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91 CWN 844

Calcutta High Court

Case No: A.O.D. No. 42 of 1984

M/s. Madhu Jayanti Pvt. Ltd.	APPELLANT
Vs	
M/s. Roger''s Engineering Pvt. Ltd.	RESPONDENT

Date of Decision: Nov. 27, 1986

Acts Referred:
Transfer of Property Act, 1882 â€" Section 10, 108(j), 6#West Bengal Premises Tenancy Act, 1956 â€" Section 1(3), 14

Citation: 91 CWN 844

Hon'ble Judges: Shyamal Kumar Sen, J; A.M. Bhattachargee, J

Bench: Division Bench

Advocate: S.P. Roy Chowdhary, S.S. Roy and K.K. Boral, for the Appellant;S.N. Tagore, Swarup Kumar Ghosh and Sachidananda Sinha, for the Respondent

Final Decision: Dismissed

Judgement

A.M. Bhattacharjee, J.
The sole question involved in these two Second Appeals is whether the two appellants hold the respective suit-

premises as Lessees or Licensees under the respondent and it is not disputed that if they are Licensees only, as held by the two courts below, the

Second Appeals are to be dismissed, but if they are held to be Lessees, the second Appeals would have to be allowed. The Transfer of Property

Act, 1882, dealing with Lease in Chapter V thereof and the Easement Act of the same year, dealing with Licence in Chapter VI thereof, are in

operation for more than a century and, therefore, the distinction between a lease and a licence should by now, as it in fact is, well-settled. Four

decisions of the Supreme Court may be taken to have crystallised the matter and those decisions are Associated Hotels of India Ltd. Vs. R.N.

Kapoor, , Mrs. M.N. Clubwala and Another Vs. Fida Hussain Saheb and Others, , B.M. Lall (Dead) by Lrs. Vs. Dunlop Rubber and Co. Ltd.

and Others, and Konchada Ramamurthy Subudhi and Another Vs. Gopinath Naik, . And the impact of these decisions, which have really

reiterated what was held by the earlier authorities, both judicial and textual, is that in order to ascertain whether an arrangement or agreement has

amounted to a lease or a licence, the intention of the parties is the real and decisive test, as under the law the parties shall not be deemed to have

created a legal relation which they did not or could never intend.

2. It is the concurrent finding of both the courts below that in these cases the parties did not intend to create any sub-lease and this is obviously a

finding of fact. This concurrent finding of fact can not be assailed before us in Second Appeal, even if we would have been inclined to take some

other view, unless that finding is based on no evidence. Rut we are satisfied that, far from being based on no evidence, the finding arrived at by

both the courts below is not resonably impossible on the materials on record. And once we hold that, a reconsideration or reapprisal of the

materials on record would become a prohibited area for us in Second Appeal.

3. The respondent-company itselfs holds the suit-premises as a Lessee under the Calcutta Port Commissioners under a registered Deed of lease

for 30 years. The Port Commissioners being a ""local authority"" within the meaning of the proviso to Section 1(3) of the West Bengal Premises

Tenancy Act, 1956 the said Act would not apply to this Lease which would be governed by the provisions of the Transfer of Property Act. The

Deed of Lease, however, clearly prohibits assignment or sub-letting of the lease-hold by the Lessee and the "relevant clause of the Deed of Lease

runs thus:

And will not assign, transfer, under-let or part with the possession of the demised land or any part thereof without the prior consent in writing of the

Commissioners. In case the permission is granted, it may be on such terms and conditions as the Commissioners may think fit. If permission is

refused, the Commissioners should not be called upon to assign any reasons for such refussal.

4. u/s 6 of the Transfer of Property Act, ""property of any kind may be transferred, except as otherwise provided in this Act....""Under Section

108(j) of the Act, ""the Lessee may transfer absolutely or by way of mortgage or sub-lease, the whole or any part of his interest in the property.....'',

but the Lessee can do so only ""in. the absence of a contract or local usage to the contrary"" A lease-hold, therefore, may not be a transferable

property if there is a contract to the contrary prohibiting transfer. Such a condition restraining transfer is expressly saved by the provisions of

Section 10 of the Transfer of Property Act. A contract to the contrary forbidding transfer of a leasehold may not merely amount to a contractual

prohibition against transfer of an otherwise transferable property, but may make the lease-hold itself non-transferable under the laws contained in

Section 6 read with Section 108(j) of the Transfer of Property Act.

5. The case of the plaintiff-respondent is that while it agreed to let out the premises to the defendants-appellants ""subject to Calcutta Port

Commissioners giving their final approval to rent the above godown"", it nevertheless permitted the defendant companies until such approval was

accorded by the Port Commissioners. And now that the Port Commisioners have refused to accord approval, the respondent has filed suits for the

recovery of possession of the premises after revoking the licences. The case of the defendants, however, is that the arrangement or agreement

under which the defendant began to occupy the premises amounted to a clear lease of sub-lease between the parties even without the approval of

the port-commissioner.

6. Mr. Tagore appearing for the plaintiff-respondent has not argea that in view of the provisions against sub-letting in the Deed of Lease, there said

not be a sub-lease between the plaintiff and the defendants it respect of the suit-premises. He has rather conceeded that such a prohibitory

condition is to be construed as only making the sub-lease voidable at the option of the lessor, but until the Lewssor chooses to a void the lease by

exercising his right of re-entry, the sub-lease would stand as operative and binding between the Lessee and the sub-lessee, his view finds support

from an old Division Bench decision of this Court in Basarat Ali v. Manirulla (ILR 36 Cal 745) and according to this law a transfer or sub-lease by

the Lessee even in contravention of the prohibitory terns of the lease is not wholly void, but is only voidable at the instance of the Lessor. Mr.

Tagore has himself drawn our attention to a rather recent Division Bench derision of this Court in Debabrata v. Kalyan (1981-1 Calcutta High

Court Notes 497) where, relying inter -alia on the decision of the Supreme Court in Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh

and Others, , it has been held (at 509) that even when the sub-letting is without the prior consent of the superior landlord and as such is in violation,

of the provisions of Section 14 of the West Bengal Premises Tenancy Act, 1956, which prohibits a tenant from sub-letting the whole or any part of

the premises without the prior consent in writing of the landlord, there would still be legal relationship of landlord and tenant between the tenant and

sub-tenant. Mr. Tagore has also very fairly drawn our attention to a very recent decision of the Supreme Court in Nanakram Vs. Kundalrai, which

has followed the earlier decision in Muralidhar Agarwala (supra),

7. But assuming that there could be in law a lease or sub-lease between the plaintiff-respondent and the defendant-appellants even though the

former was restrained from effecting such a lease without the prior consent of its Lessors, the Port Commissioners, and such consent was refused,

the question is whether the parties in fact intended to create a. sub-lease until such consent was obtained. It appears from the judgment of the

appellate court that though PW-2 deposing on behalf of the plaintiff-respondent clearly stated that the plaintiff-company inducted the defendants as

licensees only until the rceipt of consent of the Commissioners of Port of Calcutta, this was not controverted during cross-examination. As pointed

out by a Division Bench of this Court in A.E.G. Carapiet Vs. A.Y. Derderian, and later amplified in some details in Babulall Choukhani Vs. Caltex

(India) Ltd., , failure to cross-examine the witness on a material statement may, though not necessarily must, amount to acceptance of his statement

on that point. The Appellant Court also noted that as against this clear statement on behalf of the plaintiff, on the side of the defendants only a Law-

Assistant was examined as the sole witness who could have no personal knowledge about the arrangement between the parties. Both the courts

below also took note of the fact that both the parties were fully aware that under the terms of the Deed of Lease, the plaintiff-respondent was

prohibited from sub-letting without the prior consent of the Port-Commissioners and that Ext. A containing the terms and conditions of the

proposed sub-lease, which were also accepted by the defendants-appellants, clearly provided that ""this agreement. Is of course subject to

Calcutta Port Commissioner''s giving their final approval.... to rent the above godown"". The Deed of Lease also provides that a Breach of the

condition of the lease including the condition restraining transfer or sub-lease, would entitle the Port Commissioners to forfeit the lease and to

exercise the right of re-entry. The rlevant clause of the Deed of Lease, as extracted hereinabove, also provides that the Port Commissioners not

only could grant or refuse consent, but could also accord consent on such terms and conditions as they would think fit and the parties could not

know what would eventually be those terms and conditions.

8. Mr. Roy Chowdhury appearing for the defendants-appellants has, however, urged that exclusive possession of the premises was given to the

defendants and that the consideration for the occupation of the premises by the defendants was realised as ""rent"". But as pointed by the Supreme

Court in Associated Hotels of India (Supra, at 1269), in B.M. Lall (supra, at 1775) and also in Kanchanda Ramamurty Subudhi (supra, at 921),

the test of exclusive possession is not conclusive of a lease and that notwithstanding exclusive possession, circumstances may negative the intention

to create lease. And as pointed by the Supreme Court in State of Punjab and Another Vs. British India Corporation Ltd., , followed in Konchanda

Ramamurty Subudhi (supra, at 922), the user of the expression ""rent"" is also not conclusive and that ""in its wider sense, rent means any payment

made for the use of land or building and those includes the payment by a licensee in respect of the use and occupation any land or building"". In

M.N. Clubwala (Supra) also, the Supreme Court held that the expression ""rent"" may in a given case mean licence-fee. If under all these facts and

circumstances and particularly the prohibition against sub-letting without the prior consent of the lessor as provided in the Deed of Lease and the

consequential forfeiture of lease on such sub-letting, both the courts below held that the parties did not and/or could not intend the creation of a

sub-lease, it would not be possible for us to hold that such a view could not be taken on the materials on record and was based on no evidence to

warrant intervention in Second Appeal. Parties may not, unless circumstances clearly establish the contrary, be presumed to intend creation of jural

relationship in breach of law or lawful agreements, particularly when the same would expose them to forfeiture of rights or properties. It may be

noted that in M.N. Clubwala (Supra) also, the Supreme Court construed the arrangement to be a licence and not a lease as the grant of a lease in

that case would have imperilled the rights and interest of the landlords.

9. We would, therefore, dismiss these two Second Appeals, but in the circumstances of the case, we would make no order as to costs in these

appeals. But as prayed by the. learned Advocate for the appellants, the appellants are given time upto January 31, 1987 vacate the respective suit

premises, failing which the respondents will be entitled to recover possession in execution of the decree under appeals.

Shyamal Kumar Sen, J.

I agree.