

(2003) 08 BOM CK 0037

In the Bombay High Court

Case No : Second Appeal No. 14 of 1988

Radheshyam Rathod, (Deceased) through L.Rs. (Smt. Lilabai Rathod, Subhash Rathod, Omprakash Rathod, Suresh Rathod, Sunil Rathod and Smt. Lata Mawre) and Nandan Gupta, (Deceased) through L.Rs. (Smt. Kamalabai Gupta, Basantlal Gupta, Sanjay Gupta and Geeta Sahu) APPELLANT

Vs

Corporation of the City of Nagpur RESPONDENT

Date of Decision : 14-08-2003

Acts Referred:

City of Nagpur Corporation Act, 1948 — Section 25, 384, 70, 70(2), 74(2)
Civil Procedure Code, 1908 (CPC) — Section 100
Easements Act, 1882 — Section 52
Transfer of Property Act, 1882 — Section 105

Citation : (2003) 08 BOM CK 0037

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : D.C. Daga, for the Appellant; B.R. Gavai, for the Respondent

Final Decision : Dismissed

Judgement

S.T. Kharche, J.—Invoking the jurisdiction of this court u/s 100 of the Code of Civil Procedure, 1976, the appellant-plaintiff has filed this second appeal, being aggrieved by the concurrent findings recorded by the trial Court in Regular Civil Suit No. 82 of 1979, decided on 2nd July, 1983 and by the 4th Additional District Judge, Nagpur in Regular Civil Appeal No.390 of 1983, decided on 1.1.1988, that the transaction in question between the parties was that of a licence and not lease and dismissed the suit.

2. The appeal was admitted on 21st day of September, 1988 by this Court by formulating the substantial question of law. In accordance with the Ground Nos.1 to 5 mentioned in the memo of appeal, precisely and concisely the substantial question of law, which arises for consideration of this court is, whether the transaction dated 20th November, 1972, by virtue of agreement between the

parties was in the nature of a "lease" or "licence".

3. Brief facts are as under : The plaintiff had submitted application dated 13th June, 1972 to the Defendant - Municipal Corporation of the city of Nagpur, seeking lease of the land. It is the contention of the plaintiff that the lease was granted initially for the period of one year commencing from 14th September, 1972 to 13th September, 1973, as per the terms and conditions mentioned in the agreement dated 20th November, 1972. The lease-agreement was executed by the Secretary-cum-Estate Officer of the Defendant-Municipal Corporation. It is contended that even after expiry of period of lease, plaintiff continued in exclusive possession. The plaintiff had submitted a building plan for construction over the piece of land allotted to him. The said building plan was submitted to the defendant-Municipal Corporation on 28th December, 1972 and the same was sanctioned on 26th April, 1973. He further contended that the shop was constructed on the piece of land having three tasmās (rooms) on the said land. The lease money at the rate of Rs.540/- per year was agreed to be paid and, in fact, it is paid. Subsequently, there was enhancement in the lease money and the plaintiff no.1 was required to part with 1/3rd of his shop premises in favour of the plaintiff no.2. The defendant - Municipal Corporation is collecting separate lease money from the plaintiff no.2. The plaintiffs were served with notice dated 30th December, 1978 by the said Estate Officer of the Corporation calling upon them to remove the structure and vacate the suit land within three days of the notice and threatened the plaintiffs that in case of non compliance, the structure would be demolished and, therefore, the plaintiffs were compelled to file the suit for declaration and injunction.

4. The defendant - Municipal Corporation had come with a stand that the agreement dated 20th November, 1972 was, in fact, in the nature of the licence and the suit was liable to be dismissed, because the licence was duly revoked by issuing a notice and since then the plaintiffs continued in unlawful possession of the piece of land. The building plan was sanctioned at the risk of the plaintiffs and only a permission was accorded for construction of a temporary structure on the piece of land.

5. On the aforesaid pleadings of the parties, the trial Court framed the issues. Both the parties adduced oral as well as documentary evidence in support of their contentions. The trial Court, on considering the evidence and the contentions of the learned advocates for both the parties, had come to the conclusion that the transaction dated 20th November, 1972 was in the nature of licence and that the plaintiff no.1 has failed to establish that he is a lessee of the defendant. He also recorded the finding that the licence in question was duly revoked and hence plaintiffs would not be entitled to the relief of declaration and injunction sought. He negated the contention of the defendant - Municipal Corporation that the suit is not tenable for want of statutory notice u/s 384 of the City of Nagpur Corporation Act, 1948. (hereinafter referred to as Corporation Act). Consistent with this finding, he dismissed the suit with costs and vacated

the temporary injunction granted earlier in favour of plaintiff no.1. Being aggrieved by the judgment and decree passed by the Trial Court dismissing the suit of the plaintiffs, the appeal was carried in the District Court. The learned 4th Additional District Judge, Nagpur, on considering the contentions of the parties and the law position, dismissed the appeal on 1st January, 1988. These concurrent finding on the material issue recorded by both the courts are under challenge in this second appeal.

6. Shri D.C. Daga, the learned counsel for the appellants - plaintiffs, contended that the substantial question of law as formulated by this court challenging concurrent findings of both the courts below that the transaction was in the nature of licence, will have to be answered in the negative. He contended that the transaction dated 20th November, 1972 was in the nature of lease-agreement executed by the Estate Officer of the Corporation in favour of plaintiff no.1 was not in the nature of licence. He contended that only the words "licence" employed in the agreement should not be given importance and surrounding circumstances should be considered for looking into the intention of the parties and the real nature of the transaction. He contended that the piece of land was given in exclusive possession of the plaintiff no.1 and, thereafter, building plan submitted by the plaintiff no.1 for construction on the said piece of land was also duly sanctioned. He further contended that as per the sanction, three tasmās (rooms) were constructed and as per the agreement, the lease money of Rs.540/- was being regularly paid to the defendant Corporation. He contended that initially the agreement was executed for a specific period of one year and, thereafter, the lease continued from year to year basis.

7. Shri D.C. Daga, learned counsel for the appellants further contended that the test of exclusive possession is an extremely important for deciding as to whether a part transaction is a lease and/or licence and in the present case, admittedly the plaintiff no.1 was in exclusive possession and, therefore, the transaction was undoubtedly in the nature of lease agreement. In support of his submission, he relied on decision of Single Judge of this court in the case of Balwantsinghji Anand .vrs. Bhagwantrao Ganpatrao Deshmukh 1980 Mh.L.J. 459.

8. Shri D.C. Daga, learned counsel for the appellants, further contended that initially the lease agreement was for a fixed period i.e. from 14th September, 1972 to 13th September, 1973 and, thereafter, it was continued for year to year and the plaintiff no.1 is in exclusive possession and, therefore, he cannot be evicted without the due process of law. He relied on the decision of the Single Judge of this Court in the case of Mohan Sons (Bombay) Private Ltd. Vs. Lady Sonoo Jamatji Jejeebhoy and Others, .

9. He further contended that in order to determine, whether a document create a licence or a lease, the real test is to ascertain the intention of the parties i.e. whether they intend to create a licence or lease, if the documents creates an interest in the property then it is a lease but if it permits another to make use of the property without exclusive possession, then it is a licence. He contended that

in the present case, the intention of the party was to create a lease and if the surrounding circumstances are taken into consideration then the transaction dated 20th November, 1972 can be said to be a lease and not licence. In support of his submissions, he relied on Division Bench decision of the Hon"ble Supreme Court, in the case of Khalil Ahmed Bashir Ahmed .vrs. Tufelhussein Samasbhai Sarangpurwala (1988) SCC 155.

10. Shri D.C. Daga, learned counsel for the appellants, further contended that the defendant Corporation did not plead in the trial Court that only the Commissioner had power to grant the lease and, therefore, the appellate Court has committed an error of law in relying on the provision of sub clause (a) of sub clause (2) of Section 70 of the City of Nagpur Corporation Act, 1948. Learned counsel concluded his argument by submitting that both the Courts erred in law in coming to the conclusion that the transaction was in the nature of licence and, therefore, the second appeal deserves to be allowed.

11. Shri B.R. Gavai, learned counsel for the respondent - Corporation, contended that the transaction between the parties is governed by the Special Act i.e. the City of Nagpur Corporation Act, 1948. The agreement executed by the Estate Officer of the Corporation on 20th November, 1972 in favour of the plaintiffs was in the nature of the licence, which was duly revoked by issuing notice dated 3rd January, 1979. He further contended that the plaintiff is in unauthorised occupation of the piece of land, which is subject matter of the dispute in this litigation. He fully support the concurrent findings recorded by both the courts below and contended that no substantial question of law is involved in this second appeal and the same is liable to be dismissed.

12. In support of his submission, he relied on the decision of the Division Bench decision of the Hon"ble Supreme Court reported in the case of Piloo Dhunjishaw Sidhwa Vs. Municipal Corporation of The City of Poona, .

13. I have carefully considered the contentions canvassed by learned counsel for both the parties. In order to appreciate the respective contentions, it is necessary to reproduce Section 105 of the Transfer of Property Act, 1882 : "A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of 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. Lessor, lessee, premium and rent defined : The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

"Licence" defined in Section 52 of the Indian Easements Act, 1882, which contemplates thus : " Licence" defined - Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of

such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

14. In *Balwantsinghji Anand .vrs. Bhagwantrao Ganpatrao Deshmukh* (cited supra), this court had observed in para 13 that, as held by the Supreme Court in *Sohanlal .v. Laxmidas*, the test of exclusive possession is an extremely important test for deciding as to whether a particular transaction is a lease and/or leave and licence. The trial Court had proceeded upon the assumption that the petitioner was not in exclusive possession and the revisional Court has just confirmed the finding without any real application of mind to the real question. One cannot but gather an indelible impression that the revision application was disposed of in just a cursory manner.

15. In *M/s. Mohan Sons (Bombay) Private Limited .vrs. Lady Sonoo Jamsetji Jejeebhoy and others*, this Court dealt with a question as to whether the transaction in the circumstances that the exclusive possession was given was a transaction of lease or a licence and held that the circumstances that exclusive possession was given ordinarily indicated that the transaction was a lease and not a licence. In such a case the party, who wanted to contend that the agreement was a bare agreement of leave and licence, would have to show that there were special circumstances why the licensor gave exclusive possession of the premises to the licensee. The fact that the agreement was for a period of five years was also a circumstance indicating that the transaction was a lease. When the agreement was for a fairly long period and when exclusive possession was given under the agreement and when there were no special circumstances justifying the creation of a licence, there should not be any difficulty in holding the agreement to be a contract of tenancy. If any doubt remained in mind about the true nature of the transaction, then the clinching effect of the last clause should remove it and there should not be any difficulty in holding that the document evidenced an agreement of tenancy and not an agreement of leave and licence. All the necessary or vital features of tenancy were incorporated in that clause.

16. In *Khalil Ahmed Bashir Ahmed .vrs. Tufelhussein Samasbhai Sarangpurwala* (cited supra), the Hon"ble Supreme Court laid down the ratio that in order to determine whether a document created a licence or a lease the real test is to ascertain the intention of the parties i.e. whether they intended to create a licence or a lease. If the document creates an interest in the property entitling the transferee to enjoyment, then it is a lease; but if it only permits another to make use of the property without exclusive possession, then it is a licence. Substance of the document must be preferred to form. In view of the intention of the parties in the document and the facts and circumstances of this case, it is clear that the agreement created a licence and not a lease. This is clear from the language used and the restrictions put upon the use of the premises by the appellant. In the document in question the expression licence was introduced and it said that it was only for business purposes. The licence fee was fixed.

Moreover, restriction in the hours of work negates the case for a lease. Moreover, restriction in the hours of work negates the case for a lease. It also gave to the licensor the right to enter upon the premises and inspect the same at any time.

17. On consideration of the evidence adduced by the parties, the trial Court recorded the findings that the transaction dated 20th November, 1972 was in the nature of licence, because the word " licence " is used in the heading of that agreement. The appellate Court negated the contention of the plaintiff, mainly on the ground that the agreement dated 20th November, 1972 was contrary to the provisions of Section 70 (2) (c) of the Corporation Act.

It is necessary to reproduce Sec.70 which reads thus :

Provisions governing the disposal of municipal property or property vesting in or under the management of corporation. (1)No nazul lands, streets, public places, drains or irrigation channels shall be sold, leased or otherwise alienated, save in accordance with such rules as the State Government may make in this behalf.

(2) Subject to the provisions of sub-section (1) :-

(a) the Commissioner may, in his discretion, grant a lease of any immovable property belonging to the Corporation including any right of fishing or of gathering and taking fruit, flowers and the like, of which the premium or rent, as the case may be, does not exceed + (One Lakh) rupees for any period not exceeding twelve months at a time:

Provided that every such lease granted by the Commissioner other than a lease of a class in respect of which the Standing Committee has by resolution exempted the Commissioner from compliance with the requirements of this proviso, shall be reported by him to the Standing Committee within fifteen days after the same has been granted;

(b) With the sanction of the Standing Committee the Commissioner may dispose of by sale or otherwise, any such right as aforesaid, for any period not exceeding three years at a time of which the premium or rent or both, as the case may be, for any one year does not exceed (One Lakh) rupees ;

(c) With the sanction of the Corporation, the Commissioner may lease, sell or otherwise convey any Immovable property belonging to the Corporation.

(3) The Commissioner may -

(a).....)

(b) with the sanction of the Standing Committee, dispose of by sale or otherwise any moveable property belonging to the Corporation;

(c) with the sanction of the Corporation, sell or otherwise convey any moveable property belonging to the Corporation.

(4) The sanction of the Standing Committee or of the Corporation under sub-

section (2) or sub-section (3) may be given either generally for any class or cases or specifically in any particular case.

(5) The foregoing provisions of this section shall apply to every disposal of property belonging to the Corporation made under, or for the purposes of this Act :

Provided that -

(i) no property vesting in the Corporation in a trust shall be leased, sold or otherwise conveyed in a manner that is likely to affect the trust subject to which such property is held ;

(ii) no land exceeding (five lakh) rupees in value shall be sold, leased or otherwise conveyed without the previous sanction of the State Government and every sale, lease or other conveyance of property vesting in the Corporation shall be deemed to be subject to the conditions and limitations imposed by this Act or by any other enactment for the time being in force.

(6) Notwithstanding anything contained in this section the Commissioner may, with the sanction of the Corporation and with the approval of the State Government, grant a lease, for a period not exceeding thirty years, of a land belonging to the Corporation which is declared as a slum area under the provisions of the Maharashtra Slum Area (Improvement, Clearance and Redevelopment) Act, 1971 to a co-operative society of slum dwellers, at such rent, which may be less than the market value of the premium, rent or other consideration, for the grant of such lease, and subject to such conditions as the Corporation may impose.

The approval of the State Government under this sub-section may be given either generally for any class of such lands or specially in any particular case of such land :

Provided that, the Commissioner may, in like manner renew, from time to time, the lease for such period and subject to such conditions as the Corporation may determine and impose.

Explanation - For the purposes of this sub-section, the expression "slum dwellers" means the slum dwellers whose names are included -

(a) in the list of hutment dwellers prepared in the census of hutments taken in the year 1976; or

(b) Where such census of hutments is not taken, in the Assembly roll in force in the year 1976; or

(c) in the Assembly roll prepared in 1980 and published in May 1980; or

(d) Where it is contended that the name of a slum dweller remained to be included in the Assembly roll for the year 1980, in the Assembly roll in force in the year 1977, 1978 or 1979.

and who are occupying such land on the date of making an application by their co-operative society to the Corporation for grant of lease of such land.

18. Analysis of the aforesaid provisions of law would reveal that the Commissioner is empowered and has a discretion to grant a lease of any Immovable property belonging to the Corporation. Provided that, every such lease granted by the Commissioner other than a lease of a class in respect of which the Standing Committee has by resolution exempted the Commissioner from compliance with the requirements of this proviso to sub clause (a) of sub clause (2), the Commissioner is suppose to make a report to the Standing Committee within fifteen days after the same has been granted. Sub clause (c) of sub clause (2) clearly says that with the sanction of the Corporation, the Commissioner may lease, sell or otherwise convey any Immovable property belonging to the Corporation. Thus, it is a Commissioner alone, who can grant lease of any property vesting in the Corporation. The appellate Court was of the view that obviously the Secretary-cum-Estate Officer of the Municipal Corporation is not empowered to grant lease of the suit land to anybody including the appellants, on considering the provisions of sub clause (c) of sub clause (2) of Section 70 of the Corporation Act and in that view of the matter, the appellate court recorded the finding that the transaction dated 20th November, 1972 was in the nature of lease.

19. The appellate Court observed in para 10 of the judgment that it must be seen that in deciding whether a grant amounts to a lease or is only a licence, regard must be had to the substance of the agreement. Intention of the parties to an agreement examined in the light of the surroundings circumstances. The description given by the parties may be evidence of the intention, but it is not decisive. More use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial tests in each case is whether the instrument is intended to create or not to create an interest in the property. If it is in fact intended to create an interest in the property, it is a lease. If it does not, it is a licence. In deciding whether the agreement creates a lease or a licence the test of exclusive possession, though not decisive, is a significance.

20. It is not in dispute that the plaintiff is in exclusive possession of the suit land and on the basis of this fact, the learned counsel for the appellants vehemently argued that since the exclusive possession is not disputed and the appellants-plaintiffs had made a construction on the suit land with the permission of the Corporation and the plaintiff continued in possession even after the period of expiry of one year and the lease money was being regularly paid, would indicate that the nature of the transaction was lease. It is difficult to accept these submissions.

21. In this context, the learned counsel for the respondent - Municipal Corporation rightly relied on the decision of the Hon"ble Supreme Court reported in the case of Pilloo Dhunji Shaw Sidhwa .vrs. Municipal Corporation of the City

of Poona, (cited supra), where it has been observed in para 6, as under : Para 6 : "A formal contract incorporating the agreed terms between the plaintiff and the Corporation was not and could not be executed and sealed as required by the Act, for, at the relevant time elections of Councillors to the Corporation had not been held, and no Transport Committee was constituted as required by Section 25 of the Act and the powers of the Corporation were being exercised by the Commissioner pursuant to the transitory provisions. The Commissioner was, it is true, competent to exercise all the powers and perform all the duties of the Transport Committee. But under the rules in Ch.V the seal of the Corporation must be affixed in the presence of two members of the Transport Committee who sign it in token of the seal having been affixed to the contract. The Act clearly provided by Section 74 (2) that the contract which was not made in accordance with the provisions of the Act and the rules shall not be binding on the Corporation. The contract was not made in accordance with the provisions of the Act, for, it was not sealed, and was by virtue of Section 74 (2) of the Act not binding upon the Corporation."

22. It would emerge from the concurrent finding recorded by both the courts below that the agreement dated 20th November, 1972 was not executed in accordance with the provisions of Section 70 (2) (c) of the Act, because the same agreement was executed by the said Secretary-cum-Estate Officer of the Municipal Corporation and not by the Municipal Commissioner, as is required under the provisions of the Act. It would also appear from the proviso to sub clause (2) of Section 70 of the Act, that in case the Municipal Commissioner uses his discretion for grant of lease, other than a lease of a class in respect of which the Standing Committee has by resolution exempted the Commissioner from compliance with the requirements of this proviso, the Commissioner is supposed to report the same to the Standing Committee within fifteen days after the same has been granted and then with the sanction of the Corporation, the Commissioner may lease, sell or otherwise convey any Immovable property belonging to the Corporation.

23. The authorities, on which reliance is placed by the learned counsel for the appellants, are not of any help to him, because the transaction between the parties is governed by the provision of special statute i.e. the Corporation Act and hence the contention of the learned counsel for the appellants that the transaction was in the nature of lease is required to be rejected.

24. It appears that the possession of the plaintiff was only permissive and it cannot be said that the Secretary-cum-Estate Officer of the Corporation wanted to create the lease in his favour. In order to create interest in his favour for grant of lease, the Commissioner alone was competent to do so, as per the requirements of the provisions of sub clause (c) of sub clause (2) of Section 70 of the Corporation Act, and in the circumstances, the learned counsel for the respondent rightly relied on the decision of the Apex Court. The ratio laid down by the Apex Court is squarely applicable to the facts and circumstances.

25. Admittedly the suit land vests in the corporation of the lease and the same could be granted only in accordance with the provisions of the Corporation Act. In the circumstances, I am unable to persuade myself that simply because exclusive possession was with the plaintiffs, the transaction dated 20th November, 1972 could be considered as a lease. No doubt, the Corporation had sanctioned the plan regarding the construction of three tasmans (rooms) but it is pertinent to note that the Corporation only sanctioned construction of temporary nature. However, the word licence is used in the heading of the agreement and this is an additional circumstance, which could be considered, as to what was the intention of the parties at the time of the execution of the agreement. The validity of the agreement was only for the period of one year i.e. from 14th September, 1972 to 13th September, 1973. Though the plaintiff continued to be in possession after the expiry of the period of one year, by no stretch of imagination, it could be said that the licence granted to him could be converted into lease. Thus, I am of the considered opinion that the agreement dated 20th November, 1972 was in the nature of licence and there is no reason for this Court to interfere into the concurrent finding recorded by both the courts below. I do not find any error of law or fact recorded in the impugned judgments passed by both the courts below and consequently there is no reason to upset the findings of both the courts below.

26. Once it is held that the transaction dated 20th November, 1972 was in the nature of licence, it follows that it can be revoked at any time without any notice. The respondent - Corporation served the notices on the plaintiff revoking the said licence. Therefore, in the circumstances, it follows that the occupation of the plaintiffs in the suit land after service of notices revoking licence would be unlawful and if it is so, it is obvious that the plaintiffs were not entitled to the relief of declaration and perpetual injunction sought by them.

27. In the result, the second appeal stands dismissed with costs throughout.