

## **Capt. B.V.D Souza vs Antonio Fausto Fernandes on 1 August, 1989**

**Equivalent citations: 1989 AIR 1816, 1989 SCR (3) 626, AIR 1989 SUPREME COURT 1816, (1989) 3 BOM CR 150, (1989) 2 APLJ 81, (1990) 1 MAD LW 527, (1990) 2 RENTLR 381, (1990) 1 GOALT 18, (1989) 3 JT 265 (SC), (1990) 1 RENCER 186, 1989 (3) SCC 574**

**Author: L.M. Sharma**

**Bench: L.M. Sharma, Jagdish Saran Verma**

PETITIONER:

CAPT. B.V.D SOUZA

Vs.

RESPONDENT:

ANTONIO FAUSTO FERNANDES

DATE OF JUDGMENT01/08/1989

BENCH:

SHARMA, L.M. (J)

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SHARMA, L.M. (J)

VERMA, JAGDISH SARAN (J)

CITATION:

1989 AIR 1816

1989 SCR (3) 626

1989 SCC (3) 574

JT 1989 (3) 265

1989 SCALE (2)197

ACT:

Goa, Daman and Diu Buildings, (Lease, Rent and Eviction) Control Act, 1968: Section 56--Bar of Court's Jurisdiction.

Rent Control--Deed--Lease or Licence--Determination of Intention of parties--The real test--Test of exclusive possession--Whether relevant.

Civil procedure Code, 1908:Section 100 Document--Whether lease or licence--Concurrent findings by Trial Court and First Appellate Court--Binding effect of in second appeal before High Court.

HEADNOTE:

The respondent-landlord induced the appellant into the

suit premises pursuant to an agreement. The agreement was described as agreement of leave and licence, the parties as licensor and licensee and the rent as compensation for use and occupation, and it was provided that the appellant (i) shall pay monthly rent regularly on or before the 5th day of each consecutive month; (ii) shall not sub-let, under-let or part with possession nor shall keep the premises vacant for more than three months without the consent of the licensor; (iii) that on the expiry of the deed, it shall be renewable at the will of the licensee.

Several years after the expiry of the above agreement the respondent instituted a civil suit for a decree of eviction of the appellant on the ground that the appellant was in occupation as a licensee and has illegally refused to vacate. Rejecting the plea of the appellant that he was a month to month tenant protected by the provisions of, the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 and that the suit was barred by section 56 the Trial Court passed a decree for eviction which was confirmed in appeal by the District Judge.

The second appeal filed by the appellant was also dismissed by the High Court holding that it was concluded by concurrent findings of fact. Hence this appeal.

Allowing the appeal, and setting aside the decree of the Courts below,

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HELD: 1. The findings of the Courts below were not those of fact so as to be binding on the High Court under section 100 of the Civil Procedure Code. The case has to be decided on the nature of possession of the appellant which is dependent on a correct interpretation of the document. [628G]

2. It is well settled that the main purpose of enacting the Rent statutes is to protect the tenant from the exploitation of the landlord, who being in the dominating position is capable of dictating his terms at the inception of the tenancy; and, the Rent Acts must receive that interpretation which may advance the object and suppress the mischief. By adopting a different approach the Rent laws are likely to be defeated altogether. [630H, 631A]

3. For ascertaining whether a document creates a licence or lease, the substance of the document must be preferred to the form. The real test is the intention of the parties--whether they intended to create a lease or licence. If an interest in the property is created by the deed it is a lease but if the document only permits another person to make use of the property of which the legal possession continues with the owner, it is a licence. The test of exclusive possession is not irrelevant but at the same time it is not conclusive. If the party in whose favour the document is executed gets exclusive possession of the property, prima facie he must be considered to be a tenant; although this factor by itself will not be decisive. [629A-B-C, 630B-C]

Associated Hotels of India Ltd. v. R.N. Kapoor, [1960] 1 S.C.R. 368; Sohanlal Naraindas v. Laxmidas Raghunath, [1971] 3 S.C.R. 319; applied.

Shell-Mex and BP Ltd. v. Manchester Garages Ltd., [1971] 1 All E.R. 841; explained-

4. In the instant case, the terms of the deed are not consistent with the respondent's case of licence, and indicate that an interest in the property was created in favour of the appellant in pursuance of which he was put in possession with a right of renewal- The surrounding circumstances are also consistent with the deed being one of lease. The notice to vacate the premises was served on the appellant after several years of expiry of the agreement. There was no relationship or friendship between the parties, which would have induced the respondent to allow the appellant to occupy the building. Realisation of rent was the sole consideration. The description of the parties as licensor and licensee or the rent as compensation does not carry too much weight. The agreement was in reality a document of lease, and the appellant has been enjoying the exclusive possession in the capacity of month to month tenant. The suit filed by the respondent was, therefore, not maintainable. [629F, 631 B-C, D-E]

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6 184 of 1983.

From the Judgment and Order dated 28.7.1983 of the Bombay High Court in S.C.A. No. 5/B/1982.

S.K. Mehta, Dhruv Mehta, Aman Vachher and Atul Nanda for the Appellant.

S.K. Dholakia and Praveen Kumar for the Respondents. The Judgment of the Court was delivered by SHARMA, J. The only point involved in this appeal is whether the document (Ext. 20) executed by the parties at the time the appellant was inducted in the disputed premises is an agreement of leave and licence or a deed of lease. The building belongs to the respondent, and the appellant claims to be in its occupation as a month to month tenant. The respondent instituted the suit in the civil court, out of which this appeal by special leave arises, for a decree for eviction of the appellant alleging that he has been in occupation of the building as a licensee and has illegally refused to vacate in spite of service of notice. The appellant's defence is that he is a tenant protected by the provisions of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968, and in view of s. 56 thereof the suit in the civil court is not maintainable. Agreeing with the plaintiff-respondent, the trial court passed a decree which was confirmed on appeal by the District Judge. The High Court dismissed the second appeal filed by the appellant observing that it was concluded by concurrent findings of fact.

2. We do not agree with the High Court that the findings of the courts below were those of fact so as to be binding on the High Court under s. 100 of the Code of Civil Procedure. The case has to be decided on the nature of possession of appellant which is dependent on a correct interpretation of the document Ext. 20.

3. The document Ext. 20 has been described as an agreement of leave and licence and the parties as the Licensor and the Licensee. But it is significant to note that in the very first sentence of the document the respondent is described as "Landlord hereinafter called the Licensor". However, this cannot answer the disputed issue as it is firmly established that for ascertaining whether a document creates a licence or lease, the substance of the document must be preferred to the form. As was observed by this Court in *Associated Hotels of India Ltd. v. R.N. Kapoor*, [1960] 1 SCR 368, the real test is the intention of the parties--whether they intended to create a lease or licence. If an interest in the property is created by the deed it is a lease but if the document only permits another person to make use of the property "of which the legal possession continues with the owner", it is a licence. If the party in whose favour the document is executed gets exclusive possession of the property, prima facie he must be considered to be a tenant; although this factor by itself will not be decisive. Judged in this light, there does not appear to be any scope for interpreting Ext. 20 as an agreement of leave and licence.

4. The document has been placed before us by the learned counsel for the appellant. Although as stated earlier, it has been described as an agreement of leave and licence and the parties as the "Licensor" and the "Licensee", its provisions unmistakably indicate that the appellant was being let in as a tenant on the monthly rental of Rs.350 (besides water and electricity charges) to be paid regularly on or before the 5th day of each consecutive month. By clause 5, it was agreed that the appellant "shall not sub-let, under-let or part possession of the premises to any stranger nor shall he keep the premises vacant for more than 3 months without the consent of the Licensor", that is, the respondent. The question of executing a sub-lease or subletting can arise only by a tenant. If a licensee inducts any person in the property as his tenant, it cannot be described as sub-letting. In clause 15 it is stated that on the expiry of the period, the deed "shall be renewable thereafter at the will of the licensee"; and in the event of the licensee not desiring to renew, "shall give one month's notice in writing". These terms are not consistent with the respondent's case of licence, and indicate that an interest in the property was created in favour of the appellant in pursuance of which he was put in possession with a right of renewal. When compared with the terms of the documents set out in the judgments in *Associated Hotels of India Ltd. v. R.N. Kapoor*, [1960] 1 SCR 368 and *Sohan Lal Naraindas v. Laxmidas Raghu-nath Gadit*, [1971] 3 SCR 319, relied upon by the learned counsel for the appellant, which were construed by this Court as creating lease in spite of their description as licence deeds, the appellant's case stands out as stronger. If the approach adopted by the courts below in interpreting the document is accepted, it shall defeat the object of the Rent Acts, by permitting the parties to camouflage the real nature of the transaction by resorting to skilful drafting.

5. Mr. Dholakia, learned counsel for the respondent, strenuously, contended that the test of exclusive possession is an out dated one which should not now be taken into account for the purpose of deciding the nature of possession. Reliance was placed on the observations of Lord Denning

MR in *Shell-Mex and BP Ltd. v. Manchester Garages Ltd.*, [1971] 1 All E.R. 841. We do not agree that exclusive possession of a party is irrelevant as is suggested; but at the same time as has been observed in the earlier cases of this Court, referred to above, 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 observations in the English case, relied upon by the learned counsel for the respondent cannot be understood to suggest that the test of exclusive possession has been now rendered irrelevant and redundant as they are immediately followed by the statement;

"As I have said manytimes, exclusive possession is no longer decisive."

The position stands further clarified by the following statement in the concurring judgment of Buckley, L J,;

"The only clause which points one way or the other, I think, is cl. 19 in Sch. 1 which Lord Denning MR has already read, which clearly recognises that notwithstanding the bargain between the parties, the plaintiffs retained rights of possession and control over the property in question. That seems to me to be consistent only with the fact that this transaction was in truth a licence transaction and not a tenancy under which the defendants would obtain an exclusive right to possession of the property during the term of the tenancy, subject, of course, to any rights reserved by the plaintiffs."

We are also not in a position to agree with Mr. Dholakia when he says that if the parties themselves have chosen to describe the transaction as a licence, we cannot make out a different case for them. It is well settled that the main purpose of enacting the Rent statutes is to protect the tenant from the exploitation of the landlord, who being in the dominating position is capable of dictating his terms at the inception of the tenancy; and, the Rent Acts must receive that interpretation which may advance the object and suppress the mischief. By adopting a different approach the Rent laws are likely to be defeated altogether.

6. The surrounding circumstances are also consistent with the deed being one of lease. The notice to vacate the premises was served on the appellant after several years of expiry of the term of the agreement. It is not suggested on behalf of the respondent that there is any relationship between the parties or that they were friends which induced him to allow the appellant to occupy the building. Realisation of rent which has been described in the document (Ext.

20) as "compensation reserved for use and occupation" was the sole consideration of the transaction. In this background the description of the parties as lessor and lessee or the rent as compensation does not carry much weight.

7. For the reasons mentioned above, we hold that Ext. 20 was in reality a document of lease and the appellant has been enjoying the exclusive possession thereof in the capacity of month to month tenant. As a result the suit was, in view of the provisions of the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, not maintainable. The appeal is accordingly allowed but

without costs, the decree passed by the courts below is set aside and the suit is dismissed.

T.N.A.  
allowed.

Appeal