

BURMA LAW REPORTS

APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

GURBACHAN SINGH (APPELLANT)

v.

JOS. E. FERNANDO (RESPONDENT).*

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Jan. 16.

Lease and Licence—Difference between—Effect of instrument to be considered—S. 105 of the Transfer of Property Act.

A document between the parties contained clauses that 'F' allotted in his business premises a portion mentioned and for allotment of such space the appellant was to pay a sum of Rs. 100 as "guarantee commission" on the business and Radio sales, etc. and that the parties were to observe strictly business hours on week days, Sundays and holidays.

Held: That the document was one evidencing the licensing of a portion of the suit premises for selling Radios, etc.

Held further: The test for determining whether a transaction is a lease or a licence is to see whether the sole and exclusive occupation is given to the grantee.

The Acting Secretary to the Board of Revenue v. Agent, South Indian Railway Co. Ltd., (1925) 48 Mad. 368; *Frank Warr & Co. Ltd. v. London County Council*, (1904) K.B. 713 at 720, referred to.

Secretary of State for India in Council v. Bhupalchandra Ray Chaudhuri, 57 Cal. 655; *Glenwood Sumer Co. Ltd. v. Phillips*, (1904) A.C. 405, distinguished.

D. N. Dutt for the appellant.

F. S. Havock for the respondent.

U SAN MAUNG, J.—In the suit out of which this appeal has arisen the plaintiff-respondent, Jos. E. Fernando, obtained a decree for the ejectment of the defendant-appellant Gurbachan Singh from the portion

* Civil 1st Appeal No. 49 of 1949 against decree of 3rd Judge, City Civil Court of Rangoon, in Civil Regular Suit No. 1092 of 1948.

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of the premises known as 217, Sule Pagoda Road, Rangoon, which was in occupation of Gurbachan Singh and for payment of Rs. 500 found to be due to the plaintiff-respondent as " guaranteed commission."

The defendant-appellant's defence in that suit as well as his main ground of appeal in this case is that he was in occupation of the portion of the suit premises as a sub-tenant of Fernando and not merely as his licensee, that the agreement, Exhibit A, dated the 7th July 1947 was a " sham " document which was never meant to be acted upon, and that, in any event, even in terms of the agreement Exhibit A he is not liable to be ejected from the suit premises. As the facts of the case have been fully set out by the 3rd Judge of the City Civil Court who tried the suit, it is not necessary to recapitulate them here. On the pleadings the learned trial Judge framed six issues as set out below :

- (1) Whether the agreement dated the 7th July 1947, is valid and binding on the parties ?
- (2) Is the defendant a licensee or a sub-tenant of the portions allotted to him in the suit premises ?
- (3) Did the defendant pay Rs. 100 a month as a guaranteed commission or as rent ?
- (4) Is the plaintiff entitled to a decree for possession of the portions of the premises in suit ?
- (5) Is the plaintiff entitled to get Rs. 250 or any amount as representing 10 per cent commission on the nett profits out of the sale of goods other than radios, gramophones, etc ?
- (6) Is the plaintiff entitled to get Rs. 500 from the defendant by way of arrears of guaranteed commission ?

On the evidence before him he came to the conclusion that the agreement dated the 7th July 1947, was valid and binding on the parties, that the defendant-appellant was a mere licensee of the portions of the suit premises which were allotted to him, that the

payments of Rs. 100 a month by him to the plaintiff-respondent were by way of " guaranteed commission," that the plaintiff-respondent was entitled to a decree for possession of the portions of the suit premises occupied by the defendant-appellant and also to Rs. 500 due as arrears of " guaranteed commission " but not the sum of Rs. 250 claimed as commission on the nett profits out of the sale of goods other than radios, gramophones, etc.

In this appeal by Gurbachan Singh it was urged on behalf of the appellant that the learned trial Judge should have held on the evidence, that Gurbachan Singh who was occupying a portion of the premises in suit since the 1st of May 1947, was a sub-tenant of Fernando on the same terms as Harbhajan Singh who had preceded him (Gurbachan Singh), that the learned Judge erred in not holding that the document Exhibit A, executed on the 7th July 1947, was a " sham " document executed for the purpose of evading the Urban Rent Control Act and of meeting any possible objection by the landlord, that the trial Judge erred in not giving due weight to the following admitted facts, namely, (a) that Harbhajan Singh was paying rent at Rs. 100 per month for the portion of the suit premises, (b) that the plaintiff-respondent's account book shows payment of rent by Harbhajan Singh at the rate of Rs. 100 per month, (c) that on the plaintiff-respondent's own admission the defendant-appellant had to permit him to occupy a space 4' x 22'' x 48'' high for his show case, (d) that the plaintiff-respondent himself made the entries in the defendant-appellant's account book showing that the payments made to the plaintiff-respondent were by way of rent and (e) that the plaintiff-respondent was still carrying on business in the suit premises although he had alleged that the business had been sold to one Mr. R. O. Hindle.

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In this appeal three points appear to arise for our determination :—(1) Is the document Exhibit A dated the 7th July 1947, a " sham " one never meant to be acted upon, or, does it embody the terms agreed upon between Jos. E. Fernando and Gurbachan Singh ? (2) If Exhibit A is genuine and valid is it a document evidencing sub-lease of the portions of the suit premises mentioned therein or does it operate as a mere license to occupy these portions ? and, (3) if Exhibit A is a mere license is the defendant-appellant liable to be ejected from the portion of the suit premises occupied by him for breach of any of the conditions contained in Exhibit A or in pursuance of item 3, which provides that Gurbachan Singh would be allowed to carry on his business in radio as well as radio servicing for so long as Fernando carry on his business in the suit premises ?

As regards (1), there is no doubt the fact that although the defendant-appellant actually occupied a portion of the suit premises since the 1st of May 1947, the document, Exhibit A, was only executed on the 7th July, 1947. According to the defendant-appellant, at the end of June 1947, the landlord who visited the suit premises found three or persons occupying the premises in addition to his tenant Fernando and that Fernando was collecting rent of over Rs. 500 from these persons while he himself was paying only Rs. 200 as rent. Therefore, the landlord proposed to Fernando that the rent should be enhanced. Two or three days later, Fernando asked him (Gurbachan Singh) to sign the agreement, Exhibit A, saying that he wanted to avoid complications with the landlord and the Rent Controller. As he had then become very friendly with Fernando he signed the agreement on the understanding that his position as sub-tenant was not to be affected thereby. According to the plaintiff-respondent, however, before Gurbachan Singh

came into occupation it was agreed that he would sign a similar agreement as that of Harbhajan Singh, his predecessor, who was a mere licensee occupying a portion of the suit premises on payment of "Guaranteed commission." Although the defendant-appellant actually occupied the suit premises on the 1st of May 1947 the agreement could not be executed till the 7th of July 1947 as he (Fernando) was stricken with grief owing to the death of his wife and daughter who were passengers on S.S. "Harvey Adamson" which sank on its voyage from Rangoon to Tavoy. The learned trial Judge accepted the plaintiff-respondent's version in preference to that of the defendant-appellant and, in our opinion, he was right in doing so. In the letter, Exhibit 6, dated the 28th April 1947 addressed to Gurbachan Singh, Fernando told Gurbachan Singh that he could occupy the portion previously occupied by Harbhajan Singh if he would refund to Harbhajan Singh the sum of Rs. 300 paid by the latter as rent to date and that he would have to sign an agreement in the same form as that executed by Mr. Harbhajan Singh. The defendant-appellant did have to sign the agreement, Exhibit A and it must be presumed, unless the contrary is proved to be true, that Exhibit A was the agreement referred to in the letter Exhibit 6. Although Gurbachan Singh would have it that the agreement which Harbhajan Singh had to sign was an ordinary tenancy agreement he has not been able to substantiate his allegation. He has neither produced a copy of the agreement signed by Harbhajan Singh nor cited Harbhajan Singh as a witness. Furthermore, although he would have it that in the receipts granted to him by Fernando the payments were mentioned as "rent" and not as "guaranteed commission," he has not produced any of these receipts as exhibits in the suit. He contended

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that these receipts were stolen from inside the file which he kept in this almirah which was not under lock and key and that these receipts were in his possession at the time he filed his application before the Rent Controller for the fixation of standard rent for the portion of the suit premises occupied by him. However, his explanation is on the face of it, most unsatisfactory. By June 1947, Fernando was disputing the nature of his occupancy of the portion of the suit premises and it is but natural that any man of ordinary prudence would keep the receipts under lock and key as they were valuable documents in support of his contention that he was a sub-tenant and not a mere licensee. The failure of Gurbachan Singh to produce the receipts granted to him by Fernando tends to support Fernando's story that he had recorded in them payments made to him as "guaranteed commission."

Great stress has been laid by the learned Advocate for the defendant-appellant upon the fact that in the account books of the defendant-appellant payments to Fernando were recorded as rent and that the entries were made by Fernando himself. However, Fernando was acting as a part-time Accountant of Gurbachan Singh and his explanation that he had to enter the payments as rent because Gurbachan Singh had told him that this was necessary for Income-tax purposes, is amply corroborated by Gurbachan Singh's own evidence. Gurbachan Singh had to admit in cross-examination, "I did ask the plaintiff to write the payments as rents for purpose of Income-tax." Besides, the fact that the agreement Exhibit A, is genuine is borne out by the fact that in reply to the notice, Exhibit 2, dated the 1st June 1948, from Mr. Pillay for Fernando to Gurbachan Singh that the latter had failed to carry out the terms of the agreement dated the 7th July 1947, Mr. Dadachanji for Gurbachan

Singh wrote in his letter, Exhibit B, dated the 9th June 1948 as follows :

“Your letter of the 1st instant addressed on behalf of your client Mr. Jos. E. Fernando to my client Mr. Gurbachan Singh, has been placed in my hands with instructions to reply thereto as follows :

That he would be obliged if you would let me know as to which conditions of *the agreement* have been broken by him and on which particular term your client bases his right to eject him from the premises.”

If, as the defendant-appellant now contends, the document Exhibit A, dated the 7th July 1947, was a “sham” one not meant to be acted upon this is not the sort of reply one would have expected from him. He would have taken this opportunity offered to him of repudiating the agreement *in toto* instead of asking which of the conditions therein had been broken by him.

As the answer to the second point would depend very largely upon a proper construction of the document Exhibit A, it is necessary to set out below some of the important conditions embodied therein. These are as follows :

(1) Fernando would allot in his business premises namely, No. 217, Sule Pagoda Road, Rangoon, the spaces mentioned below for the purpose of carrying on a business in radio sales and radio servicing on terms to be stipulated in the agreement.

(2) The space allotted would measure 17 feet in length and 5 feet in width along the northern side of the show-room for the purpose of building a teakwood fixture and also for keeping two show-cases measuring 4' x 22" x 36" high *reserving* a space 4' x 22" x 48" high for Fernando's own show-case. Furthermore, a space 5' wide was allotted along the northern side of the premises just below the loft and another space 5 feet

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wide was allotted in the back room with access to the lavatory and the bathing-room.

(3) For allotting these spaces Gurbachan Singh was to pay Fernando monthly on or before the 5th day of each month a sum of Rs. 100 as "guaranteed commission" on Gurbachan Singh's business in radio sales, gramophone record sales and for servicing of radios. An additional commission of 10 per cent on nett profits on goods other than radios, radio parts gramophones and gramophone records must also be given but before such goods were brought in and sold in the suit premises prior permission therefore must be obtained by Gurbachan Singh from Fernando.

(4) Both Fernando and Gurbachan Singh were to observe strictly business hours as from 8-30 a.m. to 5-30 p.m. on week-days and also Sundays and other holidays.

This document, on the face of it, is one evidencing the licensing of a portion of the suit premises by Fernando to Gurbachan Singh for the specific purpose of selling radios, gramophones and gramophone records and for the servicing of radios. This is especially clear from the fact that before Gurbachan Singh could bring in other goods for sale prior permission therefor must be obtained from Fernando. Furthermore, even in the space allotted to him Gurbachan Singh could only put show-cases of certain specified dimensions. In that space Fernando reserved to himself the right of keeping his own show-case. Furthermore, Gurbachan Singh was to observe the same business hours as those observed by Fernando himself. From this latter fact it is apparent that Fernando was in control of the entrance to the premises. On Gurbachan Singh's own admission the space allotted to him by Fernando according to the terms of the document Exhibit A, was about one-fifth

of the whole of the suit premises. Except for the portion formerly occupied by Dr. Tsatos as a sub-tenant the whole premises appear to be one big common room with one small room at the rear, Dr. Tsatos' portion being the only one which had been partitioned off from the rest. After Dr. Tsatos had left, the space occupied by him was occupied by one Mr. Sidhwa on the same basis as the defendant-appellant Gurbachan Singh, that is to say, by payment of "guaranteed commission." One, Mr. Godfrey occupied a portion of the loft by paying Rs. 45 a month as "guaranteed commission." One, Mrs. Adams occupied a portion of the suit premises as a sub-tenant. After Mrs. Adams left Gurbachan Singh was able to obtain from the Rent Controller permission to occupy the portion formerly occupied by Mrs. Adams on the same terms and conditions as those of Mrs. Adams. It is not known on what terms Mrs. Adams was allowed to occupy a portion of the suit premises. However, it seems clear to us that the defendant-appellant Gurbachan Singh himself cannot be regarded as a sub-lessee of the space allotted to him by Fernando as per terms of the document Exhibit A. He could never have been in exclusive possession of this space notwithstanding his assertion to the contrary. As held by a Special Bench of the Madras High Court in "*The Acting Secretary to the Board of Revenue v. Agent, South Indian Railway Co. Ltd.* (1) "the test for determining whether a transaction is a lease or a license is to see whether sole and exclusive occupation is given to the grantee." In this connection the observations of Kumaraswami Sastri J. seem apposite. The learned Judge observed at page 377 of the Report "A 'lease' is defined in

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(1) (1925) 48 Mad. p. 368.

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section 105 of the Transfer of Property Act and a 'license' is defined by section 52 of the Easements Act. In both cases certain rights are conferred on the lessee or the licensee. In the case of a license something may be paid as consideration for allowing a person to do an act on another man's land. Both have several elements in common but it seems to me that the difference between a lease and a license is that in the case of a license there is no interest in immovable property transferred to the licensee; while in the case of a lease there is a transfer or carving out of the interest in favour of the person in whose favour the lease is granted. One chief condition is whether there is any right of exclusive possession given."

As observed by Romer L.J., in *Frank Warr & Co. Ltd. v. London County Council* (1) 'where a document does not amount to a demise or a parting in respect of any portion of the premises with the possession which the owner has when he executes a document, it would only amount to a license and not a lease.' On a proper construction of the document Exhibit A, it does not appear to us that Fernando has parted with possession of any of the portions of the suit premises allotted by him to Gurbachan Singh. Therefore this case is very similar to that of *Frank Warr & Co. Ltd. v. London County Council* (1) cited above where by a contract made between the lessee of a theatre and the plaintiffs it was agreed that the plaintiffs should have the exclusive right for a term of years to supply refreshments in the theatre, and for that purpose should have the necessary use of the refreshment rooms, bars, and wine cellars of the theatre, and that they should have an exclusive right to advertise, and let spaces for advertisements, in certain parts of the theatre, it was held that the contract did not

(1) (1904) K.B. 713 at 720.

confer on the plaintiffs an interest in land which could form the subject of compensation under the Lands Clauses Consolidation Act, 1845. No doubt, it is true that in the case now under consideration Fernando had allotted certain specified spaces in the suit premises to Gurbachan Singh but since, in our opinion, no exclusive possession thereof has been given to him there is no difference in principle between this case and that of *Frank Warr & Co. Ltd. v. London County Council* (1).

The learned Advocate for the appellant has referred up to the case of *Secretary of State for India in Council v. Bhupalchandra Ray Chaudhuri* (2) and has invited us to hold on the authority of the ruling in that case that the appellant was a sub-lessee of the portion of the suit premises occupied by him. There the learned Judges who decided that case held, following a ruling of the Privy Council in *Glenwood Sumer Co. Ltd. v. Phillips* (3) that if the effect of an instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. However, this case is distinguishable from the case now under consideration because in our opinion the effect of the document Exhibit A was not to give Gurbachan Singh an exclusive right of occupation of the spaces allotted to him. Moreover, any doubt as to the nature of the transaction evidenced by Exhibit A may be set at rest by the defendant-appellant's own admission that at the time he executed this document he knew that it was not a tenancy agreement.

Lastly, as regards the third point it would appear to us that the defendant-appellant had failed to pay

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(1) (1904) K.B. 713 at 720.

(2) 57 Cal. 655.

(3) (1904) A.C. p. 405.

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the plaintiff respondent Rs. 500 due as "guaranteed commission" for the five months prior to the date of the suit. No doubt, the defendant-appellant offered to pay this amount if the plaintiff-respondent would give him rent receipts therefor. However, this is not an unconditional offer to pay the "guaranteed commission" due to the plaintiff-respondent and the defendant-appellant had no right to insist that rent receipts should be given in acknowledgment of the payment of the sum due to the plaintiff-respondent. The defendant-appellant had admittedly not only failed to carry out that part of the agreement by which a certain space 4' x 22" x 48" was to be reserved for the show-case belonging to Fernando but also committed a breach of the agreement by occupying much more space than was actually allotted to him. In his evidence he said, "From the beginning up till now I am in occupation of practically half the portion of the whole premises." Apart from these breaches of conditions it is clear that according to Condition 3 of the agreement Exhibit A, the defendant-appellant could only occupy the portion of the suit premises allotted to him for so long as Fernando himself carried on his business at the suit premises and there is credible evidence on record to show that Fernando had entered into a partnership with Mr. O. Hindle in a concern known as Manufacturers Representative Business and had also entered into an agreement Exhibit F, whereby all the goodwill, furniture, fittings and stock belonging to him lying in the suit premises were to be sold to Mr. O. Hindle for a sum of Rs. 20,000 so as to enable Mr. Hindle to form a limited liability company in which he would be a shareholder to the extent of Rs. 5,000. Fernando's evidence on this point is corroborated by that of Mr. O. Hindle and we see no sufficient reason for

differing from the learned trial Judge's finding that the transaction evidenced by the agreement Exhibit F, was a genuine one.

For these reasons we hold that the learned 3rd Judge of the City Civil Court was right in passing a decree for possession of the portion of the suit premises occupied by the defendant-appellant and for the payment of Rs. 500 as "guaranteed commission." In the result, the appeal fails and must be dismissed with costs. Advocate's fee five gold mohurs.

U THEIN MAUNG, C.J.—I agree.

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