

E. Leslie and Co. Vs. Vaividhya Print Crafts and ors.

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Court : Mumbai

Decided On : Jun-17-2008

Reported in : 2008(5)ALLMR615; 2008(5)BomCR344; (2008)110BOMLR2045; 2008(6)MhLj410

Judge : Roshan Dalvi, J.

Acts : Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 - Sections 15A

Appeal No. : Suit No. 996 of 1973

Appellant : E. Leslie and Co.

Respondent : Vaividhya Print Crafts and ors.

Advocate for Def. : Rajesh Shah and A.B. Narvekar, Advs., i/by., Soloman & Co. and Mangesh Jarode, Deputy Engineer;;

Advocate for Pet/Ap. : Y.T. Jhon and S.R. Borulkar, Advs.;

Disposition : Petition dismissed

Judgement :

Roshan Dalvi, J.

1. The Plaintiffs admittedly licensed their premises to the Defendants under the Leave and Licence Agreement dated 15.1.1971, Exhibit - B. The Agreement is for a period of three years. It would expire by efflux of time on 14.1.1974. It is the Plaintiffs' contention that they orally terminated the Licence Agreement in December 1972 in the presence of two persons in Defendant No. 1- Firm viz. one Dattatraya Chintaman Khandkar and Prabhakar Shivshankar Bandodkar. No notice of termination is sent to the Defendants. The Defendants have denied the termination. It is the Defendants' contention that the Defendants continued to be the licensees under the Agreement, Exhibit - B dated 15.1.1971 for a period of three years which was the term of the licence have continued in possession thereafter. It is their contention that the case of termination of licence made out by the Plaintiffs is false, dishonest and made only with a view to claim possession from the Defendants after the Defendants became the sub-tenants of the Plaintiffs in respect of the suit premises upon the amendment to the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 ('Bombay Rent Act') under Section 15-A thereof. It is the Defendants' case that the Defendants paid compensation in respect of the suit premises in January 1973 and thereafter. Had the Plaintiffs terminated the licence in December 1972, they would not have accepted the compensation. It is the Plaintiffs' case that the amount accepted from the Defendants is not by way of compensation but by way of damages for wrongful occupation of the suit premises after the licence was terminated. There is nothing in writing to show that fact.

2. After the Defendants secured protection under the Bombay Rent Act, 1947 as licensees / s u b - tenants in possession of the premises on 1.2.1973, the Defendants, by their Notice dated 29.8.2003 to the Plaintiffs sent by Registered Post, claimed the protection by declaration of the Defendants as tenants and claimed to pay the rent rateably to the Plaintiffs in proportion to the amount paid by the Plaintiffs to the landlord. The Notice sent by the Defendants on 29.8.1973 is Exhibit - 5.

3. In reply to that notice, the Plaintiffs' Attorneys claimed the termination of the licence orally made in the presence of the aforesaid two persons. The Plaintiffs claimed recovery of possession of the suit premises from the Defendants as

trespassers thereon. It is the Plaintiffs' case that the Defendants were to pay the Plaintiffs' licence fees initially at the rate of Rs. 1000/- per month for the first one and half years and thereafter at the rate of Rs. 1500/- per month for the remainder of two and half years of the term of the licence. The Defendants only paid the licence fees at the rate of Rs. 1000/- per month continuously and hence, fell in arrears. It was, therefore, that the Plaintiffs terminated the licence.

4. The execution of the licence is admitted. The Plaintiffs have to prove the termination of the licence to claim possession from the Defendants as trespassers upon their property. The Defendants have to show that the licence continued in order to claim protection of the Bombay Rent Act.

5. Based upon the respective pleadings of the parties, Justice M.S. Rane (as he then was) framed the following issues:

ISSUES

1. Whether this Court has jurisdiction to entertain, try and dispose of this Suit.
2. Whether the Plaint does not disclose any cause of action against the Defendants.
3. Whether the Plaintiffs prove that licences granted to the Defendants have been terminated and /or revoked and /or cancelled.
4. Whether the Defendants prove that the alleged leave and licence Agreement dated 15 th Jan ua ry 1971 is a colourable document not made to be acted upon.
5. In the alternative, whether the Defendants further prove that the said Agreement of leave and licence was in subsistence as on 1 st February 1973 and therefore they are entitled to the protection from eviction under the amended provisions of the Bombay Rent Act.
6. Whether the Plaintiffs are entitled to any relief.
7. What reliefs, if any.

The above issues are answered as follows:

Issue No. 1 - Yes

Issue No. 2 - Not pressed

Issue No. 3 - No

Issue No. 4 - Does not survive

Issue No. 5 - Yes

Issue No. 6 - No

Issue No. 7 - Final order.

6. The Suit is filed upon an alleged termination of a licence, whereby the Defendants are claimed to be trespassers. The inherent jurisdiction of the Court is required to be decided upon the averments made in the Plaint. The averments do not show the inherent jurisdiction of the Court being ousted. Hence, Issue No. 1 is answered in the affirmative.

7. Issue No. 2 is not pressed.

8. The Defendants claimed to be in possession of the suit premises pursuant to the licence. Their eviction from the suit premises is to be determined upon the termination or continuance of the licence. The Plaintiffs claim termination of the licence during the period of the licence itself. The Plaintiffs must, therefore, strictly prove the said termination.

9. The termination is stated to be oral. On which precise date the Plaintiffs terminated the Defendants' licence is not averred in the Plaint. Defendant 2, since deceased, who was one of the partners of the 1st Defendant - Firm, is the partner stated to have been contacted by the Plaintiffs' partner. Defendant 2 has since expired. The oral termination is stated to be made in favour of two persons who were in Defendant No. 1 - Firm. Both the persons have also expired. The Plaintiffs' partner, who is stated to have orally revoked the licence, has himself expired. The

said partner's brother has deposed in support of the Plaintiffs' claim. Paragraph 9 of the cross - examination of the Plaintiffs shows that 'We' revoked the licence on 29.12.1972. The date of revocation has been mentioned for the first time in the evidence. The reason for revocation is non - payment of monthly licence fees in time as per the Leave and Licence Agreement. Paragraph 10 of the cross - examination shows that since the deponent was not present at the time of the termination of the licence, he would not be able to depose where exactly the termination was communicated. The fact of the licence having been terminated being made known to him, has remained to be hearsay evidence since the brother of the deponent, who is stated to have revoked the licence orally, has not been examined as he expired before the evidence.

10. Admittedly, no notice of termination has been sent on behalf of the Plaintiffs by the Firm or by any Advocate. The cross - examination of P.W. 1 shows that only after receipt of the Defendants ' Advocate's Notice dated 29.8.1973, the Plaintiffs' Attorneys wrote to the Defendants about the termination claimed by the Plaintiffs. Even in that notice, the specific date and the place of the termination are not mentioned.

11. Paragraph 13 of the cross - examination shows that even after the termination of licence the Defendants tendered compensation for the months of December 1972 and January 1973 on 8.1.1973 and 4.4.1973, which the Plaintiffs accepted. Their claim that it was for damages is not substantiated by any notice or any such receipt issued by the Plaintiffs upon the Defendants, copies of which kept in the regular course of the business of the Plaintiffs could have been produced by the Plaintiffs.

12. Paragraph 7 of the cross - examination of P.W. 1 shows that the Defendants had taken a separate electric Meter for their business for which the Plaintiffs had given consent. The Defendants, of course, did not remember when the Meter was taken.

13. It may be mentioned that in view of the fact that the Plaintiffs fairly conceded to have given consent to the Defendants for obtaining a separate electric Meter of their premises, it was to be seen by the Court as to whether the Defendants did

obtain a separate Meter in January 1973 or thereabouts. A witness of the BEST was accordingly summoned. He produced the file showing the application made. However, the consent of the landlord is not shown to be a requirement for obtaining a separate electric Meter. A signature of consent is not shown to be that of the Plaintiffs. Consequently, both the Advocates have consented not to rely upon the evidence produced by the officer of the BEST, save and except for the fact that the application for obtaining a separate electric Meter was made in January 1973 and have agreed to discharge the witness. His evidence has accordingly not been recorded.

14. It is sought to be made out in the evidence that because the Defendants were in arrears and were creating a nuisance the licence was terminated. The reason for the licence need not be stated if the actual termination is strictly proved.

15. The Plaintiffs have relied upon a licence of the Bombay Municipal Corporation ('BMC') issued to the Defendants on 29.12.1972. The Plaintiffs have examined the Sub Engineer of the BMC as P.W. 2. To produce the licence, P.W. 2 has deposed, on the basis of record of the BMC, that the said licence was collected from the office of the BMC by one Vasudeoprasad Shukla, Defendant No. 2, on 29.12.1972. It has been the Defendants' case that Defendant No. 2 was ill and indisposed on that day and about 2- 3 days thereafter. He never came to attend his office on that day i.e. on 29.12.1972. He attended the office a few days thereafter. The licence produced by P.W. 2 has been marked P- 1 in the evidence. The said licence dated 29.12.1972 is shown to be issued on that date and is received accordingly. Upon that licence, it has been the Plaintiffs' case for the first time in the evidence that the licence was orally terminated on 29.12.1973 itself. That specific case is required to be tested.

16. The licence has not been terminated by the deponent who is examined as P.W. 1 on behalf of the Plaintiffs. It was terminated by his brother, since deceased. He does not know the place where the licence is terminated. He was only informed by his brother of that fact. His evidence relating to the information given by his brother has remained hearsay and accordingly inadmissible. The entire of his evidence does not show any personal knowledge about the transaction. The

licence is stated to be terminated in December 1972. The Suit has been filed upon an oral termination of the licence. Paragraph 7 of the Plaint (as aforesaid) shows only the month of the termination. Consequently, the oral evidence with regard to the precise date of termination cannot be accepted. It is sought to be contended by Mr. John on behalf of the Plaintiffs that, only by production of the copy of the licence issued to the Defendants, the Plaintiffs have made out a case that the Defendants ' then partner (Defendant 2) was present in that suit premises and, therefore, could have been informed about the termination of the licence.

17. The licence is the basic document evidencing the contract between the parties. It is in respect of immovable property. It is under this contract that the Defendants came to be granted possession of the suit premises. The Defendants ' possession is sought to be recovered by virtue of the oral termination. It would be too unjust and harsh to accept the Plaintiffs' plea of termination of licence without a written notice in that behalf or without any other supporting documents. The evidence of the licence is sought to be used as corroborative evidence only to suggest that on a given date in December 1972, Defendant 2 was present in the locality where the suit premises is situated so that the Court must assume that on that day he must have attended his office to have been served the oral termination of licence in the presence of two other parties whose evidence is not recorded as they have also expired. The Plaintiffs are required to strictly prove the oral termination as to the date as well as the place. The evidence led on behalf of the Plaintiffs is by the partner of the Plaintiffs, who was not present at the time of the oral termination. Only his brother later informed him of the termination. If his brother had informed him the date of termination, such fact would have been stated in the Advocates letter, Exhibit - 5, and averred in the Plaint. Since neither the date nor the place of the oral termination was stated by his brother to him, and has not been stated until the evidence, it is seen that on seeing the copy of the licence, a case of oral termination of the date of the issue of licence is made out.

18. Even the further circumstantial evidence runs contrary to the Plaintiffs' case of oral termination of licence. The admission of receipt of compensation in January and April 1973 for the months of December 1972 and January 1973 is a further pointer to the fact that the licence was subsisting and continuing on those dates.

19. It is only after the Defendants ' Advocate gave notice to the Plaintiffs for claiming protection under the Bombay Rent Act, 1947 and for being charged the proportionate rent as a tenant as the Plaintiffs paid the landlord that the Plaintiffs' Attorneys wrote a letter alleging a prior termination. That letter is not the letter of termination. It is, therefore, seen that the termination has not been made by a legal notice. The compensation for the suit premises is accepted well after the date of termination. Even if at the time of accepting the compensation the case of the Plaintiffs that it was accepted as damages has not been made out by the Plaintiffs' letter or by their Attorneys' Notice.

20. The contention of the Defendants that the Plaintiffs also consented to the Defendants obtaining a separate electric Meter is not taken into consideration as signature showing some consent is stated not to be that of the Plaintiffs' partner and the consent is not shown to be a condition for obtaining the licence.

21. The oral evidence led by the Plaintiffs does not inspire confidence. The case of the Plaintiffs cannot be taken as correct. The circumstantial evidence is to the contrary. The case of the Plaintiffs made out at a very late stage deserves rejection. Hence, Issue No. 3 is answered in the negative.

22. This issue relates to whether the Leave and Licence Agreement dated 15.1.1971 is a colourable document and was not meant to be acted upon. The parties agreed that the Defendants were licensed the suit premises for a period of three years, commencing from 15.1.1971. If the Plaintiffs prove the termination of the licence in December 1972, the Defendants would become trespassers from that date. The Suit on trespass would then be maintainable. If not, the Defendants would continue as licensees and would be terminated as tenants pursuant to the amendment to the Bombay Rent Act, 1947 since their licence would be subsisting on 1.2.1973. Though certain evidence is led about the nature and description of the premises and its user, both Advocates have not pressed this issue. Hence, this issue need not be answered as not pressed.

23. The Leave and Licence Agreement dated 15.1.1973 continued to be in existence and was subsisting on 1.2.1973 and thereafter. The Defendants continued in possession as the licensees of the Plaintiffs on 1.2.1973. This is seen

from the fact that termination of the licence is not proved by the Plaintiffs. It is further corroborated by the fact that the Defendants continued to pay compensation as before to the Plaintiffs which came to be accepted as before by the Plaintiffs after the alleged termination of the licence even after 1.2.1973. Consequently, Issue No. 5 is answered in the affirmative.

24. The Plaintiffs are not entitled to any reliefs in this Suit which is filed on trespass since the Defendants are not seen to be trespassers.

25. Hence, the following order is passed:

ORDER

The Suit is dismissed. No order as to costs.

26. The parties shall be returned their respective original documents upon production of xerox copies thereof.

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