

Francis Vs. Sarada

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Court : Kerala

Decided On : Feb-17-2004

Reported in : AIR2004Ker187; 2004(1)KLT952

Judge : R. Bhaskaran, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 105

Appeal No. : S.A. No. 205 of 1999

Appellant : Francis

Respondent : Sarada

Advocate for Def. : K. Jaju Babu, Adv.

Advocate for Pet/Ap. : N.P. Samuel, Adv.

Disposition : Appeal dismissed

Judgement :

R. Bhaskaran, J.

1. In S.A.No. 887 of 1999, defendants 1 and 2 in O.S.No. 466 of 1992, on the file of the Munsiff's Court, Thrissur, are the appellants. In S.A. No. 205 of 1999, the defendant in O.S.No. 2002 of 1990 before the same court is the appellant. The suits were tried separately and decided by separate judgments. Appeals were also

filed separately and decided by separate judgments. Since common questions are involved and the plaintiffs in the two suits are sisters and plaint schedule properties are adjacent buildings, both the second appeals are heard and disposed of by this common judgment. The plaint schedule properties belonged to the plaintiffs' mother. The plaint schedule in O.S.No. 2002 of 1990 is a shed having a length of 68 feet and a width of 15 1/2 feet, with walls and tiled roof. According to the plaintiff, it was given to the defendant's father on a licence arrangement for running a workshop. After the death of defendant's father, the defendant was allowed to run the workshop. Subsequently, there was a partition in the family of the plaintiff and the plaint schedule property was allotted to the share of the plaintiff. The plaintiff issued a notice terminating the licence and required the defendant to vacate the premises. Since the defendant did not vacate, the suit for mandatory injunction and recovery of possession and damages for use and occupation was filed.

2. The defendant filed a written statement contending that the arrangement between the parties is one of lease and not licence. The execution of the licence agreement by the defendant's father was denied. After the death of the father, there was new entrustment to the defendant and he is running the workshop.

3. In O.S.No. 466 of 1992, it was contended by the plaintiff that the plaint schedule properly belonged to the plaintiff's mother and subsequently, the plaintiff obtained the rights in the property as per a partition deed. The mother had entered into a licence agreement with defendants 1 and 2 entrusting the plaint, schedule property for tyre retreading business. The property was required by the plaintiff for her own use. The plaintiff therefore demanded vacant possession of the building after the defendants removing their machinery and tools installed for tyre retreading. Since the defendants did not comply with the demand, the plaintiff sent a notice terminating the licence arrangement and filed the suit.

4. Defendants 1 and 2 filed a written statement contending that they have no direct knowledge of the plaintiff's title. The agreement between the plaintiff's mother and the defendants is not one of licence but of lease. The plaintiff described it as a licence with a view to enable her to save stamp duty. It was only because the

plaintiff's demand for enhanced rent was not complied with by the defendants that the suit was filed. The provisions of the Buildings (Lease and Rent Control) Act are applicable to the premises in question and the suit for eviction is not maintainable.

5. The trial court in O.S.No. 446 of 1992 found that the arrangement between the parties is one of licence and not lease. In view of the above finding, the suit was found to be maintainable. The trial court therefore decreed the suit for mandatory injunction directing defendants 1 and 2 to vacate the plaintiff schedule shed removing the machineries installed by them. An amount of Rs. 250/- per month with interest at the rate of 12% was also directed to be given by the defendants for their continued occupation and user of the plaintiff schedule shed. The appellate court confirmed the finding of the trial court.

6. In O.S. No. 2002 of 1990 also, the trial court found that the transaction between the parties is one of licence and not lease, It was also found that the suit was maintainable before the civil court and there was no necessity for the plaintiff to approach the Rent Control Court, The contention of the learned counsel for the defendant that after termination of the licence the possession by the defendant is as a trespasser and therefore a decree for mandatory injunction is not permissible was also not accepted by the trial court. The trial court therefore granted a decree for mandatory injunction directing the defendant to vacate the plaintiff schedule shed within a period of one month after removing his articles. The plaintiff was awarded damages of Rs. 6,190/- from the defendant as arrears of licence fee including interest at 12%.

7. The judgment of the trial court was confirmed in appeal by the appellate court. In S.A. No. 205 of 1999, it is contended that the burden is on the plaintiff to prove that the entrustment evidences only a licence and not a lease. It is contended that Ext.A1 was denied by the defendant and no steps were taken to prove Ext.A1. It is also contended that even If Ext. A1 was not proved, the intention of the parties was to have a tenant-landlord relationship. The further contention is that the plaintiff herself has demanded rent from the building instead of licence fee. It is argued that even if Ext.A1 evidenced only a licence, after the period of the licence the entrustment is deemed to have been terminated and thereafter the plaintiff

cannot file the suit treating the defendant as a licensee.

8. In S.A. No. 887 of 1999, it is contended that since in Ext.B2 authorisation letter given by the original owner to the plaintiff authorised him to collect the rent, it is a lease and not a licence. It is also contended that since the period of licence had expired long ago and the plaintiff continued to receive rent, the defendants were holding over under Ext.A1 which is possible only in the case of lease and not licence.

9. The learned counsel for the appellants in both the appeals argued that the plaintiff in O.S. No. 2002 of 1990 has sent a notice requiring the defendant to vacate the premises on the ground of bonafide need for own occupation. According to the learned counsel for the appellant, if the arrangement between the parties is one of licence, there was no necessity to put forward such a claim in order to terminate the licence arrangement between the parties. According to the learned counsel that would show that the plaintiff also understood the arrangement as a lease. It is also contended that in Ext.B1 authorisation letter, the term 'vadaka' is used which is consistent with the transaction being a lease as otherwise the authorisation would have been to receive licence fee. The further contention is that in the partition deed in the family of the plaintiff, it is stated that the allottees are free to evict the lessees. Therefore, it is contended that the suit as filed is not maintainable. More or less, similar arguments are made on behalf of the appellant in the connected appeal by the learned counsel for the appellant.

10. The Supreme Court in the decision reported in *Delta International Ltd. v. Shyam Sundar Ganeriwalla* (1999 (4) SCC 545) has considered the different facets of the interpretation of a document as a lease or licence. It is held that the test to determine whether an agreement is a lease or licence is by ascertaining the intention of the parties. The conclusions reached by the Supreme Court after discussing the entire case law are reproduced here:

'1. To find out whether the document creates a lease or a licence the 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 a lease and a licence is very thin.

2. The intention of the parties is to be gathered from the document itself. Mainly, the intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that the 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 the 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 sub-let 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 licence against the landlord which is a camouflage; in such cases, the mask is to be removed or the 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. Prima facie, in the 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 sub-let or transfer the

premises, cannot confer any better title. But, this question is not required to be finally determined in this manner.

6. Further lease or licence is a matter of contract between the parties. Section 107 of the [Transfer of Property Act, 1882](#) inter alia provides that leases of immovable property may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession; if it is a 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 double 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'.

11. The question whether the documents in question are leases or licences has to be considered in the light of the principles laid down by the Supreme Court in the above said decision. In both the documents special care is taken to mention that possession of the property is not given and what is given is only a permission to use the premises. The documents are drafted bearing in mind the distinguishing features of a licence as against a lease. Therefore, it is not contended that if the documents are read they will show that they are only lease deeds. It is true that possession of the properties are given to the persons to whom they are entrusted. But giving exclusive possession by itself will not make the arrangement a lease as in the case of a licence also possession which is required to enjoy the property will be given to the licensee.

12. Learned counsel for the appellants therefore submitted that it is clear from a reading of the two documents that the idea was to see that the provisions of the Kerala Buildings (Lease and Rent Control) Act are not made applicable to the transaction in question. In support of the above argument learned counsel for the appellants relied on the Division Bench decision of this Court reported in *Peramanand Gulabchand & Co. v. Mooligi Visanji*, AIR 1990 Ker. 190. The

Division Bench noted with approval the passage in *Street v. Mount Ford*, (1985) 2 All ER 289, by Lord Templeman which reads as follows:

'Parties to an agreement cannot contract out of the Rent Acts; if they are able to do so the Acts would be a dead letter because in a state of housing shortage a person seeking residential accommodation may agree to anything to obtain shelter. The Rent Acts protect a tenant but they do not protect a licensee. Since parties to an agreement cannot contract out of the Rent Acts, a document which expresses the intention, genuine or bogus, of both parties or of one party to create a licence will nevertheless create tenancy if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy'.

13. The Supreme Court has also held that where the owner of the premises and the person in need of the premises execute a deed labelling it as a licence deed to avoid the operation of rent legislation the mask is to be removed or the 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. But the Supreme Court makes it clear that this enquiry can be made only when it is pleaded that the deed executed between the parties is a camouflage to evade the provisions of the Rent Act or that it is a sham document executed for achieving some other purposes. In the absence of such pleading and proof the intention of the parties is to be gathered from the express words used in the document. In the written statements in both the cases there is no plea that the documents were written as a licence to see that the provisions of the Rent Act are not made applicable. In the written statement in O.S. 466/1992 it is stated that the reason for writing the document as a licence is to avoid stamp duty. In the written statement in O.S. 2002/1990 there is no contention that the document was created to avoid the provisions of the Kerala Buildings (Lease and Rent Control) Act and that the intention was to have a landlord tenant relationship. In O.S.466/1992 the second defendant admitted that Ext. A1 is a true document. He also admitted that after 3 years of Ext.A1 he had requested to convert it as a lease deed. But the landlord did not permit. It is therefore clear from the above deposition of DW1 that at the time of Ext.A1 parties did not intend the arrangement to be one of tenancy.

14. Learned counsel for the appellants contended that since the landlord stated that the premises is required for the bonafide need of the landlord it shows that the transaction was a lease as there was no necessity to put forward such reason for terminating the licence if it was only a licence. This contention has no force as the property is situated in an area where the Rent Control Act applies and if eviction was to be sought on the ground of bonafide need on the basis that the relationship is one of landlord and tenant the landlord would have approached the Rent Control Court and not the Civil Court. Similarly the use of the word 'vadaka' in Ext.B1 letter also will not be conclusive of the arrangement between the parties. Ext.B1 in O.S.2002/1990 is only an authorisation letter executed by Ammukutty Ammal in favour of the plaintiff in that suit. Merely because the word 'vadaka' is used in that letter it cannot be concluded that the arrangement is one of tenancy. In *Suhas Yeshwant Chopde v. Sachhidanand D. Purekar*, 1999 (5) SCC 721, the Supreme Court made it clear that the mere use of the word 'rent' is not conclusive and does not convert a licence agreement into a lease. In *Ayurvedic Oushada Nirmana Vyavasaya Co-op. Ltd. v. Abraham*, 1987 (1) KLT 853, a Division Bench of this Court held that even in cases where transfer of possession is exclusive, it need not necessarily be an indication of the creation of a lease for even in a licence there should be some transfer of possession. Exclusive possession is by no means decisive, of a lease. Learned counsel for the appellants also contended that in O.S.2002/1990 the defendant had produced Ext.B4, a partition deed by which the plaintiff acquired right over the plaint schedule property. In that it is stated that the allottees have got the right to evict lessees from the rooms given on lease. It cannot be said that such a recital is conclusive of the relationship between the parties to the said litigation as the statement in Ext.B4 partition deed is with respect to the lessees in general in occupation of the premises owned by the landlord. The question whether a particular transaction is a lease or licence cannot be considered on the basis of the language used in Ext.B4 partition deed.

15. The questions of law formulated in S.A.205/1999 read as follows:

a) When execution of Ext.A1 was denied by the defendant and when no attesting witness to that document was examined, were the courts below correct in comparing the signatures in Ext.A1 and other documents and arriving at a decision

that Ext. A1 was executed by the father of the defendant, without getting an expert opinion of the handwriting expert?

b) In view of admissions contained in Ext.B1 and B4 by the mother of the plaintiff and plaintiff that the entrustment was a lease and not a licence, were the courts below correct in relying on Ext.A1, a disputed document?

c) When the period of Ext. A1 is three years and no fresh licence deed was executed even according to the plaintiff and when holding-over is inconsistent with a licence entrustment, were the courts correct in finding that the licence continued after 3 years?

d) Is it the nomenclature in a document that determines the nature of the transaction or is it the intention of the parties and the attending circumstances that determines the nature of the transaction? In view of the public policy contained in rent control legislations, were the courts correct in holding that the transaction was a licence and not a lease?

e) When the alleged licence arrangement was for three years as per Ext. A1 and when the licence was not renewed, cannot the licence be deemed to be revoked as per Section 62(c) of the Indian Easements Act? If that is so, can a suit for mandatory injunction will lie? Is not a suit for recovery of possession the proper remedy available to the plaintiff?

f) Were the courts correct in placing credence on the self-serving, interested testimony of the plaintiff and her witness?

The questions of law formulated in S.A.887/99 read as follows:

a) Going by the principles laid down in the decision of this Court reported in AIR 1990 Ker. 190, were the courts below correct in finding that Ext. A1 is a licence deed and not a lease deed, especially when there is no evidence to show that the parties treated it as a licence?

b) When Exts.B1 and B2 contain admissions to the effect that the entrustment is lease and not licence, were the courts below correct in not accepting the

admissions and dismissing the suit? Are not admissions provide best evidence and are not the courts bound to accept it?

c) Is holding over consistent with a licence? If not can the entrustment be held as licence when the plaintiff admits that there is holding over after expiry of the term of 3 years shown in Ext. A1?

d) When landlords will try to sabotage the benefits of rent legislation, should not courts be vigilant to protect the rights of the weaker sections of the society? Viewing from this stand point were the courts correct in decreeing the suit?

e) Were not the appreciation of evidence by the courts below perverse?

16. In the light of the above discussion the questions of law formulated in S.A.887/1999 can be considered. The first question of law formulated is with regard to the correctness of the finding that Ext.A1 is a licence in the light of the Division Bench decision reported in AIR 1990 Ker. 190. As already stated in the earlier paragraphs though the court is entitled to remove the mask and find out whether the parties has contracted out of the Rent Act the same can be considered only if they are sufficient pleadings to that effect in the written statement. Ordinarily the document has to be interpreted on the basis of the words used in the document even to find out the intention of the parties. It is only in cases where specific contention is raised that the document was intentionally styled as a licence to get out of the Rent Control Act that such contention can be considered in the suit. As already noted there is no such contention raised in the written statement.

17. The next question of law framed is with regard to the non acceptance of the so called admissions in Exts.B1 and B2. Ext.B1 is the partition deed which recites about the creation of tenancies regarding the properties involved in the partition. I have already found that the recitals in the partition deed will not by itself show that the transaction between the parties is one of lease and not of licence. Ext.B2 is the authorisation given by the original owner of the property to the plaintiff authorising her to collect rent. Merely because the word rent is used in Ext.B2 it will not make the transaction a tenancy in the light of the decision of the Supreme Court referred

to earlier.

18. The 3rd question of law framed is with regard to the continuation of the arrangement between the parties even after the period of licence. The contention is that there is no holding over with respect to a licence and it is possible only with respect to a lease. The mere fact that the tenant continues in possession on the basis of the agreement between the parties even after the period of the agreement it cannot be said that the arrangement is one of lease if as a matter of fact originally it was only a licence. The other questions of law framed in the memorandum of second appeal have already been discussed. In the light of the above discussion there is no sufficient ground to interfere in the second appeal. S.A.887/1990 is only to be dismissed.

19. The first question of law framed in S.A.205/1999 is with regard to the denial of execution of Ext.A1 and not sending Ext.A1 for expert opinion. The trial court found that PW2, the brother of the plaintiff proved the execution of ExtA1. More over the defendant only denies the execution of Ext. A1 by his father. The possession of the property by the defendant as the legal heir of the father is not in dispute. He has no other document to produce in support of his possession. His claim is only one of oral lease. In the circumstances the trial court and the appellate court were justified in finding that Ext.A1 was a genuine document and nothing has been argued before me to show that Ext.A1 is not a genuine document.

20. With regard to the second question of law framed I have already found that the so called admissions in Exts. B1 and B4 are not conclusive and they are not admissions at all.

21. The third question is with regard to the possibility of holding over in the case of a licence. Merely because the plaintiff did not take any step immediately after three years that will not convert the licence into a lease if it was otherwise a licence. With regard to the 4th question whether the nomenclature of the document is decisive or not I have already found that it is not decisive and it is the intention of the parties and the attending circumstances that determine the nature of the transaction.

22. The next question of law formulated is with respect to Section 62(c) of the Indian Easement Act. The contention is that since the period of licence has expired it is deemed to be, revoked and the further possession can only be as a lessee. The trial court has found that the period of licence is not limited to 3 years as per Ext. A1. The only stipulation is that the licence cannot be terminated for a period of 3 years and it can be terminated at any time thereafter after giving notice to the grantee. Therefore Section 62(c) of the Indian Easements Act is not attracted in the present case. In view of the above discussion the questions of law formulated are not found to be substantial questions of law requiring interference in second appeal and therefore the second appeals are dismissed.

Learned counsel for the appellants has requested some time to vacate the premises. Three months time is granted from today on condition that the appellants pay the entire arrears of licence fee and file an undertaking before the trial court to unconditionally surrender the premises on or before the expiry of three months from today. The undertaking should be filed and arrears of licence fee deposited within one month from today.

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