SRIDHAR SUAR & ANR. A

v.

SHRI JAGAŃ NATH TEMPLE & OTHERS

April 21, 1976

[A. N. RAY, C.J., M. H. BEG AND JASWANT SINGH, JJ.] B

Transfer of Property Act, 1882—*Sec.* 105—*Indian Easement Act*, 1882, *Sec.* 52—*Distinction between lease and licence* Lis Pendens—*Puri Shri Jagannath Temple (Administration) Act* 1952—*Sec.* 2(*d*)—*Meaning of.*

Hindu Law—Whether Mohant of a Hindu Temple can grant a valid permanent lease.

C

The appellant's great grandfather was granted a Sanad in respect of 2 rooms in the Jagannath temple by the Superintendent of temple at the annual rent of Rs. 7/-. The Sanad provided that the grantee would be entitled to enjoy the said 2 rooms from generation to generation and in case a permanent structure was constructed thereon the rent would be enhanced to Rs. 14/- per year. After the death of great-grand-father of the appellant the grand father and thereafter the father of the appellant continued storing and selling dry 'Mahaprasad' in the said property and continued to pay Rs. 14/- per year. The respondents who have the management of Jagannath temple at present under D the Puri Jagannath Temple (Administration) Act, 1952, called upon the appellants' father to close and to hand over the possession of the two rooms to the management on the ground that the storage and sale of Mahaprasad in the Bihar Bedha of the temple affected adversely the discipline and dignity of the temple. The appellant's father was threatened with imposition of a penalty of Rs. 100/- per day in case he did not vacate the premises in question. The appellant's father, therefore, filed the suit in the Civil Court which after his death has been continued by the present appellant for permanent injunction restraining the respondents from interfering with his right of storing and selling E dry Mahaprasad in the suit premises. According to the plaintiff the permanent lease was granted to him by the Raja Dibyasingha and that since he was continuing to pay the rent regularly he was entitled to continue in the suit premises from generation to generation. The respondents contested the suit on the ground that it was beyond the competence of Raja of Puri as Manager of the temple to grant a permanent lease and that, therefore, the Sanad was ineffectual, invalid and inoperative, and conferred no rights on the appellant and his ancestors which would bind the present respondents. Secondly, since the F act of storing and selling Mahaprasad at the suit premises constitute a breach of order and discipline, the respondents under the above statute had right to ask the appellant to vacate. Thirdly what was granted by the Sanad was a licence and not a lease.

The trial court dismissed the suit. However, an appeal was allowed. The High Court accepted the second appeal and dismissed the suit.

In an appeal by special leave it was contended by the appellants :— G

(1) The suit property did not form part of the temple.

(2) The Sanad granted a permanent lease of the suit property and not merely a licence, and therefore the appellant had an indefeasible right of storing and selling Mahaprasad.

Dismissing the appeal,

H

HELD : (1) Section 2(d) of the Puri Sri Jagannath Temple (Administration) Act, 1952, defines temple as including the temple of Lord Jagannath of Puri, other temples within its premises and all other appurtenants and subordinate shrines, other sacred places and tanks and any additions which may be

A made thereto after commencement of the Act. Records of right prepared under the said Act also include the suit premises within the meaning of temple. [104 H]

(2) It is now well settled by a catena of decisions of the Supreme Court that it is the creation of an interest in immovable property that distinguishes a lease from a licence. The intention of the parties is the real test for ascertaining the character of a document. At one time it was thought that the B test of exclusive possession was infallible and if a person was given exclusive possession of a premises it would conclusively establish that he was a lessee. However, the result of the subsequent cases is that although a person who is let into exclusive possession in *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. To ascertain whether a document creates a licence or lease the substance of the document must be preferred to the form (Entire English and Indian case Law reviewed). [105 D-H, 106 A, D]

C (3) A careful perusal of the recital in the Sanad, which does not reveal the identity of the plot with precision, would show that the Sanad did not create any interest in the rooms in question in favour of the grantee. The Sanad also did not confer the right of exclusive possession of the premises. It is also evident from the right of "Dakhale Khas" of the respondents in the suit property as also from the proved facts that the Sarghara was not kept open by the temple authorities from mid-night to 6 a.m. during which interval the plaintiff could in no case occupy it nor could he have access to it. It is proved D that the employees of the Raja of Puri used to clean the refuse etc., which got accumulated in the suit premises. The Sanad, therefore, created a licence and not a lease. [107 E-H]

(4) Even if it is assumed that the Sanad created a lease it could not be a valid lease since the Mohant or manager of a Hindu temple is prohibited from granting a permanent lease except for legal necessity or benefit of the estate. In the present case no such legal necessity or benefit of estate has been proved. [108 B-E]

E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 491 of 1975.

Appeal by Special Leave from the Judgment and Order dated the 24th June 1974 of the Orissa High Court in Second Appeal No. 8 of 1971.

Gobind Das and *B. Parthasarthi,* for the Appellant.

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Santosh Chatterjee and *G. S. Chatterjee,* for the Respondent.

The Judgment of the Court was delivered by

JASWANT SINGH, J.—This appeal by special leave which is directed against the judgment and decree dated June 24, 1974, of the High Court of Orissa at Cuttack reversing the judgment and decree dated G September 23, 1970, of the first appellate court which in turn reversed the judgment and decree dated April 10, 1970, of the Trial Court relates to the controversy regarding the appellants' right to store and sell dry 'Mahaprasad' in the suit premises consisting of two pucca rooms standing on plot No. 167 in 'Bihar Bedha' (outer compound) of the Hoary Holy public temple of Lord Jagannath Ji in Puri (hereinafter referred to as 'the Temple'), which to use the language of the H illuminating and instructive preamble of Shri Jagannath Temple Act, 1954 (Orissa Act No. 11 of 1955) (hereinafter referred to as 'the Act') has ever since its inception been an institution of unique national importance, in which millions of Hindu devotees from regions far and

wide have reposed their faith and belief and have regarded it as the epitome of their tradition and culture. A

The facts giving rise to this appeal are : On August 7, 1969, one Gopal Suar, since deceased, who was the father and predecessor-in-interest of the present appellants describing himself as sevak of the Temple brought a suit in the Court of the Munsiff, Puri, being suit No. 160 of 1969, for permanent injunction restraining the respondents herein from interfering with his right of storing and selling dry 'Mahaprasad' in the suit premises. B

The case of the original plaintiff was that by means of 'Sanand' (Exhibit I) Raja Sri Dibyasingha Deb, the then Superintendent of the Temple, granted to his great grandfather, Gangadhar Suar, a permament lease of the site on which the two suit rooms stood on an annual rent of Rs. 7/-; that it was provided in the 'Sanand' that the grantee or lessee would be entitled to enjoy the site from generation to generation and in case a permanent structure was constructed thereon, the rent would be enhanced to Rs. 14/- per year; that as a result of the death of his great grandfather, Gangadhar Suar, of his grandfather, Bela Suar, and of his father, Chakhi Suar, he had become the sole owner of the property; that a few days after the commencement of the lease, two permanent pucca rooms for storing and selling 'Mahaprasad' were constructed by his great grandfather, Gangadhar Suar, who according to the stipulation contained in the aforesaid 'Sanand' became liable to pay an annual rent of Rs. 14/-; that since the commencement of the lease, his ancestors had from generation to generation been using the suit property as a store room and as a shop for selling dry 'Mahaprasad' in their capacity as tenants of the Raja of Puri who was the Superintendent of the Temple and the said right of his had been acknowledged and duly recorded in the record of rights; that ever since the taking over of the management of the Temple by the Government, he had been paying annual rent as per terms of the lease to the respondents who had accepted him as a tenant; that he had been occupying and enjoying the suit property as before without any let or hinderence either by the respondents or by their predecessor-in-interest; that on August 1, 1969, his son intimated to him that respondent No. 2 had, by means of notice dated July 31, 1969, called upon him to close the shop on pain of daily fine of Rs. 100/-, as in the opinion of the respondent, he had been using the land in inner Bedha of the Temple for storage and sale of 'Mahaprasad' which adversely affected the discipline and dignity of the Temple; that on being so informed, he personally approached respondent No. 2 and represented to him that he was the permanent lessee of the suit property and had acquired indefeasible right of storing and selling 'Mahaprasad' thereon and the respondents could not interfere with that right but his representation fell flat and respondent No. 2 threatened to close his shop forcibly, to impose penalty on him, and to dismiss him from the 'seva'; that after sometime, respondent No. 2 served him with another notice imposing an accumulated penalty of Rs. 4.600/- at the rate of Rs. 100/- per diem and that there being no provision in the Act empowering the respondents to do any of the aforesaid things, their action was arbitrary, illegal and without jurisdiction. C D E F G H

A The suit was vigorously contested by the respondents. While denying the grant of the open site to the plaintiff's ancestor, Gangadhar Suar, as alleged, as also the construction of two pucca rooms by the latter and the storage and sale thereon of 'Mahaprasad' by the plaintiffs' ancestors, the respondents averred *inter alia* that the Raja of Puri being merely a Superintendent or a Manager of the Temple, it was beyond his competence to transfer a portion of the Temple permaB nently in favour of any individual and the 'Sanand' set up by the plaintiff was as such ineffectual, invalid and inoperative and did not confer any right, title or interest on him or his ancestors and was not binding on the respondents; that according to the established custom and usage of the Temple, 'Mahaprasad' could not be stored and sold in a 'Saraghara' but was to be sold in Anand Bazar—the place specifically set apart for the purpose, and that since the plaintiff had been comC mitting a breach of discipline and violating the orders of the respondents by storing and selling 'Mahaprasad' in the 'Saraghara' standing on plot No. 167 (which had been recorded in the record of rights as 'khas dakhali' land of the respondents and was never intended for storage and sale of 'Mahaprasad') and was thus acting in a manner derogatory to the dignity of the Temple, the respondents in whom the governance and administration of the Temple and its endowments D vested under section 5 of the Act were competent to take action under sections 21(A) and 30(A) of the Act.

After framing the necessary issues and recording the evidence adduced by the parties, the Trial Court dismissed the suit holding that as sections 15 and 30(A) of the Act cast statutory obligation on the respondents to ensure maintenance of order and discipline and proper E hygienic conditions in the Temple and proper standard of cleanliness and purity of the offerings made therein, they could not be restrained by a permanent injunction from stopping the plaintiff to sell 'Mahaprasad' at a place other than the one specified for the purpose. On appeal, however, the Sub-Judge (Additional District Magistrate) Puri, decreed the suit. Aggrieved by this decision, the respondents preferred an appeal to the High Court which accepted the same and dismissed F the suit

Counsel for the appellants has urged before us that the suit property did not form part of the Temple; that the transactions evidenced by 'Sanands' (Exhibits I & II) issued by the Raja of Puri as Superintendent of the Temple in exercise of his right of superintendence and management of the Temple amounted to a permanent lease of the suit G property and not merely to a licence, and that the appellants had an indefeasible right of storing and selling Mahaprasad in the suit Saraghara. We shall deal with these contentions seriatim.

Regarding the first contention raised on behalf of the appellants, we may observe that according to section 2(d) of Act No. XIV of 1952 called the Puri Shri Jagannath Temple (Administration) Act, H 1952, 'Temple' means "the Temple of Lord Jagannath of Puri, other temples within its premises, all their appurtenant and subordinate shrines, other sacred places and tanks and any additions which may be made thereto after the commencement of the Act". It may also be

mentioned that pursuant to section 3 of that Act, a Special Officer with prescribed qualifications was appointed by the State Government for preparation of the consolidated record of rights and duties of different sevaks and pujaries and other persons connected with the seva, puja or management of the Temple as also for preparation of a list of the immovable properties endowed to Lord Jagannath Temple and the extent of the premises of the Temple and what it comprises. In the report prepared by the said Officer which was published in the Orissa Gazette (Extraordinary) and is final and entries whereof cannot be questioned except in the manner provided in section 5 of that Act, it is recorded that the Temple of Lord Jagannath occupies an area of 10 acres and its premises include all appurtenant and subordinate shrines and the outer and inner compounds and that the suit plot No. 167 lies in the 'Baisi Pahacha' area in between the inner and outer compounds of the Temple and that access to it is through the main gate *i.e.* 'Singhadawara' (lion's gate) of the Temple. It is, therefore, clear beyond any manner of doubt that the suit premises form part of the Temple. The first contention of counsel for the appellants is, therefore, repelled.

For a proper appreciation of the second contention, it is necessary to bear in mind the essential difference between a lease and a licence. It is now well settled by a catena of decisions of this Court that it is the creation of an interest in immovable property that distinguishes a lease from a licence. Reference in this connection may be made with advantage to the decision of this Court in *Associated Hotels of India Ltd* v. *R. N. Kapoor*(1) where Subba Rao, J. (with whom Das, J. agreed) observed as follows :—

> "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 licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington* v. *Errington* 1952-1 All ER 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p. 155 :
>
> The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be tenant, nevertheless he will not be held to be so

(1) A. I. R. 1959 S. C. 1262

A if the circumstances negative any intention to create a tenancy".

"The Court of Appeal again in *Cobb* v. *Lane* 1952-I All ER 1199, considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At p. 1201, Somervell B L.J., stated :

"....the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties".

Denning L.J. said much to the same effect at p. 1202 :

C "The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land ?"

The following propositions may, therefore, be taken as well-established : (1) To ascertain whether a document D creates a licence or lease, the substance of the document must be preferred to the forms; (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 E 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".

Again in *Qudrat Ullah* v. *Municipal Board, Bareilly*(1) this Court observed :—

F "There is no simple litmus test to distinguish a lease as defined in s. 105, Transfer of Property Act from a licence as defined in s. 52, Easements Act, but the character of the transaction turns on the operative intent of the parties. To put it pithily, if an interest is immovable property, entitling the transferees to enjoyment, is created, it is a lease; if per- G mission to use land without right to exclusive possession is alone granted, a licence is the legal result."

Then again in *Board of Revenue* v. *A. M. Ansari*(2) this very Bench while approving the observations made by Lord Shaw while delivering the judgment of the Board in *Kauri Timber Company Limited* v. *The Commissioner of Taxes*(3) held that in order that an H

(1) [1974] 2 S. C. R. 530.
(2) [1976] 3 S. C. R. 661.
(3) [1913] A. C. 771 (776).

agreement can be said to partake of the character of lease, it is necessary that the grantee should have obtained an interest in and possession of land. The following observations made therein are apposite :—

> "A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential, therefore, to look to the substance and essence of the agreement and not to its form."

Bearing in mind the above observations, let us now scrutinize the terms of Sanand (Exhibit-I) which reads thus :—

> "Order hereby is issued to the Parichhas Karjees (Officers) of the temple as follows :—
>
> One Gangadhara Suar of Kundhaibenta Sahi has filed an application before the Raja for opening a 'Sera Ghara' (store room of Mahaprasad) at the top step of twenty two steps adjoining the inner compound of the temple and the Eastern Gate Way having space of 10 cubits of length towards south and width of 10 cubits.
>
> It is ordered that he is permitted to open the said store room with hereditary right on payment of one gold Mohara as Salami and rupees seven as annual rent. If he at any time constructs a pucca house, he shall pay rupees fourteen as annual rent."

A careful persual of the recitals in the Sanand (which does not reveal the identity of the plot with precision) would show that the Sanand did not create any interest in the site in question in favour of the plaintiff's great grandfather. It merely permitted him to open a 'Saraghara' which meant a room for storing articles for the sole purpose of preparing Bhog for the three presiding deities. The Sanand did not also confer the right of exclusive possession of the suit property on the grantee. This is evident from the right of 'dakhale khas' of the respondents in the suit property as also from the proved fact that 'Saraghara' was not kept open by the Temple authorities from midnight to 6.00 A.M. during which interval, the plaintiff could in no case occupy it nor could he have access to it. It has also been found to have been established from the plaintiff's evidence itself that the employees of the Raja of Puri used to clean the refuse etc. which got accumulated before the suit 'Saraghara'. Thus none of the elements of lease can be said to be present in the instant case. In *M. N. Chubwala* v. *Eide Hussain Sahib*(1) this Court rejected the claim of holders of certain stalls in a market that they were lessees and not

(1) A. I. R. 1965 S. C. 610.

A licencees thereof on the ground that they had no right to us them after the closure of the market at night and the responsibility of cleaning and disinfecting the stalls and closing the market at night lay on the landlord and not on the stall holders.

No help can be derived by the appellants from Exhibit-II which relates to a quarrel in 'Kotha Bhog Nities' and is not relevant for the B purpose with which we are concerned at the present stage.

Now assuming without holding that the Sanand amounted to a lease, it cannot even then be held to be valid as permanent alienation of the temple debutter property is prohibited. The position is stated thus at page 489 of Mulla's Treatise on Principles of Hindu Law (11th Edition) :—

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> "The power of a shebait or a mohunt to alienate debutter property is analogous to that of a manager for an infant heir as defined by the Judicial Committee in *Hunooman Pershad* v. *Mussamat Babooee* 6 M.I.A. 393. As held in that case, he has no power to alienate debutter property except in a case of need or for the benefit of the estate. He D is not entitled to sell the property for the purpose of investing the price of it so as to bring in an income larger than that derived from the property itself. Nor can he, except for legal necessity grant a permanent lease of debutter property, though he may create proper derivative tenures and estates conformable to usage."

E In the present case, the position of the Raja of Puri who granted the Sanand (Exhibit-I) was merely that of a shebait. He could not have granted a permanent lease of the property in question to the great grandfather of the plaintiff without necessity or without benefit to the estate which have not at all been made out in this case.

Again the lease being a *permanent one for a fixed rent* could not F have been granted at all by the Raja of Puri. Reference in this connection may usefully be made to page 931 of Mayne's Treatise on Hindu Law (11th Edition), where the position is stated as follows :—

> "It is beyond the powers of a manager to grant a permanent lease at a fixed rent in the absence of unavoidable necessity; for, to fix the rent, though adequate at the time, in perpetuity in lieu of giving the endowment the benefit of an G augmentation of a variable rent from time to time would be a breach of duty on the part of the manager. In *Palaniappa Chetty* v. *Streemath Deivasikamony* (1917) 44 I.A. 147, Lord Atkinson observed: "Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debutter lands at a fixed rent. H however adequate that rent may be at the time of granting, by reason of the fact that, by this means, the debutter estate

(1) 44 I. A. 147.

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> is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased."

In *Palaniappa Chetty & Anr.* v. *Deivasikamony Pandara*(1) alluded to in the above quoted passage, it was also held :—

B

> "A permanent lease of temple lands at a fixed rent, or rent free for a premium, whether the lands are agricultural lands or a building site, is valid only if made for a necessity of the institution. It is not justified by a local custom, or by a practice of the institution, to grant lands in that manner.
>
> The phrase "benefit of the estate", as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir or by the trustee of a religious endowment cannot be precisely defined, but includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances."

C

D

The present case is, in our opinion, fully covered by the decision in *Shibessouree Debia* v. *Mothooranath Acharjo*(2) where it was laid down as a general rule that apart from unavoidable necessity to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty in the mohunt.

E

Thus viewed from any angle the 'Sanand' could not be held to be any more than a licence and could not clothe the ancestors of the plaintiff or the plaintiff with the status of a lessee.

This takes us to the last contention raised before us by counsel for the appellants which is also devoid of substance. A bare perusal of Exhibit-I is enough to show that it does not confer any right of selling 'Mahaprasad' on the plaintiff or on his legal representatives. Exhibit-II cannot also be usefully pressed into service by the appellants as it relates to the sale of 'Rahani Bhog', and not of 'dry Mahaprasad'.

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Thus all the contentions raised by counsel for the appellants fail. For the foregoing reasons, we affirm the judgment of the High Court and dismiss the appeal with costs. The appellants are, however, as mutualy agreed to between the parties, given one month's time to vacate the premises. The cumulative penalty of Rs. 4,600/- to which the appellants have been subjected also being excessive is reduced to Rs. 500/-.

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P.H.P. *Appeal dismissed.*

(1) 44 I. A. 147 (2) 13 M. I. A. 270.