

(1954) 01 BOM CK 0005

In the Bombay High Court

Case No : Second Appeal No's. 917 and 1296 of 1952 and Civil Revision
Application No. 1032 of 1952

Ramjibhai Virpal Shah

APPELLANT

Vs

Gordhandas Maganlal Bhagat

RESPONDENT

Date of Decision : 06-01-1954

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1944 — Section 9(1), 9(2)
Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 12(1)
Civil Procedure Code, 1908 (CPC) — Section 115, 38
Easements Act, 1882 — Section 52, 60
Registration Act, 1908 — Section 17, 17(1), 2(7)
Transfer of Property Act, 1882 — Section 105, 108, 116, 2, 5

Citation : AIR 1954 Bom 370 : (1954) 56 BOMLR 365 : (1954) ILR (Bom) 615

Hon'ble Judges : Vyas, J;Gajendragadkar, J

Bench : Division Bench

Advocate : V.S. Desai, in Civil Revn. appln. No. 1032 of 1952, D.V. Patel, in S.A. No. 917 of 1952 and Y.V. Chandrachud, for the Appellant; V.S. Desai and V.M. Tarkunde, in S.A. No. 1296 of 1952, V.M. Tarkunde and D.V. Patel, in Civil Revn. Appln. No. 1032 of 1952 and C.K. Shah, for the Respondent

Judgement

Gajendragadkar, J.—Second Appeal No. 917 of 1952 and two other matters have been referred to a Division Bench because they raise a common question of law of some importance. In all these matters the landlord had determined the lease in favour of his tenant and had sued to eject the tenant. The landlord's claim was resisted by the tenant; but ultimately a compromise decree was obtained by the parties. By reason of the compromise decree the defendant was allowed to remain in possession of the property for a stated period. At the end of this period the landlord sought to execute the compromise decree and claimed possession by execution process.

The defendant resisted this claim on the ground that the compromise decree made him a tenant of the decree-holder and under the provisions of the Rent restriction Act, 57 of 1947, it was not open to the landlord to obtain possession. It

is somewhat remarkable that in all the three matters the Courts below have held that the compromisedecree did not make the judgment-debtor a tenant of the decree-holder and they have accordingly allowed the decree-holder's claim for possession. The judgment-debtors who have come to this Court against this decision contend that the consent decrees have not been properly construed and they argue that the Courts below were wrong in directing them to deliver possession to the decree-holders.

That is how the principal question which arises in all these matters is one of construction of the compromise decrees and the principles which apply to the construction of such decrees. It may be convenient to set out the terms of the compromise decree which has given rise to second appeal No. 917 of 1952.

2. The compromise decree in this case was passed in civil suit No. 2476 of 1948 on 22-10-1947. This decree provided that the defendant do vacate and cause to be vacated the house in suit by 22-11-1949, and give possession to the plaintiff. This is the effect of Clause (1) of the decree. Clause (2) provided that Rs. 200 had been ascertained to be due to the plaintiff by the defendant in respect of rent and mesne profits as from 5-12-1946, on which date the cause of action had accrued, to 5-10-1947. This clause further allowed appropriation by the landlord of the amounts which had been deposited by the tenant in Court pending the hearing of the suit.

Clause (3) directed the defendant to pay to the plaintiff regularly every month on 5-11-1947, and on the 5th of every succeeding month Rs. 20 in respect of the mesne profits until the house in suit is handed over. It also gave the right to the plaintiff to take possession of the house in case the defendant failed to pay mesne profits for any three months. The Courts below have held that this decree merely permitted the defendant to stay in the house and did not confer upon him the status of a lessee or a tenant.

Mr. Patel for the appellant contends that in coming to this conclusion the Courts below have misapplied the principles which govern the construction of such decrees and have not given the words used in the decree their natural and reasonable meaning.

3. Courts have often had occasion to deal with compromise decrees passed in suits in which the landlords had claimed possession of the demised properties from their tenants after determining the tenancy in question. In construing such decrees, much difficulty was not experienced so long as the landlord's rights to deal with his own property were not fettered by the provisions of the Rent Restriction Acts. After the introduction of the Rent Restriction Acts, the rights of the landlord have been restricted and special protection has been given to the tenants. Even so, in suits which fall to be decided under the provisions of such Rent Restriction Acts compromise decrees are sometimes passed and the question as to the relationship which results from such compromise decrees has often to be considered by civil Courts.

In considering this question, however, an initial difficulty arises because in such cases it is not always easy or possible to attribute to the landlord the intention to lease out his property afresh to the tenant even after he had determined the lease and even though he knows that the tenant would acquire certain additional and special rights under the Rent Restriction Acts. The fact that a compromise decree in a suit between the landlord and his tenant is passed where the tenant claims the protection of the Rent Restriction Act is apt to put upon the question of the construction of the decree a different complexion.

4. It is perfectly true that even in such a suit it would be open to the landlord to enter into an agreement with the tenant by which the relationship of landlord and tenant can be created afresh between the parties. Where the agreement is reduced to writing, it is but trite to say that the relationship brought into existence by the writing must always be determined in the light of the words used by the parties in executing the document. The substance of the transaction has no doubt to be determined, and if in substance the transaction appears to be one of lease, the fact that an effort is made to clothe the transaction with an appearance of licence by the use of ingenious and clever words would not alter the essential character of the transaction.

In that sense, the use of words such as "mesne profits" or "compensation" can have no material effect. But this is a statement of one aspect of the matter. In determining the nature of the transaction itself, Courts have inevitably to take into account the words used by the parties, and in that sense it would be wrong to suggest that the words used in the document, such as "compensation" or "mesne profits" are of no consequence whatever. In deciding the question as to what was the intention of the parties in executing the document Courts would have to look at the document as a whole, give the words used in the document their plain, grammatical meaning and determine the intention of the parties in that manner.

If the intention of the parties clearly appears to be not to create the relationship of landlord and tenant between them, then in construing the words used in the document the Courts would have to bear that fact in mind. In such a case if the words used in the document are consistent both, with a lease and a licence, Courts would naturally prefer to treat the document as a licence rather than as a lease in view of the intention of the parties which is otherwise clear beyond a doubt. Even so, the intention can be given effect to in construing the words of the document only where the words are capable of two constructions, one of which is consistent with the said intention.

If the words used in the document are unambiguous and lead only to the inference that the relationship of landlord and tenant is thereby intended to be created, the doctrine of intention cannot materially affect the construction of the document. The case of -- "Sumatibai v. Anant Balbrishna", AIR 1949 Bom 402 (A) is an illustration in point. In this case the learned Chief Justice and I had to consider the terms of a compromise decree which clearly and unambiguously

evidenced an agreement to create the relationship of landlord and tenant between the parties to the suit. It is true that the specific question which we had to decide in this case was, whether a compromise decree, which operates as a lease of Immovable property for a period exceeding one year, is compulsorily registrable u/s 17(1)(d), Registration Act.

But this question arose for decision only when and after we came to the conclusion that the compromise decree operated as a lease of Immovable property; and we came to this conclusion because all the four clauses of the decree unmistakably and clearly evidenced the relationship of landlord and tenant. It would thus be clear that even though a landlord, after determining the tenant's rights under the lease, sues for possession, It would still be open to him, pending the suit, to create a contractual tenancy between himself and the tenant if he so desires.

In other words, it is not legally impossible for a plaintiff in such a case to enter into an agreement with the defendant and obtain a compromise decree in terms of the said agreement whereby the defendant would become his tenant once again. A compromise decree can and often enough does operate to create a contractual tenancy between the parties to the decree. It is, however, necessary to make one observation in regard to this decision. The compromise decree with which we had to deal in this case was passed in a suit which was apparently not governed by the provisions of any Rent Restriction Act.

5. After the Rent Restriction Act 57 of 1947 came into operation this Court has had to consider compromise decrees passed in suits to which the provisions of this Act were applicable on several occasions. On every occasion the Court attempted to ascertain the intention of the parties and then proceeded to decide the nature of the relationship created between the parties by the provisions of the compromise decree. The attempt always was to find out the substance of the transaction. In doing so words used in the compromise decree had inevitably to be considered. But it would appear from the judgments to which our attention has been invited that the question was treated ultimately as a question of fact in every case and, with respect, that no doubt is the right approach to this question.

In dealing with a question of fact of this kind, while the Courts were considering the terms used in the document in the light of the intention of the parties, sometimes same or similar words may have been differently construed. But this difference of interpretation of the same or similar words cannot conceal the uniformity of the approach adopted in each case and that approach always was to find out the substance of the transaction and, in doing so, construe the words in the light of the intention which can be safely attributed to the parties in any given case. Indeed, the Courts below, in construing the decree in question, have adopted the same course.

Mr. Patel seriously quarrels with the approach thus adopted by the Courts below in construing this decree. Mr. Patel contends that the question as to the intention

of the plaintiff would be wholly unimportant, if not irrelevant altogether, because, according to him, in dealing with such a question Courts have to construe the document without reference to the alleged intention of the parties and to ask themselves whether on a reasonable construction the document satisfies the requirements of Section 105 of the Transfer of Property Act.

Section 105 defines a lease, and Mr. Patel argues that when we are dealing with the provisions of a statute which give us the definition of a lease, there is really no scope for giving any importance to the alleged intention of the parties; words used by them in the document would speak for themselves, and if the words thus used in the document establish the essential ingredients required by Section 105, there is nothing more to be done than to hold that the document operates as a lease.

In this connection Mr. Patel has naturally relied upon a decision of the Calcutta High Court in ---- O.C. Ganguly Vs. Kamalpat Sing Dugar, . Having construed the document before him as creating a lease, Mr. Justice Chakravarti repelled the argument of the intention of the parties as being Inconsistent with the said construction by observing that though the intention of the parties may be a useful and legitimate guide in determining the relationship actually created, if in the case of a written document the rights actually transferred exceed those of a licence and make out a lease, it is quite impossible to reduce a lease to a licence by speculating as to what the lessor might really have intended.

If he intended less, his acts exceeded his intention and by the consequence of his acts he must abide. In our opinion, there can be no quarrel with this statement of the law. As I have already mentioned, if the words used in the document unambiguously and clearly lead to only one inference and that of the creation of a lease, then the consideration of the intention may not be of any avail to the party that pleads for a licence. But it would not be correct to say that the question of intention is altogether irrelevant in construing a document; though its importance cannot be exaggerated, its relevance cannot be disputed.

6. The question of the intention of the plaintiff in such a case is not a matter of mere academic Importance because in a case governed by the provisions of the Rent Restriction Acts, there are certain considerations which can be safely attributed to the parties entering into an agreement during the pendency of a suit filed by the landlord against his tenant. Where the provisions of the Rent Restriction Act apply, the rights of the landlord to deal with his own property as he likes are fettered to a considerable extent. It is perfectly true that these provisions are beneficent in their object and they are undoubtedly intended to serve a purpose of great social importance. But these provisions are likely to create bitterness in the mind of the landlord when he files a suit against his tenant and claims possession of the property let out to the tenant.

If the tenant is certain of his rights under the Rent Restriction Act, it is very unlikely that he would be prepared to enter into any compromise which would

restrict or materially affect his rights. On the other hand, even if the landlord feels reasonably certain of succeeding against his tenant, he might, in spite of the bitterness created in his mind by the provisions of the Act, still feel sympathetic or compassionate to his tenant. It would, therefore, not be unreasonable to assume that in a large majority of cases where a landlord agrees to allow the tenant to remain in possession of the property in suit for some time and the parties obtain a consent decree in terms of such agreement, the agreement is the result of the sympathy or the compassion which the landlord feels for the tenant who might be otherwise thrown on the streets.

On the other hand, the tenant may enter into the said agreement because he may feel certain that the provisions of Section 13, for instance, may enable the landlord to evict him; he is, therefore, prepared to quit provided he is shown accommodation by grant of sufficient time to vacate. If we are dealing with an agreement made between the parties under such circumstances, it would be difficult to hold that the intention of the parties should not be given its due importance in construing the terms of the agreement. If the landlord merely intended to accommodate the tenant for a specified period and if the tenant intended to obtain that relief and no more, the terms of their agreement would have to be construed in the light of this mutual intention.

That is why I have already stated that if the words used in the agreement are consistent both with the creation of a lease or of a licence, the meaning which is more consistent with the admitted or proved intention of the parties would always be preferred by the Court. From this point of view we do not think that it is correct to say that in construing the document the alleged intention of the parties should not be taken into account. In this connection I may conveniently refer to a decision of this Court to which I was a party : -- "*Baldeodas Mahaviraprasad v. Sonavalla*", AIR 1948 Bom 385 (C). The question which arose for decision in this case was whether by acceptance of rent by the landlord the tenant could claim to be holding over on the premises u/s 116, Transfer of Property Act.

On the literal construction of the provisions of Section 116, Transfer of Property Act, acceptance of rent would lend strong, if not irresistible, support to the tenant's plea that he was holding over. But we refused to give to the acceptance of rent by the landlord that force in view of the fact that under the provisions of the Rent Restriction Act the landlord had no alternative but to accept the rent under certain circumstances.

In other words, in view of the said provisions acceptance of rent by the landlord cannot in every case be treated as such voluntary acceptance as would lead to the inference of holding over. This is an illustration as to how in the light of the provisions of the Rent Restriction Acts the intention of the parties is a matter of substantial importance in some cases.

7. Mr. Patel has then contended that the decree in question undoubtedly confers

upon his client the right to the exclusive possession and enjoyment of the property; and according to Mr. Patel the right to the exclusive possession and enjoyment of the property is of such decisive importance in dealing with the question of the relationship created by the compromise decree that the inference that this relationship is akin to licence and is not a lease must be ruled out.

It may be convenient at this stage to refer to the requirements of a valid lease, as set out in Section 105, Transfer of Property Act. A lease of Immovable property, according to the definition contained in Section 105, is a transfer of a right to enjoy such property. It is made for a certain time, express or implied, or in perpetuity and in consideration of a price paid or promised to be paid periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transfer of a right to enjoy the property, which is an important ingredient of a valid lease according to Mr. Patel, is of such a decisive character that as soon as it is shown that the transferee is entitled to remain exclusively in possession of the property given to him, he is entitled to contend that it is not a licence but a lease.

In support of this contention Mr. Patel has referred us to the observations made by the learned commentator in Mulla's Transfer of Property Act where it is stated at p. 644 :

"Whether an instrument operates as a lease or as a licence is a matter not of words but of substance. If the effect of the instrument is not to give exclusive possession, it will take effect as a license though called a lease or letting. On the other hand if exclusive occupation is given, it matters not that it is subject to reservations and restrictions. But if it only gives the use of the property in a particular way or on certain terms While it remains in the possession and control of the owner, it will only be a license."

To the same effect are the observations to be found in Halsbury, 2nd edn., Vol. 20 para 5. This is how the legal position on this point is stated :

"It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a licence, and not as a lease. In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance of the agreement. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a licence."

In support of this statement of the law Mr. Patel has relied on several decisions, some of which may be mentioned.

8. In -- "Glenwood Lumber Co. v. Phillips (1904) A.C. 405 (D)", Lord Davey observed that 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. In --"Indian Hotels Co. v. Phiroz Sorabji AIR 1923 Bom 228 (E), Mr. justice Fawcett was dealing with the point as to whether the defendant who had hired stabling accommodation for his carriage in the open spaces provided by the mews belonging to the plaintiffs had become the tenant of the plaintiffs. The learned Judge came to the conclusion that the relationship between the parties was not that of landlord and tenant but merely of licensor and licensee.

The learned Judge in his judgment referred to the words "right to enjoy" used in Section 105, Transfer of Property Act and reading them with the rights of the lessee laid down in Section 108 he came to the conclusion that the words used in Section 105 clearly show that there should also be a right to exclusive possession to constitute a lease under the Transfer of Property Act. This finding was, therefore, based on the assumption that the defendant was not entitled to the exclusive possession of the open space on which he used to park his carriage.

It may, however, be added that the learned Judge then proceeded to deal with the case on the assumption that exclusive possession of a specified space had been given to the defendant; even so, he felt that the case of the defendant was analogous to that of a lodger, and since a lodger had been expressly excluded from the Rent Act of 1918, the defendant would, by parity of reasoning, be excluded from the provisions of the said Act even though, like the lodger, he may have been given exclusive possession of a particular space. This part of the judgment would show clearly that Fawcett J. did not accept the proposition that exclusive possession must indicate a lease and not a licence.

The decisions of this Court in -- "Janardan v. Ramchandra", AIR 1927 Bom 240 (P), and --"Sherif Dadumiyaji v. Emperor", AIR 1930 Bom 165 (G), also lay down that exclusive possession is an important ingredient of leasehold rights. It would, however, be necessary to add that I feel some hesitation in holding that these decisions lay down the categorical proposition that a licence of any kind can never import the notion of exclusive possession by agreement between the parties. That may probably be the consequence of the definition of a licence contained, in Section 52, Easements Act; but this aspect of the matter does not appear to have been considered and decided in these decisions.

9. The same argument has been put before us by Mr. Desai, who supports Mr. Patel's arguments, in another form. Mr. Desai contends that a lease is not a mere contract, but it amounts to a transfer of an interest in land and as such it creates a right in rem. The distinguishing feature of such a right in rem naturally is that it is given against the whole world irrespective of notice and it cannot be affected by any subsequent disposition by the lessor.

In this connection Mr. Desai has invited our attention to the observations of

Jenkins J. in --"Kally Dass Ahiri v. Monmohini Dassee", 24 Cal 440 (H):

"A man who being owner of land", observed the learned Judge "grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest. This result is to be inferred by the use of the word "lease", which implies an interest still remaining in the lessor. Before the lease the owner had the right to enjoy the possession of the land, and by the lease he excludes himself during its currency from that right, but the determination of the lease is a removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease."

In other words, the most distinguishing feature of the lessee's right is that he is entitled to the exclusive possession and enjoyment of the property let out to him so much so that he can exclude the landlord from interrupting or disturbing his possession. In this connection, reference has also been made to the decisions of the Calcutta High-Court in -- Secy. of State Vs. Sati Prasad Garga and Others, , and -- Secy. of State Vs. Bhupalchandra Ray Chaudhuri, . It must be conceded that the right to exclusive possession and enjoyment of the property let out to him is an important feature of the rights of a lessee.

It must, however, be borne in mind that for the creation of a valid lease, it is necessary to prove the presence of some other equally important ingredients as laid down in Section 105, Transfer of Property Act; so that it cannot be said that merely because a person is given the right to exclusive possession he becomes a tenant even if he does not satisfy the other requirements of the definition of, "lease" contained in Section 105.

10. The contention raised before us, however, still remains to be considered in part and that is that the right to exclusive possession must in every case negative the idea of licence. That is to say, if in a given case it is shown that a person is given the right to the exclusive possession and enjoyment of certain property, it can never be said that" he is a licensee of the said property. Mr. Patel contends that in so far as the Courts below were disposed to take the view that his client was no better than a licensee, their conclusion must be held to be wrong in law because his client was entitled to the exclusive possession and enjoyment of the property given in his possession.

It is perfectly true that the observations from Halsbury and the comments made by the learned commentator in Mulla's Transfer of Property Act do lend support to this contention, in our opinion, however, the statement that a licence is alwaysruled out as soon as the right to exclusive possession is granted to a party may not be regarded as a correct statement of the law without some qualification.

The question as to whether a licensee can be given an indefeasible right to remain in possession for a stated period by an agreement between the parties has been considered by English Courts on several occasions in recent years, and it may be stated, with respect, that the tendency of recent decisions appears to be to widen the scope of the licensee's rights and to hold that if a licensee is also

given the right to exclusive occupation for a stated period, this right does not convert the licence into a lease but merely adds certain contractual rights to the licence. It may be described as a possessory licence; it may be described as a licence to which are added certain contractual rights or, it may be, as Roxburgh J. has pointed out, that we are unable to name this particular species of rights specifically and succinctly today; that is a task which the jurists of tomorrow might perform.

In -- "Booker v. Palmer", 1942 2 All E R 674 (K), this question was authoritatively considered by Lord Green M. R. The facts on which the point arose for decision were that in 1940 the appellant had her house destroyed by a bomb and on her behalf Mr. Goldsmith approached a landowner, who had two cottages vacant. The landowner allowed the appellant to go into one of them rent free for the duration of the war. The question which arose was whether the appellant who had been let into possession of one of the cottages during the duration of the war obtained lessee's rights by virtue of the agreement between the landowner and Mrs. Goldsmith through whom the appellant went into possession of the cottage in question.

It is true that this question had to be decided not in the light of a document as in the case before us, but on evidence as to oral conversation. It is also true that the appellant had been let into occupation without her having to pay any consideration in return. These features undoubtedly distinguish the case of Booker from the case before us; but the decision of the point was based by the learned Judge on a much broader ground, and it is from the statement of this larger ground that we respectfully wish to derive assistance at p. 676 :

"... .Whether or not", observed the learned Judge, "parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention."

No doubt he added that where the parties enter into a formal document, the intention to enter into formal legal relationship is obvious. But then he went on to consider the facts which clearly showed that the landowner was actuated by feelings of compassion and humanity in allowing the appellant to occupy one of his cottages, and then he went on to add at p. 677 :

"To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind. It seems to me that this is a clear example of the application of that rule."

11. The next English decision to which reference may be made is reported in -- "Marcroft Wagons Ltd. v. Smith 1951 2 KB 496 (L). In this case the statutory tenant of a dwelling-house died in 1938 and on his death his statutory tenancy

devolved on his widow who, until her death, continued to live in the house as a statutory tenant with her daughter. On the death of the widow the daughter asked the landlords' agent to have the tenancy transferred into her own name. This he refused to do. Even so he accepted a sum from the daughter equal to two weeks' rent and she continued thereafter to pay each week the same sum as the widow had paid for rent. After some time, in September 1950, the landlords brought proceedings for possession.

The County Court judge made an order holding that the landlords had not agreed to grant any estate in the land to the daughter, that no tenancy had been created, and that she was merely a licensee. The question which arose before the Court of appeal was whether the daughter was a licensee even though she was in exclusive possession of the property and had in fact been paying rent which was accepted by the landlords. The learned Judges came to the conclusion that the daughter was no more than a licensee. Evershed M. R. dealt exhaustively with the points urged in support of the contention that the right, of the occupant was that of a lessee.

In dealing with the main question he referred to a very important matter which had to be borne in mind in considering what inference should be drawn in cases of this kind at p. 501 :

"....Until, in the present century", observed the learned Judge, "the Rent Restrictions Act came into play, the law broadly speaking necessarily inferred, when exclusive possession was granted to one of the property of another at a rent payable to that other, that a tenancy had been created. The law did not recognize that those conditions were compatible with any other kind of relationship.

That, I think, sufficiently appears from a passage in Halsbury's Laws of England (2nd edn.). Vol. 20, at p. 8. But it is now clear that, to use the formula which I think has been applied, a new "monstrum horrendum, informe, ingens", has come into our ken--the conception of a statutory tenancy--the conception that a person may have such a right of exclusive possession of property as will entitle him to bring an action for trespass against the owner of that property but which confers no interest whatever in the land: such a person is unable to dispose of the land by grant or by testamentary disposition. It is, as has been said, a statutory right of irremovability."

12. It was urged before the learned Judges by Mrs. Frazer that if the Court were to take the view that the occupant was no more than a licensee, it would be inviting all landlords to evade the Act by never granting a tenancy but saying, "we will merely let you live as a licensee in this house". The learned Judge refused to be frightened by that argument. If the relationship in question is created between the parties for the first time, it would normally present no difficulty at all. It is only where the pre-existing relationship of landlord and tenant is determined by the landlord and the matter is brought to the Court at

the instance of the landlord for the ejectment of the tenant and a compromise follows that the complication of the intention of the parties has necessarily to be considered.

Mr. Justice Roxburgh, in his concurring Judgment, confessed that he did not know how the interest of the occupant ought, in the circumstances, to be described. He added at p. 501 :

"....It would, I think, be a pity to call it a "licence", because that word has, in connexion with the landlord and tenant, already been appropriated to quite different situations. It must, I think, be left to jurists to invent a new name for what the Master of the Bolls has so aptly called "monstrum..... .informe.....""

13. The last English decision to which our attention has been invited is reported in -- "Errington v. Errington", 1952 1 All E R 149 (M). In this case a father had bought a house for his son and daughter-in-law in 1936. He paid ?250 in cash and borrowed ?500 from a building society on the security of the house. The house was in the father's name and he was responsible to the building society for the payment of the instalments. He told the daughter-in-law that the ?250 was a present to her and her husband, handed the building society book to her, & said that if & when she and her husband had paid all the instalments, the house would be their property. From that date onwards the daughter-in-law paid the instalments as they fell due out of money given her by her husband.

In 1945 the father died and by his will left the house to his widow. Shortly afterwards the son left his wife. The mother-in-law then sued the daughter-in-law for possession and she was met with the plea that the daughter-in-law had been constituted a tenant by virtue of the agreement between her father-in-law and herself. The Court repelled the plea of tenancy and held that the position of the daughter-in-law was no more than that of a licensee, it must be conceded that on material points the facts giving rise to the appeal before the English Court were different from the facts before us. The agreement on which the tenancy was pleaded had imposed no obligation on the son or the daughter-in-law to pay the instalments. It was a unilateral promise by the father-in-law and there was no document executed in that behalf.

But again it must be pointed out that the decision was based on the consideration of the general question as to whether exclusive possession is of decisive importance in determining whether the party in possession is a licensee or a lessee. Denning L. J., who delivered the principal judgment in this case, observed at p. 154 :

"....The difference between a tenancy and a licence is, therefore, that in a tenancy an interest passes in the land, whereas in a licence it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. if he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will..... whereas if he had not exclusive possession, he was only a licensee....."

The learned Judge then added that this test has often given rise to misgivings because it may not correspond to realities. Then he cited the judgment of Lord Abinger C. B. in -- "Howard v. Shaw (1841) 8 M & W 118 (N), where the learned Judge had observed at p. 122:

"While the defendant occupied under a valid contract for the sale of the property to him, he could not be considered as a tenant."

And Denning L. J. significantly observed that now, after the lapse of a hundred years, it has become clear that the view of Lord Abinger was right and the test of exclusive possession is by no means decisive.

Several English decisions were then considered and the result of these decisions was thus stated at p. 155 :

"The result of all these cases is that, although a person who is let into exclusive possession is, "prima facie", to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be licensee."

It may be that such licensees are licensees with a contractual right to remain, and under the English law as a result of the infusion of equity the position is that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.

14. It would thus be seen that the trend of recent English decisions is to cast a serious doubt on the correctness of the broad proposition that exclusive possession necessarily and in every case negatives the presence of licence and establishes the presence of a lease.

15. It is true that it is not always safe to seek for guidance from English decisions on matters where we are governed by the provisions of a statute. Mr. Desai who has pressed this point before us has laid considerable emphasis on the observations of the Privy Council in -- AIR 1930 59 (Privy Council) .

Dealing with the question as to whether the transaction in question was an underlease for the entire residue or constituted an assignment of the lease, Sir John Wallis observed at p. 59 :

"The question having arisen in India, it has, of course, to be decided in accordance with the law, not of England, but of India; it does not, however, seem to have occurred to any one in the Courts below to see, in the first place, before resorting to English decisions, whether under the law of landlord and tenant in India a sub-lease by a lessee for the unexpired residue of the term operates as

an assignment of the term."

It is perfectly true that we must bear this warning in mind in applying the observations of English Judges to the points which, we are deciding in this case.

16. But, on the other hand, it may be relevant to remember that the terms of Section 105 do not expressly apply to the compromise decree with which we are concerned in the present appeal. Section 2(d), Transfer of Property Act clearly excludes the application of the provisions of Section 105 to the relationship which has been created by a decree. In other words, when we are dealing with the relationship created by a decree passed by a Court, the terms of Section 105 as such would not be applicable. The provisions of the said section would be invoked as matters of justice, equity and good conscience, and in that respect the position may not be substantially different from the position under the English law.

It is true that under the English law the terms "tenant", "licence" and "licensee" are not defined and so in every case where the English Courts are called upon to consider whether the relationship between the parties before them is that of landlord and tenant or licensor and licensee, they have always to decide the question by drawing a proper inference from the facts proved before them, it is also true that whereas in England a licence coupled with a contractual right, which is sometimes described as a possessory licence, would be irrevocable, in India it may not be so. Section 60, Easements Act makes licences revocable by the grantor except in two cases, and the case of a licence to which is added a contractual right may not fall under the said two exceptions.

But it is not at all clear or certain that if a licence with the addition of a contractual right becomes the subject-matter of a decree, it would or could be revoked under the provisions of Section 60, Easements Act. A decree has been passed by a Court, of competent jurisdiction which confers certain rights and imposes certain obligations on both the parties to the suit. Prima facie it appears to be difficult to accede to the argument that despite the provisions of this decree it would be open to the decree-holder to revoke the licence and claim possession of the property even before the period stipulated in the decree has expired. However, it is not necessary to decide this point in the present case.

We are prepared to accept the argument urged before us by Mr. Desai that we should not blindly apply the observations of the English Judges to the point before us. But as I have already pointed out, in dealing with the question as to whether tenancy rights are created between the parties, we cannot ignore the question of intention altogether, and if we proceed to construe the terms of the decree in the light of the intention which is clearly proved, it would be difficult to hold that merely because exclusive possession was given to the appellant he became a tenant of the property and not a licensee. All that can be said in his favour is that he cannot be said to be a licensee.

I have already pointed out that exclusive possession can be compatible with a

licence to which are added certain other contractual rights. That no doubt appears to be the view which has been taken in recent English judgments; but even if that not be the position in India all that can be said would be that the appellant is not a licensee. That does not necessarily mean that he is a lessee. It may be conceded that we might find some difficulty in properly or adequately describing the precise character of the rights with which he is clothed. But there is no difficulty in determining the real substance of the matter. His possession is permissive, and though it is exclusive it is not that of a lessee.

This exclusive possession gives him rights which are larger than those of a licensee technically so called under the provisions of Section 52, Easments Act, but which are less than those of a lessee properly so called under the provisions of Section 105, Transfer of Property Act.

17. There are, however, two other considerations which are of material importance in deciding the question as to the status of the appellant "quae" the respondent. I have already pointed out that the provisions of Section 105 in terms do not apply to a compromise decree. But even while applying the substance of these provisions, the first requirement which has to be satisfied by the appellant is that there is a transfer of a right to enjoy such property. Assuming in his favour that by the compromise decree he is clothed with the right to enjoy the property in question, the question still remains whether the compromise decree effects a transfer of the said right. In other words, did the respondent transfer to the appellant the right to the property in suit?

Mr. Tarkunde contends that it is impossible to hold that the respondent transferred to the appellant the said right because the circumstances under which the compromise decree came to be passed totally negative such an assumption. I have already pointed out that the plaintiff first determined the lease by a valid notice and then filed the suit for possession of the property let out. In the suit the defendant claimed the status of a statutory tenant and set up pleas against the plaintiff's claim for immediate possession. In other words, the defendant had at this time admittedly ceased to be a contractual tenant and he claimed to be a statutory tenant.

The plaintiff denied the defendant's allegation that he was not entitled to obtain possession because of certain provisions of the Rent Restriction Act. It is thus clear that the defendant did not concede to the plaintiff the right to obtain immediate possession of the property and it was While the parties were at issue on this important point that they entered into a compromise. In such a case it is difficult to assume that the plaintiff could have transferred the right to enjoy the property to the defendant. That right was itself in dispute between the parties.

It may be that in a given case if the defendant surrenders possession of the property to the plaintiff and concedes the plaintiff's right to evict him, the plaintiff might be able to transfer his right afresh to the defendant and thereby create contractual tenancy between him and the defendant. But unless the

decree clearly shows that the defendant had surrendered his possession to the plaintiff or had unequivocally conceded the plaintiff's right to eject him "in praesenti", there would be no scope for assuming that the plaintiff could have made a transfer of the right to enjoy the property in favour of the defendant.

18. There is another aspect of the matter which has been placed before us by Mr. Tarkunde in support of the same contention. Mr. Tarkunde says that the compromise merely shows the adjustment of pre-existing rights between the parties. Both parties claimed rival rights. The plaintiff claimed that he was entitled to evict the defendant. The defendant claimed that he was entitled to continue in possession. These rival contentions were adjusted and the respective rights set up by the parties were compromised and their character and effect were determined by the terms of the compromise.

If the dispute then subsisting between the parties was adjusted and in consequence the defendant was allowed to remain in possession, it cannot be said that the right to continue in possession or to obtain possession of the premises was transferred to him by the plaintiff. As I have just mentioned," it would be possible for a statutory tenant to give up his status as such tenant and to enter into a fresh tenancy agreement with the landlord; and it would be open to the landlord in such a case to create the relationship of landlord and tenant between himself and his ex-tenant. But that must clearly appear to have happened in a given case before it could be said that the landlord has transferred the right to enjoy his property to the tenant.

In the present case there is no trace of any evidence of this kind at all. The word "transfer" used in Section 105 in referring to the right of the transferee to enjoy the property must be construed in the light of the definition contained in Section 5, Transfer of Property Act. Even while we are applying the provisions of Section 105 in substance, the definition, of the term "transfer" must likewise be applied in substance.

Section 5 provides that "transfer of property" means an act by which a living person, conveys property, in present or in future, to one or more living persons. It is, therefore, clear that if the landlord is to transfer his right to enjoy his property to the tenant, he must be either in actual possession of the property or he must be in possession of the right to obtain such possession "in praesenti" so as to be able to convey it to the tenant. In the present case, having regard to the respective contentions of the parties it is impossible to assume that the landlord would have been able to transfer the right as required by Section 105.

19. There is yet another point on which Mr. Tarkunde relies and that is that a compromise decree of "the kind with which we are dealing in the present appeal" cannot be treated as a transfer at all. It is no more and no less than an adjustment of antecedent rights in terms of which a decree has followed, it is conceivable that the terms of such a decree may be so clear that the relationship of landlord and tenant can be inferred from the said terms. Vide AIR 1949 Bom

402 (A)". Again, it is possible that even while the dispute is pending between the parties in a suit they might so adjust their dispute as to enable a transfer to be made by the landlord to the tenant.

But unless these facts are clearly established, it would be difficult to treat a compromise decree as a transfer by the plaintiff to the defendant. In support of the contention that a compromise decree cannot be treated as a transfer within the meaning of Section 5, Transfer of Property Act Mr. Tarkunde has relied upon a decision of the Privy Council reported in -- "*Khuni Lal v. Gobind Krishna Narain*", 38 Ind App 87 (PC) (P). Dealing with the argument that a family arrangement, which was impeached by the reversioners as not binding on them constituted an alienation and could be held to be valid only if it was supported by legal necessity, their Lordships observed that they had no hesitation in rejecting the reversioners' contention (p. 102) :

"....The true test to apply", said Mr. Justice Ameer Ali in delivering the judgment of the Board, "to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life tenant. In the present case *Khairati Lal* acquired no right from the daughters of *Daulat*, for "the compromise", to use their Lordships' language in -- "*Rani Mewa Kuwar v. Rani Hulas Kuwar*", 1 Ind App 157 (PC) (Q), is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is."

To the same effect are the decisions of this Court in -- "*Basangowda v. Irgowdatti*", AIR 1923 Bom 276(R) and -- "*Krishna Tanhaji v. Aba Shetti Patil* 34 Bom 139 (S). Mr. Desai has attempted to distinguish these two cases on the ground that they deal with propositions which are subject to Hindu law. That, however, is only one aspect of the matter. While these decisions were undoubtedly dealing with propositions of Hindu law, they also had to consider the question as to what can be regarded as an alienation or transfer, it must, however, be added that the decision of this question would depend always upon the construction of words used in the decree. I do not, therefore, read these judgments as laying down a general proposition that a compromise decree can never operate as a transfer.

Indeed, I have already referred to -- "*Sumatibai's case (A)*" where it has been held, following the Privy Council ruling in -- "*Hemanta Kumari Debi v. Midnapur Zamindari Co.* AIR 1919 PC 79 (T) that a compromise decree can operate as a lease. There appears to be a consensus of judicial opinion on the point that it is legally possible for parties to obtain a compromise decree which, may operate as a lease. The decision of the question would naturally depend upon the construction of the words used in the decree. Therefore, in my opinion, the contention that the appellant has become a lessee under the compromise decree must fail for the additional reason that having regard to the terms of the present decree it is difficult to hold that there has been a transfer of the right in question

by the transferor to the transferee in this case.

20. There is still another argument on which reliance has been placed by Mr. Tarkunde in support of his contention, that the compromise decree does not constitute a lease. Mr. Tarkunde says that one of the requirements of the lease is that it must be for a period certain or in perpetuity. The latter case obviously does not fall to be considered on the compromise decree. Therefore, we must find out whether this is a lease for a period certain.

I have already set out the terms of the lease at the commencement of this judgment. Clause (3) of the compromise decree clearly supports Air, Tarkunde's contention that though a period of two years was specified in Clause (1) after which the defendant had to vacate the premises, liberty was given to him to deliver possession earlier without being liable to pay any compensation, for the remaining period. Clause (3) expressly provides that the defendant was liable to pay to the plaintiff the amount specified till the house in suit is handed over. In other words, if he handed over the house to the plaintiff soon after the compromise decree was passed, he would not have been liable to pay any damages for the remaining period mentioned in the decree.

Therefore, in our opinion, there is considerable force in the contention that the period mentioned in the decree cannot be said to be certain. Two years have been mentioned; but it was not obligatory on the tenant to stay for two years, with the result that even if he vacated earlier, the landlord would have had no remedy against the tenant for damages or compensation for the remainder of the period mentioned in the decree.

21. Looking at the decree as a whole it seems to us clear that the plaintiff could not have intended to constitute the defendant a tenant of the suit premises. All that he was prepared to do was to accommodate the tenant out of compassion or humanity and the material terms of the decree are consistent with this compassionate motive of the landlord. It is very significant that there is no term in the decree specifically and clearly transferring the right to the defendant to occupy the premises in question. It only mentions the date on which the defendant must vacate the premises. It also gives the defendant liberty to vacate earlier if he so desires. I have no doubt that when this agreement was made the defendant must have pleaded for accommodation and the landlord must have consented to accommodate the defendant.

The dominant intention in the mind of the landlord was to obtain possession of the premises as soon as he could, and knowing that this intention of the landlord was likely to succeed, the defendant asked for concession and was given concession. In other words, both the parties must have agreed that despite the provisions of the Rent Act, the house had to be vacated at the latest on 22-10-1949. Knowing full well what the provisions of the Rent Restriction Act were, if they entered into a compromise which ultimately led to the decree, it would be wholly consistent with the common intention of the parties to assume

that all that the defendant was permitted to do was to hold the property otherwise than as a tenant.

It is permissive possession with which he was content, and permissive possession of the kind mentioned in the decree cannot, in my opinion, be treated as a lease. The transaction of a lease properly so called proceeds from the desire of the landlord to let out his property and obtain some rent as a consideration. The agreement which led to the compromise decree, proceeded obviously from the anxiety of the landlord to obtain possession of the property back as soon as he could and he merely agreed to accommodate the tenant out of sympathy for him. In other words, the tenant promised to vacate on or before the specified date and in consideration of the said promise the landlord agreed not to execute the decree till then; that, in my opinion, is the substance of the agreement on which the decree was based.

Having decided to accommodate the tenant, the amount which the tenant should pay was fixed, Technically speaking the amount thus fixed cannot be properly described as rent, because the landlord was not anxious to obtain this consideration at all. Therefore, in my opinion, on the decree as it stands, the lower appellate Court was right in holding that the defendant was not a tenant. In entering into the compromise precaution was taken to describe the amount to be paid by the defendant as "mesne profits." It is perfectly true that the use of one word here or there would not alter the character of the agreement.

But the use of the words made by the parties in drawing up the document must be taken into account in deciding the character of the transaction evidenced by the document. If the document had intended to make the defendant a lessee, the plaintiff would have used positive words showing transfer of the right to enjoy the property, and would not have given liberty to the defendant to vacate the premises earlier without making him liable for damages for the remainder of the period mentioned in Clause (1).

I must, therefore, hold that the scheme of the agreement, the absence of any words indicating demise as such, the emphasis on the defendant's undertaking to vacate on or before the specified date, the use of the words "mesne profits", liberty left to the defendant to vacate as soon as he liked, coupled with the circumstances under which the contract came to be made, lead to the inference that the document does not evidence the creation of a leasehold right; it only enabled the defendant to remain in possession of the property permissively at the latest until 22-10-1949. Therefore, the lower appellate Court was right in holding that on the expiration of the said period the decree-holder was entitled to execute the decree.

22. That leaves two minor points which have been faintly urged before us by Mr. Patel. Mr. Patel contends that though his client may not be a tenant properly so called within the meaning of Section 105, Transfer of Property Act, the document would nevertheless have to be registered because of the provisions of Section

2(7), Registration Act. This Sub-section defines a lease as including a counterpart, kabuliyat, an undertaking to cultivate or occupy and an agreement to lease. In view of my conclusion that the decree does not operate as a lease, the document cannot be considered as a lease even for the purpose of Section 2(7), nor as an agreement to lease.

But Mr. Patel contends that it amounts to an undertaking to occupy, and according to him it makes no difference what the nature of the occupation is. That may be true. But I see no undertaking to occupy on the part of the defendant in the compromise decree. As I have already pointed out, it would have been perfectly open to the defendant to vacate the premises the next day after, the decree was passed. Therefore, in my opinion, there is no substance in the argument that because the decree shows that there was an undertaking to occupy on the part of the defendant it amounts to a lease within the meaning of Sub-section (7) of Section 2, Registration Act.

It is, therefore, unnecessary to consider whether, even if the document had contained an undertaking to occupy, that undertaking would satisfy the requirements of Section 17, Registration Act. Indeed, we have not heard Mr. Tarkunde on this part of the appellant's case,

23. Then Mr. Patel sought to take the assistance of Section 9(1) of the Rent Control Act, 1944. While the present decree was passed it was this Act which was in operation and Mr. Patel contends that it is not open to the decree-holder to obtain possession from the appellant because he is a tenant within the meaning of this Act. Assuming that the appellant is a tenant within the artificial definition of the word contained in this Act, we do not see how he can avail himself of that definition in the present proceedings.

Section 9(1) clearly deals with a case where a claim by the landlord against the tenant is pending adjudication in a suit. Once a decree is passed, Section 9(1) cannot be invoked for the simple reason that the executing Court will have no jurisdiction to go behind the decree and allow questions to be raised which affect the propriety of the decree itself. Sub-section (2) of Section 9 shows that the recovery of possession to which reference is made in Sub-section (1) is recovery ordered to be made while a suit is pending. In other words, Section 9 (1) has no application to execution proceedings.

24. The result, therefore, is S. A. No. 917-52 fails and must be dismissed with costs.

25. In regard to S. A. 1296 of 1952 the appellant is in a much worse position because apart from the considerations which I have already set out, this decree cannot amount to a lease for the very clear and obvious reason that it is not for a period specified at all. What was implicit in the earlier decree is absolutely explicit in the present decree. This appeal is confined to one property, viz. 1-B. It follows the usual pattern of such decrees. The decree-holder gave the tenant some accommodation, allowed him to remain in possession for a certain period,

fixed the amount which he had to pay for such occupation.

But what is very important for the purpose of deciding whether this amounts to a lease or not is that the decree in terms gave liberty to the defendant to vacate the premises as soon as he liked and make himself liable to pay compensation for occupation only so long as he is in such occupation. It expressly says that the defendant should vacate the premises at the end of or before two years. Therefore, in my opinion, it is impossible to hold that this is a lease. The two other minor points which Mr. Patel had raised in his appeal were also raised before us by Mr. Chandrahud. For reasons which I have already mentioned, those points must be rejected.

26. S. A. 1296 of 1952, therefore, also fails and must be dismissed with costs.

27. In C. R. A. 1032 of 1952 Mr. Desai for the petitioner has raised the question of construction of the decree and he has argued that the decree which was passed in this case must be read in the light of the compromise purshis, and according to him, so read it would clearly lead to the inference that the relationship of landlord and tenant was intended to be created between the parties. We are unable to accept this contention. There are no specific terms actually demising the property to the defendant; on the other hand, the terms emphasise that by a particular date the defendant had to vacate the premises.

Clause (1) of this decree stated that there was a settlement in respect of the dispute between the plaintiff and the defendant as regards the question of possession and so it was not necessary to consider their respective allegations against each other in that behalf. Clause (2) provides that the defendant should vacate on 31-1-1952, and put the plaintiff in actual possession of the suit premises. It further adds that if the defendant fails to deliver possession as specified, the plaintiff should recover it by executing the decree and till then the defendant may use and occupy the premises and the plaintiff should not object to it.

In other words, it seems to us clear that this clause amounts to an undertaking by the plaintiff not to obstruct his possession in consideration for the promise given by the defendant that he would vacate the premises on 31-1-1952. That indeed seems to be the basis of the compromise on which the decree was passed. In this particular case the question as to the amount which should be paid by the defendant to the plaintiff was not settled by compromise, but it was left to be determined judicially by the Court. But with that aspect of the matter we are not directly concerned in the present revisional application.

Clause (4) goes on to add that when the standard rent is fixed by the Court, the same should be paid by the defendant to the plaintiff by way of mesne profits until he vacates the premises. That again clearly gives him liberty to vacate even before the time mentioned and it takes the case very near to the second appeals which we have just decided. In our opinion, this compromise was the result of a desire on the part of the landlord to accommodate the tenant. The tenant

promised to vacate on a particular date and the landlord permitted him to continue in possession on making it clear to him that it was open to him to vacate the premises earlier without thereby making himself liable to pay the rent for the remaining period. Therefore, in our opinion, the Courts below were right in holding that this did not make the defendant a tenant of the plaintiff.

28. In this revision application Mr. Desai has raised two minor technical points which may be briefly considered. Mr. Desai says that the darkhast application which gives rise to the present revisional application is incompetent because it purports to execute the trial Court's decree when in fact the decree of the trial Court has merged in the appellate Court's decree and it is the appellate Court's decree alone that is capable of execution. We see no substance in this contention.

What happened in the present case was that a decree for possession was obtained by consent and that could not be challenged in appeal. The question as to the standard rent was decided by the learned trial Judge and it went in appeal. Even so after the appellate Judgment was delivered Col. 4 of the darkhast application was amended, the number of the appeal was mentioned, but the nature of the relief claimed was not suitably amended. In our opinion, this is purely a technical omission and it cannot vitiate the darkhast application at all.

29. Mr. Desai has also contended that he would be entitled to claim the status of a tenant under Act 57 of 1947 in execution proceedings & in support of this contention he has relied upon the provisions of Section 12(1) of the Act. He has also invited our attention to a decision of this Court in -- Govind Waman Vs. Murlidhar Shrinivas and Others, . In our opinion, this contention also must fail. The provisions of Section 12(1) are inapplicable to execution proceedings. We are dealing with execution proceedings where the executing Court is bound to execute the decree as it stands unless the decree is a nullity or is otherwise without jurisdiction.

Mr. Desai contends that the decree is inconsistent with the provisions of the Act and therefore should be taken to be illegal and as such a nullity. We do not think that the decision in -- "Govind Waman's case (U)" lends any support to this contention at all. Besides, Mr. Desai has come to this Court in a revisional application, and even if there was any substance in the points of law which he has raised before us, that would not entitle Mr. Desai to ask for our interference u/s 105.

30. In the result the revisional application fails and the rule is discharged with costs.

Vyas, J.

31. I agree with the judgment just delivered by my learned brother. The terms of the various compromise decrees have been set out by my learned brother in his judgment and the question is whether what was created by the compromise decrees was a lease or not. Now, it is impossible for us to take the view that the

plaintiffs and the defendants of the various suits, circumstanced as they were at the dates of the decrees, could have intended to bring about, or in fact brought about, a new contractual relationship of landlords and tenants. Words cleverly used to clothe a transaction with a character other than its true character should not be allowed to cloud the substance of the transaction and we have no doubt as to the substance of the transactions incorporated in these compromise decrees.

The substance clearly was that the decrees did not create leases. On the one hand, the plaintiffs-landlords were asserting and claiming a right to possession of the properties and on the other hand the defendants-tenants were resisting that claim and were claiming protection of the Rent Control Act. In those circumstances, compromises were arrived at under which the tenants were tolerated and suffered in their use and occupation of the premises for a limited period at the end of which at the latest they were required to quit. It may be noted that the compromise decrees did not expressly purport to transfer or convey anything nor did they decide the original disputed point of right to possession.

It is true that within the maximum time-limit fixed in the compromise decrees, the tenants were to have the exclusive use and occupation of the properties. The element of exclusive possession was thus present in all these cases, but the test of exclusive possession is not the sole test determinative of whether a transaction is a lease or not, though undoubtedly it is one of the tests. If there are circumstances and reasons which compel us to the conclusion that "there was no transfer of a right to enjoy the property, notwithstanding the exclusive possession of the property with the defendant, the transaction could not amount to a lease.

In 1952 1 All E B 149 (M), it was observed by Denning L. J.. that the test of exclusive possession was by no means decisive of whether a transaction was a lease. His Lordship then proceeded to quote certain observations of Lord Greene M. B. in -- "Booker v. Palmer 1942 2 All E B 674 (K) and those observations were at p. 677 :

"....there is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

His Lordship then went on to examine several English cases and said that the result of all those cases was that, although a person who was let into exclusive possession was prima facie to be considered to be a tenant nevertheless he would not be held to be so if the circumstances negated any intention to create a tenancy. Mr. Patel has contended that the principle of the English decisions on the point would not help us because in England the law is Judge-made whereas in India we have a statutory law on the subject.

We are told that in English law the terms land-lord, tenant, lease, etc. are

nowhere defined, where-as we have got in the Transfer of Property Act in India the definitions of lease, lessor, lessee, rent, etc. Mr. Patel's submission is that, if the transaction falls under the statutory definition of a lease given in Section 105, Transfer of Property Act, it must be construed as a lease and it must be given effect to as such. According to Mr. Patel, the surrounding circumstances and intention would be irrelevant. We are told that if the conditions laid down in Section 105, Transfer of Property Act are fulfilled, we must hold that there was a lease and we must not turn to the doctrine of intention to escape that conclusion.

In our opinion, although the doctrine of intention may not be given a preponderating importance, intention of the parties is certainly a relevant factor while judging the nature of a transaction entered into by them, because it is in the light of the intention that they entered into a transaction. It may also be remembered that, in view of the provisions of Section 2(d), Transfer of Property Act, Section 105, Transfer of Property Act will not apply in terms to these cases, though in order to decide whether there were leases created by the consent decrees we shall have to examine the ingredients of a lease laid down in Section 105. Besides, often, as in this case, the question of consideration which is one of the ingredients in Section 105 becomes a matter of intention.

It is always a relevant point as to with what animus the rent was received and that must inevitably take us in most cases to the doctrine of intention. We have no doubt that in these compromises the consideration was a promise by the defendants that they would vacate the premises-within the time-limit laid down in the decrees. Rupees 20 per month was not a consideration. It was merely a continuance of the condition under which the occupation of the premises was to continue with the defendants. We have no doubt that, if the defendants had not agreed to vacate the premises within the time limit, there would have been no compromise notwithstanding the willingness of the defendants to go on paying Rs. 20 per month.

Clearly, therefore, the consideration was a promise by the defendants that they would vacate the premises within the maximum time limit provided under the decrees. In short, the doctrine of intention is not entirely irrelevant while judging whether a transaction is a lease or not u/s 105 of the Transfer of Property Act with special reference to the point of consideration.

32. In this case, we have no doubt that there was no transfer by the landlords of a right to enjoy the property. Before a transfer of a right to enjoy a property could be made, the transferor must have an undoubted or admitted right of possession. The thing to be transferred, the right to be transferred must indisputably belong to the transferor. But this main and essential ingredient of a lease was conspicuously absent in all these cases. The landlords in all these cases were claiming a right of possession of the premises and the tenants were stoutly denying that right, and what happened by the compromises was that the conflict was adjusted or resolved by the landlords agreeing, not to transfer the right to enjoy the premises, but to suffer the tenants' exclusive presence of the

premises for some time, the maximum limit of which was clearly laid down in the decrees.

Such a transaction could not be deemed to be a transfer. To use the words of their Lordships of the Privy Council in 1 I. A. 157 (PC) (Q)", the transactions embodied in these consent decrees were based on the assumption that there was an antecedent right of some kind in the parties and the agreements merely acknowledged and defined what that right was. A compromise of a doubtful or disputed right cannot be a transfer and that was what precisely happened in all these cases. Here, the conflicting rights as to possession were adjusted or compromised.

The words of the decrees would also show that there was no desire on the part of the landlords to give or convey a right to enjoy the properties to the defendants, but, on the other hand, there was an anxiety on the part of all the landlords that the defendants must give up the premises by a certain date at the very latest. We do not usually find in the leases any such provisions that the defendants might use and occupy the premises and the landlords would not object to the said use and occupation. But such language was used in the decree which was passed in suit No. 166 of 1947.

33. Moreover, if we turn to the consent decrees, we do not find any terms suggestive of certainty of time or period (the question of transfer in perpetuity does not arise in any of these cases). Indeed, the language on this point is indicative of the contrary, that is to say, there was no certainty of time provided. The words "the defendant do vacate and cause to be vacated the house in suit by 22-10-1949, and give possession to the plaintiff" read with the words "the defendant do pay to the plaintiff regularly every month on 5-11-1947, and on the fifth of every month thereafter till the house in suit is handed over" would clearly show that if the defendant had vacated the property before 22-10-1949, the plaintiff would only have been too glad.

The defendant was certainly at liberty to quit the premises before October 22, 1949. The words in the decree which were passed in suit No. 1459 of 1946 are even clearer. The words are: "The defendant do vacate and give vacant possession etc., etc., at the end of or before two years from 1-2-1947 to the plaintiff". These words clearly show that the defendant was at perfect liberty to quit the premises at any time within the above-mentioned space of two years. Then there are the further words in this decree and those words are: "For the portion 1-B comprising the ground floor and the first floor of one storey building, the defendant shall pay Rs. 20 per month for its use and occupation from 1-2-1947, till possession."

These words would also show that the defendant was at liberty to quit the premises at any time within the aforesaid space of two years. The Words in the decree which was passed, in suit No. 166 of 1947 are : "The defendant should vacate the suit premises on 31-1-1952". But these words are to be read with the

further words "the defendant should pay to the plaintiff mesne profits in substitution of rent every month for use and occupation of the premises from the date of the suit till he vacates the premises etc., etc." These words also again must undoubtedly suggest that the defendant was at liberty to quit the premises any time before 31-1-1952.

Thus, there was no certainty of time provided in any of the consent decrees. In this manner, the next important ingredient which could make the transaction a lease was also wanting in all these cases.

34. I have already said that the consideration in all these cases was a promise by the tenants that they would vacate the premises within the time limits provided for in the decrees. Thus, even if we do not look at the surrounding circumstances and even if we pay little attention to the doctrine of intention, it is clear that none of the ingredients of Section 105 is satisfied here.

35. I, therefore, agree with my learned brother that the consent decrees did not create leases. Then what was it that was created? I do not think I am called upon to answer that question.

36. Order accordingly.