

A **KONCHADA RAMAMURTHY SUBUDHI & ANR.**

v.

GOPINATH NAIK

December 7, 1967

B

[S. M. SIKRI, J. M. SHELAT AND K. S. HEGDE, JJ.]

Lease or Licence—Test for determining.

C

The appellant filed a suit for eviction of the respondent from the appellant's house. The suit was dismissed by the trial court. In appeal, a compromise was entered into between the parties and a decree was passed in terms of the compromise. The compromise provided for the respondent's continuation of possession of the house for five years, but it enabled the appellant to execute the decree by evicting the respondent if the respondent failed to pay rent for any three consecutive months. When the appellant sought to evict the respondent, the latter claimed protection from eviction as a tenant under the Orissa House-Rent Control Act, 1958.

D

On the question whether the compromise decree created a lease or a licence,

E

HELD : The facts that the appellant had filed a suit for eviction of the respondent and the compromise decree enabled him to execute the decree by evicting the respondent, show, that the intention of the parties, which is the decisive test, was not to enter into the relationship of a landlord and tenant, in spite of the fact the word 'rent' was used in the compromise. Therefore, the respondent was not entitled to any protection against eviction. [562 C; 563 A-C]

Associated Hotels of India v. R. N. Kapur, [1960] 1 S.C.R. 368, *State of Punjab v. British India Corporation*, [1964] 2 S.C.R. 114 and *M. N. Clubwala v. Fida Hussain Saheb*, [1964] 6 S.C.R. 642, followed.

Issac v. Hotel De Paris, [1960] 1 All E.R. 348, applied.

F

Sumatibai Waman Kirlikar v. A. B. Shirgaonkar, A.I.R. 1949 Bom. 402, approved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 372 of 1965.

G

Appeal by special leave from the judgment and order dated September 23, 1963 of the Orissa High Court in Miscellaneous Appeal No. 59 of 1961.

B. Parthasarathy and M. S. K. Sastri for *M/s. J. B. Dadachanji and Co.*, for the appellants.

K. R. Chaudhuri for respondent No. 1.

H

The Judgment of the Court was delivered by

Sikri, J. This appeal by special leave is directed against the judgment of the High Court of Orissa allowing the appeal and

setting aside the judgment of the District Judge Ganjam-Boudh, Berhampur, who had affirmed the order passed by the Munsif, Berhampur, dismissing M.J.C. No. 220/60 of Gopinath Naik, respondent before us, hereinafter referred to as the Judgment Debtor.

The facts in this case are not in dispute. One Konchada Ramamurti Subudhi, deceased, now represented by his legal representatives and appellants before us—hereinafter referred to as the Decree Holder—and Bhagirathi Naiko, now represented by Gopinath Naik, Judgment Debtor, filed a compromise petition under O. XXIII, r. 3 of the Code of Civil Procedure in the Court of Subordinate Judge, Berhampur, in T.A. No. 13 of 1955. In terms of this compromise petition a decree was passed. The Decree Holder filed an application for execution of the decree and the Judgment Debtor filed the application (M.J.C. No. 220/60) under s. 47, C.P.C., in the Court of Munsif, Berhampur, objecting to the execution of the decree. The Munsif dismissed this application of the Judgment Debtor and the District Judge affirmed the order. The High Court, however, on appeal, set aside the order of the District Judge.

The only point raised before us is whether the compromise decree created a lease or a licence. It is common ground that if a lease was created the Judgment Debtor would be entitled to protection against being ejected by virtue of the provisions of Orissa House-Rent Control Act (Orissa Act XXXI of 1958)—hereinafter referred to as the Act.

The terms of the compromise were as follows :

“1. Respectable people have settled the subject matter of this appeal and the suit and so both parties agreed to compromise as follows :—

(a) That the defendant-respondent should vacate the suit house on or before 1-7-60 (five years) failing which the appellant-plaintiff will be entitled to execute this decree and recover possession of the suit house through court after the date fixed above.

(b) That in respect of all arrears of rent claimed in the suit and the rent due during the pendency of the suit and of this appeal, as calculated up to 30-6-55, the defendant has paid to the plaintiff the sum of Rs. 1,125 only (Rupees One thousand and one hundred twenty-five only).

(c) That in respect of future rent, *i.e.*, with effect from 1-7-55 the defendant shall pay to the plaintiff at

A the rate of Rs. 50 a month by the end of each month until delivery, and a sum of Rs. 300 is paid to plaintiff to be kept as deposit for six months rent to be adjusted towards rent for the period of last six months ending with 1-7-1960.

B (d) In case the defendant fails to pay the rent for any three consecutive months the plaintiff will be at liberty to adjust the advance towards arrears and also to evict the defendant from the suit house without waiting till 1-7-1960 by executing the decree and also realise the amount accrued due by then, from the defendant by executing this decree.

C (e) That the house fell to the share of a minor son of plaintiff-appellant, namely, Konchada Koteswarrao for whom the appellant-plaintiff is the guardian, and the plaintiff-appellant will be responsible for the due compliance of the terms of this compromise.

D 2. That each party do bear its own costs in both courts.

3. That a decree may be passed in the above terms."

The High Court has held that the compromise decree created a lease and not a licence.

E The learned counsel for the appellants contends that the intention of the decree holder was only to give accommodation to the judgment debtor, and as he had filed a suit to eject the judgment debtor it could not have been his intention to create a fresh tenancy. He places reliance on the decision in *Ramjibhai Virpal Shah v. G. M. Bhagat*⁽¹⁾ where the Bombay High Court has elaborately considered the law bearing on the subject of the interpretation of the compromise decrees and the distinction between a lease and a licence.

F Before we approach the question of the construction of the compromise deed, we may refer to two decisions of this Court bearing on the distinction between a lease and a licence and the principles for distinguishing one from the other. This Court observed in *M. N. Clubwala v. Fida Hussain Saheb*⁽²⁾ :

G "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."

1) A.I.R. [1954] Bom. 370.
L2SupCl/68-5

(2) [1964] 6 S.C.R. 642-652, 653.

This Court further observed that exclusive possession is not conclusive evidence of a lease. "If, however, exclusive possession to which a person is entitled under an agreement with a landlord is coupled with an interest in the property, the agreement would be construed not as a mere licence but as a lease. (See *Associated Hotels of India Ltd. v. R. N. Kapur*)"⁽¹⁾.

In *Associated Hotels of India Ltd. v. R. N. Kapur*⁽¹⁾ Subba Rao, J., as he then was, summarised the propositions as follows :

"The following propositions may, therefore, be taken as well-established : (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties—whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, *prima facie*, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease."

Lord Denning, speaking for the Judicial Committee of the Privy Council in *Issac v. Hotel De Paris*⁽²⁾ observed :

"There are many cases in the books where exclusive possession has been given of premises outside the Rent Restriction Acts and yet there has been held to be no tenancy. Instances are *Errington v. Errington & Woods*⁽³⁾ and *Cobb v. Lane*⁽⁴⁾, which were referred to during the argument. It is true that in those two cases there was no payment or acceptance of rent, but even payment and acceptance of rent—though of great weight—is not decisive of a tenancy where it can be otherwise explained : see *Clarke v. Grant*⁽⁵⁾. As Lord Greene, M.R., said in *Booker v. Palmer*⁽⁶⁾ :

"There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

(1) [1960] 1 S.C.R. 368-384.
 (3) [1952] 1 All E.R. 149.
 (5) [1949] 1 All E.R. 768.

(2) [1960] 1 All E.R. 348-352.
 (4) [1952] 1 All E.R. 1199.
 (6) [1942] 2 All E.R. 674-677.

A Keeping in mind the above observations, what was the intention of the parties? It seems to us that the fact that the decree holder had brought a suit for ejection of the judgment debtor and that a compromise was entered into in that suit is important. It is difficult to impute to him an intention to create a fresh tenancy while the fact that he brought the suit shows that his
 B intention was to eject the judgment debtor after having purported to terminate the tenancy.

C Coming to the terms of the compromise, it is true, as stressed by the learned counsel for the respondent, that the word "rent" has been used, but the word "rent" is not conclusive, for as observed by this Court in *State of Punjab v. British India Corporation Ltd.*,⁽¹⁾ "in its wider sense rent means any payment made for the use of land or buildings and thus includes the payment by a licensee in respect of the use and occupation of any land or building. In its narrower sense it means payment made by tenant to landlord for property demised to him."

D The learned counsel further stresses the point that Rs. 300 were paid as deposit for six months' rent "to be adjusted towards rent for the period of last six months ending with 1-7-1960", but it seems to us that that amount was really paid as a security for the amounts due under the compromise deed, as it was only to be adjusted against the rent for the last six months. But what
 E is very significant is cl. (d) which enables the decree holder to execute the decree if the judgment debtor fails to pay rent for any three consecutive months. This, it seems to us, shows that the intention of the parties was not to enter into the relationship of a landlord and tenant. We may mention that the importance of this fact was adverted to in *Sumatibai Waman Kirlikar v. A. B. Shirgaonkar*⁽²⁾ where Chagla, C.J., observed:

F "On the failure of the defendant to pay any of the amount which is fixed as rent on its due date, the only right the decree gave to the judgment-creditor was to have it executed for the amount which remained due; it did not entitle the judgment-creditor to take possession of the land on default of payment of rent."
 G

H The High Court stressed the fact that a long period of five years was granted to the judgment debtor for continuation of the possession. In our view, the length of the period, in the circumstances, does not militate against the construction that the compromise only created a licence, for the decree holder apparently had lost in the trial court and it was only in the court of appeal that this compromise was arrived at.

(1) [1964] 2 S.C.R. 114-123.

(2) A.I.R. 1949 Bom. 4(2-4) 4.

For the aforesaid reasons we hold that the compromise deed did not create a lease. Therefore, the judgment debtor is not a tenant within s. 2(5) of the Act which defines "tenant" to mean "any person by whom or on whose behalf rent is payable for any house and includes every person who, from time to time, derives title under a tenant, or a person continuing in possession after the termination of his tenancy otherwise than under the provisions of this Act, and shall include any person against whom a suit for ejection is pending in a Court of competent jurisdiction but not a person against whom a decree or order for eviction has been made by such a Court."

A

B

In the result the appeal is allowed, the judgment of the High Court set aside and that of the District Judge restored. The appellants will have their costs incurred in this Court.

C

V.P.S.

Appeal allowed.