

Kavita S.J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 12969 OF 2024
WITH
INTERIM APPLICATION NO.2825 OF 2021
IN
FIRST APPEAL NO. 383 OF 2021

1. Rafique A. Tajani
2. Aziza A. Tejani

...Applicants/
Org. Defendant Nos. 4 & 5

In the matter between:

Pratima Mahesh Mehta & Ors.,

...Appellants

Versus

Tulsidas V. Patel Pvt. Ltd., & Ors.,

...Respondents

Mr. Kotwal a/w Ms. Gaurangi Pujara, Ms. Isha Bafna, Ms. Parita Mashruwala for the Appellants.

Mr. Rahul Soman for Respondent No.1.

Mr. Cherag Balsara a/w Mohit Arora i/b Himank Singh & Abha Gokhale i/b Desai & Diwanji for the Respondent Nos. 4 and 5.

CORAM : R.I. CHAGLA, J.

DATED : 23rd OCTOBER, 2024.

ORDER :

1. By this Interim Application, the Applicants/Original Respondent Nos. 4 and 5 in the First Appeal seeks direction permitting the Applicants to grant license for use and occupation of

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Flat No.23, admeasuring approximately 3800 sq.ft. situated on the 20th Floor of Kanchanganga Building, 72, Dr. G. Deshmukh Marg, Peddar Road, Mumbai (“said Flat No.23”) in accordance with the terms set out in the Terms Sheet annexed and marked at Exhibit-D as modified by the proposed clauses of Leave & License Agreement which has been tendered and taken on record and marked ‘X’ for identification.

2. Mr. Cherag Balsara, learned Counsel appearing for the Applicants states that the proposed clauses of Leave & License Agreement shall be incorporated in the Leave & License Agreement to be executed with the Licensee.

3. Mr. Balsara has referred to the Order dated 6th July, 1989 passed by this Court in Notice of Motion No.489 of 1988 in Suit No.1868 of 1983, wherein this Court had recorded the undertaking of Defendant Nos. 2 to 5 which includes the present Applicants not to dispose of or part with possession or create any third party rights in the said Flat No.23 pending the disposal of the Suit. He has submitted that the Suit was dismissed by the Judgment dated 20th July, 2021 passed by the City Civil Court to whom the said Suit had been transferred.

4. Mr. Balsara has thereafter referred to the Order dated 4th December, 2021 passed by this Court in the above First Appeal by which the undertaking recorded in the said Order dated 6th July, 1989 furnished by the Respondent Nos. 2 to 5 was continued. By a subsequent Order dated 30th November, 2022, this Court had noted that the First Appeal had been admitted by Order dated 30th August, 2022 and statement made by the learned Counsel for Respondent Nos. 4 and 5 who are the Applicants herein not to alienate and transfer any third party rights in respect of the Suit Property had been continued from time to time till the date of the said order as per the understanding between the parties. This Court had continued the statement which had been agreed to be continued by the Applicants herein till the hearing and final disposal of the First Appeal. By a clarification order dated 27th January, 2023 this Court clarified that in the prior order dated 30th November, 2022 the aforementioned statement recorded shall continue till the hearing and final disposal of Interim Application No.2825 of 2021.

5. Mr. Cherag Balsara has submitted that in view of the aforementioned orders, the said Flat has remained vacant and not generated income. The Applicants intend to grant License for use and

occupation of the said Floor. He has given the particulars of the proposed Leave & License Agreement to be entered into.

6. Mr. Balsara has referred to the Judgment of this Court in *Sohan Lal Naraindas Vs. Laxmidas Raghunath Gadit*,¹ wherein the Full Bench has considered that a License confers a right to do or continue to do something in or upon immovable property of the grantor which but for the grant of the right may be unlawful, but it creates no estate or interest in the property demised. He has also referred to the Judgment of the Supreme Court in *Associated Hotels of India Ltd. Vs. R.N. Kapoor*,² wherein the Supreme Court has distinguished a lease from a license and has held that Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 52 of the Indian Easements Act, a license has been defined. Under this Section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a license.

1 1971 (1) SCC 276,

2 1959 SCC OnLine SC 62

7. Mr. Balsara has accordingly submitted that the Leave & License Agreement will not be in violation of the aforementioned statement given by the Applicants to this Court. However, out of abundant caution and to obviate any doubt, the present Interim Application has been taken out seeking permission to enter into Leave & License Agreement in respect of the said Flat.

8. Mr. Kotwal, learned Counsel appearing for the Appellants in the First Appeal and Respondents herein has objected to the relief sought for in the Interim Application. He has submitted that the conduct of the Applicants has been noted by the City Civil Court in the impugned Judgment. The Appellants in the First Appeal have been deprived of their Flat which they had purchased in the Kanchanganga Building on 19th Floor, which had thereafter become the 20th Floor despite having paid full purchase consideration for the same. He has submitted that the Defendant No.1 in the Suit filed by the Plaintiffs / Appellants herein had given an undertaking to the Court that as and when the said Flat is constructed, the Respondents will not sell, alienate, encumber, transfer or create third party rights in respect of the said Flat. He has submitted that Defendant No.1 in connivance with Defendant Nos. 2 to 4 breached the undertaking by

playing fraud upon the Court and thereby the Appellants deprived of their Flat which is the very same Flat i.e. the said Flat which the Applicants herein propose to give out on Leave & License basis.

9. Mr. Kotwal has referred to the decision of this Court in **Sudeshkumari (Smt.) alias Santoshkumar Roshanlal Agarwal Vs. Bombay Alloy Steel Industries Pvt. Ltd. & Others,³** wherein this Court had considered a Leave & License Agreement to be parting with possession in breach of an injunction order. He has submitted that in the event this Court permits the Applicants herein to entered into the Leave & License Agreement, the possession of the said Flat would thereafter be parted with and which would be in breach of the aforementioned undertaking given by the Applicants herein to this Court.

10. Having considered the submissions, in my view, the law laid down by the Supreme Court in ***Associated Hotels of India Ltd. Vs. R.N. Kapoor (supra)*** had not been placed before this Court in ***Sudesh Kumari (supra)***. The Supreme Court has in the said decision held that a license only gives a right to use the property in a particular way or under certain terms while the property remains in the possession and

³ 2000 SCC OnLine Bom 514

control of the owner thereof. This is in contradistinction to a lease which amounts to transfer of interest in the property. Thus, the entering into of a Leave & License Agreement will not amount to parting with possession and there will be in breach of the aforementioned statement given to this Court by the Applicants herein.

11. Further, the submissions have been made by the original Defendant No.1 in the Suit who is Respondent No.1 herein that the entering into Leave & License Agreement would be a violation of the Agreement dated 10th June, 1978 executed between Respondent No.1 and Respondent Nos.2 to 5 herein and in particular Clauses 5 and 9 have been referred to. A further submission has been made that an Administrator had been appointed in respect of Respondent No.1 and there is change of Administrator which proceedings are currently pending before the Supreme Court. Having considered these submissions, in my view, the clauses in the Agreement dated 10th June, 1978 are not applicable to a Leave & License Agreement in view of the above finding that a License does not amount to parting with possession of the said Flat.

12. In that view of the matter, the relief sought for in the

Interim Application requires to be granted.

13. Hence, the following order is passed:

(i) The Applicants are permitted to grant by way of Leave & License use and occupation of the said Flat No.23 described in prayer Clause (a) of the Interim Application, subject to the terms set out in Terms Sheet as modified by the Proposed Clauses of Leave & License Agreement which has been tendered and marked 'X' for identification and with further modification that one set of keys of the said Flat No.23 shall be deposited with this Court.

(ii) The Applicants shall annex this order to the Leave & License Agreement to be entered into with the Licensee.

(iii) Further, it has already been provided in the Proposed Clauses of Leave & License Agreement marked 'X' that the Licensee shall abide by the orders passed in First Appeal No. 383 of 2021 and Interim Application No.7464 of 2021 and 12969 of 2024. This shall also apply to the Applicants herein as Licensors.

(iv) Further, there shall also be a clause in the Leave & License Agreement that in the event, the Appellants succeed in the First Appeal and the impugned Judgment of the City Civil Court is set aside, the Licensors / Applicants herein shall forthwith take possession of the said Flat No.23 from the Licensee.

(v) Further, a copy of the Leave & License Agreement executed between the Applicants and the Licensee shall also be submitted to this Court.

(vi) The Interim Application is accordingly disposed of. There shall be no orders as to costs.

(vii) The Court to whom the above First Appeal has been assigned is requested to hear and dispose of the First appeal expeditiously.

[R.I. CHAGLA, J.]