

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION (ST) NO. 27627 OF 2015
IN
CIVIL REVISION APPLICATION NOS. 207 AND 208 OF 2008

Jamaluddin Sweman Ghori
(deceased through heirs and LRs
1. Smt. Sakuvan J. Ghori and ors.)

.. Petitioners

vs.

Sharada Prasad Jaijai Ram Pandey

.. Respondent.

Mr. Vijay A. Thorat, Sr. Advocate a/s. Ms K. Shah i/b India Las
Alliance for the Petitioners.

Mr. P.K. Dhakephalkar, Sr. Advocate i/b Mr. Pankaj Dwivedi for the
Respondent.

CORAM : M. S. SONAK, J.

DATE : 2 FEBRUARY 2016.

P.C. :-

1] This review petition seeks review of the judgment and order dated 4 August 2015 in Civil Revision Application Nos. 207 and 208 of 2008.

2] Mr. Vijay Thorat, learned senior advocate for the review petitioners, has submitted that in the present case there were no pleadings on the part of the landlord that the agreement dated 5 September 1981 constituted a camouflage. On the contrary, the review petitioners, in response to the suit instituted by the landlord as also in the independent suit instituted by the review petitioners

had clearly contended that the agreement dated 5 September 1981, infact constituted a camouflage. Mr. Thorat submitted that the real relation between the parties was that of landlord and tenant. The agreement dated 5 September 1981 came to be executed, because at the relevant time, there was a bar to the payment and acceptance of Pagadi. The contract between the parties had contemplated payment of an amount of Rs.65,000/- by the review petitioners to the landlord and in order that such payment is not construed as Pagadi, the agreement dated 5 September 1981 came to be entered into. Mr.Thorat pointed out that both the Appeal Court as well as this Court in its judgment and order under review have in fact, accepted the position that the agreement dated 5 September 1981, constitutes a camouflage. If this be so, Mr. Thorat contends that even a decision of the Hon'ble Supreme Court in case of *Delta International Ltd. Vs. Shyam Sundar Ganeriwalla and Anr. - (1999) 4 Supreme Court Cases 545* requires that the surrounding circumstances and the conduct of the party is required to be borne-in-mind and there is no question of placing reliance upon the document, which is accepted as 'camouflage'.

3] Mr. Thorat, also submitted that the Appeal Court had taken into consideration several circumstances like the duration of ten years, lumpsum payment of Rs.65000/- as circumstances evidencing the intention to create a lease. These circumstances have not been adverted to, in the judgment and order under review. Mr. Thorat submitted that the judgment and order under review suffers from error, apparent on face of record and therefore, case is made out for exercise of review jurisdiction.

4] At the outset, it must be noted that the parameters of review jurisdiction are extremely limited. The review petition is certainly not an appeal in disguise. The contentions, which are now raised in this review petition, are neither new nor it can be said that such contentions were not considered in the judgment and order under review. In the context of agreement dated 5 September 1981, being a camouflage, it was clarified that the agreement evidences the license, though, it may have styled as an '*agreement for conduct*'. It was also clarified that in the present case, there is no camouflage as such, in the context of agreement being a lease deed or licence deed. It is therefore, in the light of these clarifications that the issue of applicability of the decision of the Hon'ble Apex Court in case of

Delta International Ltd. (supra), is required to be considered and has been considered. The relevant observations contained in paragraphs 15 and 16 of the judgment and order under review are reproduced for convenience of reference.

15. *Dealing with the contention that intention of the parties is to be determined upon a proper construction of the deed entered into between the parties, and that alone is a decisive matter, the Court dealt with the said contention in paragraph 32 and observed as under : -*

"Indeed learned counsel placed strong reliance on the following observations by this Court in [M.N. Clubwalq V. Fida Hussain Saheb AIR 1965 SC 610](#):

"Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement."

(emphasis supplied)

The proposition of Dr. Chitale as to the conclusiveness of what emanates from the construction of the documents has, in this case, its own limitations. The import, significance and conclusiveness of such documents making, or evidencing, the grants fall to be examined in two distinct contexts. The dispute may arise between the very parties to the written instrument, where on the construction of the deed one party contends that the transaction is a 'licence' and the other that it is a 'lease'. The intention to be gathered from the document read as a whole has, quite obviously, a direct bearing. But in cases where, as here, 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 emanates from the construction of the

deed. At best, it is a piece of evidence, the weight to be accorded to which will necessarily depend upon all the other circumstances of the case; The tenant and the subtenant, who jointly set up a plea of licence against the landlord may choose to camouflage the truth and substance of the transaction behind a facade of a self-serving and conveniently drafted instrument." (emphasis supplied)

16. Learned counsel for the respondent had also relied upon the decision of this Court in the case of *Sohan Lal Naraindas v: Laxmidas Raghunath Gadit*, [1971] 1 SCC 276, 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 emphasized the pretence, it was also recited that the defendant was not to have any right as tenant or subtenant in respect of the loft.

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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 a lease or a license the 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 a 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 sub-tenant 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 the 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 immoveable property may be made either by a registered instrument or by an 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.

5] The other contention with regard to consideration of surrounding circumstances has also received a attention in the judgment and order under review. It is to be noted that the review petitioners cannot be permitted to rely upon the agreement dated 5 September 1981, for some purposes but to condemn the very said agreement as being a camouflage for other purposes. If the contention of the review petitioners that the agreement dated 5

September 1981, is only a camouflage in order to escape rigors of the Rent Act, where, at the relevant stage, there was a bar to acceptance of Pagadi, is to be accepted, then perhaps, the agreement dated 5 September 1981 will have to be completely excluded from consideration.

6] If the document is completely excluded from consideration, the parties will have to fall back upon oral evidence. As noted in the judgment and order under review, the oral evidence hardly supports the existence of relationship of landlord and tenant. The Appeal Court has also not relied upon any oral evidence, but the Appeal Court had also relied upon certain terms and conditions of the agreement dated 5 September 1981, to draw an inference that the same suggest the existence of relationship of landlord and tenant. In doing so, however, the Appeal Court had failed to take note of the specific clauses in the agreement dated 5 September 1981, wherein, the parties had stated that there was no intention whatsoever to constitute a lease. In fact, in the course of evidence, the review petitioners had admitted that the agreement dated 5 September 1981 had been prepared by their advocate and that the review petitioners had understood its terms before they signed the same.

7] Therefore, considering the aforesaid, this is not a case for exercise of review jurisdiction. Accordingly, review petition is dismissed. There shall however, be no order as to costs.

8] At this stage, Mr. Thorat, learned senior advocate appearing for the review petitioners applies for continuance of restraint upon eviction for a period of six weeks, by pointing out that the Hon'ble Apex Court whilst disposing of Special Leave Petition Nos. 31173 - 31174 of 2015 had reserved liberty to the review petitioners to apply for special leave, in case, the review petition were to be rejected.

9] Even earlier, such relief had been granted to the review petitioners. Therefore, subject to review petitioners once again 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 six weeks from today. Copy of the undertaking to be furnished to the learned counsel for the Respondents-landlord, before the same is filed in the Registry.

(M. S. SONAK, J.)