

(1974) 10 BOM CK 0001

In the Bombay High Court

Case No : Special Civil Application No. 1255 of 1971

Mohan Sons (Bombay) Private Ltd.

APPELLANT

Vs

Lady Sonoo Jamatji Jejeebhoy and Others

RESPONDENT

Date of Decision : 24-10-1974

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(1), 5(3)

Evidence Act, 1872 — Section 67

Transfer of Property Act, 1882 — Section 106, 111

Citation : AIR 1976 Bom 417 : (1976) 78 BOMLR 195 : (1977) ILR (Bom) 1146

Hon'ble Judges : Bhasme, J

Bench : Single Bench

Advocate : R.B. Andhyarujina and S.C. Pratap, for the Appellant; M.O. Chinoy, by Gagrut and Co., Attorneys, for the Respondent

Judgement

1. The petitioner, a private limited company, is original defendant No. 1 tenant. Respondents Nos. 1 to 4 are the original plaintiffs. They are trustees of the N. M. Wadia Charities, having their office at 22-D Parsi Bazar Street, Fort, Bombay-1. Respondent NO. 5 is the original defendant NO. 2. It is also a limited company. The plaintiffs had filed a suit against the defendants for possession of the suit premises on the ground that defendant No. 1, the tenant, had sublet a portion of the suit premises on the ground that defendant No. 1, the tenant, had sublet a portion of the suit premises in their occupation to defendant No. 2 after May 1959. As this is illegal subletting contrary to the terms and conditions of the tenancy agreement, the plaintiffs were entitled to claim possession of the suit premises. The claim possession of the suit premises. The claim was also based on the ground of arrears of rent from 1-9-1960 to 10-10-1960. Both the defendants had filed separate written statements and resisted the plaintiffs' suit claim. One of the contentions raised was that the notice to quit, which was given by the plaintiffs before the institution of the suit was not valid in law. No particulars were furnished in the written statements about the alleged invalidity

of the notice to quit. According to defendants Nos. 1 and 2, in fact, there was no sub-letting. The contract between defendant No. 1 and defendant No. 2 was a contract of leave and licence. A number of issues were framed by the learned trial Judge. Parties relied on both oral and documentary evidence. After part of the evidence was recorded, the defendants raised a specific contention about the invalidity of the notice. In fact two notices were given by the plaintiffs to defendant No. 1. The first notice is of 7/15-1-1960 and the second one is of July 1960. The second notice was expressly given without prejudice to the first notice. During the course of the trial the defendants contended that the first notice was bad in law because it was not given by proper person. It is not necessary to refer to the other contention that, in fact, the notice does not bring about the termination of the tenancy of defendant No. 1. The Secretary of the plaintiffs had given instructions to the advocate and the advocate had issued the notice seeking to terminate the tenancy. The Secretary was not authorised by the plaintiffs who were the trustees of the Trust Property. None of the plaintiffs had entered the witness-box to depose to the fact that all or any one of them had instructed the Secretary to serve the notice on the 1st defendant or otherwise instructed the advocate to write such a letter. As the Secretary was the constituted attorney of the plaintiffs, the contention raised on behalf of the defendants was that the power of attorney does not give any authority to the attorney to terminate the tenancy of the 1st defendants. The said power is restricted to the right to commence and prosecute or appear in and defend all suits, actions and proceedings. The Secretary, although he was the holder of the power of attorney, had no power to instruct the advocate of the plaintiffs to address the letter.

2. As the point was allowed to be raised during the course of the trial, the Secretary was recalled and further examined. The plaintiffs relied upon a document which is marked Ex. M. Ex. M consisted of two parts. The first part was the memorandum submitted by the Secretary to the trustees in which a mention is made of the alleged breach of the terms of the tenancy agreement under which the 1st defendant was in occupation. The Secretary had sought directions of the trustees regarding the breach committed by the 1st defendant. At the foot of the Memorandum there was an endorsement purporting to be in the hand of one of the trustees. Below the endorsement, the trustees i. e. the plaintiffs had signed. The plaintiffs have relied upon this document for establishing their case that the plaintiffs have relied upon this document for stabilising their case that the plaintiffs trustees had authorised the Secretary, their Power of Attorney holder, to instruct the lawyer and the lawyer acting on such instructions and given a notice terminating the tenancy of the defendants. The attack of the defendants on this document was twofold. The first objection was to the admissibility of this document in evidence. Assuming the document was admissible then the case of the defendants was that the endorsement does not contain any instructions under which the Secretary was authorised to approach the lawyer for getting to approach the lawyer for getting

the tenancy of the 1st defendants terminated.

3. The second substantial defence was that the agreement between defendants 1 and 2 under which defendant No. 2 came to occupy a major portion of the suit premises was one of leave and licence and not of sub-tenancy.

4. After consideration of the oral and documentary evidence the learned trial Judge came to the conclusion that the tenancy of defendant No. 1 was validly terminated. The Power of Attorney did confer authority on the Secretary to approach the lawyer for getting the tenancy of the 1st defendant terminated by the alleged notice. Ex. M together with the endorsement was held to be admissible in evidence. According to the learned trial Judge even the endorsement gave specific instructions or directions to the Secretary and that was sufficient authority for him to approach the lawyer. In effect the lawyer had given the notice to quit under proper instructions of the plaintiffs, the lessors. As state above, the plaintiffs had relied upon two separate notices, under which the tenancy was determined. As regards the second notice, the plaintiffs' case was that one of the plaintiffs had given specific instructions to the Secretary to approach the lawyer and as a result of such directions the Secretary had instructed the lawyer. Even the second notice was held to be validly given. For all these reasons the learned trial Judge found that the tenancy of defendant No. 1 was duly terminated in accordance with law.

5. Then the learned trial Judge construed the so-called agreement of leave and licence. He examined the clauses of the agreement in the light of the evidence adduced by the parties, the surrounding circumstances and the various other clauses of the agreement. He came to the conclusion that it was a contract of sub-tenancy and not an agreement of leave and licence. Consistent with these findings, the learned trial Judge decreed the plaintiffs' claim for possession of the suit premises.

6. Against this judgment and decree the 1st defendant alone preferred an appeal and the 2nd defendant appears to have accepted the finality of the adjudication. However, the second defendant was made a party to the appeal as Respondent No. 5. Even before the Appellate Bench of the Court of Small Causes, the two contentions were raised on behalf of the petitioners, who were the appellants. The Appellate Court agreed with the learned trial Judge and dismissed the appeal.

7. Mr. Andhyarujina, who appears for the petitioner, has raised the same two contentions in these proceedings before me. Although he ad argued the question of the validity of the notice after making his submission regarding the nature of the transaction. I propose to deal with that question first.

8. Shortly stated the submissions of Mr. Andhyarujina are that the constituted attorney Mr. Morris had no authority to give the notice to quit and, therefore, had no power to instruct the advocate to give any notice to quit. The power of attorney which authorised the holder of the power to commence an ejectment suit cannot confer upon him the power to create a cause of action for an

ejectment suit. Then Mr. Andhyarujina submitted that the document produced at Ex. M together with the endorsement cannot be read in evidence as the same is not duly proved in accordance with law. The plaintiffs have only proved in a formal way the signature of the trustees at the foot of the endorsement. As none of the trustees is examined and as no other person acquainted with the facts of the case has given evidence the contents of Ex. M and more particularly the endorsement part of it cannot be read in evidence. Assuming the document can be read in evidence, then Mr. Andhyarujina submits that the words "take action send notice to them questioning the assignment", occurring in the endorsement cannot spell out any power or authority under which the Secretary can act and terminate the tenancy of the 1st defendants. Such power, whether it is contained in the power of Attorney or in any other document, will have to be strictly construed. On such strict construction it will be clear that the endorsement in Ex. M will be clear that the endorsement in Ex. M will not amount to any authority given by the plaintiffs to the Secretary for the purpose of termination of the tenancy.

9. As the plaintiffs relied upon the two notices, a small point is also made about the validity of the second notice which was given by the Secretary through the lawyer after obtaining verbal instructions from the 1st plaintiff. Mr. Andhyarujina submitted that if one of the trustees is considered to be in the position of a co-owner, as contended by Mr. Chinoy for the plaintiffs, then such trustee without the concurrence of the other trustees or without their specific authority cannot himself authorise the termination of the tenancy. The position in this regard, however, was governed by the trust deed and the Indian Trusts Act. Reliance was also placed on the extended definition of "landlord" contained in Section 5(3) of the Rent Act for the proposition that the term "landlord" will include any person, who is for the time being, receiving or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf or for the benefit of any premises whether on his own account or on account, or on behalf or for the benefit of any other person or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant. According to the plaintiffs the Secretary, who was also the holder of the Power to Attorney, was the person who was receiving or collecting rent from the various tenants of the trust property. According to the evidence he was the person who received rent from the 1st defendant in respect of the suit premises. As he was the landlord within the meaning of Section 5(3) the two notices which were given at his instance will have to be considered to be valid in law. Mr. Andhyarujina submitted that this is not a correct position in law. I will consider these various submissions in the order in which I have mentioned them here.

10. Mr. Andhyarujina referred to certain decisions and authorities for the proposition that the power of attorney will have to be strictly construed. At page 65 of Bomstead on Agency. 13th Edition, under Article 24, the following rules regarding construction of powers of attorney are mentioned:---

"Powers of attorney must be strictly construed, and are interpreted as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction:

(a) The operative part of a deed is controlled by the recitals where there is ambiguity.

(b) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.

(c) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for the purpose.

(d) The deed must be construed so as to include all incidental powers necessary for its effective execution."

11. Bearing in mind the above principles, we will have to interpret clauses (4) and (5) of the Power of Attorney in question. Clauses (4) and (5) so far as material, read as under:---

"(4) To commence and prosecute or appear in add defend all suits, actions and proceedings.....

(5) To employ and retain pleaders, solicitors and counsel and to obtain legal advice or assistance in relation to any of the matters to which the powers herein conferred may relate."

Mr. Andhyarujina argues that the power to "commence" any proceeding will not include the power to terminate the tenancy of the tenant. He says that the termination of tenancy furnishes a case of action for the suit. It is not incidental to the institution of the suit. It is a condition precedent. Such an important power will have to be expressly given by the principal to the agent. Neither Mr. Andhyarujina, who appears for the petitioner, nor Mr. Chinoy, who appears for the respondent-plaintiffs, was in a position to cite any authorities on this point except one solitary decision of the Calcutta High Court. According to Mr. Andhyarujia, this decision does not lay down good law. At any rate the observation of the learned Judge are biter as the case was decided on some other ground. Mr. Chinoy, on the other hand, strongly relied on the ratio of this decision for the proposition hat the power to institute proceedings in ejectment will also include the power to terminate the tenancy. The Calcutta decision is Bodardoja and Others Vs. Ajijuddin Sircar and Others, . Part of the head note is as under:

"An am-mukhtearnama expressly empowering the agent to sue in ejectment should be construed as implying an authority to issue notice to quit, for the power to sue in ejectment should ordinarily be taken to include power to take such action as may be necessary as preliminaries to the institution of such a

suit." From the body of the judgment it appears that the learned Judges were very much influenced by the circumstance that the objection to want of authority was not taken by the defendants in the written statement. The validity of the notice was not challenged on such grounds. Even assuming that there was some substance in the contention, the learned Judges were of the view that the power to sue in ejectment should ordinarily be taken to include the power to take such action as may be necessary as preliminaries to the institution of such a suit. In view of the paucity of decisions on this point and in view of the fact that I am considering Ex. M as a document conferring authority on the Secretary for this purpose, it is not necessary to discuss this question at length. It is for this reason that I am not mentioning the various other authorities cited by Mr. Andhyarujina which lay down the rules regarding the construction of power of attorney.

12. It will now be necessary to consider whether Ex. M containing the endorsement is duly proved in accordance with law.

13. Strong reliance is placed by Mr. Andhyarujina on a decision of this Court reported in *Madholal Shindhu v. The Asian Assurance Co. Ltd.* 56 Bom LR 147 : AIR 1954 Bom 305. From the facts of the case it appears that one Balkrishna Bhagwan Deshmukh, who was merely the sub-appears that one Balkrishna Bhagwan Deshmuh, who was merely the sub-accountant in the head office of the bank, was only concerned with the writing of the books of account of the ban. On behalf of the plaintiffs an attempt was made to prove through this witness the various documents consisting of letters and document executed by one Jamnadas in favour of the bank and also the resolutions of the Executive Committee of the Ban and the letters addressed by the ban to one Nissim by proving the hand-writing in which all the same purported to have been written. The attempt was obviously to prove the hand-writing of these various documents without calling in evidence the persons who had written the same or who were acquainted with the contents thereof so that they might not be subjected to cross-examination at the hands of the counsel for the Official Assignee. Relying on the ratio of an earlier decision reported in *Reg. v. Jora Hasji* reported in (1874) 11 Bom HCR 242, Bhagwati, J. (as he then was) held that the documents cannot be held to be proved unless at least the persons who were acquainted with the facts were examined. It was only then that the contents of the documents could be said to be proved. Mere proof of the signature or proof of handwriting will not amount to proof of the contents of the document in question. According to the learned Judge, Section 67 of the Indian Evidence Act, 1872, permits the proof of the signature or handwriting of the persons signing or writing the document to be given and considers it to be sufficient in those cases where the issue between the parties is whether a document was signed or written wholly or in part by that person. The section does not go so far as to say that even if it was proved that the signature or the handwriting of so much of the document as wall alleged to be in the handwriting of the person, was in his handwriting of the person, was in his handwriting, it would go to prove the contents of the document.

14. Mr. Andhyarujina says that the law laid down in this authority is still good law. This case was followed by our High Court in a subsequent decision reported in (In the matter of Mr. D. and Mr. S. Advocates) Mohammed Yusuf and Another Vs. D. and Another, . The ratio of the decision of the Division Bench would be clear from the following head note:---

"One D identified the signature of A to a typewritten document on the basis of his acquaintance with A's handwriting. It was sought to be urged by D that the had proved not only A's signature to the document but also its contents. A had not deposed to the truthfulness of the contents of the document."

This Court held that what was formally proved was the signature of A and not the writing of the body of the document and that even if the entire document was held formally proved, the did not amount to a proof of the truth of the contents of the document.

15. Mr. Chinoy, who appears for the plaintiffs, submitted that the endorsement at the foot of the typed memorandum was duly proved in the present case. Mr. Morris, the Secretary of the Plaintiffs, had given evidence and proved the contents of the endorsement. He was the person acquainted with the facts and he will be a competent witness to prove the truth of the document containing the endorsement. According to Mr. Andhyarujina, Mr. Morris cannot be styled as a person, who was acquainted with the facts of the case. Mr. Andhyarujina submitted that the contents of the endorsement are not self-explanatory. Only one of the trustees could have thrown some light on the meaning of the said endorsement. Mere presence of the Secretary on the occasion when the endorsement was made or when the trustees appended their signatures will not make him person competent to speak about the meaning and the truth of the contents. To make this point clear, Mr. Andhyarujina has drawn my attention to the earlier decision of this Court, which formed the basis of the principle laid down by Justice Bhagwati. See Reg. v. Jora Hasji (1874) 11 Bom HCR 242. It appears that a plan of certain fields which was prepared before the Chief Constable, who gave evidence in the case, was sought to be proved by calling the chief constable without anything more. At page 246, the Appellate Court observed:

"A plan of fields which the Chief constable says, he saw made before him, is admitted. To say that it was prepared in his presence and bears his signature is not a sufficient reason for admitting the plan. The witness did not depose that to his knowledge the plan was a correct one, and if he could not say this, the person who made the measurements and prepared the plan should himself have been called --- but we mention the matter in order that our opinion regarding its non-admissibility in evidence may be known."

16. But Mr. Chinoy, who appears for the plaintiffs, has drawn my attention to the specific part of the evidence of the plaintiffs" Secretary Mr. Dinshaw Byramjee Morris. Before referring to that part of the evidence, it will be desirable to now

the contents of the memorandum prepared by Mr. Morris when he went to the various plaintiffs for obtaining their instructions. In para. 3 of the memorandum Mr. Morris had drawn the attention of the plaintiffs to the fact that defendant No. 1 had let out a major portion of their business premises to defendant NO. 2, without first obtaining the consent of the trustees. Reference is made to the clause of the lease, which specifically precludes the tenant from assigning, sub-letting the premises or any part thereof without first obtaining the written consent of the trustees. Reference is made specifically to clause 11 in this behalf. The consent in question has not been obtained by the tenants and they have, therefore, committed a breach of the terms of the lease. It is understood that Sir R. P. Masani is one of the directors of the Premier Tyres Limited. As the tenant had committed breach of the terms of the lease, it is for the plaintiffs to decide whether they wished to take any action against them. It is clear from the memorandum that the Secretary had placed before the trustees all the relevant facts which constituted a breach of the terms of tenancy. He wanted to now from the trustees whether they desired that any action should be taken against he defaulting tenant. Mr. Morris in his evidence says that he took this memorandum to each of the plaintiffs. The endorsement is made and each of the plaintiffs had signed below the endorsement. After obtaining the signature of the first plaintiff, he had taken the memorandum together with the endorsement to the other trustees. It must be mentioned that Sir R. P. Masani is one of the trustees, who happened to be one of the directors of defendant NO. 2 at the relevant time. It is clear from the evidence of Mr. Morris that he had received instructions from the trustees about the giving of notice and institution of the suit. According to him, the instructions were in writing and they are to be found in the endorsement at the foot of the memorandum. If this is the evidence then it cannot be said that Mr. Morris was acting as a peon or Chaprasi, when he took the memorandum to the various trustees for their signature. He had prepared the memorandum containing all the relevant facts and he had personally sought the instructions of the trustees on that memorandum. In my opinion he is a person acquainted with the facts of the case and he is competent to prove the contents of the endorsement. Even applying the ratio of the above-mentioned decisions, there is no doubt that Ex. M including the endorsement is duly proved in accordance with law.

17. Mr. Andhyarujina strenuously urged that the contents of the endorsement will not confer any authority on Mr. Morris, the Secretary, to instruct the lawyer in the matter of the quit notice.

18. It appears that in the appellate Court there was slight misreading of the endorsement. Instead of the word "send" the Court thought the word was "and". According to Mr. Andhyarujina, this misreading has vitiated the reasoning of the appellate Court. No doubt there is such misreading. But I have considered all the submissions of Mr. Andhyarujina while correctly reading the endorsement. The endorsement may be reproduced here:

"Take action. Send notice to them questioning this assignment."

"The endorsement is made by using a marking pencil. After the words "take action" and before the word "send" there is a faint dot like a full stop or a full point. It is slightly lower and, therefore, Mr. Andhyarujina submitted that it is not a full point, completing the sentence "take action". In my opinion, it is not a casual dot and it may have been hurriedly put down as a full point. But whether there is a full point or not, the same will not make much difference while interpreting the operative words of the endorsement. Mr. Andhyarujina says that these words do not categorically confer any authority on Mr. Morris to terminate the tenancy of defendant No. 1. Mr. Andhyarujina says that Sir R. P. Masani happened to be one of the trustees and, therefore, one of the plaintiffs. He happened to be one of the directors of defendant No. 2. It was a delicate matter. The trustees may not have thought of taking any precipitate action at once without knowing the full implications of the assignment or transfer by defendant No. 1 to defendant No. 2. But the memorandum makes it very clear that the attention of the trustees was specifically drawn to the fact that Sir R. P. Masani was a director of defendant No. 2 company. Even then Sir R. P. Masani had, as a trustee, signed below the endorsement. This circumstance will not in any manner cut down the operative part of the endorsement. Mr. Andhyarujina says that the words "take action" should be considered in conjunction with the other words which require the Secretary to send notice merely questioning the assignment. The words "to question" according to the dictionary meaning, says Mr. Andhyarujina, is to dispute. The Secretary was directed only to give a notice disputing the assignment. The expression "assignment" appears to have been used through inadvertence. As I see there was no inadvertence in fact and the contents of the memorandum make it very clear. If the content of the memorandum are taken into account, then there is no doubt that the words "take legal action". The only legal action in the present case would be to terminate the tenancy of defendant No. 1 and commence ejectment proceedings. In my opinion the two Courts below were right when they construed Ex. M as containing sufficient authority for the purpose of terminating the tenancy of defendant No. 1.

19. As stated above, plaintiffs also based the suit on the second notice. The second notice was given by the Secretary on the strength of verbal instructions given by one of the plaintiffs. No doubt the Courts have accepted the validity of the second notice. But Mr. Andhyarujina wanted to argue that one of the trustees cannot terminate the tenancy without the concurrence or authority of the other trustees. Mr. Chinoy for the plaintiffs disputed this proposition. Both the parties wanted to rely upon certain authorities. But as I am holding the first notice to be valid for all purposes, it is not necessary to consider this question any further.

20. The plaintiffs want to rely upon the extended definition of the word "landlord" contained in Section 5(3) of the Rent Act. According to Mr. Chinoy, who appears for the plaintiffs, Mr. Morris the Secretary will be the landlord of the premises for

all purposes. He will be competent to terminate the tenancy of the tenant and institute proceedings in ejectment against him. It is not necessary for him to see directions from all or any of the trustees i.e; the plaintiffs. Mr. Ohinoy for this purpose opted a decision of a single Judge of this Court in *Mishrimal Chhogalal Vs. N.B. Patel, S. M. Shah, J.*, had an occasion to consider whether a person, who would be a landlord according to the extended definition, given in the Bombay Rent Act, would be competent to terminate the tenancy on any of the grounds mentioned in Section 13 and to institute a suit for ejectment. NO doubt the learned Judge has expressed the view that a person, who merely receives the rent of demised premises on account of himself or entirely for the benefit of somebody else will be a person entitled not only to give notice of ejectment on any of the grounds mentioned in Section 13 except 13(g) of the Rent Act but also to institute a suit for ejectment on any such ground. After a careful reading of the said judgment, I find that the learned Judge has not considered how a lease could be determined by a landlord under the provisions of the Rent Act. A lease of Immovable property can be determined only by the lesser under the provisions of the Transfer of Property Act. u/s 111(h) of the Transfer of Property Act a lease of immovable property determines on the expiration of a notice to determine the lease or to quit, or of intention to quit the property leased, duly given by one party to the other. A plain reading of this provision would indicate that such a notice determining the lease can be given by a lesser to the lessee or by the lessee to the lesser as the case may be Section 105 of the Transfer of Property Act, which contains the definition of "lease", inter alia, provides that the transferee is called the lesser and the transferee is called the lessee. As the lease of immovable property is to be determined under the Transfer of Property Act, a notice to quit in the present case could be given only by the lesser. The expression "lesser" is different from the expression "landlord", if we were to adopt the extended definition of "landlord" given in Section 5 of the Bombay Rent Act. It is now well settled that the tenant will be entitled to protection of the Rent Act only when the contractual tenancy is determined, he will become the statutory tenant entitled to such rights or privileges as are conferred upon him by the Rent Act. A landlord under the Rent Act will be entitled to recover possession of the premises if the Court is satisfied about the existence of one of the grounds mentioned in Section 13 of the Rent Act. Termination of tenancy by a notice to quit is obviously not one of the grounds mentioned in Section 13 of the Rent Act. Termination of tenancy by a notice to quit is obviously not one of the grounds mentioned in Section 13 of the Rent Act. After the contractual tenancy is validly terminated, the tenant will continue to hold the demised premises under the provisions of the Rent Act. In the above mentioned case this aspect of the matter was not noticed by the learned Judge.

21. Mr. Andhyarujina has invited my attention to a recent Full Bench decision of the Gujarat High Court in *Nanalal Girdharlal and Another Vs. Gulamnabi Jamalbhai Motorwala and Others*, . Bhagwati, C. J. (as he then was), who delivered the judgment of the Full Bench, has gleaned the true meaning and

connotation of the extended definition of "landlord" appearing in Section 5(3) of the Bombay Rent Act. He has not accepted the view of S. M. Shah, J. in the above-mentioned case as correct. The learned Judge has relied on the Supreme Court decision in *Bhaiya Punjalal Bhagwanddin Vs. Dave Bhagwatprasad Prabhuprasad*, . When a tenancy is created by contract between the landlord and tenant, the tenancy continues in force so long as it is not determined in the manner provided by law and while the tenancy continues to subsist the tenant has full protection of the contract and cannot be evicted by the landlord. But when the tenancy is determined by any of the modes provided in Section 111 of the Transfer of Property Act, the landlord becomes entitled to possession of the premises and as provided in Section 108(q) of the Transfer of Property Act, the tenant is bound to hand over possession of the premises to the landlord. The landlord, but for Section 12(1) of the Rent Act, would be entitled to recover possession of the premises from the tenant on the determination of the tenancy. But Section 12(1) says that this right to recover possession shall not be enforceable by the landlord against the tenant so long as the tenant complies with the conditions set out in that sub-section. The subject and the context would indicate that the landlord referred to in Section 12(1) of the Rent Act is the landlord who, but for the injunction contained in the sub-section, would be entitled to recover possession of any premises and that would be determined by the general law of landlord and tenant and the extended definition of "landlord" contained in Section 5(3) of the Rent Act would have no application. The following passage from that judgment at page 144 would clearly indicate the view of the Gujarat High Court:

"We are therefore, of the view that the extended meaning of the word "landlord" given in the definition in Section 5, sub-section (3) cannot be projected into Section 12 and Section 13, sub-section (1). The landlord referred to in Section 12 and Section 13, sub-section (1) is not a landlord as defined in Section 5, sub-section (3) but a landlord, who is entitled to possession of the premises on determination of the tenancy under the ordinary law of landlord and tenant Rent Act does not deal with the subject of termination of tenancy and there is no provision in the Rent Act providing for termination of tenancy in which the definition of "landlord" can be read so as to a mere receiver of rent to determine the tenancy."

As this is the clear legal position. I am not prepared to accept the contention of Mr. Chinoy that Mr. Morris, the Secretary, was the landlord of the premises and in that capacity was competent to terminate the tenancy and institute ejectment proceedings.

22. That leaves for decision the next question about the real nature of the transaction between defendant No. 1 and defendant No. 2. Whether a certain transaction is a lease or an agreement of leave and licence is always a vexed question. Mr. Andhyarujina for the petitioner and Mr. Chinoy for the plaintiffs have cited a number of decisions of English and Indian Courts, which, according

to them, lay down the true test or principles which would assist the adjudication of the real nature of the impugned transfer.

23. At the outset I may point out that the learned author Mr. Andhyarujina in his recent edition of the Law of Rent Control (1974 Edn..) has set out (pp. 269-270), illustrative cases, based upon various English and Indian Court decisions. These issues traits cases, no doubt, will be of help while assessing the facts of a particular case. I may only refer to a few relevant principles which may be culled from those illustrative cases.

24. A term certain would be appropriate to the grant of tenancy. If a sum is agreed to be paid periodically by the occupier in consideration of right to enter upon, use and enjoy the property, it will certainly be rent or payment in the nature of rent, though it might be described as licence fees. A repairing covenant would be inappropriate in a licence. A provision to keep the property in good and tenant able repair would be an indication in favour of tenancy rather than a licence. If the licensee agrees not to cut down trees, remove any soil, clay or sand, etc., from the land, if the occupier were a licensee, this provision would be unnecessary, for a licensee has no right or power to do all these things. This would be so, if there is a provision for not erecting a structure on the land. Where the grantee is permitted to enter the property to inspect the condition thereof and for all other reasonable purposes, this provision is, if not a decisive indication, at all events, a very important indication to the effect that a tenancy as distinct from a licence, is the real subject-matter of the document. A provision to deliver up the premises at the end of the licence or the expression "deliver up" is more appropriate to a tenant with an interest in the land than to a person who has a mere contractual right to be on the land. The provision for re-entry is really inappropriate to the case of a licensee, for the conception of a re-entry is the resumption of possession by the landlord and the determination of the interest of the tenant. The provision to the effect the "nothing in this agreement shall be construed to create a tenancy" is a labile affixed by the parties as to their relationship, determined by law, in the light of the other provisions of the document.

25. The following passage from Halsbury's Laws of England, 3rd Edn. Vol. 23 page 427, para. 1022, will also be useful as containing the relevant test:

"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 licensor and licensee the 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; not 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 offer a licence."

At page 429, the excerpt from para. 1024 furnishes yet another guideline:----

"A person may be allowed temporary rights of exclusive possession to alleviate hardship or for other reasons which negative the intention to create a tenancy which would confer on the grantee a per manded right of occupation under the Rent Restrictions Act and in these circumstances the grant may be construed as a licence".

26. In *Facchini v. Bryson* (1952) 1 TLRR 1386, an employer let his employee into occupation of a house in consequence of his employment, at a weekly sum payable by him and the occupation had all the features of a service tenancy. The agreement contained a clause that nothing in this agreement shall be construed to create a tenancy". It was held by the Court of Appeal that the agreement must be construed as a whole and their relationship was determined by the law and not by the label which they chose to put on it. According to the Appeal Court. the agreement operated as a tenancy agreement. The following observations of Lord Justice Denning would be relevant while judging whether an agreement is a lease or a licence in cases where but for the agreement, the parties would be governed by the provisions of the Rent Act:

"In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such lie, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that entail now-a-days, when there was no intention to create a tenancy at all."

After mentioning that labile, which the parties chose to put on it is not conclusive, the learned Judge says:

"..... the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it: *Commrs. of Customs and Excise v. Pools Finance* (1952) 1 TLR 797. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords grating licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven --- I will not in these days say a coach and four but an articulated vehicle."

In *Addiscombe Garden Estates Ltd. v. Crabba* (1957) 3 All ER 563, a decision of the Court of Appeal, Jenkins, L. J., while construing an agreement of licence as a lease has made the following observations at page 565:

"The principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence, is merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been

examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence."

The learned Judge then examined the relevant clauses of the agreement. The grantee was required to maintain the premises in good tenant able repair and condition. The grantee without the grantor's previously written consent was not to cut down or injure any plants, trees, bushes, etc. He was not to erect any building or other structures upon the said property except such a shall be approved by the grantors. The grantee was to permit the grantors and their agents at all reasonable times to enter the said premises to inspect the condition thereof and for all other reasonable purposes. The agreement provided that the grantors may renter and determine the licence in the event on non-payment of any of the said payments or court-fees. It was for these reasons that the Appeal Court upheld the decision of the lower Court which had construed the licence agreement as a lease.

27. In *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, , the Supreme Court had to determine the true relationship between the contracting parties. When the grantor was the Associated Hotels of India Ltd., owning the hotel, the grantee came to occupy a room in the hotel subject to the terms and conditions contained in the agreement. It was styled as a leave and licence agreement. It was to use the occupy the premises to carry on the business of hairdressers. Some of the clauses were similar to the clauses which ordinarily are to be found in a lease agreement. Subba Rao, J. (as he then was), after referring to Section 105 of the Transfer of Property Act and Section 52 of the Indian Easements Act had noted the distinction between a lease and a licence. Only the passage about the efficacy of the test of exclusive possession need be quoted here. It is to be found at page 1269:

"if a document gives only a right to use the property in a particular was of 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 premises, it would conclusively establish that he was a lessee. But there was change and the recent trend of judicial opinion it reflected in *Errington v. Errington* (1952) 1 All ER 149, wherein Lord Denning reviewing the case law on the subject summarises the result of his discussion

thus at page 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".

28. With reference to the words of Lord Denning in *Facchini v. Bryson* (1952) 1 TLR 1386 which are quoted above, Patel J. has made certain remark in *Aninha D'Costa Vs. Parvatibai M. Thakur*, . The learned Judge while delivering the judgment on behalf of the Division Bench, was discussing the relevant test which would be applicable while adjudging the transaction to be a lease or a licence. About the caution sounded by Lord Denning while dealing with landlords vis-a-vis the Rent Act, Patel, J. says:---

"If one has regard to the conditions prevailing in Bombay and also at some other places, there can be no doubt about the truism of the remarks. In the city of Bombay, in the case of new premises, the Act practically is non-existent. There are also unscrupulous tenants who make huge profits out of their tenancies by inducting what are called licensees. While, therefore, construing the terms of a document, the Court would not lose sight of the fact that ingenious attempts are made to circumvent the provisions of the statute. Indeed, in such cases, it may even be possible to say that the document is bogus or sham. However, ultimately, as the relationship is determined by law irrespective of the label attached to it by the parties. one need not go so far. It possible that when exclusive possession is given having regard to the special circumstances mentioned by Denning L. J. it can be said that in a given case a right to enjoy the property was not intended to be transferred or given."

29. In *Sohanlal Naraindas v. Laxmidas R. Gadit*, (1966) 68 Bom LR 400, a Division Bench of this Court was called upon to resolve the true nature of a leave and licence agreement having regard to the intention of the parties. After analysing the ingredients of a lease as mentioned in Section 105 of the Transfer of Property Act and the essentials of a licence as found in Section 52 of the India Easements Act, Justice Tarkunde says at page 403:---

"It is clear from the terms of Section 105 of the Transfer of Property Act that where the three conditions mentioned in that section are fulfilled. The transfer amounts to a lease as a matter of law. It is not permissible to parties to enter into a transaction which amounts to a lease as defined by Section 105, and then to say that the transaction does not create a lease but amounts to a licence. We agree that the intention of the parties is of paramount importance in deciding whether a transaction between them was a lease or a licence, but in our view, the said intention must relate to the elements which constitute a lease or a licence receptively It is, therefore, of primary importance in construing the terms of transfer as to whether the parties intended that the transferee should get exclusive possession of the immovable property in

question. The intention of the parties is also relevant in deciding whether the other conditions of the lease have been fulfilled Even where exclusive possession of immovable property was transferred for a certain period, the transaction might amount to a licence and not lease where the dominant consideration was not the price which the transferee was to pay for the use and enjoyment of the property Exclusive possession of immovable property for a specified period may also be granted to a person out of sympathy and not in consideration of the price that might be paid by him and in such cases also the transfer may amount to a licence and not a lease. Thus, in our view, the intention of the parties which is relevant in deciding whether a transaction is a lease or a licence, is their intention with regard to the elements which in law constitute a lease or a licence and not their intention with regard to whether their transaction should be regarded as a lease or a licence. It is only where the terms of a transaction are capable of being construed as the terms of a lease as well as those of a licence that the assertion of the parties that they intend to create a lease or a licence, as the case may be, would be a material consideration."

The unsuccessful party in the above case approached the Supreme Court. The Supreme Court has confirmed the decision of the Division Bench of this Court. It is *Sohan Lal Naraindas v. Laxmidas R. Gadit* (1972) 74 Bom LR 144 Shah, C. J. at p. 146 has dealt with the intention of the parties to the document:

"Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject-matter of the agreement. If it is intended to create an interest in the property, it is a lease. If it does not, it is a licence. In determining whether the agreement creates a lease or a licence the test of exclusive possession, though not decisive, is of significance. *Mrs. M.N. Clubwala and Another Vs. Fida Hussain Saheb and Others*,

30. Mr. Andhyarujina has invited my attention to a very recent decision of the Supreme Court on the same subject, *Qudrat Ullah Vs. Municipal Board, Bareilly*. The legal position emerging from some of the above mentioned decisions is summed up by Krishna Iyer, J. in these words at page 208 (of SCC) = (at p. 398 of AIR):

"There is no simple litmus test to distinguish a lease as defined in S. 105, Transfer of Property Act from a licence as defined in 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 transferees 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 Hotels of India Ltd. Vs. R.N. Kapoor*, . In Halsbury's Laws of England, Vol. 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)."

31. In the light of the various principles or tests laid down in the above-mentioned catena of cases, it will be now possible for me to scrutinise the true nature of the agreement in dispute. The agreement (Ex. 3) has the usual preamble in which all the introductory particulars which are to be found in a lease are mentioned. But the parties are described as licensors and licensees. Part of the lease-hold premises held by defendant No. 1 appears to be the subject-matter of the agreement. Out of 2300 square feet area, the licensee is given the right to use and occupy about 1800 sq. ft. Then follows the terms and conditions subject to which the so-called licence is granted. Clause No. 1 provides that the licensee is given leave and licence to occupy the licensed premises without creating any sort of tenancy rights in favour of the licensee. The licensor agreed not to revoke the leave and licence for a period of five years from 1-1-1960 except in accordance with the terms of the agreement.

32. Under Clause 2 the licensor shall be deemed to be in exclusive possession of the licensed premises. This has become the subject-matter of some debate between the learned counsel on either side. Mr. Andhyarujina wants me to accept NO. 2. Relying on these recitals Mr. Chinoy for the plaintiffs submitted that in fact the licensee had the exclusive possession and a deeming provision introduces a mere fiction in the agreement. Apart from these rival interpretations, parties have also relied upon the evidence adduced in the lower Court. Mr. Chinoy, no doubt, says that there is a finding of fact recorded by the two Courts below in favour of the plaintiffs. Mr. Andhyarujina was not in a position to urge that any such finding of fact can be reconsidered by me after re appreciation of the evidence. However, he submitted that if the admitted facts and evidence are properly considered then the meaning of these recitals will be clear to one's mind.

33. As stated above, the licensee was given a major portion of the premises by the licensor. There are separate entrances for the two portions. Certain map or plan at Ex. F is placed on the record of the case. According to the petitioners they had a right to pass through the licensee's portion, which is marked in pin in that map. This right, the licensors had for two purposes. The licensors had their telephone at point F. 4. They even say that they had their own receptionist at the telephone at point F. 4. they even say that they had their own receptionist at the telephone. At point A-2 there is an inter-communicating door between the licensors' portion and the licensee's portion of the premises. It is said that this door is not looked by the licensees. The licensors can enter through this door for reaching the telephone at point F-4 or for going to the lavatory or sanitary blocs

shown by letter O. But the evidence also shows that there, is a better and more convenient access to point C along the points A-1, A, A-3 and A-5. Admittedly this passage is used by the other tenants on the same floor. Mr. Chinoy for the plaintiffs relies on the circumstance that there is not such reservation mentioned in the leave and licence agreement. This appears to be a clear afterthought on the part of the licensees. Mr. Andhyarujina, on the other hand, argues that in the very nature of things such reservation could not be mentioned in the leave and licence agreement as the same would be destructive of the true nature of the transaction.

34. I do not think that it will be permissible for me to consider the evidence afresh and record my own findings. I accept the findings recorded by the two Courts below and hold that defendant No.2 did have exclusive possession of the portion, which was the subject-matter of the leave and licence agreement.

35. As exclusive possession was given to the licensee, that will be a circumstance of some importance while determining the true nature of the agreement. It is well settled that exclusive possession when given will ordinarily indicate a lease and not a licence. But Mr. Andhyarujina, relying on Megarry's Rent acts (10 Ed.) pp. 53 and 54 submits that now-a-days even possessor license are recognised a valid transactions, which may not amount to a lease. But in such a case the party, who wants to contend that a certain agreement is a bare agreement of leave and licence, will have to show that there are special circumstances why the licensor gave exclusive possession of the premises to the licensee.

36. Mr. Andhyarujina submits that in the instant case if we turn to clause 11 of the head lease, then the existence of a special circumstance will become very clear. Clause 11 for better understanding of Mr. Andhyarujina's contention may be reproduced here:

"Clause 11: The lessees shall not assign, relate or sublet the said demised premises or any part thereof without first obtaining the written consent of the lessors thereto which consent shall not be unreasonably withheld in the case of a respectable and responsible assignee under shall have been obtained shall only be at demised premises subject to the conditions herein contained."

Mr. Andhyarujina says that this is as good as a condition, which permits the lessee to sublet the demised premises even without the consent of the lessors. If consent is applied for and unreasonably refused, then in law the consent will be deemed to be given and there will not be any breach of the terms of tenancy. The lessee notwithstanding the refusal of the lesser can sublet the demised premises. There need not be any controversy about the legal position. But I must state that Mr. Chinoy for the plaintiffs also relies on this clause as a surrounding circumstance which will indicate the true intention of the parties to the agreement and will betray the real nature of the agreement between them. Mr. Andhyarujina asserted that nothing was easier for defendant NO. 1 in the present case than to apply for permission of the lesser and then create a sub-tenancy in

favour of defendant NO.2. As this is not done there need not be any doubt about the fact that the parties or at least the Petitioner never intended to create a sub tenancy in favour of defendant No. 2 Superficially considered this may be an attractive argument. But on a closer scrutiny of the facts and examination of the relevant law, I find that Mr. Chinoy is right that this will be one of the surrounding circumstances which will indicate that the case is one of lease and not licence.

37. It is in evidence that the lesser was in occupation of the demised premises since 19.0. He was the Chief Agent of the Insurance Company. He may have required office premises consisting of an area of 2300 sp. ft. or there about, for his business till the insurance business was nationalised. Admittedly since nationalisation of insurance business, he has been trying his hand at various enterprises. He was not successful. As found by the Courts below, he wanted to get some profit or return out of the leasehold premises. For the leasehold premises he was paying a monthly rent of Rs. 242/12. The monthly compensation he is charging for the licensee is Rs. 1,500/-. If he were to create a sub-tenancy with or without the consent of the lesser after complying with Clause No. 11 of the head lease, then he could not have succeeded in his objective. He could not have charged the subtenant any amount as compensation which might exceed the standard rent. Even if he were to charge more amount, the subtenant would be free to get the standard rent fixed at an amount which would be less than the monthly rent paid by the lessee to the lesser. It is, therefore, evident that the lessee was interested in protecting his interest not only against the lesser but also against the sub-lessee or licensee. It is for this reason that he may have thought of bringing into existence an agreement of leave and licence. The lesser may not question the legality of the transaction. The sub-lessee dare not say that it is a contract of tenancy. It would be unlawful as it is created after May 1959 and as it is not in accordance with the provisions contained in Clause 11 of the head lease. There are no special circumstances, which would explain away the grant of exclusive possession by the grantor to the grantee. This fact is very much in favour of the plaintiffs.

38. Realising this position. Mr. Andhyarujina argued (i) that this may be considered as a contractual licence for a stated period where the consideration is fixed and the other terms are agreed by the parties to the contract, but (ii) that to maintain its character as a licence the agreement must not create rights and liabilities which are referable only to a lease. For the first part of his submission Mr. Andhyarujina relied on a decision of this Court reported in M.F. De Souza Vs. Childrens Education Uplift Society, . In that case the appellate Court had passed a consent decree whereby the plaintiff agreed to allow the defendant to be in exclusive possession of one-third portion of the room and further agreed that the defendant's right as a licensee to occupy it was irrevocable so long as the Bombay Rent remained in force. It was argued on behalf of the plaintiff that the licence must always be regarded as revocable at the instance of the licensor except in the two classes of cases set out in Section 60 of the Indian Easements

Act, 1882. It is irrevocable when it is coupled with a transfer of property and such transfer is in force. It is also irrevocable when the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution. Mr. Justice Mudholkar was of the view that, apart from the Easements Act, there could be an irrevocable licence between the parties, under the Law of Contract. He says at page 751 (of Bom LR) = (at p. 534 of AIR):

" But apart from the Easements Act, there is the law of contract, and if parties enter into a contract and arrive at a solemn agreement to the effect that the licence shall be irrevocable or shall be limited for a particular duration, it follows that the licensor will be bound by his engagement and will not be entitled to terminate the licence or revoke the licence at his sweet will and pleasure."

39. In my opinion, the ratio of this decision may not be pressed into service by Mr. Andhyarujina in support of his above submission. Whether or not an agreement whether reduced to writing or whether it is in the form of a consent decree, will amount to a lease or licence was never in controversy in that case. Such a point was raised, it was just likely that the transaction evidenced by the consent decree could have been styled as a lease and not an irrevocable licence. As the licensee was protected against eviction during the period when the Rent Act is in force, perhaps it was considered idle for him to raise any such point. A contractual tenant has no protection apart from the contract. If a tenant after termination of the contract of tenancy gets statutory protection under the Rent Act then he has no reason to make any grievance. It may be for this reason that such a plea may not have been raised in that case.

40. Mr. Chinoy for the plaintiffs also emphasised the circumstance that the leave and licence agreement was for a period of five years. As the period was fairly long, the transaction must be one of tenancy and not of licence.

41. Mr. Andhyarujina says that there can be a contractual licence and fixation of a longer period will not change its character. But the settled view appears to be otherwise. When it is for a fairly long period and when exclusive possession is given under the agreement and when there are no special circumstances justifying the creation of a licence, there should not be any difficulty in holding the agreement to be a contract of tenancy.

42. Then as one of the surrounding circumstances Mr. Chinoy mentioned the fact that the leave and licence agreement was drawn up by practically adopting most of the clauses of the head lease. He even suggested that the draftsman of the leave and licence agreement must have placed before him the original head lease and then made only superficial changes by shifting the order of the various clauses. No doubt there is some substance in this contention. Clause 4, which requires the licensee to pay all charges for gas electricity, etc. appears like clause 5 of the head lease. Clause 5 (a) says that the licensee shall not place any partitions or other fixtures or make any alterations, etc. This may be compared with Clause 9 of the head lease. This also bears greater resemblance to a contract

of tenancy. Clause 5 (c) requires the licensee not to store in or upon any part of the said premises any bales or packages, etc. Clause 18 of the head lease is to the same effect. Clause 5 (d) absolves the licensor from any liability to repair or replace any broken pans, etc. This we find in lease Clause 22. Sub-clause (e) of Clause 5 prohibits the holding of any auction sale on the premises. Lease Clause 13 contains a similar prohibition. Sub-clause (f) requires the licensee to maintain and repair and keep in good order the electric installations including meters and fittings, etc. Clause 14 of the lease requires the lessee to do the the same thing. Sub-clause (g) of Clause 5 of the licence is the same as lease Clause 12, which throws the burden of repairs on the grantee of the premises. Apart from the similarity, such a clause is held to be an indication of tenancy. Clause 7 gives a certain indemnity to the licensor against damage. Same is to be found in lease Clause 16. Clause 8 is the same as lease Clause No. 17 whereby the licensor or his agent has a right to inspect the premises at any time between 11.0 a.m. and 5.0 p.m. on any day. This militates against the licence character of the transaction. This also betrays the fact that the licensee is given exclusive possession. It also shows that he has substantial interest in the premises. In similar circumstances on account of such a clause, the transaction was adjudged to be not a licence but a lease. Clause 10 gives no permission to the licensee to make alterations or addition to the construction without the previous consent of the licensor. Clause 12 is a sort of repetition referring to the responsibility for any damage, etc. This is because there is similar repetition in lease Clause 16. The last clause i. e. Clause 14 has its own importance. If the compensation for the licensed premises payable under the agreement shall remain unpaid for a period of one month after the same had become due or that if any of the terms and conditions contained in the agreement on the part of the licensee to be observed or performed shall not be observed or performed, then and in any of the said event it shall be lawful for the licensor or any person or person or persons duly authorised by the licensor to forthwith terminate and revoke the license hereby granted notwithstanding anything to the contrary herein contained and upon such termination the licensor and his authorised representative shall be at liberty to enter upon the licensed premises and take possession thereof. If any doubt remains in mind about the true nature of the transaction, then the clinching effect of this clause should remove it and there should not be any difficulty in holding that his document evidences an agreement of tenancy and not an agreement of leave and licence. All the necessary or vital features of tenancy are to be found incorporated in this clause. There is provision for virtual forfeiture of tenancy and right of re-entry.

43. Mr. Andhyarujina tried to distinguish the various key words in this clause. He said that there is nothing like forfeiture of tenancy or right of re-entry. It is only revocation of licence and nothing more. If the label given by the parties is not decisive, then such quibbling also will not be an answer and the Court will be justified in ignoring the same. In the Supreme Court case reported in *Qudrat Ullah Vs. Municipal Board, Bareilly*, . Krishna Lyer, J. underscored the significance

of draughtsman ship and recitals in these words:

" We may also indicate that legal attention and cartographic precision appear to have been gone into the preparation of the two Thekanamas. While it is fair to infer that the purpose of these transaction was not to grant regular leases of land but to make over he right to collect Municipal market dues only, even so it is not possible to ignore the effect of clear recitals transferring more rights than a mere licence implies, to the Thekedar." Under Clause 1, the rights enjoyed by the grantor, as proprietor on possession of the property, were transferred to the grantee, Clause 2 gave exclusive possession and Clause 4 empowered the grantee to let the shops to sub-tenants. The learned Judge, therefore, concluded:

"Clause 1 itself is tell-tale, Clause 2 clinches and Clause 4 virtually designates the transactions relating to the shops and sheds as letting."

44. In the case before me, the various clauses and at any rate the last mentioned forfeiture clause has such clinching effect and I unhesitatingly designate the impugned transfer as a lease and not a licence.

45. In the result the decree passed by the Courts below will be confirmed. Rule is discharged with no order as to costs. The decree for possession will not be executed for a period of three months from today. However, the undertaking given by the petitioners to this Court on 22-11-1971 regarding maintenance of status quo will hold good during this period.

46. Order accordingly.