
(1975) 07 CAL CK 0043
In the Calcutta High Court
Case No : F.A. No. 91 of 1970

Garibdas Jaiswal APPELLANT
Vs
Corporation of Calcutta RESPONDENT

Date of Decision : 15-07-1975

Acts Referred:

Calcutta Municipal Act, 1951 — Section 446, 448, 449(1), 456
Calcutta Municipal Act, 1961 — Section 449(1)
Easements Act, 1882 — Section 52
Transfer of Property Act, 1882 — Section 105

Citation : 79 CWN 916 : (1975) 2 ILR (Cal) 88

Hon'ble Judges : Sharma, J; M.M. Dutt, J

Bench : Division Bench

Advocate : B.C. Dutt, Biswajit Ghose and Alope Chakraborty, for the Appellant; Mihir Roy, Manindra Nath Ghose and Bhupendra Kumar Dey, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Dutt, J.—This appeal is at the instance of the Plaintiff and it arises out of a suit for permanent injunction.

2. The Plaintiffs are holders of stalls abutting on a passage having a width of 6" 4" in Block "F" of the College Street Market belonging to the Corporation of Calcutta. It is the case of the Plaintiffs that the said passage is the only passage for ingress to and egress from the row of stalls of the Plaintiffs and they have been using the same for more than twenty years. It is alleged that without this passage it is impossible for the Plaintiffs to load and unload merchandise from College Street. The Corporation of Calcutta has granted licences to the Defendants Nos. 2 to 9 for carrying on business in the stalls to be erected on the said passage opposite to the stalls of the Plaintiffs. The construction of such stalls would reduce the width of the passage from 6"4" to 3".

3. It is the case of the Plaintiffs that there is a tacit understanding between the

Plaintiffs and the Corporation of Calcutta that the passage will never be blocked and curtailed in any way as, but for the passage, it would be impossible for the Plaintiffs to utilise their stalls and as the minimum breadth of 6'4" is essentially necessary for loading and unloading heavy and bulky merchandise. Upon the said allegations, the Plaintiffs have prayed for a permanent injunction restraining the Defendants including the Corporation of Calcutta from blocking, curtailing or narrowing the passage.

4. The Defendants entered appearance in the suit and contested the same by filing two sets of written statement, one by the Corporation of Calcutta and the other by the Defendants Nos. 2 to 9. Their case is that the Plaintiffs are mere licensees of the Corporation of Calcutta. The licences have been granted on daily rent basis by the Commissioner of the Corporation of Calcutta in exercise of his power u/s 449(1) of the Calcutta Municipal Act, 1951, on terms and conditions mentioned in the said licences. It has been averred by them that there is a ledge in front of each stall measuring 3' in width. It is their case that the Plaintiffs have been using the said passage for loading and unloading their goods and for storing the same which mostly consist of heavy and bulky hardwares causing * obstruction to and encroachment upon the said passage for which they have been warned by the market authority. It is alleged that the Plaintiffs have no right to encroach upon the passage for the purpose of loading and unloading and for storing their merchandise or to create any obstruction thereon. It is contended by them that the Plaintiffs who are mere licensees are not entitled to maintain the suit for permanent injunction and that the suit is liable to be dismissed.

5. The learned Judge, Third Bench, City Civil Court, Calcutta, has come to the finding that the Plaintiffs are licensees and that no right of the Plaintiffs will be infringed if the proposed stalls are constructed. Upon the said findings the learned Judge dismissed the suit. Hence this appeal.

6. It has been urged by Mr. Bankim Chandra Dutt, learned Advocate appearing on behalf of the Plaintiffs-Appellants, that the Plaintiffs are tenants and not licensees. This point has not been specifically pleaded in the plaint. There is no averment in the plaint that the Plaintiffs are tenants of the Corporation of Calcutta and that the disputed passage along with the stalls are included within their respective tenancies. It is only that the daily payments, which they have to make in respect of their stalls, have been referred to in the plaint as rents. Further, it is alleged that the flank of stalls under the tenancy of the Plaintiffs abut on 6'4" passage. It is contended that the Plaintiffs have pleaded their tenancy in the plaint. Although we are not inclined to accept this contention made on behalf of the Plaintiffs, we propose to decide the question whether the Plaintiffs are tenants or licensees of the Corporation of Calcutta.

7. u/s 449(1) of the Calcutta Municipal Act, 1961, no person shall, without a licence from the Commissioner, sell or expose for sale any animal, article or thing whatsoever in any municipal market. The Plaintiffs took out such licences from

the Corporation, some of which are Exs. 2 to 2(g) Much reliance has been placed on behalf of the Plaintiffs on Section 456 of the Act which is as follows:

The Corporation may

(a) charge such stallages, rents and fees

(i) for the occupation or use of any stall, shop, standing, shed or pen in a municipal market, municipal slaughter-house or municipal stock-yard.

(ii) for the right to expose goods for sale in the municipal market,

(iii) for the use of machines, weights, scales and measures provided u/s 446 for any municipal market and (iv) for the right to slaughter animals in any municipal slaughter-house and for the food of such animals before they are ready for slaughter,

as may from time to time be fixed by it in this behalf; or

(b) farm the stallages, rents and fees leviable as aforesaid, or any portion thereof, for such period as it may think fit; or

(c) put up to public auction, or dispose of by private sale, the privilege of occupying or using any stall, shop, standing, shed, or pen in a municipal market, municipal slaughter-house or municipal stock-yard, for such period and on such conditions as it may think fit.

In our opinion, there is nothing in Section 456 which suggests that any tenancy is created in respect of stalls in a municipal market. The Corporation has been authorised to levy stallages, rents and fees for the use or occupation of any such stalls. It is true that the word "rents" has been used in Clause (a), but that is not sufficient to create a tenancy. It is also conceded by Mr. Dutt that whether a tenancy is created or not depends upon the terms and conditions of the contract creating it and not merely by the use of the term "rents". It is not disputed that there is no contract between the Plaintiffs and the Corporation in respect of these stalls. The documents under the Plaintiffs occupy the stalls in the market are the licences granted u/s 449(1) read with Section 456. Merely because the Plaintiffs have to pay for the use or occupation of the stalls and such payments have been termed as "rents" do not make them tenants under the Corporation in respect of those stalls.

8. There is a marked distinction between a lease and a licence. Mr. Dutt has cited some decisions in which the distinction has been laid down. We may refer to the decision of the Supreme Court in *B.M. Lall (Dead) by Lrs. Vs. Dunlop Rubber and Co. Ltd. and Others*, in which Bachawat J. has, with reference to the previous decisions on the point, clearly laid down the distinction as follows:

The question is whether the occupier under this agreement is a tenant or a licensee. The distinction between a lease and a licence is well-known. Section 105 of the Transfer of Property Act defines a lease. Section 52 of the Indian

Easements Act defines a licence. A lease is the transfer of a right to enjoy the premises, whereas a licence is a privilege to do something on the premises which otherwise would be unlawful. If the agreement is in writing, it is question of construction of the agreement having regard to its object and the circumstances under which it was executed whether the rights of the occupier are those of a lessee or a licensee. The transaction is a lease if it grants an interest in the land; it is a licence if it gives a personal privilege with no interest in the land. The question is not of words but of substance and the label which the parties choose to put upon the transaction, though relevant, is not decisive. The test of exclusive possession is not conclusive. See *Errington v. Errington and Woods* (1952) 1 K.B. 290 (298); *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, though it is a very important indication in favour of tenancy. See *Addiscombe Garden Estates Ltd. v. Crabbe* (1958) 1 Q.B. 513 at p. 525.

It is not necessary to refer to other decisions which have been placed before us on behalf of the Appellants laying down the distinctions between a lease and a licence.

9. The main question is whether any interest in land has been granted to the Appellants. We have already referred to the licences granted to the Appellants for the use of the stalls and there is nothing to indicate that any interest in land was created. It may be that the Appellants are in exclusive possession of their respective stalls, but exclusive possession is not conclusive though it is an important factor. In this connection, we may refer to Section 448 of the Act which provides that the Corporation after giving general notice may alter a date to be specified in the notice close any municipal market, municipal slaughter-house or municipal stock-yard or any portion thereof; and the premises occupied in any market, slaughter-house or stock-yard or portion so closed may be disposed of as the property of the Corporation. Section 448 unmistakably shows that the Corporation retains control on every portion of the market. One of the tests to distinguish a lease from a licence is that in a lease the landlord does not retain exclusive control of the subject-matter of the lease, but in the case of a licence the grantor has the exclusive control of the property in respect of which the licence is granted. In the facts and circumstances of the case, in our opinion, there is no substance in the contention of the Appellants that they are tenants in respect of the stalls held by them under the Corporation. We hold that the stall-holders of a municipal market are licensees and not tenants even though they have to pay for their occupation.

10. It is next contended that the Appellants are not mere licensees but their licences are also coupled with grants. It is well-settled that in the case of a grant some interest is created in land. In support of his contention that, even as bare licensees the Appellants have possessory title and can bring actions on the basis of such title, reliance has been placed on a Bench decision of the Allahabad High Court in *Kanta Tewari and Another Vs. Sheo Narain Lal and Others*, . In this case Sulaiman C.J. observed as follows :

In the present case even if we assume that the constructions, not being of a permanent character, the licence was not coupled with a grant, it must be conceded that the Plaintiffs were in possession of this piece of land which they were using as their courtyard over which they had cattle troughs and a platform. The Defendants had unlawfully removed the cattle troughs and the platform and taken possession of the land by building upon it. We think that the Plaintiffs had sufficient possessory title to maintain the action against the Defendants.

This case is distinguishable from the instant case before us. In that case, the cattle troughs and the platform were installed by the plain-tiffs on the land in respect of which they were licensees. The cattle troughs and the platform belonged to the Plaintiffs. They had, therefore, possessory title or possessory right to the troughs and the platform and the Defendants having unlawfully removed the same, it was held that the Plaintiffs were entitled to bring an action against the Defendants on the basis of their possessory title. In the present case, the Appellants have no possessory title so far as the stalls and the passage are concerned. It is not their case that their goods have been removed unlawfully by the Corporation of Calcutta. There is, therefore, no substance in the contention of the Appellants that they are entitled to sue the Corporation on the strength of their alleged possessory title. A bare licensee has no title whatsoever to the subject-matter of licence and as" such, no action against the licensor is maintainable at his instance. The decisions in *Mahadeo Misir and Another Vs. Palakdhari Misir and Others*, and *Muskett v. Hill* (1833) All E.L.R. 89 are cases of licences coupled with grants and as such, they are not applicable to the facts of the present case. In our view, the Appellants have failed to make out a case of tenancy or a case of a licence coupled with grant.

11. Now, we may consider the merits of the case. Under the licences granted to the Plaintiffs, they are permitted to carry on only electro-plating business in the stalls. But it is evidence of D.W. 2, the Sub-Inspector of the College Street Market, that the Plaintiffs were let out the stalls for the purpose of sale of hardwares and small tools and that licences were granted accordingly. The learned Judge has referred to Rule 68 of the Market Manual which provides that no change in the sanctioned nature of business in a shop or stall shall be made by the respective shop-keepers or stall-holders without a written sanction being first obtained from the Corporation in that behalf. Although, Rule 68 was not placed before us, the purport of the rule as stated by the learned Judge has not been challenged. It is the specific case of the Plaintiffs that without the disputed passage it is impossible for them to load and unload merchandise from College Street. In the evidence which have been adduced on their behalf, no such case has been sought to be proved. P.W. 1, who is the Plaintiff No. 2, says that they are carrying on business in their stalls for a long time and that, if the proposed stalls are constructed by the Corporation, it will not be possible for them to carry their merchandise, machineries etc. to the respective shops and the customers will also not be in a position to come to their shops. It is, therefore, his evidence that if the width of the passage is reduced, there will be inconvenience in

carrying machineries. There is no indication in his evidence about the nature of the machineries. P.Ws. 3, 4, 5, 7 and 8 have said that if the width of the passage is reduced, it will not be possible for them to carry big machines, pipes etc. to the stalls. It appears from the plan, Ex. A, that after the construction of the proposed new stalls, the width of the passage will be reduced to 3'10" or 4". The question is whether it will be impossible for the Appellants to carry their goods along the passage. It has been stated already that the Appellants had no right to carry on any business other than the business of sale of small stools and hardwares.

12. It transpires from the evidence that the Appellants are carrying on hardware business in the stalls. There are two gates on the two extremities of the passage which run east-west. P.W. 1 has admitted that the width of the eastern gate is 21/2. It appears from the report of the Advocate Commissioner for local inspection, Ex. 5, that in view of the existence of a pan shop which is on one side of the western gate the width of the gate is reduced to 3" or 31/2 only. If the width of this gate is only 3" or 31/2, we are unable to accept the evidence of the Appellants that big machineries are carried through this gate and for the purpose it requires a passage not less than 6" in width. It is the evidence of D.W. 2 that a passage having a width of 3'10", to which the existing passage will be reduced, will be quite adequate for running business in the disputed stalls. It is also his evidence that in the market there are passages flanked on both sides with stalls, less than 5" or 51/2" in width. P.W. 3 has not been able to deny the suggestion made on behalf of the Defendants that on the back side of Block F there are stalls where hardwares and tools are sold and that the passage in front of those stalls is about 3". In these circumstances, we are unable to accept the case of the Appellants which is sought to be proved by the evidence of P.W. 1 that there is no passage less than 5" or 51/2" or 6" and flanked on both sides with stalls in the College Street Market, Further, we are of the view that no inconvenience will be caused to the Appellants if the passage is reduced to 3'10" or 4" in width.

13. The Appellants have failed to prove that they are entitled to use the ledges in front of their shops. There is no pleading in that regard in the plaint nor is there any satisfactory evidence on the point. It transpires from the evidence of P.W. 2 that allotment slips are issued by the Corporation when licences are granted in respect of stalls. The Appellants have not produced any such allotment slips to show that the ledges in front of their respective shops are also included within their licences. The learned Judge has not believed the evidence of the witnesses examined on behalf of the Appellants and for the reasons stated by him, we are not also inclined to place any reliance on their evidence.

14. It is argued on behalf of the Appellants that the objection which was filed by the Appellants to the grant of licences to the Defendants Nos. 2 to 9 were not heard by the Corporation and that the Appellants were not also informed of the allotment of new stalls. It is, however, the positive evidence of D.W. 2 that P. Guha, the Deputy Commissioner of the Corporation of Calcutta, heard the

objection of the Appellants and personally inspected the site and overruled the objection. In para. 13 of the written statement filed by the Corporation, it has been stated that the Appellants' petition of objection was duly considered by the Standing Works and Town Planning Committee and by the Deputy Commissioner I and the grant of objection having been found untenable, were rejected. It is further stated that the Appellants were informed of the dismissal of their objection by the Superintendent of the College Street Market through Paresh Nath Tewari, one of the objectors. The Appellants have not examined the said Paresh Nath Tewari to give a denial to the allegation made in para. 13 of the written statement. Moreover, as the learned Judge has pointed out, none, on behalf of the Appellants, has said that Paresh Nath Tewari did not receive any such letter.

15. After considering the facts and circumstances of the case and the evidence adduced on behalf of the parties, we are of the view that the learned Judge was perfectly justified in dismissing the suit.

16. In the result, the judgment and decree of the learned Judge are hereby affirmed and this appeal is dismissed, but in view of the facts and circumstances of the case, there will be no order as to costs. We do not feel that there is any necessity for additional evidence. The application of the Appellant for additional evidence is, accordingly, dismissed without any order for costs.

R.K. Sharma, J.

17. I agree.