

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.207 OF 2008
WITH
CIVIL REVISION APPLICATION NO.208 OF 2008

Shri Shardaprasad Jaijai Ram Pandey.] ... Applicant

Versus

Smt. Sakuvan Jamaluddin Ghorl and Ors.] ... Respondents

Mr. P. K. Dhakephalkar, Senior Advocate, i/b Mr. Diwakar Dwivedi,
Mr.Pankaj Dwidevi & Ms. Sapna Parihar for Applicant.
Mr. Vijay A. Thorat, Senior Advocate, a/w Smt. Anita A. Dwivedi for
Respondent Nos.1 to 4.

CORAM :- M. S. SONAK, J.

Judgment Reserved on :- JULY 29, 2015.
Judgment Pronounced on :- AUGUST 04, 2015.

JUDGMENT :-

1. These two Civil Revision Applications can be disposed of by a common order. Both these Civil Revision Applications challenge the common Judgment and Order dated 15/12/2006 made by the Appellate Bench of the Small Causes Court (Appeal Court).

2. The Applicant (Pandey) is the owner of Shop No.3, Milap Apartment, S. V. Road, Malad (West), Mumbai - 400 064 ('suit premises'). Pandey and predecessor-in-title of the Respondent (Ghori) entered into an agreement dated 05/09/1981 titled as '*Agreement for Conduct*'. It is the case of Pandey that such agreement was for constituting Ghori as conductor of the business through the suit premises or at the highest, the agreement constitutes a license to Ghori to use the suit premises. On the other hand, it is the case of Ghori that the agreement constitutes a lease in respect of the suit premises. When disputes arose between the parties, Pandey instituted L. E. & C. Suit No.42/52 of 1991 seeking eviction of Ghori. Similarly, Ghori instituted R.A.D. Suit No.995 of 1991, seeking declaration of tenancy and restraint upon eviction.

3. The Court of Small Causes at Mumbai (Trial Court), by Judgment and Decree dated 17th and 18th March 2004, dismissed Ghori's R.A.D. Suit No.995 of 1991. However, the Trial Court, by Judgment and Decree dated 17th and 18th March 2004, decreed Pandey's L. E. & C. Suit No.42/52 of 1991 by directing the eviction of Ghori from the suit premises. In the appeal instituted by Ghori, the Appeal Court, by common Judgment and Order dated 15/12/2006 (impugned order), has set aside the Judgment and Decree made by the Trial Court. Hence, these two Civil Revision Applications by Pandey.

4. Mr. Dhakephalkar, learned Senior Advocate for Applicant (Pandey), submitted that agreement dated 05/09/1981 makes it clear that Ghori was, at the highest, a licensee in respect of the suit premises. The Appeal Court, by virtually ignoring the agreement dated 05/09/1981 and by purporting to advert to '*surrounding circumstances*', has held that Ghori was a lessee in respect of the suit premises. In doing so, the Appeal Court has completely ignored the law laid down by the Hon'ble Apex Court in the case of ***Delta International Limited Vs. Shyam Sundar Ganeriwalla & Another***¹. Accordingly, Mr. Dhakephalkar submitted that the finding recorded by the Appeal Court is vitiated by patent perversity and the impugned order is in excess of jurisdiction.

5. Mr. Thorat, learned Senior Advocate for Respondent (Ghori), at the outset, submitted that this Court, in the exercise of revisional jurisdiction, is not entitled to correct errors of fact howsoever gross or even errors of law unless such errors have relation to the jurisdiction of the Court to try the dispute itself. In this regard, reliance was placed upon the decision of the Hon'ble Apex Court in the case of ***M/s. D. L. F. Housing and Construction Co. (P.) Ltd. Vs. Sarup Singh and others***² and ***Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh***³. In any case, Mr. Thorat submitted that the finding of fact that the agreement dated 05/09/1981 was merely a camouflage to conceal the real transaction of lease, is borne out from

1 (1999) 4 SCC 545

2 AIR 1971 Supreme Court 2324

3 (2014) 9 Supreme Court Cases 78

the material on record in this regard. Mr. Thorat made reference to several circumstances, which according to him, establish that the suit premises were indeed leased to Ghori. In particular, Mr. Thorat emphasized that since exclusive possession had been handed over to Ghori, there was a presumption that lease, as opposed to a mere license was created. This presumption has not been rebutted by Pandey. Reliance was placed upon the decision of the Hon'ble Apex Court in the case of *Associated Hotels of India Ltd. Vs. R. N. Kapoor*⁴. For all these reasons, Mr. Thorat urged the dismissal of the revision applications.

6. Although, the agreement dated 05/09/1981 has been styled as '*Agreement for Conduct*', the Appeal Court is quite right in its conclusion that the same did not constitute Ghori as conductor of Pandey's business from out of the suit premises. Pandey was a tenant in respect of the premises in the old building. Upon demolition of the old building, Pandey was allotted the suit premises in the newly constructed building, on ownership basis. Pandey was also required to pay an amount of Rs.65,000/- or thereabout, possibly because the suit premises had some additional area. Through the tenanted premises in the old building, Pandey used to engage in the business of sale of coal and newspapers. Upon completion of construction of the new building, Pandey directly allotted the suit premises to Ghori. Ghori was to undertake the business of sale of mattresses through the suit premises. Unlike a normal conductor, Ghori was not to be paid

4 AIR 1959 Supreme Court 1262

for the conduct of business through the suit premises. Rather, Ghori had undertaken to pay to Pandey royalty of Rs.700/- per month excluding water and electricity charges. All these circumstances, make it clear that the agreement dated 05/09/1981 was not an agreement under which Ghori was to conduct Pandey's business from out of the suit premises. There is accordingly, no reason to interfere with the finding of fact recorded by the Appeal Court in that regard.

7. The Appeal Court, however, is not right in concluding that since agreement dated 05/09/1981 was not in reality an agreement for conducting business, the same constitutes a lease deed by which Pandey had leased the suit premises to Ghori. In record of such conclusion, the Appeal Court has applied the incorrect tests, posed unto itself incorrect questions and finally recorded a conclusion which is neither borne from the material on record nor is the same in consonance with the ratio in case of *Delta International Limited (supra)*. Mr. Thorat is right in his submission with regard to the restrictive parameter of interference in revisional jurisdiction. However, even the decision in the case of *M/s. D. L. F. Housing and Construction Co. (P.) Ltd. Vs. Sarup Singh and others (supra)* clearly recognizes interference with errors of fact and law, which relate to the question of jurisdiction. Further, in the case of *Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh (supra)*, the Hon'ble Apex Court has held that if finding of fact recorded by the Court/authority below is perverse or has been arrived at without consideration of the material evidence or if such finding is based on no evidence or

misreading evidence of if such finding is so grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, it is open to correction in revisional jurisdiction, because such a finding cannot be regarded as one made according to law. No doubt, both the decisions of the Hon'ble Apex Court make it clear that revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a Court of first appeal, though, review on grounds of procedural illegality or irregularity is not ruled out.

8. The Appeal Court has persuaded itself to be influenced by the circumstance that exclusive possession for at least a term of 10 years was granted by Pandey to Ghorī against payment of royalty amount of Rs.700/- per month exclusive of water and electricity charges. The Appeal Court has also, to some extent, relied upon the circumstance that Ghorī, by way of security deposit for due fulfillment and purpose of agreement dated 05/09/1981, had paid Pandey a sum of Rs.65,000/- at a stage when Pandey had to pay his landlord an amount of Rs.63,000/- towards the additional area allotted by way of suit premises. On this basis, the Appeal Court suggests that this amount was nothing but a '*Pagdi*' and since payment of '*Pagdi*' was prohibited under The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 ('1947 Act'), the parties had camouflaged the real transaction of tenancy by styling the same as a '*Agreement of Conduct*'. The Appeal Court, by relying upon such surrounding circumstances, ignored vital clauses in the agreement dated 05/09/1981, and has

held that the real transaction between Pandey and Ghori in respect of the suit premises was that of a lease and not a license.

9. In the case of *Associated Hotels of India Ltd. Vs. R. N. Kapoor (supra)*, the following tests were laid down for determining whether the document is a lease or license :-

“(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 license, 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.”

10. In the aforesaid decision, considerable emphasis was laid upon the test of exclusive possession. However, in the case of *Delta International Limited (supra)*, the Hon'ble Apex Court, upon an extensive review of the law and authorities upon the vexed issue of determining whether a document is a lease or a license, has laid down the following tests :-

17. 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.”*

11. From the aforesaid, it is quite clear that the basic test is to find out the intention of the parties. In cases where exclusive possession is given, the line of distinction between the lease and license may be very thin. The intention of the parties is to be gathered

from the document itself. Mainly, intention is to be gathered from the meaning and words in the document itself. If the terms of the document evidencing the agreement between the parties are not clear, then the surrounding circumstances and the conduct of the parties will assume relevance for ascertaining the real relationship between the parties. In this case, the Appeal Court has ignored certain vital terms in the agreement dated 05/09/1981 but emphasized upon 'surrounding circumstances'. In particular, the Appeal court, has totally ignored the following recitals and clauses :-

- “(a) *AND WHEREAS the Conductor has requested the owner to allow him to run and conduct the business of Mattresses etc., in the said Shop premises.*
- (b) *The Owner allowed the Conductor to conduct the business of Mattresses etc., in Shop No.3, in the newly constructed building situate on C.T.S. No.425 at Malad Vilage, Borivli Taluka, S.V. Road, Malad (West), Bombay – 400 064, on and from 5th day of September 1981.*
- (c) *The Conductor shall pay to the Owner a sum of Rs.700/- (Rupees seven hundred only) per month as and by way of Royalty for allowing the conductor to conduct the said business in the said premises. The conductor shall pay the said amount of Royalty every month regularly without any default on or before 10th*

day of each month, excluding of water and electricity charges.

- (d) *It is hereby agreed that no demise is created by these presents in respect of the said Shop premises. The conductor shall have no right in the aforesaid premises or whatsoever nature except to use and occupy the same in course of conducting the aforesaid business in the said shop premises of and incidental to conducting the said business.*”

12. Clause 10 of the agreement dated 05/09/1981, in terms, expresses that no demise is created in respect of the suit premises and that Ghori shall have no right in respect of the suit premises of whatsoever nature except to use and occupy the same in the course of conduct of business in the suit premises and incidental to the conducting of such business in the suit premises. In the case of *Delta International Limited (supra)*, the Hon'ble Apex Court has held that the intention of the parties is to be gathered mainly from the meaning and words used in the document itself and due weight is required to be given to what the parties have stated. In the cases where exclusive possession is handed over, the terms of the document are to be read as they are and it would be unreasonable to draw inference that the parties intended to create relationship of landlord and tenant despite expressed contrary terms in the deed which are binding between the parties. The contract between the parties is to be construed on the basis of the terms of the document disregarding the legal

consequences. If only, the terms of the document are ambiguous and are holding double intendment, then the meaning which is lawful is to be preferred.

13. In the case before the Hon'ble Apex Court, Clause 12 of the document read as follows :-

“It is hereby expressly agreed upon and declared by and between the parties that these presents shall not be treated or used or dealt with or construed by the parties in any way as a tenancy or lease or as a document within the preview of the West Bengal Premises Tenancy Act or any modification or amendment thereof or to confer any relationship as landlord and tenant between the parties hereto.”

14. In the aforesaid context, the Hon'ble Apex Court has observed the aforesaid term of the document was not provided by any illiterate layman or poor person in need of premises for his residence or business, but was executed by two companies where it can be presumed that such term was entered into after fully understanding and to avoid any wrong inference of intention. The clause mentions that only license was created and not a lease. The clause is positive as well as negative form providing that agreement was a license and should not be treated as offering any relationship of landlord and tenant between the parties. The Hon'ble Apex Court, in such circumstances, went on to observe that when parties which are capable of understanding their rights fully, expressly agreed and

declared that document should not be construed in any manner as creating any relationship, as landlord and tenant between them, it would be impermissible to conjecture or infer that their relations should be construed as that of landlord and tenant because of certain terms mentioned in the deed can have double intendment. As stated above, intention of the parties is the meaning of the words they have used and there could be no intention independent of that meaning.

15. Applying the aforesaid principles to the present case, due consideration and weight shall have to be accorded at least to Clause 10 of the agreement dated 05/09/1981. The Appeal Court, has virtually ignored this clause and recorded the conclusion that the relationship between Pandey and Ghori was that of landlord and tenant. Clause 10, as noted earlier, in terms states that the parties have agreed that no demise is created by the agreement dated 05/09/1981 and Ghori shall have no right in the suit premises of whatsoever nature, except the right to use and occupy the same for conduct of business. In the course of evidence, Ghori has admitted that the agreement dated 05/09/1981 was prepared by his Advocate and that he had understood its terms before he signed the same. The Appeal Court, has not applied the correct test and its decision is almost contrary to the law laid down by the Hon'ble Apex Court in the case of *Delta International Limited Vs. Shyam Sundar Ganeriwalla & Another (supra)*, which prescribed the correct test in determining whether the relationship between the parties is a lease or a license. Without advertng to the terms of the agreement dated 05/09/1981,

the Appeal Court has chosen to advert to what it refers to as '*surrounding circumstances*'. Such '*surrounding circumstances*' can be adverted to in case of ambiguity in the terms of the agreement between the parties. In any case, '*surrounding circumstances*' cannot, ordinarily nullify the express provisions in the agreement, in the context of ascertaining the real intention of the parties.

16. Mr. Thorat, however, submitted that *Delta International Limited* (*supra*) has itself carved out exceptions in cases where the document is alleged and proved to be camouflage. This is correct. However, in the present case, there is no camouflage as such in the context of the document being a lease or a license. True, the agreement has been styled as a '*Agreement for Conduct*'. In a certain sense, right to conduct the business may also be regarded as a specie of license. However, in the present case, apart from mere user of the term '*Agreement for Conduct*', if the substance of the agreement dated 05/09/1981 is considered, then it is quite clear that Pandey had permitted or licensed Ghori the use of the suit premises against payment of compensation/royalty of Rs.700/- per month. On the aspect of lease or license, there is no camouflage as such. Besides, Ghori, cannot, for some purposes, refer to the terms of the agreement dated 05/09/1981 and for other purposes state that the agreement being a camouflage, ought not to be looked into at all. If the agreement constitutes a camouflage, then the same may have to be excluded from consideration in its entirety.

17. If the agreement is excluded from consideration, the oral evidence hardly supports the existence of lease in respect of the suit premises. It is also not Ghori's case that agreement dated 05/09/1981 should be completely excluded from consideration.

18. For all the aforesaid reasons, the impugned order is liable to be set aside and is hereby set aside. The L. E. & C. Suit No.42/52 of 1991 is decreed and Respondent's R.A.D. Suit No.995 of 1991 is dismissed.

19. Rule is accordingly made absolute in the two Civil Revision Applications. There shall, however, be no order as to costs.

(M. S. SONAK, J.)

20. At this stage, Ms.Anita Dwivedi, seeks for continuance of restraint upon eviction for a period of eight weeks as the Respondents would seek recourse against this Judgment and Order before the Hon'ble Apex Court. The request is reasonable and accordingly, subject to the Respondents filing usual undertaking in the Registry within a period of two weeks from today, there shall be a restraint upon the execution of eviction order for a period of eight weeks from today. The copy of the undertaking to be furnished to the learned Counsel for the Applicant, before the same is filed in the Registry.

(M. S. SONAK, J.)