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Court : Kolkata

Decided On : Jul-21-2005

Reported in : AIR2005Cal295,2005(4)CHN99

Judge : Bhaskar Bhattacharya and ;Rajendra Nath Sinha, JJ.

Acts : [West Bengal Premises Tenancy Act, 1997](#); ;Indian Penal Code (IPC) - Section 196; ;Code of Criminal Procedure (CrPC) - Section 340; ;Code of Civil Procedure (CPC) - Order 39, Rules 1 and 3

Appeal No. : F.M.A.T. Nos. 1335, 1345 and 1476 of 2005

Appellant : Ayan Chatterjee and Etc.

Respondent : Future Technology Foundation Inc. and ors.

Advocate for Def. : Jayanta Mitra, ;Subrata Nayek, ;Amal Krishna Saha, ;S.P. Roy Chowdhury and ;Aniruddha Chatterjee, Advs.

Advocate for Pet/Ap. : Sudhis Dasgupta, ;Jiban Ratan Chatterjee, ;S.P. Mukherjee and ;Hiranmoy Bhattacharyya, Advs.

Judgement :

Bhaskar Bhattacharya, J.

1. All these three first miscellaneous appeals were taken up together as these are preferred against the self-same order being order dated 6th April, 2005 passed by the learned Civil Judge, Senior Division, 9th Court, Alipore in Title Suit No. 3 of 2005 thereby disposing of an application under Order 39, Rules 1 and 3 of the Code of Civil Procedure filed by the plaintiff by directing the parties to maintain status quo over the suit property with a finding that the plaintiff is in possession of the same and that the defendant No. 2 failed to prove that he was in possession of the property in his personal capacity.

2. F. M. A. T. No. 1335 of 2005 has been filed by defendant No. 2, F. M. A. T. No. 1345 of 2005 has been preferred by defendant No. 1 and the plaintiff has come up with a separate appeal being F. M. A. T. No. 1335 of 2005 against the said order.

3. The plaintiff filed a suit in the 9th Court of Civil Judge, Senior Division, Alipore being Title Suit No.3 of 2005 thereby praying for declaration that the plaintiff was a tenant under defendant No. 1 in respect of the suit property and for permanent injunction restraining the defendant Nos. 1 and 2, their servants and agents from interfering with the peaceful possession of the plaintiff in the suit property as also of its furniture, fixture and computer and other equipments kept therein in any manner whatsoever. The plaintiff prayed for further declaration that the defendant No. 2 had no right to operate the bank account of the plaintiff being current account No. 0029-136274-050 with the Gariahat Branch of defendant No. 3. The plaintiff further prayed for mandatory injunction directing defendant No. 3 to allow the plaintiff and/or the individual authorised by the plaintiff to operate the said bank account.

4. The case made out by the plaintiff may be epitomised thus :

(a) The plaintiff is a Corporation incorporated under the appropriate law of the State of New Jersey, United States of America and is carrying on business of imparting Information Technology Education and Training and 'contract staffing solutions' to their clients across the U.S.A.

(b) The plaintiff being interested in opening a branch in Kolkata for the purpose of its business duly applied to the Reserve Bank of India for such permission and

appointed defendant No. 2 as the Chief Executive Officer in relation to its affairs in India and granted him a power of attorney authorising to represent the plaintiff.

(c) Ultimately, the Reserve Bank of India granted permission under the Foreign Exchange Management (Establishment in India of a branch or office or other place of business) for establishing branch of its Office in India at Kolkata.

(d) The defendant No. 1 is the owner of the premises No. P-87, Lake Road. After coming to learn that the said defendant was in search of a tenant for induction in the flat No. 4, on the first floor of the said premises, the plaintiff inspected such premises and found the same suitable for the purpose of locating its Kolkata Branch Office.

(e) On discussions between the plaintiff and defendant No. 1, it was agreed that defendant No. 1 would grant tenancy in favour of plaintiff in respect of the said flat for a period of five years with effect from 1st April, 2003 at a monthly rent of Rs. 12,000/- a month.

(f) Subsequently, defendant No. 1 informed the plaintiff that he was advised that in formal document that would to be executed, the relation between the parties should be described as that of licensor and licensee and that the said document should reflect that such licence was granted for a period of less than one year with a renewal clause incorporated therein.

(g) The defendant No. 1, however, assured the plaintiff that the wrong description of the plaintiffs tenancy as a licence in the said agreement would not in any way affect its right as a tenant and he also undertook to enter into identical agreements year after year for five consecutive terms on identical terms and conditions,

(h) The defendant No. 1, accordingly, prepared the agreement and requested the defendant No. 2, the constituted attorney of the plaintiff, for his signature. The said agreement was signed by the defendant No. 1 on 21st April, 2003. The said agreement contained some typographical mistakes, for instance, the term 'licensor' was wrongly described as licensee.

(i) The defendant No. 1 also represented to the plaintiff that for the purpose of assisting him in reducing excessive corporation taxes, the rate of rent/licence fee of Rs. 12,000/- should be broken up into two parts and described as Rs. 8,000/ - towards rent/ licence fees and Rs. 4,000/- towards miscellaneous expenses. The plaintiff with the object of assisting the defendant No. 1 agreed to such proposal.

(j) The plaintiff had been duly making payment of rent to defendant No. 1 in terms of the agreement of tenancy and in the receipts the same is described as licence fee.

(k) Upon expiry of the terras recorded in the agreement dated 15th April, 2003, the defendant No. 1 in compliance with his undertaking, executed another agreement dated 16th March, 2004 containing identical terms and conditions and the said agreement dated 16th March, 2004 recorded that the same was for the period of eleven months expiring on 15th February, 2005.

(l) The defendant No. 2 on the strength of the Power, of Attorney granted to him by the plaintiff had been looking after all the affairs of the plaintiff in India and had been entering with and signing agreements on behalf of the plaintiff with various parties including the defendant No. 1

(m) The defendant. No. 2 on the basis of the said Power of Attorney granted to him by plaintiff had also opened Current Account with the defendant No. 3 bank in the name of the plaintiff and had been operating the same.

(n) Shri Buddhadeb Gupta, the Chief Executive Officer of the plaintiff arrived in India on last November, 2004 and while going through the accounts of Kolkata Branch, various financial and other irregularities committed by the defendant No. 2 were discovered in the month of January, 2005. The defendant No. 2 was unable to furnish any explanation to those irregularities.

(o) In the circumstances, the plaintiff by its letter dated 10th January, 2005 terminated the employment of the defendant No. 2 with immediate effect and also revoked the Power of Attorney earlier granted in his favour and such letter was delivered to defendant No. 2 on 10th January, 2005.

(p) After going through the contents of the said letter, the defendant No. 2 used abusive language towards Shri Buddhadeb Gupta, the Chief Executive Officer of the plaintiff and gave out that he had already obtained the consent of the defendant No. 1 to transfer the tenancy of the plaintiff in respect of the suit property in the name of the defendant No. 2. The defendant No. 2 further threatened the plaintiff that he would claim ownership of all furniture, fixtures, computers and other equipments lying in the suit property and the plaintiff being a foreign company with no other office or managerial staff in India, would not be able to resist such acts of defendant Nos. 1 and 2.

(q) The plaintiff also informed the defendant No. 3 the fact of revocation of the power of attorney and requested the defendant No. 3 not to allow the defendant No. 2 to operate bank account of the plaintiff and to supply the plaintiff with copies of the Bank Statements in respect of the period mentioned in the said letter. The defendant No. 3, however, refused to act on such instructions in regard to the said account unless such instruction is signed by the defendant No. 2 who was named as the authorised signatory in respect of such account. In view of the aforesaid activities of defendant Nos. 1 and 2 the plaintiff had filed the aforesaid suit.

5. On the basis of the self-same allegations, the plaintiff filed an application for temporary injunction restraining the defendant Nos. 1 and 2 from causing any disturbances to the running of the business of the plaintiff from the suit property till the disposal of the suit together with an ad interim order of injunction till the disposal of the petition.

6. The learned trial Judge issued notice upon the defendant Nos. 1 and 2 to show-cause why the prayer of the plaintiff should not be granted but refused to grant any ad interim order of injunction.

7. Both the defendant Nos. 1 and 2 entered appearance in the suit and filed written objection to the application for injunction filed by the plaintiff and the objection filed by the defendant No. 1 may be summarised thus :

(i) The claim of the plaintiff that it was incorporated under the laws of United States of America and was a tenant in respect of the property was false. The defendant

No. 1, the landlord and owner of the premises granted licence in favour of defendant No. 2 at a monthly licence fee of Rs. 12,000/- and accordingly defendant No. 2 had been paying licence fees to him without default for the last more than two years. The latest receipt of said licence was issued in favour of defendant No. 2.

(ii) The defendant No. 2 is the licensee under defendant No. 1 and he carried on business along with his employees in the suit property for the last more than two years.

(iii) The last licence agreement executed between the defendant Nos. 1 and 2 expired and from 15th February, 2005, the defendant No. 1 renewed the said agreement with defendant No. 2 for further period in respect of suit property.

(iv) The plaintiff was never a tenant under defendant No. 1 nor was any tenancy agreement executed and the plaintiff never paid any rent to defendant No. 1 either in Indian currency or American currency. All talks of occupation of property were held with defendant No. 2 and the said defendant No. 2 had been carrying on business under the name and style M/s. Future Soft Management Pvt. Ltd. till date.

8. The objections raised by defendant No. 2 were as follows :-

1. The defendant No. 2 is in lawful occupation of the property for the last more than two years and had paid all the outgoings in respect of the suit property to the landlord. The latest receipt issued by the landlord in respect of the occupation of defendant No. 2 was annexed to the objection. Plaintiff was never a tenant in respect of the suit property and Shri Buddhadeb Gupta had never paid any money to the landlord either through Indian or American currency. All talks of occupation of the property suggested by the defendant No. 2 have been approved by defendant No. 1 and neither the plaintiff nor Shri Buddhadeb Gupta had any role to play in the matter. The suit itself is not maintainable as no resolution of the company was forthcoming indicating authority of Shri Buddhadeb Gupta to file the suit against the defendant Nos. 1 and 2. As the plaintiff had no possession in the suit property, the question of its removal did not arise.

9. The plaintiff gave affidavit-in-reply to the aforesaid two objections and in its affidavit-in-reply it was specifically stated that the rent and/or licence fees were all paid by plaintiff through cheques as would appear from the Bank Statements of the plaintiff.

10. Subsequently, the defendant No. 2 filed supplementary affidavits and in one of such affidavits the defendant No. 2 for the first time filed Xerox copy of the alleged leave and licence agreement which indicated that the said agreement was entered into not between the plaintiff and defendant No. 1 but between the defendant No. 1 and defendant No. 2. It may not be out of place to mention here that in the earlier written objections, the copy of the agreement annexed by the plaintiff to the application for temporary injunction was not disputed as a forged one either by the defendant No. 1 or the defendant No. 2.

11. The learned trial Judge by the order impugned herein came to the conclusion that the plaintiff made out a strong prima facie case to have an order of injunction and the documents annexed by defendant No. 2 were all of doubtful nature. The learned trial Judge further found that the original agreement was entered into between the plaintiff and defendant No. 1. The learned trial Judge further came to the conclusion that the plaintiff was running business from the suit property as would appear from various documents filed by the plaintiff and accordingly, granted an order of status quo in the matter of running of the business from the suit property and in the matter of operating bank account as the same existed on the date of passing of the order.

12. As indicated earlier, the aforesaid three appeals have been preferred by the defendant No. 1, the defendant No. 2 and the plaintiff respectively.

13. Mr. Dasgupta, the learned senior advocate appearing on behalf of the defendant No. 2 has vehemently contended before us that the plaintiff being a company incorporated in the United States of America had no actual possession over the property. By relying upon various documents relied upon by his client he wanted to impress upon us that his client was in actual possession of the property and as such, the learned trial Judge acted illegally and with material irregularity in granting an order of status quo in favour of the plaintiff. Mr. Dasgupta contends

that even the agreement relied upon by the plaintiff would show that the same created a mere licence and such licence having expired during the pendency of the suit and fresh licence having been granted by the admitted owner of the building in favour of his client, the learned trial Judge acted illegally in granting an order of status quo in favour of the plaintiff. Mr. Dasgupta contends that at the time of final hearing of the application of injunction, the plaintiff had no subsisting right in the property as his earlier licence agreement had already expired by efflux of time. Mr. Dasgupta submits that the defendant No. 1 having granted fresh licence in favour of his client, the learned trial Judge erred in law in arriving at the conclusion that plaintiff had a strong prima facie case or that the balance of convenience and inconvenience is in favour of granting injunction. Mr. Dasgupta further submits that it appears that plaintiff has started its Branch Office in different places in Kolkata and as such, if the injunction prayed for is not granted, the plaintiff will not suffer any irreparable loss and injury. In support of his contentions, Mr. Dasgupta placed strong reliance upon the decision of the Supreme Court in the case of Delta International Ltd. v. Shyam Sunder Ganeriwala reported in : [1999]2SCR541 and also in the case of Hindustan Petroleum Corporation Ltd. v. Sriman Narayan reported in : AIR 2002 SC2598 . He, thus, prays for setting aside the order impugned and dismissal of the application for temporary injunction.

14. Mr Roy Chowdhury, the learned senior advocate appearing on behalf of the defendant. No. 1 has adopted the versions of Mr. Dasgupta and has contended that his client never recognized plaintiff as a licensee and his client all along got money from defendant No, 2, Mr. Roy Chowdhury further asserts that defendant No. 2 was all along the licensee under his client and as such, the plaintiff could not have any prima facie case to have an order of injunction. Mr. Roy Chowdhury, thus, prays for setting aside the order impugned and rejection of the application for temporary injunction. In support of his contention, Mr. Roy Chowdhury relied upon the following decisions :-

(1) In the case of Dalpat Kumar v. Prahlad Singh reported in : AIR 1993 SC276 ;

(2) In the case of Rame Gowda v. M. Varadappa Naidu reported in : (2004)1SCC769 ;

(3) In the case of Arpan Ali v. Gnanendra Kumar reported in : AIR1945 Cal413 .

15. Mr. Mitra,, the learned senior advocate appearing on behalf of the plaintiff-appellant, however, has opposed the aforesaid contentions of Mr. Dasgupta and Mr. Roy Chowdhury. By referring to the alleged agreements relied upon by defendant No. 2 and defendant No. 1, he points out that the documents relied upon by the defendant Nos. land 2 on a simple perusal will manifest that those were fabricated ones. Mr. Mitra in this connection relies upon the observations of the learned trial Judge as regards genuineness of the agreements filed by the defendant No. 2. Mr. Mitra prayed before this Court for a direction upon the defendant No. 2 to produce the original documents in Court. In view of the discrepancies pointed out by the learned trial Judge in the alleged agreements filed by defendant No. 2, we directed Mr. Dasgupta to produce the originals so that we can verify those documents. Mr. Dasgupta after taking instruction from his client who was present in the Court informed us that pursuant to a criminal complaint lodged by the plaintiff, all those documents have been seized by the Police from the suit premises and as such, his client is not in a position to produce the original agreements. In the same way, Mr. Roy Chowdhury, the learned advocate appearing on behalf of the defendant No. 1 after taking instruction from his client informed us that the original was lying with defendant No. 2 and that the said agreement was not made in duplicate; consequently, his client is unable to produce the original.

16. At this juncture, Mr. Mitra draws our attention to the seizure lists annexed to the paper book and submits that it does not appear from the seizure list that any document was ever seized by the Police and that the defendant Nos. 1. and 2 are deliberately withholding those documents lest their fraudulent transactions are detected before this Court.

17. In support of the appeal preferred by the plaintiff, Mr. Mitra submits that undisputedly, money was taken by cheques issued from the account of the plaintiff and the money receipt granted by defendant No. 1 would show that money was

received not from the defendant No. 2 but from the plaintiff. According to Mr. Mitra, the learned trial Judge having specifically come to the conclusion that plaintiff has a strong prima facie case, ought to have passed an order for mandatory injunction directing dispossession of the defendant No. 2 and granting the possession in favour of his client because it is the common case of defendant Nos. 1 and 2 that they have created new agreement after the filing of suit and defendant No. 2 is claiming to be in possession of the property by virtue of such agreement in his personal capacity. Mr. Mitra further contends that the first agreement of April, 2003 itself will show that exclusive possession of the property was given to the plaintiff by virtue of such agreement and the defendant No. 1 had no control over the property and therefore, according to him, the agreement was really for creation of a tenancy and the said agreement was couched as an agreement for grant of licence not only to avoid excessive amount of corporation tax but also to evade the rigour of the rent control legislation. Mr. Mitra, thus, contends that it is a fit case where mandatory injunction should be granted directing either possession in favour of the plaintiff or appointment of a receiver by ousting the defendant No. 2 who is claiming right by virtue of a fresh agreement after filing of the suit. In support of his contention, Mr. Mitra relies upon the following decisions :-

(1) Indian Cable Company Limited v. Smt. Sumita Chakraborty reported in : AIR1985 Cal248 ;

(2) Luganda v. Service Hotels Ltd. reported in (1969) 2 All ER 692;

(3) Films Rover International Ltd. v. Cannon Films Sales Ltd. reported in (1986) 3 All ER 772;

(4) Dorab Cawasji Warden v. Coomi Sorab Warden reported in : [1990]1SCR332 .

18. He, thus, prays for modification of the order impugned by directing appointment of receiver over the property.

19. Both Mr. Dasgupta and Mr. Roy Chowdhury opposed the aforesaid prayer of Mr. Mitra and contended that temporary mandatory injunctions are granted in exceptional cases and in this case, no such exceptional case was made out, Mr.

Dasgupta in this connection relies upon the decision of the Apex Court in the case of Metro Matins v. Bonus Watch Co. Ltd., reported in : (2004)7SCC478 in support of his contention that temporary mandatory injunction should not be granted in the facts of this case. They, therefore, pray for dismissal of the appeal filed by the plaintiff.

20. After hearing the learned counsel for the parties and after going through the materials on record we agree with the learned Trial Judge that the plaintiff has made out a very strong prima facie case to go for trial. We find substance in the contentions of Mr. Mitra that in the agreement annexed to the application for injunction it is specifically recorded that the same was executed between the plaintiff and the defendant No. 1 and the defendant No. 2 was merely the constituted attorney of the plaintiff in the said transaction. From the money receipts granted by the defendant No. 1, it is apparent that advance money was received by defendant No. 1 from plaintiff by cheques and the defendant No. 2 was acting as an agent of the plaintiff. The fact that defendant No. 2 was holding Power of Attorney on behalf of the plaintiff could not be disputed by defendant No.2 and the documents produced by the plaintiff show that the money was taken from the Bank of plaintiff. It is apparent that during the pendency of the suit, the third agreement was executed with effect from March, 2005 between the defendant No. 1 and the defendant No. 2 in his personal capacity.

21. The next question is whether the alleged agreement for licence was really a licence or a lease. In this connection we may profitably refer to the following tests laid down by the Supreme Court in the case of Associated Hotels of India Ltd. v. R. N. Kapur reported in : [1960]1SCR368 :-

'(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.'

22. We further find that by the alleged agreement for licence of the year 2003, exclusive possession had been given in favour of the plaintiff. The plaintiff was even permitted to install new electric meter in its name and was also permitted to make arrangement for the security of the office of the plaintiff. The defendant No. 1 retained no control over the property in dispute. Over and above, after the expiry of the period mentioned therein the said licence was again renewed on the same terms. It is needless to mention that the alleged licence was not revocable earlier even for non-payment of the occupation charge and was binding upon the heirs, executors or even the assignees of the owner. The general rule relating to licence is that a licence comes to an end on the death of the licensor or on transfer of the property by the licensor and such licence is not binding upon either his heirs or assigns. The fact that by the agreement the defendant No. 1 wanted to bind his heirs and assigns itself indicates that the intention of the parties was to create an interest in the property involved. The moment such fact is established, the inevitable conclusion that emerges out is that the agreement was really an agreement for tenancy. From the aforesaid facts, we are prima facie convinced that the intention of parties was not to confer any temporary personal privilege without creating any interest in the property but to create interest in the property in favour of the plaintiff in lieu of payment of money. Therefore, a prima facie case of tenancy has been established. The sole object of the defendant No. 1 was to lighten the corporation tax by showing the occupation charge as Rs. 8000/- though it was really Rs. 12000/-; the difficulty that arose for adopting such fraud was that if the monthly rent comes to Rs. 8000/- a month, the tenancy, even for non-residential purpose, will come within the purview of the West Bengal Premises Tenancy Act and to overcome the severity of the said statute, the tenancy agreement was sought to be passed off as an agreement for licence. Once it is established that a prima facie case of tenancy has been made out, there will be no necessity of extension of the period of tenancy because according to the [West Bengal Premises Tenancy Act, 1997](#) the tenancy for a period of eleven months should be treated as a monthly tenancy and the tenancy would continue so long any decree for eviction is not passed by any competent authority of law unless the tenant surrenders the tenancy in the mean time. Therefore, during the pendency of

the suit the defendant No. 1 could not create fresh agreement in favour of defendant No. 2 unless plaintiff surrendered its possession in accordance with law. We find that during subsistence of the tenancy the suit was filed and the plaintiff prayed for declaration that he was a tenant under defendant No. 1. In such circumstances, there was no necessity of approaching the defendant No. 1 over again for a fresh formal agreement for renewal.

23. We have already found that defendant No. 2 is mere transferee pendente lite in collusion with the landlord and as such, he cannot take advantage of his own wrong. The plaintiff being a company incorporated in United States of America and having employed the defendant No. 2 to run its business, the said defendant No. 2 after termination of service cannot collude with the landlord and retain possession of the property for his own benefit which was so long held by him as the agent of the plaintiff. Once it is proved that defendant No. 2 was an agent of plaintiff, it is his duty to return all the property entrusted to him by virtue of such agency to the plaintiff. Without giving back possession in favour of the plaintiff, the defendant No. 2 cannot legalise his possession so long enjoyed in the capacity of an agent of the plaintiff as his own lawful possession by conspiracy with the defendant No. 1 by virtue of an illegal agreement with the defendant No. 1

24. We, therefore, find that defendant Nos. 1 and 2 have deliberately used forged documents for the purpose of showing that original agreement was between the defendant No. 1 and defendant No. 2. We have already pointed out that when the plaintiff relied upon a copy of the agreement executed in the month of April, 2003 indicating that the agreement was between the plaintiff and the defendant No. 1 in the application for temporary injunction, neither the defendant No. 1 nor the defendant No. 2 ever disputed the veracity of such document; on the other hand, money receipts granted by defendant No. 1 justify the statement of the plaintiff that the agreement was really between the plaintiff and defendant No. 1. We have already noticed that no paper was seized by the Police from the custody of the defendant No. 2 as it appears from the seizure list annexed to the paper book. In such circumstances, we are of the view that the defendant Nos. 1 and 2 have deliberately relied upon those fabricated documents, namely, two agreements for licence for the purpose of getting favourable order in their favour. The alleged

agreement executed in the year 2003 relied upon by the defendant Nos. 1 and 2 shows that the same was signed by the parties on April 15, 2003 whereas the attestation made by the Notary indicates that the same was attested on April 11, 2003 which is physically impossible. The defendant Nos. 1 and 2 have taken recourse to mendacity when they were asked to produce the originals. We have already pointed out that the money receipts granted by the defendant No. 1 acknowledging advance payment of the alleged licence fees by cheques for the period between April, 2003 and July, 2004 leave no doubt that those receipts could not be issued by the defendant No. 1 if the agreement was really between the defendant No. 1 and the defendant No. 2. The money receipt for Rs. 72000/- granted by defendant No. 1 printed at page 28 of the paper book shows that he received the said amount as advance from the plaintiff through its representative viz. the defendant No. 2 as the advance licence fees for the period from 16th April, 2003 to October, 2003. Curiously, the defendant No. 1 has subsequently issued another changed receipt in favour of the defendant No. 1 acknowledging receipt of the selfsame amount for the same period as if the amount is paid by the defendant No. 1 in his personal capacity and not as an agent of the plaintiff. Such receipt is annexed at page 107 of the paper book. The aforesaid receipt is also outcome of fraud committed by the defendant Nos. 1 and 2 upon the Court.

25. We now propose to deal with the decisions cited by Mr. Dasgupta and Mr. Roy Chowdhury.

26. In the case of Delta International Ltd. v. Shyam Sundar Ganeriwalla. reported in : [1999]2SCR541 , the Supreme Court reiterated the principles which are required to be followed for the purpose of determining whether a transaction is lease or a licence. According to the Supreme Court, unless camouflage is alleged or is apparent, the intention has to be gathered from the terms of the agreement between the parties and if the terms are not clear, from the surrounding circumstances and conduct of the parties. It was further held that the document should be construed in accordance with well-established principles and in case of camouflage or attempt to avoid the rigours of any legislation, the mask is to be removed or veil lifted from the self-serving instrument and true intention should be gathered from the relevant circumstances. We have already indicated that in the

plaint the plaintiff has made specific allegation of camouflage contending that for the purpose of avoiding imposition of excessive municipal tax, the document was described as one creating license. We have also pointed out that if the rent of the premises is Rs. 8,000/- a month, the [West Bengal Premises Tenancy Act, 1997](#) would be applicable and as such, the agreement had been couched in the form of a contract conferring licence. After considering the entire materials, we have also come to the conclusion that if the intention was to create a simple licence, the landlord would not have bound his successors or even assigns by the said agreement. Therefore, even by applying the principles laid down in the said Supreme Court decision, it would appear that a strong prima facie case of tenancy has been made out. The said decision, therefore, does not help Mr. Dasgupta in any way.

27. In the case of Hindustan Petroleum Corporation Ltd. v. Sriman Narayan, reported in : AIR 2002 SC2598 , the Supreme Court repeated the well-known principles which are required to be followed before exercising discretion of grant of injunction in favour of a party. It was held therein that the Court should normally exercise discretion in favour of a plaintiff if he can establish a prima facie case and at the same time the balance of convenience and inconvenience is also found in favour of plaintiff and it will further reveal that the plaintiff will suffer irreparable loss and injury if his prayer for interlocutory injunction is not allowed. In the present case, we have found a strong prima facie case in favour of the plaintiff and the balance of convenience and inconvenience is certainly in favour of grant of mandatory injunction in view of the fact that the defendant Nos. 1 and 2 have colluded with each other and have practised fraud upon the Court and in the process, have tried to dispossess a lawful tenant from the property by way of treachery. In such a case, in our view, the Court should pass mandatory injunction in favour of the plaintiff as held by a Division Bench of this Court in the case of Indian Cable Company Ltd. v. Sumitra Chakraborty, reported in : AIR1985 Cal248 . It is rightly pointed out by Mr. Mitra, the learned advocate appearing on behalf of the plaintiff by relying upon the decision of the Supreme Court in the case of Dorab Cawasji Warden v. Commi Sorab Warden, reported in : [1990]1SCR332 that it is a fit case of grant of mandatory injunction against the defendant Nos. 1 and 2. In this case, the defendant Nos. 1 and 2 tried to steal a march on the plaintiff by forging

the original agreement between the parties and by accepting the defendant No. 2 as a new licensee during the pendency of the suit for the purpose of frustrating the relief claimed by the plaintiff and in such a case, temporary mandatory injunction is the appropriate order.

28. In the case of Rame Gowda v. M. Varadappa Naidu, reported in : (2004)1SCC769 , relied upon by Mr. Roy Chowdhury, the Supreme Court laid down as a proposition of law that a settled possession of a trespassers should not be disturbed during the pendency of a suit but in order to get such benefit, such settled possession must be (i) effective, (ii) undisturbed and (iii) to the knowledge of the owner or without any attempt of concealment by the trespasser. In the case before us, we are unable to describe the alleged possession of the defendant No. 2 as a 'settled possession' when from the document creating the grant, it appears that he came into possession as an agent of the plaintiff and subsequently after being terminated from service, he colluded with owner and practised fraud upon the Court by manufacturing documents and tried to get the tenancy in his own name during the pendency of the suit. Such an unfaithful agent should not be permitted to continue possession by taking benefit of his own fraud and in such a case, grant of mandatory temporary injunction is most apposite. Therefore, the said decision relied upon by Mr. Roy Chowdhury is of no avail to his client,

29. In the case of Dalpat Kumar v. Prahlad Singh, reported in : AIR 1993 SC276 , the Supreme Court was considering a case where a vendee entering into agreement to purchase property got the sale deed executed through Court and subsequently a suit was filed by vendor for setting aside sale alleging that vendee being his counsel practised fraud on him. In the meanwhile symbolical possession of property was obtained by vendee and the vendor sought interim injunction from dispossession. In such a case, the Supreme Court held that injunction application should be dismissed as vendor can be adequately compensated on success in the suit. The said decision given in such a fact cannot have any application to the present case where lawful right, title and possession of a party has been disturbed by the defendant Nos. 1 and 2 by practising fraud during the pendency of the suit.

30. In the case of Arpan Ali v. Gnanendra : AIR1945 Cal413 (supra), a Division Bench of this Court reiterated the English law relating to licence pointing out that a licence otherwise revocable may not be revocable for a particular period if there is agreement to that effect on payment of consideration. The Division Bench gave instance of purchasing ticket for witnessing a theatrical performance or enjoying or betting at a race and in those circumstances there is an implied agreement that till the end of the theatrical performance or the race, the licensor cannot revoke the licence of witnessing those performances. We fail to understand how the said decision can be of any help to the defendant No. 1 in this case where the period of the alleged license is eleven month with right of renewal and in the agreement there is no provision for revoking licence earlier even in case of non-payment of occupation charge. The present, case is not a case of grant of alleged licence for a few hours for witnessing some performance. Therefore, the said observation of the Division Bench is of no assistance to the defendant No. 1.

31. In the case of Metro Marins v. Bonus Watch Co. (P) Ltd. (AIR 2005 SC 1444) (supra), a suit was filed for decree for khas possession against the alleged licensee on the ground of expiry of licence period. In such a suit, the plaintiff prayed for grant of interim mandatory injunction for delivery of possession during the pendency of the suit. In such a case, the Supreme Court held that interim mandatory injunction should not be granted nor was appointment of a receiver necessary. In our view, the said decision cannot have any application to the fact of the present case. In paragraph 6 of the Judgment, the Supreme Court relied upon the observation of the earlier decision of the same Court in the case of Dorab Cawasji Warden : [1990]1SCR332 (supra), and pointed out that the relief of interlocutory mandatory injunctions are granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. In the case before us, we have already found that the plaintiff has by production of documents proved that it was the plaintiff who got the right in the property and the owner of the building, during the pendency of the suit has tried to dispossess the plaintiff by colluding with the agent of the plaintiff who has since been terminated from service. Therefore, the

principle laid down in the case of Dorab Cawasji Warden (supra), rather applies to the fact of the present case.

32. None of the decisions cited by the learned counsel for the respondents, thus, helps their clients.

33. We, thus, find that it is a fit case where mandatory injunction should be granted by dispossessing the defendant No. 2 from the suit property who tried to retain his possession initially obtained as agent of the plaintiff by practising fraud upon Court. Both the defendant Nos. 1 and 2 have relied upon fresh agreement of licence granted in favour of the defendant No. 2 during the pendency of the suit in support of the claim of possession of the defendant No. 2 although at the time of the filing of the suit the plaintiff was in lawful possession of the property through its constituted attorney, viz., the defendant No. 2. We have already found prima facie case of tenancy in favour of the plaintiff and as such, without getting possession from the plaintiff by lawful means the defendant No. 1 has thus taken possession through defendant No. 2 and has granted a licence in his favour.

34. We, accordingly, appoint Mr. Pinaki Dhole, a learned Advocate of this Court as a Special Officer who will take possession of the disputed property from the defendant Nos. 1 and 2 after making inventory of the movables lying therein in the presence of the defendant Nos. 1 and 2 and will keep the suit property in his custody till the disposal of the suit subject to the final decision of the suit.

35. The plaintiff will, however, go on paying the amount agreed to be paid to defendant No. 1 as price of occupation, namely, Rs. 12,000/- a month and will also pay the monthly remuneration of the Special Officer which we fix at Rs. 2000/-. Ultimately, if the suit succeeds, the remuneration paid to the Special officer will be borne by the defendant No. 1 and will be adjusted towards future rent.

36. We, thus, dismiss the appeals filed by the defendant Nos. 1 and 2 and allow the one filed by the plaintiff by modifying the order impugned to this extent that a Special Officer should be appointed to take possession of the property and the property will remain in his possession till the disposal of the suit subject to the decisions of the suit. It will be unfair to permit the defendant No. 2 to take

advantage of his wrong by permitting him to enjoy fruit of status quo granted by the learned Trial Judge.

37. The appeals are, thus, disposed of with the above order with costs in favour of the plaintiff which we assess at Rs. 10,000/-to be payable by each of the defendant Nos. 1 and 2 separately to the plaintiff as consolidated costs of these three appeals.

38. The learned Trial Judge is directed to dispose of the suit itself within December 31, 2005 without granting any unnecessary adjournment to either of the parties.

39. After careful scrutiny of the xerox copies of the two agreements and the receipt granted by defendant No.1 in favour of the defendant No. 2 for Rs. 72,000/-, we are prima facie convinced that those are fabricated ones and were relied upon by the defendant Nos. 1 and 2 with the object of defrauding the Court with an eye to obtain favourable order in their favour and as such, they have prima facie committed an offence Under Section 196 of the Indian Penal Code; it is, therefore, expedient in the interest of justice that an enquiry should be made to ascertain whether those documents included in the paper book between pages 107 and 123 are really fabricated ones. We accordingly in exercise of our power conferred Under Section 340 of the Code of Criminal Procedure direct the learned Registrar General of this Court to lodge a complaint, before the appropriate Court against the defendant Nos. 1 and 2 alleging offence under; Section 196 of the Indian Penal Code on the aforesaid facts.

Rajendra Nath Sinha, J.

40. I agree.

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