

(1981) 06 GUJ CK 0008
In the Gujarat High Court

Case No : First Appeal No's. 380 and 596 of 1977

Ratilal Dosabhai Tanna

APPELLANT

Vs

Abdul Husein Hasanali and Another

RESPONDENT

Date of Decision : 22-06-1981

Acts Referred:

Easements Act, 1882 — Section 52
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1982 Guj 266 : (1982) 2 GLR 140

Hon'ble Judges : S.L. Talati, J; D.H. Shukla, J

Bench : Division Bench

Advocate : Arun H. Mehta, for V.B. Patel, for the Appellant; D.L. Kothari and R.D. Kothari, for the Respondent

Judgement

S.L. Talatt, J.—There is a house property bearing No. 453 on plot No. 12 at Rajkot and the property is known as "Manoramy". The plaintiffs are the brothers and the defendant wanted to sell the above property. The plaintiffs' case is that on 10-5-1968 an agreement was entered into between the parties by which the plaintiffs agreed to purchase the property for a sum of Rupees 1,10,000/-. That document is at Ext. 120. On that date two months' time was fixed for executing the sale deed. However, the defendant wanted a sum of Rs. 35,000/- which the defendant wanted to pay to the Co-operative Bank as the title-deeds were lying with the bank and the defendant had borrowed money. The plaintiffs' further case is that the defendant approached for the above sum and they were not willing to part with the sum of Rs. 35,000/- as two months' time was fixed initially for executing the document. The defendant thereupon agreed to execute the sale deed at the earliest and, therefore, the sum of Rs. 35,000/- was paid on 16-5-1968. Ultimately this sale deed was executed on 18-5-1968 and it was presented for registration. However, the document could not be registered on that day as the Sub-Registrar insisted for production of Income Tax clearance certificate. The defendant applied for the same and ultimately got the same on 15-11-1968. The document came to be registered on 17-7-1969. That document

is at Ext- 122. On the day on which the sale deed was executed, another agreement was entered into between the parties and that document is Ext. 123. The plaintiffs, case is that the defendant wanted time for the Purpose of handing over possession of the suit Property and, therefore, Ext. 123 was entered into and according to the plaintiffs' case it is a document of license. The plaintiffs in the beginning hesitated for giving time and ultimately the defendant agreed to deposit a sum of Rs. 50,000/- for due performance of the contract. According to the plaintiffs the defendant agreed to hand over the possession of the suit property on 10-2-1969. The defendant did -not hand over possession on 10-2-1969 as per document Exhibit 123 and on 14-2-1969 the plaintiffs sent a telegram Ext. 89. A notice was also addressed by the plaintiffs to the defendant which is produced at Ext. 90. The defendant gave reply on 1-3-1969 by sending a telegram which is at Ext. 92. The defendant also sent a reply on the next day i. e. on 2-3-1969 and that reply is at Ext. 93. Thereafter the plaintiffs gave a counter-reply on 10-3-1969 which is at Ext. 94. Thereafter on 28-3-1969 the plaintiffs filed Special Civil Suit No. 29 of 1969 in the Court of Civil Judge (S. D) at Rajkot. The plaintiffs claimed possession of the suit property and they prayed for mandatory injunction, asking the defendant to remove himself and his belongings and his family members and dependants and his agents and servants from the suit premises. A permanent prohibitory injunction was also prayed for. The plaintiffs also prayed for compensation at the rate of Rs. 1,000/- per month from 10-2-1969 till the possession of the suit premises was handed over. The mesne profits at the rate of Rs. 1,000/- were calculated from 10-2-1969 till 28-3-1969 the date on which the suit was filed and a sum of Rs. 1632/- was claimed. The plaintiffs also prayed for the damages and the damages were calculated at the rate of Rs. 500/- per month from 1-3-1975. An amount of Rs. 26,100/- was claimed as damages and they were calculated at the rate of Rs. 500/- per month as paid to Mrs. Vidyagauri N. Mehta. The amount was subdivided and Rs. 3,600/- were calculated till 31-5-1971 and Rs. 22,500/- were calculated from 1-6-1971 till 28-2-1975 and from 1-3-1975 a sum of Rs. 500/- per month was claimed.

2-8. xx xx xx xx

9. The next question which is required to be considered is whether the defendant is tenant of the suit property from 18-5-1968. The case of the plaintiffs is that the defendant is a licensee. This is a question of considerable importance and the arguments were advanced at great length and, therefore, this question is required to be examined closely. According to the learned advocate Shri. Mehta though in the document Exh. 122 it was mentioned that vacant possession was handed over, in fact no possession was handed over and at that time Exh, 123 was entered -into between the parties. Exhibit 123 is dated 18-5-1968. It is signed by the plaintiffs and the defendant. In para 1 of that document it is stated that the suit property is sold and vacant possession is handed over. It is further mentioned that the suit house was given for use on request up to 10-2-1969 and that the defendant was to use that property as licensee and permission was

granted till that date. It was also stated that the suit property was to be handed over to the plaintiffs on or before 10-2-1969 and it was further mentioned that a cheque for a sum of Rs. 50,000/- was handed over to the plaintiffs by the defendants as a deposit for due performance of that assurance. The document further provided that if vacant possession was not handed over on due date and the plaintiffs had to go to the Court for obtaining possession, an amount of Rs. 50,000/- which was kept as deposit would be forfeited as damages, licence fee and for breach of the contract. It was further provided that till vacant possession was handed over a sum of Rs. 1,000/- per month would be paid as mesne profits from 10-2-1969 if possession was not handed over on that date. It was also provided that fans, geyser, electric motor, fixtures and fittings were to be kept in the same condition in which they were and the plaintiffs were owners and the defendant would keep them in good condition and up to 10-2-1969 those fixtures, geyser, electric motor etc. are given to the defendant for use on request and no charge was to be taken for the use of those articles. It was also provided that if vacant possession was not handed over on 10-2-1969 mesne profits of Rs. 1,000/- per month which was fixed would also include mesne profits for the above fixtures. The document further, provided that for a period beginning from 18-5-1968 to 10-2-1969 the suit property was given for use and for the use of that property no damages or licence fee was to be charged. The document also provided that the plaintiffs would keep a sum of Rupees 50,000/- as deposit and would not pay any interest on that amount from 18-5-1968 to 10-2-1969 and if possession was not handed over on 10-2-1969 an amount of Rs. 50,000/- would stand forfeited and, therefore, the question of paying any interest over that amount after that period would not survive. The last clause provided that if possession was handed over on any date prior to 10-2-1969 the deposit amount of Rs. 50,000/- was to be returned and receipt obtained. Now this is a document which is required to be interpreted and according to the plaintiffs this is a document which creates a license while according to the defendant this document creates a lease in his favour. On behalf of the plaintiffs, plaintiff No. 1 gave his evidence at Exh. 120, Hargovind broker is examined at Exh. 133 and the scribe of the document Jayasukhlal Pathak is examined at Exh. 134. A clerk from the office of the Sub-Registrar is examined at Exh. 139 and Vrajlal Kanji, Administrator of the property of Mrs. Vijaygauri is examined at Exh. 135. The defendant gave his evidence at Exh. 142. Prior to filing of the suit there is notice correspondence and the first notice is given by the plaintiffs to the defendant and it is at Exh. 89, dated 14-2-1969. In that notice, the plaintiffs stated that they had purchased the property and that the defendant was occupying the said premises as licensee from 18-5-1968 till 10-2-1969 as per the terms of the license. It is also mentioned that the term of license expired by efflux of time. Further mention was that in spite of repeated demands as vacant possession was not handed over on or before 10-2-1969, a breach of contract was committed and the amount of Rs. 50,000/- deposited by the defendant with the plaintiffs for fulfilment of the contract had been adjusted as license fee for the use and occupation of the suit building together with electric fittings and fixtures from

15-8-1968 to 10-2-1969 as well as had been adjusted towards compensation and damages for committing breach of the contract as per terms of the agreement. It was specifically stated that that amount was forfeited and the defendant had no right to recover the same from the plaintiffs. The defendant by that notice was treated as the trespasser and he was asked to hand over possession. A detailed registered notice was sent on the same day which is produced at Exh. 90. The reply given by the defendant by telegram is Exh. 92 and the reply given by post is at Exh. 93. The defendant took up a stand that no possession was handed over when the sale deed was executed and the sale deed dated 18-5-1968 was incomplete for want of full consideration. Therefore, the sale deed was infructuous, invalid, vague and not binding. It was stated that the sale price contracted was Rs. 1,10,000/- while the defendant received only Rs. 60,000/-. Under, these circumstances, according to the defendant there was no question of breach of contract and no question arose for handing over possession of the suit premises. Now it may here be stated that in the notice correspondence the defendant did not take up the plea that he was a tenant. According to the notice correspondence the case of the defendant was that the plaintiffs never became owners and possession was never handed over to the plaintiffs and that the defendant continued to be the owner inasmuch as full consideration was not paid. For the first time the defendant took up the contention in the written statement Exh. 115 that he was a tenant. That was also an alternative plea. In the written statement also the first contention was that the plaintiffs were not owners as consideration was not fully paid and possession was not handed over. Alternatively, however, the defendant took up the contention that he was a tenant.

10. Now, plaintiff No. 1 who gave his evidence at Exh. 120 stated that after the sale deed was executed and handed over to the Sub-Registrar for registration, the parties went to the suit property and it was for the purpose of obtaining possession. At that point of time according to plaintiff No. 1 the defendant made a request that on the adjoining plot he was constructing the house and it was likely to be completed within a period of nine months. That, therefore, he should be given time for nine months for handing over possession. According to plaintiff No. 1, the defendant is a Barrister at Law and he is practising at Rajkot. He trusted defendant's word and ultimately the document at Exh. 123 was entered into. The learned advocate Shri. Mehta submitted that though in the agreement of sale, Exh. 121 it was mentioned that vacant possession was to be handed over within sixty days and though in the sale deed Exh. 122 it was mentioned that vacant possession was handed over and though in Exh. 123 it was mentioned that vacant possession was handed over to the plaintiffs in reality the defendant continued to be in possession. According to the learned advocate Shri. Mehta the defendant continued to be in possession and his possession was exclusive and as the defendant was in exclusive possession, interest in the property was created and, therefore, the defendant become a tenant. The learned advocate Shri. Mehta cited four rulings which we will refer in order to appreciate his arguments

and the evidence on record.

11. The first case cited by Mr. Mehta is a case *Harshadrai Raghanathji Desai v. Paragji Hirabhai* reported in (1961) 2 Guj LR 505. It was held in that authority as under:-

"That in the case of a licence as defined in S. 52 of the Easements Act, there is a right to do or continue to do, in or upon the Immovable property of the grantor something, which does not amount to an easement or interest in property, Whereas in the case of "lease", as defined in S. 105 of the T. P. Act, there is a right to enjoy such property and not merely to do something in or upon the property.

That what is important is the real intention of the parties to the transaction, the substance of the document and not merely the form of the document which embodied the transaction.

That the parties to a transaction cannot turn a lease into a licence merely by stating that one of the parties is a licensee and that the transaction is a licence. The term that the owner can come into land and bungalow whenever he wishes is not inconsistent with a lease."

12. Relying upon a case of *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, it was observed as under :-

"The essential requirements of the lease are therefore, (1) there should be a transfer of a right to enjoy immovable property: (2) it should be for a certain time, express or implied, or in perpetuity; and (3) it should be 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 special occasions to the transferor by the transferee. The right to enjoy immovable property would of course amount to an interest in the immovable property."

That was a case where the real controversy between the parties was upon the first requirement viz. whether there was or was not a transfer of right to enjoy such property. It was also observed as under:-

"To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form, (2) the real test is the intention of the parties whether they intend to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease, but if it only permits another to make " use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, "prima facie", he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease."

13. In the case referred to above there was an agreement and Cls. 3 and 4 of that agreement read as under:-

"3. We are to make use of your land and bungalow as a licensee for 10 years. If we fail to pay you Rs. 526/- regularly every year, you are entitled to recover the possession before the expiry of the term and you are entitled to recover from us any damages which you incur.

4. If under any circumstances, we deliver possession to you within 10 years, you can take damages at the rate of Rs. 526/- per year for the unexpired period and we are liable to pay the same."

On these facts it was held that that document was a document of lease.

14. The second authority cited by the learned advocate Mr. Mehta is a case Virji Lavji Makwana Vs. Partners of Business Running in the Name of Rainbow Screen Shades and Others, . There was a document and

there was a stipulation to restore possession on the expiry of 11 months. In para 5 of that judgment it was observed as under :-

"5. A genuine relationship of licensor and licensee can conceivably arise in the following circumstances :

(1) A property owner may have an occasion to oblige a relation or friend in need of accommodation and in view of the special relationship may grant the premises for temporary use without intending to create a lease so that the premises not needed by him at the moment may not remain idle Whilst his needy friend or relative us era avoidable hardship;

(2) An owner of property may suddenly have an occasion to go to some other place for a temporary period and instead of allowing the premises to remain idle he permits some one in whom he has trust to occupy the same to meet the temporary need of the latter which may coincide with his own temporary period of absence."

On facts it was held that there was no special relationship between the appellant and the respondents and there were no special circumstances. The further fact was that before expiry of 11 months provided in the agreement Exh. 16, the plaintiff had served a notice on the defendants through his advocate wherein reference was made to a proposal for executing a fresh agreement of leave and license for a further period of eleven months, and it was stated therein that as the defendants had refused to sign the fresh agreement, the plaintiff was obliged to revoke the licence.

15. The third case on which reliance is placed is a case Associated Hotels of India Ltd. Vs. R.N. Kapoor, . The facts were, the Associated Hotels of India Ltd., were the proprietors of Hotel Imperial, New Delhi. R. N. Kapoor was in occupation of two rooms described as ladies" and gentlemen"s cloak rooms, and carried on his business as a hair-dresser. He secured possession of the said rooms under a deed dated 1-5-1949, executed by him and the appellants. He got into possession of the said rooms, agreeing to pay a sum of Rupees 9,600/- a year

i.e. Rs. 800/- per month, but later on, by mutual consent, the annual payment was reduced to Rs. 8,400/- i. e. Rs. 700/- per month. The document was described as deed of licence and the parties were described as licensor and licensee. There were several terms embodied in the document and the important terms to which we would like to refer, are conditions Nos. 4 and 8 which read as under:-

"4. That the licensee shall have the opportunity of further extension of the period of license after the expiry of one year at the option of the licensor on the same terms and conditions but in any case the licensee shall intimate their desire for an extension at least three months prior to the expiry of one year from the date of the execution of this Deed."

"8. That in ran the licensees for reasons beyond their control are forced to close their business in Delhi, the licensor agrees that during the remaining period the license shall be transferred to any person with the consent and approval of the licensor subject to charges so obtained not exceeding the monthly charge of Rs. 800."

It was held that the document though uses phraseology "appropriate to licence" but in substance it "was a lease because it is the substance of the agreement that matters and not the form, for otherwise clever drafting can camouflage the real intention of the parties. After discussing several English Authorities it was observed as under:-

"The result of all these cases is that, although a person who is let into exclusive possession is, "prima facie", to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

The observation of Denning L. J. was quoted which runs as under:-

"The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land ?"

The following propositions, therefore, were taken as well established :-

"(1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties - whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, "prima facie", he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease."

It was further observed as under :-

"The covenants are those that are usually found or expected to be included in a lease deed. The right of the respondent to transfer his interest under the document, although with the consent of the appellants, is destructive of any theory of licence."

16. The fourth case is a case of Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh, . The facts found were that the respondent constructed the building known as the Hotel Imperial, Now Delhi on land leased to him by the Secretary of State for India in Council under a perpetual lease deed dated July 9, 1937. By a deed dated Aug. 18, 1939, he leased the appellant the hotel premises together with fittings and furniture for a term of 20 years commencing on Sept. 15, 1939. On Jan. 28, 1958, the respondent instituted the present suit alleging that in breach of the express conditions of the lease dated Aug. 18, 1939, the appellant sublet portions of the premises and made unauthorised additions and alterations in the premises, that on such breaches he was entitled to determine the lease and he did so by notice in writing dated Jan. 6, 1958. The two Courts concurrently found that the appellant had sublet several rooms, counters, showcases and garages. The two Courts found that the appellant had sublet rooms to (1) Pan American World Airways, (2) Mercury Travels, India (Private) Ltd., travel agents, (3) Indian Art Emporium, dealers in curios and jewellery, (4) Shanti Vijay and Co.; dealers in jewellery, (5) Roy and James, hairdressers, (6) Sita World Travels, travel agents and (7) Ranee Silk Shop, dealers in saris and curios. The businesses of the sublessees were not confined to the residents of the hotel. The letting to Pan American World Airways and Indian Art Emporium were before commencement of the Act and the lettings to Mercury Travels, Shanti Vijay and Co., and Roy and James were after the commencement of the Act. The concurrent finding is that the occupants were given exclusive possession of the rooms occupied by them. The appellant did not retain any control and dominion over the rooms. According to the respondents, the documents were not genuine and the real agreements were being withheld. The stamp auditor noted on the documents the deficiency in stamps and penalty leviable on them on the footing that they were lease deeds. The appellant did not contest the note nor paid the penalty and deficiency as directed by the trial Court. The surprising feature of the case was that the appellant did not attempt to prove any of the documents. Where the agreement was in writing, it was a question of construction of the agreement whether the grant was a lease or a license. It was for the appellant to prove the written agreements, and the Court could then construe them. The appellant did not bring before the Court the best and the primary evidence of the terms on which the apartments were being occupied. It was also observed that the test of exclusive possession though not conclusive was a very important indication in favour of tenancy.

17. Relying on the aforesaid four authorities stated above the learned advocate Mr. Mehta submitted that the defendant continued to be in exclusive possession throughout and he never parted with the possession. Interest in immovable property, therefore, was created and the document Exh. 123 was a clear lease

deed. It was also submitted that there was clever drafting and though a sum of Rs. 50,000/- was deposited with the plaintiffs no interest was to be charged and that was the consideration for occupying the suit house for a period from 18-5-1968 to 10-2-1969. This was drafted in negative manner. Having carefully considered the above rulings and the arguments advanced by the learned advocate Shri Mehta we have to state that there are several circumstances in which go to show that the defendant was a licensee. The first important circumstance is that the plaintiffs wanted to purchase the suit house for their residence. Normally, therefore, they would require the defendant to hand over the possession. From the evidence there is nothing to show that the plaintiffs were investors in the immovable property and that they purchased the property for the purpose of realising rent by leasing out the property. In documents Exhs. 121, 122 and 123 it is clearly mentioned that the possession was handed over and that the vacant possession was handed over. In Exh. 121 it was mentioned that the possession was to be handed over within a period of sixty days at the time when registered sale deed is executed and in documents Exhs. 122 and 123 it is clearly stated that the vacant possession was handed over. The evidence though shows that in reality the defendant never took out his belongings and that the actual vacant possession was not handed over, it clearly appears that in law constructive possession was handed over, and the document Exh. 123 clearly recites that fans, geyser and other articles were kept in the suit property which the defendant was obliged by the document to keep in his custody. This would mean that for all those articles nothing was to be charged and the plaintiffs retained their control over those articles and the defendant permitted to use them and return them in proper condition. Another circumstance which is of great importance is that the defendant is a practising Bar-at-law. It cannot be and in fact it was not suggested for a moment that he did not understand the distinction between the lease and the licence. He, with open eyes, entered into an agreement Exh. 123 which in clear and unequivocal terms stated that the license was being created in his favour for a fixed period. The document Exh. 123 further shows that a sum of Rs. 50,000/- was deposited with the plaintiffs for due performance of the agreement, Exh. 123 by which the defendant was obliged to hand over the possession on 10-2-1969. Such a condition would normally not exist if the agreement is not between the licensor and the licensee, but it is between a landlord and a tenant. In fact the evidence disclosed that the defendant was constructing a house for himself and, therefore, he wanted accommodation for a short period. This was estimated at nine months. He was, therefore, given permission to use the house for a period of nine months. The plaintiffs were hesitant and, therefore, they took a sum of Rs.50,000/- as deposit for due performance

of the contract. It also appears from the evidence that the defendant did construct a house but he sold away that house in the year 1970. As we have observed earlier, in the notice correspondence the defendant never took up the contention that he was a lessee. His contention in the notice correspondence

throughout remained that he was the owner and that the ownership rights never passed to the plaintiffs. Now, therefore, if we consider the circumstances existing in this particular case it appears that the relationship between the parties existed as that of the vendor and the vendee. The plaintiffs paid a large sum of money for the purpose of getting exclusive possession of the house in order that they may reside in that house. It has come out in evidence that the plaintiffs who are two real brothers were residing with the third brother and as they could not get possession from the defendant, plaintiff No. 2 had to purchase another house and plaintiff No. 1 had to get a house on rent and he paid Rs. 500/- per month to Smt Vidyagauri. This evidence would show that the two plaintiffs were in need of a house for their own residence and, therefore, they paid a large sum. Under these circumstances they would never create a lease. The other circumstances are that the defendant was in need of a house for a short period because he was constructing his own house in the neighbouring plot and his estimate was that he would be able to complete the house within a period of nine months. If for that period the house was given to him for use the intention of the parties which is required to be gathered is that the plaintiffs only wanted the suit property for their residence. They never wanted to part with the property. However, they became willing to accommodate the defendant for a short period and in order that the defendant may not back out, a substantial sum was taken from him as deposit viz. a sum of Rs. 50,000/-. Under the above circumstances, therefore, even if one were to come to the conclusion that the defendant was in exclusive possession of the suit property that would be only a prima facie evidence to show that he was a tenant but all other circumstances put together would negative and show that the intention of the parties was to create a licence. With this background we have gone through the evidence of the defendant who is examined at Ext. 142. In his evidence in para 18 he stated that for occupying the premises as licensee the period was up to 10-2-1969 and that is correct. In para 19 he stated that whatever the understanding was in licence deed, Exh. 123, the parties had to act accordingly. With these admissions a person who is practising Bar-at-law cannot suggest that he did not understand the implications of the document which he was passing. The further admission of the defendant is in his examination-in-chief. He stated that when sale deed was to be drafted by Shri J. D. Pathak there was a talk about possession. At that time it was stated that as the possession was not being handed over, a fixed amount has to be given as deposit. The defendant stated that he agreed to do so and asked the plaintiffs as to what should be done about the rent. The plaintiffs replied that they would not pass any rent note but the defendant would be a licensee. Ultimately according to the defendant it was agreed that he would pay Rs. 50,000/- as deposit and no interest would be charged and no rent would be charged meaning thereby that when talk of possession took place and when the defendant wanted accommodation for a short duration in that talk also the plaintiff clearly stated that no lease could be created and the defendant agreed to this. Now, therefore, a person well versed in law who knows the distinction between the lease and license agrees to become a licensee and pays a sum of Rs. 50,000/- as deposit

for due performance of the contract, he thereafter cannot be heard to say that the real intention was entirely different. The intention is to be gathered from the circumstances appearing in the case and all circumstances negative the idea that the lease was being created. All circumstances go to show that the defendant who was in need of accommodation for a short duration was being accommodated and for due performance of that contract he paid a large sum as deposit. As observed in the case of *Virji Lavji Makwana Vs. Partners of Business Running in the Name of Rainbow Screen Shades and Others*, it clearly appears that special relation existed between the parties and there were special circumstances and mere exclusive possession though prima facie evidence of lease is negated by overwhelming evidence on record.

18. The learned advocate Shri Kothari also relied upon the two authorities and the first case cited by him is *Qudrat Ullah Vs. Municipal Board, Bareilly*, . There also the observation is as under:-

"Whether a deed is a lease or a licence depends on the intention of the parties. If an interest in immovable property entitling the transferor to enjoyment is created it is a lease, if permission to use land without right to exclusive possession is alone granted it is a license."

The important observations in para 7 run as under:-

"There is no simple litmus test to distinguish a lease as defined in Section 105, T. P. Act from a license as defined in Section 52, Easements Act, but the character of the transaction turns on the operative intent of the parties. To put it pithily, if an interest in immovable property, entitling the transferors to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a license is the legal result. Marginal variations to this broad statement are possible and Exs. "1" and "4" fall in the grey area of unclear recitals. The law on the point has been stated by this Court in the *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, ". Thereafter some passages are quoted from Halsbury's Laws of England, Vol. 23. The important clauses which are of some bearing are as under :-

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

"1023. Nature of grant of exclusive possession. The fact that the agreement grants a right of exclusive possession is not in itself conclusive evidence of the existence of a tenancy, but it is a consideration of the first importance.

In deciding whether a grantee is entitled to exclusive possession regard must be had to the substance of the agreement. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee requires that he should have, exclusive possession.

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

19. Another judgment on which reliance was placed by the learned advocate Shri Kothari was a case of Board of Revenue and Others Vs. A.M. Ansari and Others, . In para 10 of that judgment it has been observed as under:-

"A close study of the above definition shows that it is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of Intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential, therefore, to look to the substance and essence of the agreement and not to its form."

In the same para it has been observed as under:-

"At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in Errington v. Errington (1952) 1 All ER 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at page 155 :

"The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy".

Another quotation of Denning L. J. was taken down in that judgment which was from page 1202. The said quotation runs as under:-

"The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land ?"

"The following propositions may, therefore, be taken as well-established : (1) To

ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, "prima facie" he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease".

20. The learned advocate Shri Kothari also cited a case *Heslop v. Burns* reported in (1974) 3 All ER 406. At page 415 it has been observed as under :-

"In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement an act of friendship or generosity, or such like, to negative any intention to create a tenancy."

The result of all the above authorities with the evidence on record would go to show that it was, an act of generosity on the part of the plaintiffs that they allowed the defendant to continue in possession for a particular period up to 10-2-1969 in order that he may be able to construct his own house and thus he may not be put to inconvenience during the period he is constructing the house and thereafter without any inconvenience gets into his own property and hands over vacant possession of the property which he had sold and which he continued to occupy out of generosity.

21. The learned advocate Sbri Mehta drew our attention to the document Exh. 123 and he tried to show that that document was interpolated. In last para of that document originally the day mentioned was "Friday" and the date mentioned was "17th" and Gujarati date was mentioned as "6th". All the three are overwritten and "Friday" is changed to "Saturday", "17th" is changed to "18th" and Gujarati date "6th" is changed to "7th". We may say that this document is on a stamp paper which was purchased on 18-5-1968. Therefore, it was impossible to prepare or type that document on 17-5-1968. The scribe of the document gave explanation that looking at the calendar he mentioned the date 17th and the signatories to the document deposed that at the time of making signatures they realised that the date was not correct and, therefore, before signing they changed the same. One thing is clear that the stamp paper was dated 18-5-1968 and, therefore, the document could never have been typed or prepared for signature before 18-5-1968. Therefore, it cannot be suggested for a moment that that document was prepared or typed on 17-5-1968. It may be that the theory of the scribe that he looked at the calendar and mentioned the date, may not be correct. it is more likely that on 17-5-1968 a rough draft was prepared which was being typed on 18-5-1968 and as rough draft must have mentioned the date 17th and no intelligence was required for the purpose of copying, the same date was typed. But when the signatories were to sign the document they

immediately realised that there was a mistake and they corrected it. Therefore, mere change of date in document Exh. 123 would not help the defendant. The learned advocate Shri Mehta submitted that Exh. 121 was prepared on 10-5-1968. Thereafter on 16-5-1968 Rs. 35,000/- were paid to the plaintiffs. On 18-5-1968, the sale deed was executed and on the same date agreement Exh. 123 was prepared in which time up to 10-2-1969 was given. He submitted that 10th of February must have relation to 10th May, and exactly from 10th May, 1969 nine months were calculated and, therefore, the learned advocate Shri Mehta submitted that everything between the parties was agreed not on 18-5-1969 as suggested, but on 10-5-1968 and there was package deal between the plaintiffs and the defendant and as a result of the package deal all the documents were prepared. In spite of this fact the learned advocate Shri Mehta submitted that the plaintiffs came out with false evidence and according to plaintiff No. 1, Abdulla, Exh. 120 he stated in Court that after the document Exh. 122 was executed, the parties went to the suit property and at that time for the first time talk took place regarding possession and thereafter document Exh. 123 was prepared. That theory of plaintiff No. 1 was required to be rejected and, therefore, according to the learned advocate Shri Mehta when the plaintiff is giving false evidence, his evidence was required to be rejected in toto and in view of this situation when the theory of the plaintiff is required to be rejected, the document Exh. 123 must be held to be void. We cannot agree to this suggestion for several reasons. The first reason is that it does not appear to us that on 10-5-1968 any package deal could have been in existence. If that was the situation sixty days' time would not have been given in the document, Exh. 121 which was prepared on 10-5-1968. It appears that on 16-5-1968 the defendant approached the plaintiffs or their broker and demanded a sum of Rs. 35,000/- which he was required to give to Nagrik Cooperative Bank for the purpose of obtaining title-deeds. At that time the plaintiffs were not willing to give that amount and at that point of time the defendant agreed to pass sale deed earlier. It could be possible, therefore, that on 16-5-1968 a package deal might have come into existence and the parties did not go to the trial Court with full correct facts but the point that is required to be determined is as to what was the intention of the parties when they entered into an agreement Exh. 123 or what was the intention of the parties when they decided to bring about an agreement, Exh. 123 ? Are we to hold that the plaintiffs who had agreed to purchase the house for their own personal use by paying consideration of Rs. 1,10,000/-, abruptly either, on 16-5-1968 or on 18-5-1968 changed their intention and their intention was changed to such an extent that they decided that they did not now desire to have the property for personal use but that they would purchase the property for leasing out the same? Are there any circumstances on record which would go to suggest that the plaintiffs changed intention in that fashion? If we dealt with the intention of the defendant he decided to sell the property. He, therefore, knew that he was to hand over possession. He had therefore, started constructing his property on the neighbouring plot. He had, therefore, a desire to hand over possession of the

property which he was selling and ultimately occupying the property which he was constructing. Did he overnight change his intention that after constructing his new property he would sell away the property and that he would not hand over possession to the plaintiffs and that he would become the tenant in the property? The answers must be that the parties did not change their intention. The first party wanted the property for personal occupation and the second party wanted time in order that he may be able to ultimately vacate and occupy the property which he was constructing. Out of generosity the plaintiffs gave time. The plaintiffs had fear and because of that fear the plaintiffs demanded a sum of Rs. 50,000/- being security for due performance of the contract at that particular point of time the defendant had good intentions. He was sure that he was going to hand over possession on 10-2-1969 and, therefore, even though Exhibit 123 contained a condition that in case possession is not handed over on 10-2-1969, an amount of Rs. 50,000/- would be forfeited, the parties entered into an agreement of licence on 10-2-1969. So with good clear intentions the parties entered into an agreement of licence on 10-2-1969 and for the best reasons known to the defendant, the defendant decided ultimately on 10-2-1969 that he would not hand over possession. Under these circumstances the intention of the parties we have gathered not only from the document, not only from the evidence on record, but from all the circumstances existing on record and we are of the clear opinion that on the date on which the document Exh. 123 was signed the parties had a clear intention not to create interest in the property in favour of the defendant but to create a licence and out of generosity accommodated the defendant for a fixed period.

22-30. x x x 31. Order accordingly.