

(1997) 06 SHI CK 0017

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 118 of 1991

Sunt. Krodha (deceased) through L.R. Smt. Bimla	APPELLANT
Vs	
Smt. Sodhan and Others	RESPONDENT

Date of Decision : 23-06-1997

Acts Referred:

Easements Act, 1882 — Section 52
Transfer of Property Act, 1882 — Section 105, 107, 108

Citation : (1997) 3 ShimLC 88

Hon'ble Judges : Kamlesh Sharma, J

Bench : Single Bench

Advocate : Bhupender Gupta, for the Appellant; Sanjiv Kuthiala and vice K.D. Sood, for the Respondent

Final Decision : Dismissed

Judgement

Kamlesh Sharma, J.—This Regular Second Appeal is directed against the decree and judgment dated 14-11-1990 passed by the District Judge, Hamirpur, whereby the appeal of the Respondents-Defendants was accepted and the decree and judgment dated 28-12-5985 of Sub-Judge (II), Hamirpur, was set aside. The Sub-Judge had decreed the suit of the original Appellant- Plaintiff Smt. Krodhu for declaration to the effect that she is owner in possession of the land in dispute and also for possession thereof. The land dispute comprises land measuring 3 Kanals 1 Maria situated in Tika Hatli, Tappa Galore, 2 Kanals 2 Marias situated in village Lehra Tappa Galore, as detailed in the hearing of the plaint. Smt. Krodhu had died during the pendency of the appeal and Smt. Bimla Devi wife of Gian Chand has been substituted in her place as her legal representative.

2. The facts of the case are not in dispute that Smt. Krodhu was the owner of the land in dispute and she had given it to Jai Ram, predecessor in interest of the Respondents, for cultivation vide agreement dated 4-3-19.54. As per the agreement Jai Ram was to provide main penance to Smt. Krodhu in the shape of 9 Mounds (Kacha) of Maize and 9 Mounds (Kacha) of Wheat for Kharif and Rabi

crops of the year and 40 Bundles of Tanda and 4 Maunds (Kacha) of Wheat Bhusa per year. She was also entitled to cut grass from the land in dispute, if she kept a Buffalo. In case she did not keep any buffalo, Jai Ram was entitled to cut the grass but he was to give 18 Maunds of Corn and 40 Bundles of Tanda and 4 Maunds of Wheat Bhusa per year in lieu thereof to her. One of the stipulations in the agreement was that even if there was no crop in the land, Jai Ram was bound to pay the maintenance in kind as agreed between him and Smt Krodhu. Jai Ram failed to pay the maintenance as per agreement and Smt Krodhu was compelled to file a number of Civil suits for the recovery thereof which were decreed but her prayer for possession of the land in dispute was rejected. Jai Ram died on 25-11-1975 which gave a cause of action to Smt. Krodhu to initiate the present litigation on the ground that the agreement dated 4-3-1954 stood abrogated with the death of Jai Ram and in the absence of any agreement with the Respondents-Defendants, they have no right, title and interest to continue in possession of the land in dispute.

In their written statement, the Respondents-Defendants took number of preliminary objections, including that the suit was barred by the principles of res judicata as similar suits for possession of the land in dispute were filed against Jai Ram, their predecessor-in-interest. On merits, their stand was that Jai Ram was tenant of the land in dispute on payment of rent and on his death on 25-11-1975, they have inherited his tenancy rights and are continuing in possession of the land in dispute as tenants on the same terms and conditions as incorporated in the agreement dated 4-3-1954.

3. On the construction of the agreement dated 4-3-1954, the trial Court has held that Jai Ram was only holding licence of the land in dispute which stood terminated on his death and the Respondents-Defendants cannot claim any right, title and interest in the land in dispute as his legal heirs. The District Judge has reversed these findings. On the interpretation of various stipulations of the Agreement dated 4-3-1954, it has been held that Jai Ram was tenant-at-will of the land in dispute on payment of rent and his tenancy rights were inherited by the Respondents-Defendants on his death on 25-11-1975 and the suit of Smt. Krodhu was dismissed. Hence the present Regular Second Appeal.

This Court has heard the learned Counsel for the parties and gone through the record. The only substantial question of law arising in the present appeal is whether on the construction of the Agreement dated 4-3-1954, Jai Ram was licensee or lessee of the land in dispute. For deciding this question, the distinction between lease and licence has to be kept in view.

4. Section 105 of the Transfer of Property Act defines a lease as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. u/s 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The lessor parts with his right to enjoy the property during the term of the lease and the lessee gets that right to the exclusion of the lessor. As per the definition

given in Section 52 of the Indian Easements Act, only a right to use the property in a particular way or under certain terms is given to the licensee and the possession and control thereof remains with the owner, in other words, licence does not create an estate or interest in the property in favour of the licensee. Section 52 of the Indian Easements Act is as under:

Where one person grants to himself, or to a definite number of other persons, a right to do or to 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.

The perusal of Sections 105 and 107 of the Transfer of Property Act and Section 52 of the Indian Easements Act makes it clear that a lease envisages and transfers an interest in the demised property creating a right in favour of the lessee in rem whereas in case of a licence, interest in the property is not transferred in favour of the licensee but he is given a right to do in or upon the immovable property something which would in the absence of such right be unlawful.

In *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, the learned Judges of the Supreme Court have laid down the following propositions:

...(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 Anr. 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 negate the intention to create a lease...

5. This judgment has been further followed in *Mrs. M.N. Clubwala and Another Vs. Fida Hussain Saheb and Others*, wherein it is explained that the decisive consideration to hold whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee is the intention of the parties which is to be ascertained on consideration of all the relevant provisions in the agreement. Where there is no formal document or the terms of the document are not clear, the surrounding circumstances and conduct of the parties is to be borne in mind for ascertaining the real relationship between them. The fact that the premises are in exclusive possession of a person would not make him a lessee. If, however, exclusive possession to which a person is entitled is coupled with an interest in the property, the agreement would not merely be construed as a licence but as a lease. These propositions have further been reiterated by the learned Judges of the Supreme Court in *Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh*,

6. From the above stated well settled propositions of law, it is clear that if exclusive possession over the immovable property is coupled with an interest in the property, the agreement would be construed as a lease and not a mere licence, Examining the agreement dated 4-3-1954 in the light of these propositions, it is clear that Jai Ram was given exclusive possession of the land in dispute and he had an interest to cultivate it in any manner he wanted. He was liable to pay maintenance in kind to Smt. Krodhu but on his failure to do so, Smt. Krodhu was not entitled to get back the possession of the land in dispute. Therefore, notwithstanding the word "maintenance" used in the agreement dated 4-3-195 J, Jai Mam was holding the land in dispute as a tenant on payment of rent in kind as agreed between him and Smt. Krodhu Therefore, the first appellate Court has rightly held that under the agreement dated 4-3-1934 lease and not licence in respect of the land in dispute was created in favour of Jai Ram and the rights thereof could be. inherited by the Respondents-Defendants on the death of Jai Ram. The substantial question of law is answered accordingly.

No other point is urged on behalf of the Appellant-Plaintiff. In the result, there is no merit in this appeal and it is dismissed. The parties are left to bear their own costs.