

A

## SOHAN LAL NARAINDas

v.

## LAXMIDAS RAGHUNATH GADIT

January 8, 1971

B

[J. C. SHAH, C.J., K. S. HEGDE AND A. N. GROVER, JJ.]

*Lease and licence—Difference between—Test of exclusive possession—Language of document must be read with surrounding circumstances.*

C

The plaintiff commenced an action in the City Civil Court, Bombay for a decree in ejectment against the defendant alleging that the defendant was occupying loft on the upper floor of a building under an agreement of licence and the licence had been duly terminated and withdrawn. The defendant contended that he was tenant of the loft, that the tenancy had not been duly terminated as required by law; that he was entitled to the protection of the Bombay Rents, Hotel and Lodging Rates Contract Act, 1947; and that the court had no jurisdiction to try the suit. The trial court dismissed the suit. The decree was confirmed in appeal by the High Court of Bombay. The plaintiff applied for certificate under Art. 133(1)(a) of the Constitution and in the alternative under Art. 133(1)(c) thereof. The High Court passed an order certifying the case under Art. 133(1)(c), and the plaintiff appealed.

D

HELD: (1) A certificate granted by the High Court must be supported by adequate reasons. It is obligatory upon the High Court to set out the question of public or private importance which in their opinion falls to be determined in the proposed appeal. In the present case since there was no merit in the appeal it was not necessary to vacate the certificate. [318 G]

E

(2) A licence confers a right to do or continue to do something in or upon immovable property of grantor which but for the grant of the right may be unlawful, but it create no estate or interest in the immovable property of the grantor. A lease on the other hand creates an interest in the property demised. [322 G]

F

Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of surrounding circumstances. The description given by the parties may be evidence of the intention but is 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 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. [322 H-323 B]

G

*Mrs. M. N. Clubwala v. Fida Hussain Saheb & Ors.*, [1964] 6 S.C.R. 642, relied on.

H

In the present case on a careful consideration of the covenants and in the light of the relevant surrounding circumstances it must held that the exclusive possession given to the defendant was intended to confer an interest in the loft and on that account the agreement operated as a lease and not as a licence. [323 D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2443 of 1966. A

Appeal from the judgment and order dated January 21, 25 of the Bombay High Court in First Appeal No. 769 of 1963.

*F. S. Nariman, P. C. Bhartari and J. B. Dadachanji*, for the appellants. B

*D. V. Patel, Ramesh Malik and Ganpat Rai*, for the respondent.

The Judgment of the Court was delivered by

**Shah, C.J.** Sohan Lal Naraindas—hereinafter referred to as 'the plaintiff'—commenced an action in the City Civil Court, Bombay, for a decree in ejectment against Laxmidas Raghunath—hereinafter called 'the defendant'—alleging that the defendant was occupying a loft 19' × 15' on the upper floor of a building at Prajagalli, Mulji Jetha Market, Bombay under an agreement of licence dated November 3, 1958 and that the licence had been duly terminated and withdrawn but the defendant had failed and neglected to vacate the loft notwithstanding the demand. The defendant contended that he was a tenant of the loft, that the tenancy had not been duly terminated as required by law, that he was entitled to the protection of the Bombay Rents Hotel & Lodging House Rates Contract Act 1947 and that the Court had no jurisdiction to try the suit. C  
D  
E

The Trial Court dismissed the suit holding that the defendant was a tenant of the plaintiff and not his licensee. The decree was confirmed in appeal, by the High Court of Bombay. The High Court held that on the terms of the agreement and in the light of the surrounding circumstances the relationship between the parties was that of landlord and tenant. With certificate granted by the High Court the plaintiff has appealed to this Court. F

The certificate granted by the High Court is defective. The plaintiff applied for certificate under Art. 133(1)(a) of the Constitution and in the alternative under Art. 133(1)(c) of the Constitution. The High Court passed an order certifying the case under Art. 133(1)(c). A certificate granted by the High Court must be supported by adequate reasons. It is obligatory upon the High Court to set out the question of public or private importance which in their opinion fall to be determined in the proposed appeal. Since we are of the view that there is no merit in this appeal, we have not thought it fit to vacate the certificate. G

The agreement dated November 3, 1958 was recorded formally in writing and was duly executed. The plaintiff was the lessee of a shop No. 11 in Prajagalli, Mulji Jetha Market, and H

**A** the loft of that shop was the subject matter of that agreement. The period of the agreement was one year. It was stated in the agreement that the loft "was given on leave and licence basis for use and occupation" of the defendant on the terms and conditions mentioned therein. The relevant conditions were—

**B** "1. The owner (the plaintiff) has agreed to grant the leave the licence for use and occupation of the said loft (Medo) of the said shop for a period one year commencing from *Aso Vad* 13 S. Y. 2014 to *Aso Vad* 12 S. Y. 2015.

**C** 2. The Licensee (the defendant) shall pay to the Owner monthly compensation or Licensee fee at the rate of Rs. 250/- per month, and the Licensee has paid Rs. 3000/- (Rupee three thousand) only to the Owner as compensation or licence fee for the said period in advance on or before the execution of this agreement.

**D** 3. The Licensee shall have no right as a tenant or sub-tenant in respect of the said loft (Medo) of the said shop. The Licensee shall not sub-let, allow to use, transfer or assign in any way the said loft (Medo) of the shop to any one else.

**E** 4. The Owner shall bear and pay the rent of the said shop.

5. The Licensee shall use and occupy the said loft (Medo) of the said shop as a cloth merchants only and shall not be entitled to carry on any other business.

**F** 6. The parties hereto shall give one month's clear notice of their intention to terminate this agreements in writing.

7.

**G** 8. If the Licensee commits breach of any of the terms of this agreement in that case the Owner shall be entitled to terminate and reVOKE the leave and licence hereby granted without giving notice to the Licensee."

**H** The defendant was put in exclusive possession of the loft. The plaintiff did not reserve possession of any part of the loft or a right of entry therein. The loft had a separate entrance. The customers of the defendant used the separate entrance to the loft during the business hours and his stock of cloth remained in the loft after business hours. The plaintiff and defendant were both cloth merchants, and the only consideration for granting the licence was the payment of Rs. 250/- per month. There is no

evidence that the loft was given to the defendant out of sympathy or because of friendship, or relationship, or any similar motive. It was stipulated that the plaintiff may terminate the agreement by giving one month's clear notice, the agreement could not be terminated by notice of a shorter duration. A

An attempt was deliberately made to camouflage the true nature of the agreement, by reciting in several clauses that the agreement was for leave and licence, and to emphasise the presence it was also recited that the defendant was not to have any right as tenant or sub-tenant in respect of the loft. B

At the trial the elder brother of the defendant was examined as a witness. He stated that the agreement dated November 3, 1958 was intended to be an agreement of lease, but the plaintiff insisted that the agreement be drafted with the conditions set out therein. C

Section 52 of the Easements Act defines a "Licence" :—

"Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence" D

Section 105 of the Transfer of Property Act defines "lease" :— E

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

A licence confers a right to do or continue to do something in or upon immovable property of grantor which but for the grant of the right may be unlawful, but it creates no estate or interest in the immovable property of the grantor. A lease on the other hand creates an interest in the property demised. G

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 H

A 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.

B In determining whether the agreement creates a lease or a licence the test of exclusive possession, though not decisive, is of significance. *Mrs. M. N. Clubwala v. Fida Hussain Saheb and Ors*(<sup>1</sup>).

C The Trial Court regarded exclusive possession of the premises given to the defendant as conclusive of the question whether the loft was in the occupation of the defendant as a tenant. The Court observed that on a consideration of the clauses of the agreement it was unable to reach a conclusion whether the agreement was intended to operate as a lease or as a licence but since exclusive possession was given it must be regarded a lease. The High Court considered all the covenants and the attendant circumstances and reached the conclusion that having regard to the exclusive possession given to the defendant it was intended to confer an interest in the loft and on that account the agreement operated as a lease and not as a licence.

D

E We have carefully considered the covenants in the light of the relevant surrounding circumstances. We are unable to disagree with the view taken by the High Court that by the terms of the agreement an interest was created in the loft in favour of the defendant.

The appeal fails and is dismissed with costs.

G.C.

*Appeal dismissed.*

---

(1) [1964] 6 S.C.R. 642.