

(2012) 03 GUJ CK 0039
In the Gujarat High Court
Case No : First Appeal No. 879 of 2011

Dipak Rasbiharilal Goyel

APPELLANT

Vs

Naliniben H. Raval

RESPONDENT

Date of Decision : 23-03-2012

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 4
Transfer of Property Act, 1882 — Section 106, 111(a)

Citation : (2012) 2 GLH 44 : (2012) 2 GLR 1572

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : J.R. Shah, for the Appellant; Yatin Oza and D.K. Puj, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Rajesh H. Shukla, J.—The present First Appeal has been tiled by the appellant - original defendant challenging the judgment and order rendered in Special Civil Suit No. 551 of 2008 by the learned 3rd Additional Senior Civil Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad dated 19.02.2011 on the grounds stated in the memo of appeal. The facts of the present case briefly stated are that the suit property -flat No. B-13, Venunad Apartment, Near Udgam School, Ahmedabad had been given by the respondent - original plaintiff on leave and licence basis as per the agreement of Leave and Licence at Ex. 26 subject to the terms and conditions mentioned therein for a period of 11 months. As per the terms and conditions of the Leave and Licence Agreement, the appellant was to handover vacant and peaceful possession on expiry of the period. The appellant was also required to pay Rs. 5,500/- regularly, every month and in case of any two consecutive defaults, the tenancy would get terminated automatically. It is also stipulated that, by notice, such leave and licence could be terminated before expiry of 11 months. As there was a default committed by the appellant in making payment of the amount of Rs. 5,500/-for the month of October and November 2008, and also there was a breach of the conditions with regard to the

use only for the residential purpose, the notice dated 04.10.2008 was served asking to hand over the vacant and peaceful possession within 15 days, or in any case on expiry of 11 months of the Leave and Licence Agreement. The reply was given and ultimately, the aforesaid suit has been filed. It is required to be mentioned that the suit was filed and the same is decreed on appreciation of material and evidence by the Court below, which is assailed in the present Appeal on the grounds stated in the memo of Appeal inter alia the learned trial Judge has committed an error in not appreciating the evidence including the notice. It is contended that, by the Notification, the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short "the Rent Act") has been suspended and the suit is required to be filed instead of Small Causes Court to City Civil Court. It is also contended that as per the Transfer of Property Act, if any breach is committed by the tenant, the landlord is entitled to get the possession after issuing the notice, and the grounds which have been given, have not been justified, and therefore, the impugned judgment is erroneous.

2. Learned Advocate Mr. J. R. Shah for the appellant has submitted that as per the provisions of the Rent Act, which has been suspended, the only difference would be that the suit would be filed in the Civil Court instead of Small Causes Court i.e. Rent Court. He submitted that for any breach or violation of the terms and conditions of the agreement and to recover the possession of the premises, the notice is required to be given by the landlord even under the Transfer of Property Act. Learned Advocate Mr. Shah submitted that the recovery of possession has been sought on two grounds; (i) default in payment of the rental charges; (ii) the use of the premises in breach of the conditions. He submitted that the notice was issued demanding the rent for the month of November 2008. Therefore, the said ground is not available. Another default is with regard to the use of the premises for residential purpose only whereas the appellant is said to have been using it for tuition. He submitted that it has not been properly appreciated that it is not a commercial use and that ground is also not available. He has referred to the papers the Leave and Licence Agreement at Ex. 26 and reply at Ex. 28. He pointedly referred to the Leave and Licence Agreement at Ex. 26 produced which has been produced with the paper book and referred to clause 10 of the Leave and Licence Agreement which provides that

the Licensee agrees and undertake to pay regularly and punctually to the Licensor a License Fee of Rs. 5500/-P.M. on or before the 2nd day of each month during the license period. The licensee further agrees that any lapse on his part in payment of monthly license fee on or before the aforesaid stipulated date shall be treated as default of the terms of these presents by the Licensee and such two defaults, continuously or otherwise by the Licensee shall be treated as a breach of trust.

Learned Advocate Mr. J. R. Shah submitted that it commands that the lessor has a right to terminate the agreement and take possession back in case of breach of the conditions. It is provided in clause 2 of the Leave and Licence Agreement

about such recovery of possession. Learned Advocate Mr. J. R. Shah submitted that even in the legal notice produced at Ex. 28, a reference is made to the rent. Therefore, learned Advocate Mr. Shah submitted that it is required to be considered by the Court whether the relationship of the landlord and tenant is established from the said documents or not and the intention of the parties has to be gathered from an agreement. Learned Advocate Mr. J. R. Shah for the appellant submitted that it was an agreement for lease and not a leave and licence agreement. Learned Advocate Mr. J. R. Shah submitted that the Court may consider the cause of action at the time when the suit was filed. He submitted that subsequent event like expiry of period of Leave and Licence Agreement, is not required to be considered or taken into account. Learned Advocate Mr. Shah submitted that purpose of deciding such suit based on breach of agreement of Leave and Licence Agreement, the Court has to consider whether there is any breach of such agreement which has given rise to the cause of action. Learned Advocate Mr. Shah submitted that the events which have occurred subsequently cannot be considered and such subsequent events are not required to be considered.

3. Learned Advocate Mr. J. R. Shah submitted that even if it is assumed that in view of the notification issued with regard to the suspension and applicability of the Rent Act, such protection is not available still the intention of the parties has to be gathered from the Leave and Licence Agreement. Learned Advocate Mr. J. R. Shah submitted that it is required to be considered whether it is a lease or not. Learned Advocate Mr. J. R. Shah submitted that even if it is assumed that the Rent Act is not applicable still the provisions of the Transfer of Property Act would be attracted and the notice is required to be given.

4. Learned Advocate referred to the provisions of the Transfer of Property Act including Section 106 and submitted that the notice u/s 106 is required to be issued before terminating such lease or any agreement. He has also referred to Section 111(a) of the Transfer of Property Act and submitted that it provides that the lease of the immovable property would terminate of efflux of time, but the notice is required to be given. Mr. J. R. Shah learned Advocate referred to and relied upon the decision of the Calcutta High Court in the case of Shyam Sundar Ganeriwalla v. Delta International Limited, reported in 1998 (2) RCR 199. He referred to this judgment in support of his contention that whether it is agreement for lease or licence, while determining intention of the parties which is required to be gathered from the agreement. In support of his submissions, he has relied upon following decisions -

1. In the case of P. Ramasami Naidu Vs. Venkataramanjulu Naidu and Others, .
2. In the case of Satish Chand Makhan and Others Vs. Govardhan Das Byas and Others, .

He submitted that even after expiry of the period of lease, if the tenant continuous possession, he would be holding over the premises and suit for

ejectment without notice, would not be maintainable. Therefore, learned Advocate Mr. J. R. Shah submitted that there is no such notice as required u/s 106 of the Transfer of Property Act, has been given, such suit itself would not be maintainable. Learned Advocate Mr. J. R. Shah submitted that assuming the relationship between the parties are governed by terms and conditions of the contract/Leave and Licence Agreement and it is not governed by Rent Act, the relationship between the parties, and the intention of the parties has to be gathered from the agreement of leave and licence. He also referred to and relied upon the decision in the case of Lal Chand and Others Vs. State of Haryana, .

5. Learned senior Advocate Mr. Yatin Oza with learned Advocate Mr. D. K. Puj for the respondent has submitted that admittedly, the premises in question has been given as per the Leave and Licence Agreement produced at Ex. 26. Learned senior Advocate submitted that the relationship between the parties would be governed by the terms of the agreement and if there is any breach of any terms of the contract, other party would be entitled to take action by filing the suit for such breach of the conditions. Learned senior Advocate submitted that the provisions of the Rent Act, have not been applicable as the same has been suspended by the notification issued by the Government and, thereafter as per the Gujarat Second Amendment Act, 2001 (Gujarat Act 27 of 2001) has also been made. Learned senior Advocate submitted that the Rent Act would not be attracted and, therefore, the protection under the Rent Act would not be available and parties are governed by the terms of the agreement. Learned senior Advocate submitted that in view of this notification, when the Rent Act is not attracted, the relationship between the parties has to be governed by the terms of the agreement which is a Leave and Licence Agreement. Learned senior Advocate submitted that the confusion which is sought to be created is "the lease agreement and leave" and "licence agreement," is required to be considered as it is not an agreement for lease, but it is an agreement for leave and licence for a limited period of 11 months. Learned senior Advocate submitted that on expiry of 11 months, an agreement would automatically come to an end and the appellant who is in possession has to handover the possession back, as per the terms of the agreement. Learned senior Advocate submitted that if the breach has been committed, for which, after a notice, suit has been filed. However, during the pendency of the suit even otherwise leave and licence agreement, by efflux of time, the period is over and the appellant is required to handover the possession which would otherwise be illegal. He submitted that it is by virtue of such leave and licence agreement, the appellant has been put in possession and when the agreement has come to an end on expiry of the period automatically, the possession should be restored unless it is extended by renewal of the leave and licence agreement or fresh agreement. Learned senior Counsel submitted that the submissions have been made on the basis of the agreement with regard to the fact whether it is a leave and licence agreement or a lease agreement are required to be considered. These two are separate and distinct concepts and both have to be considered in the background of the fact and material on record. The

leave and licence agreement has been placed on record in the present case which leaves no doubt that it is a leave and licence agreement and not a lease agreement. There are two distinguishes whether it is a lease or lease and licence agreement and the licence granted for the use of the premises. In the facts of the present case, admittedly, there is a leave and licence agreement and not a lease agreement. Learned senior Advocate for the respondents emphasized and submitted that when the Rent Act was in force in order to see that the clutches of the Act are not escaped by any such agreement, it has been observed that intention of the parties has to be gathered for determining the relationship between the parties. In the facts of the present case, since the Rent Act is not attracted, the parties are governed by purely a contractual relation under the Contract Act. Therefore, the learned senior Advocate Mr. Oza for the respondent submitted that the reliance has been placed by learned Advocate Mr. J. R. Shah on the same grounds would not be relevant.

6. In view of these relevant submissions, it is required to be considered whether the present appeal can be entertained or not.

7. As it transpires from the documents produced at Ex. 26 with regard to the premises in question bearing Flat No. B-13 Venunad Apartment, which is permitted to use for the purpose of residence by the licensee on "Leave and License" basis for the period of eleven months. The recital in the Leave and Licence Agreement at Ex. 26 clearly provides in clause 1, which reads as under:-

The Licensee agrees that Flat No. B: 13 on the 4th Floor admeasuring 155 Sq. Yds. or thereabouts in building known as VENUND APARTMENTS, Thaltej, Ahmedabad or thereabouts and more particularly described in the Schedule hereunder written (hereinafter referred to as "the Licensed premises") will be used for the purpose of residence by the Licensee on "Leave and License" basis for period of Eleven (11) months with effect from 2nd February 2008. The Licensee hereby agrees to use the Licensed premises as a aforesaid, purely on leave and license basis as Licensee only and not as a Lessee or a tenant."

Clause 7 of the Leave and Licence Agreement reads as under:-

That the Licenser have and shall have full right over the Licensed premises and her authorized representatives shall be entitled to view and or inspect the Licensed premises at any reasonable hours of the day. The Licensee confirms that he will not claim exclusive possession or claim any tenancy right over the Licensed premises.

Further clause 10 provides for payment of the licence fee of Rs. 5500/-per month and any lapse on the part of licence in payment of monthly licence fee before stipulated date is default and would permit the licensee to terminate the agreement for recovery of the possession. The submissions which have been made by the learned Advocate Mr. J. R. Shah for the appellant that it is a lease and intention of the parties has to be gathered from the Leave and Licence Agreement or other document is required to be considered. Moreover, it has been

submitted that the operation of the Rent Act has been suspended and the notification will have effect only for the purpose of filing the proceedings instead of the Rent Court to the Civil Court, cannot be readily accepted. The notification which has been placed on record by the learned Advocate for the appellant particularly Sub Section (1-A) of Section 4 of the Rent Act has been amended vide Government notification dated 30.10.2001, which reads as under :-

(1-A) This Act shall not apply to -

(a) any premises constructed on or after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Gujarat Second Amendment) Act, 2001 (Guj. 27 of 2001) (hereinafter referred to as "the amending Act");

(b) any existing premises which is self-occupied by the owner or vacant on or after the commencement of the amending Act, and it let after such commencement;

for a period of ten years from the date of the commencement of the amending Act.

Explanation.-For the purposes of this Section, "existing premises" means any premises which exists on the date of commencement of the amending Act.

8. The notification by which the Bombay Rents, Hotel and Lodging House Rates Control Act has been suspended clearly provides that "it shall be suspended for a period of ten years from the date of the commencement of the amending Act" and the provisions of the Rent Act would not be applicable. Therefore, naturally, when the statutory provisions of the Rent Act are not applicable and the entire transaction is pursuant to the leave and licence agreement between the parties, the parties would be governed by terms and conditions of such leave and licence agreement. As stated above, clause in the recital, the leave and licence agreement at Ex. 26 which has been quoted here clearly provides that the premises has been permitted to be used purely on leave and licence basis as licensee only for a limited period of 11 months and not as a lessee or a tenant. Further, clause 7 again provides that "the licensee confirms that he will not claim exclusive possession or claim any tenancy right over the licensed premises." Thus, it is more than clear that the parties have accepted and agreed to be governed by leave and licence agreement as expressed stipulation that the possession is given only for the purpose of residence on the basis of leave and licence agreement for a period of 11 months and not as lessee or a tenant. Further, it has been clarified and confirmed by the licensee/applicant that he will not claim exclusive possession or claim any tenancy right over the premises. This would make it more than clear about the intention of the parties that they have willingly and readily accepted to be the governed by the leave and licence agreement. Therefore, the submissions with regard to gathering of the intention of the parties does not survive as parties have made their intention clear by clause in the agreement. Moreover, admittedly, by virtue of the amendment in the Rent Act, the operation of the Rent Act itself has been suspended and it is

made clear that it was not applied for a period of 10 years. Therefore, when there is no statutory provisions in force or applicable and when the parties have entered into leave and licence agreement willingly with open eyes with the terms and conditions" which has been reduced in writing, they would naturally be governed by such expressed conditions agreed upon between the parties. Thus, they are governed by the terms and conditions of the leave and licence agreement.

9. Another facet of the arguments which have been emphasized by learned Advocate Mr. J. R. Shah referred to the provisions of the Transfer of Property Act particularly Section 106 and Section 111(a) to emphasize that the Transfer of Property Act would be attracted even if the Rent Act is not applicable. In that case such possession cannot be recovered without following the procedure and issuance of notice as contemplated under the provisions of the Transfer of Property Act particularly Section 106 is also misconceived. Both the aforesaid submissions proceed on the assumption that it is a lease and the agreement is a lease agreement. It is required to be noted again, as per the leave and licence agreement at Ex. 26, it has been specifically stipulated in the agreement itself that the possession of the premises is given on leave and licence basis for the period of 11 months only and not as a lessee or tenant. Further, the provisions of Section 106 of the Transfer of Property Act provides with regard to the termination of a lease and the notice in absence of any agreement or written contract. However, in the facts of the case, there is specific leave and licence agreement between the parties which provides for the aspects like, the possession is handed over on leave and licence agreement for a period of 11 months making it clear that it is not a lease and that the appellant cannot claim any right or possession as a lessee or a tenant. Therefore, when there is expressed stipulation in the contract/leave and licence agreement providing for such aspects that Section 106 of the Transfer of Property Act will not have any application as it refers to the lease. Further as stated above again it refers to the lease where there is no contract whereas in the facts of the case there is a separate leave and licence agreement at Ex. 26 between the parties. Therefore, this submission made by learned Advocate Mr. J. R. Shah also would not have any application. The submission made by learned Advocate Mr. J. R. Shah to claim any right as a tenant or a lessee cannot be accepted in light of the specific leave and licence agreement at Ex. 26 coupled with the fact that the operation of the Rent Act has been suspended for 10 years and the statutory provisions of the Rent Act would not be attracted. Therefore, the submissions made by learned Advocate Mr. J. R. Shah cannot be accepted. The submissions made by learned Advocate Mr. J. R. Shah to claim any right as a tenant or a lessee cannot be accepted in light of specific leave and licence agreement at Ex. 26 coupled with the fact that the operation of the Rent Act has been suspended for a period of 10 years and the statutory provisions of the Rent Act would not be attracted. The reliance has been placed by learned Advocate Mr. Shah referring to the decision in the case of Lal Chand and Others Vs. State of Haryana, , will not have

applicable. Similarly the reliance has been placed by learned Advocate Mr. Shah referring to the decision in the case of P. Ramasami Naidu v. Venkataramajulu Naidu and another, reported in AIR 1914 Madras 301 again would not be applicable as it refers to the lease whereas in the facts of the case, it is a case of leave and licence agreement. Similarly, the reliance has been placed by learned Advocate Mr. Shah the decision of Calcutta High Court in the case of Shyam Sundar Ganeriwalla v. Delta International Limited, reported in 1998 (2) RCR 199, does not apply in light of the specific notification issued by which the provisions of the Rent Act have been suspended. Similarly, unless it could be proved prima facie with the evidence that it was a lease, the Transfer of Property Act would also not be any applicability. Therefore, as discussed above, the submission has to be considered in the background of the facts and material on record and there is no doubt about the fact that it was not an agreement of lease but it was an agreement for leave and licence. The observations which have been referred to are made with reference to the facts applicable in a given case of lease and not in the present case. Under these circumstances, the present appeal cannot be entertained. The impugned judgment and order passed by learned 3rd Additional Senior Civil Judge, Ahmedabad (Rural), Mirzapur, Ahmedabad dated 19.02.2011 in Special Civil Suit No. 551 of 2008 does not call for any interference as this Court has broad agreement with the findings, and conclusion arrived at, after appreciating and discussing the material evidence on record, by the learned 3rd Additional Senior Civil Judge. Therefore, the present appeal deserves to be dismissed and accordingly, stands dismissed.

After the order was pronounced, learned Advocate Mr. J. R. Shah has stated that the interim relief was granted, which may be continued for some time to enable his client to approach the Hon"ble Supreme Court. The request is granted. The operation of the order is stayed till 20th April 2012.