
(1991) 07 BOM CK 0072
In the Bombay High Court
Case No : Suit No. 402 of 1973

Sandoz (India) Limited

APPELLANT

Vs

Surinder Anand and Another

RESPONDENT

Date of Decision : 17-07-1991

Acts Referred:

Easements Act, 1882 — Section 52
Transfer of Property Act, 1882 — Section 105

Citation : (1991) 3 BomCR 680

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : D.R. Zaiwala, for the Appellant; F.E. Devitre, for defendant No. 1 and E.P. Bharucha, for defendant No. 2, for the Respondent

Judgement

S.M. Daud, J.—This is claim for possession and damages in relation to a flat bearing No. A-1-1, 1st floor, Darshan Apartments, Mount Pleasant Road, Bombay-400 006.

2. The suit flat is owned by the Malbar Hill Co-operative Housing Society (Society) which is a tenant co-partnership society. Plaintiff, a public limited company, acquired it initially in the name of an Executive and subsequently got itself substituted in his place. Defendants are full brothers-the first, apart from other things, being the sole proprietor of a concern known as the Oriental Industries. Defendant No. 1 on 28-12-1970 entered into an agreement in relation to the flat with plaintiff. The said agreement labelled a "leave and licence agreement" is at Ex. P-1. Defendants No. 2 has attested the said agreement. Ex.P-1 permitted defendant 1 to allow the flat to be used by an Officer of the Oriental Industries and the said Officer's family. Defendant 2 and his family are in occupation right since the inception. The occupation charges were remitted to plaintiff by defendant 1. The transaction at Ex.P-1 had the approval of the Society and in fact as required by the Society bye-laws, defendants 2 as the occupant of the flat, became along with the parties to Ex. P-1, a co-signatory of

letter dated 4-9-1970 (Ex.2-D-2) addressed by them to the Society. Letters and a notice to vacate addressed to defendant 1 not having yielded a result, plaintiff filed this suit against him. Served with a summons in a declaratory suit initiated in 1981 by defendant No. 2 in the Small Causes Court at Bombay, plaintiff in 1983 impleaded him also to this suit.

3. The plaint asserts that Ex.P-1 is a plain and simple leave and licence agreement with defendant 1. Its duration was six months and after the expiry thereof, defendant No. 1 was bound to vacate. Defendant 2 had no right of his own in the flat. Defendants failure to vacate had compelled plaintiff to incur a huge expense to put up a foreign technician for whom the suit flat was meant. This sum together with enhanced compensation "Rs. 1470/- P.M. and possession were claimed from defendants.

4. The discrepant in some particulars stand of defendant apart, their defence is that the real beneficiary of Ex.P-1 was defendant 2. Next Ex.P-1 cloaked a transaction of lease. Recitals to the contrary thereon were nominal and not intended to be acted upon. This Court had no jurisdiction to deal with the suit. The claims for possession and enhanced compensation were untenable.

5. Pleadings summarised above have given rise to the following issues and these are given below with my findings :---

Issues Findings 1. Does defendant 1 prove that the suit agreement is in substance an agreement of lease ? "Yes" 2. Does defendant 2 prove that he was the real beneficiary of the transaction embodied in the suit agreement ? "No" 3. What damages - if any - are plaintiffs entitled to ? "Not entitled". 4. Relief and costs ? "See para 13".

Reasons for the findings

6. It would be proper to begin the consideration of the issues with issue No. 2. The admitted position is that right from the inception the flat is in the actual occupation of defendant 2. The status of the two brothers described in Ex. 2 D-2 is "licensee" and "occupant" respectively. This is in keeping with Ex.P-1 clause 3 whereof permitted the licensee to allow any senior Officer, his family and servants to occupy the flat. It is in this background that we have to consider the defence about defendant 1 being a mere name-lender to the transaction between plaintiff and defendant 2. Defendant 2 has of course testified to what he believes is a well-rounded story. Had there been any truth therein defendant 1 the name-lender should not have fought shy of entering the witness box and making this clear on oath. He naturally could not, for, in his written statement defendant 1 has described defendant 2 as an Officer of his i.e. defendant 1's proprietary concern Oriental Industries. An attempt is made in that written statement to plead that both the defendants were joint tenants of the flat. The next factor discrediting the defence version is the failure of either brother to reply to much less plead the stand now taken by defendant 2, in reply to the communications addressed to defendant 1 by plaintiff. Defendant 1 has kept out of the witness

box and defendant 2 professes to have felt unconcerned as he had warned plaintiff to write to him if they expected a reply. He would have it that he was not in the employ of defendant 1 and that in 1970 the said defendant was a mere 21 year old. Defendant 2 given out that defendant 1 was chosen to lend his name because of plaintiff's preference for dealing with companies. But defendant 2 was also connected with a company. Ex.P-1 was not drawn up in a hurry. More than three months went into the drawing up of Ex.P-1 as reckoned from the date of defendant 2's occupying the suit flat. Defendant 1 did not own a company and Oriental Industries was a proprietary concern. This was not unknown to plaintiff and in fact the very preface to Ex.P-1 makes a reference to defendant 1 being the proprietor of Oriental Industries. Assuming that defendant 2 was not in the employ of Oriental Industries, the resultant inference would be that defendants deceived plaintiff into believing differently. However viewed, it is not possible to hold that defendant 1 was a mere name-lender and that defendant 2 was the real beneficiary of the transaction.

7. The crucial issue is whether Ex.P-1 embodies what it is labelled to be or whether it incorporates a lease ? This will be decided on the basis of the surrounding circumstances and an interpretation of the terms appearing in Ex.P-1. Defendants 2's plea that plaintiff give an assurance that Ex.P-1 would not be enforced as a document of leave and licence rests on nothing more than his bare interested word. His belated filing of the declaratory suit and the flimsy attempts to explain inconvenient facts carry no conviction. The depositions of witnesses examined have little or no bearing on the true nature of Ex.P-1. A brief summary of the document's main features require to be set out. First, of course is the title showing the document to be a leave and licence agreement. But titles can be deceptive and in any case cannot take precedence over the substance of what constitutes the transaction. Next comes the duration of the licence. The period stipulated is six months as commencing from 7-9-1970. According to Counsel for plaintiff, this shortness of the licence period corroborates the sworn testimony of P.W. 1 J.G. Gandhi that a special request for a short term accommodation led to plaintiff deviating from its usual policy of reserving its flats for its executives. But Ex.P-1 also contains a contrary indication viz. the possibility of an extension as also shortening of the duration (see clause 4(ix). Gandhi testifies that defendant 1 gave out that he was leaving for the States in six months time and wanted to be accommodated until then. Defendant 1's avoidance of the witness box may seem to compel acceptance of Gandhi's version. But that version stands refuted by clause 3 of the agreement which provides for defendant 1 allowing the use and occupation of the flat by any of his senior officers and family. Significantly, not a word is said to explain the incongruity of a shortly-to-migrate licensee insisting on the incorporation of this clause when the very basis of his being allowed the flat's leave and licence was his impending departure to a foreign country. Gandhi asserts that clause 3 was included because of defendant 1's insistence. It is proved that the physical occupants were always defendant 2 and the members of his family. Plaintiff is

clear that defendant 2 had not participated in the negotiations culminating in Ex.P-1. As to the short of duration argument, even a contract of lease can be expressed to be for a shortness of duration. The liberality of the scribe of Ex.P-1 in the use of the words "licence", "licensor" and "licensee" have been pressed as an indicator of the intent of parties. But words by themselves have no meaning. It is the context and the times which give meaning to their user in documents. The latter factor in this case is not unimportant. For defendants, it has been argued that plaintiff as a drug manufacturer was in a bad way. In 1969 or so the Government of India had promulgated a drugs price control order and this acted as a serious constraint in the financial viability of drug manufactures in particular, multi-nationals like plaintiff who thrived on high profits. To face the on coming slump, drug manufactures including plaintiff started devising measures to stay afloat. Not to put too fine a gloss over the plea, what defendants would have us believe, is, that the statutorily pegged prices of drugs compelled plaintiff to advertise the letting out of their flats so as to get something out of the expected financial stagnancy. Belief in this proposition is possible only if one accepts (i) that the corporate sector including multi-nationals like the plaintiff panic so easily, and (ii) when faced with impending doom turn to the unprofitable calling of a landlord despite the obviously preferable alternative of disposing of the asset and banking away the proceeds. The elaborate story of defendant 2 coming across the advertisement and his tracking down the vacancy at the flat does not carry conviction. But nothing much turns upon whether the vacancy was advertised or not. The crucial fact to remember is that Broker Bhagwandas acted as a go-between and that both the parties paid him a commission for his pains. Gandhi admits that a brokerage of Rs. 500/- was paid to Bhagwandas. Be the amount no comparison to what real estate brokers get in Bombay, nonetheless plaintiff did give him commission. He must have also got a cut from the 1st defendant. Defendants 2's version that he paid Rs. 1300/- to Bhagwandas may be true though the payment was for and on behalf of defendant 1. Prior to the moving into the flat by defendant 2 neither defendant had any intimacy or even acquaintance with plaintiff. True Bhagwandas was one who was a favourite broker of plaintiff. But he did not guarantee defendant's honesty or solvency. Both these factors viz. Bhagwandas getting a commission and the at-an-arms length relationship and deal, negative the faint suggestion of plaintiff having acted out of semi-altruistic motives. Taking the plaintiff's case at its best, the position emerging is this : The suit flat was to remain vacant until the foreign technician came. Defendant No. 1 viz. Bhagwandas made an offer for it-perhaps hinting or even promising that his need was for a short duration. The promise plus the lavish charge offered and the business-man's distaste for allowing an asset to lie idle, persuaded plaintiff to permit defendant No. 1 the desired occupation. The occupant came and the terms governing the occupation required being set out in black and white. That necessitated certain back and forth exchanges and the final product was Ex.P-1. The very time required for the deliberations and the utilisation of the talents of the Legal Department of the plaintiffs as Gandhi admits, negatives the attempt to pass off the deal as a

favour to defendant No. 1. The shortness of the terms of occupation should not be given undue weight. After all no landlord in rent-legislation governed areas wants a would-be-tenant to get ideas subversive of his superior status. Living in a seller's market the incoming occupant has no option but to sign whatever document be placed before him. This situation has to be borne in mind as also the reverse of a human weakness to bite the hand that feeds. There is force in the argument of plaintiff's Counsel about defendant No. 1 getting an extension because of the fervent pleas of a Mrs. Anand referred to in Ex. P- 2 dated 10-6-1971. But a demand after the expiry of the stipulated period and the occupant making insincere promises of vacating shortly, do not take the case any further. What eventually governs are the principles laid down in a long line of cases to differentiate a lease from a licence. To this aspect of the matter I now turn.

8. Counsel for parties have referred to a number of decided cases on the subject. It is not necessary to burden the judgment by a reference to any but a few of them. *Associated Hotels of India Ltd. Vs. R.N. Kapoor, , Subba Rao, J.,* said:---

"The following propositions may, therefore, 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 licence; (3) if the document creates an interest in the property, it is 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."

Lord Denning Mr., in *Marchant v. Charters*, 3 All England Reporter, 918, at page 922 observed:---

"Gathering the cases together, what does it come to? What is the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on the whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did not he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?"

9. Viewed in the light of the above the substance of Ex.P- 1 denotes it to be a lease. The very preface indicates that the agreement will bind the successors and assigns of the so-called licensor and the heirs, executors, administrators and permitted assigns of the alleged licensee. These words militate against the

parties contemplating the seeking and conferment of a personal privilege upon defendant No. 1. True the occupation charges are described as "compensation or licence fee". Significantly the figure of Rs. 1300/- per month agreed upon is more than what the plaintiff had to pay to the society. Thus there is a return on the investment made by plaintiff in the acquisition of the flat and a not insignificant return at that. Next comes the provides for an initial deposit of Rs. 1300/- which the licensor was to return without interest to the licensee. Such a provision shows the absence of sentiment or sympathy actuating the induction of defendant No. 1 into the flat. Again, this is a feature more compatible with a lease than a licence. The 3rd clause provisions for the licensee notwithstanding the earlier clauses permitting the flat to be occupied by an officer of Oriental Industries. This goes a far way to demolish the story of defendant No. 1's impending departure for the U.S.A. influencing the plaintiff to agree to the transaction. Clause 4 enumerated the different obligations undertaken by defendants No. 1. These obligations- words apart- can well be found in leases also. Even here sub-clause (viii) permits the licensee to "assign, transfer, underlet, sublet" the premises with the prior consent in writing of the licensor. Surely this demolishes the possibility of the transaction being a licence, the essence of which transactions is, that it is a personal privilege coming to an end with the mere desire of the licensor and untransferable. Of course the document ends with the ringing declaration that the licensee is not a tenant or sub-tenant and that the licensor "shall be deemed to be in exclusive possession" even during the currency of the licence. The absence of such a clause in camouflaged leases would occasion great surprise and the presence thereof does not successfully conceal the camouflage. Much is made of plaintiff's furniture and fixtures lying in the flat. This is said to bear out the existence of the plaintiff's possession over the flat. The definition of "premises" in the Bombay Rent Act, 1947, at section 5(8)(b) provides for the use of furniture supplied by the landlord for use in the building or part of a building. The existence of such furniture does not conceal the fact of the exclusive possession being that of the inductee lessee.

10. It was argued that plaintiff was a tenant in the flat and could not therefore let or sublet the same. In this connection reliance is placed upon section 15(1) of the Bombay Rent Act and the bye-laws of the society. Regulation 4 of the regulations governing grant of tenancies to members by the society does not contain an absolute prohibition against under letting. In fact with the consent in writing of the society under letting is permitted. It is no part of plaintiff's case that Ex.P. 1 was in contravention of the bye-laws. Ex.P. 4 dated 18-7-1972 addressed to defendant No. 1 by plaintiff speaks of the society intimating them of the B.M.C. demanding higher tax because of the flats being occupied by non-members. Ex.P. 7 is the society's letter to plaintiff in this connection. It may be argued that defendant No. 1 had to establish that the under letting was with the written consent of the society. This argument has no validity in the face of Ex.P. 4 and Ex.P. 7. These show that the plaintiff had the society's consent to the transaction with defendant No. 1 and it was for plaintiff to establish that this

consent was not in conformity with Regulation 4 mentioned above. The burden of proof is no immobile concept. It keeps shifting with the circumstances and in the state of the facts of this case. It was for plaintiff to prove that the assignment, subtenancy or whatever Ex.P. 1 be, was contrary to law. Next section 15 of the Rent Act has undergone extensive changes vide Maharashtra Act 18 of 1987. Sub-section (2) thereof has regularised sub-lettings right upto 1st February 1973. It reads :

"The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in sub-section (1), shall, subject to the provisions of this sub-section, be deemed to have had no effect before the 1st day of February, 1973 in any area in which this Act was in operation before such commencement; and accordingly, notwithstanding anything contained in any contract or judgment, decree or order of a Court, any such sub-lease, assignment or transfer of any such purported sub-lease, assignment or transfer in favour of any person who has entered into possession, despite the prohibition in sub-section (1), a purported sub-lessee, assignee or transferee and has continued in a position on the date aforesaid shall be deemed to be valid and effectual for all purposes, and any tenant who has sub-let any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (1) of section 13.

The provisions aforesaid of this sub-section shall not affect in any manner the operation of sub-section (1) after the date aforesaid."

The prohibition against sub-letting will not affect such transactions of a date anterior to 1st February, 1973. Ex.P 1 is dated 28-12-1970 and records a transaction in force since 7th September, 1970. Therefore, the vice of illegality does not affect it having regard to the amendment effected in section 15(2). The once-upon-a-common-misconception that premises of a tenant co-partnership society could not be let out or sub-let by a tenant-member stands removed by Sanwarmal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others, . Said the Court in that decision:---

"That takes us to the next question whether or not a member of a co-partnership type of a co-operative society has such interest in the premises allotted to him as would entitle him to give the same on leave and licence basis to a non-member. In a tenant co-partnership type of society the members are shareholders; but the title to the property vests in the society which in turn rents the tenants or flats to its members. The cost of construction of dwellings is met from deposits and loans besides the share money. The rental is usually determined on a basis so calculated as to meet the cost of construction and upkeep of the building and to guarantee perpetuity of occupation on repayment of the whole value of the tenement or flat. At the end of the period the member is credited with additional shares equal to the amount paid by him; the interest on these shares generally matches the rental payable by him to the society. Thus on full payment the

member becomes entitled to occupy the tenement or flat free of charge as the rental he has to pay to the society is almost met from the interest received from shares held by him. Thus a member has more than mere right a to occupy the flat.

11. To recapitulate, the only feature of a leave and licence present in Ex.P. 1 are the title and words indicating an anxiety to cull defendant No. 1 into the belief that he was not to get wrong notions of his having any superior rights in the flat. Every term of substance however belies the attempt. Plaintiff cannot get over the effect of these terms except by pleading and proving that they were unthinkingly copied by its legal department. That is not plaintiff's case and the words relied upon to make out of a leave and licence, are empty shells not sufficient to wipe out the compelling inference of a lease. Applying the test of "nature and quality of the occupancy" spoken of by Lord Denning (*supra*) what we get is a lease ineffectively tried to be passed of as a licence.

12. Having regard to the affirmative answer to the 1st issue, plaintiff cannot recover damages. Neither has this Court jurisdiction to try the suit.

13. Plaintiff's claim for possession and damages fails. It is hereby dismissed with parties left to bear their own costs. Plaintiff at liberty to withdraw the occupation charges deposited by defendant No. 1 and/or defendant No. 2 the latter's credits to be appropriated as made for and on behalf of defendant No. 1.