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P. Narayanan Vs. the Managing Director, Kerala Health Reserach and Welfare Society

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Court : Kerala

Decided On : Nov-15-1990

Reported in : AIR1991Ker306

Judge : S. Padmanabhan, J.

Acts : [Easements Act, 1882](#) - Sections 52; [Transfer of Property Act, 1882](#) - Sections 105

Appeal No. : S.A. No. 957 of 1986E

Appellant : P. Narayanan

Respondent : The Managing Director, Kerala Health Reserach and Welfare Society

Advocate for Def. : M.N. Venkitachalam, Adv.

Advocate for Pet/Ap. : V.R. Venkatakrishnan, Adv.

Disposition : Appeal dismissed

Judgement :

S. Padmanabhan, J.

1. The coffee stall of the Kerala Health Research and Welfare Society in the payward attached to the District Hospital, Manjeri is intended to cater food solely to in-patients, by-standers and members of staff through contractors. Appellant (plaintiff) was the contractor for three years from 10-3-1976. The document is Ext. B2. It is styled as a lease and the rent fixed is Rs. 125/-per month, Sub-letting is prohibited. Catering had to be in conformity with the standards fixed by the Government, under the supervision and control of the Superintendent of the District Hospital regarding sanitation, quality of food, etc. Right to cancel the licence and close the stall, at any time, was also reserved with him. When the term was about to expire, the appellant was served with notice to vacate. Then he filed the suit for injunction against eviction except in accordance with the provisions of the Buildings (Lease and Rent Control) Act. He claims to be a lessee. Contention is that he is only a licensee.

2. Both the courts below found that he is only a licensee. The suit was dismissed and the decision was confirmed in appeal. The only question for consideration is whether Ext. B2 evidences a lease or licence. The present suit helped the appellant to continue for more than eleven years after the term was over.

3. The nomenclature of Ext. B2 as a lease deed, provision for payment of rent, prohibition against subletting and exclusive possession claimed under Ext. B2 are the factors alleged in support of the plea that the transaction is a lease coming under the provisions of the rent control legislation. But, in raising that contention, the appellant overlooked certain facts probably in his anxiety to cling on to the profitable arrangement at any cost. He was not given the stall on rent. What was given was only the right to run the coffee stall for three years. What is termed as rent is the licence fee for the permission. He could use the stall only for preparing and catering food to the specified class of persons and that too only according to specifications regarding the items of food, their quality and sanitation. That is also subject to the control, by periodical inspection, by the Superintendent, who was given the liberty to cancel the arrangement at any time and close the stall. Whatever be the wordings in Ext. B2, it is clear from the provisions that it was intended only as a permission to use the stall for preparing and catering food for the limited period to specified class of persons under the control of the person,

who gave the permission.

4. Lease of immovable property is a transfer of the right to enjoy such property in consideration of price paid or promised. Licence is only a right to do or continue to do in or upon immovable property something which would, in the absence of such right, be unlawful. So also, such rights should not amount to an easement or interest in the property. Licence does not create any estate or interest in the property. It is true that there cannot be any litmus test to distinguish a lease from a licence. The operative intention of the parties, evident from the document and attendant circumstances, must solve the issue. If interest in immovable property is created entitling enjoyment, it is a lease. If permission to use the land without any exclusive possession alone is given, it is only a licence. Creation of right in immovable property coupled with the right to exclusive possession is the main factor that distinguishes a lease from a licence. The substance and effect of the agreement, as distinguished from its form, is the deciding factor. The document has to be considered as a whole fairly and reasonably. Licence is only a personal privilege as distinguished from the interest in property created under a lease coupled with exclusive possession.

5. The decisions in Board of Revenue v. A.M. Ansari (AIR 1976 SC 1813), KunkaKurup v. Lakshmikutty Amma (1984 KLJ 786), Moideenkutty Haji v. Muhammedali (1987 (2) KLT 994), Permanand Gulabchand and Co. v. Mooligi Visanji, 1989 (2) KLJ 425 : (AIR 1990 Ker 190), Mrs. M.N. Clubwala v. Fida Hussain Saheb (AIR 1965 SC 610) and Nanik Swatrai Chainani v. Union of India, 1970 (2) SCC 321 : (1971 Cri LJ (NOC) 10) were cited before me. I do not wish to refer to these decisions individually. Individual decisions may project certain legal principles necessary and relevant for the facts of cases involved. Those principles may not be applicable to the facts of other cases. I do not think that the sum and substance of any of these decisions will go against what I have stated in the previous paragraph.

6. Licence is revocable at will except in cases covered by Section 60 of the Indian Easements Act. Section 62 enumerates the circumstances under which a licence is deemed to be revoked. It is true that Ext. B2 was inartistically drafted and

probably the drafting was by an inexperienced person. As to whether a transaction creates a lease or a licence is always a question of fact depending upon the intention of parties, which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential, therefore, to look to the substance and essence of the agreement and not to its form. The nomenclature of the document or the usage of the word 'rent' may not be decisive. These words must give way to the real intention gatherable from the document as a whole and the attendant circumstances. Different clauses in the document should be harmoniously construed. It has to be found out which is the leading provision and which is the subordinate one. Even exclusive possession could only be prima facie considered in favour of tenancy, but circumstances may even then negative an intention to create a lease. As held in *Mrs. Clubwala's case* (AIR 1965 SC 610), exclusive user of a stall during specified time necessary for the purpose does not mean a right to use when he chooses. That is the position in this case also. Here, exclusive possession itself is not there and what is given is only a permission though exclusive user of the stall may be necessary to avail of the permission. That itself is subject to control. Exclusive possession is not conclusive evidence of a lease and it will evidence a lease only if it is coupled with an interest in immovable property.

7. While it is true that the essence of a licence is that it is revocable at will of the grantor, the provision in the licence that the licensee is entitled to a notice before being required to vacate is not inconsistent with a licence. The mere necessity or giving such a notice would not indicate that the transaction was a lease. That is the law laid down in *Mrs. Clubwala's case* (AIR 1965 SC 610). Licence will be deemed to be revoked under Section 62(c) of the Easements Act when it is granted for a limited period. That decision as well as the one in *Nanik Awatrai Chainani's case* (1970 (2) SCC 321 ; 1971 Cri LJ (NOC) 10) are almost similar on facts to the present case. What is involved here is also only the contractual right of a bare licence. Subject to the terms of Ext. B2. The appellant cannot claim any right outside or beyond the terms of Ext. B2. The terms expressly reserved to the Superintendent exercise power of directing and regulating the appellant's user and its manner. The purpose of Ext. B2 was to afford amenities to specified class of

persons and retain overall power with the Superintendent. The only right the appellant could claim under Ext. B2 is the right to run the coffee stall subject to all the restrictions and control. It is only a licence within the meaning of Section 52 of the Indian Easements Act.

8. Though the trial Court awarded costs, the Appellate Judge directed costs to be suffered. I do not think that the Appellate Judge was justified. But there is no appeal or cross objection.

Second appeal is dismissed with costs.

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