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C.M. BEENA AND ANR.

v.

P.N. RAMACHANDRA RAO

MARCH 22, 2004

B

[R.C. LAHOTI AND DR. AR. LAKSHMANAN, JJ.]

Rent Control and Eviction:

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Lease and licence—Distinction between—Tests to determine—Held: Real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances as also their conduct before and after creation of the relationship is of relevance to determine whether it is lease or licence—If the owner retained control or possession over the property, then it was a licence—User of the terms like “lease” or “licence” not by itself decisive—Indian Easements Act, 1882, S. 52.

D

Constitution of India, 1950:

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Article 142—Relief—Grant of—Rent paid in respect of a property lease was found to be very meagre—Said property located in a busy commercial locality of a city bustling with business and commercial activity—Hence, considering all facts and circumstances of the case, relief of enhanced rent granted.

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The respondent filed a civil suit seeking issuance of mandatory injunction directing the appellants to hand over vacant possession of the suit premises to the respondent on the ground that the licence to occupy the suit premises was terminated. The trial Court directed the suit to be dismissed by recording a finding that one of the two appellants was a tenant and not a mere licensee. The decree was maintained in the first appeal. In the appeal preferred by the landlord-respondent, the High Court had set aside the judgments and decrees of the two Courts below and directed a decree as prayed for being passed. Hence the appeal by the defendant-appellant.

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Allowing the appeal, the Court

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HELD: 1.1. Though a deed of licence may have been executed it is open for the parties to the documents to show that the relationship which was agreed upon by the parties and was really intended to be brought into existence was that of a landlord and tenant though it was outwardly styled as a deed of licence to act as a camouflage on the Rent Control Legislation.

[311-C-D]

1.2. Generally speaking the difference between a 'lease' and 'licence' is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstance. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful. [311-E-F]

Associated Hotels of India Ltd. v. R.N. Kapoor, AIR (1959) SC 1262 and *Corporation of Calicut v. K. Sreenivasan*, [2002] 5 SCC 361, relied on.

Evans and Smith: "*The Law of Landlord and Tenant*" 4th Edn. and Hill and Redman: "*Law of Landlord and Tenant*" 17th Edn., Vol. 1, referred to.

2. A few principles are well settled. User of the terms like 'lease' or 'licence', 'lessor' or 'licensor', 'rent' or 'licence fee' are not by themselves decisive of the nature of the right created by the document. An effort should be made to find out whether the deed confers a right to possess exclusively coupled with transfer of a right to enjoy the property, or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention. [311-G-H; 312-A]

3. On the facts found by the two Courts below which findings have not been reversed by the High Court it is clear that the nature of the premises is of a shop and not a garage meant and designed exclusively for parking a car. The premises are located in a busy commercial market. The appellant has exclusive possession over the premises and the owner neither can nor does interfere therein. A full fledged stationery shop and

A allied business activities have been carried on by the appellant in the premises ever since 1972. The appellant was in possession of the premises for about 20 years before the date of the deed of licence and in spite of the 'deed of licence' of 1981 having been executed continued to possess, use and enjoy the occupation of the premises as before. Though the so called licence expired in 1982, the respondent did not insist on the appellant putting back the respondent in possession of the premises but allowed him to remain in occupation and to continue to do so for a period of about seven years till the date of the institution of the suit. It is thus clear that the present one is not a case where the possession or control of the premises was retained by the respondent while the appellant was only permitted to make such use of the premises as would have been unlawful but for the permission given. Agreeing with the Courts below and disagreeing with the High Court it is held that the relationship between the parties to be of landlord and tenant and the possession of the appellant over the premises as that of a tenant. [313-D-H]

D 4. The compensation which the appellant was paying to the respondent was very meagre looking at the size of the premises and its admitted location in a busy commercial locality of a city bustling with business and commercial activity. Though, the suit must suffer a dismissal and as a result the appellant shall continue in possession but considering all the facts and circumstances of the case, the appellant should pay enhanced rent till he continues to remain in lawful possession of the premises. [314-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1548 of 1999.

F From the Judgment and Order dated 17.6.98 of the Kerala High Court in S.A. No. 846 of 1995.

E.M.S. Anam for the Appellants.

G T.L.V. Iyer, Ms. Malini Pondual and Ms. Lansinglu Rongmei for the Respondent.

The Judgment of the Court was delivered by

H R.C. LAHOTI, J. The suit property is a shop situated on the ground floor of a building known as "Woodlands Building" on the M.G. Road, Ernakulam. The respondent filed a civil suit seeking issuance of mandatory

injunction directing the appellants to hand over vacant possession over the shop to the respondent on the ground that the licence to occupy the suit premises was terminated. The trial Court directed the suit to be dismissed by recording a finding that one of the two appellants (who are father and son) was a tenant and not a mere licensee. The son was held to be a tenant and hereinafter he is being referred to as the appellant. The decree was maintained in first appeal. In the second appeal preferred by the landlord the High Court has set aside the judgments and decrees of the two Courts below and directed a decrees as prayed for being passed. The defendant has preferred this appeal by special leave.

The building is a double-storey building. On the upper floor the respondent is conducting hotel business. On the ground floor there are several shops. A photo of the building, produced for the perusal of the Court at the time of hearing, shows a number of shops in continuity located on the ground floor.

According to the respondent the premises in occupation of the appellant is a car parking place. As between the parties there exists a document dated April 1, 1981 executed by the appellant in favour of the respondent which is styled as a deed of licence. The document begins with a recital-"whereas licensee is desirous of having the use of the premises for conducting a stationery shop in room.....in Woodlands building intended as car parking space for lodgers at the time of construction." The next para states-"And whereas the licensor is willing to grant licence to the licensee in respect of the aforesaid room for the purpose of carrying on business in stationery goods as licensee of the premises".

A brief resume of the relevant out of the nine clauses of terms and conditions agreed upon between the parties and as contained in the deed would suffice. Vide clause (1), the licence fee is appointed at Rs. 500 per mensem. The licensee is authorized "to use the room as licensee for period of one year from 1.4.1981". Clause (2) enjoins the licensee not to make any structural alterations in the room. Clause (3) permits the licensee and his servants to use the bathroom and toilet facility in the building and also the telephone facilities subject to payment of the telephone charges. If the licensee requires any decorative electrification it may be provided by the licensor at the cost of the licensee. Clause (4) obligates the licensee to pay the current charges of electricity consumed. Vide clause (5), the licensee must, at the end of one year, hand over possession to the licensor by removing all his goods

A and other immovable from the premises unless by mutual agreement a fresh contract is entered into between the parties. Clause (6) entails automatic termination of licence on non-payment of licence fee. Clauses (7) and (8) were much relied on by the learned counsel for the licensor-respondent and hence are reproduced verbatim as under:-

B "7. It is also understood and agreed that if the Licensor desires to have the premises used as a car park or used for any propose of his Hotel and Loding Business it is open to the Licensor to terminate this Licence at any time after giving one month's Notice.

C 8. It is definitely understood that the Licence creates no estate or interest in the Licencee over the premises and the Licensee shall have only a permission to use the premises for his business."

D It is the respondent's own case, as pleaded in the plaint, that the appellant is running a stationery shop and allied business activities in the premises. Though the period of licence expired w.e.f. 13.3.1982, the appellant has continued to remain in occupation of the premises. The suit was filed on 22.9.1989. The written statement obviously denied all the material plaint averments and pleaded a case of tenancy and the deed of licence being a camouflage for evading the applicability of Rent Control legislation.

E In its judgment dated 17.1.1992, the trial Court arrived at certain finding which are of relevance and significance. The trial Court found that initially the appellant was inducted as tenant in the premises in the month of April 1972 on a monthly rent of Rs. 300 and has continued to remain in occupation of the premises ever since then. The rent was increased from Rs. 300 to Rs. 360 and then to Rs. 500. The business carried on by the appellant in the suit premises is not in any manner connected with the hotel business of the respondent. The nature of the premises is not such as can be said to be necessarily an adjunct of the premises in possession of the respondent for his own use. Though a part of the same building, the shop in possession of the appellant is a separate entity or a separate unit of premises. The appellant is in exclusive possession of the premises. The business conducted by the appellant in the premises is not only different from the one carried on by the respondent, the respondent has no supervisory power or any other connection with the business run by the appellant. The compensation paid by the appellant to the respondent for user of the premises is paid month by month. The appellant entered in the witness box but the respondent did not adduce any evidence relevant for the purpose of determining the nature of the appellant's

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occupation of the suit premises or the appellant's status- whether a tenant or a licensee. The trial Court also concluded that the appellant has been in possession of the suit premises for a long time and the respondent being in a dominating position he had prevailed over the appellant for executing the deed of licence. On these findings, the trial Court concluded that the appellant was a tenant and the tenancy was not terminated. All these findings have been upheld by the first appellant Court.

A perusal of the judgment of the High Court shows a failure on the part of the High Court in giving any serious thought to the findings concurrently arrived at by the two Courts below. The High Court has been much impressed by the apparent tenor of the document dated April 1, 1981 and held the relationship between the respondent and the appellant to be that of the licensor and licensee.

The crucial issue for determination is as to whether there is a lease or licence existing between the parties. Though a deed of licence may have been executed it is open for the parties to the document to show that the relationship which was agreed upon by the parties and was really intended to be brought into existence was that of a landlord and tenant though it was outwardly styled as a deed of licence to act as a camouflage on the Rent Control Legislation. 'Lease' is defined in Section 105 of the Transfer of Property Act 1882 while 'licence' is defined in Section 52 of the Indian Easements Act 1882. Generally speaking the difference between a 'lease' and 'licence' is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premise for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful (See *Associated Hotels of India Ltd. v. R.N. Kapoor*, AIR (1959) SC 1262). The decided cases on the point are legion. For our purpose it would suffice to refer to a recent decision of this court in *Corporation of Calicut v. K. Sreenivasan*, [2002] 5 SCC 361.

A few principles are well settled. User of the terms like 'lease' or 'licence', 'lessor', 'rent' or 'licence fee' are not by themselves decisive of the nature of the right created by the document. An effort should be made to find

A out whether the deed confers a right to possess exclusively coupled with transfer of a right to enjoy the property or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.

B Given the facts and circumstances of a case, particularly when there is a written document executed between the parties, question arises as to what are the tests which would enable pronouncing upon the nature of relationship between the parties. Evans and Smith state in *The Law of Landlord and Tenant* (Fourth Edition)- "A lease, because it confers an estate in land, is much more than a mere personal or contractual agreement for the occupation of a freeholder's land by a tenant. A lease, whether fixed-term or periodic, confers a right in property, enabling the tenant to exclude all third parties, including the landlord, from possession, for the duration of the lease, in return for which a rent or periodical payment is reserved out of the land. A contractual licence confers no more than a permission on the occupier to do some act on the owner's land which would otherwise constitute a trespass. If exclusive possession is not conferred by an agreement, it is a licence." ".....the fundamental difference between a tenant and a licensee is that a tenant, who has exclusive possession, has an estate in land, as opposed to a personal permission to occupy. If, however, the owner of land proves that he never intended to accept the occupier as tenant, then the fact that the occupier pays regular sums for his occupation does not make the occupier a tenant." (at page 33).

F In Hill and Redman's *Law of Landlord and Tenant* (Seventeenth Edition, Vol.1) a more detailed discussion also laying down the determinative tests, is to be found stated as followed: "It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should be granted the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without being entitled to exclusive possession must operate as a licence and not as a lease. It was probably correct law at one time to say that the right of exclusive possession necessarily characterized the grant as that of a lease; but it is now possible for a licensee to have the right to exclusive possession. However, the fact that exclusive possession is granted, though by no means 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. Further, a grant of exclusive possession may be only a licence and not a lease where the grantor has no power to grant a lease. In deciding

whether a grant amounts to a lease, or is only a licence, regard must be had A
to the substance rather than the form of the agreement, for the relationship
between the parties is determined by the law and not by the table which they
choose to put on it. It has been said that the law will not impute an intention
to enter into the legal relation of landlord and tenant where circumstances B
and conduct negative that intention; but the fact that the agreement contains
a clause that no tenant is to be created will not, of itself, preclude the instrument
from being a lease. If the effect of the instrument is to give the holder the
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 *prima facie* a lease; if the contract is merely for the use of the property in C
a certain way and on certain terms, while it remains in the possession and
under the control of the owner, it is a licence. To give exclusive possession
there need not be express words to that effect; it is sufficient if the nature of
the acts to be done by the licensee require that he should have exclusive
possession. On the other hand, the employment of words appropriate to a
lease such as 'rent' or 'rental' will not prevent the grant from being a mere
licence if from the whole document it appears that the possession of the D
property is to be retained by the grantor." (at pages 14-15).

On the facts found by the two Courts below which findings have not
been reversed by the High Court it is clear that the nature of the premises is
of a shop and not a garage meant and designed exclusively for parking a car. E
The premises are located in a busy commercial market. The appellant has
exclusive possession over the premises and the owner neither can nor does
interfere therein. A full fledged stationery shop and allied business activities
have been carried on by the appellant in the premises ever since 1972. The
appellant was in possession of the premises for about 20 years before the date
of the deed of licence and in spite of the 'deed of licence' of 1981 having F
been executed continued to possess, use and enjoy the occupation of premises
as before. Though the so-called licence expired in 1982 the respondent did
not insist on the appellant putting back the respondent in possession of the
premises but allowed him to remain in occupation and to continue to do so
for a period of about seven years till the date of the institution of the suit. It
is thus clear that the present one is not a case where the possession or control G
of the premises was retained by the respondent while the appellant was only
permitted to make such use of the premises as would have been unlawful but
for the permission given. Agreeing with the Courts below and disagreeing
with the High Court we hold the relationship between the parties to be of
landlord and tenant and the possession of the appellant over the premises as H

A that of a tenant.

B The suit for mandatory injunction filed by the respondent must suffer the inevitable dismissal. However, during the course of hearing we indicated to the learned counsel for the appellant that the compensation which he was paying to the respondent was very meager looking at the size of the premises and its admitted location in a busy commercial locality of a city bustling with business and commercial activity. Though, the suit must suffer a dismissal and as a result the appellant shall continue in possession but considering all the facts and circumstances of the case the appellant should pay Rs. 2000 per month by way of rent of the suit premises from 1st April, 2004 till he continues to remain in lawful possession of the premises.

C The appeal is allowed. The judgment and decree of the High Court is set aside. Instead, the decree of the trial Court as upheld by the first appellate Court is restored. The appellant shall remain liable to clear the previous arrears, if any, at the rate agreed upon between the parties and pay rent calculated at the rate Rs. 2000 per month for future w.e.f. 1st April 2004. Costs as incurred throughout.

V.S.S.

Appeal allowed.