
(1962) 12 P&H CK 0049

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 15-D of 1962

Pooran Chand and another

APPELLANT

Vs

Malik Mukhbain Singh

RESPONDENT

Date of Decision : 26-12-1962

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 12

Citation : (1962) 12 P&H CK 0049

Hon'ble Judges : Tek Chand, J

Bench : Single Bench

Advocate : Yogeshwar Dayal, for the Appellant; Bakshi Mehtab Singh, for the Respondent

Final Decision : Dismissed

Judgement

Tek Chand, J.—This is Defendants second appeal from the decree passed in Plaintiff's favour by the trial Court for mandatory injunction requiring the Defendant to vacate the premises in suit and never to interfere with the possession of the Plaintiff on the ground that their possession was merely that of licensee and not that of a tenant. The Senior Subordinate Judge dismissed the Defendant's appeal.

2. The facts giving rise to this case are that prior to the partition of the country a house situated at 43, Rajpur Road, Civil Lines, Delhi, belonged to one Jafri Begum, an evacuee. A portion " of the servants" quarters attached to this house was in the occupation of Puran Chand Defendant allegedly as a tenant of Mst. Jafri Begum. On 13th of September, 1946 a deed of exchange was executed (Exhibit P.6) by which Mst. Jafri Begum exchanged this house with the Plaintiff's house in Rawalpindi. The deed was registered on 6th of September 1948. The Custodian declared this to be evacuee property on 28th of January 1948. After exchange the Respondent had actually entered into possession of the premises and had been receiving rent from the Appellants upto December 1949, A number of receipts executed by or on behalf of the Plaintiff have been placed on record

and his learned Counsel has not denied the fact that his client was the landlord of the Appellants upto that date. According to the survey effected by the Custodian, after the property was notified as evacuee property on 28th of January 1948, the Defendant was shown as "old occupant" vide Exhibit P.W. 1/3. The Defendant made a statement before the Assistant Custodian on 5th of January 1950 in which he said that he had been paying rent to Mst. Jafri Begum upto 11th of September 1947 and after that he had been paying rent to Malik Mukhbain Singh Plaintiff upto December 1949. He claimed himself as an old tenant of a portion of the house at No. 43, Rajpur Road, Civil Lines, Delhi. On 6th of January 1951 the Defendant addressed a communication to the Custodian of Evacuee Property which runs as under:

Sir,

Whereas you have taken possession of servant quarter bearing Municipal No. 43, Rajpur Road in Mohalla Civil Lines, Delhi, in your capacity as Custodian of Evacuees' Property, Delhi.

And whereas you are willing to allow the temporary occupation thereof to me as a Licensee on the conditions that the possession of the said premises shall vest and remain with you and that I will hereby be allowed temporary occupation thereof as a Licensee under you on the terms and conditions hereinafter stated.

I, therefore, confirm having agreed to occupy the said premises temporarily as a Licensee and will for the occupation thereof, pay you a sum of Rs. 10/ every month together with arrears, if any. The monthly fee fixed shall be subject to alteration by the Custodian.

I further confirm having agreed that I shall be liable to be removed from the occupation thereof at forty-eight hours notice and in case of my refusal to do so, you shall have the right to oust me summarily without recourse to a Court of law and to take such action as may be necessary in pursuance thereof.

Yours faithfully, Sd/- Licencee.

The above document clearly shows that the occupation was temporary as a licensee on payment of Rs. 10/-p.m. The condition was that he was liable to be removed from the occupation on 48 hours' notice. In the event of refusal he admitted the right of the Custodian to oust him summarily without recourse to a Court of law.

3. There was a prolonged litigation between the Plaintiff and the Custodian. The Plaintiff maintained that the deed of exchange should be recognized by the Custodian and this should be excluded from the evacuee property. On 18th of July 1958 the exchange was confirmed by the Assistant Custodian (Judicial) with retrospective effect vide copy of the order Exhibit P.W. 3/1. The operative words are-

in the light of above findings, I am of the opinion that this is a fit case for

confirmation. This being so, the confirmation application of Malik Mukhbain Singh son of Malik Chhaiber Singh, resident of 43, Rajpur Road, Delhi, is hereby allowed unconditionally and the exchange deed executed on 13th September, 1947. registered on 6th December, 1948 in suit is hereby confirmed. Property No. 43, Rajpur Road, Delhi, is de-notified and released as non evacuee property in favour of the applicant Malik Mukhbain Singh son of Malik Chhaiber Singh.

On 31st of July 1958 an order was passed that the property in question had been declared as non evacuee and it may therefore be deleted from the list of evacuee property and de-notified. On 1st of August 1956 the Plaintiff wrote a letter to the Custodian requesting him that the tenants of the property be directed to attorn to him and rent realised by the Custodian be refunded to him as owner of the property in question On 7th of November 1958 the Plaintiff sent a notice to the Defendant requiring him to vacate the premises which were under his occupation under Custodian, or otherwise he would be proceeded against according to law. vide Exhibit P. 1. The Defendant wrote back to say he was an old tenant and was willing to pay the rent. The present suit was instituted by Malik Mukhbain Singh on 12th of June 1959 claiming issuance of a mandatory injunction and also for recovery of Rs. 70/- as a licence-fee.

4. The Defendant denied the Plaintiff's claim, and on the parties' pleadings the following preliminary issue was framed:

Whether the suit in the present form is maintainable ?

This issue was decided in the affirmative by the trial Court and subsequently it framed the following, issues:

1. Whether the Defendants were licensees in the suit premises ?
2. If issue No. 1 is proved, whether the Plaintiff is entitled to the relief claimed ?
3. Whether the suit is not properly valued for purposes of court-fee and jurisdiction ?
4. Relief.

The first two issues were decided in Plaintiff's favour and on the third issue neither side led any evidence and the issue was left undecided. In the course of evidence an additional issue was framed: Whether the Plaintiff is the owner of the suit property ; if not, to what effect ? This was also decided in Plaintiff's favour. The question of recovery of Rs. 70/- as rent was not pressed by the Plaintiff before the trial Court and the only relief which was granted to the Plaintiff was the passing of the decree in his favour for mandatory injunction requiring the Defendant to vacate the premises and never to interfere with the Plaintiff's possession. This decree was challenged in appeal which was dismissed by the Senior Subordinate Judge Delhi. The lower Appellate Court rejected the Defendant's contention that the relationship between the parties was of landlord and tenant. His next contention that the Plaintiff could only sue for the ejectment

of the Defendant in accordance with the provisions of Delhi Rent Control Act was also rejected. His next contention that Plaintiff ought to have instituted a suit for possession of the property and not for issuance of mandatory injunction was also repelled. The lower appellate Court was of the view that by the writing Exhibit P.W.1/1, the Defendant has admitted himself to be licensee to the Custodian paying rent at Rs. 10/- p.m. This amount was a mere licence fee. By execution of Exhibit P.W.1/1, the old tenancy stood surrendered. It was held that the Defendant was thus bound by his own act of abandonment of any tenancy rights which he might have enjoyed previously before admitting himself to be a licensee as per Exhibit P.W.1/1. The position of the Defendant in no way improved by confirmation of the exchange in favour of the Plaintiff by the Custodian. It was also held that the licence had been unequivocally terminated and the Plaintiff was not estopped from instituting a suit for a mandatory injunction. For these reasons, the lower appellate Court affirmed the decree passed by the trial Court.

5. Seven points have been urged before this Court by the learned Counsel for the Defendant-Appellants. I may first deal with the question of the competency of the suit in which relief is confined to mandatory injunction. The contention on behalf of Defendant is that the status of a person after revocation of the licence is that of trespasser and therefore the Plaintiff ought to have instituted a suit for possession and not merely sought any injunctive relief. My attention has been drawn to a recent decision of this Court in Messrs. Delhi Gate Service Private Ltd. Delhi v. Messrs. Caltex (India) Ltd., New Delhi (1962) 64 P.L.R. 550. Falshaw C.J. held that where a licensee who was in occupation of certain premises under an agreement refused to leave the premises on the termination of the agreement, a suit u/s 55 of the Specific Relief Act for the grant of a permanent injunction can be instituted against the licensee. Before me reliance was placed by the learned Counsel for the Appellants on decision of a Full Bench of Calcutta High Court in Sisir Kumar Dutta and Others Vs. Susil Kumar Dutta, . That case was also cited before Falshaw J. who expressed the view that that decision did not directly apply to the case before him and that is also my view. In Prabirendra Nath Nanday and Another Vs. Narendra Nath Nanday, a single Judge of that Court also expressed the view that the owner of the immovable property can, on the termination of a licence, maintain a suit against the licensee for a mandatory injunction directing him to vacate the property. I do not think that a case has been made out for successfully challenging the competency of this suit on the ground that the relief in a suit like the present could not be confined to an injunctive remedy.

6. The next question is whether on the record of this case the Defendant was a licensee or a tenant of the premises. The communication addressed by the Defendant to the Custodian, Exhibit P.W.1/1 which has already been reproduced in extenso admits of no doubt whatsoever that the Defendant claimed not higher right than that of a licensee of the said premises undertaking to pay Rs. 10/- p.m. for the occupation which was stated to be temporary. This communication bears the date 6th January, 1951 and it was urged that formerly the Defendant

had been the tenant of the Plaintiff and therefore after the confirmation of the exchange and recognition of the ownership of the Plaintiff, the relationship between the parties should be deemed to be that of landlord and tenant and not of licensor and licensee. After the notification of these premises as evacuee property they vested in the Custodian u/s 9A of the East Punjab Evacuees' (Administration of Property) Act, 1947. All leases granted or any orders passed by a rehabilitation authority before the 30th of July 1948 shall be deemed to have been duly made by or on behalf of the Custodian under this Act. The Custodian was authorised to cancel any allotment or terminate or amend the conditions of any lease etc. He could even treat a person in unauthorised possession of any evacuee property as a tenant or as a trespasser. Similar powers vested in the Custodian u/s 12 of Act No. XXXI of 1950. A proviso was, however, added to Section 12 in 1953 which restricted the powers of the Custodian when proceeding against a lessee. Therefore when Exhibit P.W.1/1 was executed by the Defendant the previous status of the Defendant ceased as lessee and he became a licensee. The Defendant after writing Exhibit P.W. 1/1 could not retain the status of a tenant. With respect to the same premises, he could not hold two capacities, namely, a tenant vis-a-vis the Plaintiff and a licensee in relation to the Custodian. Thus a new relationship was established from 6th of January 1951 and the previous lease, if it was at all subsisting should surrender. A surrender can be implied by the conduct of the parties evidencing the giving of consent to a new relationship. A new lease operates as a surrender of the old lease and similarly the creation of relationship of licensor and licensee in substitution of the relationship of landlord and tenant amounts to the surrender of the former lease. When a surrender takes place by operation of law, the rule of estoppel bars a party from disputing what he has surrendered. As observed in *Lyen v. Reed* (1844) 13 M & W. 285(306), *Fenner v. Blake* (1900) 1 Q.R. 426, a surrender is "an act done by or to the owner of a particular estate, the validity of which he is estopped, from disputing, and which could not have been done if the particular estate continued to exist." The question whether former lease could be surrendered to the Custodian presents no difficulty as under the statutory provisions the Custodian had the power not only to amend the terms of any lease under which any evacuee property was held or occupied by a person but he could even terminate any lease, regardless of the fact whether it had been amended before or after the commencement of the statute, vide Section 9 A of East Punjab Act 14 of 1947 and Section 12 of the Administration of Evacuees' Property Act, XXXI of 1950. It is true that the word "surrender" is not used in the communication, Exhibit P.W. 1/1, but its use is not necessary and surrender can be inferred from the conduct of the parties. As observed in Vol. 23 Halsbury's Laws of England, para 1413. page 684, (third edition) "Any form of words, which shows the intention of the parties to effect a surrender will be sufficient, and the words will be construed so as to give effect to that intention " In para 1416 at page 687 of the same volume the rule of surrender by change in character of occupation of tenant is stated thus "A surrender is also implied when the tenant remains in occupation of the premises in a capacity inconsistent with

his being tenant, where, for instance, he becomes servant or caretaker or licensee of the landlord." Vide *Foster v. Robinson* (1950) 2 A E.R. 342, which furnished an instance of contractual tenancy having been surrendered in return for the grant of a licence,

7. If the tenant was not willing to surrender the previously existing lease, he need not have taken the premises as a licensee. That conduct alone is sufficient in the circumstances of the case to establish an act of surrender on his part. After this letter had been executed the old lease came to an end and as the lease and the licence with respect to the same premises could not contemporaneously co-exist, the previous lease is deemed to have been surrendered. The previous lease was put an end to and thus was surrendered. The surrender of the lease had become effectual in every way.

8. The next question which call for consideration is whether the relationship between the parties is that of a licensor, and a licensee or of landlord and tenant, The status of the Defendant after 6th of January 1951 was that of a licensee. The exchange was confirmed by the Custodian in favour of the Plaintiff subsequently and the property on de-notification on 12th of August 1958 ceased to be evacuee and right of title of the owner became vested in the Plaintiff. From the date of the creation of the licence by the Custodian and the date of de notification there was no change in the status of the Defendant with respect to these premises. It is, however, the contention of the defend ant that his status was that of a lessee and not of a licensee and this question may now be considered. Sometimes the distinction between a lease and licence appears to be blurred. While deciding the case of *Gugan Mal and Ors. v. Messrs. Moti Lal Chand Mal* (1962) 64 P.L.R 872, I had an occasion to observe as under:

The essential feature of "lease" as distinguished from "licence" is that it confers a right of possession or real property with an interest even against the landlord whereas "licence" conveys no estate in the property and is generally revocable at will and without notice. The mere permission to occupy the land of another is a "licence" and not a "lease" or "assignment". A mere permission to use land; dominion over which remains in the owner not creating interest in or giving exclusive possession thereof to the tenant, is a "licence" and not a "lease". A "licence" is merely a right to do certain things upon the property of another, whereas, "lease" confers exclusive, possession to the lessee in exchange for payment of rent. The main test to determine whether agreement for use of immovable property is "lease" or "licence" is whether the contract gives exclusive use of the premises as against all the world and, if so, it is a "lease". "Licence" creates no interest in the land, but is simply the authority or power to use it in some specific way. "Licence" is in the nature of mere leave or liberty to be enjoined as a matter of indulgence at the will of the party giving the "licence". It is a "licence" when a mere privilege is conferred to occupy the premises under the owner. It is said that "Licence" is an authority to do some act or series of acts on the land of another without passing an estate in the land and

it amounts to nothing more than an excuse for the act which would otherwise be a trespass. "Licence" moreover is a personal privilege and can be enjoyed only by the licensee.

I had also referred to the decision of the Supreme Court in *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, in which their Lordship observed that the following propositions 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.

At one time there was a view that exclusive possession determined tenancy from licence but that is no longer considered as the real test for even a licence may confer such a right. The essential feature of this distinction which is vital, though not of ten readily distinguishable, is that if the agreement amounts to a lease the occupier as the lessee has an interest in the estate which is protected by law whereas a licensee receives no such benefit in law. Wherever there is an exclusive possession the Courts are entitled to draw an inference of lease but it is not a universal feature. Whether a particular transaction created a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of the case and on evidence placed on the record. If the circumstances and the conduct of the parties indicate that the intention was to create a licence despite exclusive possession such a person will remain nothing more than a licensee which carries merely a personal privilege of occupation but no definite interest in the land. It is equally true that what matter is the substance and not the label and it is not the description of the instrument as a lease or a licence which stamps it as such. An instrument may contain the usual words to lease and yet from the intention of the parties it may turn out to be a licence and vice versa.

9. The Courts lay emphasis upon the consideration that whole of the document is to be looked at regardless of the obligation attached to it. The rights and obligations between the parties have to be taken into consideration before treating it either as a tenancy agreement or a mere licence. A transaction may still retain its character as a licence even where it is not gratuitous but for value. Revocability at the instance of the party is also helpful in determining whether a licence is being created or an interest is being created in an estate by

means of a lease. One feature of a licence is its revocability at the will of the licensor. A licence is also determined by an assignment of the land over which the licence is to be enjoyed, vide Woodfall on Landlord and Tenant (26th Edition) para 22. The view in England has in recent decisions veered round the proposition, that the relationship is determined by the law and not by the label which the parties choose to put on it, and it is simply a matter of ascertaining the true relationship of the parties. As pointed out by Denning L.J. in Errington v. Errington (1952) I.K.B. 290 (297), "the test of exclusive possession is by no means decisive." See also Addiscombe Garden Estates Ltd. v. Crabbe 1958 I.Q.B. 513 (527-528), In Errington v. Errington⁹, the principles of English cases were referred to where occupier in exclusive possession were held to be not tenants but only licensees, vide Minister of Health v. Bellotti (1944) K.B. 298, Southgate Borough Council v. Watson (1444) K.B. 541, Ministry of Agriculture v. Matthews (1950) I. K. B. 148, Foster v. Robinson (1951) I.K.B. 149, 156 and Marcroft Wagons Ltd. v. Smith (1951) 2 K.B. 496. In Booker v. Palmer (1942) 2 All. E.R. 674, 677 an owner had given some evacuees permission to stay in a cottage for the duration of the war without paying any rent. The Court of appeal in that case held that evacuees were not tenants but only licensees. Lord Greed M.R. said:

To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind.

10. Applying the above principles to the facts and the circumstances of this case, I am persuaded to hold that the relationship between the Custodian and the Defendant had become that of licensor and licensee and that relationship did not undergo any change after the title of the Plaintiff under deed of exchange was acknowledged and the premises had been de-notified and excluded from evacuee property. As the Defendant is not better than a licensee, he is liable to eviction and the suit, as framed, was competent and decree for permanent injunction was rightly passed by the trial Court.

The result is that the decree of the trial Court is affirmed and this appeal, being devoid of merit, fails and is dismissed with costs.