NIZAM v. MUSTAFFA
(S. C. 41/80)

MUSTAFFA v. NIZAM
(S. C. 53/80)

SUPREME COURT.
SAMERAWICKRAME, J., ISMAIL, J. AND WIMALARATNE, J.
S.C. APPEAL 41/80 – C.A. 473/78 (F) – D.C. KANDY 12475/MR.
S.C. APPEAL 53/80 – C.A. 473/78 (F) – D.C. KANDY 12475/MR.
DECEMBER 8, 9 AND FEBRUARY 6, 1981.

Lease – Whether letting of a business or premises – Is agreement letting a business required to be notarially attested – Prevention of Frauds Ordinance (Cap. 70), section 2 – Whether sum stipulated in agreement a penalty.

The question that arose for determination in this appeal was the effect of a written agreement P1 by which the plaintiff purported to lease to the defendant a business known as "Thaj Hotel". The agreement was not notarially attested. The defendant continued to carry on the business under the same name in contravention of the agreement after the expiry of the lease. The learned District Judge had held that the document was one required to be notarially attested and that the plaintiff had to prove such attestation despite the defendant's admission that he had signed the document and accordingly he dismissed the plaintiff's action.

The Court of Appeal reversed the finding that notarial attestation was required. It also held that the stipulation in P1 for the payment of Rs. 1,000 per day was in the nature of a penalty and awarded only Rs. 250 per day.

Held

A consideration of all the terms and conditions of P1 clearly showed that it was only a lease of the business and the defendant therefore only became a licencee of the premises in which the business was carried on in order to enable him to carry on the same. Where the dominant or primary intention of the parties to a transaction is to effect the lease of a business, then the fact that the lessee of that business has a personal privilege of occupying the land exclusively does not give him any interest affecting land such as would require notarial attestation in terms of section 2 of the Prevention of Frauds Ordinance. The plaintiff's action was therefore entitled to succeed. The sum of Rs. 1,000 per day stipulated in P1 was however in the nature of a penalty and a reasonable estimate of the damages would be Rs. 150 per day.

Cases referred to

(1) *Charles Appuhamy v. Abeysekera, (1954) 56 N.L.R. 243.*
(2) *Sediris Singho v. Wijesinghe, (1965) 70 N.L.R. 185.*
(3) *Nicholas Hamy v. James Appuhamy, (1950) 52 N.L.R. 137.*
(4) *Pathirana v. de Silva, (1978) 79 (2) N.L.R. 265.*
(5) *Arsecularatne v. Perera, (1927) 29 N.L.R. 342.*
(6) *Addiscombe Garden Estate Ltd. v. Crabbe, (1957) 3 All E.R. 563; (1958) 1 Q.B. 513; (1957) 3 W.L.R. 980.*

(7) *Isaac v. Hotel de Paris Ltd., (1960) 1 All E.R. 348; (1960) 1 W.L.R. 239.*
(8) *Booker v. Palmer, (1942) 1 All E.R. 674.*
(9) *Wijesuriya v. The Attorney-General, (1950) 51 N.L.R. 361 (P.C.).*
(10) *Thomas v. Sorrel, (1973) Vaugh 330.*
(11) *Samanhamy v. Silva, (1860-62) Ram. Reps. 101.*
(12) *Fernando v. Themaris, (1892) 2 C.L. Rep. 183.*

APPEAL from a judgment of the Court of Appeal.

Walter Jayawardena, Q.C., with *P. Somatilakam, H. L. de Silva, Faiz Mustapha* and *A. Mandaleswaran,* for the defendant-appellant in S.C. 41/80 and defendant-respondent in S.C. 53/80.

K. N. Choksy, with *Lakshman de Alwis,* for the plaintiff-respondent in S.C. 41/80 and the plaintiff-appellant in S.C. 53/80.

Cur. adv. vult.

March 10, 1981.

WIMALARATNE, J.

The plaintiff is the owner of a business known as the "Thaj Hotel", an eating house situated at 50, Dalada Veediya, Kandy. Upon a written agreement P1 he purported to lease the business to the defendant for a period of one year commencing from 1.2.76, the defendant agreeing to pay as rent a sum of Rs. 18,000 in monthly instalments of Rs. 1,500 each. The defendant entered into possession and carried on the business under the same name; but he continued to do so even after 1.2.1977 in contravention of the agreement. The plaintiff thereupon instituted the present action for the ejectment of the defendant and his agents from the business, for the recovery of arrears of rent and of the articles of furniture and utensils set down in a schedule to P1 (or their value estimated at Rs. 50,000) and for continuing damages at Rs. 1,000 per day from 1.2.77 until he be restored to possession.

The defendant admitted his signature in P1, but denied that P1 was his act and deed because he signed in the belief that it was a sale of the business to him. He pleaded further that P1 is of no force or avail in law as it has not been duly attested by a notary and two witnesses in terms of section 2 of the Prevention of Frauds Ordinance (Cap. 70). The claim for Rs. 1,000 per day was resisted on the ground that it was a penalty and not a genuine pre-estimate of damages.

At the trial it was admitted that the defendant signed P1, and that the defendant continued to be in possession of the business

even after 1.2.77. Thereupon learned Counsel for the plaintiff raised an issue as to whether, on the admissions recorded, the plaintiff was entitled to judgment as prayed for. The defendant raised some fifteen issues. Neither party led evidence, but addressed the Court on two questions, viz :

(a) Whether P1 required notarial attestation, and if so,

(b) Whether the defendant's admission of his signature on P1 relieved the plaintiff from proving that P1 was duly attested in terms of section 2 of the Prevention of Frauds Ordinance.

The learned District Judge held in favour of the defendant on both questions, and dismissed the plaintiff's action. The Court of Appeal (Ranasinghe, J., Atukorale, J. agreeing) reversed the finding on the first question. That is to say, the Court of Appeal has taken the view that an agreement such as is embodied in P1 does not constitute "an agreement for establishing any interest affecting land or other immovable property" within the meaning of the said section 2 and hence does not require notarial attestation. Although that decision was sufficient to dispose of the appeal, the Court of Appeal went on to answer the second question as well, and decided that if P1 is an agreement that required notarial attestation, the plaintiff had not discharged the burden of proving due attestation. The Court of Appeal also took the view that the stipulation in P1 for the payment of Rs. 1,000 per day was in the nature of a penalty, and hence unenforceable; but went on to award a sum of Rs. 7,500 per month (or Rs. 250 per day) as continuing damages from 1.2.77 until the plaintiff is restored to possession.

The defendant's appeal to this Court from the decision on the first question as well as from the award of damages, is numbered SC No. 41/80. The plaintiff's appeal from the decision on the second question as well as on the inadequacy of the awarded damages is numbered SC No. 53/80.

Document P1, which is termed an indenture of lease, has been executed before a notary public. It describes the lessor as the owner of the business known as the "Thaj Hotel" situated at 50, Dalada Veediya, Kandy. What has been let, leased and demised to the lessee, for a period of one year are "all that and those fully described in the schedule hereto, together with all and singular the

rights and privileges of the said business". The schedule gives lists of furniture, fittings and utensils (all movable) in the office, stores, kitchen, ground floor and top floor. The lessee was "to hold the said business....with all and singular the rights and privileges thereto". The lessee was to pay the lessor Rs. 18,000 in twelve monthly instalments of Rs. 1,500 each. He was also to pay the electricity and water bills, whilst the lessor was to pay the municipal rates and taxes. The lessee was not entitled to join hands with any other person to run the business, nor to conduct on the premises any business other than the hotel business. Thereafter followed the stipulation regarding the payment of damages if the lessee failed to hand back the business, together with the scheduled items, to the lessor.

Indentures similar to P1 have been the subject of interpretation in two earlier cases to which reference has been made in the judgment of the Court of Appeal. In both cases the question which the Supreme Court was called upon to decide was whether the relationship created between the parties is one of letting and hiring of immovable property or whether the delivery of possession of immovable property was ancillary to the delivery of possession of a business—in both cases a hotel and tea kiosk. In the former case, that of *Charles Appuhamy v. Abeysekera* (1), Nagalingam, S. P. J., found it "impossible to resist the conclusion that the transaction entered into between the parties was not one of letting any immovable property for the purpose of enabling one party to carry on a business nor the letting of the building to that party with the option to him to carry on or not the business previously carried on there, but of placing the 'lessee' in charge of a business that had been and was being carried on for the sole purpose of its being continued as a going concern and with a view to its being delivered back as such going concern together with the goodwill and the improvements and advantages gained or accrued thereto in the meantime; and as ancillary to the object which the parties had in contemplation it was that possession of the premises was delivered. The defendant's position was no more than that of a licensee and is far removed from that of a tenant". In the later case of *Sediris Singho v. D. H. Wijesinghe* (2), Sansoni, C.J., whilst being in entire agreement with the reasoning of Nagalingam, S.P.J., in the former case, distinguished the case of *Nicholas Hamy v. James Appuhamy* (3), where the building, and not the business that was being carried on in that building, was the subject of the lease.

A recent decision, not referred to in the judgment of the Court of Appeal, is that of *Pathirana v. de Silva* (4). The lessor entered into an informal agreement whereby he gave the lessee certain premises in Maradana "together with the bakery business, the furniture and the fittings thereto" for a period of 2 years. It was obligatory on the lessee to maintain the bakery and the bakery business, and not to use the premises otherwise than as a bakery. Samarakoon, C.J., observed that in deciding the question as to whether a document, such as the one in that case, is a lease of a business or merely a letting of premises, one has to look at the totality of its provisions and the object it seeks to achieve; and that whether the facts established show that in fact it has achieved something different and whether the document is only a cover for it.

The agreements in all three cases referred to above were no doubt considered against the background of claims for protection under the provisions of the Rent Restriction Act (Cap. 274). The question as to whether the agreements incorporating the terms of the lease required notarial attestation did not arise for consideration. But the principles set out in the judgments are, in my view, applicable to the construction of the true nature and scope of agreements such as P1.

The Court of Appeal distinguished the decision of the Privy Council in the case of *Arsecularatne v. Perera* (5), where the appellant agreed with the respondent to prospect for plumbago on certain conditions, and the respondent agreed to give over his interest in the lease which he had taken from the owners of the mine, and which had yet eight years to run. Both the District Court and the Supreme Court held that as the agreement had not been attested in terms of section 2 of the Prevention of Frauds Ordinance, it was void in law, and dismissed the plaintiff's action for a commission, a dissolution of the partnership and for an accounting. The Privy Council held that though the agreement was void to effect a transfer of the lease, it was nevertheless valid for the purpose of establishing a partnership, and that the plaintiff was thus entitled to an accounting. There could be no doubt that as the agreement required the respondent to "give over" his interests in a subsisting lease of immovable property, notarial execution was essential. It seems to us that the Court of Appeal rightly distinguished that case from the present.

It has been contended before us on behalf of the defendant that the agreement gave the lessee a right to the exclusive possession of immovable property, and that that was an important circumstance in deciding the question as to whether the defendant was a lessee or a mere licensee of the premises. The decision of the Court of Appeal in *Addiscombe Garden Estate Ltd. v. Crabbe* (6), has been relied upon for the proposition that the fact of exclusive possession is an event of the first importance. In that case the owner of certain property comprising a club-house and tennis courts authorised a lawn-tennis club, by a written agreement, to occupy and enjoy the property for a period of two years. After the period had expired the tennis club continued to occupy the premises. A clause in the agreement expressly entitled the grantors "to enter the premises to inspect the condition thereof and for all other reasonable purposes". That clause was considered to be an indication that the right to occupy the premises granted by the grantor to the grantee was intended to be an exclusive right of occupation, and that that was a strong circumstance in favour of the view that there was a tenancy as opposed to a licence. Jenkins, L.J., observed that "there could be no doubt that the fact of exclusive possession, if not decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance" (p. 571). We note that in the agreement in the present case there is no similar clause reserving to the plaintiff the right to enter the premises.

On the other hand in *Isaac v. Hotel de Paris Ltd.* (7), where the proposed terms of an agreement acted upon included, inter alia, a condition that the appellant (Isaac) was to remain in occupation of a Hotel (of which the respondent was a lessee) and was to pay all expenses incurred in running the Hotel, including the monthly rent which the respondent company paid to their landlord, the Privy Council took the view that conditions in the agreement showed that all that was intended was that the appellant should have a personal privilege of running a night bar on the premises with no interest in the land at all. Lord Denning cited with approval the following passage from the judgment of Lord Greene, M. R. in *Booker v. Palmer* (8).

> "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." (at p. 677).

Where the circumstances are such that they negative an intention to create a tenancy of immovable property, it would obviously be unjust to saddle the grantor with a tenancy with the momentous consequences that that entails nowadays. A consideration of all the terms and conditions of P1 clearly shows that all that was intended when the parties entered into it was that the defendant should, whilst being the lessee of the business, be granted a personal privilege, with no interest in the land. He thus becomes only the licensee of 50, Dalada Veediya, in order to enable him to carry on the business which formed the subject matter of the agreement. The Court of Appeal was therefore correct in its conclusion that the defendant was only a licensee and not a tenant of the premises.

The second argument of Counsel for the defendant has been that even if the relationship between plaintiff and defendant is that of licensor and licensee in respect of the premises, apart from the business, yet as such licence is an interest affecting land, it is of no force or avail in law as it has not been granted in compliance with the provisions of section 2 of the Prevention of Frauds Ordinance. Counsel relied very much on the decision of the Privy Council in *Wijesuriya v. The Attorney General* (9). In that case the appellant had an oral agreement with the Crown to tap and take the produce of certain rubber trees standing on a defined area of crown land. The Privy Council took the view that the agreement was in respect of a permit, which was not a 'lease' but a 'licence', and that the rights of occupation or possession and other ancillary rights as are necessary to make the primary right effective fell within the ambit of section 2 of the Frauds Ordinance.

The object of the licence granted to the lessee to occupy the premises on which the business was conducted was merely to negative any suggestion of a trespass by him during the pendency of the lease of the business, and thus to enable him to oppose any claim for ejectment during such period. The classic definition of a licence as propounded by Vaughn, C. J., in *Thomas v. Sorrel* (10) at 331, and adopted in subsequent cases, that it is "a dispensation which passeth no interest, nor alters nor transfers property in anything, but only makes an action lawful, which without it would have been unlawful" supports the view taken by me regarding the object for which occupancy of the premises was permitted.

It seems clear that in English Law a mere licence does not create any interest in the property to which it relates. It only makes an act lawful which without it would be unlawful. Consequently an agreement for a licence is not "an agreement for an interest in land" such as is required to be in writing under section 40 of the Law of Property Act, 1925: Halsbury's, Laws of England, (3rd Edition) Vol. 23, page 430, para. 1026. This, indeed, had been the principle on which our Courts have acted. For example, in *Samanhamy v. Silva* (11), a Divisional Court whilst holding that a contract for the sale of fructus industrialis, such as corn, is not a contract for the sale of any interest in land, but is merely one for the sale of goods, observed that "the question is whether in order to effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an easement of the rights to enter the land for the purpose of harvesting and carrying them away is all that was intended to be granted to the buyer" (at p. 103). Likewise in Fernando v. Themaris (12), a licence to enter land for the purpose of drawing toddy from a certain number of coconut trees growing on it was held to pass no interest in land.

In Wijesuriya's case (above) it would appear that although the subject matter of the oral agreement between Wijesuriya and the Assistant Government Agent of Badulla was described in a Gazette notification as being related to the lease of the right to tap and take the produce of the rubber trees on 278 acres of Crown land, the evidence as accepted by the District Judge, and acted upon by the Privy Council, showed that what was given to Wijesuriya was in fact a lease of this large extent of land. The receipt issued to him for the payment of Rs. 6,000 was described as "rent (per annum) on Kemapitiya Estate pending issue of lease". A letter from the Chena Surveyor was to the effect that he had been instructed by the Government Agent "to put him (Wijesuriya) in possession of the lands in question". There could thus be no doubt that such an agreement related to an interest in land, and required notarial attestation. The facts of that case are therefore easily distinguishable.

It seems to me that where the dominant or primary intention of the parties to a transaction is to effect a lease of a business, then the fact that the lessee of that business has a personal privilege of occupying the land on which the business is being conducted, albeit exclusively, does not give the lessee any interest

affecting land such as to require notarial execution in terms of section 2 of the Prevention of Frauds Ordinance. Applying this rule, it seems to us that as the dominant intention in executing the agreement P1 was to lease the business known as the "Thaj Hotel" to the defendant, and not to lease No. 50, Dalada Veediya, as well, the defendant had only a personal privilege of occupying the premises without hindrance for the purpose of carrying on the business during the stipulated period. Such grant of a licence or personal privilege to occupy the premises did not require notarial execution. The Court of Appeal has therefore been right in its answer to the first question.

As this decision would suffice to dispose of the question regarding the validity of P1 it is, in our view, unnecessary to determine the second question whether there was a burden on the plaintiff of proving that P1 has been duly attested.

There remains the question of damages. The Court of Appeal has rightly concluded that the stipulation for the payment of Rs. 1,000 per day is in the nature of a penalty. The Court has considered as reasonable a sum of Rs. 7,500 per month (i.e. Rs. 250 per day) as continuing damages from 1.2.77 until the plaintiff is restored to the possession of the business. Now, the consideration for the lease of the business, as stipulated in P1, is Rs. 1,500 per month, which is only one-fifth of the amount of damages awarded. We are of the view that a sum of Rs. 4,500 per month (i.e. Rs. 150 per day) is a reasonable estimate of damages. In arriving at this amount we have taken into consideration the fact that the defendant has had, and is having, the use of a large quantity of furniture, cooking utensils, crockery and cutlery, as itemised in the schedule to P1.

Appeal SC No. 41/80 is dismissed, subject to the reduction in the amount of damages payable by the defendant to the plaintiff from Rs. 250 to Rs. 150 per day from 1.2.77 until the plaintiff is restored to possession. The defendant will pay half the costs of this appeal.

Appeal SC No. 53/80 is also dismissed, but without costs.

SAMERAWICKRAME, J.—I agree.

ISMAIL, J.—I agree.

Appeals dismissed.

Damages varied.