

(2000) 02 MAD CK 0085

In the Madras High Court

Case No : Second Appeal No's. 1790 and 1791 of 1998 and C.M.P. No. 18405 of 1998

B. Devendrakumar, rep. by his Power of Attorney agent M. Arunachaiam APPELLANT

Vs

R. Ranganathan (died) and R. Nandakumar RESPONDENT

Date of Decision : 29-02-2000

Acts Referred:

Easements Act, 1882 — Section 52
Tamil Nadu Civil Courts Act, 1873 — Section 13
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 44(2), 67
Transfer of Property Act, 1882 — Section 105, 107, 108

Citation : (2000) 02 MAD CK 0085

Hon'ble Judges : S.S. Subramanian, J

Bench : Single Bench

Advocate : T.L. Ram Mohan, for Mr. S. Subbiah, for the Appellant; T.R. Mani, for T.M. Hariharan, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Subramanian, J.—Plaintiff in O.S. No. 172 of 1993 on the file of the District Munsif's Court at Kodaikanal, (renumbered as O.S. No. 928 of 1995 on the file of the Additional Subordinate Judge, Dindigul) who is also the defendant in O.S. No. 952 of 1993 on the file of the same Court, is the appellant in both these Second Appeals. Parties herein will be referred to according to their respective rank in O.S. No. 952 of 1993, which is a suit for possession. Necessary facts for disposal of Second Appeals, could be summarised thus:

As per Ex.A.27 dated 21.3.1993, an agreement was executed between the plaintiff and defendant, the interpretation of which is the issue in the Second Appeal. According to the plaintiff, it is only a licence arrangement, permitting the defendant to make use of the property for the conduct of restaurant for a period of six months. According to the plaintiff, only a permission was granted and there is no transfer of interest or lease arrangement between the parties. On the

expiry of the term of six months, plaintiff demanded vacant possession and asked the defendant to vacate. It is also the case of the plaintiff that during the pendency of six months, the defendant attempted to put up permanent structures, for which permission was sought from the plaintiff, which was not granted. But, subsequently, the defendant attempted to put up new construction, alleging that the arrangement dated 21.3.1993 is a lease arrangement and they are entitled to put up such constructions. The suit was, therefore, laid for possession and also directing the defendant to remove the temporary sheds put up by him. Plaintiff also claimed mesne profits from 1.10.1993 at the rate of Rs. 20,000/- per month and future profits also at the same rate till the defendant vacates the property.

2. According to the defendant, he is in exclusive possession of the property with right to exclude the plaintiff and his possession is that of lessee. He is entitled to do business in the schedule premises without any obstruction from the plaintiff until he is lawfully evicted in due course of law. It is not a licence arrangement and agreement is only a camouflage or veil and the real intention of the parties is to create a lease arrangement. The defendant, therefore, filed O.S. No. 172 of 1993 for a decree of permanent prohibitory injunction, restraining the plaintiff in O.S. No. 952 of 1993 from interfering with his possession, which was transferred and re-numbered as O.S.928 of 1995 on the file of the Additional Subordinate Judge, Dindigul.

3. After filing O.S. No. 952 of 1993, both the suits were clubbed together and by a common judgment, O.S. No. 172 of 1993 i.e. O.S. No. 928 of 1995 filed by the appellant was dismissed and O.S. No. 952 of 1993 filed by the respondent was decreed, awarding mesne profits at the rate of Rs. 15,000/- for two months October and November, 1993 and, thereafter, Rs. 20,000/- per month till recovery of possession.

4. Against the judgment, appellant preferred two appeals as A.S. Nos. 21 and 22 of 1997 on the file of the Principal District Judge, Dindigul. The lower Appellate Court, confirmed the finding of the trial Court, held that the arrangement dated 21.3.1993 is only a licence arrangement and the decree, granting recovery of possession in O.S. No. 952 of 1993 was confirmed. But, regarding profits, the lower Appellate Court held that after institution of suit what is the rate of profits will be decided in execution under Order 20, Rule 12 of the Code of Civil Procedure. The appellant's appeal against the dismissal of his suit was dismissed.

5. It is against the said judgment, appellant has preferred these Second Appeals on the following substantial questions of law:

a) Whether the District Judge, having a limited pecuniary jurisdiction up to Rupees 3 Lakhs u/s 13 of the Tamil Nadu Civil Courts Act, 1873, has got jurisdiction to hear the appeal when the value of subject matter is Rs. 6,44,000.00 after the revised valuation?

b) Whether the decree and judgment passed by the Lower Appellate Court in

exceeding its pecuniary jurisdiction is null and void?

c) Whether the grant of exclusive possession of vacant land by its owner upon another person to run a restaurant by putting up temporary" construction making arrangements and other facilities is a lease or a mere licence?

d) Whether the factor that exclusive possession was given by the land owner to another is a strong piece of evidence to show the intention of both parties to treat the arrangement as a lease?

e) Whether non-taking of a permission from the local authorities would be taken as a factor, that the arrangement would be taken only as a licence?

f) When the suit land had been given within defined four boundaries, can it be concluded that the person who had been given possession of an approximate area trespassed into the other areas.,

g) Has not the lower Appellate Court committed an error in determining the past mesne profits at a specified rate, while remitting the matter for the determination of future mesne profits by separate proceedings under Order 20, Rule 12 of the Code of Civil Procedure?

h) Whether the order directing the fresh enquiry under Order 20, Rule 12 of CPC can be considered as an order of remand?

i) Whether the Lower Appellate Court had committed an error in not directing the refund of Court fee as provided u/s 67 of Tamil Nadu Court Fees and Suit Valuation Act, 1955, while relegating the proceedings for a separate enquiry under Order 20, Rule 12 of Code of Civil Procedure?

j) Whether directing an enquiry under Order 20 , Rule 12 of CPC after setting aside the future mesne profits would amount to an order of remand?

k) Whether the tower Appellate Court is correct in dismissing the appeal as the prayer in the suit was for permanent injunction from interfering with the lawful possession of the property, except under due process of law?

6. In the suit for injunction filed by the appellant, he is not making any reference to Ex.A.27 agreement dated 21.3.1993. In the cause action paragraph, he has said that he became a tenant on 1.4.1993 and on 1.10.1993, when the defendant sent a warning notice, asking him to vacate. How he came into occupation of the land and what are the terms of that arrangement is not disclosed. In the plaint, he only says that he is a lawful tenant and that he is running a Hotel by name "Arya Bhavan by Hills" in his constructed superstructure.

7. It is admitted that the parties have entered into an agreement as per deed dated 21.3.1993. Though the appellant has his own explanation about the arrangement, it is admitted that the parties have entered into such an agreement, it is only proper on my part to extract the entire document, which read thus:

"This agreement of Licence, for the use of vacant land, is given on the 21st day of March, one thousand nine hundred ninety three by Sri. R. Ranganathan, aged 78, son of T. Rajagopala Iyengar, residing at Door No. 33, Chatram Street, Dindigul 624 001, or represented by R. Nandakumar, son of R. Ranganathan above-named, hereinafter called the Licensor on the one hand and Mr. Devendrakumar aged 37, residing at Door No. 241, A West Masi Street, Proprietor, New Arya Bhavan, Madurai-1, on the other, hereinafter called the "Licensee".

Whereas the Licensee had approached the Licensor viz. Owner of the vacant land described in the schedule herein, with a view to running a restaurant at the said vacant land by putting up at his cost, temporary and removable superstructure for a period of 6 months from 1.4.1993 to 30.9.1993 at a Licence fee of Rs. 30,000/- (Rupees Thirty thousand only) and give vacant possession of the land at the end of the said period and this deed witnessed as follows:-

The Licensor agrees with the Licensee as follows: -

1. To permit the use and occupation of vacant land for a period of 6 months from 1.4.1993 to 30.9.1993 after receiving a non-refundable Licence fee of Rs. 30,000/- (Rupees Thirty thousand only) from the Licensee prior to the commencement of the Licensed period.
2. To permit the licensee to put up at his expense a removable and temporary superstructure on the Licensee agreeing to pay the structure tax, when imposed by the Township authorities and to pay the said superstructure tax in the name of the "Licensor" only.
3. To permit to use of the vacant land from the Bender loch Road after removing the existing fence at the expense of the Licensee and restore the same in the same position at his expense at the expiry of the licence.
4. To permit the licensee to obtain a temporary Electricity connection in his own name on the Licensee indemnifying the Licensor that the same be removed at the end of the Licensed period and pay the energising charges during its usage and not to claim any ownership right consequent on such permission being granted to the Licensee by way of gesture and goodwill.
5. To permit the use of the vacant land without causing any hindrance or danger to the nearby Petrol Pump by the Licensee, thereby Licensee ensuring the safety, cleanliness and pollution-free and indemnify the Licensor with regard to the same.

The Licensee agrees with the Licensor as follows: -

1. To pay the said non-refundable Licensee fee of Rs. 30,000/- (Thirty thousand) at the commencement of the period of Licence viz. 1.4.1993.
2. To give vacant possession of the land at the end of the period viz. 30.9.1993.
3. To pay the superstructure Tax in the name of the Licensor for the temporary,

removable superstructure put up by the Licensee when imposed by the Township authorities and indemnify the Licensor, if objected to by the Township authorities and undertakes to vacate if objected by them and not to claim any damages or compensation or any part thereof from the Licensor nor claim any return of the Licence fee thereof for any unexpired portion.

4. Not to let out or assign the vacant land or any portion thereof.
5. To use the vacant land only for the purpose of running a temporary restaurant.
6. To obtain a temporary Electrical connection in his own name and pay the consumption charges.
7. There is no water at the vacant land. However, if the Township authorities may permit a temporary Water connection at the site, the same may be applied for in the name of the Licensor and the consumption charges including may have to be paid by the Licensee.
8. Not to do anything which will endanger the surroundings and be responsible for the consequences if any, and indemnify the owner during the said term of the Licence.
9. Not to use any other portion other than the vacant land specified in the schedule.
10. To keep the space and surroundings neat and indemnify the Licensor completely with regard to the same and also take up an Insurance Cover adequately at his cost.

Upon any breach of conditions contained herein, the Licensor may at any time notwithstanding any of the clauses contained in this Licence, revoke the abovesaid Licence and thereupon the same shall become void.

SCHEDULE

The vacant land in TS. No. 296 of Kodaikanal Township behind R.R. Home Lodging also belonging to the Licensor and bounded on the North, the Petrol Pump and on the South by the residential building also belonging to the Licensor overlooking the Bender loch Road admeasuring about 50" in length on the Bender loch Road side and 20" in width thus totaling in all about 1000 sq.ft. and thus having access 10 the Bender loch Road."

8. It is admitted by the defendant as D.W.1 that he has executed Ex.A.27. It has also come out in evidence that he is a Graduate and himself and his father are doing Hotel business in various places. Both the Courts below have held that the entire terms of contract had been put down in writing as per Ex.A.27 and there is also no vagueness in the deed. Both the parties are educated.

9. Whether the document is lease or licence depends mainly on the intention of the parties. Both the parties are competent to enter into lease arrangement or licence arrangement and consciously, the parties have named the document in a

particular way. That is a relevant circumstances to be taken into consideration. It is true that the nomenclature used by the parties may not be conclusive test and entire terms of the document will have to be taken into consideration to find out the intention of the parties. It is well settled that merely because, exclusive possession is granted, from that alone an inference cannot be drawn that it is a lease.

10. As early as in *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, , in paragraph 27 of the judgment, their Lordships held thus:

"(27) There is a marked distinction between a lease and a licence. S. 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised, under S.108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is, therefore, a transfer of an interest in land. The interest transferred is called the lease hold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas S.52 of the Indian Easements Act defines a licence thus:

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

Under the aforesaid section, 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-I 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 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 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:

"The question in all these cases is one of the 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 creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties - Whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, "prima facie", he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. Judged by the said tests, it is not possible to hold that the document is one of licence. Certainly, it does not confer only a bare personal privilege on the respondent to make use of the rooms. It puts him in exclusive possession of them, untrammelled by the control and free from the directions of the appellants. The covenants are those that are usually found or expected to be included in a lease deed. The right of the respondent to transfer his interest under the document, although with the consent of the appellants, is destructive of any theory of licence. The solitary circumstance that the rooms let out in the present case are situated in a building wherein a hotel is run cannot make any difference in the character of the holding. The intention of the parties is clearly manifest, and the clever phraseology used or the ingenuity of the document-writer hardly cancels the real intent. I, therefore, hold that under the document, there was transfer of a right to enjoy the two rooms, and, therefore, it created a tenancy in favour of the respondent."

11. In (1974) 1 S.C.C. 202 (Qudrat Ullah v. Municipal Board), in para 7 of the judgment, it was held thus:

"7. There is no simple litmus test to distinguish a lease as defined in Section 105, Transfer of Property Act from a licence as defined in Section 52, Easements Act, but the character of the transaction turns on the operative intent of the parties. To put it pithily, if an interest in immovable property, entitling the transferors to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a licence is the legal result. Marginal variations to this broad statement are possible and Exs. 1 and 4 fall in the grey area of unclear recitals. The law, on the point, has been stated by this Court in the Associated Hotel's case. In Halsbury's Laws of England, Volume 23, the distinctive flavour, the deceptive labels and the crucial considerations in a lease

versus licence situation have been stated and excerpts therefrom may serve as guidelines (see pages 427, 428 and 429):

"1022. PRINCIPLES FOR DETERMINING WHETHER AGREEMENT CREATES LEASE OR LICENCE. In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of license and licensee decisive consideration is the intention of the parties. The parties to an agreement cannot, however, turn a lease into a licence merely by stating that the document is to be deemed a licence or describing it as such; the relationship of the parties is determined by law on a consideration of all relevant provisions of the agreement; nor will the employment of words appropriate to a lease prevent the agreement from conferring a licence only if from the whole document it appears that it was intended merely to confer a licence. In the absence of any formal document, the intention of the parties must be inferred from the circumstances and the conduct of the parties.

1023. NATURE OF GRANT OF EXCLUSIVE POSSESSION. The fact that the agreement grants a right of exclusive possession is not in itself conclusive evidence of the existence of a tenancy, but it is a consideration of the first importance.

In deciding whether a grantee is entitled to exclusive possession, regard must be had to the substance of the agreement. 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 grantee requires that he should have exclusive possession.

The grant of an exclusive right to a benefit can, however, be inferred only from language which is clear and explicit. If an exclusive right of possession is subject to certain reservations or to a restriction of the purposes for which the premises may be used, the reservations or restriction will not necessarily prevent the grant operating as a lease.

1024. WHEN GRANT CONFERRING EXCLUSIVE POSSESSION OPERATES MERELY AS LICENCE. A grant which confers the right to exclusive possession may operate as a licence in the following circumstance?; which negative the intention to create a lease.

1025. INSTANCES OF AGREEMENTS (CREATING LICENCES. A licence normally created where a person is granted the right to use premises without becoming entitled to exclusive possession thereof, or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the possession and control of the owner, the agreement will operate as a licence, even though the agreement may employ words appropriate to a lease."

12. In Delta International Ltd. Vs . Shyam Sunder Ganeriwalla and Anr. and (4)

of the judgment, their Lordships held thus:

"5. Where the document is unambiguous, there is no need to travel beyond the document and look at the attendant circumstances together with the intention of the parties."

In that case, their Lordships also considered the decision reported in Capt. B.V. D'Souza Vs. Antonio Fausto Fernandes, which was heavily relied on by the Counsel for the appellant herein. After considering the same, their Lordships held that the nomenclature of the document is of some importance, though it is not always conclusive. In that case also, an argument was put forward by the counsel for the appellant i.e., the site was under lock and key and he is in exclusive possession. It is true that in the document that came up for consideration before their Lordships, it was said that the possession and control shall remain with the owner and their Lordships held that it is a clear indication of fact that no interest is created in immovable property. How far that could be distinguished was dealt with in the later portion of the judgment.

12. In Lilawati H. Hiranandani Vs. Usha Tandon, the nomenclature or the label for the arrangement was given much importance by Court. In para 9 of the judgment, their Lordships held thus:

"9. The nomenclature or the label for the arrangement is unambiguous. It is only a "licence". The appellant sought permission of the original applicant to occupy a portion of the flat belonging to the original applicant No right or interest whatsoever in the said premises or any part thereof is created in favour of the original respondent. The appellant also undertook to vacate the building and to give quiet possession to the applicant at any time when required to do so. All that was stipulated was that the information should be given one month before it is so required. The document is clear. The eye need look no further. The Bombay Rent Control Act was in existence ever since 1947. The appellant (the original respondent) as well as the applicant were aware or should be deemed to be aware of the prevailing state of law. They chose to call the arrangement as a "licence". Permission was sought to occupy a part of the flat and it was given. In our opinion, the specific label or nomenclature of the arrangement and the contents of the communication, should conclude the matter. It is idle for the appellant to contend that she is entitled to the protection of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 as a tenant. We are of the view that the plea based on Section 42A of the Act is without substance and we repel the same. Our above reasoning and conclusion are in accord with the bench decision of this Court in Swaran Singh v. Madan Singh. No other point was raised in the appeal. We affirm the judgment of the learned single Judge dated 28.11.1991 and dismiss this appeal. However, there shall be no order as to costs in this appeal."

(Emphasis supplied)

In that case, the appellant before the Hon"ble Supreme Court, occupied a flat on

the basis of permission and the appellant was allowed to occupy the flat only as a licensee. The question that came up for consideration before the Hon''ble Supreme Court is, whether the occupant is entitled to the benefit of Rent Control Act.

13. Vayallakath Muhammodkutty Vs. Illikkal Moosakutty, is also a case, where the defendant was allowed to run a restaurant and for the said purpose, he appointed his own employees. The defendant was also in exclusive possession of the building and even there was increase in rate of rent. There was also a clause in that agreement that he shall not sublet or assign the arrangement to any 3rd party. In para 9 of the judgment, it was held thus:

"9. We have considered the document Ext.A1 containing the terms and conditions under which the defendant was allowed to run the said business, and, in our view, the said document is consistent with the case of licence. In D''Souza''s Case, this Court has indicated that for a consideration as to whether a document creates a licence or lease, the substance of the document must be preferred to the form. It is not correct to say that exclusive possession of a party is irrelevant, but at the same time it is also not conclusive. The other tests namely, intention of the parties and whether the document creates any interest in the property or not, are important considerations. Mr. Sukumaran has very strongly relied on the embargo put against sub-letting by the defendant in the said document Ext.A-1 and referring to D''Souza''s Case has submitted that such embargo of sub lease can arise only in a case of tenancy and for the purpose of proper construction of the document, the said embargo cannot be lost sight of. Although, normally in a case of licence, question of sub-letting does not arise, but simply for giving such clause in an agreement, an agreement cannot be held to be an agreement for lease. The pith and substance of the document are required to be considered for the purpose of finding out the true import of a document, namely whether a document creates a lease or a licence."

(emphasis supplied).

14. In (1997) 1 S.C.C. 373 = 1997 - 2 -L.W.522 (Sultana Begum v. Prem Chand Jain), in paragraphs 36 to 40 of the judgment, this question was considered, which read thus:

"36. Tenant or lessee of a premises is a person in whose favour an interest in the specific immovable property is transferred, who, therefore, comes to occupy the demised property exclusively in his own rights. The right to exclusive possession is the basic feature of the tenancy created by lease. The licensee''s possession, on the contrary, is only permissive and he can be thrown out at any time. He does not also get the right to exclusive possession. Since the decree for eviction was passed against the respondent in his capacity as tenant of the premises in question, he could have, if at all avoided that decree only by getting a fresh lease of that premises and not a licence which cannot have the effect of avoiding the decree or superseding or substituting the decree. The intention of the parties

clearly was not to extinguish the decree for eviction but to create only a licence allowing the respondent to stay in the premises for a while.

37. In *Konchada Ramamurthy Subudhi and Another Vs. Gopinath Naik*, this Court relied upon the theory of intention and held that the intention of the parties was the decisive test as to whether the rights under the decree were given up or not. In that case, the landlord had filed a suit for eviction of the tenant which was dismissed by the trial Court, but was compromised at the appellate stage. The decree was passed in terms of the compromise which provided that the tenant could continue in possession for five years but if he did not pay rent for three consecutive months, he would be evicted by executing the decree. When execution proceedings were initiated against the tenant, an objection was raised by him that the compromise decree created a fresh lease and, therefore, the decree was inexecutable. This plea was rejected and it was held that the intention of the parties, which was the decisive test, was not to enter into the relationship of landlord and tenant. Reliance in this case was placed on the decision of Subba Rao, J. (as he then was) in *Associated Hotels of India Ltd v. R.N. Kapoor* in which the proposition laid down was:

"The real test is the intention of the parties -Whether they intended to create a lease or a licence.

39. Reliance was also placed on the observations of Lord Greene, M.R. in *Booker v. Palmer* which is quoted below:

"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".

39. *Ramamurthy Case* was followed by this Court in *Smt. Kalloo and Others Vs. Dhakadevi and Others*, in which again the intention of the parties was held to be the decisive test and it was laid down that whether a fresh lease was intended to be created would depend upon the intention of the parties.

40. In the instant case, the respondent himself says that it was only a licence which was created in his favour and that he had to pay the licence fee. This itself is indicative of the fact that a fresh lease was not created in his favour and consequently the rights under the decree were neither intended to be surrendered nor were they actually surrendered. The decree remained preserved and the creation of a licence had not the effect of destroying it."

(Emphasis supplied)

15. In a recent decision of the Hon^{ble} Supreme Court reported in *Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another*, this question was considered in detail after discussing the earlier case law, their Lordships declared the law thus:

"From the aforesaid discussion what emerges is:

(1) To find out whether the document creates a lease or a licence the real test is to find out "the intention of the parties"; keeping in mind that in cases where exclusive possession is given, the line between the lease and a licence is very thin.

(2) The intention of the parties is to be gathered from the document itself. Mainly, the intention is to be gathered from the meaning and the words used in the document except where it is alleged and that the document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

(3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be the most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.

(4) If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole. But in cases where the landlord alleges that the tenant has sub-let the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into, inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed; the tenant and the sub-tenant may jointly set up the plea of a licence against the landlord which is a camouflage; in such cases, the mask is to be removed or the veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances. Same would be the position where the owner of the premises and the person in need of the premises executes a deed labelling it as a licence deed to avoid the operation of rent legislation.

(5) Prima facie, in the absence of a sufficient title or interest to carve out or to create a similar tenancy by the silting tenant in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour; because a person having no right cannot confer any title of tenancy or sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the premises, cannot confer any better title. But, this question is not required to be finally determined in this matter.

(6) Further lease or licence is a matter of contract between the parties. Section 107 of the Transfer of Property Act, 1882 inter alia provides that leases of immovable property may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the lessee and the lessor. This contract

between the parties is to be interpreted or construed on the well-laid principles for construction of contractual terms, viz., for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having double intendment, one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing only what he had a right to do".

(Emphasis supplied)

16. In that case also, the document was executed by two Companies and their Lordships presumed that the words used in the document are used after full understanding and to avoid any wrong inference of intention. Their Lordships also gave importance to nomenclature of the document. Their Lordships further declared in that case, in para 19, that when parties who are capable of understanding their rights fully, expressly agreed and declared that the documents should not be construed in any manner as creating any relationship as landlord and tenant between them it would be impermissible to conjecture or infer that their relations should be construed that of landlord and tenant though certain terms mentioned in the deed can have a double intendment. Their Lordships further declared that, the intention of the parties is the meaning of the words they have used and there could be no intention independent of that meaning.

17. On the basis of the above decisions, it has to be considered as to what the parties intended while executing Ex.A.27. The important terms of the documents are, the appellant is allowed to use the property for a period of six months for a total consideration of Rs. 30,000/-. This term is mostly unusual in the case of a lease. It further says that the licensee, has to put up a removable and temporary superstructure and a term of six months is also provided. The licensee has also obtained temporary electric connection and the vacant land can only be used for only the purpose of temporary restaurant. It also says that the licensee will not let or assign the vacant land or any portion thereof. Nowhere in the document we find that any interest in the land is created nor there is any transfer. A lease is a transfer of immovable property for the purpose of enjoyment. The entire document only says that the licensee may make use of the vacant land for a period of six months for a total consideration of Rs. 30,000/- by putting up a temporary construction, which is liable to be removed on the expiry of the term and also obtaining temporary electricity connection. The nature of construction is also to make it clear that it must be removable (not to be demolished). The document further provides that if the removable structure put up by the licensee is objected to by the Township Authorities, the licensee is bound to vacate the same without claiming any compensation or damages nor licensee is entitled to return of the licence fee for the unexpired term. Regarding taking of temporary electricity connection, it further says that merely because the connection is taken in the name of the licensee, he shall not claim any ownership right consequent to

such permission that by way of gesture or goodwill. On a reading of the document, it is clear that there is no transfer of possession and only in case, there is transfer of possession, the question of exclusive possession also arises. But, if the nature of transaction is such that the person may have to occupy the land, that by itself will not prove that he is in exclusive possession i.e. the right to exclude the owner. The legal possession continues with the owner.

18. An argument was taken on the basis of clause that the appellant is not allowed to let out or assign the vacant land or any portion thereof. According to the appellant, it is unnecessary in the case of licence. Counsel also relied on the decision reported in Capt. B.V. D'Souza Vs. Antonio Fausto Fernandes, I do not think the above decision will have a bearing in this case, where the facts are entirely different. In that case, there was right of renewal, which is unknown in the case of licence and the word used was that the licensee shall not sub-let, under-let or part with possession of the premises without the consent of the licensor. That means with the consent of the owner, the person who took possession could sub-let the premises. It was under those circumstances, their Lordships held that is a case of lease and not a licence in Swaran Singh's case (cited supra), the above decision was distinguished and their Lordships held that it is nothing more than an affirmation of the requirement that the licensee alone must use the property and their Lordships held that licence is personal and when an affirmation is made that the licensee shall not sublet or assign to anybody else, such an affirmation cannot alter the relationship of the parties as lessor and lessee. The above decision was also distinguished in Delta International Ltd's case (cited supra) and in Vayallakath Muhamed Kutty's case (cited supra). In all the above cases, their Lordships were interpreting the document with a transaction in respect of a building and the question was, whether the Rent Control Act applies. In this case, there is no scope of applicability of Rent Control Act since admittedly, the subject matter of the transaction is a vacant land.

19. It is true that the appellant has averred in his written statement in O.S. No. 952 of 1993 in para 7 that, the word "licence" is nothing but a camouflage and what is leased out is an immovable property with full control throughout day and night without any break by the tenant. Camouflage means concealing the real object. There must be some purpose to conceal. If the Rent Control Act will not apply, what is the benefit the party is going to get. Even if it is a case of lease, the term will expire by six months and by efflux of time, the appellant is bound to vacate the premises. In fact in Delta International Ltd's Case (cited supra), their Lordships held that, whether a transaction is a lease or a licence "turns on the operative intention of the parties and there is no single, simple litmus test to distinguish one from the other". In paragraph 14, their Lordships relied on the decision reported in (1989) 1 S.C.C. 19 (Rajbir Kaur v. S. Chokesiri and Co.). In that case their Lordships held that,

"Wherever there is exclusive possession, the idea of a licence is not necessarily ruled out. English law contemplates what are called "Possessory Licences" which

confer a right of exclusive possession, marking them off from the moral usual type of licences which serve to authorise acts which would otherwise be trespasses. Thus exclusive possession itself is not decisive in favour of a lease and against a mere licence. for, even the grant of exclusive possession might turn out to be only a licence and not a lease."

(Emphasis supplied).

The appellant has no case that the parties have executed a document to evade the rigours of law or that it is a sham document and Ex.A.27 was executed for achieving some other purpose (see para 18 in the Delta International Ltd.'s case (cited supra). Under these circumstances, the intention of the parties must be gathered from the express words of the various terms provided in the document itself and the Court is not expected to look into the surrounding circumstances.,

20. An argument was taken by the learned counsel for the appellant that the building to be constructed is in Kodaikanal area, where the Local Authorities never used to give a licence for putting up a permanent construction. I do not find any ground to accept such a contention, especially, when such a case is not put forward in the written statement nor the learned Senior Counsel was in a position to bring to my notice any prohibition by any authority barring permanent construction in that area. The subsequent conduct also proves that the parties "intention is only to create a licence and not a lease arrangement. Ex.A.2 is a letter written by the appellant's Agent Somendrakumar i.e. dated 27.7.1993, during subsistence of the term. In that letter, he said that because of the rains, they could not get customers and he sought permission from the respondent that they may be permitted to put up some other construction. He stated in that letter thus:

From this letter, it is clear that the permission was granted only to put up removable structures and not structures which are liable to be demolished. In the earlier portion of the letter, he also admits that what they have obtained is " ;" that means licence. The permission sought for is not given. It is clear from Ex.A.5 i.e. immediately after the expiry of the term on 1.10.1993 itself, the respondent sent a telegram, asking the appellant to vacate the premises and a letter is also given under Ex.A.7.

21. The respondent is conducting a Petrol Bunk in one portion of the entire premises. The subject matter of the agreement Ex.A.27 is really a portion of Petrol Bunk area, but it remains vacant. Naturally, when the respondent gives a permission, the same should not affect his Petrol Bunk business. That is why, he does not want any permanent structure to be put up and thereby allowing the appellant to cause damages to the Petrol Bunk. In fact, the Bharat Petroleum Corporation, has sent a letter to the respondent that granting permission to run a temporary restaurant can prove hazardous to the public at large both visiting the hotel as well as to the Petrol Bunk and they wanted the respondent to take immediate steps to see that the hotel is removed from the present location. The

Revenue Divisional Officer, as per Ex.A.22 notice took objection against the respondent for having permitted to run a temporary restaurant, which is likely to endanger the public and the same was causing traffic obstruction to the neighbours. The Revenue Divisional Officer sought an explanation why he shall not recommend cancellation to run the Petrol Bunk. It is true that the suit was filed by the appellant on 13.10.1993 and this letter dated is 15.10.1993. But, all these can also be taken into consideration, why the parties contemplated to execute a licence agreement. Under the Local Laws, without permission of the Local Authority, no construction could be made. The fact that the appellant has put up constructions without the sanction of the Local Authority, is admitted in his cross-examination. The appellant is not conducting the business for first time. It is admitted that he has chain of hotels in various places He knows that for running a hotel business, construction have to be made and with open eyes, he agreed that the removable construction alone will be made. That shows, he himself did not intend to enjoy the property, which is necessary ingredient for lease.

22. Counsel for the respondent also brought to my notice, a Bench decision of this Court reported in 1994-I-L.W.463 (Sekaran, T. v. The Managing Director, Thiruvalluvar Transport Corporation, Madras). The above decision fully supports the case of the respondent.

23. In Second Appeal in 1790 of 1998 has also raised two other substantial questions of law i.e. regarding the jurisdiction of the lower Appellate Court to hear the appeal against the decree in O.S. No. 952 of 1993. Trial Court while allowing recovery of property, has also awarded future profits at the rate of Rs. 15,000/- per month from the date of suit. In view of the finding that the plaintiff is entitled to recover future profits at the rate of Rs. 15,000/- from the date of suit. Court fee was directed to pay u/s 44(2) of the Court Fees Act. Future profits came to Rs. 5,32,500/-, for which additional Court fee of Rs. 39,938/- was also paid. An argument was taken by the counsel that the jurisdiction of the lower Appellate Court is only to hear appeals up to Rs. 3,00,000/- under Section 13 of the Tamil Nadu Civil Courts Act, 1873 as amended by Act 18 of 1996 and as in this case, the value exceeds Rs. 6,00,000/-, the Court has no jurisdiction,

24. I do not find any merit in the submission. Jurisdiction for the purpose of appeal depends upon the valuation of the suit. It is not the case of the appellant that the nature of suit is above three lakhs, though by granting a relief, more amount has been awarded to the plaintiff. Merely because mesne profits (future profits) was awarded pending suit, that will not be a reason to hold that the appeal before the lower Court is not maintainable.

25. It was the appellant, who preferred the appeal before the lower Appellate Court and obtained an adverse judgment. When a judgment went against him, he has taken this contention before this Court that the appeal filed by him is not maintainable.

26. If the appeal is not found to be maintainable, the remedy is to set aside the judgment of the lower Appellate Court and direct the lower Appellate Court to return the Memorandum of appeal so as to enable the appellant to file an appeal before this Court. That contingency does not arise in this case since I hold that the lower Appellate Court had jurisdiction. Even otherwise, in the suit filed by the appellant for injunction, the same question has already been agitated and it has been held that the transaction as between the parties is only that of licensee. That will be an added reason to hold that I do not want to follow the procedure since that is only a technical objection and no manifest injustice had been done to the appellant. I reject the contention that the lower Appellate Court has no jurisdiction to deal with the appeal. In the result, all the questions of law are found against the appellant and consequently, both the Second Appeals are dismissed with costs. C.M.P. No. 18405 of 1998 is also dismissed.