

(2003) 08 KL CK 0058

In the High Court Of Kerala

Case No : Regular Second Appeal No. 567 of 2003

Panamukkil Sreenivasan

APPELLANT

Vs

Kolakkat Muhammed Ismail and Thayyil Valappil Puthen
Peediyakkal Shahar Banu

RESPONDENT

Date of Decision : 08-08-2003

Acts Referred:

Easements Act, 1882 — Section 52

Citation : (2004) 2 CivCC 99 : (2004) 2 RCR(Civil) 65 : (2004) 1 RCR(Rent) 195

Hon'ble Judges : A. Lekshmikutty, J

Bench : Single Bench

Advocate : P.N. Krishnankutty Achan and K. Mohana Kannan, for the Appellant;
S. Sreekumar, for the Respondent

Judgement

A. Lekshmikutty, J.—The appellant is the defendant in O.S. No.87 of 1997 on the file of the Court of the Munsiff Magistrate, Ponnani. The Power of Attorney Holder of the first plaintiff filed the sui for recovery of possession of the plaint schedule property with item No. 1 shop room and item No. 2 part of the property with profits at the rate of Rs. 350/per month for the shop room and Rs. 90/- per month for the adjoining property till recovery of possession, profits being claimed as damages for use and occupation. The arrears of profits also were claimed at the same rate. The case of the plaintiffs is that the plaint schedule property belongs to the plaintiffs. The Power of Attorney Holder of the first plaintiff granted a licence of the shop room to the defendant on 11.10.1991 pursuant to Ext. A1 licence/agreement. As per Ext. A1, the defendant was permitted to occupy the first item for the purpose of trade by remitting the licence fee of Rs. 250/per month. The period was two years. The lock and key of the premises were given to the defendant. The current charge shall be paid by the defendant and he shall vacate the premises on the expiry of the licence period. But he had not vacated the shop room. He had also not requested the Power of Attorney Holder of the first plaintiff for renewing the licence for another period. After the expiry of the period, the Power of Attorney Holder demanded the defendant to

vacate the premises for which he was not amenable. The defendant is in unlawful occupation of the first item since 11.10.1992. The defendant has also put up a roof on the eastern side of the first item and has constructed a linto (Chayippu) which is shown as item No. 2. The act of the defendant is illegal. Even though the defendant was asked to remove the unlawful construction and surrender possession of the plaint schedule property, he was not amenable. The defendant has not remitted any amount towards licence fee. The first item would yield a monthly profit of Rs. 350/- and the second item would yield a monthly profit of Rs.90/-. The defendant is liable to pay the same as profits or as damages for use and occupation to the plaintiffs. Notice was issued demanding surrender of possession of the plaint schedule property. A false reply was sent by the defendant. Hence the suit.

2. The defendant filed a written statement contending that he had not executed any licence deed in favour of the plaintiffs. Even prior to the occupation of the plaint schedule property, he was in occupation of yet another room belonging to the plaintiffs which he had taken on lease on a monthly rent of Rs. 120/- by paying Rs. 10,000/- as advance for the purpose of running a trade of manufacturing bakery items and banana chips. The previous room was under the staircase and the plaintiffs felt that it will be inconvenient to keep possession of the same with the tenant and had demanded to surrender possession of the same. They agreed to let the plaint schedule room to the defendant and in pursuance of the agreement, the previous room was surrendered and the plaint schedule room was taken on rent. Previous advance of Rs. 10,000/- was adjusted as advance to the plaint schedule room. The monthly rent was fixed as Rs. 250/and he is running the trade of manufacturing and selling of bakery items and banana chips therein. Even on the date of lease, the costruction on the east of the building was there and the shop room was rented out along with the linto. The defendant has got licence issued by the Small Scale Industrial Department for running the aforesaid trade. While he was keeping possession, the Power of Attorney Holder Fathima wanted the defendant to subscribe his signature on blank stamp papers and making use of the said blank stamp paper Ext. A1 was created. In the concern of the defendant, there are two other workers employed there. If the defendant is asked to surrender the lease hold premises, it will cause irreparable hardship and injury to the defendant. The plaint schedule building is situated in the Ezhuvathiruthy Panchayat wherein the Kerala Building (Lease and Rent Control) Act is made applicable. The intention of the plaintiff to deny the beneficial provisions of the said Act to the defendant. The defendant had remitted rent up to and inclusive of 11.1.1997. The plaintiffs have demanded enhancement of rent for which the defendant was not amenable. Thereafter, the plaintiffs had not accepted the rent from the defendant. Hence the defendant had sent the rent by money order which was refused by the Power of Attorney holder of the first plaintiff. The plaintiffs are not entitled to get any relief and the suit is liable to be dismissed.

3. The trial court framed 4 issues on the basis of the pleadings. The evidence

consists of oral testimony of PWs. 1 and 2, DW-1, Exts. A1 to A5 and B1 to B8(d). The trial court dismissed the suit, against which the plaintiffs filed A.S. No. 35 of 1999 before the Sub Court, Tirur. The first appellate court set aside the judgment and decree of the trial court and allowed the appeal, against which this R.S.A. is filed by the defendant.

4. The substantial questions of law formulated in this appeal are:

(a) Whether the transaction in issue is a lease or licence?

(b) Whether the Power of Attorney was wrongly withdrawn with a new power of attorney produced by the holder of the Power of Attorney

(c) Whether the defendant is in possession of of the plaint schedule property including items 1 and 2 as lessee only?

5. The points :- There is no dispute with regard to the fact that the plaint schedule premises belong to the plaintiffs. The Power of Attorney Holder of the plaintiffs gave evidence in accordance with the averments in the plaint. As per the evidence of PW-1, the plaint schedule premises was entrusted to the defendant purely as a licence and the second item was encroached upon by him subsequently. Ext. A1 is the alleged agreement executed between the plaintiffs and defendant. The nomenclature of the document is "Anuvadapathram" (licence). The execution of Ext. A1 is denied by the defendant. According to him, he has not executed any licence deed in favour of the plaintiffs. He took the building on a monthly rent of Rs. 250/-. He was in occupation of another building of the plaintiffs and it was surrendered at the promise that the plaint schedule property shall be rented out to him. An advance amount of Rs. 10,000/- was paid when the earlier lease was granted. With regard to Ext. A1, his case is that the licence deed was created by the plaintiffs using the signed blank stamp papers which was obtained by PW-1 by misrepresenting that the same should be presented before the authorities. He is a tenant in respect of the plaint schedule building. The plaintiffs admitted the previous occupation of the defendant in another shop room. Both the agreements were denied by the defendant.

6. The only question to be considered is whether Ext. A1 is a licence or lease. It is contended by the learned counsel for the appellant that even if Ext. A1 is found to be genuine, it can be seen that it is only a lease and not a licence as claimed by the plaintiffs. The nomenclature of the document would disclose that the same is written as a licence agreement. However, in the operative portion of the document it is stated that the building has been entrusted to the defendant for his "use for trade purpose" for a period of 2 years and the key has been entrusted to him. There is a provision to remit the electricity charges during the period of his "user of the premises". The defendant was restrained from doing certain types of trade like liquor, money lending business and user of the premises for storing fertilisers and salt. So, it is clear from the document itself that the defendant is at liberty to do any other business except the type of

business mentioned in the document. Possession was also given to the defendant with lock and key. It is also stated in Ext. A1 that he shall not transfer any portion of the premises for the purpose for the user by strangers and he shall not cause any material alteration so as to reduce the value and utility of the room during the period of his "user". It is further stated that the defendant shall surrender possession of the premises after the expiry of the period. If any amount is due towards licence fee and electricity charges and if any loss is sustained to the plaintiffs due to the act of the defendant, the same shall be appropriated from the security amount and the balance if any shall be recovered from the defendant personally. All these facts would lead to the conclusion that the entrustment of the premises was for using the same for trade purpose. These clauses would show that even though the document is styled as a licence, it is actually a lease. If any interest on immovable property entitling the transferee for enjoyment is created, the same is a lease and not a licence. If permission to use the land without exclusive possession is alone granted, the same will amount to licence. In the present case, if the document is read as a whole, it would reveal that even though the word used in the document is licence it was given for enjoyment for the purpose of conducting trade in the premises. In the operative portion of the document, there is a provision to enjoy the premises for the purpose of conducting trade and there is provision for payment of electricity charges. In order to escape from the provisions of the B.R.C. Act, Ext. A1 is written styled as a licence. At the time of examination of PW-1, the power of attorney holder admitted that on the basis of the entrustment, the defendant has got right to keep possession of the premises to conduct trade therein and keep it under the lock and key and the defendant has every right to use the premises subject to the restriction imposed. It is also admitted that neither PW-1 nor the owner of the property has right to enter into the plaint schedule property or to keep possession of the same so long as it is in the occupation of the defendant. So, from the deposition of PW-1 also, it can be gathered that the intention of the parties is to keep the tenanted premises as a lease. No restriction was made in the document with regard to the conduct of the business time and the only restriction was made from conducting certain type of trade only. If as a matter of fact, it was a licence, the owner of the property can enter the premises at any time.

7. Another contention is that even after the expiry of the 2 years, the defendant was continued in possession and business was being conducted therein. The period mentioned in the document expired in 1992 whereas the suit was filed only in 1997. If actually, it was a licence as claimed by the plaintiffs, the plaintiffs shall not allow the defendant to continue the business without renewal of the licence. No objection was seen raised by the plaintiffs during these period So, the allegation that the defendant trespassed into the property, after the expiry of the licence period also cannot be accepted. No action was taken by the plaintiffs to take possession of the premises till 1997. It is true that the plaintiffs examined one witness to prove that the defendant is a licensee. He is the attester to Ext.

A1. It has come out in evidence that PW-2 is holding another shop room belonging to the plaintiffs. As per this witness, he was permitted to conduct business in the said shop room and he is holding the shop room as per the licence given by the plaintiffs. The difference between the lease and licence as per PW-2 is that, if it was a lease, he can transfer his possession to others, but he cannot transfer the licence to others. This version of PW-2 would show that he is a tutored witness. It has come out in evidence that PWs. 1 and 2 are active workers of Juma-at-Islami. Therefore PW-2 is interested and a tutored witness. Even otherwise, PW-2 is not competent to say whether the plaint schedule property was given for enjoyment of not. Ext. B1 is the certificate issued by the Small Scale Industrial Department in favour of the defendant. As per Ext. B1, the defendant was granted licence for manufacturing banana chips, potato chips, tapioca chips etc.. Ext. B2 is the licence fee demand register of Ezhuvathiruthy Panchayat. The licence was in the name of his wife. Ext. B3 is the extract of the building tax register of the said Panchayat which would show that the plaint schedule premises is in occupation of the wife of the defendant. At the time of examination, the defendant deposed that licence was taken in the name of his wife because it was easy to obtain loan from the Bank and hence the licence was obtained in her name. However, the plaintiffs have no case that the premises is not in the possession of the defendant. Exts. B6 series, B7 series and B8 series would show that the defendant is in possession of the premises. The defendant was in occupation of another premises belonging to the plaintiffs on rent is sworn to by him. Since manufacturing of banana chips etc. cause inconvenience to the adjacent occupants, the plaintiffs wanted to vacate the said room and assured another room and accordingly, the plaint schedule property was given to him for his business purpose. So, the intention of the plaintiffs was to give possession of the room to the defendant for doing his business.

8. Whether a deed is a lease or a licence depends on the intention of the parties. If an interest in immovable property, entitling enjoyment is created, it is a lease; if permission to use the land without right to exclusive possession alone is granted it is a licence. The cardinal distinction between a lease and a licence is that in the former there is a transfer of interest in immovable property to enjoy, whereas in the latter there is no transfer of interest in immovable property at all. An important feature of the lessee's right is his right to possession and enjoyment of the premises to the exclusion of the lessor. In deciding whether a grant amounts to a lease or only a licence, regard must be had more to the substance than the form of the transaction. It is determined by the law and not by the label the parties choose to put on it. To give exclusive possession, there need not be express words to that effect. It is sufficient, if the nature of the acts done by the grantee show that he has and was intended to have the right of exclusive possession. The fact that the agreement contains a clause that no tenancy is to be created will not of itself preclude the instrument from creating a lease. As per Section 52 of the Easement Act, licence is defined as a right to do or continue to do in or upon the immovable property of the grantor something

which would be in the absence of such right be unlawful. Whereas the lease is defined in Section 105 of the Transfer of Property Act as the transfer of a right to enjoy immovable property made for a certain time, express or implied or perpetuity, in consideration if a price or promised or of money, share, 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. Merely because Ext. A1 document is styled as a licence and the monthly payment as licence fee, it will not change the character of the lease. The first appellate court based on the wording used in Ext. A1 observed that Ext. A1 is a licence and not a lease. The circumstances also would show that after the expiry term, the defendant was continuing his business and no action was taken by the plaintiffs against the business of the defendant till notice was sent on 11.1.1997. So, I find that Ext. A1 is a lease.

9. Now the question to be considered is whether item No. 2 of the plaint schedule property also was given to him on the date of Ext. A1. As per the plaintiffs, subsequent to Ext. A1, the defendant has trespassed into item No. 2 and constructed a linto. The date of trespass is not stated in the plaint. Admittedly, the defendant took the premises for manufacture of chips of various types. So, for the purpose of manufacturing chips, item No. 2 property is inevitable. It has also come out in evidence that the defendant was evicted from the earlier premises as the manufacturing process caused inconvenience to the adjacent occupants. For manufacturing purposes item No. 2 is inevitable. In such circumstances, it is only probable that the linto also has been taken on the same day. So, the contention of the plaintiffs that the defendant subsequently trespassed into item No. 2 also cannot be accepted. A careful analysis of Ext. A1 would show that it is a lease and not a licence as found by the first appellate court. It has come out in evidence that the Kerala Building (Lease and Rent Control) Act is applicable in the area. So, the plaintiffs are entitled to evict, the defendant in accordance with the provisions contained in the Act. For the reasons stated above, I find that Ext. A1 is a lease and item No. 2 also has been included in the lease and the defendant is not a trespasser as alleged by the plaintiffs. In such circumstances, the judgment and decree of the trial court are upheld and the judgment and decree of the first appellate court are set aside.

The Second Appeal is disposed of.