Delta International Ltd.

Versus

Shyam Sunder Ganeriwalla

Civil Appeal Nos. 2198-99 of 1999

(G.B. Pattanaik, M.B. Shah JJ)

09.04.1999

JUDGMENT

M.B. Shah, J.

1. Leave granted. These appeals are filed against the Judgment and Decree dated 2nd December, 1997 passed by the Division Bench of the High Court of Calcutta in Appeal from Original Decree Nos. 148 of 1992 and 165 of 1992. Undisputed facts of the matter are that original owner of the premises was Abhiram Mullick (since deceased) who created tenancy of the premises, namely, No. 4D, Council House Street, Calcutta in favour of Mallika Investment Company Private Limited. Dewar's Garage India Private Limited was inducted into the premises as the monthly tenant under Mallika Investment Company Private Limited. Dewar's Garage (India) Private Ltd. (in short `Dewar') was maintaining and running a petrol service station for sale of motor spares and components at the tenanted premises. Dewar had erected and built certain structures on the said premises. Dewar was subsequently amalgamated into Delta International Limited (appellant-plaintiff). By an agreement dated 18th July, 1970, Dewar executed leave and license agreement in favour of ESSO Standard Eastern Inc. (in short ESSO). The ESSO in turn permitted Shyam Sunder Ganeriwalla, respondent No. 1, to run a petrol service station. By an Order passed in Company Petition No. 331/94, Dewar was amalgamated with plaintiff (Delta International Limited). Further, the business undertakings and the estates of ESSO also had been taken over by the Act of Parliament and has been transferred and assigned by the Central Government in favour of M/s. Hindustan Petroleum Corporation Limited. In 1985, Delta International Limited filed Civil Suit No. 491/85 in the High Court of Calcutta for a perpetual injunction restraining the Defendants and/or their servants, agents and assigns from using any of the fixtures, fittings and accessories lying at suit premises; for damages, for wrongful use and occupation of the premises at the rate of Rs. 20,000/- p.m. from 1st May, 1985, that is, the date of termination of leave and license as claimed in the plaint and for decree for possession of the said premises and other reliefs. The learned Single Judge passed the decree in favour of the plaintiff by holding that the agreement in question was only a license agreement and it was not a sub-lease. In appeal, the said Judgment was reversed by holding that the agreement in question constitutes a lease mainly on the basis of exclusive possession and the Division Bench observed that "to put is pithily, if an interest in immovable property entitling the transferees to enjoyment is created, it is a lease, if permission to use land without right to exclusive possession is alone granted, a licence is the legal result."

2. At the time of hearing of this appeal, learned counsel for the parties exhaustively referred to the material terms and conditions of the agreement in which the term `leave and license' is used. In support of their contentions, they also referred to various decisions which have laid down tests to find out in which set of circumstances even though the document is termed as a leave and license

could be construed as a lease.

Learned counsel for the appellant submitted that :-

1. Learned Single Judge of the High Court was right in holding that the document does not create any lease because intention of the parties was quite manifest from the document as well as clause 12 which stared in the face.

2. Appellant itself was a monthly tenant of the premises and could not create a sub-tenancy without the prior written consent of the landlord in view of the provisions of Section 14(1) of the West Bengal Premises Tenancy Act, 1956. It is nobody's case that such consent was obtained. [Para 1 of the deed].

3. The license was for the purpose of running the petrol station which had been set up by the appellant and which the appellant no longer wished to operate. [Paras 2 and 3 of the deed].

4. The possible grant of sub-lease was specifically reserved for future in the event that the appellant was able to obtain a consent from its landlord Mallika Investment Company Private Limited. [Paras 4, 5 and 6 of the deed]

5. The license is stated to be for the benefit of the respondent to "use, occupy, enjoy, run and work" the petrol station. [clause 1]

6. The respondent was not obliged to pay any portion of the outgoings in respect of the premises despite the fact that fifty per cent of municipal rates, taxes etc. were normally payable by the occupier of the premises; thus even the charges attendant upon occupation of the premises were to be paid by the appellant. [clauses 3 and 4]

7. The respondent was obliged to keep the plant and machinery at the said premises in good repair. [clause 5]

8. The respondent was obliged to take out necessary insurance policies for the business. [clause 8]

9. The appellant was entitled to revoke the license in the event of any breach or default on the part of the respondent. [clause 9]

10. Clause 11 specifically permits the respondent to carry out business in the name of the appellant which normally would not be permitted if it is not a license to run the business.

11. Clause 12 manifests the intention of the parties that the document was executed only for the purpose of creating license and not lease.

12. Clause 13 to 17 specifically make provision for the possible future grant of sub-lease by the appellant to the respondent in the event that the appellant obtains a consent from the tenant. These clauses also contemplate various terms which would be provided in the prospective sub-lease.

13. Clause 18 provides for the payment of advance license fees by the respondent and the term `demised premises' used thrice in the clause must be read in conformity with other clauses of the document and the intention of the parties.

14. The right given to the respondent to give it on sub-license was given, as respondent was only to operate petrol station. [clause 19]

3. On the basis of the aforesaid terms of the document, Mr. Ashok Desai, learned Senior counsel for the appellant submitted that the construction of the document would depend upon its pith and substance and not upon the labels that the parties may put upon it. Paramount test for determining whether it is lease or license is `the intention of the parties'. He submitted that exclusive possession of the premises being granted, although an important factor, does not preclude the court from holding that the document is in fact a license, particularly in cases where if the grantor did not have the power to grant a lease or is forbidden by the provisions of the Rent Control legislations. He emphasised that dominant intention is to be found out in such cases from the document itself. He referred to the following principles stated in the decisions of this Court to advance his contention :

(a) The construction of a document would depend upon its pith and substance and not upon the labels that the parties may put upon it. This principle was laid down by this Court in the decisions of *Inderjeet Singh Sial and another v. Karam Chand Thapar and others, 1995(6) SCC 166 : 1996(2) RCR 51 (SC)* at p. 173 and *Vayallakath Muhammedkutty v. Illikkal Moosakutty, 1996(9) SCC 382 : 1996(2) RCR 213 (SC)* at p. 387.

(b) The paramount test is `the intention of the parties' as stated in the case of *Capt. B.V. D'Souza v. Antonio Fausto Fernandes, 1989(3) SCC 574 : 1990(1) RCR 186 (SC)* at p. 577 and 1996(9) SCC 382 at p. 387 (supra).

(c) Exclusive possession of the premises being granted, although an important factor, does not preclude the Court from holding that the document is in fact a license as decided in the case of *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit, 1971(1) SCC 276 : 1971 RCR 159 (SC)* at p. 279 and *Rajbir Kaur and another v. M/s. S. Chokesiri and Company, 1989(1) SCC 19 : 1988(2) RCR 328 (SC)* at pp. 31-33.

(d) Even where exclusive possession is granted, only a license will be created if the grantor did not have the power to grant a lease. This principle was laid down in the case of 1989(1) SCC 19 (supra).

(e) The appellant, as a monthly tenant, was forbidden by Section 14(1) of the Act to sublet the premises without the prior written consent of the landlord. It is nobody's case that the prior written consent of the landlord was in fact obtained in the present case. It is, therefore, not possible to contend that any sub-lease was granted and any such purported disposition would be unenforceable and void. (Decided in the case of *Waman Shriniwas Kini v. Ratilal Bhagwandas and Company, 1959 Suppl.(2) SCR 217* at 221).

(f) Where the dominant intention is to use the premises with fittings and fixtures for the purpose of running a business, the same does not tantamount to a lease of immovable property as decided in the case of *Uttam Chand v. S.N. Lalwani, A.I.R.*

1965 SC 716, paras 11 and 12.

As against this, Mr. D.P. Gupta, learned senior counsel for the respondent No. 1 submitted that for resolving the dispute that the document is a lease or a license, the legal principals have been laid down in a long line of decisions which *inter alia* are as under :-

(a) The Court looks at the substance of the transaction and not the label which the parties may have agreed to put on the transaction. The Court is entitled to decide whether or not the agreement between the parties is a mere camouflage to get round the rigours of rent control legislations.

(b) Irrespective of the label that may have been put upon the transaction by the parties, the Court would gather the true intention of the parties as to whether an interest in land or premises was sought to be created or not.

(c) Exclusive possession is a most significant indicator to hold that the document creates lease.

4. In support of his contentions, learned counsel for the respondent referred to the decisions of this Court in the cases of *Associated Hotels (P) Ltd. v. R.N. Kapoor, 1960(1) SCR 368; Sohonlal Naraindas v. Laxmidas Raghunath Gadit, 1971(1) SCC 276; Capt. B.V. D'Souza v. Antonio Fausto Fernandes, 1989(3) SCC 574; Tulsi v. Paro (dead), 1997(2) SCC 706 : 1997(1) RCR 281 (SC)* and *K. Achyuta Bhat v. Veeramaneni Manga Devi and another, 1989(1) SCC 9*.

5. Further, the learned counsel for the respondent referred to various clauses of the Deed for finding out the intention of the parties and referred to certain terms such as :-

(a) The licensee is described in the agreement so as to include its successors and assigns as per the Memorandum of Agreement.

(b) The expression "demised premises" has been used three times in clause 18 which leaves no doubt that interest in the property is created.

(c) The operative clause is in the language of a formal lease. What is granted and given to use, occupy, enjoy, run and work is the premises described in the First Schedule together with the plant and machinery, fixtures and fittings set out in the Second Schedule.

(d) ESSO was to pay for electricity, was liable to repair the fittings and fixtures and to keep them in proper running and usable condition, was entitled to bring in and instal other machinery, was to take out necessary licenses and insurance policies, could continue the business either in its own name or in the name of Dewar (subject to indemnity) and would not assume any liability or responsibility for taking over the existing employees. [clauses 5, 6, 7, 8 and 11]

(e) ESSO would have the right to grant leave and license to a third party during the continuance of the agreement. [clause 13]

(f) It was contemplated that if the Dewar is able to obtain a lease of the said premises

on terms which would not be inconsistent with ESSO's standard form, then Dewar will grant a sub-lease to ESSO for at least a period of 10 years with three renewal options. [clause 15(a)]

6. From the aforesaid submissions it is apparent that the common contention of the learned counsel for both the parties is that the Court has to gather and find out the true `intention of the parties' as to whether the document creates a lease or license; the dominant intention of the parties is to be gathered from the terms of the document irrespective of the labels that the parties may put upon it. It is to be stated that even though it is the common contention of the learned counsel for the parties that dominant intention of the parties is to be gathered from the document, yet all throughout the question had remained a vexed one, having no easy solution and precise mathematical tests. Because ultimately `intention of the parties' is to be inferred. For this purpose, we would first refer to the tests laid down by this Court in the case of *Associated Hotels of India Ltd. v. R.N. Kapoor, 1960(1) SCR 368* which are relied upon in subsequent decisions. In minority judgment rendered by Subba Rao, J. the Court held that there is a clear distinction between lease and license; the dividing line is clear, though sometimes it becomes very thin or even blurred and observed that for such determination following propositions may 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."

7. Before laying down the aforesaid proposition, the Court held 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, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at P. 155;
>
> "The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy".
>
> The Court of Appeal again in Cobb v. Lane considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At P. 1201, Somervell, LJ., stated :
>
> ".... the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties."

Denning, L.J., said much to the same effect at p. 1202 :

"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 ?"

8. At this stage, it would be worthwhile to quote some more instructive discussion from the case of *Cobb and another v. Lane, 1952(1) All. E.R. 1199* rendered by three learned Judges in their judgments given separately :-

Somervell, L.J. observed :

"Certainly under the old cases (and I doubt if this has been affected by the modern authorities), if all one finds is that somebody has been in occupation for an indefinite period with no special evidence of how he got there or of any arrangement being made when he went into occupation, it may be that the court will find a tenancy at will. I am assuming that there is no document, or clear evidence as to terms. *The modern cases establish that, if there is evidence of the circumstances in which the person claiming to be a tenant at will went into occupation, those circumstances must be considered in deciding what the intention of the parties was*."

The learned judge further observed :

"No doubt, in former days, except for the question of the statute, the distinction between a tenancy, whether at will or for a period, and a licence was not so important as it has become since the Rent Restrictions Acts came into operation. In many cases under those Acts it has a special importance. *That fact has led to an examination of the distinction, and the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.*"

Denning, L.J. further observed to the same effect as under :-

"Under the old cases there would have been some colour for saying that the brother was a tenant at will, but the old cases can no longer be relied on. Owing to the impact of the Rent Acts, the courts have had to define more precisely the difference between a tenant and a licensee". ..."*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 ?"

Delivering concurring judgment, Romer. L.J., further considered the facts and observed :

"She was not a tenant at will, and, unless she was, she could not create the tenancy on which the defendant relies. *In the absence of a sufficient title or interest in her to carve out or to create a similar tenancy in the defendant, his claim, I say, fails in limine*."

9. Further, in his judgment, Lord Denning, J. referred to an earlier decision in the case of *Errington v. Errington, 1952(1) All.E.R. 149* wherein the Court held that the test of exclusive possession is by no means decisive. For determining what was the intention of the parties the Court relied upon

following observations from the decision in the case of *Booker v. Palmer, 1942 All England Law Reporter 677* wherein Lord Greene, M.R. held :

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

10. Alongwith other cases, the aforesaid case was referred to and relied upon in the case of *Rajbir Kaur and another v. M/s. S. Chokesiri and Co., 1989(1) SCC 19*, this Court considered and held that ultimately the question whether a transaction is a lease or licence "turns on the operative intention of the parties and there is no single, simple litmus test to distinguish one from the other."

11. The relevant discussion in paragraph 2 is an under :-

> "22. It is essential to the creation of a tenancy that the tenant be granted the right to the enjoyment of the property and that, further, the grant be for consideration. While the definition of `lease' in Section 105 of the Transfer of Property Act, 1882, envisages the transfer of a right to enjoy the property, on the other hand the definition of a `licence' under Section 52 of the Indian Easements Act, 1882, consistently with the above, excludes from its pale any transaction which otherwise, amounts to an "easement" or involves a transfer of an interest in the property, which is usually involved in the case of a transfer of right to enjoy it. These two rights, viz. Easements and lease in their very nature, are appurtenant to the property. On the other hand, the grant only for the right to use the premises without being entitled to the exclusive possession thereof operates merely as a licence. But the converse implications of this proposition need not necessarily and always be true. *Whenever there is exclusive possession, the idea of a licence is not necessarily ruled out*. English law contemplates what are called `Possessory Licences' which confer a right of exclusive possession, marking them off from the more usual type of licences which serve to authorise acts which would otherwise be trespasses. *Thus exclusive possession itself is not decisive in favour of a lease* and against a mere licence, for, even the grant of exclusive possession might turn out to be only a licence and not a lease *where the grantor himself has no power to grant the lease. In the last analysis the question whether a transaction is a lease or a licence "turns on the operative intention of the parties" and that there is no single, simple litmus test to distinguish one from the other. The "solution that would seem to have been found is, an one would expect, that it must depend on the intention of the parties*." (Emphasis added).

Dealing with the contention that intention of the parties is to be determined upon a proper construction of the deed entered into between the parties, and that alone is a decisive matter, the Court dealt with the said contention in paragraph 32 and observed as under :-

> "Indeed learned counsel placed strong reliance on the following observations by this Court in *Mrs. M.N. Clubwala v. Fida Hussain Saheb, 1964(6) SCR 642* :-
>
> "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. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement." (Emphasis supplied).

The proposition of Dr. Chitale as to the conclusiveness of what emanates from the construction of the documents has, in this case, its own limitations. The import, significance and conclusiveness of such documents making, or evidencing, the grants fall to be examined in two distinct contexts. *The dispute may arise between the very parties to the written instruments, where on the construction of the deed one party contends that the transaction is a `licence' and the other that it is a `lease'. The intention to be gathered from the document read as a whole has, quite obviously, a direct bearing*. But in cases where, as here, the landlord alleges that the tenant has sublet the premises and where the tenant, in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into, *inter se*, between himself and the alleged licensee, *the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed*. At best, it is a piece of evidence, the weight to be accorded to which will necessarily depend upon all the other circumstances of the case. The tenant and the subtenant, who jointly set up a plea of licence against the landlord may choose to camouflage the truth and substance of the transaction behind a facade of a self-serving and conveniently drafted instrument."

12. Learned counsel for the respondent had also relied upon the decision of this Court in the case of *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit, 1971(1) S.C.C. 276*, (paras 6 and 9) wherein the Court has observed as under :-

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

9. *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 operates 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." (Emphasis added).

13. From the aforesaid discussion what emerges is :-

(1) To find out whether the document creates lease or license real test is to find out `the intention of the parties', keeping in mind that in cases where exclusive possession is given, the line between lease and license is very thin.

(2) The intention of the parties is to be gathered from the document itself. Mainly, intention is to be gathered from the meaning and the words used in the document

except where it is alleged and proved that document is a camouflage. If the terms of the document evidencing the agreement between the parties are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

(3) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got it, the intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would be most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease.

(4) If the dispute arises between the very parties to the written instrument, the intention is to be gathered from the document read as a whole. But in cases where the landlord alleges that the tenant has sublet the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a deed entered into, *inter se*, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed; the tenant and the sub-tenant may jointly set up the plea of a license against the landlord which is a camouflage. In such cases, the mask is to be removed or veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument is to be gathered from all the relevant circumstances. Same would be the position where the owner of the premises and the person in need of the premises executes a deed labelling it as a licence deed to avoid to operation of rent legislation.

(5) *Prima facie*, in absence of a sufficient title or interest to carve out or to create a similar tenancy by the sitting tenant, in favour of a third person, the person in possession to whom the possession is handed over cannot claim that the sub-tenancy was created in his favour; because a person having no right cannot confer any title of tenancy or sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the premises, cannot confer any better title. But, thus question is not required to be finally determined in this matter.

(6) Further lease or licence is a matter of contract between the parties. Section 107 of the Transfer of Property Act *inter alia* provides that leases of immoveable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be executed by both the lessee and the lessor. This contract between the parties is to be interpreted or construed on the well laid principles for construction of contractual terms, viz. for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have used and there can be no intention independent of that meaning; when the terms of the contract are vague or having double intendment one which is lawful should be preferred; and the construction may be put on the instrument perfectly consistent with his doing what he had a right to do.

14. For construction of contracts between the parties and for the interpretation of such document, learned Senior Counsel, Mr. Desai, has rightly relied upon some paragraphs from "The Interpretation of the Contracts" by Kim Lewison, Q.C. as under :

1.03 *For the purpose of the construction of contracts, the intention of the parties is the meaning of the words they have used. There is no intention independent of that meaning*.

6.09 Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.

15. Sir Edward Code [Co. Litt. 42a] expressed the proposition thus :

"It is a general rule, that whensoever the words of a deed, or of one of the parties without deed, may have a double intendment and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken."

In more modern times that statement was approved by the Privy Council in *Rodger v. Comptoir D'Escomple de Paris, (1869) L.R. 2 P.C. 393*, in which Sir Joseph Napier, delivering the advice of the Board said :

"The rule that words shall be construed most strongly against him who uses them gives place to a higher rule; higher because it has a moral element, that the construction shall not be such as to work a wrong."

Similarly, in *Fausset v. Carpenter, 1831(2) Dow. & Cl. 232*, the House of Lords accepted the submission of counsel that the Court :

"....in judging of the design and object of a deed, will not presume that party executing the deed meant to do and did what he was wrong in doing, when a construction may be put on the instrument perfectly consistent with his doing only what he had a right to do."

However, the question of construction should not be approached with a leaning in one direction or another. Thus although the law frowns upon covenants in restraint of trade, nevertheless such a covenant should not be approached on the basis that it is *prima facie* illegal. "*Your are to construe the contract, and then see whether it is legal.*"

Illustrations :

1. A bond was conditioned to assign all offices. It was held that it should be construed as limited to those offices which it was lawful to assign. *Harrington v. Kloprogge, 1785(2) B & B 678 n. (a)*.

2. A contract for the assignment of a lease provided that if licence to assign was delayed beyond a certain date, the purchaser would pay the purchase price to the vendor and the vendor would "thereupon allow the purchaser to enter into occupation pending completion" and the purchaser would pay the rent and other outgoings. It was held that "allow", meant, "lawfully allow", and consequently did not cover entry into occupation in breach of covenant. *Cantor Art Services Ltd. v. Kenneth Bieber Photography Ltd., 1969(1) W.L.R. 1226*, C.A."

16. In our view, the submission of the learned counsel for the appellant requires to be accepted because as stated above, it is nowhere pleaded that the deed executed between the parties is a camouflage to evade the rigours of the provisions of the Rent Act nor is it stated that a sham document is executed for achieving some other purpose. In these set of circumstances, the intention of the parties is required to be gathered from the express words of various terms provided by them in the deed. For this purpose, clause 12 of the document is to be taken into consideration and due weight is required to be given to what parties have stated. It provides as under :-

> "12. It is hereby expressly agreed upon and declared by and between the parties that these presents shall not be treated or used or dealt with or construed by the parties in any way as a tenancy or lease or as a document within the perview of the West Bengal Premises Tenancy Act or any modification or amendment thereof or to confer any relationship as landlord and tenant between the parties hereto."

17. The aforesaid term of the document is not provided by an illiterate layman or poor person in need of some premises for his residence or business, but is executed by two companies where it can be presumed that it is mentioned after full understanding and to avoid any wrong inference of intention. It specifically mentions that only a license was created and not a lease. The said clause is in positive as well as negative form providing that the agreement was a licence and should not be treated or used or dealt with or construed by the parties in any way as lease or to confer any relationship as landlord and tenants between the parties. When the parties which are capable of understanding their rights fully, expressly agreed and declared that document should not be construed in any manner as creating any relationship as landlord and tenant between them, it would be impermissible to conjecture or infer that their relations should be construed as that of landlord and tenant because of certain terms mentioned in the deed can have double intendment. As stated above, intention of the parties is the meaning of the words they have used and there could be no intention independent of that meaning. The learned Single Judge of the High Court rightly, therefore, held that this clause stares in his face in construing it as a lease deed.

18. Secondly, parties to the document were fully aware that lease or sub-lease could not be granted and therefore, specific provision is made in the deed that if the consent of the tenant is obtained for creation of sub-lease, deed for the same would be executed on the terms and conditions which were set out in the document; detailed provisions are made in various clauses of the deed for obtaining permission and execution of lease deed. Parties were conscious that a lawful lease deed could be executed only after obtaining consent of the landlord and the document if treated as sub-lease, would be illegal. Paragraphs 4, 5 and 6 of the deed specifically provide that after obtaining the consent of the landlord, licensor would grant a sub-lease in respect of the said premises for a period of atleast ten years and the licensor would endeavour to obtain a lease on the terms which would not be inconsistent with the standard terms on which a sub-lease is obtained by the licensee for the purpose of selling his products through the Petrol Service Station and a copy of the standard form of the lease was also attached with the deed.

19. Thirdly, no contention was raised by the defendants to the effect that license deed is a camouflage to circumvent the provisions of law or to defeat the rights of owner or tenant who granted the licence and inducted the licensee in possession. Further, in cases where contract for license is executed by handing over exclusive possession of the premises, the distinguishing line between the lease and license is absolutely thin. In such cases, the terms of the document are to be read as they are and it would be unreasonable to draw inference that parties intended to create relationship of landlord and tenant despite express contrary terms in the deed which are binding

between the parties.

20. However, Mr. D.P. Gupta, learned Senior Counsel for the respondent vehemently relied upon various terms of the document in support of his submission that the document should be construed as a lease deed. He submitted that construe the document as it is and disregard what would be the legal consequences of construing it one way or the other way. For that purpose, he referred to the following observations of Buckley, J. from the paragraphs which are sought to be relied upon from the Interpretation of Contracts by Kim Lewison, Q.C. :

> "My first duty is to construe the contract, and for the purpose of arriving at the true construction of the contract, I must disregard what would be the legal consequences of construing it one way or the other way."

21. For this proposition there cannot be any dispute. The contract is to be construed on the basis of the terms of the document disregarding the legal consequences. However, when terms of the document are ambiguous and are holding double intendment then the meaning which is lawful is to be preferred. As stated above, in the license deed, the parties have specifically made it clear that they were not executing lease deed, but only a license deed and it should not be construed as a lease deed or a deed creating relationship of landlord and tenant between them. It was known to them that without prior consent, creation of sub-tenancy would be illegal. Hence, it would not be correct to arrive a conclusion which is contrary to the law and the express terms of the agreement. Learned counsel for the respondents further submitted that in the present case, exclusive possession of the property was handed over to the defendant coupled with the fact that in clause 18, the parties have used the phrase `demised premises' which means that the intention of the parties was to create relationship of landlord and tenant. In our view, this submission of the learned counsel cannot be accepted. Exclusive possession as discussed above is not the sole inditia (indicia ?) to establish the relationship of landlord and tenant between parties. It is true that the word `demise' indicates either lease or conveyance depending upon the terms of the document. But, at the same time said word is to be construed by finding out what is sought to be conveyed or transferred in the context of all the terms of the document. If privilege of occupying the premises exclusively is granted on certain terms and conditions specifically as a licensee or what is agreed to be granted is exclusive possession of the premises on certain terms and conditions as a licensee, then there is no question of holding to the contrary. This would be clear from various meanings which could be assigned to the word `demise'. In Stroud's `Judicial Dictionary of Words and Phrases', the word `demise' is given different meaning and it is stated that it is to be interpreted in context of other terms. This would be clear from the following meanings given to the said word :

> "On the demise of a brewery, with the exclusive privilege of supplying ale, *it would seem that no covenant can be implied with respect to such a privilege from the word `demise'.*" (*Hind v. Gray 9 L.J.C.P. 253*).
>
> *An instrument is not a demise or lease, although it contains the usual words of demise, if its contents show that such was not the intention of the parties* (*Taylor v. Caldwell, 32 L.J.Q.B. 164*); and, on the other hand, an agreement only may sometimes be a lease."

22. In Butterworths `Words and Phrases' the word `demise' has been explained as under :-

> "*The relationship of landlord and tenant is one of contract*, but a lease also operates

> as a conveyance. The usual word for this purpose is `demise', but neither this word nor any formal words of conveyance are necessary. Provided the instrument shows the parties' intent that the one is to divest himself of the possession and the other is to come into the possession for a determinate time, either immediately on in the future, it operates as a lease. This is so whether it is in the ordinary form of a demise, or in the form of a covenant or agreement, or in the form of an offer to let or take on certain terms and an acceptance appearing on correspondence. (27 Halsbury's Laws (4th Edn.) para 107).
>
> `It is true that the word demise [in a lease] does imply a covenant for title, but only when there is no express covenant inconsistent with such a construction.' *Line v Stephenson, 1938(5) Bing NC 183* at 186, per Lord Denman, CJ.
>
> `The terms of the lease, in my opinion, establish an exclusive occupation. The word "demise" *prima facie* alone would be sufficient to establish that. I do not go so far as to say that where the word "demise" is used in a lease or agreement no evidence would be admissible to displace the presumption arising from its use, but the word *prima facie* would establish an exclusive occupation." *Young and Co. v. Liverpool Assessment Committee, 1911(2) KB 195* at 215, DC, per Avory, J."

23. Hence for determining whether the phrase `demised premises' should be construed as a lease or a license as expressly stated in the agreement, the phrase or the word is to be construed in context in which it is used. In the present case the said phrase is used in clause 18 three times along with the term `license fee' which was to be paid by the licensee and the manner of its payment. It provides that `license fee' for the demised premises was Rs. 3950/- per month and the license fee was payable for the said demised premises as provided therein, that is to say, Rs. 23,700/- for six months in advance and that the said license fee is to be adjusted in respect of the demised premises per month. The phrase `demised premises' is used for recovering the license fee. If the intention of the parties was to create lease, then the word `rent' would have been easily used at all the places. `Demised premises', in the present case, includes not only the premises, but fittings, fixtures and the petrol service station also. License was granted specifically to run the petrol service station on the terms and conditions specified therein. There are number of other terms and conditions in the document which indicate that it was a license deed. Firstly, the license was for the purpose of running the petrol service station which was set up by the licensor. The possible grant of sub-lease was reserved for the future in the event of Delta obtaining consent from its landlord Mallika Investments Company. The licensee was not obliged to pay any part of the outgoings in respect of the premises which indicate that the charges attendant upon occupation of the premises were to be paid and borne by the licensor. He was also required to keep the plant and machinery at the said premises in good repair and was required to obtain necessary insurance policies for the business. A further clause to the effect that the licensee was permitted to carry on business in the name of the licensor indicates that the premises were not let out otherwise there was no question of permitting the use of the licensor's name. It is true that there are certain other clauses which may indicate a different intention if they are construed in isolation such as a term to the effect that licensee was entitled to grant sub-licence to operate the petrol station or that they were entitled to instal other machinery. But, at the same time, these clauses are to be read in the context of the fact that the licensor had decided not to run the business of petrol service station and that by the impugned deed, right to run the said business along with the premises was given to the licensee. Further, clause 9 specifically provides that licensor shall be at liberty to withdraw and or revoke the leave and licence in case there is any default of the terms mentioned in the document. Clause 16 provides that if the sub-lease is granted

then licensee was required to purchase the equipments, fittings and fixtures as mentioned in the Second Schedule at a price of Rs. 2,50,000/- within a period of one year from the date thereof. Admittedly, sub-lease is not granted and the amount of Rs. 2,50,000/- as agreed is also not paid by anyone.

24. Hence, even though it is not necessary to discuss, however, we would briefly refer to other decisions upon which learned Counsel for the parties relied upon. Learned Counsel for the respondent relied upon the decision in the case of *Capt. B.V. D'Souza v. Antonio Fausto Fernandes, 1989(3) S.C.C. 574* and submitted that the main purpose of enacting the rent statutes is to protect the tenant from the exploitation of the landlord, who being in dominating position is capable of dictating his terms at the inception of the tenancy and the Rent Acts must receive that interpretation which may advance the object and suppress the mischief. He, therefore, submitted that using of the words leave and licence or some other terms in the document should be construed in a way so as to advance the object of the Rent Act. In our view, in the present case, there is no question of such exploitation by the landlord. `Dewar' itself was inducted by a tenant in the premises and at the time of executing the leave and licence document; parties were under the impression that they would obtain the consent of the landlord for granting sub-lease. The contemplation was not achieved. Hence, the said judgment has no bearing in interpreting the terms of the document which is executed between two Companies knowing full well their rights and the legal implications of the terms provided in the document. He also referred to the decision in the case of *Tulsi v. Paro (dead) 1997(2) SCC 706* wherein this Court after considering the revenue records for the period from 1951-52 to 1971-72 mentioning that appellant was not in a possession as the "tenant at will", held that the theory of licence was untenable and in that context observed that a licensee has no right in property and not to speak of any right to exclusive possession of the property and animus of possession always remains with the licensor and the licensee gets the possession only with the consent of licensor and is liable to vacate when so asked. In the said case, there was no written document between the parties and considering the facts of the case particularly exclusive possession for a period of 20 years and the revenue records, the Court held that it was unthinkable to conclude that appellant of that case was licensee. As stated above, exclusive possession is one of the most relevant factors for deciding whether it is a lease or licence. But, at the same time, when the terms of the document are clear leaving no doubt that parties never intended to execute lease deed, in that set of circumstances, exclusive possession would lose its importance. Dealing with the similar question in the case of *M.N. Clubwala v. Fida Hussain Saheb, 1964(6) S.C.R. 642*, this Court observed as under :-

> "While it is true that the essence of a licence is that it is revocable at the will of the grantor the provision in the licence that the licensee would be entitled to a notice before being required to vacate is not inconsistent with the licence. In England it has been held that a contractual licence may be revocable or irrevocable according to the express of implied terms of the contract between the parties. It has further been held that if the licensee under a revocable licence has brought the property on to the land, he is entitled to notice of revocation and to a reasonable time for removing his property, and in which to make arrangements to carry on his business elsewhere. Thus the mere necessity of giving a notice to a licensee requiring him to vacate the licensed premises would not indicate that the transaction was a lease. Indeed, section 62(c) of the Indian Easements Act, 1882 itself provides that a licence is *deemed to be revoked where it has been either granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled*. In the agreements in

> question the requirement of a notice is a condition and if that condition is fulfilled the licence will be deemed to be revoked under section 62. It would seem that it is this particular requirement in the agreements which has gone a long way to influence the High Court's finding that the transaction was a lease. 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. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement*. In the absence, however, of a formal document the intention of the parties must be inferred from the circumstances and conduct of the parties."

25. Lastly, it is to be noted that if the document is a camouflage as stated earlier, the mask or veil is required to be removed for determining the true intent and purpose of the document. In the present case, there is no pleading by the defendants that the document was a camouflage so as to defeat the rights of a tenant who had inducted the appellant or that of the owner of the premises. As stated earlier, the document contemplates three types of agreements, one, that of a leave and licence; secondly, in case a consent is obtained from the tenant, for execution of sub-lease which would create interest in the property as sub-tenant and thirdly, in case of sub-lease, for purchase of equipment, fittings and fixtures at a price of Rs. 2,50,000. Second and third part of the Agreement never came into operation. Hence, for the reasons discussed above, we hold that the agreement dated 18th July, 1970 is a deed of `leave and licence' and not a `lease'.

26. In the result, the appeals are allowed, the judgment of the Division Bench dt. 2.12.1997 is set aside and the order passed by the learned single Judge in Suit No. 491 of 1985 is restored. In the circumstances of the case, there shall be no order as to costs.

Appeal allowed.