
(1983) 08 BOM CK 0001
In the Bombay High Court
Case No : Appeal No. 102 of 1978

Vasudeo Mirchumal Devjani and others APPELLANT
Vs
Hindustan Chemical Works Ltd. and another RESPONDENT

Date of Decision : 31-08-1983

Acts Referred:

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

Citation : (1984) MhLj 503

Hon'ble Judges : M.N. Chandurkar, Acting C.J.; D.M. Rege, J

Bench : Division Bench

Advocate : I.S. Khemani, for the Appellant; V.C. Kotwal with G.J. Desai and Prashant Thakkar, for the Respondent

Judgement

M.N. Chandurkar, Actg.C.J.

1. This is an appeal by the heirs of the original plaintiff whose suit for possession of Flat 12A in a building known as Punam, 67 Nepean Sea Road, Bombay-400006, has been dismissed by the learned Single Judge.

2. According to the plaintiff, the said flat was allowed to be used by the first defendant which is a public limited company, of which defendant No. 2 is the Managing Director, for a period of 11 months on terms and conditions set out in the agreement of leave and licence dated 25th June 1963. This agreement was valid for a period of 11 months commencing from 1st July 1963 to May 1964 and for a further period of two years at the option of the licensee. The plaintiff's allegation was that the licence under the agreement came to an end on 31st May 1966 or, in any case, it was terminated by the plaintiff's Advocate's letters dated 8th June 1966 and 30th June 1966. The plaintiff, therefore, claimed possession of the said flat and arrears of compensation and mesne profits in the suit filed by him.

3. The Defendant's case is that the flat was let out to the defendants on rental

basis for the residence of defendant No. 2. The defendants agreed to pay a monthly rent of Rs. 950 in respect of the said flat. The case of the defendants further is that the plaintiff represented to the defendants that the defendants would be the tenants of the plaintiff and believing the aforesaid representations to be true, they agreed to execute the said agreement in the form of leave and licence as requested by the plaintiff. In other words, the plea taken is that the agreement of leave and licence does not represent the true and real agreement between the parties, which is one of monthly tenancy of the said flat. Alternatively, the case pleaded was that the said purported agreement of leave and licence created relationship of landlord and tenant between the plaintiff and the defendants in respect of the said flat.

4. The two questions which fell for determination before the learned single Judge were:

(1) Whether the original plaintiff agreed to let out the said flat to the first defendants, and

(2) Whether the agreement creates a relationship of landlord and tenant between the plaintiff and the first defendants.

5. The only witnesses examined before the trial Court were defendant No. 2, one Kotwal, who was working in the Advertisement Department in The Times of India since 1952, and the appellant No. 4.

6. In the course of evidence, defendant No. 2 stated that he had read an advertisement in The Times of India that the said flat was to be let out, the advertisement being Ex. 3 produced by witness Kotwal, and when he went to inspect the said flat, he found a broker by name Prakash there. According to defendant No. 2, he went later to the broker's office where the broker told him that the flat was to be let out at Rs. 1000 per month and that the landlord, that is, the plaintiff was in Goa and was not likely to return but that defendant No. 2 could see the plaintiff's uncle by name Bagumal. Defendant No. 2 stated that Bagumal had reduced the rent to Rs. 950 per month and he produced a draft of the leave and licence agreement whereupon defendant No. 2 declined to enter into the leave and licence agreement as he was interested only in taking the flat on rental basis. The conversation between Bagumal and defendant No. 2, in the words of defendant No. 2, was as follows:?

Bagumal then told me that the original plaintiff was never going to return to Bombay and I would never have to vacate the flat. He said I would be in exclusive possession and that the agreement would be renewed every two years. I told him not to ask for any water charges as those were only payable by lessees and not by a tenant and he agreed. He also agreed that I would never be required to become a member of the Co-operative Society of Punam when it was formed.

According to defendant No. 2, when he agreed to these terms, Bagumal told him

that the draft agreement would be sent to Goa for the plaintiff's approval and for engrossment and stamping. Defendant No. 2 had admitted in cross-examination that he had never met the original plaintiff and when he made a statement in the written statement that the original plaintiff had made some representations to him that the leave and licence agreement was not to be acted upon, the reference was to Bagumal. Defendant No. 2 admitted that Prakash, the broker, was alive and that he was present at the time when the talk with Bagumal had taken place.

7. When the suit reached the stage of trial before the learned single Judge, both the plaintiff and Bagumal were dead.

8. The learned single Judge declined to accept the case of the defendants that any oral representation was made that the leave and licence agreement would not be acted upon or that there was any agreement that the flat was to be let out by the original plaintiff to the first defendants. Having rejected this story of oral representation or the agreement of lease as pleaded, with Bagumal, the learned Judge proceeded to decide the question whether the agreement of leave and licence in fact and substance was an agreement to let out the flat. After referring to the decision of the Supreme Court in *Sohanlal Naraindas v. Laxmidas* 1971 Mh. LJ 604 =74 Bom. LR 144, the learned Judge considered five factors which indicated, according to him, that the agreement was intended to confer upon the first defendants a right to use and occupy the flat and not merely to give permission to the first defendants to do so. These factors were as follows:?

(1) There were clauses in the agreement which indicate that the first defendants were given exclusive possession of the said flat.

(2) The newspaper advertisement stating that the flat was to be let out.

(3) The transaction between the parties was purely a business transaction.

(4) The term of the agreement was in the first instance for a period of 11 months and an option was given to the first defendants to renew it for a further period of two years.

(5) The terms of the agreement and the undisputed position that the original plaintiff was residing in Goa, which indicated that the first defendants were to have the use of the flat for a long period of time.

In view of this finding, the trial Court held that this Court had no jurisdiction to entertain the suit and the suit was dismissed. The trial Court made no order as to costs of the suit. This dismissal of the suit is now challenged by the appellant in this appeal.

9. Mr. Khemani appearing on behalf of the appellants has contended that though the burden to prove that the first defendants were a tenant of the premises was rightly placed on the defendants, the learned Judge should have further held that this burden of proof had not been discharged and that the evidence in the case

did not warrant a finding that the first defendant was a tenant. The learned counsel contended that the finding with regard to exclusive possession is an erroneous finding because the learned Judge has failed to consider several clauses in the agreement, which indicate that the defendants were not in exclusive possession of the flat. With regard to the advertisement, it was pointed out that it was not true that the plaintiff had inserted the advertisement and, according to the learned counsel, the fact that the transaction was a business transaction showed that the initial period of the agreement was 11 months and there was an option to continue in possession for a further period of two years and this by itself did not indicate that the agreement should be construed as one of tenancy.

10. Mr. Kotwal appearing on behalf of the defendants has contended before us that undoubtedly the defendants have stated in their written statement that the representation that the agreement of leave and licence was not intended to be acted upon was made by the plaintiff, but, according to the learned counsel, those averments must be read as meaning that the representations were made by the plaintiff's agent, that is, Bagumal, in the first instance, and the plaintiff's broker also. The learned counsel wanted to argue that it has not been disputed that Bagumal and Prakash were agents of the plaintiff. According to Mr. Kotwal, even assuming that the defendants failed in their case of the alleged representation that the agreement of leave and licence was not intended to be acted upon, the defendants were still entitled to argue that on a reading of the agreement, the agreement must be construed as an agreement which creates tenancy though it is styled as an agreement of leave and licence. Some decisions on which reliance was placed in support of the contention that the agreement in question should be construed as an agreement of lease will be referred to later.

11. Now, the defendants have specifically pleaded in their written statement that the representation that the agreement of leave and licence, which defendants No. 1 were required to execute, will not be acted upon was made by the plaintiff himself. In paragraph 4 (b) of the written statement of defendants No. 1 the averment made is that "the plaintiff requested these defendants through defendant No. 2 that an agreement in terms of leave and licence should be executed between the plaintiff and these defendants so that the plaintiff could recover the rent of Rs. 950 per month". The reason given for the defendants being called upon to execute the agreement was that it was difficult to recover the rent of Rs. 950 per month in view of the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Bombay Rent Act"). It is further stated that "The plaintiff represented to these defendants that these defendants would be the tenant of the plaintiff and believing the aforesaid representations to be true, these defendants agreed to execute the said agreement in the form of leave and licence as requested by the plaintiff.....However, the real agreement between the plaintiff and these defendants (acting through defendant No. 2) was for monthly tenancy of the said flat at monthly rent of Rs. 950". These pleadings are very clear that the original

agreement of tenancy took place with the plaintiff and that it was the plaintiff who made a representation that notwithstanding the execution of the agreement of leave and licence, defendants No. 1 would be the tenant of the plaintiff. In the examination-in-chief itself the conversation with regard to tenancy is said to have taken place with Bagumal and the case made out was that it was Bagumal who asked him to sign the agreement. Defendant Mo. 2 had also admitted that he had never had any discussion with the original plaintiff. He had further stated that at the time the written statement was being prepared, he had told his legal advisors that he had discussions with Bagumal and not with the original plaintiff. In the face of this evidence, it is obvious that the learned Judge was right in rejecting the case of the defendants that any representation was made by the plaintiff. The obvious result of this finding would be that the representation alleged to have been made by the plaintiff that the parties had agreed that defendants No. 1 were to be a tenant of the plaintiff but that in order to secure a larger amount of rent the transaction had to be given the form of leave and licence by the agreement, must be held to be unsubstantiated.

12. It is also difficult to accept the argument of the learned counsel for the defendants that Bagumal and Prakash, the broker, must be held to be agents of the plaintiff. Whether a particular person is an agent of another or not is essentially a question of fact and if it is not pleaded by the defendants that either Bagumal or Prakash, the broker, was acting as the agent of the plaintiff, it is difficult to see how the defendants can now be permitted to argue that representations made by Prakash and Bagumal must be treated as binding on the plaintiff and, therefore, the defendants' case that there was an agreement of tenancy should be accepted.

13. It is surprising that the defendants did not think it worthwhile examining Prakash as their witness. Defendant No. 2 has admitted that Prakash was alive and that Prakash was present every time defendant No. 2 had a talk with Bagumal. Prakash would have been the best person to give evidence about the exact nature of the transaction. The burden to establish that the transaction was something different from what is represented by the agreement of leave and licence being on the defendants and Prakash being the only person alive apart from defendant No. 2, who had knowledge of the transaction, it was for the defendants to examine Prakash. It is true that the advertisement (Ex. No. 3) refers to Flat 12A being available on "rental/ownership basis", but there is no evidence to show who has put in this advertisement. Mr. Kotwal, who had produced the copy of the issue of The Times of India dated 18th May 1963, had to admit that he would not be able to say as to who paid for this advertisement. According to him, the advertiser has to sign the form asking that the particular advertisement should be inserted. He states that the records of 1963 have been destroyed. If the record relating to the advertisement is not available and Prakash was the person, according to defendant No. 2, who was contacted by defendant No. 2, then also, in our view, Prakash was a very material and relevant witness. Defendant No. 2 admitted that he knew the address of Prakash.

If in spite of this the defendants have failed to examine Prakash, who was a material and relevant witness, in our view-adverse inference was liable to be drawn against the defendants for non-examination of Prakash as a witness. An important question which was asked by the Court to defendant No. 2 was whether he ever ascertained from the original plaintiff that Bagumal was authorised to make the representations which, according to defendant No. 2, Bagumal had made. Defendant No. 2's answer was in the negative. In the face of this statement and in the absence of evidence of Prakash, it is even otherwise difficult to accept the argument of the learned counsel for the defendants that Bagumal and Prakash were the agents of the plaintiff or that any representations were made by them on behalf of the plaintiff, apart from the fact that this case is not pleaded in the written statement.

14. This brings us to the other and the most substantial contention advanced on behalf of the defendants that if the terms of the agreement in question are properly read, in the light of the surrounding circumstances the agreement should be construed as one of lease.

15. The surrounding circumstances, according to Mr. Kotwal, were:

- (1) that the plaintiff was at the material time in Goa,
- (2) that an advertisement that the flat was to be let out was published in The Times of India,
- (3) that the transaction was a business transaction in the sense that the plaintiff and defendant No. 2 were not related in any way.

So far as the second circumstance is concerned, we have already pointed out that there is no evidence to show that the plaintiff himself had inserted the advertisement (Ex. No. 3).

16. Mr. Kotwal has primarily relied upon the well-known decision of this Court in *Sohanlal Naraindas v. Laxmidas* 1966 Mh. LJ 649 =63 Bom. LR 400, and the decision of the Supreme Court in *Sohan Lal v. Laxmidas*. The contention is that the test laid down in *Sohanlal's* case by this Court that the intention of the parties which is relevant in deciding whether a transaction is a lease or a licence is their intention with regard to the elements which in law constitutes a lease or a licence and not their intention with regard to whether their transaction should be regarded as a lease or a licence, has been satisfied and for this contention the learned counsel has argued that the several clauses, if read together, will show that the test of exclusive possession of the defendants is satisfied, that there is substantial consideration of Rs. 950 per month and that there is no relationship between the plaintiff and defendant No. 2. Thus, according to the learned counsel, the agreement must be construed as one of tenancy.

17. Mr. Khemani, on the other hand, has argued that once the Defendant's contention that there was a representation that the agreement of leave and licence was not to be acted upon because the real transaction was one of lease,

is held not to be substantiated, then it is not open now to the defendants to argue that the agreement of leave and licence is a cloak for a transaction of lease. In other words, the contention is that if the story that there is an agreement to lease the flat is rejected, then the only agreement which survives is the agreement of leave and licence and there is no question of now going into the construction of the agreement of leave and licence.

18. Now, in the evidence of defendant No. 2, the only case which was sought to be established by him is that the lease was granted in favour of defendant No. 1 and it is not his case in evidence that the agreement in question incorporates the agreement to lease or of tenancy in respect of the premises in question. The agreement itself is dated 25th June 1963 and the case of the defendants is that possession was already delivered to defendant No. 1 on 24th June 1963. It is, therefore, difficult to see how it is now possible for the defendants to contend that a lease should be spelt out in their favour on the basis of the agreement in question which, even according to the defendants, was an agreement of leave and licence, the only other case being that the agreement of leave and licence was not to be given effect to.

19. The Board of Directors of defendants No. 1 has an advocate as a member. According to defendant No. 2, he had discussed with the Advocate Mr. P.C. Jambusaria the terms of the agreement though the agreement itself was not shown to the advocate. According to him, the advocate advised him to sign the agreement because the tenancy could not be granted at a high rate of rent, as otherwise it would be open to the defendants to apply for fixation of standard rent. There is, therefore, no-doubt that defendant No. 2 very well knew that he was signing an agreement of leave and licence. The only reason why, according to defendant No. 2, he was signing the agreement of leave and licence and that too after consulting an advocate was obviously the story which is trotted out by him that the agreement was not to be given effect to. But once we hold that the case of the defendants that there was an agreement between the parties that the agreement of leave and licence was not to be given effect to is rejected, then it is difficult for us to see how the defendants can contend that the agreement of leave and licence is in effect an agreement of lease whereby a tenancy was created in their favour, which is not the case in evidence at all.

20. For the purposes of the complete disposal of the case, however, we shall deal with the contention advanced before us that on a construction of the agreement itself, the proper inference to be drawn should be one of tenancy in favour of defendants No. 1.

21. Now, the tests which have to be applied while considering whether an agreement is an agreement of leave and licence or an agreement of tenancy are now well settled. In *Associated Hotels of India v. R.N. Kapoor* AIR 1959 SC 1263, the tests are laid down in the following propositions:?

(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."

According to the Supreme Court, therefore, the real test is the intention of the parties and this intention must be ascertained with reference to the time when the transaction was entered into. If on reading of the document it is found that an interest in the property is created or that the owner of the property had transferred any interest in the property to the transferee, then the transaction will have to be held to be a lease. One of the tests to decide whether there is a transfer of interest of the owner is to find out whether a person has been placed in exclusive possession of the property. This will have to be primarily ascertained on the terms of the document, giving the terms and the words of the document their natural and grammatical meaning. The Supreme Court in *Sohanlal's* case has observed as follows:?

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

These observations of the Supreme Court will show that the substance of the agreement between the parties has to be found out and not merely the form and the question as to whether exclusive possession was given to a person or not is a factor which helps to ascertain the intention of the parties at the time when the lease is said to have been granted.

22. We may also refer to another decision of the Supreme Court where again the test of intention was highlighted. That decision is in *Qudrat Ullah Vs. Municipal Board, Bareilly*, , where in paragraph 7 of the decision, the Supreme Court observed as follows:?

There is no simple litmus test to distinguish a lease as defined in section 105,

Transfer of Property Act from a licence as defined in section 52, Easements Act, but the character of the transaction turns on the operative intent of the parties. To put it pithily, if an interest in immovable property, entitling the transferors to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a licence is the legal result.

In this decision, the Supreme Court has extracted passages from Halsbury's Laws of England, Vol. 23 which say that a grant which confers the right to exclusive possession may operate as a licence in certain circumstances which negative the intention to create a lease. In paragraph 1025 of Halsbury's Laws of England, Vol. 23, instances of agreement creating licences are given and the passage reads as follows:?

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

The above paragraph has been cited with approval by the Supreme Court. It is, therefore, clear that though exclusive possession is a very significant and important test, it is not a decisive test and if the transaction discloses that the property remains in the possession and control of the owner, then notwithstanding that the agreement uses terminology indicative of a lease, the transaction will have to be held to be a licence.

23. The question as to whether the transaction is a lease or a licence has to be decided on the facts in each case and in the light of the recitals in the relevant agreement evidencing the transaction. There is no set formula in which a case has to be fitted. The facts of no two cases can be identical and, therefore, while guidance may be available from decided cases in so far as the test to be applied is concerned, merely because on facts of a reported case an inference of lease has been drawn, it will not be proper to draw the same inference on so called similar facts because there are bound to be distinguishing features in each case as brought out in the oral and documentary evidence.

24. It will, therefore, become necessary to refer to the relevant terms of the agreement in the instant case, because, as earlier observed, the only evidence given by defendant No. 2 was with regard to the earlier conduct of the parties or, to be more precise, the conduct of defendant No. 2 and Bagumal and Prakash. The plaintiff was not in the picture at all when the agreement took place. The agreement in question recites in paragraph 2 the covenants and conditions which defendant No. 1 was required to observe. The relevant conditions which were referred to at the hearing were the following:?

2. (f) To use the said flat for the residence of the Licensee and the members of his family only.

(g) Not to allow any person to stay in or to use the said flat save and except the members of his family and except casual guests visiting Bombay from up-country for a very short period.

(h) Not to keep any boarders or paying guests in the said flat.

(i) Not to part with possession of the said flat or any part thereof to any one except the licensor.

(l) Not to change the lock on the main entrance door of the said flat without the consent in writing of the licensor.

(m) To give all facilities to the licensor to enter and inspect the said flat at any time between sunrise and sunset on receipt of 24 hours, notice by the licensor of his intention to do so.

(q) Not to do or omit to do any act which may invalidate or in any way affect the insurance on the said property or which may render the licensor liable to pay any extra or excess insurance premium.

(t) To oil paint or white or colour wash or distemper the said flat once in every three calendar years.

(v) To put the said flat and every part thereof in good and tenant-table repair and condition before removing himself from the said flat on the revocation or determination of the said licence PROVIDED HOWEVER that this covenant on the part of the licensee shall not entitle him to remain in the said flat after the licence has expired or is revoked. In addition to these positive covenants, there are other important terms in paragraph 4 of the agreement. They are:

(a) This agreement does not create any demise or tenancy or any other right in favour of the licensee in the said flat or any part thereof, but it is mere licence to use the said flat for the licensee and the members of the family only.

(d) The Licensor shall throughout the period of* the licence have full control over the said flat.

(e) The licensor shall be entitled to enter the said flat at any time between sunrise and sunset for inspection or on revocation of the licence for the removal of the licensee and persons staying with the licensee and/or his or their belongings from the said flat after giving 24 hours" notice to the licensee pf the intention to do so.

Clause 9 of the licence provides that the licence shall be valid for a period of 11 months commencing from 1st July 1963 to May 1964 and further two year"s option in favour of the licensee, subject to their carrying out all obligations towards above agreement.

25. Now, according to Mr. Kotwal, clauses (t) and (v) of paragraph 2 of the agreement will clearly indicate that defendants No. 1 were placed in exclusive possession of the flat in question, while according to the learned counsel for the appellants, there are clauses in the agreement which clearly go to show that the original plaintiff had retained complete control over the flat. Now undoubtedly under clause (t) of paragraph 2 of the agreement the licensee was required to oil paint or distemper the said flat once in every three calendar years and under clause (v) of the same paragraph he has to put the flat in a good and tenantable repair and condition before removing himself from the said flat on the revocation or determination of the licence, but it is difficult for us to see how these two terms can even remotely suggest that the test of exclusive possession is satisfied in the instant case. The test that a person in occupation should re-paint the flat, assuming that it is consistent with the lease, is surely not inconsistent with the licence. If the licensor and the licensee agree that the licensee shall keep the flat in good condition by re-painting it, such a condition cannot be utilised for showing that the occupant is in exclusive possession. Similarly so far as condition (v) is concerned, it relates to the occupant being required to put the flat in a proper state of repair at the time of removing himself from the flat. This again is a condition, which it is difficult to see how it can be utilised for supporting the plea of exclusive possession. This is a normal condition which is consistent with both a lease and a licence and there is nothing unusual if a licensee is asked to put the flat in a proper state of repair before he vacates the flat.

26. Undoubtedly both in the case of a lease as well as in the case of a licence, a person is in occupation of the premises. The crucial question which has to be decided is whether that occupation is in the nature of exclusive possession or has the possession still been retained by the owner or the transferor of the property. Now, if the owner of the property and the person in occupation expressly agree that the entire control of the premises should be with the licensor or the owner, in our view, this is the surest indication of the fact that the parties never intended that the person in occupation should be treated as a person in exclusive possession. To assume, in spite of such a term being found in the agreement in pursuance of which a person has been placed in occupation, that the person should be treated as being in exclusive possession would be to render the term a futile one. A term in an agreement cannot be treated as a dead letter and we must, therefore, assume that when two parties have signed an agreement expressly agreeing that the owner or the licensor shall have full control over the flat throughout the period of the licence, it is an unambiguous expression of a clear intention on the part of the parties that the person is not to be placed in exclusive possession of the property. This conclusion is further supported by a prohibition against defendant No. 1 that he shall not change the lock on the main entrance door of the said flat without the consent in writing of the licensor. If these two terms are read together, it is obvious that the manner in which the control over possession is sought to be retained is to prevent the licensee from changing the lock and it is obvious that this term was specifically put in order to

work out the other terms in the agreement with regard to the access to the premises with 24 hour's notice.

27. There are also further restrictions which are wholly inconsistent with a transfer of interest. Section 105 of the Transfer of Property Act defines the lease as follows:?

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

It is now well-known that the transfer of a right to enjoy the property implies that the property must be held to the exclusion of the grantor and that the lease is a transfer of an interest in land and creates a right in him. Where there are any restrictions which are inconsistent with the exercise of such a right which should normally vest in the transferee if he is a lessee.

It would, in our view, be inconsistent with the transaction being called a lease. The agreement has reserved the right to re-enter the flat for the purposes of inspection between sunrise and sunset after giving 24 hours' notice. This, in our view, is wholly inconsistent with a claim that defendant No. 1 was intended to be placed in exclusive possession. If the intention at the time when the agreement was entered into is a material fact then on a plain reading of the provisions of the agreement, the intention was never to place defendant No. 1 in exclusive possession, for, on no other footing can the express provisions in the agreement with regard to retaining the control and prohibition against changing of the lock be explained.

28. It is undoubtedly true that the learned Judge has observed that it was not disputed before him that exclusive possession of the said flat was in fact given to the first defendants. We find no justification for such an assumption. As a matter of fact the case of the appellants is that defendant No. 1 was a licensee and merely being in occupation is not equivalent to being in exclusive possession. All that is not in dispute in the present case is that defendant No. 1 was in occupation under the agreement in question.

29. Mr. Kotwal has heavily relied on the Division Bench decision of this Court in Sohanlal's case. In Sohanlal's case, the Division Bench on a consideration of the legal position found that the intention of the parties is of paramount importance in deciding whether a transaction between them was a lease or a licence and the Division Bench further observed that the said intention must relate to the elements which constitute a lease or licence respectively. There is no need to quarrel with this proposition. The Division Bench then went on to point out that one of the requirements of a lease is the right to exclusive possession of immovable property and it was, therefore, of primary importance in construing the terms of a transfer as to whether the parties intended that the transferee

should get exclusive possession of the immovable property in question. Even according to the Division Bench in Sohanlal's case, therefore, the intention which has to be ascertained is whether the transferee was to get exclusive possession of the immovable property. The Division Bench further pointed out that even where exclusive possession of immovable property was transferred for a certain period, the transaction might amount to a licence and not a lease where the dominant consideration was not the price which the transferee was to pay for the use and enjoyment of the property. The legal position was summarised by the Division Bench as follows:?

Thus, in our view, the intention of the parties which is relevant in deciding whether a transaction is a lease or a licence is their intention with regard to the elements which in law constitute a lease or a licence and not their intention with regard to whether their transaction should be regarded as a lease or a licence.

In the earlier part of the judgment the elements of a lease which were implicit in the definition of lease in section 105 of the Transfer of Property Act were spelt out as follows:?

The terms of section 105 of the Transfer of Property Act show that a transfer of a right amounts to a lease if three requirements are fulfilled. The transfer must be of a right to enjoy immovable property the transfer must be for a certain time, and the transfer must be for valuable consideration. If these three requirements are fulfilled the transfer amounts in law to lease.

On the facts of the case before them the Division Bench went on to find out whether these three elements were present and it was found that all the three elements were satisfied and that is how it was held that the transfer in that case was in the nature of a lease.

30. Now, it is difficult to see how this decision could be of any assistance to the defendants in the instant case. It is not in dispute that the essential requirements of a lease have to be satisfied as contemplated by section 105 of the Transfer of Property Act and what is to be ascertained is the intention with reference to the elements which constituted a lease or licence respectively. The question as to whether this intention is proved with regard to the elements which constitute a lease has to be decided on the facts of each case which fall for consideration before the Court. We have already pointed out that on the document the intention to place defendants No. 1 in exclusive possession is squarely negated by the terms with regard to retaining control of the premises and requiring the defendants not to change the lock on the premises without the written consent of the plaintiff.

31. The learned counsel has referred us to a decision of the Court of Appeal in *Addiscombe Estates Ltd. v. Crabtree* 1957 All ER 563. The Court of Appeal in that decision held that the relationship between the parties to the agreement was to be determined by law and not by the description given by the agreement to the parties and it was held on the facts of that case that the agreement on a

consideration of all its relevant provisions and having regard to it showing an intention to confer a right to exclusive possession created the relationship of a landlord and tenant between the parties to the agreement. In the course of the judgment, Jenkins L.J. referring to the principles applicable for resolving the question as to whether a given transaction is a lease or a licence observed as follows:?

The principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence.

These observations do not lay down any law different from what we have referred to earlier. It is undoubtedly true that in that case, as a result of certain terms, a conclusion was reached that the right to occupy the premises granted to the grantees was intended to be an exclusive right of occupation which was a circumstance in favour of a view that there was a tenancy as opposed to a licence. Three conditions in the agreement were reproduced and considered important. One was an agreement "to permit the grantors and their agents at all reasonable times to enter the said premises to inspect the condition thereof and for all other reasonable purposes". The second was a provision "to deliver up the said premises at the termination of this licence in a condition consistent with the foregoing provisions" and the third provision was "that the grantors may re-enter and determine the licence in the event of non-payment of any of the said payments of court fees for fourteen days (whether formally demanded or not) or on breach of any of the grantees' stipulations". The Court of Appeal pointed out that a reference to re-entry and non-payment of any of the payments of court fees are provisions fully appropriate to a tenancy agreement. Similarly they pointed out that the words "to deliver up" seem to be an expression more appropriate to a tenant with an interest in the land than to a person who had a mere contractual right to be on the premises. With regard to the power to enter the premises, the Court of Appeal took the view that the importance of that power was that it showed that the right to occupy the premises conferred on the grantees was an exclusive right of occupation, in that it was thought necessary to give a special and express power to the grantors to enter.

32. On the reasoning in the judgment of the Court of Appeal, it was contended by Mr. Kotwal that similar clauses were found in the agreement in question in this case and those terms must also be construed as being indicative of the relationship of landlord and tenant. Now, we have earlier pointed out that what has weighed with us in holding that there was no intention to put the defendants

in exclusive possession of the premises was the provision retaining complete control of the premises and a prohibition against changing of the lock which again is indicative of the fact that the licensor or the owner wanted to exercise his control over the premises. Such terms were not to be found in the case before the Court of Appeal in Addiscombe Estates Ltd.'s case. Merely on the decision of the Court of Appeal, therefore, it will not be possible for us to take the view on the facts of the present case that the relationship was one of landlord and tenant.

33. We are, therefore, satisfied that assuming that the defendants were entitled to rely on the terms of the alleged lease simpliciter, even those terms are not indicative of any intention to create a relationship of landlord and tenant between the plaintiff and the defendants.

34. In the view which we have taken, the appeal must succeed. The judgment and the decree of the learned single Judge dismissing the Appellant's suit are set aside and the appellants will be entitled to a decree for possession in terms of prayer clause (a) of the plaint. Mr. Khernani makes a statement- that the appellants do not press the claim, in 90 far as prayer (b) is concerned. The appellants will also be entitled to a decree for Rs. 5218. The Defendant's counsel has made a statement that the said amount has been deposited in Court and the said amount has already been withdrawn by the appellants. There shall be an enquiry into mesne profits-payable to the appellants far the period 1st June 1972 till possession is handed over to the appellants. The Defendants will, however, be entitled to have the amount already deposited for the period from the date of the suit till the dismissal of the suit adjusted towards the amount of mesne profits found due. The appellants will also be entitled to withdraw the amounts lying in deposit in Court subject to their adjustment towards the dues which will ultimately be determined as being payable by the defendants- The appellants will, also be entitled to the costs of this- appeal as well as the suit.

35. Leave to appeal to Supreme Court asked for rejected.

36. The respondents request for stay of operation of this judgment for a period of 8 weeks. The judgment will not be given effect to for a period of 8 weeks only if the respondent-defendants deposit a sum of Rs. 60,000 within four weeks from today and subject to their giving a usual undertaking that they shall not in any case part with or encumber or induct or create any interest in the property. If and when the amount of Rs. 60,000 is deposited, the appellants will be entitled to withdraw the said amount.