
(2014) 01 AHC CK 0285
In the Allahabad High Court
Case No : C.M.W.P. No. 3020 of 2014

M/s. Pantaloon Retail (India) Ltd.

APPELLANT

Vs

Chief Controlling Revenue Authority

RESPONDENT

Date of Decision : 20-01-2014

Acts Referred:

Constitution of India, 1950 — Article 16, 226
Easements Act, 1882 — Section 2(16), 52, 56, 60, 62
Mines and Minerals (Development and Regulation) Act, 1957 — Section 3
Stamp Act, 1899 — Section 56(1A)
Transfer of Property Act, 1882 — Section 105, 107

Citation : (2014) 4 ADJ 478 : (2014) 3 ALJ 569 : (2014) 105 ALR 187 : (2014) 123 RD 422

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Abhishek Kumar, Advocate for the Appellant

Judgement

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Sudhir Agarwal, J.—Learned Standing counsel fairly stated that the issue raised in this case is a pure question of law which has to be determined by construction of agreement, Annexure 1 to the writ petition, so as to find out whether it results in grant of a "Lease" in the garb of a "Memorandum of Licence" or, in fact, it is a "Licence" only and, therefore, the writ petition may be heard finally at this very stage under the Rules of the Court, as he does not propose to file any counter-affidavit but would address this Court from the documents available on record as also the statutory provisions and various authorities on the subject. In these circumstances, I proceed to hear this matter at length so as to decide finally at this stage under the Rules of the Court. Heard Sri Abhishek Kumar, learned Counsel for petitioner, and, learned Standing Counsel for respondents.

2. The question up for consideration in this writ petition, filed under Article 226 of the Constitution, which has arisen from the orders dated 5.12.2012 passed by Additional Collector (Administration), Gautambudh Nagar and 30.12.2013 passed

by Chief Controlling Revenue Authority, U.P., Allahabad, is "whether the instrument in question can be said to be an "Agreement to License" as claimed by petitioner or it is an instrument of "Lease", as held by respondents 1 and 2".

3. It is said that New Okhala Industrial Development Authority (hereinafter referred to as "NOIDA") executed a lease-deed in favour of International Recreation Parks (P) Ltd. (hereinafter referred to as "Original Lessee") for a term of 90 years. The Original Lessee executed an agreement treating it to be an "Agreement to License" with the petitioners on 12.3.2007 in respect whereof respondent No. 2 taken the view that there is an evasion of stamp duty since instrument in question executed between the petitioner and Original Lessee is an instrument of "Lease" and, therefore, ought to have been stamped accordingly, but that has not been done. He consequently issued no(sic) dated 2.9.2008 to petitioner mentioning its address as under:

"M/s. Pantaloon Retail India Ltd.

328-A Plot No. A-2 Sector 38A NOIDA"

4. The notice was sought to be served personally and Process Server submitted his report that an employee or Manager of the Company, after reading notice, refused to accept the same and, therefore, it was pasted on the gate of aforesaid establishment and treating the said service sufficient, respondent No. 2 passed order dated 5.12.2012 determining stamp duty payable by petitioner to the tune of Rs. 82,84,624/- and imposing a penalty of Rs. 1,70,000,00/-raising demand of a total sum of Rs. 2,52,84,524/-. Petitioner thereagainst came to this Court in Writ Petition No. 9273 of 2013 which was dismissed on the ground of alternative remedy vide order dated 4.3.2013. Thereafter, petitioner preferred Appeal Under section 56(1-A) of Indian Stamp Act, 1899 (hereinafter referred to as "Act, 1899") which has been rejected by respondent No. 1 by order dated 30.12.2013.

5. Both the authorities have held that instrument in question though termed as "Agreement to License" in fact is a "Lease-Deed" executed for a period of 9 years subject to renewal on three years with a further condition of increase in rent by 15 per cent every third year and, therefore, stamp thereon is chargeable under Schedule-1, Entry 35(1)(iii) of Act, 1899. Sri Abhishek Kumar, learned Counsel for petitioner, contended that the agreement is nothing but a "Licence" and respondents 1 and 2 have committed manifest error in treating it to be a "Lease", so as to demand exorbitant stamp duty, which is patently arbitrary, illegal and contrary to law. He further placed reliance on several authority of this Court which I shall discuss later on.

6. Learned Standing Counsel, on the contrary, stated that from a careful reading of various clauses and stipulations in the instrument in question, it is evident that it is an instrument of "Lease" and, therefore, chargeable for stamp duty under Schedule-1, Entry 35(1)(iii) of Act, 1899 and has rightly been held so by respondents 1 and 2 and, therefore, writ petition is liable to be dismissed. The instrument in question states that Original Lessee (in the agreement described as

"Licensor") is in possession of land No. as plot No. A-2, Sector 38-A, NOIDA (Gautambudh Nagar) measuring 142.4463 acres by virtue of a Lease for a period of 90 years executed by NOIDA. It also says that Original Lessee is in the process of developing the said land in the name and Style of Noida Amusement Park and 15 per cent of the land has been allowed and earmarked for commercial purpose whereon Original Lessee is in the process of developing a commercial complex park along with multilevel basement, car parking. Petitioner has approached to take on license commercial space, in bare shell condition, bearing Unit No. 328-A on Third Floor admeasuring approximately 1607 Sq. Meters (approximately 17,300 square feet) of super area for exclusive purpose of super marketing of selling various products which has been accepted by Original Lessee. The terms and conditions, which are contained in agreement for extending the aforesaid Licence, as per the petitioner; and, Lease, as per respondents, relevant for the purpose of issue in question, are reproduced as under :

"1.1 The Licensor hereby agrees to License to the Licensee and the Licensee hereby agrees to take on License from the Licensor, subject to the mutual rights and obligations as contained in the Agreement, bearing unit No. 328-A on Third Floor admeasuring approx. 1607.2 sq. mts. (approx. 17,300 sq. ft) of super area (Super Area: Covered Area (100 : 70) in the Complex. The Premises is in bare shell condition, and is subject to area confirmation by the Licensor & the Licensee after joint measurement, but the ratio of covered area to super area as aforesaid shall be maintained.

1.2 The Licensor agrees to give the rights to permitted use common areas in the complex along with other occupants of the Complex as may be permitted by the Maintenance Agency."

"2.1 The license agreement shall continue to be in force and binding between the Parties for a period as provided hereinafter.

2.2 The Licensor shall issue to the Licensee a written notice, calling upon the Licensee to take occupation of the Demised Premises by a given date, for undertaking Licensee's preoperational Fit-Outs. The Licensee shall through its authorized representative take the Licensed premises for its Fit-Outs within a period of 7 (seven) days from the date of such notice so issued failing which the Licensee shall be deemed to have taken the demised premises for fit-outs on the expiry of the 7 (seven) days.""

"2.5 The License shall commence from the License Commencement Date and shall continue to be in force and biding between the Parties 9 years from the License commencement date (License period). It is agreed between the parties that the license period shall be divided into three terms of three years each, with the INTTIAL TERM of three years starting from the license commencement date.

2.6 It is agreed between the Parties that the initial term of 3 years shall be regarded as the LOCK-IN-PERIOD, wherein the License cannot be terminated by

the Parties before the expiry of three years, except in cases of breach as specified herein. If the Licensee surrenders the Premises or terminates the License during the Lock-in Period then the Licensee shall be liable to pay the License Fee for the entire Lock-in Period.

2.7 That on expiry of the Initial Term, the next term of three years shall automatically commence which shall be treated as the SECOND TERM followed by one more term of three years which shall be treated as the THIRD TERM for which no notice of renewal is required to be given by either party. After the Lock in period the Licensee may discontinue the License at any point upon serving a 3 months" notice upon the Licenser."

"3.1 In consideration of the Licenser agreeing to grant License to the Licensee for the right to use of the Premises, the Licensee shall pay the Licenser a License Fee @ Rs. 85/- in the first year and Rs. 100/- from second year onwards per sq. ft. per month of super area per month for the initial period of 3 (three) years in respect of the Premises from the date of commencement of the License Period."

"3.2 In the event the License Period is extended for a further period of 3 (three) years, the increase in the monthly License Fee after every term of 3 (three) years shall be 15% (fifteen percent) over the monthly License Fee of the last term."

"3.4 In addition to monthly License Fee payable by the Licensee in accordance with the aforesaid clauses, the Licensee shall also pay a sum Rs. 88,23,000 (Rupees Eighty Eight Lakhs Twenty Three Thousand Only) towards the Interest Free Security Deposit equivalent to 6(six) month"s License Fee. The said Interest Free Security Deposit shall be payable by the Licensee as Under."

"3.5 In the event of increase in the License Fee of the Premises upon the renewal of each term of the License, the security deposit shall automatically stand increased equivalent to 6(six) months of the corresponding License Fee.

3.6 Upon termination of this License in accordance with this Agreement, the Licenser shall refund the Interest Free Security Deposit only upon the Licensee surrendering all his right as a Licensee under this Agreement after deducting the arrears of License Fee and other charges due and payable by the Licensee (if any). In the event of delay by the Licensee in handing over the vacant possession of the Premises the Licensee shall be liable to pay the 2(two) times the License fee for the period of such extended use of the Premises along with interest, costs, damages etc. without prejudice to all or any other right and remedy available to the Licenser under the law."

"3.9 That in addition to above, a common charge as may be decided from time to time shall be payable by the Licensee for the purpose of joint business promotion of the Park by the Licenser/Maintenance Agency.

3.10 That in addition to above, deposit for electricity and its usage charges, meter hire charges, etc. shall be payable by the Licensee at applicable rates.

3.11 The Licensee shall pay electricity usage charges with respect to the Premises as per the sub-meter installed, at applicable rates."

"4.1 The Licensee hereby agrees that it shall simultaneously enter into a separate Maintenance Agreement with the Maintenance Agency for the maintenance of the Premises and the Common Areas of the Complex. The Maintenance Agreement shall be signed before the License Commencement date. The said Maintenance Agreement shall form part of the Agreement and is annexed hereto as Annexure "B", and the Licensee hereby undertakes to abide with all the terms and conditions stipulated therein."

"5.1 To permit the Licensee to carry out at the cost to the Licensee, but without in any way damaging the main structure of the Premises, internal partitions and other internal alterations and additions which are not visible from outside, as may be necessary for the business of the Licensee. In case however approval or sanction of any agency or authority is required for any addition or alteration, the Licensee shall procure the same at its own cost."

"5.3 The Licensee shall have uninterrupted access to the Premises, during the mall timings (i.e., business hours), as may be decided by the Maintenance Agency, duly appointed by the Licenser, under the Maintenance Agreement, from time to time."

"6.1 Save as otherwise provided in this Agreement, no right, title or interest in the Premises shall pass to the Licensee by virtue of these presents. It is agreed and accepted between the Parties that this License is exclusively for the Right to use of the Premises and may not in any way be treated as any sale, Agreement to sell, lease, transfer, etc. The Licensee shall at no time contest or challenge the Licenser's sole and exclusive right, title and interest in the Premises.

6.2 The Licensee also agrees and undertakes not to transfer, sell, assign, lease or sublet or sublicense the Premises or otherwise encumber or suffer a Hen thereon without the prior consent of the Licenser in writing.

6.3 Conditional upon the Licensee's compliance with and fulfillment of the term and conditions of this Agreement, the Licensee shall have the right to have exclusive peaceful right to use of the Premises for the full term of the Agreement."

"7.11 The Premises shall be used only by the Licensee for its own office/shop/show-room, or its associates, subsidiaries, group companies and affiliates and the Licensee undertakes that it shall not assign, transfer, lease, mortgage, sublet or grant leave and license or transfer or part with or share the Premises or any part thereof in any manner whatsoever without the prior written consent of the Licenser and further undertakes to produce relevant documents to substantiate the use of the Premises by group companies, subsidiaries etc. as and when required.

7.12 The Licensee shall not make any structural additions or alternations in the

Premises, and if any addition or alterations are permitted then the Licensee shall ensure that upon vacating the Premises, the Licensee shall remove all such fittings and alterations and restore the Premises in its original condition except for normal wear and tear."

"9.1 The Licenser or its designated representative shall have the right from time to time during the normal business hours on any working day with prior notice to the Licensee to enter upon the Premises for the purpose of inspecting the service and maintenance in the Premises."

"10.1 Stamp Duty

The Stamp Duty and registration charges as may be applicable shall be borne by the Licensee.

10.2 Assignment/Attornment

The Licenser shall have the right to sell or transfer the Premises during the period of License to any Third Party. However, the Licenser shall ensure that the third party shall be bound by and adhere to the terms and conditions of the Agreement for use of the Premises by the Licensee for the Period of License."

"10.6.1.1 License

The Licensee herein shall enter into a License Deed as and when required by the Licenser."

"10.6.2 COMMON AREA

Notwithstanding anything contained in this agreement, all rights with regard to the Common Area, shall upon sale/transfer of the Premises/Complex stand transferred in the name and favour of the Developer i.e. M/s. International Recreation Parks (P) Ltd."

"11.1 The Licenser may terminate this Agreement after a reasonable show-cause notice to the Licensee, if any of the following occurs."

"ARTICLE 16

NO PARTNERSHIP/AGENCY

Nothing in this Agreement shall be construed as creating a partnership or joint venture between the Licenser and the Licensee. Neither party will be deemed to be an agent of the other party as a result of any act under or related to this Agreement, and will not in any way pledge the other Party's credit or incur any obligation on behalf of the other Party."

7. Apparently, the agreement in question, though has been termed as a license by petitioner and the Original Lessee, but Counsel for petitioner could not dispute that terminology used by parties to ah instrument will not deter mine its nature, but it is the substance of the document itself, which will be relevant to find out

whether it relates to a "Licence" or a "Lease". The term "License" is defined in section 52 of Indian Easement Act, 1882 (hereinafter referred to as "IE Act, 1882") and reads as under:

"52. "Licence" defined.-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 immovable 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."

8. A bare perusal of this definition shows that a "License" does not create any estate or interest in the property to which it relates. There are some other restrictions contained in IE Act, 1882 with reference to a License inasmuch as vide section 56 thereof it is not assignable and vide section 60 it is revocable by grantor. The "License" does not entitle the licensee to sue stranger in his own name and it can be determined when the grantor makes an assignment of the subject matter.

9. The term "Lease" is defined in section 105 of Transfer of Property Act, 1882 (hereinafter referred to as "TP Act, 1882") and it reads as under:

"105. Lease defined.-A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

10. Broadly the definition of "lease" shows that the relationship of lessor and lessee is one of contract. If an agreement vests in the lessee a right of possession for certain time, it operates as a conveyance or transfer, and it is a lease. The essential elements of a lease are:

- "(i) the parties;
- (ii) the subject-matter; or immovable property
- (iii) the demise, or partial transfer;
- (iv) the term, or the period;
- (v) the consideration, or rent"

11. It is also worthy to notice that an "Agreement to Lease" is neither a "Lease" nor "License". The "Lease", as contemplated under section 105 of TP Act, 1882 creates a right or an interest in the enjoyment of demised property and a tenant or a sub-tenant is entitled to remain in possession thereof until the lease is duly terminated and eviction takes place in accordance with law.

12. Differentiating "Licence" from "Lease", element of transfer of interest was emphasized by Baron Alderson in *Wood v. Leadbitter*, (1845) 153 ER 351 at page

354 and it said :

"A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful"

13. The distinction between "lease" and "licence" was also pointed out in *Glenwod Lumber Co. v. Phillips*, (1904) AC 405 at page 408 and it says:

"If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

14. The definition of "Licence" under section 52 of IE Act, 1882 excludes from its pale any transaction which otherwise amount to an "easement" or involves a transfer of interest in property which is usually involved in the case of a transfer of right to enjoy it. These two rights, i.e., "easement" and "lease" in their very nature are appurtenant to the property. The grant, however, only of the right to use premises without being entitled to the exclusive possession thereof operates merely as a licence. This Court cannot take converse implications of the above proposition, necessarily, and always be true, namely, whenever there is exclusive possession, the idea of a "licence" is not necessarily ruled out. Exclusive possession itself is not decisive in favour of a "lease" and against a mere "licence". Even the grant of exclusive possession may turn out to be only a "licence" in certain circumstances and not a "lease", viz. where the grantor himself has no power to grant lease. It can be said that whether a transaction is a "lease" or "licence" turns on the operative intention of the parties. There is no single, simple litmus-test to distinguish one from another. Though the term "creation of an interest in the property" is said to be the crucial necessary ingredient in favour of "lease", but this itself is quite complicated and sometimes travel in a grey area as to whether a right to enjoy property in a particular case results in creation of an interest in the property or it is only privilege to enjoy the property.

15. Lord Denning MR, considered the test of determining whether an occupier is a licensee or tenant in *Marchant v. Charters*, (1977) 3 All ER 918 at page 922 (C.A.) and said :

"Gathering the cases together, what does it come to? What is the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on the whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did not he have only permission for himself personally to occupy the room, whether under a

contract or not, in which case he is a licensee?"

16. In *Cobb v. Lane* (1952) a All ER 1199, it was held that the solution to determine would depend on the intention of parties.

17. In *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, in the majority judgment of Hon"ble K. Subbarao, J. it was observed that though document therein used the phraseology appropriate to a "license" but it is the substance of instrument that matters and not the form for otherwise clever drafting can camouflage the real intention of the parties. Having said so, the Court discussed a "Lease" and "License by observing:

"(1) The real test is the intention of the parties, whether they intended to create a lease or a licence;

(2) if the document creates an interest in the property, it is a lease; but, if it only permits another to use the property, of which the legal possession continues with the owner, it is a licence; and

(3) 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."

18. Therein two rooms were given to "A" in a Hotel called "Imperial Hotel" under an agreement to one R.N. Kapoor. These Rooms were described as Ladies" and Gents" Cloak Rooms, where Sri Kapoor used to carry on his business as a hair-dresser. Under a deed executed between the Hotel and Sri Kapoor, he secured possession and agreed to pay certain amount of fee/rent/charges. The question was whether it was an arrangement of a "License" or a "Lease". In these facts and circumstances and looking to the proposition as noticed above, Hon"ble K. Subbarao J. held that judged by the aforesaid tests, it cannot be held that the document executed between parties was that of a license. It did not confer a bare personal privilege on Sri Kapor to make use of the rooms. It puts him in exclusive possession, untrammelled by the control and free from the directions of Hotel officials. There was also a condition that in case Sri Kapoor is forced to close his business, he may transfer the premises to any person with the consent of licensor. The Court said that this condition was destructive of any theory of license. In the words, of the Court:

"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 conceals the real intent."

19. The Court said that the above rooms cannot be treated at par with the rooms of the Hotel used for boarding and lodging of travellers etc. and other persons. It

said that a Hotel in common parlance means a place where a proprietor makes it his business to furnish food or lodging, or both to travellers or other persons. A building cannot be run as a hotel unless services necessary for the comfortable stay of lodgers and boarders are maintained. Services so maintained vary with the standard of the hotel and the class of persons to which it caters; but the amenities must have relation to the hotel business. Provisions for heating or lighting, supply of hot water, sanitary arrangements, sleeping facilities, and such others are some of the amenities a hotel offers to its constituents. But every amenity however remote and unconnected with the business of a hotel cannot be described as service in a hotel. The idea of a hotel can be better clarified by illustration than by definition and by giving examples of what is a room in a hotel and also what is not a room in a hotel. The Court then said:

"(1) A owns a building in a part whereof he runs a hotel but leases out a room to B in the part of the building not used as hotel;

(2) A runs a hotel in the entire building but lets out a room to B for a purpose unconnected with the hotel business;

(3) A runs a hotel in the entire building and lets out a room to B for carrying on his business different from that of a hotel, though incidentally the inmates of the hotel take advantage of it because of its proximity;

(4) A lets out a room in such a building to another with an express condition that he should cater only to the needs of the inmates of the hotel; and

(5) A lets out a room in a hotel to a lodger, who can command all the services and amenities of a hotel."

20. The Court said that in the first illustration, the room has never been a part of a hotel though it is part of a building where a hotel is run. In the second, though a room was once part of a hotel, it ceased to be one, for it has been let out for a non-hotel purpose. In the fifth, it is let out as part of a hotel, and, therefore, it is definitely a room in a hotel. In the fourth, the room may still continue as part of the hotel as it is let out to provide an amenity or service connected with the hotel. But to extend the scope of the words to the third illustration is to obliterate the distinction between a room in a hotel and a room in any other building. If a room in a building, which is not a hotel but situated near a hotel, is let out to a tenant to carry on his business of a hair-dresser, it is not exempted from the operation of the Act. If that be so, a similar room in a building, wherein a hotel is situated is let out for a similar purpose; it has to be treated in the same way.

21. Again the distinction between "Lease" and "Licence" was considered in *Mrs. M.N. Clubwala and Another Vs. Fida Hussain Saheb and Others*, . The Court said:

"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, which has to be ascertained on a consideration of all the relevant provisions in the agreement. In the absence, however, of a formal

document the intention of the parties must be inferred from the circumstances and conduct of the parties."

22. The Court said that essence of a "License" is that it is revocable at the will of the grantor but the provision in the Licence that the licensee would be entitled to a notice before being required to vacate is not inconsistent with a Licence. In other words, mere necessity of giving notice to a licensee requiring him to vacate the licensed premises would not indicate that the transaction was a "Lease". Similarly, it would be important to know actual possession of premises has been given to the licensee or not to determine its nature, whether it is a "Lease" or a "Licence", but even if the exclusive possession of the premises is passed to a person, his right to exclusive possession would not be a conclusive evidence of existence of a tenancy though it would be a condition of first importance. If, however, exclusive possession to which a person is entitled under an agreement with a landlord is coupled with an interest in the property, the agreement would be construed not as a mere "Licence" but is a "Lease".

23. In B.M. Lall (Dead) by Lrs. Vs. Dunlop Rubber and Co. Ltd. and Others, a Three-Judge Bench considered certain conditions to find out whether they resulted in a "Lease" or a "Licence". Referring to section 105 of TP Act, 1882 and section 52 of IE Act 1882, the Court said:

"A lease is the transfer of a right to enjoy the premises; whereas a license is a privilege to do something on the premises which otherwise would be unlawful. If the agreement is in writing, it is a question of construction of the agreement having regard to its terms and where its language is ambiguous, having regard to its object, and the circumstances under which it was executed whether the rights of the occupier are those of a lessee or a licensee. The transaction is a lease if it grants an interest in the land; it is a license if it gives a personal privilege with no interest in the land. The question is not of words but of substance and the label which the parties choose to put upon the transaction, though relevant, is not decisive. The test of exclusive possession is not conclusive."

24. In Qudrat Ullah Vs. Municipal Board, Bareilly, the Court said:

"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 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 Ex. "I" and "4" fall in the grey area of unclear recitals."

25. In Rajbir Kaur and Another Vs. S. Chokesiri and Co., the Court said that one of the twin principal tests by which a lease is distinguishable from the relationship created under a licence is the element of right to exclusive

possession involving the transfer of an interest in the property; the other being the "rent" stipulated for the grant.

26. The Court also said that whether a grant amounts to a "Lease" or only a "Licence" is a question of substance and not of words and the label which the parties chose to put on it. To give exclusive possession, there need not be express words to that effect; it is sufficient if the nature of acts done by the grantee show that he has and intended to have right to exclusive possession. The fact that the agreement contains a clause that no tenancy is to be created, will not, by itself, preclude the instrument from creating a lease.

27. The question as to when a document will be interpreted to have resulted in grant of a "Licence" or a "Lease" has again been considered in Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another, and having gone through the various authorities of Apex Court, in para 15 of the judgment, the Court culled out certain principles discerned from the judgments discussed therein and has noticed those principles as under:

"(1) To find out whether the document creates lease or license 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 lease and licence is very thin.

(2) The intention of the parties is to be gathered from the document itself. Mainly, intention is to be gathered from the meaning and the words used in the document except where it is alleged and proved that 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 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 sublet 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 subtenant may jointly set up the plea of a license against the landlord which is a camouflage. In such cases, the mask is to be removed or 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 absence of a sufficient title or interest to carve out or to create a similar tenancy by the sitting 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 inter alia provides that leases of immoveable property may be made either by registered instrument or by 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."

28. The Court also observed that if it is pleaded that the document is a camouflage, the mask or veil is required to be removed for determining the true intent and purpose of the document.

29. Again this issue has been considered in C.M. Beena and Another Vs. P.N. Ramachandra Rao, and therein the Court said:

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

30. In The Corporation of Calicut Vs. K. Sreenivasan, the Court has reproduced following passage from Evans & Smith in The Law of Landlord and Tenant (Fourth Edition):

"A lease, because it confers an estate in land, is much more than a mere personal or contractual agreement for the occupation of a freeholder's land by a tenant. A lease, whether fixed-term or periodic, confers a right in property, enabling the tenant to exclude all third parties, including the landlord, from possession, for the duration of the lease, in return for which a rent or periodical

payment is reserved out of the land. A contractual licence confers no more than a permission on the occupier to do some act on the owner's land which would otherwise constitute, a trespass. If exclusive possession is not conferred by an agreement, it is a licence."

31. It is said that the fundamental and apparent difference between a tenant and a licensee is that a tenant, who has exclusive possession, has an estate in land, as opposed to a personal permission to occupy. If, however, owner of land proves that he never intended to accept the occupier as tenant, then the fact that occupier pays regular sums for his occupation does not make the occupier a tenant.

32. In *Pradeep Oil Corporation Vs. Municipal Corporation of Delhi and Another*, the Court emphasized that the "lease" and "licence" is marked by the last clause of section 52 of IE Act, 1882 as by reason of a license, no estate or interest in the property is created. It has considered certain other features that a licence is not assignable. It does not entitle the licensee to sue the stranger in his own name. It is revocable. It is determined when the grantor makes subsequent assignment.

33. In order to construe a document as "Lease", the Court in *Pradeep Oil Corporation (supra)* referred to a Clause in the agreement that a three months' notice would be given for determination of agreement. The Court said that such a clause in a document has a significant role to play in the matter of construction thereof. If the parties to the agreement intended that by reason of such agreement, merely a "licence" would be created; such a term could not have been inserted. The Court further said:

"It is well settled legal position that a license can be revoked at any time at the pleasure of the licensor. Even otherwise, unless the parties to the agreement had an intention to enter into a deed of lease the Administration would not have agreed to demise the premises on payment of rent in lieu of grant of exclusive possession of the demised land and further stipulated service of three months' notice calling upon either party to terminate the agreement. In view of the same, the argument advanced by the learned Counsel of the appellant that a stipulation having been made in the agreement itself that by reasons thereof the grantee shall not be a tenant and thus the deed must be construed to be a license cannot be accepted. In our considered view, such a clause may at best be one of the factors for construction of the document in question but the same by itself certainly be a decisive factor."

34. Before proceeding further, it would also be worthy to notice that the instrument in question is being considered by this Court to find out whether the stamp duty payable therein treating it to be a "Licence" is correct or it is chargeable treating it a "Lease". In Act, 1899, the term "Lease" is separately defined in section 2(16) as under:

"(16) "Lease".-"Lease" means a lease of immovable property and includes also--

"(a) a patta;

(b) a kabuliyat or other under-taking in writing, not being a counterpart of a lease, to cultivate or occupy or pay or deliver rent for immovable property;

(c) any instrument by which tolls of any description are let;

(d) any writing on an application for a lease intended to signify that the application is granted;

(e) any instrument by which mining lease is granted in respect of minor minerals as defined in Clause (e) of section 3 of the Mines and Minerals (Regulation and Development) Act, 1957."

35. The definition of "Lease" under Act, 1899 is a bit wider than what it is provided under TP Act, 1882. In the sum and substance, it can be said that a licence is a right or permission granted by a competent authority or the owner of premises to carry on business or to do an act which, without such licence/permission would be illegal. In other words, it is a formal or official permit or permission to carry on some business or do some act which, without the licence, would be unlawful and the word "Licence" and "permit" are often used synonymously. The word "Lease" is frequently used to designate the contract by which relationship of landlord and tenant is created. A "Lease" is a species of contract for possession and profits of land and tenements, either for life or for a short period of time, or during the pleasure of parties or a contract for the possession and profit of the land for a determinate period with the recompense of rent. A lease may be regarded as a conveyance or grant of an estate or interest in the real property, for limited period with conditions attached. A "Licence" is distinguishable from a "Lease" in more than one ways. "Licence" generally provides to the Licensee, less rights in real estate than a "Lease". If a contract gives exclusive possession of premises against all the world, including the owner, it is a "Lease", but if it merely confers a privilege to occupy the premises under the owner, it is a "Licence". Accordingly, a licence in a property is the permission or authority to engage in a particular act or series of acts upon the land of another without possessing an interest therein, and is thus subject to management and control retained by owner. A lease generally conveys an interest in the land, requires a writing to comply with the Statute of frauds and transfers possession, while the "Licence" merely excuses acts done by one, on the land in possession of another, that without licence, would be trespasses, and conveys no interest in land.

36. Now I proceed to consider the document in question whether it would satisfy the term "Licence", as pleaded, and sought to be represented by petitioner and the alleged Licensor, namely, NOIDA, or it is a "Lease". The possession of land with agreed area has to be taken by petitioner by a given date, failing which the possession shall be deemed to have been taken. The area actually transferred in possession is given to exclusive possessory authority of petitioner with further permission to use common area in complex with other occupants. Therefore, in

respect to the common area of the Complex, petitioner has no exclusive right of possession but in respect to the area bearing Unit No. 328-A on Third Floor, in the complex, the possession of petitioner is exclusive. It is also for a fixed period of nine years from the date of commencement of agreement. For first three years, the parties cannot terminate the agreement. Meaning thereby, the alleged licence is irrevocable for the first three years except in case of breach of conditions contained in the agreement. In case of surrender or termination of alleged agreement during these three years" period, there is a penalty clause whereunder the Licensee will have to pay the licence fee for the entire lock-in-period of three years. This clause is not consistence with section 60 of IE Act, 1882 and goes against the, document being treated a "Licence". Further after expiry of the lock-in-period of three years, it cannot be evicted at the will of Licensor, but if the Licensee intends to discontinue he has to give a three months" notice to the grantor, i.e., NOIDA. The licence fee on periodical increasing basis is provided in para 3.1 and 3.2 which can be termed as rent, in case the document is held to be a "Lease". For the purpose of doing his business, it can make such internal changes like internal partition, alteration and additions which are not visible from outside vide para 5.1 of the agreement. For such construction etc., if any approval, sanction is required from any agency or authority, it has to be procured by petitioner at his own cost. Had it been a mere "licence", such permission ordinarily would have to be obtained by owner from the authorities concerned. Though in para 6.1 it is said that no interest or right has been created in the premises and the agreement is only for right to use the premises and not to be treated as sale agreement to sell, lease, transfer etc. but then in para 6.2 there is a Clause against transfer, sell, assign, lease, sublet or sub-licence by Licensee without prior consent of Licensor, meaning thereby the Licensee can do all or any of the things mentioned therein with the consent of Licensor. This clause again goes against so as to construe the aforesaid document not as a mere "Licence".

37. Then the exclusive peaceful right to use the premises has been conferred upon petitioner vide para 6.3 and 7.11 of the agreement. Here also in para 7.11 there is a clause that the petitioner shall not assign, transfer, lease, sublet etc. the premises or any part thereof to a third person without prior written consent of Licensor. A limited right to enter the premises has been given upon Licensor or its designated representative, and, that too, only for the purpose of inspecting the service and maintenance and not otherwise. The ownership right since continues with the Licensor, para 10.2 signifies this right of the Licensor by stipulating that it can sell or transfer the premises to a third party, but such transfer is restricted in the sense that the third party shall be bound to adhere with the terms and conditions of the agreement for continuing use of premises by petitioner. Section 62 of IE Act, 1882 contemplates that a licence is deemed to be revoked when a grantor ceases to have any interest in the property affected by the license. But in the present case, even the alleged Licensor is not free to transfer ownership to third party without having a clause so as to

maintain right of the petitioner to use premises in dispute for the period of agreement. Then a Licensor cannot terminate the agreement unless it gives a show-cause notice and, that too, on occurrence of certain conditions and not otherwise. All these conditions, in my view, clearly indicate the fact that transfer of property to petitioner by NOIDA under the agreement in question is not a simple permission to enjoy the property but it creates an interest in the property for a prescribed period with a recompense of rent and all the ingredients of lease exist. It, thus, cannot be said that the instrument in question is a mere "Licence" though the parties to the agreement have titled it as a Memorandum of Licence, and this appears to have been done to evade huge stamp duty which was payable on the instrument in question, looking to the quantum of rent payable therein, on the basis whereof, the stamp duty has to be determined. This is a clear case of clandestine attempt on the part of petitioner and NOIDA, the grantor, to evade stamp duty and fee payable to State. It is really surprising that a statutory authority, like NOIDA, is indulging in an act of camouflaging the documents, so as to allow a party, evasion of stamp duty, though being a statutory body, it is bound to act in accordance with law and not otherwise. The Collector, in the case in hand, has rightly held the document in question to be an instrument of "Lease". The impugned order, therefore, warrants no interference. The writ petition is thoroughly misconceived. Dismissed.