

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Ajoy Kumar Mukherjee

SAT 101 of 2018
With
CAN 1 of 2018
(Old No: CAN 2212 of 2018)

Sri Arun Kumar Pattanayak
Vs.
Sri Partha Pratim Das

(Via Video Conference)

For the Appellant : Mr. Aniruddha Chatterjee, Adv.,
Mr. Surya Prasad Chattopadhyay, Adv.

For the Respondent : Mr. Partha Pratim Roy, Adv.,
Mr. Tanmoy Mukherjee, Adv.,
Mr. Manik Ganguly, Adv.

Hearing concluded on : 15th February, 2022

Judgment Dated : 2nd March, 2022

Soumen Sen, J.: The second appeal has come up for admission.

We have recorded in earlier order dated 14.02.2022 that the learned Counsel for the parties have submitted that the second appeal itself can be disposed of on the basis of the available records and the pleadings made available to this court by the parties. They have consented to second appeal being heard out along with connected application on merits in presence of the opposite party.

The appellant is aggrieved by the judgment and decree dated 23rd February, 2018 passed by the Additional District Judge, 7th Court, Paschim Medinipur in Other Appeal No.30 of 2016 thereby reversing the judgment and decree dated 19th December, 2015 passed by the learned Civil Judge (Jr. Division), 1st Court, Paschim Medinipur in Other Suit No.65/2009 heard analogously with Other Suit No.123/2009.

This decree of reversal has been assailed in this second appeal.

In view of the fact that the second appeal is required to be admitted only on substantial question/questions of law. We have invited the appellant to address us on the substantial question/questions of law involved in the second appeal.

Before we refer to the submissions made on behalf of the appellant, we feel it necessary to summarize the facts in order to appreciate the argument advanced by Mr. Aniruddha Chatterjee, learned Counsel appearing on behalf of the appellant in support of the appeal.

There are two suits disposed of by the learned Trial Judge. The two suits were heard analogously.

Sri Arun Kumar Pattanayak filed a suit being suit no. 65 of 2009 (hereinafter referred to as 'first suit') for declaration of tenancy along with other consequential reliefs. The respondent filed a suit being suit

no. 123 of 2009 (hereinafter referred to as 'second suit') praying for recovery of khas possession and other consequential reliefs.

In the second suit the plaintiff contended that the father of the plaintiff inducted Sri Arun Kumar Pattanayak as tenant in respect of the Schedule 'Ka' property at a monthly rent of Rs.600/- per month for a period of five years commencing from March, 1994 to 31st March, 1999. Subsequently, the said period of tenancy was orally extended till 31st March, 2001. Thereafter, the father of the plaintiff became ill and a fresh agreement was executed on 15th June, 1999 with regard to the extension of tenancy and the plaintiff signed the said deed of agreement on behalf of his father. After the expiry of the said period another tenancy agreement for two years commencing from 1st April, 2001 to 31st March, 2003 was executed. The said agreement was signed by the brother of the plaintiff on behalf of their father. Subsequently, on 5th December, 2002, the father of the plaintiff died. After the demise of the plaintiff's father, Sri Arun Kumar Pattanayak requested the brother and the mother of the plaintiff to execute another tenancy agreement for two years in respect of the suit premises after expiry of the aforesaid tenancy on 31st March, 2003. The said proposal was accepted and a fresh tenancy agreement on 1st April, 2003 was executed. Subsequently, a partition suit being No. T.S. 47/2005 was filed in respect of the joint properties of the heirs of deceased Nirmal Chandra Das, the father of the plaintiff in the second suit. The defendant was

asked to vacate the suit premises after the expiry of the tenancy on 31st March, 2005. However, a new tenancy agreement in respect of the suit premises for the period 1st April, 2005 to 31st March, 2007 was executed. At the time of execution of the agreement, the plaintiff informed the defendant that they would not let out the suit premises for any further period after expiry of the tenancy on 31st March, 2007.

On expiry, the plaintiff requested Sri Pattanayak to vacate the suit premises. At that time Sri Pattanayak requested the plaintiff for further extension of the period on a plea that some time would be required for him to get a Drug licence from the Drug Control office for relocation of his business at a new place and a suitable extension of the period may be favourably considered. The plaintiff accepted keeping such request in view the probable inconvenience likely to be caused to the defendant in the event the said defendant is immediately evicted.

On such consideration, the plaintiff agreed to permit him to stay in the suit premises as licensee for two years. On the basis of such understanding on 13th April, 2007 a licence agreement was executed by the plaintiff and the defendant. It was agreed that the defendant would pay licence fee at the rate of Rs.1,140/- per month along with 10% of the municipal tax in respect of the suit premises. Subsequently, due to differences between the plaintiff and the defendant, the relationship got strained and the defendant stopped paying licence fee from the month of July, 2008.

Thereafter in view of the fact that in terms of the licence agreement dated 13th April 2007 the period of licence would expire on 31st March, 2009, a notice dated 7th March, 2009 was issued on behalf of the plaintiff in the second suit duly revoking the licence and Shri Pattanayak was requested to vacate and deliver possession of the premises in question on 1st April, 2009.

The defendant entered appearance in the second suit and contested the proceeding by filing the written statement. Sri Pattanayak in the written statement has also mentioned about the plaint filed in his first suit as contended that the relationship between the parties is that of landlord and tenant and he was unaware about the nomenclature of the agreement dated 13th April, 2007 as he was informed that it was a mere extension of the tenancy agreement and he would enjoy the same status as tenant which he was enjoying since inception of the tenancy.

The learned Trial Judge initially framed six issues. However, the principle issue appears to be, whether Mr. Pattanayak is a licensee or a tenant in the suit premises. The learned trial Judge on the basis of the evidence held that the licence agreement on the basis of which the plaintiff of the second suit is described as a licence agreement, is in effect, a tenancy agreement and accordingly the termination was bad in law. The learned trial judge held that the intention of the parties has to be gathered on a wholesome reading of the agreement along with other

documentary and oral evidence. In view of the fact that Sri Pattanayak was in exclusive possession of the suit property even after the execution of the licence agreement and also having regard to the fact that Mr. Pattanayak was inducted initially as a tenant in the suit premises by the father of the plaintiff of the second suit by an agreement dated 28th March, 1998 and subsequently the said tenancy was renewed from time to time each for a period of 2 years and last of which was executed on 23rd March, 2005, it would appear that the intention of the parties was to continue with the relationship of landlord and tenant. The licence agreement does not reflect the real state of affairs and real intention of the parties. The learned Trial Judge on consideration of the licence agreement dated 13th April, 2007 that was marked as Exbt. 7, was of the opinion that the terms conditions of the said agreement is same and similar to that of the previous tenancy agreements being Exbts.1 to 4. The manner of possession provided in the previous agreements is also the same with the only difference that the parties are now described as licensor and licensee instead of landlord and tenant.

From a bare reading of the previous agreements as well as licence agreement the exclusiveness of possession by Mr. Pattanayak could be easily inferred. The Trial court believed the evidence of Sri Pattanayak that he had signed the said agreement in good faith without actually being aware of the contents of the said agreement and in the absence of

any independent witness claiming that he had seen or was present when Mr. Pattanayak alleged to have executed such agreement with full knowledge about the contents of the same, the plaintiff cannot take advantage of the licence agreement to evict Mr. Pattanayak from suit premises. The leaned Trial Judge was also took the view that the receipt of the licence fees cannot be the decisive factor for determination of the matter in dispute. As a matter of general prudence the tenant would not permit the landlord to convert his status from a tenant to licensee unless the owner of the premises put any extraneous pressure upon him.

From the surrounding circumstances it can be reasonably inferred that the alleged licence was created to circumvent the express possession of the tenancy law. When all the earlier agreements being Exbt. 1 to 4 clearly show that the relationship of the parties were of landlord and tenant, sudden alteration of the status is something more that it needs the eyes.

Accordingly, the suit filed by Partha being the plaintiff in the second suit for a decree for eviction of Mr. Pattanayak as a licensee and for recovery of khas possession must fail. On the contrary Mr. Pattanayak has been able to establish his tenancy right and accordingly he is entitled to continue to remain in possession of the suit premises as the tenant. In short the suit for declaration of tenancy right was upheld.

The landlord preferred in appeal.

The Appellant Court reverse the judgment and decree passed in favour of Mr. Pattanayak. On appreciation of the oral and documentary evidence adduced before the learned Trial Judge, the Appellate court was of the view that having regard to the fact that Sri Pattanayak never disputed the execution of the agreement dated 13th April, 2007, it cannot now be contended that he continued to remain as a tenant and the said licence agreement does not reflect the real intention between the parties. The Appellate Court disbelieved Sri Pattanayak that he executed the licence agreement being moved by the notion that it was an agreement for monthly tenancy.

Mr. Chatterjee has submitted that when the parties have acted in a particular way over a long period of time and there is a sudden departure from that relationship, thereby creating a new relationship which is detrimental to one of the parties and would give an edge to one party over the other, it needs to be ascertained what was the necessity to change such relationship and whether such change in relationship was consensual.

In the present case, when Mr. Pattanayak was enjoying the protection under the Tenancy Law this sudden change of relationship from tenant to licensee has to be viewed with suspicion and needs to be considered in a holistic manner on the basis of all relevant and surrounding circumstances relating to the execution of the alleged

licence agreement. Mr. Chatterjee submits that since inception of the tenancy the record would show that the duration of the tenancy was extended from time to time and the parties acknowledged their relationship as landlord and tenant. It is submitted that the evidence of the defendant has to be read as a whole. The first appellate court has overlooked the fact that Mr. Pattanayak was not aware of the true nature of the agreement and the blanks in the alleged licence agreements were all filled up by the plaintiff. The Appellate Court ignored this vital and material piece of evidence as it clearly establishes the superior bargaining power and dominance of Partha over Pattanayak. These circumstances would show that the agreement was not entered into voluntarily. The Appellate Court has also failed to take into consideration that the exclusive possession of the suit premises remained with Mr. Partha and there is no clause in the license agreement which would show that Partha had the right to enter the suit premises during the so called licence period. Mr. Chatterjee submits that the phraseology used in a document is not a decisive factor and it is the substance of the agreement that matters.

The alleged licence agreement obliges Mr. Pattanayak to defray all expenses including payment of municipal rates and taxes which is unusual in licence agreement.

Mr. Chatterjee submits that if a document gives only right to use the property in a particular way or under certain terms while it remains

in possession and control of the owner it will be a license. The Appellate Court has overlooked that in the alleged license agreement no such right was preserved in favour of Partha.

Mr. Aniruddha Chatterjee, learned Counsel appearing on behalf of the appellant has strenuously argued that surrender of tenancy has to be categorically proved by cogent evidence by the plaintiff as the plaintiff asserted that the defendant has surrendered her tenancy and a licence agreement less favourable to Sri Pattanayak was entered into by and between the parties. The agreement is merely a camouflage and in effect a “hidden lease”. It does not show that there has been a surrender of tenancy by Sri Arun Kumar Pattanayak in favour of the plaintiff. It is submitted that surrender of tenancy has to be by way of a registered instrument and in absence of any document to show that the surrender of tenancy was done by any registered instrument, the inference arrived at by the Appellate Court on the construction of the agreement dated 13th April, 2007 is clearly erroneous and against the canons of interpretation of documents.

Mr. Chatterjee has invited this Court to allow this appeal on the ground that there has been a manifest misreading of Exhibit-7, that is the licence agreement, leading to miscarriage of justice. It is, submitted that the finding of the learned Appellate Court that the tenancy was surrendered is perverse and contrary to the evidence on record.

Mr. Chatarjee has drawn our attention to the affidavit in Chief of Arun Kumar Pattanayak paragraph 8, 9, 10 and 13 to show that the defendant in the affidavit-in-chief, has specifically stated that the alleged agreement which now turned out to be a licence agreement by reason of Partha with the knowledge that the said agreement is for monthly tenancy. The said agreement was prepared by plaintiff and was never read over and explained by Mr. Partha and the defendant also did not get any chance to read it. After the service of the notice dated 7th March, 2009 Mr. Pattanayak tendered the rent to the plaintiff for the month of February 2009 by money order, as the plaintiff refused to accept the rent and asked Mr. Pattanayak to vacate the suit premises. Since Partha refused to accept the rent, Mr. Pattanayak filed H.R.C case no.8 Sadar 2009 before the House Rent Controller under Section 21 of the West Bengal Premises Tenancy Act and also filed a suit namely OS No. 65 of 2009 against Partha for declaration of the tenancy right and injunction. The notice dated 7th March, 2009 by the learned Advocate for Partha describing Mr. Pattanayak as licensee is illegal, invalid and not binding upon him as he is a monthly tenant in the suit premises and he had never occupied the said premises as a licensee.

The Appellate Court has failed to consider the real intention of the parties which were to be gathered from a complete reading of document along with surrounding circumstances including conduct of the parties

before and after creation of the relationship. In this regard Mr. Chatterjee has relied upon the decision of the Hon'ble Supreme Court in:

1. ***Associated Hotels of India Ltd. v R.N. Kapoor*** reported in **AIR 1959 SC 1262.**

2. ***Delta International Ltd. v Shyam Sundar Ganeriwalla & Anr.***, reported in **1999(4) SCC 545**

3. ***C.M. Beena & Anr. v P.N. Ramachandra Rao***, reported in **2004(3) SCC 595.**

Mr. Chatterjee also raised a jurisdictional issue and questioned the maintainability in suit filed by Partha. It is submitted that a suit for eviction of a licensee is not maintainable in view of the fact that the provisions of Section 60 of the Easement Act is not applicable to the State of West Bengal. In this connection, he has relied upon a Division Bench of our court in ***Madhulata Kankani v. Homant Bangur***, reported in **AIR 2005 Cal 268.**

Mr. Chatterjee submits that the Hon'ble Division Bench after taking note of the judgment of the Hon'ble Supreme Court in ***Panchugopal Barua & Ors. v Umesh Chandra Goswami & Ors.***, reported in **1997(4) SCC 713** has categorically observed in paragraphs 18 and 19 in ***Madhulata*** (supra) that the provisions of the Indian

Easement Act would have no manner of application in the State of West Bengal.

Mr. Partha Pratim Roy the learned Counsel appearing on behalf of the respondent/decreed holder submits that the learned Trial Judge has completely overlooked the admission of Arun Kumar Pattanayak during his evidence that he executed the agreement.

The Appellate Court noticed such mistake committed by the learned Trial Court and reversed the judgment on the ground that there is a clear admission on behalf of Pattanayak that he became a licensee by virtue of the licence agreement. Our attention was drawn to the agreement dated 13th April, 2007 which bears a description “*Ghor Babohar Koribar Licence*” meaning thereby it is a **(licence for using premises)**.

Mr. Roy submits that subsequent to the said licence agreement licence fees were paid and receipts showing such payment as licence fees were issued.

Mr. Roy has referred to 15 such receipts showing payment of licence fee that were marked as Exbt. 8 (series) and contrasted the said receipts with the earlier receipts where rent was specifically mentioned. Moreover the description of the two receipts are completely different. The receipt issued after the licence agreement bear the nomenclature “Licence fee Prodaner Rashid”, that is, “Receipt towards Licence fee”

and on the left hand side it is specifically mentioned that on expiring of the licence, the licence shall be obliged to handover possession of the room.

Mr. Roy submits that Mr. Pattanayak had never questioned the existence of the said agreement nor the receipts with the aforesaid description issued pursuant to the licence agreement and had paid licence fees in terms of the said licence agreement. Our attention is drawn to the cross-examination of Mr. Pattanayak to show that he was not only aware of the existence of the said agreement and the relationship that were to follow after the execution of the said agreement but he has also admitted to have a copy of the said agreement which he said during his cross-examination that he would file after consulting with his learned Advocate. This evidence clearly demolishes the evidence of Mr. Pattanayak in Chief where he has denied receipt of such agreement or unaware of its contents. Mr. Roy submits that there is no absolute bar to file a suit for revocation of licensee and the judgments relied upon by Mr. Chatterjee with regard to the maintainability of the suit on the ground that Section 52 of the Easement Act has no manner of application in the State of West Bengal was never raised either before the Trial Court or before the first Appellate Court. It was not even urged as one of the grounds of appeal in the memorandum of appeal. Moreover Justice I.P. Mukherji in ***ITC v. Chowringhee Residency Private Ltd.*** reported in **AIR 2015 Cal 37**

has expressly stated that the courts across jurisdiction has applied the common law principle to decide a claim based on licence. In any event in ***Madhulata*** (supra) the Hon'ble Division Bench has applied the principle of justice equity and good conscience to interpret the provisions of the Easement Act. It is a fit case where such principle of equity needs to be applied to do complete justice.

Moreover, agreement dated 13th April, 2007 bears the nomenclature "Ghar Babohar Koribar license" (Licence for using premises). The said agreement mentions licence fee at the rate of Rs.1140/- per month for two rooms described in the Schedule to the deed. The receipts showed that payment is made towards licence fee and all the receipts were marked as Exhibit 8. The agreement dated 13th April, 2007 read with receipts, according to the learned Appellate Court, manifestly shows that Sri Arun Kumar Pattanayak had surrendered his tenancy right in respect of the suit premises by entering into licence agreement which became operative on and from 1st April, 2007.

We shall now examine on the basis of the submissions made on behalf of the parties whether any substantial question of law is involved in this second appeal. The preponderance of evidence on the basis of which a civil litigation is to be decided both documentary and oral are overwhelming in favour of the respondent / decree holder. The reasons are as follows:-

During his cross examination on 3rd July, 2015 in relation to the agreement dated 13th April, 2007, he has categorically stated in his cross examination that before he put his signature on the said agreement he was fully aware of the contents of the said document. He had further admitted that after expiry of the agreement dated 31st March, 2007, the relationship of the landlord and tenant had ceased and that before the expiry of the licence agreement, he was asked by the plaintiff to vacate the suit premises. There is no requirement in law that all surrender has to be by a registered instrument. It could be implied from the conduct of the parties.

There are contradiction in the evidence of Mr.Pattanayak with regard to the receipt of the copy of the agreement. While in the examination in chief on affidavit he has stated that he did not receive a copy of the agreement but during his cross-examination he admitted that he has a copy of the said agreement and he would produce the said agreement only upon consultation with his advocates. It is correct that some of the blanks in the said agreement were filled up by the landlord/plaintiff however, those are not essential terms to decide the nature of the said agreement. The typed written agreement clearly mentions "Asthayi Licence Sarupe Bandobosto hoilam" meaning thereby that the appellant becomes a licensee.

Apart from the names of the parties, duration of the agreement and the monthly licence fee payable under the said agreement, all other

terms are printed. This is a clear departure in the language of the licence agreement from the earlier tenancy agreement. Every page of the said agreement was signed by Mr. Pattanayak. Mr. Pattanayak has never alleged that he is illiterate or the agreement was never read over to him. In fact, all the earlier agreements were in Bengali language which were duly signed by the parties. The evidence shows that Mr. Pattanayak with free will and voluntarily executed the said agreement of licence in favour of the landlord. The doctrine of *factum non valet* is not applicable in the instant case Mr. Pattanayak is a businessman and we have every reason to believe that only after he read the said agreement he put his signature. He did not file a suit for delivery up and cancellation of the said agreement nor made any counter claim in the written statement. Although it was open for him to do so immediately after he allegedly became aware of the said agreement. In fact, Mr. Pattanayak could not had any convincing evidence suggesting that he was not aware of the contents of the agreement as he did not contemporaneously received the said agreement. In fact, series of receipts exhibited by the plaintiff would show that he has made payment as a licensee and towards licence fee and the word "Bhara" which is commonly used to identify rent as opposed the licence fee were conspicuous in their absence in each of the receipts issued by the landlord after the licence agreement was executed by the parties. The plaintiff having proved due execution of the licence agreement is not required to discharge any other onus. The licence agreement along

with licence fees clearly establish the relationship between the plaintiff and the defendant is one of licencor and licensee.

Mr. Chatterjee has strenuously argued that the licence agreement is, in fact, a hidden tenancy and exclusivity of possession of the appellant in the said premises is a pointer towards tenancy and not licensee. In ***Associated Hotels of India Limited*** (supra) Justice K. Subbarao in paragraph 28 of the said report laid down the tests to be applied to ascertain whether an agreement is lease or licence :-

“For ascertaining whether a document creates a licence or lease, the substance of the document must be preferred to the form. It is not correct to say that exclusive possession of a party is irrelevant but at the same time it is not conclusive. The other tests, namely, intention of the parties and whether the document creates any interest in the property or not, are important considerations”.

The intention of the parties has to be gathered from the oral and documentary evidence and the conduct of the parties. All the earlier agreements were temporary in nature. The parties never intended to have a long continuous relationship. It has come on record that Mr. Pattanayak was aware of the nature of the agreement and it was on his request that the plaintiff allowed him to stay for few more years. So that he did not face any inconvenient in his business. The alteration in the status was consensual and consciously adopted by the parties. Once the parties with their eyes wide open create to alter their situation knowing fully its contents a party likely to be affected by the said

agreement cannot question the said agreement after he has accepted the said agreement and performed his duties and obligation under the said agreement.

In view of the unclinching evidence both oral and documentary that the agreement is a licence agreement as it appears and intended, there is no scope to hold that the said licence agreement is a hidden tenancy. The 2nd appeal can be admitted provided it involves a substantial question of law as opposed to a mere error of law. It needs to have a substantial foundation on law bound to withstand the regards Section 100 of the Code of Civil Procedure.

The trial court and the first Appellate court are best suited to decide on the question of fact and law. The appreciation of evidence by both the courts unless it is perverse are not to be interfered with 2nd Appeal. Although the order of the learned Trial court was reversed by the appellate court but we are convinced that the order of the trial court was erroneous as it has failed to interpret the agreement in its proper perspective and has overlooked the material piece of evidence which strongly suggest licence and not tenancy. The appellate court has correct the said error.

Before I conclude it needs to be mentioned that the non-maintainable of the suit on the ground that the provision of the Easement Act would not apply in the instant case was never raised before any of the courts including in the grounds of appeal filed before

us. When a party does not raise such questions in the earlier proceedings, High Court cannot decide the second appeal on the basis of a new point not specifically set out in the memorandum of appeal. However, even on the basis of the judgment cited by the parties in this regard the jurisdiction of the court to revoke a licence has been guided by the common law principle of justice equity and good conscience and if the court is convinced on the basis of the evidence on record that the said principle is required to be applied to do justice between the parties, the court is not preclude from applying the principle in an appropriate case to do complete justice between the parties. This inherent power of the court recognised in the decision cited by the parties in this regard.

On such consideration the second appeal being SAT 101 of 2018 along with CAN 1 of 2018 (Old CAN 2212 of 2018) stand dismissed.

However, there shall be no order as to costs.

I agree,

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)