

Durjendra Krishna Vs. K. Shaw

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Court : Kolkata

Decided On : Mar-06-1952

Reported in : AIR1953Cal147,56CWN671

Judge : K.C. Das Gupta and ;Bachawat, JJ.

Acts : West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 - Section 9; ;[Transfer of Property Act, 1882](#) - Section 105; ;[Easements Act, 1882](#) - Section 52

Appeal No. : Civil Revn. Case No. 2610 of 1951

Appellant : Durjendra Krishna

Respondent : K. Shaw

Advocate for Def. : P.C. Mallick, ;T. Dastidar and ;Kanti Charan Basu, Advs.

Advocate for Pet/Ap. : Atul Chandra Gupta and ;Provas Chandra Basu, Advs.

Disposition : Appeal allowed

Judgement :

K.C. Das Gupta, J.

1. The opposite party K. Shaw filed an application before the Rent Controller for standardisation of rent for what he claimed was held by him as a tenant under the

present petitioner, viz., a portion of , the roof and parapet of 1 R.G. Kar Raod, Calcutta, where admittedly the opposite party displayed an advertisement by fixing a hoarding on a portion of the roof and the parapet. The petitioner raised an objection that this was no case of lease but that the opposite party K. Shaw was a mere licensee and not a lessee and accordingly the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 were not available to him.

The learned Rent Controller accepted this contention and rejected this application on this ground. On appeal the learned Subordinate Judge held that this was not a case of mere license and that the paramount intention of the parties was to create a tenancy in respect of the roof and that the grantee was in the position of a tenant. He accordingly allowed the appeal and remanded the case to the Rent Controller with a direction for disposing of the application for standardisation of rent in accordance with law.

2. It is contended before us by Mr. Atul Chandra Gupta on behalf of the petitioner that on a proper interpretation of the documents that are produced and the evidence on the record it should be held that there was no demise and that only a license was granted to the opposite party and that the opposite party K. Shaw was not a tenant within the meaning of the Transfer of Property Act or within the meaning of the West Bengal Premises Rent Control Act, 1950.

3. There is no dispute before us as regards the principle to be applied in deciding whether a person is a lessee or a licensee. The principles were laid down recently by their Lordships of the Privy Council in -- 'H.E. Wijesuriya v. Attorney. General for Ceylon' in (1950)A.C. 493. In that case their Lordships had to consider whether the provisions in a permit to be given to the appellant to tap and take the produce of the rubber trees on certain Crownlands created a lease or a license.

Their Lordships observed:

'The decisive test is whether on its true construction the effect of the document is to give exclusive possession to the holder of. the so-called permit; and, adopting this test, they are of opinion that all that is granted by the document is the right to

tap and take the produce of the rubber trees within, a defined area together with such rights of occupation or possession and other ancillary rights as are necessary to make the primary right effective. They find nothing in the document which would exclude the Crown or its officers from entering on, and making such use of, the land as might be thought fit, subject only to the limitation that in doing so they must not derogate from the rights granted to the grantee.'

This test, it may be mentioned, has been applied in a large number of English cases and on the basis thereof it has been held that an agreement to allow advertisement to be displayed or hoardings to be fixed on a part of a building does not create a lease but only grants a license. In -- 'Wilson v. Taverer'. (1901) 1 Ch. D. 578, there was an agreement in writing by which the defendant agreed to let the plaintiff erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable end for a bill-posting station at a yearly rent payable on the usual quarter-days from the then ensuing quarter day. Joyce J. held that there was no demise or lease and that the relationship of landlord and tenant was never created between them. The effect of the document was to give the plaintiff a license.

In -- 'Frank Warr & Co. Ltd. v. London County Council', (1904) 1 K. B. 713, the Court of Appeal held, on the construction of a contract made between the lessees of a theatre and the plaintiffs by which it was agreed that the plaintiffs should have the exclusive right for a term of years to supply refreshments in the theatre and for that purpose should have the necessary use of the refreshment rooms, bars and wine cellars of the theatre and that they should have an exclusive right to advertise, and let spaces for advertisements, in certain parts of the theatre, that the contract did not confer on the plaintiffs an interest in land which could form the subject of compensation under the Lands Clauses Consolidation Act, 1845. Collins M.R. pointed out that though the word 'let' was used, the subject-matter of the letting was so defined as most carefully to exclude the idea that any interest in land was to be given,

Romer L. J. referring to certain parts of the agreement which related to the use of the cellars and the right to advertise and let space for advertisement in certain parts of the theatre stated,

'To my mind it is clear that they create nothing more than a licence properly so-called. The agreement for use of the cellars does not necessarily involve that the possession of them is given to the plaintiffs, and therefore does not amount to the grant of an interest in the cellars. Similarly, I think the agreement for the use of parts of the premises for advertisements does not import a grant of the walls or any part of the premises.'

In -- 'King v. Alien & Sons, Billposting Ltd', (1916) 2 A. C. 54, where by an agreement in writing the defendants gave the plaintiffs permission to affix posters and advertisements to the flank walls of a picture house proposed to be erected on his property for a period of 4 years, the House of Lords held that the agreement did not create an interest in land but created merely a personal obligation on the part of the licensor to allow the licensees the use of the wall for advertisement.

4. Mr. Mullick appearing for the opposite party did not challenge the correctness of the view that if the right he obtained from the present petitioner was nothing more than the right to fix hoardings for the purpose of advertisements he was a mere licensee. Mr. Mullick has argued, however, that in this case the documents clearly show that he did obtain something more than the right to affix hoardings for advertisement and in fact he obtained exclusive possession of a portion of the roof. We have examined carefully the documents and the evidence given by his client and are unable to accept the argument. There is no agreement in writing as regards what rights were created. The earliest document is the letter dated the 29th December 1939.

There, giving reference to a previous letter of Mr. Shaw, the Receiver of the estate wrote in these words:

'The roof of premises No. 1, R.G. Kar Road, (Shambazar Market) between the two gates on both side of the Nahabatkhana is let out to you from 15-1-1940 to 14-1-1941 at a rent of Rs. 200/- (Rupees two hundred) only to be paid before the 15th January next.'

It mentioned also that the receipt was being enclosed. Looking at the receipt which is exhibit 2, we find it mentioned there that the amount was being received at an

annual rent 'being the part payment for allowing him to put up advertisement on the roof of 1, R.G. Kar Road, Calcutta'. A later receipt is dated 1-2-1941 and has been marked Exhibit 2 A. There also it is said that the amount was received for allowing him to put up advertisement on the roof of 1, R.G. Kar Road, Calcutta. In both these receipts there is a statement. 'The space let out is between the two gates on either side of the Nahabatkhana', and the receipt dated 18-1-1943 is also in almost exactly similar words.

The opposite party in his own evidence in court stated in examination-in-chief that he took the advertisement space from 15-1-1940 though in cross-examination he improved on it by saying that he 'occupied' the roof and parapet between the two gates. Reading the oral evidence and these documents carefully I have come to the conclusion that no right was granted to the opposite party, of exclusive possession of any portion of the roof or the parapet and all that he obtained was the right to fix hoardings for displaying advertisement. Applying the principles laid down by the Privy Council in -- 'H.E. Wijesuriya v. Attorney General for Ceylon', (1950) A C 493, I hold, therefore, that the opposite party K. Shaw was a mere licensee and not a tenant.

5. The question next arises is whether the provisions in the West Bengal Premises Rent Control Act, 1950 as regards standardisation of rent are available to such a licensee. Mr. Mullick has drawn our attention to the definition of the word 'premises' and 'tenant'. In Section 2 of the Act, the tenant is denned as any person by whom rent is or but for a special contract would be payable for any premises. The relevant portion of the definition of 'premises' is in these words, 'Premises means any building or part of a building or any hut or part of a hut let separately.' It is argued by Mr. Mallick that the word 'rent' should be taken to have been used not in the strict sense of payment for a demise but in the sense of payment for the grant of any right whether it is in the nature of a license or a demise.

While we are conscious that the word 'rent' is sometimes used in a loose sense to include payments for grants other than demise, there seems nothing in this Act to indicate that the word 'rent' has been used here in that wider or loose sense. On the contrary the definition of the word 'premises' gives reason to think that unless

there has been a demise, the provisions of standardisation of rent will not apply. The important word to notice here is the word 'let'. It was concluded by Mr. Mallick that the ordinary use of the word 'let' is in the sense of demise. I think it is not at all usual to speak of a building or part of a building being let, merely because something is allowed to be done on the premises. After careful consideration I am unable to accept Mr. Mallick's argument that the provisions of standardisation of rent are available to a licensee, like the opposite party K. Shaw who has obtained a mere right to do something on the premises without obtaining any interest in the premises.

6. I have accordingly come to the conclusion that the opposite party's application for standardisation of rent is not maintainable in law.

7. Accordingly I would set aside the order order passed by the learned Rent Controller. The petitioner will get his costs of this Court and the court of appeal below--the hearing fee being assessed at two gold mohurs.

Bachawat, J.

8. Section 105, T. P. Act, shows that a lease of immovable property is a transfer of a right to enjoy such property, on the other hand Section 52, Easements Act, shows that a license is the grant of a right to do or continue to do in or upon the immovable property of the grantor something which 'would in the absence of such right be unlawful where such right does not amount to an easement or an interest in the property. Regard must be had to the substance of the transaction and not to its form in order to determine whether there is a license. The transaction is a transfer of a right to enjoy the property and a lease if there is a grant of the right to use the property coupled with exclusive possession and it matters not that this right is subject to reservations and restrictions. On the other hand the grant of a bare right to use the property unaccompanied by the grant of a right of exclusive possession is a license. The licensee of course has such right of occupation as will make the grant of the license effective. But the licensee has no right of exclusive possession and he is not entitled to exclude the grantor from, using the property without derogating from his grant.

9. If exclusive possession of the property is not given to the grantee, the transaction though; described as a lease will not operate as a lease but will operate as a license.

10. The evidence in this case read as a whole shows that there was a grant by the owner of the premises to the respondent of a right to display advertisement in a hoarding in the space of the outer wall between two gates coupled with a right to rest the hoarding on the parapet and a right to fix pillars on the roof for the purpose of securing the hoarding. The grant of such right is not a transfer of any known interest in land. There is no transfer of exclusive possession of any portion of the premises to the grantee. The transaction in substance amounts to the grant of a bare license or privilege to do on the premises something which in the absence of such privilege would have been unlawful.

11. There is no doubt that a licensee cannot apply for fixation of standard rent under Section 9, West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. No premises has been let to him either in whole or separately and he is not a tenant entitled to apply under that section.