
(2014) 09 MP CK 0104

Madhya Pradesh High Court (Gwalior Bench)

Case No: WP No. 4047/2011

Kalyan Memorial
Nursing Home

APPELLANT

Vs

Municipal Corporation

RESPONDENT

Date of Decision: Sept. 1, 2014

Acts Referred:

- Madhya Pradesh Municipal Corporation Act, 1956 - Section 246, 248, 366
- Transfer of Property Act, 1882 - Section 105, 108

Citation: (2014) 09 MP CK 0104

Hon'ble Judges: S.K. Palo, J; S.K. Gangele, J

Bench: Division Bench

Advocate: Nandita Dubey, Advocate for the Appellant; Deepak Khot, Advocate for the Respondent

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

S.K. Gangele, J.

The petitioners have filed this petition against the notice dated 08-06-2011 (Annexure P-1) and the notice dated 17-06-2011 (Annexure P-2).

2. One Mr. Baijnath Sharma was granted licence by the Municipal Corporation, Gwalior-respondent on 21-01-1985. By the aforesaid licence, he was granted permission to construct a Nursing Home on the roof of shops. Following were terms and conditions of the licence agreement, copy of which has been filed as Annexure P-5 along-with the writ petition:-

3. As per the petitioner, Mr. Baijnath Sharma incorporated a Charitable Trust, named as "Kalyan Memorial Charitable Trust" (hereinafter referred to as the "Trust"). He was

founder of the Trustee and life-long President for the effective administration and maintenance of the Trust. Municipal Corporation was informed about the Deed of Trust vide letter dated 21-01-1985 (Annexure P-6). The Trust constructed a Nursing Home and the Trust has been running a Nursing Home since then. Mr. Baijnath Sharma was died on 26-09-2006. Respondents-Municipal Corporation issued a notice on 08-06-2011 to the petitioners-Trust that it had illegally made a construction of Nursing Home and directed the Trust to remove the same and an amount of Rs. 10,75,400/- was demanded from the Trust. Copy of notice has been filed as Annexure P-1.

4. The petitioners replied the notice. Thereafter, the Corporation directed the petitioners vide Annexure P-2 to hand over the possession of the premises and also directed to pay an amount of Rs. 13,19,400/- as illegal use of top of roof of the shops which had been granted on licence to Mr. Baijnath Sharma. Those two notices are under challenge in this writ petition.

5. Respondents, in the return, pleaded that the licence was granted by the Corporation in favour of Mr. Baijnath Sharma. however, Municipal Corporation had never granted any licence in favour of the petitioners-Kalyan Memorial Nursing Home/Trust. Mr. Baijnath Sharma without permission from the Corporation, executed an agreement. On the basis of the aforesaid agreement, it cannot be said that the Trust became licensee of the Municipal Corporation. It is contrary to the provisions of Section 366 of MP Municipal Corporation Act, 1956 [hereinafter referred to as "the Act"]. It is further pleaded that one Dr. Abhinav Sharma also filed two petitions before this Court which were registered as WP No. 6457/2010 and WP No. 4188/2011. Both the writ petitions were disposed of by this Court vide order dated 10-05-2012 and the Court issued a direction to consider the application of petitioner-Dr. Abhinav Sharma for transfer of licence.

6. Section 366 of the Act prescribes licence and permission. The aforesaid provisions are as under:-

""366. Licences and Permissions- (1) Whenever it is prescribed [by or under this Act] that the permission of the Commissioner is necessary for the doing of any act, such permission shall, unless it is otherwise expressly provided, be in writing.

(2). Every licence and written permission granted under this Act under any rule or bye-law made thereunder, shall be signed by the Commissioner and shall specify-

(a) the date of the grant thereof;

(b) the purpose and the period, if any, for which it is granted;

(c) the restrictions and conditions, if any, subject to which it is granted;

(d) the name of the person to whom it is granted;

(e) the tax or fee, if any, paid for the licence or written permission;

(f) the date by which an application for the renewal of the same may be made.

(3). Except when it is otherwise expressly provided in this Act or in any rule or byelaw made thereunder, a fee for every such licence or written permission may be charged at such rate as may be fixed by the Commissioner and such fee shall be payable by the person to whom the licence is granted.

(4). Every person to whom a licence or permission has been granted shall produce it at all reasonable hours of inspection if required by the Commissioner or any officer authorized by him in this behalf.

(5). Any licence or written permission granted under this Act, or under any rule or bye-law made thereunder, may at any time be suspended or revoked, by the Commissioner if any of its restrictions or conditions is infringed or evaded by the grantee, or if the grantee is convicted of a breach of any of the provisions of this Act or of any rule or bye-law made thereunder in any matter to which such licence or permission relates.

(6). When any such licence or written permission is suspended or revoked, or when the period for which the same was granted, has expired, the grantee shall for all purposes of this Act or of any rule or bye-law made thereunder, be deemed to be without a licence or written permission until such time whether within the said period or otherwise, as the authority granting the same may see fit to cancel the order suspending or revoking the licence or written permission or until the licence or written permission is renewed, as the case may be.

(7). Pending the receipt of orders on his application made on before the date described [by bye-laws] for application for renewal, an applicant shall be entitled to act as if it has been renewed.

(8). The acceptance by or on behalf of the fee for a licence or permission shall not entitle the person paying the fee to the licence or permission.

(9). Every application for a licence or permit shall be addressed to the Commissioner.

(10). Save in cases falling under sections 246 and 248, if the orders of the Commissioner on an application for a licence or permission which complies with the provision of the foregoing sub-section are not communicated to the applicant within six weeks from the date of receipt of the application by the Commissioner, the applicant may act as if the licence or permit had been granted for the year or for such shorter period as is mentioned in the application.

(11). The rate of the licence and permission fees shall be revised once in every three years."

7. From perusal of provisions of Section 366 of the Act, it is clear that the authority has a right to withdraw the permission if there was any violation of terms and conditions of licence.

8. In the present case, it was a condition of the licence which was granted in favour of Mr. Baijnath Sharma that he could construct a hospital, however, he executed a Deed of Trust and constituted a Trust, copy of which has been filed as Annexure P-6. It cannot be held that the licence which was granted in favour of Mr. Baijnath Sharma was transferred automatically in favour of Trust because the Trust has an independent legal identity. The Municipal Corporation specifically pleaded in the return that no permission for construction of hospital was taken from Municipal Corporation. Along-with return, the Corporation also filed an order dated 19-10-2010 (Annexure R-3) passed by the Commissioner, Municipal Corporation. It is mentioned in the order that after death of original licensee Mr. Baijnath Sharma, Mr. Abhinav Sharma got illegal possession of the land, hence, he was an encroacher.

9. It is a fact that the Corporation never granted licence in favour of the Trust. Neither it had granted consent for transfer of licence issued earlier in favour of Mr. Baijnath Sharma, to the Trust. Hence, the Trust has no legal right to occupy roof of shops.

10. Hon"ble the Supreme Court in the case of [Pradeep Oil Corporation Vs. Municipal Corporation of Delhi and Another](#), has held as under in regard to licence:-

"13. A licence may be created on deal or parole and it would be revocable. However, when it is accompanied with a grant it becomes irrevocable. A mere licence does not create an interest in the property to which it relates. A licence may be personal or contractual. A licence without the grant creates a right in the licensor to enter into land and enjoy it. 15. In [Associated Hotels of India Ltd. Vs. R.N. Kapoor](#), the following well-established propositions were laid down by the Constitution Bench for ascertaining whether a transaction amounts to a lease or licence (AIR p. 1269, para 27)

"27. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. u/s 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the Easements Act defines a licence thus:

Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with

the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington* (1952 KB 290 : (1952) 1 ALL ER 149 (CA)] wherein Lord Denning reviewing the case law on the subject summarises the result of his discussion thus at ALL ER p.155. (KB p.298)

"The result of all these cases is that, although a person who is let into exclusive possession is prima facie to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy".

11. In view of the principle of law laid down by Constitution Bench of Hon"ble the Supreme Court in the case of *Associated Hotel of India Ltd.* (supra) which is quoted above and subsequently followed by Hon"ble the Supreme Court in the case of *Pradeep Oil Corporation* (supra), the petitioners have no legal right to continue in possession on the land. In our opinion, the notices issued by the Corporation vide Annexures P-1 and P-2 are in accordance with law. Hence, we do not find any merit in this writ petition. The Corporation if think proper can consider grant of licence in accordance with law. The petition is disposed of accordingly. No order as to costs.