

(2003) 07 DEL CK 0117

In the Delhi High Court

Case No : Regular First Appeal : 158 of 1997

Sushil Malhan

APPELLANT

Vs

Pearey Lal Bhawan Association

RESPONDENT

Date of Decision : 11-07-2003

Acts Referred:

Easements Act, 1882 — Section 52, 63
Transfer of Property Act, 1882 — Section 105, 107

Citation : (2003) 2 ILR Delhi 34

Hon'ble Judges : Usha Mehra, J;Ramesh Chand Jain, J

Bench : Division Bench

Advocate : A.B. Dial, with Ms. Sumali Anand and Mr. Gunjan Kumar, for the Appellant; Neeraj K. Kaul with Mr. Sachin Chopra and Mr. Vivek B. Shareya and Mr. S.C. Nand, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Jain, J.—In the present appeal we are again called upon to answer the vexed question- "Whether in the facts and circumstances of the present case, a lease or licence was created in favour of the appellant in respect of a canteen existing at the Gandhi Memorial Hall, New Delhi owned by the respondent, a charitable trust registered under the Societies Registration Act?" The germane facts are in a narrow compass. In the year 1973, by means of a letter dated 12.9.1973 (Ex. PW 1/A), the respondent-society permitted the appellant to run canteen services in the Gandhi Memorial Hall against the charge of Rs. 10/- per day/show, which were later raised to Rs. 50/- per day/show. The appellant started running the canteen services and paid the charges uptill the beginning of 1983. On or about 28.1.83, the respondent served the appellant with a notice to clear his articles from the premises by 4.2.1987. The appellant did not clear his articles by the aforesaid date and made a representation to the respondent-society for grant of reasonable time and also instituted a suit for permanent injunction for restraining the respondent from evicting the appellant from the premises and from removing or throwing away his articles from the canteen. The

basis of the suit was that licence granted to the appellant to run the canteen was not revoked and the threatened action of the respondent-society was not in accordance with law. However, later the appellant improved his case by pleading that he was not merely a licensee of the canteen but was a tenant with exclusive possession with certain other rights and was therefore not liable to be evicted from the canteen in question. The suit was contested by the respondent-society thereby denying that there existed any lease between the parties in respect of the canteen in question and pleading and that the appellant was granted a mere licence to run the canteen services in the year 1973 which was revoked in accordance with law and, thereafter, the appellant had no right or legal authority to run the canteen services and suit for injunction was not maintainable. On the pleadings of the parties the learned trial court framed the following issues:

- (1) Whether the canteen was given to the Appellant in 1978 on permanent basis and that the appellant has been running the said canteen for more than 13 years? if so, to what effect? (OPP)
- (2) Whether the suit in the present form is not maintainable as placed in para Nos. 1 & 2 of the preliminary objections in the written statement? (OPD)
- (3) Whether the overall control of the premises including the canteen and store was that of the defendants and the appellant was only a licensee? if so, to what effect? (OPD)
- (4) Whether the appellant is entitled to permanent injunction as prayed?
- (5) Relief.

2. Parties largely relied upon the oral testimony of their witnesses besides the documentary evidence in the shape of correspondence exchanged between the parties. On a consideration of the evidence and material brought on record, the learned trial court answered issue No. 2 in negative by holding that the suit for permanent injunction was maintainable. However so far as the crucial issues No. 1 and 3 touching the respect whether the plaintiff-appellant was granted a lease or licence in respect of the canteen in question, the learned trial court categorically held that the plaintiff-appellant was a mere licensee in regard to the canteen/store etc. in the premises of the defendant. Despite the said finding, but in view of the provisions contained in Section 63 of the Easement Act, the learned trial court vide impugned judgment dated 22.5.97 passed a decree for injunction in favour of the plaintiff ordering that the plaintiff shall not be dispossessed from the canteen and store etc. except with due process of law i.e. after giving a reasonable time of one month to the plaintiff to remove his articles from the canteen/store of the defendant premises. Aggrieved by the said finding the appellant has filed the present appeal.

3. We have heard Shri A.B. Dial, Sr. Advocate on behalf of the appellant and Mr. Neeraj K. Kaul, Sr. Counsel on behalf of the respondent and have given our thoughtful consideration to their respective submissions.

4. As noticed above the facts in the case in hand are not much in dispute. It is an admitted case of the parties that the permission to run the canteen was granted to the appellant in the year 1973 by means of a communication dated 12.9.1973 issued by one Shanti S. Kalra, Manager of the respondent-society addressed to the appellant. The contents of the said letter exhibit PW 1/1 reads as under:

Mr. Sushil Malhan,

B-127, Kothalia Building,

Connaught Place,

New Delhi

Reg. Canteen in the Gandhi Memorial Hall.

Dear Sir,

I am directed to intimate to you that on the basis of your meeting with the Chairman of the Association in connection with the letting out of the Canteen with the kitchen and store of the G.M. Hall, is being given to you on the rental basis Rs. 10/- (Rs. Ten only) as per date/show.

Kindly contact the undersigned immediately.

Yours faithfully,

Sd/

Shanti S. Kalra,

12/9

Manager.

It is also not disputed that pursuant to the said letter the appellant started running the canteen services at the canteen from the first floor counter of Gandhi Memorial Hall and had also occupied a store on the ground floor for the purpose of strong his goods/articles related with the running of the canteen and the appellant started paying the charges at the rate of Rs. 10/- per date/show and later at the rate of Rs. 50/- per date/show. It is also not disputed that the appellant used to put his lock on the store on the ground floor and on the canteen on the first floor although the overall control of the Gandhi Memorial Hall was with the respondent inasmuch they used to lock the main entrance/door of the said hall. Having regard to the contents of the letter dated 12.9.73 coupled with the above factual position it is to be seen if the occupation of the canteen/store by the appellant was in the capacity of the lessee or a licensee.

5. Mr. A.B. Dial, learned Counsel for the appellant has vehemently urged that the term, "letting out" and "rental basis" used in the said letter coupled with the circumstances that the canteen and store has been in exclusive possession of the appellant, who used to lock the same and had been paying the charges in the

shape of rent initially at the rate of Rs. 10/- and later at the rate of Rs. 50/- per show/day, unambiguously point out that a lease of the canteen/store within the meaning of Section 105 of the Transfer of Property Act was created by the respondent in favour of the appellant and, therefore, the finding of the learned trial court that the appellant was a licensee at the premises and the consideration/charges stipulated in the letter dated 12.9.73 was not rent is erroneous and untenable.

Section 105 of the Transfer of Property Act reads as under:

Lease defined-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.

6. Besides referring to the provisions of Section 105 of the Transfer of Property Act in support of his contention he has heavily relied upon a Madras D.B. Judgment in the case of Viziamam Gajapathiraj Bahadur, Raja of Vizianagaram Vs. Vikramadeo Varma, Maharaja of Jeypore, and the case of Jonnada Sayi and Others Vs. Jonnada Subbanna and Others, . In the former case, the court held as under:

The first question to be decided in this appeal is whether there was concluded contract. It has been contended by the learned Advocate General on behalf of the respondent that there was no binding agreement, firstly as to the amount of rent, and secondly, as to the date of the commencement of the lease, and that in the absence of certainty on these two points the contract cannot be enforced. The learned Advocate-General has relied upon the undoubted proposition that a mere agreement to agree cannot constitute a contract. We have however indicated our opinion that Ex. CCC dated 23rd July 1921 constitutes a definite acceptance on behalf of the Court of Wards of all the essential provisions of the agreement, which provisions provided for the definite fixation of the rent on an agreed basis. The ratio of half the net proceeds was undoubtedly accepted for the whole of the term of the lease. The basis on which the rent for the first ten years was to be calculated and also the basis of the decennial revisions were covered by the agreement. Though the actual figure of the rent was not yet determined, there was not longer any uncertainty regarding the way in which it should be fixed throughout the lease.

7. We do not see as to how this authority can advance the case of the appellant because what has been considered in the said case was primarily a question as to whether a concluded contract in view of the contention that there was no binding agreement, firstly as to the amount of rent, and, secondly as to the date

of the commencement of the lease, in the absence of certainty of these two points whether the contract would be enforced. Based on facts and circumstances of that case, the court came to the conclusion that as long as the basis on which the rent was ascertainable or could be calculated the agreement was valid and enforceable. In that case the Court was not considering the specific question as to whether the transaction was that of a lease or licence.

8. Reliance is also placed on the Supreme Court decision in the case of Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another, In para 15 of the said case, the Supreme Court laid down the following criterion as to what distinguishes a lease from the licence.

(1) To find out whether the document creates lease or license real test is to find out "the intention of the parties", keeping in mind that in cases where exclusive possession is given, the line between lease and license is very thin.

(2) The intention of the parties is to be gathered from the document itself. Mainly, intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

(3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.

(4) If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole. But in cases where the landlord alleges that the tenant has sublet the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into, inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed; the tenant and the sub-tenant may jointly set up the plea of a license against the landlord which is a camouflage. In such cases, the mask is to be removed or veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances.

Same would be the position where the owner of the premises and the person in need of the premises executes a deed labelling it as a licence deed to avoid the operation of rent legislation.

(5) Prime facie, in absence of a sufficient title or interest to carve out or to create a similar tenancy by the sitting tenant in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-

tenancy was created in his favour, because a person having no right cannot confer any title of tenancy or sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the premises, cannot confer any better title. But this question is not required to be finally determined in this matter.

(6) Further lease or licence is a matter of contract between the parties. Section 107 of the Transfer of Property Act inter alia provides that leases of immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession; if it is registered instrument, it shall be executed by both the lessee and the lessor. This contract between the parties is to be interpreted or construed on the well laid principles for construction of contractual terms, viz. for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having doubled intendment one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing only what he had a right to do.

9. On the strength of the above authority, Mr. Dial, learned Counsel for the appellant, has strongly contended that the learned trial court has gone wrong while holding that the charges payable by the appellant for intermittent duration of per day/show is not rent because the consideration for lease can be any price paid or promised, share in crops, service or any other thing of the value, to be referred periodically or on specified occasions. Therefore what is required to be a payment being termed as "Rent" is that the consideration must be ascertainable and not uncertain and if method of ascertainment is specified the criteria is satisfied. According to the learned Counsel the charges fixed per day/show were specified along with period in the letter and therefore it clearly amounted to rent within the meaning of Section 105 of the Transfer of Property Act.

10. As against the above submission of the learned Counsel for the appellant, learned Counsel for the respondent has emphatically urged that in absence of any formal agreement between the parties specifying if the transaction was a lease or licence, it is the intention of the parties deducible from the facts and surrounding circumstances of the case which would determine the real character of the transaction. In the case of Associated Hotels of India Ltd. Vs. R.N. Kapoor, in para 27 the Supreme Court laid down the following prepositions as well established for ascertaining whether a transaction is a lease or licence.

(i) To ascertain whether a document creates a lease or a licence, the substance of the document must be preferred to its form;

(ii) the real test is the intention of the parties/whether they intended to create a lease or a licence;

(iii) if the documents creates an interest in the property, it is lease; but if it only permits another to make use of the property, of which legal possession continues

with the owner, it is a licence; and

(iv) if under the document a party get 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.

11. The facts and circumstances of the present case are to be tested having regard to the above prepositions. In the case in hand it is not disputed that appellant was permitted to run the canteen only on a day or days when there was a show or exhibition in the Gandhi Memorial Hall and on no other day. The payment of charges was also to be made on per day/show basis. The appellant could not enter the canteen area unless the respondent permitted the appellant through the main entrance which was under the lock and key of the respondent. This in the opinion of the Court would in turn show that the appellant was in fact granted a limited right i.e. a right to run canteen on specified day when a show or exhibition was held and he was not granted any exclusive right to run the canteen on all the days. This is otherwise a logical inference because of the fact that appellant was not required to make any payment for those days when there was no show which could be for several days or even weeks or months. A licence is defined in Section 52 of the Easement Act as a right to do or continue to do, in or upon the immovable property of the guarantor something which would in the absence of some right be unlawful, and such right does not amount to easement or a interest of the property. These circumstances clearly point out that the appellant was not in exclusively occupation of the premises and in fact no interest was intended to be created or in fact created in favour of the appellant. The appellant was only permitted to make use of the canteen and store for the purpose of running canteen services on a particular day/show subject to certain payment.

12. It is next submitted by the learned Counsel for the respondent that the charges referred to in the letter Ex. PW-1 cannot amount to rent within the meaning of Section 105 of the Transfer of Property Act because it might lead to absurdity or uncertainty because the rent would be calculated depending upon the number of shows held in a particular month meaning thereby that for a certain month the appellant can enjoy the protection of Delhi Rent Control Act while for the other month he may not and in that situation may be governed by the provisions of the Transfer of Property Act. It is, therefore, difficult to held that the rental talked in the letter dated 12.9.73 can be validly construed as "rent" within the meaning of Section 105 of the Act despite the loose/ambiguous use of the word rental in the letter Ex. PW 1/A. Having regard to the attendant circumstances it seems to be reasonable to infer that there was no intention on the part of the respondent to grant any lease of the canteen/store etc. to the appellant and the intention was simply to grant a mere licence to the appellant to run the canteen on specified days/shows on payment of certain licence fee. In the opinion of this Court this finding of the learned trial Court is based on the correct appreciation of the facts and circumstances and the material brought on

record and is also in consonance with the settled legal prepositions.

13. Besides, it appears to us that the parties clearly understood the transaction as that of the licence because initially the licence was made the basis of filing of the suit for permanent injunction but later on becoming wiser the plaintiff altered his stance and pleaded the transaction between the parties as lease. This was clearly afterthought because in his own letter dated 29.1.87 Ex. PW/D1 in response to the respondents letter dated 28.1.1987, the appellant never propounded any lease of the canteen in his favour rather he pleaded for reasonable time to enable him to consume the eatables cleared the articles and or make alternative arrangements before he vacated the premises. Having considered the matter in its entirety we are of the considered opinion that appellant was merely granted a licence to run the canteen services from the canteen of the respondent on particular days on payment of certain charges/ licence fee and no lease was created and no rights under lease were granted to the appellant in regard to the canteen/store etc. The finding of the learned trial court cannot be assailed on any ground. In the result this appeal fails and is hereby dismissed with costs.