 of Vol. XX of Hals-bury, p. 151 of the present edition, says that a tenant who entered into an agreement in writing to rent a house, the landlord agreeing not to raise the rent so long as the tenant paid it regularly, was before 1926, entitled to obtain the grant of a lease for his life. Indeed it is this proposition which is borne out by the decision of -- "Zimblar v. Abrahams" (M)".

Therefore, in our opinion having regard to all the clauses which are to be found in the contract of lease in the present case it must be held that the tenant had a right to remain in possession of the property leased out to him so long as he paid the rent and so this is a tenancy for the life-time of the tenant. Since the lessee in this case is a registered company, we must hold following the decision of Mr. Justice Patkar and Mr. Justice Barlee in -- Indian Cotton Co. Ltd. Vs. Raghunath Hari Deshpande, , that the lease-hold rights enure so long as the company lasts.

14. In this view of the matter, we must reverse the finding made by the Courts below that the lease in suit is a permanent lease and hold that it enures during the life-time of the company, that is to say, so long as the company exists. That, however, does not affect the decree passed by the Courts below.

15. The appeal, therefore, fails and is dismissed with costs.

16. Appeal dismissed.