

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.1702 OF 2014
IN
FIRST APPEAL NO.509 OF 2014**

Yogesh Mangalsen Bahel and Ors. .. Applicants

vs

Shri Dhiraj Dharamchand Chhajed and Anr. .. Respondents

Mr.Drupad S. Patil for the applicants

Mr.Abhishek Pungalia for the respondent nos.1 and 2

**CORAM : K.K.TATED, J.
DATED : 22/07/2015**

PC:

1 Heard the learned counsel for the parties.

2 This application is preferred by defendants for stay of the operation and implementation of the impugned judgment and decree dated 29.11.2013 passed by 7th Joint Civil Judge, Senior Division Pune in S.C.S. No.488 of 2012 directing applicants defendants to hand over vacant and peaceful possession of the suit premises admeasuring 448 sq.ft. in the nature of Shop No.156, situated at – Rajgurunagar, within the limits of Grampanchayat Rajguunagar, Taluka – Khed, Dist. Pune and to pay Rs.3,12,432/-.

3 The learned counsel for the applicants defendants submits that as

per the earlier order passed by this court, they already deposited a sum of Rs.3,12,342 in the Trial Court. Statement is accepted.

4 The learned counsel for the applicants defendants submits that earlier there was partnership between plaintiffs and defendants to carry on the business in the suit premises of wine. He submits that subsequently, plaintiffs retired from the said partnership firm. He submits that thereafter, the plaintiffs executed leave and license agreement dated 1.2.2001 in respect of the suit property. He submits that since then the defendants are in possession of the suit premises.

5 The learned counsel for the defendants submits that the monthly compensation paid by them to the plaintiffs was accepted by them. He submits that the Trial Court erred in coming to the conclusion that the plaintiffs are entitled vacant and peaceful possession of the suit premises. He submits that the Trial Court has not considered the main issue about maintainability of the suit itself. He submits that the plaintiffs had filed the suit for recovery of possession of suit property on the basis of unregistered Leave and License Agreement dated 1.2.2001. He further submits that the Trial Court had not considered the objection raised by the defendants about tenancy rights.

6 The learned counsel for the defendants submits that the defendants have good chance of success in the present proceeding. He submits that if the impugned decree passed by the Trial Court directing defendants to hand over vacant and peaceful possession of the suit premises is not stayed, irreparable loss and injury will be caused to the applicants. He submits that applicants are ready and willing to pay and or deposit monthly compensation in respect of the suit premises in the

Trial Court or to the plaintiffs directly.

7 The learned counsel for the applicants defendants submits that in the interest of justice, this Hon'ble Court be pleased to stay the operation and implementation of the impugned judgment and decree dated 29.11.2013 passed by 7th Joint Civil Judge, Senior Division Pune in S.C.S. No.488 of 2012 till the hearing and final disposal of the First Appeal.

8 On the other hand, the learned counsel for the respondents plaintiffs vehemently opposed the present Civil Application. He submits that the Trial Court has rightly decreed the suit directing defendants to hand over possession of the suit premises. He submits that the defendants failed and neglected to brought on record copy of partnership deed. He further submits that the Leave and License Agreement dated 1.2.2001 was only for eleven months. Thereafter, neither the plaintiffs permitted defendants to remain in suit premises or executed any further Leave and License Agreement. He submits that even in pleading before the Trial Court, defendants have not raised any plea in respect of tenancy of the suit premises. He further submits that admittedly plaintiffs themselves were in possession of the suit premises. Hence, defendants cannot claim tenancy against the plaintiffs.

9 The learned counsel for the plaintiffs submits that at the time of interpreting the Leave and License Agreement one has to see each and every clause. He submits that the Apex Court in the matter of *Delta International Ltd. v. Shyam Sunder Ganeriwalla and another reported in AIR 1999 SC 2607* held that the intention of the parties is to be gathered from the document itself. Main intention is to be gathered

from the meaning and the words used in the document except where it is alleged and proved that document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties. He mainly relies on the paragraph 15 of the said judgment which reads thus:

“15 Learned Counsel for the respondent had also relied upon the decision of this Court in the case of Sohan Lal Naraindas v. Laxmidas Raghunath Cadit, (1971) 1 SCC 276, (paras 6 and 9) wherein the Court has observed as under:

6. An attempt was deliberately made to camouflage the true nature of the agreement, by reciting in several clauses that the agreement was for lease and licence and it emphasise the pretence, it was also recited that the defendant was not to have any right as tenant or subtenant in respect of the loft.

9. Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operates as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject-matter of the agreement. If it is in fact intended to create an interest in the property it is a lease, if it does not, it is a licence. In determining whether the agreement creates a lease or a licence the test of exclusive possession, though not decisive, is of significance.

(Emphasis added)

From the aforesaid discussion what emerges is:

(1) To find out whether the document creates lease or license real test is to find out 'the intention of the parties'; keeping in mind that in cases where exclusive possession is given, the line between lease and licence is very thin.

(2) The intention of the parties is to be gathered from the document itself. Mainly, intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

(3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.

(4) If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole. But in cases where the landlord alleges that the tenant has sublet the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed; the tenant and the subtenant may jointly set up the plea of a license against the landlord which is a camouflage. In such cases, the mask is to be removed or veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances. Same would be the position where the owner of the premises and the person in need of the premises executes a deed labelling it as a licence deed to avoid the operation of

rent legislation.

(5) Prima facie, in absence of a sufficient title or interest to carve out or to create a similar tenancy by the sitting tenant, in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour; because a person having no right cannot confer any title of tenancy or sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the premises, cannot confer any better title. But, this question is not required to be finally determined in this matter.

(6) Further lease or licence is a matter of contract between the parties. Section [107](#) of the Transfer of Property Act inter alia provides that leases of Immovable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the lessee and the lessor. This contract between the parties is to be interpreted or construed on the well laid principles for construction of contractual terms, viz. for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having double intendment one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing only what he had a right to do.”

10 On the basis of these submissions, the learned counsel for the plaintiffs submits that there is no substance in the present Civil Application and same be dismissed. He submits that if interim protection is granted restraining plaintiffs to execute decree on the basis of the suit premises, irreparable loss and injury will be caused to

the plaintiffs.

11 I have heard both the sides. Admittedly, in the present proceeding, the Leave and License agreement on which basis the plaintiffs have filed the suit was not registered document. Apart from that as per the Leave and License Agreement dated 1.2.2011 the defendants were supposed to be in possession for 11 months. Thereafter, the said agreement was not extended by the plaintiffs nor he has taken any steps for recovery of the suit premises in the year 2011. The first time plaintiffs had issued notice calling upon the defendants to hand over vacant and peaceful possession of the suit premises. It is to be noted that till the filing of the suit, plaintiffs used to accept compensation from the defendants as per the Leave and License Agreement. Not only that during the pendency of the suit, he had accepted compensation. As on today, the defendants are in possession of the suit premises.

12 The authority cited by the learned counsel for the plaintiffs in the matter of *Delta International Ltd. v. Shyam Sunder Ganeriwalla and another* (Supra) specifically stated that the intention of the parties be gathered from the documents itself. As per the agreement for Leave and License Agreement dated 1.2.2001, the defendants were supposed to be in possession for 11 months. Thereafter, neither the plaintiffs issued any notice to the defendants calling upon him to vacate the suit premises and or taken any action against him. That itself shows that the plaintiffs allowed the defendants to occupy the suit premises even after completion of license period. Whether that was allowed on the basis of Leave and License and or tenancy/sub-tenancy basis, that can

be decided only at the time of hearing of the First Appeal.

13 Considering the above mentioned facts and circumstances of the present case, I am of the opinion that defendants have made out a case for allowing application on following terms :

a) Operation and implementation of clause 2 of the the impugned judgment and award dated 29.11.2013 passed by 7th Joint Civil Judge, Senior Division Pune in S.C.S. No.488 of 2012 is stayed till the hearing and final disposal of the First Appeal. Clause 2 reads thus:

“(2) The defendants shall hand over the vacant possession of the suit premises to the plaintiffs within 45 days from today. In case the defendants failed to deliver the possession then the plaintiffs should recover the possession of suit premises at the cost of defendants thereafter.”

b) Applicants defendants are restrained by an order of injunction from creating any third party right, title and interest in respect of the suit premises till the hearing and final disposal of the suit premises.

c) Applicants defendants to pay monthly compensation of Rs.22,500/- to the plaintiff on or before 10th of each month.

d) Advocate for the respondents plaintiffs after taking instruction from the plaintiff who is present in court makes a statement that plaintiff is ready and willing to accept monthly compensation from the applicants defendants without prejudice to the rights and contentions of the present First Appeal and same is allowed.

e) Liberty granted to the respondents plaintiffs to prefer appropriate application if they so desire for monthly compensation in respect of the suit premises and that will be decided on its own merits.

f) Applicants defendants to clear the arrears if any in respect of payment of monthly compensation within one month from today.

g) Civil Application is disposed of accordingly.

(K.K.TATED, J.)