

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 47 OF 2005

1. M/s Hotel Satkar,
having their registered office
at Mardol, Ponda, Goa,
Represented by its partners:
a) Mr. Gopalkrishna Pandurang Kamat,
son of Pandurang Kamat,
married, major of age,
residing at Veling,
Mardol, Ponda, Goa.

b) Mr. Vijaykumar Pandurang Kamat,
son of Pandurang Kamat,
married, major of age,
residing at Veling,
Mardol, Ponda, Goa. ... Appellants

V e r s u s

1. Krishnanath Nanu Chavdikar,
son of Nanu Babuao Chavdikar,
residing at Chawadi,
Usgao, Goa.
2. Smt. Sunita Velingkar,
Major, widow,
Resident of c/o Hotel Satkar,
Mardol, Ponda, Goa. ... Respondents

Mr. S. D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar, Advocate for the Appellants.

Mr. J. Godinho, Advocate for the Respondents.

Coram :- **F. M. REIS, J**

Date of Reserving Judgment : **15th December, 2014**
Date of Pronouncement : **13th March, 2015.**

JUDGMENT

Heard Shri S. D. Lotlikar, learned Senior Counsel appearing for the Appellants and Shri J. Godinho, learned Counsel appearing for the Respondents.

2. The above Second Appeal came to be admitted by an Order dated 06.10.2005 on the following substantial questions of law :

(1) Whether in view of the decision of the Apex Court in case of Raptakos Brett & Co. Ltd. v. Ganesh property [1998(7) SCC 184] and in view of the fact that the plaintiffs/appellants in the suit were enforcing the statutory obligation on part of respondent no. 1 to vacate the suit premises in view of the termination of licence in his favour, suit could be said to be barred by Section 69(2) of Indian Partnership Act, 1932 ?

(2) Whether a true and correct interpretation of the agreement dated 1.4.1976, 10.9.1980, 1.4.1982, 1.4.1986, 1.4.1987 and 1.4.1988 the same could be considered as creating a lease in respect of suit hotel in favour of respondent no. 1?

3. Shri S. D. Lotlikar, learned Senior Advocate appearing for the Appellants, in support of the aforesaid above substantial questions of law has pointed out that the Courts below have erroneously dismissed the suit filed by the Appellants on the ground that the suit is barred under the provisions of Section 69(2) of the Indian Partnership Act, 1932, without noting that the suit filed by the Appellants was to enforce the statutory obligations to vacate the disputed premises as the occupation of the Respondents was that of a trespasser. Learned Senior Advocate further pointed that pursuant to an Agreement to conduct a business, the Respondents were permitted to run such business for a specific period of time which had already lapsed and, as such, according to him, any occupation by the

Respondents was that of a trespasser and, as such, in view of the provisions of the Act, the Appellants were entitled to file a suit for enforcing such right. Learned Senior Advocate further pointed out that the Appellants were not enforcing any right based on an agreement but, according to him, such right was being exercised under the common law. Learned Senior Advocate in support of his submissions has relied upon the Judgment of the Apex Court reported in **1998 (7) SCC 184** in the case of ***Raptakos Brett & Co. Ltd. v. Ganesh Property***. Learned Senior Advocate has taken me extensively through the said Judgment and pointed out that on going through the ratio laid down therein, the findings of the Courts below that the suit is barred in terms of Section 69(2) of the Indian Partnership Act, are totally erroneous. Learned Senior Advocate as such submits that the first substantial question of law be answered in favour of the Appellants. Learned Senior Advocate has further pointed out that the Appellants themselves are tenants of the disputed premises and, as such, the question of the Respondents claiming that they are tenants of the suit premises are totally misplaced. Learned Senior Advocate further pointed out that on bare perusal of the Agreement, the Respondents were only permitted to run the business and, as such, by no stretch of imagination, such permission can be construed to be a tenancy Agreement. Learned Senior Advocate further pointed out that all the articles in the premises belonged to the Appellants and, as such, the question of the Courts below coming to the conclusion that the Respondents were in possession of the disputed premises are totally perverse. Learned Senior Advocate further pointed out that the Courts below have erroneously rendered a finding by misreading the document as well as the evidence on record to come to the conclusion that the Respondents

were tenants of the suit premises. Learned Senior Advocate further pointed out that the Courts below have lost sight of the fact that the Appellants were tenants of the premises and, consequently, the contention of the Respondents is totally farfetched. Learned Senior Advocate has taken me through the Judgments of the Courts below and pointed out that the Courts below have erroneously come to the conclusion that there was a tenancy Agreement between the parties.

4. On the other hand, Shri J. Godinho, learned Counsel appearing for the Respondents, has pointed out that the suit is barred in terms of Section 69(2) of the Indian Partnership Act, as admittedly the partnership was an unregistered partnership firm. Learned Counsel further pointed out that the contention of the learned Senior Counsel appearing for the Appellants, that the Appellants were enforcing a statutory right is totally erroneous as, according to him, the claim of the Appellants was on account of the breach of the contract. Learned Counsel has further pointed out that merely because the Partnership Firm was thereafter registered, would not cure the defect of the bar to file a suit by an unregistered firm. Learned Counsel has thereafter taken me through the Judgments of the Courts below to point out that both the Courts below have rightly come to the conclusion that the suit is barred in terms of Section 69(2) of the Indian Partnership Act. In support of his submissions, the learned Counsel has relied upon the Judgments of the Apex Court reported in **(2007) 15 SCC 58** in the case of **Purushottam & anr. vs. Shivraj Fine Arts Litho Works & Ors.** and **AIR 2001 Bombay 255** in the case of **Sardar Pruthisingh vs. Kanchanlal Purushottamdas Desai**. Learned Counsel as such pointed out that the suit filed by the Appellants itself was not maintainable.

5. With regard to the second substantial question of law, learned Counsel has pointed out that the Respondents are in possession of the disputed premises and, as such, both the Courts below have rightly come to the conclusion that the intention of the parties was to create a lease. Learned Counsel as such points out that there is no case for any interference in the impugned Judgment as, according to him, as the possession of the disputed premises are with the Respondents, the Courts below have rightly taken a view that the Respondents are tenants of the disputed premises.

6. I have duly considered the submissions of the learned Counsel. I have also gone through the records. Before I proceed to examine the rival contentions, I shall proceed to examine the nature of the suit filed by the Appellants. It is the case of the Appellants that the Appellants are in the business of running a Restaurant and that such business was being run in the name and style of "Hotel Satkar" situated in the premises belonging to Sripad Balkrishna Zuvenkar situated at Mardol. It is further their case that the suit premises were let out to Vishnu Vaikunt Camotim also known as Vishnu Voicunt Kamat, who retired from the said partnership and that Rukmini Pandurang Kamat was the sole proprietor along with her minor children who continued the said business activity. It is further their case that thereafter Rukmini Kamat retired from the said partnership firm and said Gopalkrishna Pandurang Kamat and Vijaykumar Pandurang Kamat formed a partnership by Deed dated 18.07.1975. It is further their case that by an Agreement to conduction dated 01.04.1976, the Appellants appointed the Respondents as

Conductor to conduct the said hotel business for a period of two years from 01.04.1976 to 31.03.1978 and at that time, the articles in the premises have been clearly mentioned at para 8 of the plaint. Subsequently, another Agreement dated 01.04.1978, came to be executed whereby the Respondent was again appointed as a Conductor of the business. There were subsequent Agreements of similar nature executed by the Appellants dated 10.09.1980, 01.04.1982, 01.04.1986, 01.04.1987 and 01.04.1988 and that the last appointment by the Appellants was by the said Agreement dated 01.04.1988 to 31.03.1990. As the Respondent was in the process of doing some illegal activity in the premises, the Appellants lodged a complaint before the local Panchayat. Thereafter, the notice of termination of the Agreement was sent by legal notice dated 09.11.1989. A reply was sent to the said notice dated 08.12.1989. It is further their case that the Respondent is in illegal and unauthorized possession of the suit premises and has taken illegally and unauthorisedly the control of the said hotel. As such, the suit was filed, inter alia, to declare the appointment of the Respondent as a Conductor of the said hotel as terminated from 16.12.1990 further to direct the Respondents to leave the suit premises and to stop running the said Hotel Satkar and also to Order the payment of Rs.8400/- together with interest at 18% per annum and mesne profits at the rate of Rs.400/- per month from the date of filing of the suit.

7. The Respondents filed their written statement by merely denying the contents of Paras 1 to 7. The fact that the items were in the premises has also been admitted by the Respondents except for some items. It is further their case that though the said Agreement was styled as Leave and Licence Agreement, it is a

lease Agreement. The Respondents also disputed the right of termination of the Agreement by the Appellants and denied that any amount is to be paid and, as such, prayed that the suit be dismissed.

8. The Respondent no. 2 filed the written statements, inter alia, contending that the suit is not maintainable as the partnership firm is not registered. The said defendant denied that she was occupying the suit premises and claimed that such allegations are fabricated besides being a concocted story with ulterior motives. The said defendant also contended that she was staying in a separate unit.

9. The learned Trial Judge after framing of issues and recording of evidence, by Judgment and Decree dated 28.10.2002, dismissed the suit filed by the Appellants. The learned Trial Judge while examining the issue nos. 1 and 7, has taken note of the clauses of the Agreement and has come to the conclusion that the Appellants did not have any control of the suit premises. The learned Judge further found that the Respondent no. 1 is a tenant in respect of the suit premises and, as such, the learned Judge came to the conclusion that the Respondent no. 1 cannot be held to be a conductor of the business. Whilst examining Issue no. 2, the learned Judge found that both the Respondents admitted that electricity and water connection to the premises wherein the Respondent no. 2 is residing is from the Hotel. The learned Judge further found that whilst examining the issue nos. 3 and 4 that the Respondents are in wrongful possession of the suit premises and, as such, they are not liable to pay any mesne

profits to the Appellants. Whilst examining issue no. 8, the learned Judge relying upon the provisions of Section 69(2) of the Partnership Act, held that the suit is not maintainable. The learned Judge further found that the Civil Court has no jurisdiction to entertain the suit and, consequently, dismissed the suit. In an Appeal preferred before the Appellate Court being Regular Civil Appeal no. 150 of 2002, the learned Addl. District Judge, by Judgment and Decree dated 06.12.2004, had come to the conclusion that the suit is barred under Section 69(2) of the Indian Partnership Act and found that the findings of the learned Judge that the Respondents were tenants of the premises cannot be faulted and, consequently, dismissed the Appeal filed by the Appellants.

10. Before we examine the maintainability of the suit in view of the provisions of Section 69(2) of the Indian Partnership Act, one will have to consider the real nature of the suit filed by the Appellants. The suit filed by the Appellants on the basis of the averment in the plaint is that the Respondent was a Conductor of the business and that despite of the notice of termination, he continued in the premises as a trespasser and/or illegal occupant and, consequently, directed the removal from the disputed premises. The case of the Appellants is that the Respondent no. 1 was merely a licensee and/or a relationship of Tenant/Landlord existed between the Appellants and the Respondents. In such circumstances, considering the nature of the suit, a licence can be created to run a business in the premises under the provisions of the Easement Act. An occupation of a person after termination of such licence is that of a trespasser. As such, even assuming that the stand of the Respondent no. 1 is to be accepted, the claim of the

Appellants was not for the specific performance of the contract of running the business but, however, for a relief in terms of the law of common principles as it was their case that the Respondent no. 1 was in illegal occupation. Such relief can be obtained on the basis of the Easement Act and the common law which, inter alia, stipulates that the real owner is always entitled for the eviction of a trespasser. In such circumstances, the Courts below were not justified to come to the conclusion that the suit is barred in terms of Section 69(2) of the Indian Partnership Act. The Agreement between the parties was only for two years from 01.04.1988. There was also a stipulation therein to terminate the Agreement by 30 days notice. In such circumstances, the relief sought is on the basis that the Respondents are trespassers and in illegal occupation of the disputed premises. It is also contended that contrary to the said Agreement, the Appellants have not permitted the Respondents to possess the said premises and, as such, the reliefs claimed in the suit are under the common law. The Lower Appellate Court has erroneously taken a view that the reliefs were not under the common law. The Apex Court in the Judgment reported in **Raptakos Brett & Co. Ltd. v. Ganesh Property** (supra), has observed at Paras 14, 17, 18, 20 and 22 thus :

“14. However, the aforesaid conclusion will not clinch the matter one way or the other. The reason is obvious. While considering the question whether the suit as filed is hit by Section 69 sub-section (2) of the Partnership Act or not, we have to see what the plaintiff claims as his cause of action. It is obvious that if the suit is based solely on the ground that the erstwhile tenant-defendant unlawfully remained in possession after the expiry of the lease and is required to hand over possession to the plaintiff, the

suit can be said to be based on the sole cause of action for enforcement of a right arising at general law and under the Transfer of Property Act in favour of the plaintiff and against the defendant who was earlier protected by the contract between the parties. Shri Nariman in this connection was right when he contended that the aforesaid decisions of this Court only decide the status of such an erstwhile tenant and there cannot be any dispute that the appellant on the expiry of the lease, especially when there was no evidence to show that he was a tenant by holding over, had continued in occupation as a tenant at sufferance. However, the nature of the right sought to be enforced by the plaintiff has to be culled out from the recitals in the plaint even against such a tenant at sufferance.

15. ...

16 ...

17. However, the aforesaid conclusion of ours cannot put an end to the controversy between the parties. The reason is obvious. The plaintiff in the clearest terms has based its cause of action also on the law of the land as found in para 2 of the plaint. So far as this part of the cause of action is concerned, it is a distinct cause of action apart from the cause of action emanating from the alleged breach of the covenant on the part of the defendant. So far as the law of the land is concerned, it is obviously the common law under which the erstwhile tenant on the expiry of the lease has to hand over vacant possession to the erstwhile landlord. But that apart, the said obligation on the part of the erstwhile tenant

is statutorily recognised by Section 108(q) read with Section 111(a) of the Property Act. Section 111 clause (a) reads as under:

“111. A lease of immovable property, determines—

(a) by efflux of the time limited thereby;

(b)-(h) * * *

In the present case, we are not concerned with any of the other clauses of Section 111. We confine the present decision only on the aforesaid mode of determination of lease of immovable property by the efflux of time. It is obvious that such a lease gets determined by the efflux of time. The determination is automatic and does not depend upon any Act either on the part of the landlord or on the part of the tenant. When such automatic statutory determination of lease takes place, Section 108(q) gets simultaneously attracted against the erstwhile lessee. Section 108 of the Property Act deals with rights and liabilities of lessors and lessees. The said section reads as under:

“108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:

(A) *Rights and liabilities of the lessor*

(a)-(c) * * *

(B) *Rights and liabilities of the lessee*

(d)-(p) * * *

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.”

It is, therefore, obvious that a statutory obligation is foisted on the lessee on the determination of the lease which earlier existed in his favour. Therefore, on a conjoint reading of Section 108(q) read with Section 111(a) of the Property Act, it

becomes obvious that under the law, the erstwhile landlord is entitled to base his cause of action on the statutory obligation of the erstwhile lessee on determination of the lease to put the lessor in possession of the property. It is this statutory right of the lessor and the corresponding statutory obligation of the lessee that can be said to have been relied upon by the plaintiff for getting peaceful possession from the defendant as per the recitals in the second part of para 2 read with paras 3 and 4 of the plaint.

It is of course true that in para 2 of the plaint, reliance is also placed on the non-delivery of vacant and peaceful possession of the suit premises to the plaintiff by the defendant as per the covenants which as we have noted are covenants being clauses 14 and 17 of the lease. As they are express covenants relied on by the plaintiff, it is not necessary for us to examine the wider question whether there is any implied covenant on the part of the lessee to hand over possession to the lessor on the expiry of the lease as tried to be suggested by learned Senior Counsel, Shri Nariman placing reliance on a decision of the Division Bench of the Travancore High Court in *Sivjanam Abraham v. Mathevan Pillai Bhoothalingam Pillai*¹⁰ and also on the decision of the Karnataka High Court in the case of *Thayarammal v. People's Charity Fund*¹¹. All the same, we may briefly deal with them. In the case of *Sivjanam Abraham v. Mathevan Pillai Bhoothalingam Pillai*¹⁰ the Court was not directly concerned with the interpretation of Section 69 sub-section (2) of the Partnership Act. The question before the Court was whether on the determination of the lease, the erstwhile tenant was liable to restore the possession of the property to the plaintiff. Analysing the landlord's claim for recovery of possession

on the determination of the tenancy, it was observed in para 7 that:

“7. The landlord’s claim for recovery of possession of the properties from a tenant on the determination of tenancy need not be based on any contract expressly entered into in that behalf. The right of the landlord to get and the liability of the tenant to surrender possession of the properties leased, on the determination of the tenancy, is inherent in the very relationship of landlord and tenant and will be implied by the law. This is known as the rule in *Henderson v. Squire*¹².

‘The duty of the tenant upon the determination of the tenancy ... is simply to yield up peaceable and complete possession of the premises demised to him together with all fixtures except those which he is entitled to remove.... This duty will be implied in law if not expressed in the contract between the parties and the tenant will not discharge the duty by merely going out of possession unless he restores possession to the landlord.’ *Foa on the Relationship of Landlord and Tenant*, 6th Edn., p. 838.

‘A lease usually contains a covenant on the part of the lessee to deliver up the premises on the determination of the term. In the absence of such a covenant or of any express stipulation, the tenant is under an implied contract to restore possession to the landlord.’ *The Complete Law of Landlord & Tenant by Redman*, edited by Hill, 8th Edn., (1939) p. 459.

See also *Venkatesh Narayanpai v. Krishnaji Arjun*¹³. Section 108(q) of the Transfer of Property Act has recognised this obligation on the part of the tenant. Indeed one does not

come across an instance of this plea having been ever seriously put forward.”

We fail to appreciate how this decision can advance the case of the appellant. All that it says is that on the determination of the tenancy, the tenant would be bound to restore the possession of the demised premises to the erstwhile landlord and if there is an express term/covenant in the lease to that effect, it would apply and if there is no express covenant, the law will imply an obligation to that effect of the erstwhile tenant. As we have noted in the present case, there is an express covenant in the lease which also was relied upon by the plaintiff. But in the absence of such an express covenant, the law would imply a statutory obligation on the part of the ex-tenant to deliver and restore vacant possession of the demised premises to the landlord on determination of the lease. That would obviously create a legal right in favour of the landlord and a corresponding legal duty and obligation on the part of the ex-tenant. That is precisely what is being sought to be enforced by the plaintiff by basing its right to possession also on the law of the land. Similarly, the decision of the learned Single Judge, M. Rama Jois, in the case in *Thayarammal v. People's Charity Fund*¹¹ also cannot be of any avail to learned Senior Counsel for the appellant. The learned Judge in the said decision has taken the view following this Court's decisions that on the expiry of the lease, the erstwhile lessee cannot be said to be in lawful possession within the meaning of Rule 6 of the Karnataka Cinemas (Regulation) Act

(23 of 1964). It is of course true that while referring to Section 108(q) of the Property Act, it has been observed that on the expiry of the lease period, the lessee was bound to put the lessor into possession of the property and that it would be an implied term of the contract. It imposes an obligation in law on the erstwhile tenant to restore possession to the landlord.

19. ...

20. Even these observations do not in any way dilute the contention of learned Senior Counsel for the respondent that when the plaintiff has relied on the law of the land, any implied covenant as contemplated by the statutory provisions of Section 108(q) would still remain in the domain of statutory obligation on the part of the appellant to hand over vacant possession to the respondent on the determination of the lease by the efflux of time. Consequently, the decisions of the Travancore and Karnataka High Courts which have taken the view that there is an implied term in the contract of lease that after the expiry of the lease period, the lessee would put the lessor in possession would not be of any assistance to the appellant. It has to be noted that so long as this implied term runs parallel to the statutory obligation of such erstwhile lessee as per Section 108(q), it cannot be said that the said statutory obligation gets obliterated and repealed merely because such implied term can be culled out from the contract itself. Such an implied obligation or term in the contract cannot in any way reduce the legal efficacy of the statutory obligation foisted upon such a lessee by the express provisions

of Section 108(q) read with Section 111(a) of the Property Act.

21. ...

22. The net effect of this discussion, therefore, is that the plaint as framed by the plaintiff-respondent is based on a composite cause of action consisting of two parts. One part refers to the breach of the covenant on the part of the defendant when it failed to deliver vacant possession to the plaintiff-lessor on the expiry of the lease after 15-3-1985 and thereafter, all throughout, and thus it was guilty of breach of Covenants 14 and 17 of the lease. The second part of the cause of action, however, is based on the statutory obligation of the defendant-lessee when it failed to comply with its statutory obligation under Section 108(q) read with Section 111(a) of the .Property Act. So far as this second part of the cause of action is concerned, it cannot certainly be said that it is arising out of the erstwhile contract.”

11. Considering the ratio laid down by the Apex Court and in view of the fact that the suit filed by the Appellants also has two parts, (1) on the ground that there is a breach of the terms of the Agreement which entitle the termination of the Agreement by the Appellants and (2) on the ground that cause of action is under the general law which, inter alia, contemplates that a person who continues to occupy the premises after the termination of his licence is a trespasser and is bound to cease to occupy such premises after the termination of the licence. To enforce an obligation carved out in the statute, cannot be said to be a right which arises from the contract between the parties and, as such, the suit filed by the

Appellants cannot be said to be hit by the provisions of Section 69(2) of the Indian Partnership Act as held by the Courts below. In such circumstances, the findings of the Courts below that the suit is not maintainable in view of the provisions of Section 69(2) of the Indian Partnership Act cannot be sustained and deserves to be quashed and set aside.

12. The Judgments relied upon by Shri J. Godinho, learned Counsel appearing for the Respondents, are not applicable to the facts of the present case. The Judgment of the Apex Court in the case of ***Purushottam & anr. vs. Shivraj Fine Arts Litho Works & Ors.*** (supra) is in the context wherein the contract being enforced was taken over by a partnership firm. On these facts, the Apex Court has come to the conclusion that when the Agreement being enforced is executed by a unregistered partnership firm, the bar under Section 69(2) would apply. In the present case, as pointed out herein above, the relief sought by the Appellants are under the common law as the Respondent is claimed to be in illegal occupation of the disputed premises. In such circumstances, I find that considering the nature of the cause of action and the relief sought in the suit, it cannot be said that the suit is not maintainable in terms of the provisions of Section 69(2) of the Indian Partnership Act. The first substantial question of law is answered accordingly.

13. With regard to the second substantial question of law, the Agreement itself provides that the Respondent no. 1 was permitted to conduct the business in the premises. The Agreement to run a business is in the nature of a licence Agreement. The fact that the items of the Appellants were in the disputed premises

has not been disputed by the Respondent no. 1. Apart from that, the Agreement itself provides that it shall not be construed that the Agreement creates any Lease in favour of the Respondent no. 1 herein. Reading the Agreement as a whole, I find that the Agreement between the parties was essentially a license Agreement and, by no stretch of imagination, can be construed to be a Lease Agreement. This Court in a Judgment in **Second appeal no. 68 of 2009** in the case of **Shri Prakash Ganesh Lotlikar vs. Shri Prakash Ganesh Lotlikar** has taken note of the observations of the Judgment reported in **2013(1) ABR 853 (Goa Bench)** in the case of **Joao Necessidade Rooque Antonio by Lrs and others V/s Dr. Vaman Govind Lotlikar and Ors.** and observed at Para 9 thus :

“9. Another contention of Mr. Thali, learned counsel appearing for the respondent is that the appellant allowed such relationship to continue for a period of 24 years which according to him suggest that the parties intended to create a lease. It has already been held on the basis of document as well as the other material on record that the intention of the parties was in fact to create a licence, nevertheless, merely an act of tolerance on the part of the appellant in allowing the respondent to occupy such premises by itself would not suggest that he had acquiesced or permitted such relationship or create any change in the colour of his occupation by such extension. In fact, it was the case of the respondent that he became a statutory tenant in the year 1980. There is nothing on record to show how and in what circumstance the respondent became a statutory

tenant in the year 1980. It is not the case of the respondent that there is a new agreement which changed the intention of the parties to occupy the disputed premises on the basis of the licence agreement at Exhibit 25. In such circumstances, the said contention of Mr. Thali, does not deserve any consideration. The learned Single Judge of this Court in the judgment reported in **2013(1) ABR 853 (Goa Bench)** in the case of **Joao Necessidade Rooque Antonio by Lrs and others V/s Dr. Vaman Govind Lotlikar and Ors** has relied upon the judgment of the Apex Court and observed at paras 21, 22, 23, 24, 25, 26 and 27 thus :

“21. In the case of Captain B. V. D'Souza (AIR 1989 SC 1816) (supra), the Apex Court held that in order to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form. Exclusive possession of the party is relevant but at the same time it is not conclusive. The intention of the parties and whether the document creates any interest in the property or not, are important considerations.

In the facts of the case the Apex Court held that document created lease and not leave and licence as has been held by three Courts below.

22. In the case of Lillawati Hiranandani (AIR 1996 SC 441) (supra), the Apex

Court after considering the facts of that case observed that the agreement was unambiguous and it was only a licence. The appellant sought permission of the original applicant to occupy the portion of the flat belonging to the original applicant. No right, or interest whatsoever in the said premises or any part thereof was created in favour of the original respondent. The appellant also undertook to vacate the building and to give quiet possession to the applicant at any time when required to do so. The only condition was that notice of one month was to be given. The Apex Court held that document was clear and as such it was not necessary to look further. Both the parties were aware as to what was the prevailing state of law and entered into the agreement. In this background, the Apex Court held that the label or nomenclature of the agreement and the contents of the communication should conclude the matter. Consequently, the Supreme Court dismissed the appeal.

23. In the case of *Suhas Chopde* (1999 AIR SCW 4948) (supra), the Apex Court held that mere use of word "rent" in a document executed by the licensor by itself would not mean that the

relationship between the parties was that of lessor and lessee. The Apex Court held that undue importance could not have been given to the word "rent" in the agreement and also in some receipts. Consequently, the Supreme Court set aside the judgment of this Court holding that the relationship between the parties was that of landlord and tenant.

24. In the case of Vayallakath Muhammadkutty (AIR 1996 SC 3288) (supra), the Apex Court, after referring to the judgment in the case of Captain B.V. D'Souza (AIR 1989 SC 1816) (supra), held that normally in a case of licence the question of sub-letting does not arise but simply on the ground that there is such a clause in the agreement, the agreement cannot be held to be an agreement for lease. Pith and substance of document are required to be considered for the purpose of finding out true import of a document, namely whether the document creates a lease or licence. In the fact of the case, the Apex Court upheld the finding of the High Court that defendant was not inducted in the premises as lessee and consequently, dismissed the appeal.

25. In the case of Delta International Ltd. (AIR 1999 SC 2607) (supra), after

considering several judgments, the Apex Court in paragraph 15 has observed as follows:-

From the aforesaid discussion what emerges is:

(1) To find out whether the document creates lease or license, the 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 licence 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 in, 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 subtenant 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 the 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, this 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 only what he had a right to do.

In the said case the Apex Court has further observed that the agreement was not entered into by illiterate layman or poor person in need of some premises for his residence or business, but it was executed by two companies and as such, it could be presumed that the terms were incorporated after full understanding and to avoid any wrong inference or intention. The agreement had specifically mentioned that only licence was created and not lease. The said clause was in positive and negative forms 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 or tenant between the parties. The Apex Court further held that when the parties are capable of understanding their rights fully agreed and declared that the document should not be construed in any manner creating any relationship

between the landlord and the tenant, 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 and can have double intentment. The intention of the parties is the meaning of the words they have used and there could be no intention independent of that meaning. In this factual background, the Apex Court held that the learned Single Judge of Calcutta High Court was right in holding that relationship between the parties was that of licensor and licensee.

The Apex Court further observed that mere use of words "demised premises" would not mean that relationship of landlord was accepted. Exclusive possession was not sole inditia to establish the relationship of landlord and tenant between the parties. The Apex Court further held that mere fact that the agreement provided for giving notice to a licensee requiring him to vacate the licensed premises would not indicate that the transaction was a lease. Heavy reliance has been rightly placed by Mr. Usgaonkar upon this judgment.

26. In the case of C.M. Beena (AIR 2004 SC 2103) (supra), the Apex Court

held that the parties to a document can show that what was intended was to create landlord and tenant relationship, although the deed was styled as deed of licence. In the facts of the case, the Apex Court held that the relationship of the parties was of landlord and tenant.

27. In the case of Maria Piedade (supra), learned Single Judge of this Court after considering several judgments of the Apex Court and also several agreements entered into between the parties, held that last agreement dated 1.9.1990 entered into between the parties created relationship of licensor and licensee and not lessor and lessee as held by the First Appellate Court and consequently, allowed second appeal. In the said case also there was a break in between the agreements and the first agreement was drawn on 1.6.1981 whereas last agreement was drawn on 1.9.1990. Learned Single Judge held that what was required to be considered was the last agreement for the purpose of finding out the relationship between the parties. I do not deem it necessary to refer to the judgments of the Apex Court in the case of East India Hotels (supra) and the Division Bench judgment of this Court in

the case of Bento de souza (supra), since the facts in both these cases are clearly different.”

Considering the ratio laid down by the Apex Court in the said judgment the intention of the parties at the time of execution of the agreement is much relevant. In the present case as already pointed out herein above the agreement itself suggest that the appellant only intended to create a licence in favour of the respondent to occupy a room of the shop belonging to the appellant. The electricity supply was also from the said shop of the appellant as stated in the agreement. The dominant intention of the parties is to be gathered from the terms of the document irrespective of the label that the parties may be put to it. As pointed out herein above, the exclusive possession by itself will not amount to creation of interest in the premises. The exclusive possession by itself would not meditate against the concept of licence if the circumstances negate any intention to create a tenancy. As such, I find that the Lower Appellate Court was not justified to come to the conclusion that the disputed agreement had created tenancy in favour of the respondent. The Lower Appellate Court

has misconstrued the said document to come to such conclusion. As pointed out herein above, the intention of the parties as gathered from the document clearly shows that the intention was for creating a mere licence to occupy the disputed premises which consists of part of the larger premises belonging to the appellant. The learned Trial Judge has rightly come to the conclusion that the relationship between the parties was a licence and consequently, directed that the appellant was entitled for the relief sought in the suit. The interference by the Lower Appellate Court in the impugned judgment was not justified.”

14. Taking note of the observations and the ratio laid down in the Judgments referred to herein above and going through the Agreement between the parties, by no stretch of imagination, an Agreement to conduct the business executed between the Appellants and the Respondent no. 1 can be construed to be a Lease Agreement. As noted herein above, the Appellants themselves were tenants of the original Landlord and merely because the Respondent no. 1 was permitted to carry on business, no tenancy could be created in favour of the Respondent no. 1 by the Appellants. The findings of the Courts below that the Respondents were exclusively in possession of the disputed premises are totally perverse on perusal of the recitals of the Agreement executed between the parties. The Respondents have failed to establish any exclusive possession based on the

terms of the Agreement. As the Respondent was not in exclusive possession of the disputed premises, no presumption of tenancy could be drawn in his favour and in any event it is rebuttable. Considering the admission of the Respondent no. 1 that the implements and other materials referred to in the plaint, belonging to the Appellants, were existing in the disputed premises, would by itself suffice to hold that Respondent no. 1 was not in exclusive possession of the disputed premises. In such circumstances, the Courts below have misread the evidence on record to hold that the Agreement to conduct the business executed between the parties is in fact a lease Agreement of the disputed premises. Hence, the findings of the Courts below on that count be sustained being perverse and deserve to be quashed and set aside.

15. On perusal of the plaint, the Appellants have, inter alia, sought for relief to hold that the Respondent no. 1 is a conductor of the business in the premises in dispute. The occupation of the Respondents after termination of the licence Agreement is that of a trespasser and, consequently, the Respondents are not entitled to occupy the disputed premises. The second substantial question of law is answered accordingly.

16. The Appellants have failed to establish the mesne profits which the Appellants are entitled in view of the illegal occupation of the premises by the Respondents. In such circumstances, I find it appropriate to direct the learned Trial Court to hold an inquiry in terms of Order 20(12)(ba) of the Civil Procedure Code, which reads thus :

“12. Decree for possession and mesne profits.- (1)
Where a suit is for the recovery of possession of
immovable property and for rent or mesne profits, the
Court may pass a decree-

- (a) ...
- (b) ...
- (ba) for the *mesne profits* or directing an inquiry as
to such mesne profits;

16. In the present case, as pointed out herein above, there is no material produced by the Appellants to establish the amount of mesne profits in respect of the disputed premises. As such, the Trial Court will have to hold an enquiry in terms of the said provisions of the Civil Procedure Code and fix the amount of mesne profits, if any, payable to the Appellants by the Respondents for unauthorised occupation of the disputed premises from the date of the filing of the suit.

17. In view of the above, I pass the following :

ORDER

- (I) The Appeal is partly allowed.
- (II) The impugned Judgments and Decree dated 28.10.02 passed by the learned Trial Court and the Lower Appellate Court dated 06.12.2004, are quashed and set aside.
- (III) The suit filed by the Appellants is partly decreed in terms of prayer clauses (a) and (b).

(IV) The learned Trial Judge shall provide to hold an enquiry in terms of Order 20 Rule 12(ba) of the Civil Procedure Code for mesne profits in accordance with law.

(V) Appeal stands accordingly disposed of with no order as to costs.

F .M. REIS, J.

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