

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.331 OF 2015

WITH

CIVIL APPLICATION NO.295 OF 2015

Messrs Miscellenary Marketers]
Pvt. Ltd. having its address at]
Shop No.2, Sun-N-Sand Hotel,]
Juhu, Mumbai-400 049].. Applicants

Versus

Messrs Sun-N-Sand Pvt. Ltd.]
Having its address at Sun-N-Sand]
Hotel, Juhu, Mumbai-400 049].. Respondents

AND

CIVIL REVISION APPLICATION NO.335 OF 2015

WITH

CIVIL APPLICATION NO.297 OF 2015

Messrs Miscellenary Marketers]
Pvt. Ltd. having its address at]
Shop No.2, Sun-N-Sand Hotel,]
Juhu, Mumbai-400 049].. Applicants

Versus

Messrs Sun-N-Sand Pvt. Ltd.]
Having its address at Sun-N-Sand]
Hotel, Juhu, Mumbai-400 049].. Respondents

Ms. Zenobia S. Irani, for the Applicants in both the CRAs.

Mr. P. S. Dani, Senior Advocate, Mr. Durgaprasad Sabnis a/w Ms. Shauna Jain i/by Lex Firmus, for the Respondents in both the CRAs.

CORAM : R.M. SAVANT, J.

JUDGMENT RESERVED ON : 3rd DECEMBER 2015

JUDGMENT PRONOUNCED ON : 8th JANUARY 2016

ORAL JUDGMENT

1. Admit, with the consent of the Learned Counsel for the parties heard forthwith.

2. By way of the above Civil Revision Applications the applicants seek to invoke the Revisionary Jurisdiction of this Court against the common judgment and order dated 08.05.2015 passed by the Appellate Bench of the Small Causes Court, by which the Appeals being Appeal No.16 of 2011 and Appeal No.17 of 2011 filed by the Applicants came to be dismissed and the cross objection No.3 of 2011 filed by the original Plaintiffs came to be allowed and resultantly, the decree passed by the Trial Court dated 27.01.2011 came to be confirmed.

Both the above Civil Revision Applications involve common facts which can be conveniently narrated as under:-

3. The Civil Revision Applicants are the original Plaintiffs in LD Suit No.59 of 1995 and the Defendants in LE & C Suit No.17/17 of 1996. The Respondents are the original Defendants in the said LD Suit No.59

and 1995 and the Plaintiffs in LE & C Suit No.17/17 of 1996. The suit premises is Shop No.2 admeasuring 200 sq.ft. on the ground floor of the hotel run by the Defendants being Sun-N-Sand Hotel, Juhu, Mumbai-400 049. The suit premises are more appropriately described in the plaints in the suits filed by the respective parties. The parties would be referred to hereinafter as per their status in the eviction suit being LE & C Suit No.17/17 of 1996. The Applicants herein Messrs Miscellenary Marketers would be referred to as the Defendants whereas Messrs Sun-N-Sand Pvt. Ltd. i.e. the Respondents herein would be referred to as the Plaintiffs. The acts in contention in the above Civil Revision Applications are the Bombay Rent Act, 1947 which for brevities sake would be referred to as the “Rent Act”. The Presidency Small Cause Courts Act, 1882 which would be referred to for brevities sake as the “PSCC Act”. The Transfer of Property Act, 1882 which would be referred to for brevities sake as the “T. P. Act” and the Indian Easements Act, 1882 which would be referred to as the “Easements Act”.

4. The Plaintiffs and the Defendants are both registered private limited companies registered as such under the Companies Act, 1956. An agreement was entered into between the Plaintiffs and the Defendants for the first time on 01.07.1988. By the said agreement the Plaintiffs had granted a licence to the Defendants to sell goods and merchandise in the

hotel run by them being Sun-N-Sand. In pursuance of the said licence the Plaintiffs had let out the suit premises to the Defendants i.e. Messrs Miscellenary Marketers on monthly rent of Rs.1500/- for a period of 4½ years for selling various goods and merchandise. In terms of the said agreement the Defendants paid an amount of Rs.4500/- as security deposit which was equivalent to three months rent. The said agreement dated 01.07.1988 came to an end on 31.12.1992. Further agreement was entered into on 01.01.1993 for a period of 20 months on the same terms and conditions. After the expiry of the second agreement dated 01.01.1993 a fresh agreement was entered on 01.10.1994 for a further period of one year however with a clause of renewal which agreement according to the Defendants was to come to an end on 30.09.1997. It was the case of the Defendants that the Plaintiffs had given exclusive possession of the suit premises to the Defendants and that no duplicate key of the suit premises was with the Plaintiffs. In so far as the Plaintiffs are concerned, i.e. Sun-N-Sand Hotel Private Limited, it was their case that since it was not possible for the Defendants to supply various articles and things of necessity and utility to its guests, the Plaintiffs permitted the Defendants to carry on the business of selling and supplying of various goods and merchandise as per the agreement dated 01.07.1988 and thereafter to continue to do so pursuant to the further agreements which

were entered into. It was the case of the Plaintiffs that the place from which the Defendants were permitted to carry on business was not permanent and the said place of business changed with the change of agreements. It was the case of the Plaintiffs that they were paying all the taxes and charges in respect of the suit premises occupied by the Defendants. It was therefore their case that the Defendants were not in occupation of any permanent premises and that they were shifted from one place to another on execution of each fresh agreement. It was the case of the Plaintiffs that the Defendants violated the terms and conditions of the agreement in the matter of selling articles which were not permitted to be sold in terms of the agreements. It was the case of the Plaintiffs that the Defendants were therefore issued a notice dated 16.05.1989 asking them to cease and desist from breaching the terms of the agreement. Pursuant to which the Defendants had temporarily suspended the sale of prohibited items. It was the case of the Plaintiffs that as the Defendants had breached the terms of the agreement, the Plaintiffs by letter dated 31.08.1995 had called upon the Defendants to hand over possession of the suit premises to them on 30.09.1995. It appears that the Defendants replied to the said letter vide their letter dated 20.09.1995 and it was their case that the Plaintiffs had no right to ask for possession of the suit premises up to 30.09.1997 which was the extended period of the last agreement dated

01.10.1994. The Defendants filed a declaratory suit being LD Suit No.59 of 1995 in view of the apprehension which arose out of the Managing Director of the Plaintiffs calling upon the Managing Director of the Defendants to his office and threatening him that the Plaintiffs would forcibly take possession of the suit premises if the Defendants did not comply with the letter dated 31.08.1995 of the Plaintiffs. The Defendants have therefore in the LD suit sought a declaration that the agreement entered into between the parties is in fact a lease agreement and that the Defendants are the tenants of the suit premises and that the Plaintiffs be enjoined by a permanent injunction from disturbing the Defendants possession of the suit premises as also for preventing the Defendants Directors, staff, from entering the suit premises and also restraining the Plaintiffs from preventing the customers of the Defendants entering into the suit premises.

5. In so far as the Plaintiffs Sun-N-Sand Hotel Private Limited is concerned, it was the case of the Plaintiffs that the Defendants were required to hand over possession of the suit premises on or before 30.09.1995 as per the notice dated 31.08.1995 as the Plaintiffs required the suit premises for their own use. It was the case of the Plaintiffs that the Defendants have filed the said LD suit by raising baseless contentions and that they have obtained ex-parte injunction against the Plaintiffs in the

said suit by making several false and frivolous allegations. It was the case of the Plaintiffs that the agreement dated 01.10.1994 has not been renewed and has been validly terminated by the notice dated 31.08.1995 and therefore the Defendants are liable to be evicted which is the main substantive relief sought in the said LE & C Suit No.17/17 of 1996. The Plaintiffs have also claimed arrears of compensation, mesne profits and also permanent injunction restraining the Defendants from continuing to carry on the activity of buying, selling, supplying of merchandise and articles not permitted as per the agreement dated 01.10.1994. In the said LE & C Suit No.17/17 of 1996 the Defendants raised an issue of jurisdiction of the Small Causes Court on the touchstone of Section 19(h) of the Presidency Small Causes Court Act, 1882. It was the case of the Defendants that there was no cause of action for the Plaintiffs to file the suit as also the suit filed was not within limitation from the date of the notice dated 16.05.1989 and therefore the suit as filed is beyond limitation. The Trial Court on the basis of the pleadings of the parties framed the issues which are to the following effect :-

“L.D. Suit No.59 of 1995

Issues

Findings

(1) Whether the Plaintiffs prove that they are the tenants in respect of suit premises, as alleged ?

.. No.

(2) Whether the Plaintiffs further prove that

- | | |
|--|--|
| they are entitled for the relief of permanent injunction as prayed for ? | .. No. |
| (3) Whether this Court has jurisdiction to entertain and try the suit ? | .. Does not survive, as it was decided as preliminary issue. |
| (4) Whether the Plaintiffs are entitled for declaration as prayed for ? | .. No. |
| (5) What declaration and order ? | .. As per final order. |

L. E. & C. SUIT NO.17/17 of 1996

- | <u>Issues</u> | <u>Findings</u> |
|---|--|
| (1) Whether Plaintiff prove that the Defendant was his Licensee in respect of suit premises ? | .. Yes. |
| (2) Whether Plaintiff prove that he has terminated the License of the Defendant in respect of suit premises ? | .. Yes. |
| (3) Whether Plaintiff is entitled to get possession of suit premises, as sought ? | .. Yes. |
| (4) Whether Defendant proves that he is deemed tenant in respect of suit premises ? | .. Does not survive as it was deleted by my learned predecessor on 12.10.2007 & additional issues were framed. |
| (5) Whether Defendant proves that he is protected under the provisions of Bombay Rent Control Act ? | .. No. |
| (6) What order and decree ? | .. As per final order. |

ADDITIONAL ISSUES

- | | |
|--|---------|
| (1) Whether the suit is properly valued as per Bombay Court Fees Act ? | .. Yes. |
|--|---------|

- (2) Whether this Court is competent to try and entertain the present suit in view of provisions of Section 19 sub-clause (h) of Presidency Small Causes Court Act ? .. Yes.
- (3) Whether the suit barred by law of Limitation ? .. Redundant.
- (4) Whether the suit is not maintainable for want of mis-joinder and non-joinder of cause of action as alleged in Para-2 of Written Statement ? .. No.
- (5) Whether Defendants prove that they are the tenants of the suit premises ? .. No.”

6. The parties in support of their respective cases adduced oral evidence. In so far as the Defendants, Messrs Miscellenary Marketers Pvt. Ltd. are concerned, they led the evidence of Mr. Guloo Mohan Alimchandani, whereas the Plaintiffs i.e. Sun-N-Sand Pvt. Ltd. led the evidence of three witnesses i.e. Mr. Gul Ramchand Advani who is their Managing Director, Shri. Anant Kumar Singh, Photographer and Mr. Ganesh Purushottam Pandit. Both the parties have also led documentary evidence.

7. A perusal of the said issues discloses that the defining issues were whether the Defendants prove that they are the tenants in respect of the suit premises and whether the Plaintiffs prove that the Defendants were their licensees in respect of the suit premises, which issues were answered against the Defendants i.e. Messrs Miscellenary Marketers Pvt. Ltd. and in favour of the Plaintiffs i.e. Messrs Sun-N-Sand Pvt. Ltd. by the

Trial Court which accordingly decreed the suit.

8. The Trial Court as indicated above, answered the defining issues against the Defendants i.e. Messrs Miscellenary Marketers Pvt. Ltd. and held that the Defendants are the licensees of the Plaintiffs and not the tenants. The Trial Court considered the evidence adduced on behalf of the Defendants i.e. the evidence of the Managing Director Mr. Guloo Mohan Alimchandani. The Trial Court has adverted to the said evidence and has referred to the admissions given by the said witness wherein the witness has admitted that in the said agreements the Defendants status is described as a "licensee". The Trial Court has further noted that the said witness has accepted the fact that in the said agreement the licence fee is shown as compensation. The Trial Court has also adverted to the fact that the witness admitted that before the execution of the agreements the terms and conditions were discussed between the parties. The Trial Court has thereafter referred to the evidence of Mr. Gul Ramchand Advani on behalf of the Plaintiffs i.e. Messrs Sun-N-Sand Pvt. Ltd. The Trial Court has adverted to the evidence of the said witness wherein he has stated that in order to provide steady supply of necessary articles to their guests that the Plaintiffs permitted the Defendants to carry out the business of buying, selling and supplying of various goods and merchandise enumerated in the agreement dated 01.07.1988. The Trial Court has further adverted to

the evidence of the said witness wherein it has been stated that the Defendants were shifted from the earlier location to new location in the hotel premises and were allowed the use of 200 sq.ft. of space. It has further come in the evidence adduced on behalf of the Plaintiffs that on entering into a fresh agreement on 01.10.1994 the Defendants were shifted to another location in the hotel premises. It has further come in the evidence that the Defendants were never allotted any fixed space for doing their business and they were shifted from place to place as per the convenience of the Plaintiffs. It has further come in the evidence of the Plaintiffs that the Defendants were paying charges for the use of the space allotted to them along with hotel expenditure tax for the period 01.07.1988 to 31.05.1989. The Trial Court has adverted to the fact that the hotel expenditure tax is paid by the guests who come to reside in the hotel. The Trial Court has referred to the cross-examination of the witness of the Plaintiffs Mr. Gul Advani. The Trial Court has thereafter considered the agreement dated 01.07.1988 and especially clauses (1), (4) and (6) thereof. On the basis of the said clauses of the agreement as also certain circumstances namely that the suit shop being in the lobby of the hotel building, which has one main entrance and which if locked no one can enter the suit shop. As also the circumstance that the keys of the main gate remain with the Defendants. Therefore there was no exclusive possession

of the Plaintiffs in respect of the suit shop. The Trial Court has also referred to the fact that the receipts issued by the Plaintiffs were for compensation received and not rent and since by the said agreements the Defendants were only allowed to buy, sell and supply articles stipulated in the said agreements, the Trial Court came to a conclusion that the Defendants i.e. Messrs Miscellenary Marketers Pvt. Ltd. are only licensees of the Plaintiffs and not their tenants. The Trial Court also rejected the prayer for injunction made by the Defendants in their suit being LD Suit No.59 of 1995. The Trial Court also recorded a finding that the Plaintiffs have duly terminated the licence of the Defendants. The Trial Court accordingly by its judgment and order dated 27.01.2011 has decreed the suit.

9. In so far as the Appellate Bench of the Small Causes Court is concerned, the Appellate Bench as indicated above confirmed the decree passed by the Trial Court. In addition, the Appellate Bench has also allowed the cross objections filed by the Plaintiffs i.e. Messrs Sun-N-Sand Pvt. Ltd. and thereby has modified the decree passed by the Trial Court. The Appellate Bench of the Small Causes Court answered the issue as to whether the Defendants are licensees or tenants. The Appellate Bench has considered the circumstances which weighed with the Trial Court in answering the said issue by holding that the Defendants are licensees and

not tenants. The Appellate Bench has adverted to the fact that the place of business of the Defendants had changed from agreement to agreement. The Appellate Bench has also having regard to the recitals in the agreements dated 01.07.1988, 01.01.1993 and 01.10.1994 recorded a finding that the intention of the parties was to create a licence and not a lease. The Appellate Bench has further observed that the terms and conditions in the said agreements clearly establish that the transaction entered into by the parties is a licence and not a lease. The Appellate Bench has also recorded a finding that the Plaintiffs had validly terminated the licence of the Appellants Messrs Miscellenary Marketers Pvt. Ltd. in respect of the suit premises. As regards the contention of the Defendants that in view of Section 19(h) of the Presidency Small Causes Court Act, the suit was not maintainable, the Appellate Bench held that the relief of injunction claimed by the Plaintiffs in their suit i.e. LE & C Suit No.17/17 of 1996 is a consequential relief and not the main relief. The main relief claimed by the Plaintiffs is the eviction and recovery of possession of the suit premises. According to the Appellate Bench, since the main relief is that of possession, the same would be covered by Section 41(h) of the said Act. The Appellate Bench also held that the suit is filed on the basis of the letter dated 31.08.1995 by which the Plaintiffs had called upon the Defendants to vacate and hand over possession of the suit

premises due to breach of the terms and conditions which were stipulated in the agreement dated 01.10.1994. The Appellate Bench on a re-appreciation of the terms and conditions of the licence held that the full control over the suit premises was that of the Respondents/Licensors and that the Plaintiffs/Licensors had put certain restrictions on the use of the suit premises by the Defendants at the time of granting licence and that the licensees were permitted to sell only certain articles which are mentioned in the agreement which all are indicative of the fact that the agreement executed between the parties was a Leave and Licence agreement and not a lease. The Appellate Bench of the Small Causes Court has accordingly by the impugned common judgment and order dated 08.05.2015 dismissed the Appeals and thereby confirmed the decree passed by the Learned Judge of the Small Causes Court.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS BY LEARNED COUNSEL MS. ZENOBIA IRANI :-

A) That in seeking the relief sought vide prayer clause (a) of the LE & C suit the Plaintiffs have implicitly accepted the fact that the Defendants are not licensees but have a higher right may be of lessees.

B) That the suit in question being LE & C Suit filed by the Plaintiffs having regard to the prayer sought vide prayer clause (a) is not maintainable. In support of the said contention reliance is placed on the Division Bench judgment of this Court in the matter of Smita Rajeev Sah.

& another Vs. Roop Narain Sah & another.¹

C) That the suit is also not maintainable having regard to Section 19(h) of the Presidency Small Causes Court Act.

D) That both the Courts below have erred in decreeing the suit on a ground which is not a ground made out in the notice dated 31.08.1995.

E) That both the Courts below in arriving at a conclusion that the Defendant is a licensee have misconstrued and misinterpreted the three agreements i.e. the agreement dated 01.07.1988, 01.01.1993 and 01.10.1994 entered into between the parties. The Courts below ought to have seen that the said agreements are a camouflage for a lease.

F) That both the Courts below ought to have appreciated that the Defendant was in exclusive possession of the premises which were covered by the said three agreements and since the exclusive possession is one of the factors which is determinative of the fact whether the document is a lease or a licence the Courts below ought to have held that the Defendants are lessees.

G) That both the Courts below failed to take cognizance of the admissions which had come in the evidence of the Plaintiffs witness i.e. Managing Director of the Plaintiffs who has stated in his evidence that the Defendants are in occupation of the same premises since the year 1994 and further the fact that the Plaintiffs could not produce the keys of the

¹ 2013(6) BCR 193

suit premises which fact proved that the Defendants were in exclusive possession of the suit premises as the duplicate key was not with the Plaintiffs.

H) That the suit premises being a shop in the hotel of the Plaintiffs the same is not affected by the provisions of Section 5(8) of the Bombay Rent Act and therefore the judgment of the Supreme Court in the matter of *Associated Hotels of India Ltd. Vs. R. N. Kapoor*² has no application.

I) That the mere inclusion of the clause in the agreement to the effect that the agreement should not be construed as a sub-lease etc. would not ipso-facto make the document a licence. In support of the said contention reliance is placed on the judgment of the Apex Court reported in the matter of *Capt. B. V. D'Souza Vs. Antonio Fausto Fernandes*³.

J) That the Plaintiffs could not have terminated the agreements as the Plaintiffs had reserved no such power to themselves under the agreement dated 1.10.1994.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS BY THE LEARNED SENIOR COUNSEL MR. P. S. DANI :-

1) That the licence granted to the Defendants was only for carrying out the business of selling and supplying all kinds of merchandise mentioned in the agreement, in the hotel of the Plaintiffs, it is pursuant to the said

² AIR 1959 SC 1262

³ AIR 1989 SC 1816

licence that the space was allotted to the Defendants and therefore the place from where the business was carried out assumed secondary importance.

2) That the agreements entered into between the parties makes it ex-facie clear that the intention of the parties was always to create a licence and not a lease.

3) That by the agreements entered into between the parties, no right or interest was created in respect of the suit premises which is a prerequisite of Section 105 of the T. P. Act for the document to be considered as a “lease”. Reliance is placed on the judgment of the Apex Court in the matter of Swarn Singh Vs. Madan Singh.⁴

4) That the “licence” under the Easements Act can be revoked at any time except in the circumstances mentioned in Section 60. In fact there is a deemed revocation under certain eventualities mentioned in Section 62 of the Easements Act. The Plaintiffs were therefore entitled to revoke/terminate the licence.

5) That in the instant case, the Plaintiffs have followed the due process of law by terminating the licence and filing the suit for eviction by invoking Section 41(h) of the Small Causes Court Act.

6) That the LE & C suit is essentially a suit filed for eviction of the Defendants as borne out by prayer clause (b) of the suit, in view thereof

4 SC and Full Bench Rent Cases 1995 page 430

prayer clause (a) seeking a declaration loses its significance.

7) That the control in respect of the suit premises was always that of the Plaintiffs in view of the fact that the Defendants were only permitted to carry out business in respect of goods and merchandise mentioned in the agreements, the duplicate keys of the suit premises were always with the Plaintiffs, that the opening and closing of the main entrance of the hotel was always within the control of the Plaintiffs and therefore the prerequisites of Section 105 in the matter of interest being created in favour of the Defendants was conspicuously absent for the document i.e. the agreement dated 1.10.1994 being construed as a lease. Reliance is placed on a Division Bench judgment of this Court reported in the matter of *Bhika Cullianji and Co., Bombay Vs. Avon Electric Company, Bombay & others*⁵ as also the judgment of the Learned Single Judge of this Court reported in the matter of *Radheshyam s/o Balaji Rathod Vs. Corporation of the City of Nagpur*.⁶

8) That since a finding of fact is recorded by the Courts below as regards the nature of the documents as also the relationship between the parties, the same does not call for any interference at the hands of this Court in its Revisionary Jurisdiction.

⁵ BLR 1994 Vol. 96 page 621

⁶ 2014(1) ALL MR 457

CONSIDERATION

10. Having heard the Learned Counsel for the parties, I have considered the rival contentions. The issue that flows out from the contentions urged on behalf of the parties is whether the document in question i.e. agreement dated 01.10.1994 is a lease or licence. The answer to the said issue would undoubtedly determine the fate of the said LE & C suit filed by the Plaintiffs i.e. Messrs Sun-N-Sand Pvt. Ltd. as also has a defining impact on the relief sought by the Defendants in their suit being LD suit. In so far as the said issue is concerned, there is no dispute about the fact that it is on 01.07.1988 that the first agreement was entered into between the parties. The said agreement was followed by the second agreement dated 01.01.1993, which is followed by the last agreement dated 01.10.1994. By the said agreements, the Defendants were granted licence to sell goods and merchandise to the customers/guests staying in the hotel run by the Plaintiffs. This was as and by way of providing an amenity or service to the customers/ guests of the Plaintiffs who were residing in the hotel. It would also be relevant to note that the shop premises wherein various facilities are provided to the customers/guests are situated in the lobby of the hotel. In the present case, there is a main entrance to the hotel which leads to the lobby wherein the shop premises are located. Hence, if the main entrance is locked, then the lobby cannot

be accessed from the outside by any person. It is an undisputed position that the main entrance is under the control of the Plaintiffs i.e. Messrs Sun-N-Sand Pvt. Ltd. Hence, when the main entrance is locked by the Plaintiffs, then the shop of the Defendants cannot be accessed both by the Plaintiffs as well as their customers.

11. Before proceeding further, it would be also apposite to refer to clauses (1), (4) and (6) of the agreement dated 01.07.1988 as the same have a bearing on the adjudication of the issue which is posed in the instant matter. The said clauses are therefore reproduced hereinunder for ready reference :-

“1) That the Licensors agree and undertake to allow and grant the Licence to the Licensees by virtue of which the licensees shall acquire from the Licensors rights to carry out business of selling & supplying all kinds of merchandise mentioned hereinabove as the Licensees may from time to time during the continuance of this agreement wish to buy, sell or supply with effect from 01st day of July 1988 in the premises of the Licensors for the period of 4 ½ years from the 01st day of July one thousand nine hundred eighty eight.

2).....

3).....

4) That the Licensors agree and undertake to provide the Licensees during the continuation of this agreement, for the purpose of carrying on their aforesaid business part of the lobby on the ground floor of the hotel premises, admeasuring approximately 200 sq.ft. in the main building Shop No.2.

5).....

6) That the lease and licence is granted on the express undertaking of the LICENSEES that nothing herein shall be

deemed to constitute a lease or sub-lease or confer any right of tenancy or sub-tenancy on the licensees who shall and can enjoy the use and occupation of the premises only at the will and pleasure of the Licensors subject to the terms and conditions of this agreement.”

12. In so far as the agreements dated 01.01.1993 and 01.10.1994 are concerned, clauses (1) and (6) as above as also the other clauses are similar. It is only in clause (4) where there is a change as regards the premises from which the licensees have been permitted to carry out the sell of merchandise. In so far as the agreement dated 01.01.1993 is concerned, clause (4) thereof reads thus :-

“4) That the Licensors agree and undertake to provide the Licensees during the continuation of this agreement, for the purpose of carrying on their aforesaid business on part of the basement of the crew lounge admeasuring approximately 200 sq.ft., in the main building.”

13. In so far as the agreement dated 01.10.1994 is concerned, clause (4) thereof reads thus :-

“4) That the Licensors agree and undertake to provide the Licensees during the continuation of this agreement, for the purpose of carrying on their aforesaid business on the shop space provided in the arcade in the main building.”

(emphasis supplied)

14. However since the agreement dated 1.10.1994 is the last in point of time it would also be necessary to refer to clause No.6 and 11 thereof which are reproduced hereinunder :

“6) that the lease and licence is granted on the express undertaking of the Licensees that nothing herein shall be deemed to constitute a lease or sub-lease or confer any right of tenancy or sub-tenancy on the Licensees who shall and can enjoy the use and occupation of the premises only at the will and pleasure of the Licensors subject to the terms and conditions of this agreement.

(11) The licensees hereby agree that they shall not let or sublet any portion of the premises to anyone.”

15. It would also be apposite to reproduce the relevant provisions of the PSCC Act, the T. P Act and the Easements Act, since a reference to the same is being made in the latter part of this judgment. The said provisions are as under :-

PSCC Act

“19. The Small Cause Court shall have no jurisdiction in-

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h) suits for the specific performance or rescission of contracts;

(i)

(j)

- (k)
- (l)
- (m)
- (n)
- (o)
- (p)
- (q)
- (r)
- (s)
- (t)
- (u)
- (v)
- (w)

41. (1) Notwithstanding anything contained elsewhere in this Act [****] but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor, irrespective of the value of the subject matter of such suits or proceedings.”

T.P. Act

“105. Lease defined.- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be

rendered periodically or on specified occasions to be transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.- The Transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

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107. Leases how made.- A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

[All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

[Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:]

Provided that the State Government may [***] from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding on year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]”

Easements Act

“52. “License” defined.- Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.

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59. Grantor's transferee not bound by license.- When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

60. License when revocable.- A license may be revoked by the grantor, unless-

- (a) it is coupled with a transfer of property and such transfer is in force;
- (b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

61. Revocation express or implied.- The revocation of a license may be express or implied.

62. License when deemed revoked.- A license is deemed to be revoked-

- (a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license;
- (b) when the licensee releases it, expressly or impliedly, to the grantor or his representative;
- (c) where it has been 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;

(d) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right;

(e) where the licensee becomes entitled to the absolute ownership of the property affected by the license;

(f) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable;

(g) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist;

(h) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee;

(i) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.”

16. A reading of the agreements dated 01.07.1988, 01.01.1993 and 01.10.1994 therefore discloses that the licensors have granted licence to the licensees to carry out business of selling and supplying all kinds of merchandise during the subsistence of the said agreements. It is only towards that end that the licensors agreed to provide them premises in the hotel at the place mentioned in clause (4) of the agreements. In so far as the said premises is concerned, as disclosed by the agreements the same have changed from time to time with the agreements. In so far as the agreement dated 01.07.1988 is concerned, the premises are in part of the lobby. In the agreement dated 01.01.1993, the premises are part of the

basement of the crew lounge and in the agreement dated 01.10.1994 the premises are in the shop space provided in the arcade in the building. Hence, in so far as the premises are concerned, they are not the same premises in any of the agreements. The said fact therefore proves that the allotment of space or premises to carry out the business under the licence was exclusive within the domain of the Plaintiffs and that the Defendants had no choice or right in respect of a particular place and hence, no interest was created in respect of a particular place in the Defendants. The said fact therefore proves that the control as to the place as well as the conduct of business was that of the Plaintiffs. The reliance placed by the Learned Counsel for the Applicants on the evidence of the Managing Director of the Plaintiffs Mr. Gul Advani is misplaced to contend that the Defendants were in occupation of the same premises since the year 1988. The evidence of the said witness is being misinterpreted by the Defendants. In his cross-examination he has stated that it is true that the Defendants Messrs Miscellenary Marketers are in occupation of the same premises from 01.10.1994 till date. The said evidence cannot be construed to mean that the Defendants are in occupation of the same premises since the year 1988 i.e. from the time of the first agreement. Moreover it is well settled that no oral evidence which is contrary to the document can be entertained. In the instant case all the agreements refer to different

premises. The said agreements also make it clear that the use and occupation of the premises was only at the will and the pleasure of the licensors and therefore no interest was created in favour of the Defendants.

17. Since it is the case of the Defendants i.e. Messrs Miscellenary Marketers Pvt. Ltd. that the agreement is a lease and not a licence. The evidence of the Defendants would have to be considered. In the cross-examination of Mr. Guloo Mohan Alimchandani, the Managing Director of the Defendants, it has come on record that the shop premises has changed from time to time, he has accepted the fact the Defendants were described as licensees, that the terms and conditions were settled in a joint meeting, and that he had never protested against the terms and conditions mentioned in the agreement. The said evidence therefore negates the case of the Defendants that they were in possession of the same premises and that such possession was exclusive since the time of execution of the first agreement dated 01.07.1988. The said evidence also negates the case of the Defendants that they were in control of the said premises till the last agreement dated 01.10.1994. The said evidence of the Managing Director of the Defendants coupled with the evidence of the Managing Director of the Plaintiffs Mr. Gul Advani is also a pointer to the intention of the parties which was to create a licence and not a lease.

18. Apart from the aforesaid evidence which is vital, the attendant circumstances also assume importance in so far as the present case is concerned. As indicated above, the shops are situated in the lobby of the hotel building, amongst which is the suit shop. It is an undisputed position that there is only one entrance to the hotel building and if the said entrance is locked then the suit premises cannot be accessed from the outside. There is also a internal locking system to the main gate and the keys of the main gate remain with the Plaintiffs. The said fact therefore proves that the total control was that of the Plaintiffs in the matter of entry to the hotel premises. It is also required to be noted that the Plaintiffs were also levying hotel expenditure tax on the Defendants which tax is levied on the guests residing in the hotel. The receipts issued by the Plaintiffs for the amount received from the Defendants as and by way of consideration also show that the amounts were shown as compensation and not rent. As indicated above, the licence granted to the Defendants was for selling merchandise in the hotel for which space was provided by the Plaintiffs. The suit premises therefore assume secondary importance and the licence granted can therefore in no way create any right or interest in the Defendants in so far as the shop premises are concerned.

19. It is pertinent to note that the agreement has been executed on behalf of the Defendants by the Managing Director Mr. Guloo Mohan

Alimchandani who cannot be said to be a lay person. It would therefore have to be held that the Managing Director has entered into the said agreements being fully conscious of the contents and the import thereof. There is no correspondence entered into by the Defendants that the terms and conditions mentioned in the agreements are not acceptable to them or that the agreements are not in terms of what has been agreed upon between the parties. No suit or other proceeding has also been filed by the Defendants in any Civil Court seeking a declaration that the said agreements are sham, bogus, null and void or fabricated. The agreements are clear and unambiguous and leave no room for doubt that they are leave and licence agreements and not a lease. It is further required to be noted that in so far as a lease is concerned, the same in terms of Section 107 of the Transfer of Property Act can be created only by a registered document and therefore in so far as the instant agreement dated 01.10.1994 is concerned, the same being not registered, it does not meet the requirement of Section 107 of the T. P. Act and therefore is not a lease within the meaning of Section 105 of the said Act.

20. Now coming to the judgment of the Apex Court in *Capt. B. V. D'Souza's* case (*supra*), on which strong reliance was placed by the Learned Counsel for the Applicants, in my view the said judgment does not aid the Applicants in so far as their case of the document being a lease

and not a licence is concerned. The Apex Court in the said case was also concerned with a similar issue as to whether the document (Exh.20 in that case) was a licence or a lease. The Apex Court held that to determine the said issue the substance of the document is to be preferred to the form. The Apex Court held that though exclusive possession is relevant to determine whether a document is a licence or a lease the same is not conclusive. The other test namely that the intention of the parties and whether the document creates any interest in the property or not are important considerations. The Apex Court in the facts of the said case wherein the terms contained in the document Exh.20 include a clause for the renewal of the deed at the will of the licensee and in the event of the licensee not desiring to renew, to give one months notice in writing held that the said terms are not consistent with the Respondent's case of licence and indicate that an interest in the property was created in favour of the Appellant therein in pursuance of which he was put in possession. Hence, the facts in the case of *Capt. B. V. D'Souza's case (supra)*, stand apart from the facts of the present case. In the present case, though there is a clause prohibiting subletting etc. the other attendant circumstances unmistakably lead to a conclusion that the document is a licence and not a lease. As indicated above, the premises mentioned in each of the three documents is different. The Defendants as indicated above are granted a licence to sell

the merchandise which is covered by the agreements. The Defendants did not have exclusive possession of one premises as the premises have changed from time to time with the agreements. Regulation and control of the main entrance of the hotel was also with the Plaintiffs and therefore, the Plaintiffs were in a position to control the entry in the hotel building. If the main entrance is locked, then the shop premises wherein the Defendants were carrying out the business could not be accessed. The Defendants were also paying the expenditure tax which is levied on the guests staying in the hotel meaning thereby that the Defendants had no interest in the suit premises and were only occupying the same temporarily pursuant to the licence granted by the Plaintiffs. The amounts paid by the Defendants to the Plaintiffs by way of consideration has also been termed as compensation in the receipts issued by the Plaintiffs. In so far as renewal of the licence is concerned, the Defendants had no right in respect of the same though the last agreement dated 01.10.1994 provided for a renewal of the licence which was to continue up to 1997. Hence, the aforesaid factors distinguish the facts in the instance case from the facts in *Capt. B. V. D'Souza's* case (*supra*) and therefore the said judgment does not further the case of the Defendants.

21. Now, coming to the contention urged on behalf of the Applicants that the Plaintiffs could not have filed the said LE & C suit prior

to 1997 i.e. the date on which licence on renewal was come to an end and therefore the suit filed in the year 1995 was pre-mature. In my view, the said contention is mis-founded. Though by clause (1) of the agreement dated 01.10.1994 a renewal of two years was provided which was to end on 30.09.1997. The said renewal clause cannot be said to be automatic and necessitated an overt act on the part of the Plaintiffs in the matter of renewing the licence. Since the Plaintiffs have not renewed the licence, the same has come to an end by efflux of time on 30.09.1995. In so far as the termination or revocation of the agreement is concerned, it is required to be noted that only in the circumstances mentioned in Section 60 of the Easements Act that the licence cannot be revoked. The instant case is not a case which can be said to be covered by the two circumstances mentioned in Section 60 of the said Act. In fact, Section 62 provides for a deemed revocation in the circumstances mentioned therein. Hence when the Easements Act provides for a revocation of the licence except in the circumstances covered by Section 60 and when the said Act also provides for a deemed revocation, the Plaintiffs were surely entitled to revoke the license in the absence of any power in the agreement. The Plaintiffs have accordingly done so by the notice dated 31.08.1995 and therefore on revocation the Plaintiffs were entitled to seek possession of the premises from which the Defendants were carrying out business in terms of the

licence granted to them.

22. In so far as the contention urged on behalf of the Applicants that the LE & C suit for the relief sought vide prayer clause (a) was not maintainable having regard to Section 19(h) of the PSCC Act. In my view, there is no substance in the said contention as the said LE & C Suit has been filed essentially for seeking possession of the suit premises and therefore prayer clause (a) though seeking a declaration loses its significance. The said relief of possession is therefore referable to Section 41(h) of the PSCC Act and therefore, the bar of Section 19(h) of PSCC Act does not come in the way of the maintainability of the suit.

23. Now coming to the judgments relied upon by the Learned Senior Counsel Mr. P. S. Dani. In so far as the judgment in *Swarn Singh's* case (*supra*) is concerned, the issue before the Apex Court was the same as in the instant matter namely whether the document was a licence or a lease. The document involved in the said case contained a statement to the following effect :-

“I shall not sublet it further to anybody else.”

By relying upon the said statement and the judgment in *Capt. B. V. D'Souza's* case (*supra*), it was sought to be contended on behalf of the Appellant Swarn Singh that the document is a lease. The Apex Court
BGP.

negatived the said contention by holding that the said statement is nothing more than an affirmation of the requirement that the licensee must use the property. The Apex Court further held that where an affirmation is made such an affirmation cannot alter the relationship of the parties as lessor and lessees. The Apex Court accordingly distinguished the facts of the said case before it from the facts in *Capt. B. V. D'Souza's case (supra)*. In my view, for the self same reasons mentioned in *Swarn Singh's case (supra)*, the facts in the instant case can be distinguished from the facts in *Capt. B. V. D'Souza's case (supra)* and therefore, merely because there is a clause prohibiting the licensee to sublet etc. the same would not alter the relationship between the parties in the instant case.

24. In so far as the judgment in *Bhika Cullianji's case (supra)* is concerned, the Division Bench of this Court held that the basic ingredient of a lease as emerges from the provisions of Section 105 of the Transfer of Property Act would presuppose not only the possession but control. The Division Bench held that they are two sides of the same coin and both the ingredients must co-exist. The Division Bench further held that it would not be correct in law for a party to contend that the possession was exclusive if the facts indicate that the party did not have access to the premises uninterruptedly at all points of time. Applying the test laid down by the Division Bench in the aforesaid judgment, it cannot be said that the

Applicants have satisfied the ingredients of Section 105 of the Transfer of Property Act for the document in question to be termed as a lease and the relationship of the parties being that of lessor and lessee.

25. In so far as the judgment in *Radheshyam Balaji Rathod's* case (*supra*) is concerned, a Learned Single Judge of this Court in the said case held that the crucial test determining whether a document is a licence or a lease is whether the document is intended to create or not to create an interest in the property. A reading of the document in the instant case i.e. agreement dated 01.10.1994 as observed hereinabove does not create any interest in the suit premises in favour of the Applicants.

26. Since the Appellate Bench has relied upon the judgment of the Apex Court in *Associated Hotels of India Ltd.* (*Supra*) the Learned Counsel for the Applicants Ms. Zenobia S. Irani endeavoured to distinguish the facts of the instant case from the facts in *Associated Hotels of India Ltd.* so as to contend that the said judgment would have no application. In the said case, the Apex Court was concerned whether the space in a hotel let out for carrying on business of hair dresser would qualify as a room in a hotel within the meaning of Section 2(b) of the Delhi and Ajmer– Merwara Rent Control Act. This was in the context of the claim made by the Respondents for fixation of fair rent under the said Act. The Apex Court by a majority view held that a room in a hotel within the definition is any BGP.

room in the building in the whole of which the business of a hotel is run. So understood the definition would include the spaces in the cloak rooms of the hotel. These spaces are rooms in a hotel. The Apex Court held that the said spaces in hotel are excluded from the operation of the Rent Act. The Rent Controller therefore has no power to fix any standard rent in respect of them and accordingly dismissed the applications filed for standard rent. The distinction sought to be made by the Learned Counsel for the Applicants on the ground that the instant case involves a shop premises cannot be accepted. Since in the instant case the space i.e. the shop premises provided to the Defendants is admittedly within the hotel premises, the same would be exempted from the applicability of provisions of the Rent Act as in the case of Associated Hotels of India Ltd., and therefore the ratio of the said judgment would equally apply to the facts of the present case and the Defendants therefore cannot claim to be the tenants of the Plaintiffs.

27. The Courts below on the basis of the material on record have come to a conclusion that the document in question that is the agreement dated 01.10.1994 is a licence and not a lease and that the relationship of the parties was therefore that of a licensor and licensee. Both the Courts below have recorded a finding of fact to the said effect. Hence, for the reasons afore-stated, this Court has come to a conclusion that there is no

error of jurisdiction committed by the Courts below in decreeing LE & C Suit No.17/17 of 1996 and dismissing LD Suit No.59 of 1995 for this Court to exercise its Revisionary Jurisdiction. The above Civil Revision Applications are accordingly dismissed.

28. In view of the dismissal of the above Civil Revision Applications, the above Civil Applications do not survive and are disposed of as such.

[R.M. SAVANT, J]

(After Pronouncement of Judgment on 08.01.2016)

At this stage, the Learned Counsel for the Applicants seeks stay of the decree of possession so as to enable the Applicants to approach the Apex Court. In the facts and circumstances of the case, the said decree is stayed for a period of eight weeks from date on the Applicants filing the usual undertaking in this Court within two weeks from date.

[R.M. SAVANT, J]