

*IN THE HIGH COURT OF BOMBAY AT GOA**Second Appeal No.42/2012*

1. Ana Francisca Braganza
Major of age, married, housewife
and her husband;

2. Mr. Rosario Miguel Mascarenhas
Son of late Joao Mascarenhas
Major of age, businessman
Both of them running business
of Bar and Restaurant in room No.5,
bearing Panchayat H. No.1279,
Chirdolem, Curtorim Salcete, Goa.

... Appellants

Versus

1. Mr. Jawaharlal Edwin do Carmo
Moniz, son of late Inacio Moniz,
aged 48 years, married in service
and his wife;

2. Mrs. Marie Loreta Rosario Da Costa,
daughter of Caetano Felix Da Costa,
major in age, in service, both of them
residents of Churchill Avenue,
New South Wales, Australia
represented herein by their constituted
Attorney, Mr. Olavo Estanislau do
Carmo Moniz, major of age, in service,
resident of H. No. 1284 Curtorim,
Salcete, Goa.

... Respondents

Mr. C. A. Coutinho with Mr. I. Santimano, Advocates for the
Appellants.

Mr. A. F. Diniz, Senior Advocate along with Mr. Ryan Menezes and
Mr. Nigel Fernandes, Advocates for the Respondents.

Coram:- M.S. SONAK, J.

Reserved on:- 4th February 2021

Pronounced on:- 12th February 2021

JUDGMENT:

Heard C. A. Coutinho with Mr. I. Santimano for the Appellants and Mr. A. F. Diniz, Senior Advocate along with Mr. Ryan Menezes and Mr. Nigel Fernandes for the Respondents.

2. This appeal was admitted on 24.08.2012 on the following substantial questions of law:

(i) Whether the Courts below have misconstrued the agreement dated 1/03/1973 entered into between the appellants and the respondents to come to the conclusion that the agreement between the appellants and the respondents was a licence agreement.

(ii) Whether non-consideration of the fact that the agreement between the parties was not renewed for a period of nearly 25 years has vitiated the findings of the Courts below to the effect that the relationship between the appellants and the respondents is that of a licensor – licensee.

3. The appellants are the original defendants and the respondents are the original plaintiffs in Regular Civil Suit No.136/2002/D instituted in the court of the Civil Judge, Senior Division, Margao (Trial Court).

4. The plaintiffs had sought a declaration that the occupation of the defendants in Shop No.5 bearing Panchayat House No.1279 admeasuring about 14 sq. meters. (suit premises)is illegal and for a decree to vacate the suit premises and to hand over the possession thereof to the plaintiffs. The mesne profits at the rate of ₹300/- per month from the date of filing of the suit were also claimed.

5. The Trial Court framed and answered the issues in the suit in its judgment and decree dated 26.11.2010, in the following manner:

ISSUES

FINDINGS

1. Whether the plaintiffs prove that the suit premises Were given on Leave and Licence basis to the defendants specifically to run the business of Restaurant?

Proved.

2. Whether the plaintiffs prove that the defendants were maintaining a kitchen in the suit premises as against the condition of Leave and Licence agreement?

Proved.

3. Whether the plaintiffs prove that the defendants are in illegal occupation of the suit premises and they are entitled for direction of this Court to vacate the suit premises and hand over the vacant

possession of the suit premises to the
plaintiffs?

Proved.

4. Whether the plaintiffs prove that
they are entitled for a mesne profits from
the defendants @ Rs. 300/per month from
the date of filing of the suit till the suit
premises are vacated by the defendants?

Disproved.

5. What relief? What order?

As per final order.

ADDITIONAL ISSUE

FINDING

1. Whether the plaintiffs prove that the
suit premises were given to the defendants
on Leave and Licence?

Proved.

2. Whether the defendants prove that
the suit premises were given to them on
Lease basis?

Disproved

6. Aggrieved, the defendants appealed to the District Judge, South Goa vide Regular Civil Appeal No.8/2011. By judgment and decree dated 13.05.2011, the First Appellate Court dismissed the appeal. Hence the present Second Appeal on the aforesaid substantial questions of law.

7. Mr. Coutinho, learned counsel for the appellants submits that

the mere nomenclature of a document is quite irrelevant and the two Courts were required to look to the intention of the parties which could be gathered from the surrounding circumstances. He submits that there was intrinsic evidence in the agreement dated 01.03.1973 which made it clear that the same was a deed of lease and not merely a deed of leave and license.

8. Mr. Coutinho pointed out some of the clauses of the agreement dated 01.03.1973 to submit that the same was a deed of lease. He pointed out that in clause 6 there was a bar to the defendants leasing or sub-leasing the suit premises and submitted that such a bar was unnecessary if the parties intended to only create a license. He pointed out that there was a clause for automatic renewal. He pointed out that there were clauses for the issue of notice to terminate the agreement. He submitted that all these clauses were indicative of the intention of the parties to create a lease and not a mere license.

9. Mr. Coutinho submitted that even though clause 16 of the agreement dated 01.03.1973 had retained the liberty in the plaintiffs to inspect the suit premises, there was evidence on record that no such inspections ever took place. He submitted that the fact that the term of the agreement stood automatically renewed for nearly 25 years clearly establishes not only that the suit premises were in the exclusive possession of the defendants but further, such possession was as lessees of the suit premises.

10. Mr. Coutinho submitted that the agreement dated 01.11.1979 entered into between the parties was not substantially different from the agreement dated 01.03.1973. He submits that both these agreements make it clear that the relationship between the parties was that of lessor and lessee and not licensor and licensee. He submits that the findings recorded by the two Courts are vitiated by perversity and the failure to apply the correct principles of law. He relied on *C. M. Beena and another v. P. N. Ramachandra Rao*¹, *Sardar Pruthisingh v. Kanchanlal Purushottamdas Desai*², *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit*³, *Pradeep Oil Corporation v. Municipal Corporation of Delhi and another*⁴, *Mr. Guy Vigney Athanasius D'Melo v. The Government of Goa Daman and Diu*⁵, *Miss Aninha D'Costa v. Mrs. Parvatibai M. Thakur*⁶ and *Balvantisingji Anand v. Bhagwantrao Ganpatrao Deshmukh*⁷ in support of his submissions.

11. Mr. A. F. Diniz learned Senior Advocate for the plaintiffs defended the impugned judgments and decrees based on the reasoning reflected therein. He pointed that there are concurrent findings of facts and there is no perversity in the record of the same. He pointed out that there is a difference between the terms of the 1973 and 1979 agreements. He pointed out that in any case both the agreements very

¹ 2004(5) ALL MR (S.C.) 460

² AIR 2001 Bombay 255

³ (1971) 1 SCC 276

⁴ (2011) 5 SCC 270

⁵ 2012(5) BomCR 334,

⁶ AIR 1966 Bom 113

⁷ AIR 1980 Bom 333

clearly establish that the defendants were only licensees and there was no intention whatsoever to create any lease. He pointed out the conduct of the defendants in not paying the compensation of 50/- per month during the pendency of proceedings. He distinguished the decisions relied upon by Mr. Coutinho and relied on *Delta International Ltd. v. Shyam Sundar Ganeriwalla and another*⁸, *Swarn Singh v. Madan Singh*⁹, *Joao Necessidade Roque Antonio AS. v. Vaman Govind Lotlikar (Dr.) & Ors.*¹⁰, *Shrikant Dattatraya Deshpande v. Shalini Waman Bhat (dead) and others*¹¹ and *Prakash Ganesh Lotlikar v. Joel Avelini Noronha – Second Appeal No.68 of 2009 decided on 28.02.2014*¹²

12. The rival contentions now fall for my determination.

13. As the substantial questions of the law suggest the main issue involved in this appeal is whether the agreements between the parties constituted a relationship of licensor and licensee as contended by the defendants or lessor and lessee as contended by the plaintiffs.

14. Now the first substantial question of law refers only to the agreement dated 01.03.1973. Admittedly, the parties entered into an agreement dated 01.11.1979 and this was in supersession of the agreement dated 01.03.1973. Therefore, the defendants, cannot

⁸ AIR 1999 SC 2607

⁹ 1995 Supp (1) SCC 306

¹⁰ 2013(2) Bom. C.R. 842

¹¹ 2019 DGLS (Bom.) 1474

¹² Second Appeal No.68/2009 decided on 28.02.2014

continue to rely on the agreement dated 01.03.1973 and based thereon urge that they were the lessees in respect of the suit premises and not merely licensees. In any case, as held by the two Courts concurrently, even the deed of leave and license dated 01.03.1973 does not suggest that the same was some sort of camouflage to avoid rigors of rent control legislations or that the same was, in fact, a deed of lease.

15. Some clauses of the 1973 deed of leave and license did refer to the authentic renewal or a requirement of notice or a bar to lease or sub-lease. However, all such clauses, are not conclusive in themselves. All such clauses have to be construed in the light of the remaining clauses as well as the real intention of the parties. The two Courts, based on the evidence on record have found that the intention of the parties was never to create a relationship of lessor and lessee. No perversity in the record of such concurrent findings is pointed out. In any case, the agreement of 1973 loses significance, once, the parties entered into a leave and license agreement dated 01.11.1979. For the suit as well as the appeals arising therefrom, it is the agreement of 01.11.1979 which is most relevant and therefore, required to be considered.

16. Now the clause which had barred the defendants from creating a lease or sub-lease in the leave and license agreement dated 01.03.1973 was specifically deleted from the 1979 leave and license deed. Instead, the defendants were only barred from parting with or transferring the

occupation of the said premises to any person whomsoever and further, there were restrictions imposed upon the change of user of the suit premises without seeking written consent from the plaintiffs. Such a clause is entirely consistent to create a license.

17. Besides, the 1979 leave and license deed very specifically provided that the license can be revoked at any time “without notice”. Clause 12 also made it clear that the possession of the suit premises shall always remain with the plaintiffs who shall have powers to inspect the same at any time and at all times. There were restrictions to the defendants carrying on any alterations to the suit premises or affixing any permanent fixtures. There was a specific restriction on having a kitchen in the suit premises so that the suit premises are not exposed to any smoke or fire hazards. All these clauses are consistent with the creation of a license rather than a lease.

18. If the 1979 agreement is perused, then, there is nothing therein to suggest that the parties intended to create a lease and that the agreement was a mere camouflage. There are no pleadings in the defendants' written statement that the agreements were a mere camouflage. The defendants failed to even step into the witness box and establish that the agreements were a mere camouflage and the real relationship between the parties was that of lessor and lessee. In such a position, there is no warrant to interfere with the concurrent findings of facts recorded by the two Courts.

19. In *Delta International Limited (supra)* the Hon'ble Supreme Court has summarized the legal position in determining whether a document constitutes a lease or license. The summary in clauses 1, 2, and 3 at paragraph 15 is relevant for purposes of the present case and therefore is transcribed below:

“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 license 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.”

20. The Hon'ble Supreme Court has held that the intention of the parties is to be gathered from the document itself. Mainly, the intention is to be gathered from the meaning and words used in the document except where it is alleged and proved that the document is a

camouflage. In the present case, there are no clear allegations of camouflage in the written statement filed by the defendants. However, even if it is assumed that the assertion by the defendants that they were the lessees and not merely licensees has to be regarded as pleadings of camouflage, even then, the defendants having failed to even step into the witness box cannot be said to have proved the allegations of camouflage.

21. It is only when 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. Here, the terms and conditions of the 1979 leave and license agreement are quite clear and there is no serious ambiguity. Therefore, applying the principles in *Delta International Limited (supra)* this appeal will have to be dismissed.

22. In *Swarn Singh (supra)*, the Hon'ble Supreme Court has held that where the document is unambiguous there is no need to travel beyond the document and look at the attendant circumstances together with the intention of the parties. In the said case the Hon'ble Supreme Court concluded that the document in question was a license and not a lease by adverting to the following two circumstances:

“(1) *The nomenclature of the document is licence, although nomenclature is not always conclusive.*

(2) *The statement in the document that the possession and control shall remain with the owner, clearly indicates that no interest in the immovable property has been conferred on the grantee. Thus this is a case of license under Section 52 of the Transfer of Property Act and not a lease under Section 52 of the Easements Act.”*

23. The Hon'ble Supreme Court also distinguished the decision in ***Capt. B. V. D'Souza v. Antonio Fausto Fernandes***¹³, upon which reliance was placed by Mr. Coutinho to the effect that there was to be no sub-letting of the suit premises by observing that such an affirmation cannot alter the relationship of the parties and convert the relationship of licensor – licensee, into lessor – lessee.

24. In *Joao Necessidade Roque Antonio AS.(supra)*, the learned Single Judge of this Court has held that the where, in the written statement filed by the defendants there was not even a whisper that the agreement dated 04.02.1986 and for that matter, the earlier agreements entered into by the parties were entered into as camouflage or due to coercion, the agreements which were styled as leave and license agreements had to be accepted and there was no question of referring to the surrounding circumstances to find out the intention of the parties.

25. In *Shrikant Deshpande (supra)*, another learned Single Judge of this Court held that where a defendant who was alleging that the

¹³ (1989) 3 SCC 574

document in question was, in fact, a lease even though the same was styled as a license failed to step into the witness box, the burden cast upon him or the onus which had shifted upon him could not have been said to have discharged. In the present case as well, looking at the nature of the documents and also the evidence led on behalf of the plaintiffs, the onus had very clearly shifted on the defendants. However, the defendants chose not to even step into the witness box and this is yet another ground to uphold the concurrent findings of fact recorded by the two Courts and dismiss this appeal.

26. In *Prakash Lotlikar (supra)*, learned Single Judge of this Court, in similar circumstances, and after distinguishing the judgment of the Hon'ble Supreme Court in *C.M. Beena (supra)* which was the sheet anchor of Mr. Coutinho's submissions held that the defendant was only a licensee and not a lessee.

27. *C.M. Beena (supra)* turned on its peculiar facts. In that case, there were clear pleadings of camouflage. The landlord had led no evidence and the evidence was mainly led by the tenant who was incorrectly alleged to be the licensee. There were concurrent findings of fact recorded by the two Courts in favour of the tenant. There was evidence that the landlord was in a dominating position and it prevailed upon the tenant to sign the document styled as leave and license. There was evidence that the tenant was in occupation of the suit premises for about 20 years before the so-called deed of license

came to be entered into between the parties. All such factors do not apply to the present case and therefore, *C.M. Beena (supra)* can be of no assistance to the defendants.

28. *Sardar Pruthisingh (supra)* also turns on its facts which are quite peculiar and offer no parallel to the facts and circumstances established in the present case. *Sohan Lal Naraindas (supra)* is an authority for the proposition that mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a license. The crucial test is the intention. Exclusive possession is also one of the factors to be taken into consideration. Even applying the principles in *Sohan Lal Naraindas (supra)*, the 1979 agreement or the relationship created thereby cannot be regarded as one of the lessor and lessee.

29. *Pradeep Oil Corporation (supra)* again turns on its peculiar facts in the context of an agreement for erection of oil storage tank together with the pump house, chowkidar cabins, etc. The facts in the said case have no co-relation with the facts in the present case. Even *Guy Vigney Athanasius D'Melo (supra)* or for that matter *Miss Aninha D'Costa (supra)* again turn on their facts which have no co-relation with the facts in the present case. Similar is the position in *Balvantsingji Anand (supra)*.

30. The circumstance that there were no formal renewals for a considerable time is also not conclusive in the facts and circumstances

of the present case since the agreements between the parties are clear and unambiguous and since the defendants did not even step into the witness box to establish that they were the lessees and not merely the licensees of the suit premises. This circumstance, by itself, can be of no assistance to the defendants. This is a case of absence of pleadings or in any case absence of proof. This is a case where the 1973 agreement was superseded by the 1979 agreement and some of the clauses of the 1973 agreement, which may have created an ambiguity as regards the legal relationship between the parties were specifically altered and replaced to leave no scope for ambiguity.

32. For all the aforesaid reasons both the substantial questions of law are required to be answered against the appellants.

33. This appeal fails and is hereby dismissed with no order as to costs.

34. The interim relief if any is hereby vacated.

M. S. SONAK, J.