

(1986) 11 CAL CK 0013

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 - Section 10, 108(j), 6
- West Bengal Premises Tenancy Act, 1956 - 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. But we are satisfied that, far from being based on no evidence, the finding arrived at by both the courts below is not reasonably impossible on the materials on record. And once we hold that, a reconsideration or reappraisal of the materials on record would become a prohibited area for us in Second Appeal.

3. The respondent-company itself 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 refusal.

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 Commissioners 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 conceded 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 relevant 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.