

Rasheed Khan Vs. Mohd. Ayyub and Others

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Court : Mumbai Aurangabad

Decided On : May-06-2014

Judge : T.V. Nalawade

Appeal No. : Second Appeal No. 699 of 2012

Appellant : Rasheed Khan

Respondent : Mohd. Ayyub and Others

Judgement :

1) The appeal is filed against the judgment and decree of Regular Civil Appeal No.49 of 2011 which was pending in the Court of the District Judge-1, Nanded. Regular Civil Suit No.499 of 1994 was filed by respondent for possession against the present appellant and the suit was decided in favour of the present respondent. The First Appellate Court has confirmed this decision. The decree of possession is given and the present appellant is directed to pay damages for use of the premises. Both the sides are heard.

2) The plaintiff is owner of house Municipal No. 3-2-160 situated at Station Road Nanded. It is the case of the plaintiff that suit premises, the space admeasuring 23 x 14 ft which includes Chabutara of this property was given to defendant for its use as licensee. It is contended that the document was made in that regard and after expiry of the period of licence new documents of leave and licence were prepared. Plaintiff was getting Rs.1101/- per month for the use and the first agreement was

for the period of 11 months.

3) It is contended that the period given in the last agreement expired on 31-5-1994 and so after that the defendant is using the suit premises illegally. It is contended that the plaintiff had asked the defendant to withdraw from the premises but the defendant refused to do so. The suit was filed for relief of possession and also damages in respect of the suit premises.

4) The defendant filed written statement. He denied that there was relationship as licensor and licensee. He contended that there was lease agreement. It is contended that only to avoid dispute and as the plaintiff was demanding increase in the rent, agreements were made. It is contended that plaintiff exploited the situation and obtained signatures of the defendant on some documents. It is contended that he offered rent even in July 1994 but the plaintiff refused to accept the same. It is contended that the plaintiff was demanding exorbitant increase in monthly rent and when the defendant refused to give such rent, plaintiff filed the suit. The defendant filed counter claim by claiming that he had given Rs.20,000/- by way of deposit, premium. Dispute was also raised by the defendant on the points like area in his possession. He contended that Civil Court had no jurisdiction.

5) In view of the defence taken by the present appellant, initially the Court of the Civil Judge, Junior Division, had returned the plaint. There is no Small Cause Court in Nanded and so jurisdiction was with the Civil Court (Civil Judge, Junior Division). After return of the plaint, the Civil Judge Senior Division, who had power to make assignment of the work, assigned the case to the Civil Judge, Junior Division, and the matter came to be decided.

6) Issues were framed on the basis of aforesaid pleadings. The trial Court held that there was relationship of licensor and licensee and no lease was created. The trial Court further held that possession of the defendant from 1-6-1994 was illegal. Point of jurisdiction was also answered in affirmative and the Court held that plaintiff is entitled to get damages as the possession is not returned after termination of licence. Decree of possession is also given. These finding are confirmed by the First Appellate Court.

7) By order dated 10-4-2013 this Court admitted the appeal and following substantial questions of law are framed.

(i) Whether the suit could have been proceeded with after direction for return of plaint by Civil Judge, Junior Division on the order of the Civil Judge, Senior Division in the facts and circumstances of the present case?

(ii) Whether the Courts below have committed patent error in holding that relationship of licensor and licensee existed between the parties?

(iii) Whether the appellate Court has committed error in enhancing the quantum of compensation?

8) So far as the first substantial question of law is concerned, it can be seen that there was virtually no force in the defence taken by the defendant about jurisdiction of Civil Court. Admittedly at Nanded no Small Cause Court was established. Civil Courts were dealing with the matters of the present nature. On this point learned counsel for the respondent placed reliance on a case reported as **1965 Mh.L.J. 913 (Raje Vyankatrao v. Sitalprasad)** and a copy of judgment in Civil Appeal No. 5787 of 2002) **LaxmidasMorarji v. Miss Behrose Darab Madan)** delivered by the Apex Court. In the first case, after considering provisions of Section 9 of the Civil Procedure Code this Court laid down that if Special Court, Tribunal is not constituted under the Special Act, the provisions for referring matters before such special Court or Tribunal become ineffective and the aggrieved person has right to proceed in ordinary civil Court. There cannot be any dispute over this proposition. This Court finds no force at all in the submission made on the first point. On this point learned counsel for the appellant placed reliance on the case reported as **2002 (2) Bom. C.R. 98 (Qari Mohammed Zakir Hussain v. Municipal Corporation of Greater Mumbai)**. This Court has considered the provisions of Order 7 Rules 10 and 10-A of the Code of Civil Procedure and recourse to be followed by the plaintiff is discussed. There cannot be any dispute about the observations made. Facts of this case were altogether different. There was power to the Civil Judge, Senior Division, to make allotment and correct the mistake. Even the same Court could have corrected it. There was no question of return of the plaint.

9) So far as the second point is concerned, learned counsel for the appellant placed reliance on the case reported as **AIR 1959 SC 1262 (Associated Hotels of India Ltd. v. R.N. Kapoor)**. In this case the Apex Court has observed that it is duty of the Court to ascertain real nature of relationship. Whether it is a lease or licence needs to be ascertained from the substance of agreement and not from the form. Otherwise clever drafting can camouflage the real intention of the parties. The Apex Court has made following observations:-

œThe following propositions may 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.?

10) This Court has carefully gone through the facts of the reported case. The terms and conditions are quoted in the aforesaid case. Terms of the agreement show that right was given to the licensee to hand over possession to third party if he wanted to close business prior to expiry of the term. In that case licensor was entitled to get monthly charges at the rate of Rs.800/-. In view of terms and conditions of the agreement the Apex Court held that there was lease and not the licence. In view of the facts of other case, in the case reported as **2001 (Supp) Bom CR 692 (Sardar Pruthisingh v. Kanchanlal Purshottamdas Desai)**, this Court had held that the agreement was of lease.

11) The learned counsel for the respondent has placed reliance on some reported cases like (1) **2002 (4) ALL MR 524 (Peter Alex Dsouza v. Prithi Paul Singh)**, (2) **1996 (1) Civil LJ 392 (Jagannatha v. Sridhara Murthy)** (Karnataka High Court); (3) **2010 SCCR 84 (The New Bus Stand Shop Owners Association v. Corporation of Kozhikode)**; and, (4) **AIR 2007 Gujarat 18 (Gajriben v. Knatilal)**.

12) In the case of Jagannatha (cited supra), the Karnataka High Court has discussed the provisions of Section 52 of the Easements Act 1882 and it is observed that when defendant claims that he is not licensee and he has better title, burden is on him to prove such case.

13) In the case of The New Bus Stand Shop Owners Association (cited supra) the Apex Court held that use of terms like lease, licence, rent, etc. by themselves are not conclusive and the conduct and intention of the parties before and after creation of relationship is relevant to find out the intention. In the case of Peter Alex (cited supra) this Court has laid down that mere exclusive possession of premises cannot amount to lease.

14) It cannot be disputed that, for ascertaining the intention of the parties under one document a decision on a construction of the terms of another document cannot ordinarily afford any guidance unless the terms are exactly similar to each other. Reliance can be placed on a case reported as **AIR 1963 SC 1906 (Bhoju Mandal v. Debnath Bhagat)**. In the case of Associated Hotels of India Ltd. (cited supra) there were many terms and conditions giving indication of intention that the property was given by way of lease though the title was of leave and licence. The premises was given for use and occupying it for carrying on a particular business and the period was fixed of one year. At the first instance, the period was of one year only but there was possibility of extension of period of licence at the option of the licensor provided that the licensee had applied for extension about three months prior to the expiry of one year period. There was also a term enabling the licensee to transfer the licence to any person if before expiry of the period the licensee wanted to close the business. In that case for the remaining period the charges which were to be paid by the new person were fixed and the licence was to be transferred with the consent and approval of the licensor. In view of these terms and conditions the Apex Court held that it was in fact lease document. The provisions of section 108 of the Transfer of Property Act in respect of lease and section 52 of the Indian Easements Act were considered by the Apex Court.

15) In the present case, relevant conditions of the document are as under:--

œ1. That the grant is for a period of 11 (eleven) months, ending on February, 1986 for the personal use and occupation of premises which is the part of 3-2-110 to 112 situated at Station Road, Nanded, admeasuring 14 x 18 and Chabutra is about 5 x 14 ft bounded on East : another premises of Licensor being No.() West-Chabutra about 5x14 thereafter Govt. Drain and C.C. Road leading to Rly. Station Road, North-Licensors personal land and his personal gate and South : Shop No.3-2-113 of Shri. Md. Osman.

2. That the licensee shall pay licence fee Rs. 1101/- (Rupees One Thousand one hundred and one only) per month in advance on or before 1st day to 3rd day of every Calender month in lieu of the use and occupation of the above said premises.

3. That the licence shall be revoked and ineffective after the expiry of above said period, but it shall be renewable on such further terms and conditions as would be agreeable by both the parties i.e. Licensor and licensee.

4. During the period of Grant the actual possession of the premises shall be vested with the licensor and only the right of use and occupation is granted.

5. If the licensee wants to surrender the right of use and occupation of the said premises granted under the licence, he may do so giving a prior notice of 15 days to the grantor or licensor.

10. The grant of licensee is made with free consent after negotiations in between both the parties. The terms of the Grant are agreeable to the licensee.?

16) The aforesaid terms and conditions show that possession was to remain with the plaintiff. Though there is the evidence showing that the keys were kept with the defendant, only due to this circumstance inference cannot be drawn that it was transaction of lease. Further there is evidence to show that for getting loan no objection certificate was obtained from the plaintiff by the defendant and on that document also the word œlicence? was used. There is also evidence to show that when there was litigation between plaintiff and one Ziyauddin about other shop, the present defendant had filed affidavit in support of the present plaintiff and he

had described himself as licensee. This document, affidavit, was confronted to the defendant in the present proceeding. The defendant has not denied his signature appearing on the licence document and also the aforesaid record. In view of such documents, burden was heavy on the defendant to prove that he has better right than the right of licensee. From the aforesaid record and the previous admissions given by the defendant in other proceeding, inference is easy that there was the intention to create transaction of leave and licence and not of lease. Thus, on this point also, both the Courts have not committed any error. The aforesaid material is considered by both the Courts below.

17) On the last point it can be said that in view of the location where the property is situated and in view of the period for which the damages are given, both the Courts have not committed any error. The First Appellate Court has not committed any error in holding that the plaintiff is entitled to get damages for the period from July 1994 till the date of decision of the suit i.e. till 21-3-2011 which was not granted by the trial Court. There was no reason for refusing the damages in respect of that period and there is possibility that due to over sight no damages were granted for that period. Considering the agreed rate mentioned in the document, the business for which the defendant was using the premises and its location, the amount fixed is not on higher side. It is finding of fact and no interference is possible on this point also. There is no need to discuss the other evidence as there is no possibility of inference.

18) The appeal stands dismissed.

19) The learned counsel for the appellant requested for stay to the judgment and decree. If the appellant deposits rupees one lakh before 9th June 2014 there shall be stay to the decree up to that date. If after depositing the amount, the appellant wants time, there is liberty for moving the Court. If the amount is not deposited before 9th June 2014 the stay shall stand vacated automatically.

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