

THE HON'BLE SRI JUSTICE A.V. SESA SAI

WRIT PETITION No.15824 of 2006

%09-02-2016

Between:

A.P. Gandhi Smaraka Nidhi,
Rep. by Jr. Secretary, Gandhi Gyan Mandir,
Sultan Bazar, Hyderabad

... PETITIONER

a n d

Government of Andhra Pradesh, Rep. by Principal Secretary,
Social Welfare Department, Secretariat, Hyderabad and others

... RESPONDENTS

< GIST:

> HEAD NOTE:

!Counsel for petitioner : Sri V. Hari Haran

^Counsel for Respondents : GP for Social Welfare

? Cases referred

1. *AIR 1959 SC 1262*
2. *AIR 1988 SC 184*
3. *AIR 1991 Kerla 281*
4. *AIR 1925 Mad. 434*

THE HON'BLE SRI JUSTICE A.V. SESA SAI

WRIT PETITION No.15824 of 2006

ORDER:

The issue in the present writ petition arises under A.P. Schedule Areas Land Transfer Regulations. In the present writ petition challenge is to the order of the State Government issued vide G.O.Ms.No.43 Social Welfare (LTR-2) Department, dated 16-05-2006. By virtue of the said order, the 1st respondent – State Government confirmed the orders passed by the District Collector/Agent to Government, Khammam and the Spl. Deputy Collector.

The subject matter of the writ petition is the land admeasuring 123.48 Hectors situated in Sy.No.287/18 of Chirramalla village, Pinapaka mandal, Khammam District. On the report submitted by the Mandal Revenue Officer (Tahsildar), Pinapaka Mandal the Special Deputy Collector pressed into service the provisions of A.P. Schedule Areas Land Transfer Regulations (hereinafter called, 'Regulations') and passed an order, dated 30-09-1993 in case No.83/93/PNK, directing the Mandal Revenue Officer, Pinapaka to take over the possession of the subject land on the ground of violation and contravention of Regulations.

As against the said order of ejectment, the petitioner preferred appeal before the Agent to Government/District Collector and the District Collector by virtue of an order, dated 25-02-1994 dismissed the said appeal vide C.M.A.No.17 of 1993.

Assailing the said orders passed by the primary and appellate authorities the petitioner preferred revision before the State Government. The 1st respondent – State Government vide G.O.Ms.No.43, dated 16-05-2006 dismissed the said revision filed by the petitioner. The said orders of the primary, appellate and

revisional authorities are under challenge in the present writ petition.

This Court while ordering *rule nisi* on 31-07-2006 in W.P.M.P.No.19730 of 2006 granted interim stay.

Heard Sri V. Hari Haran, learned counsel for the petitioner and learned Government Pleader for Social Welfare for respondents, apart from perusing the material available before this Court.

Submissions/contentions of the learned counsel for the petitioner:

1. *The orders passed by the respondent authorities are erroneous, contrary to law and opposed to the very spirit and object of the provisions of Regulations.*
2. *Having held that the special leave and licence agreement is inadmissible in evidence, the authorities ought to have held in favour of the petitioner.*
3. *The leave and licence is not a transfer of interest in the property and the same would not fall under the definition of transfer as defined under the Regulations.*
4. *The respondent authorities ought to have appreciated that no possession of the property much less any title was transferred to the 4th respondent under the leave and licence agreement.*
5. *Various clauses in the leave and licence agreement categorically demonstrate titular and possessory rights of the petitioner only.*
6. *The authorities ought to have seen that the petitioner itself is an organization working for the welfare of the Tribals, as such, the question of the petitioner transferring any right to a non-tribal does not arise.*

7. *The authorities failed to note that the agreement by itself does not have the effect of deviating the object of Regulations. The reasoning of authorities to treat the leave and licence agreement under the category of “other dealing” as stipulated under Section 2 (g) of Regulation is only erroneous and in-correct.*

In support of his submissions and contentions the learned counsel for the petitioner placed reliance on the following judgments:

1. *AIR 1959 SC 1262. (paragraph Nos.32, 33 and 36)*
2. *AIR 1988 SC 184. (paragraph Nos.9, 10 and 14)*
3. *AIR 1991 KER 281. (paragraph Nos.4, 5 and 8)*
4. *AIR 1925 Mad 434 (paragraph Nos.2, 3 and 4)*

The submissions/contentions of learned Government Pleader:

1. *There is no illegality nor there exists any infirmity in the orders under challenge, as such, the present writ petition is not maintainable and the petitioner is not entitled for any relief from this Court under Article 226 of the Constitution of India.*
2. *The subject transaction between the petitioner and Bhadrachalam Paper Board falls under the definition of transfer as defined under Clause 2 (g) of the Regulations, as such, the same falls under the prohibition as contained under Clause 3 of the Regulations.*
3. *Since the orders impugned are supported by valid and cogent reasons, the same are not amenable for any judicial review under Article 226 of the Constitution of India.*
4. *Impugned orders are strictly in accordance with the Regulations, as such, the present writ petition has no merit and is liable to be dismissed.*

In the above backdrop, the issues that boil down for consideration of this Court are:

1. *Whether the questioned orders are in accordance with the A.P. Scheduled Area Land Transfer Regulations?*
2. *Whether the transaction between the petitioner and the Bhadrachalam Paper Board is hit by the provisions of the Regulations.*
3. *Whether the petitioner herein is entitled for any relief from this Court under Article 226 of the Constitution of India?*

The information available before this Court reveals that the petitioner and the Bhadrachalam Paper Board entered into an un-registered leave and licence on 27-02-1990. On the ground that the said transaction amounts to transfer as defined under Regulation 2(g) of the Regulations thereby attracts the prohibition contained under Regulation 3, respondent authorities passed the questioned orders.

On the otherhand, it is the case of the petitioner precisely that the said transaction in between the petitioner and the 5th respondent does not fall under the said prohibitory regulations.

In order to examine the above said issues and for arriving at just and correct conclusions, it may be apt and appropriate to refer to the relevant recitals in the said agreement of leave and licence, dated 27-02-1990. Clauses 2, 3, 4, 7, 8, 11 and 16 of the said agreement of leave and licence read as under:

“2. The FIRST PARTY agrees to grant an irrevocable licence to the SECOND PARTY to carry out the plantation management as envisaged in these presents on the Scheduled Land, subject to the terms and

conditions hereof, and the SECOND PARTY agrees to take up the said plantation management in the manner set out hereunder and subject to the terms and conditions of these presents.

3. For the purpose of and in the course of carrying out the plantation management, the FIRST PARTY hereby agrees that the SECOND PARTY shall and is hereby permitted to do the following for and on behalf and for the benefit of the FIRST PARTY:

a) to carry out survey of the Scheduled Land and make appropriate plots or partitions, as may be required for the purpose of carrying out these presents;

b) to level and develop the Scheduled Land including digging and excavation in a scientific manner and employing modern techniques;

c) to carry out all such operations and to do all such acts, deeds and things as are necessary for and incidental to the plantation management envisaged under these presents;

d) to erect necessary temporary structures as are required for the purpose on the Schedule Land;

e) to bring such machinery and tools and tackles for the purpose of digging wells, laying pipes, and to provide sprinklers and such other equipment on the Schedule Land as are necessary for the purpose;

f) to provide for suitable storage tank on the Schedule Land for storing water for plantation operations and management;

g) to install requisite irrigation equipment, dig channels, trenches, lay pipes, etc., on the Schedule Land;

h) to install pumps, electric poles, electrical equipment and lay the power lines on the Schedule Land;

i) to bring and operate on the Schedule Land mechanized and other transport vehicles for purposes of carrying out the plantation management;

j) to bring water from adjacent lands and other sources by such means as are convenient and economical to create water facilities for the plantation

operations;

k) to provide for suitable fence and stockades on the Schedule Land, as may become necessary and incidental in order to protect the Schedule Land and the plantations, and the requisite equipment, implements, etc., in the course of carrying out of the said plantation management, and

l) to do all other acts, deeds, matters and things as are incidental and ancillary to the operations envisaged in these presents for the purpose of effectively carrying out the plantation management.

4. The FIRST PARTY will have right to do inter-crop cultivation between the tree-planting lines without, however, damaging or interfering with the tree-seedlings, for which the SECOND PARTY will not have any objection.

... ..

7. In consideration of the FIRST PARTY agreeing to sell the ultimate yield coming from the Schedule Land at the end of each 7-year period as envisaged in these presents and the SECOND PARTY being thus assured of the steady and sustained supply of the raw material required by it for its manufacturing operations, and further the FIRST PARTY having agreed to sell the said material at the pre-agreed firm rates as mentioned in Clause (5) above irrespective of the market price of such material at the end of each such 7-year period, the SECOND PARTY agrees to bear all the expenses that are required to be incurred by the FIRST PARTY for the operations contemplated under these presents and shall not lay any claim on the FIRST PARTY on this account, subject, however, to Clause (14) infra.

8. The SECOND PARTY shall, at the end of each year of leave and licence herein contemplated, furnish to the FIRST PARTY a statement of account detailing the expenditure incurred by the SECOND PARTY in carrying out the plantation management as envisaged in these presents upon the Schedule Land, and obtain from the FIRST PARTY an acknowledgment thereon.

... ..

11. *It is specifically understood and agreed by both the parties that notwithstanding anything contained in these presents, the ownership and possession of the Schedule Land shall always remain and be deemed to remain with the FIRST PARTY. It is also specifically understood and agreed that no transfer of interest of any kind in the Schedule Land shall or shall be deemed to take place at any time from the FIRST PARTY to the SECOND PARTY by virtue of these presents. The FIRST PARTY shall be responsible for regular payment of all taxes, cesses, assessment and other outgoings on the Schedule Land.*

... ..

16. *It is mutually agreed that at the end of the agreement period as envisaged in Clause (1) above, the SECOND PARTY, if desired by the FIRST PARTY, leaves the stumps on the Scheduled Land, free of any compensation therefor. Likewise, the SECOND PARTY agrees to leave all the structures of immovable nature and improvements made on and attached to the Schedule Land, against payment at their book value."*

The Regulations relevant and pertinent for the present case on hand are:

Regulations 2 (g) and 3(2)(a)&(b) of the Andhra Pradesh Scheduled Areas Land Transfer Regulation, 1959, which read as under:

"Section 2(g): 'Transfer' means mortgage with or without possession lease, sale, gift, exchange or any other dealing with immovable property, not being a testamentary disposition and includes a charge on such property or a contract relating to such property in respect of such mortgage, lease, sale, gift, exchange or other dealing."

"Section 3 (2)(a): Where a transfer of immovable property is made in contravention of sub-section (1), the Agent, the Agency Divisional Officer or any other prescribed Officer may, on application by any one interested, or on information given in writing by a public servant, or suo moto decree ejectment against any person in possession of the property claiming under the transfer, after due

notice to him in the manner prescribed and may restore it to the transfer or his heirs.

Section 3(2)(b): If the transferer or his heirs are not willing to take back the property or where their whereabouts are not known, the Agent, the Agency Divisional Officer or prescribed officer, as the case may be, may order the assignment or sale of the property to any other member of a Scheduled Tribe (or a society registered or deemed to be registered under any law relating to Co-operative Societies for the time being in force in the State) composed solely of members of the Scheduled Tribes, or otherwise dispose of it, as if it was a property at the disposal of State Government.”

As per the recitals in the agreement of leave and licence, dated 27-02-1990 the first party (petitioner herein) is the absolute owner with exclusive possession of 123.48 Hectors (305 acres of land) situated in Sy.No.287/18 of Chirramalla village, Pinapaka mandal, Khammam District and the 1st party is desirous of raising Eucalyptus trees/pulpwood plantations suitable as raw material for manufacture of paper and paperboards. It is further stipulated in the said leave and licence agreement that the 2nd party (Bhadrachalam Paper Board) has requisite knowledge and expertise in industrial pulpwood plantations and management thereof by introducing modern methods and by making use of modern advanced and sophisticated technology in development of land, crop management, in providing irrigation potential, water distribution and conservation and proper use of water, in providing inputs for better and healthy crop and in protection and preservation of crop from pests and wastage, etc. It is further clear from the agreement that the 1st party – petitioner herein approached the 2nd party – Bhadrachalam Paper Board with a request to take up plantation management on his/her land and as a

quid pro quo therefore has further offered to sell the eventual produce of the plantation on his land to the 2nd party on the terms and conditions enumerated in the agreement. It is further clear from the agreement that for the purpose of carrying out plantation management the 1st party/petitioner herein agreed to grant an irrevocable licence to the 2nd party to enter upon the land and to do all acts, deeds, matters and things as are necessary to carry out the said plantation management.

As per Clause 4 of the agreement the 1st party will have right to do inter-crop cultivation between the tree-planting lines without, damaging or interfering with the tree-seedlings, for which the 2nd party will not have any objection. It is also evident from Clause 11 of the agreement that the ownership and possession of the schedule land shall always remain and be deemed to remain with the 1st party/petitioner herein and no transfer of interest of any kind in the schedule land shall or shall be deemed to take place at any time from the 1st party to the 2nd party.

In this context, it would be appropriate to refer to the judgments cited by the learned counsel for the petitioner.

In case of ***Associated Hotels Of India Limited v.***

R.N. Kapoor^[1], the Hon'ble Apex Court held at paragraph Nos.32, 33 and 36 as under:

"32. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immoveable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under s. 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is there-fore a transfer of an interest in land. The interest, transferred is

called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas s. 52 of the Indian Easements Act defines a licence thus :

"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 immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

33. *Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose'. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in Errington v. Errington [1952] 1 All E.R. 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p. 155:*

"The result of all these cases is that, although a person who is let into exclusive possession is prima facie, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

... ..

36. *The following propositions may, therefore, be taken as well-established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form ; (2) the real test is the intention of the parties-whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the*

legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. Judged by the said tests, it is not possible to hold that the document is one of licence. Certainly it does not confer only a bare personal privilege on the respondent to make use of the rooms. It puts him in exclusive possession of them, untrammelled by the control and free from the directions of the appellants. The covenants are those that are usually found or expected to be included in a lease deed. The right of the respondent to transfer his interest under the document, although with the consent of the appellants, is destructive of any theory of licence. The solitary circumstance that the rooms let out in the present case are situated in a building wherein a hotel is run cannot make any difference in the character of the holding. The intention of the parties is clearly manifest, and the clever phraseology used or the ingenuity of the document- writer hardly conceals the real intent. I, therefore, hold that under the document there was transfer of a right to enjoy the two rooms, and, therefore, it created a tenancy in favour of the respondent.”

In case of **Khalil Ahmed Bashir Ahmed v. Tufelhussein Samasbhai Sarangpurwala**^[2], the Hon'ble Apex Court held at paragraph Nos.9, 10 and 14 as under:

“9. In support of this appeal Sree R.F. Nariman very laboriously took us through the documents. He submitted that the document in question in the instant case read as a whole was lease and not a licence. He referred us to the decision of this Court in the case of *Associated Hotels of India Ltd. v. R.N. Kapoor*, [1960] 1 S.C.R. 368 where at page 383 this Court noted that there was a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act, 1882 defined a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration of a price paid or promised. Under section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease involves a transfer of an interest in land, Subba Rao, J. as the learned Chief

Justice then was, observed in that case. This Court referred to the well-known decision in the case of *Errington v. Errington*, [1952] 1 All E.R. 149 where Lord Denning reviewing the case law on the subject summarized the position as follows:

"The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

The Court of Appeal in England again in *Cobb v. Lane*, [1952] 1 All E.R. 1199 considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. Somervell, L.J., had observed:

"... The solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties."

Denning, L.J. also reiterated the same decision. Reviewing these decisions Denning, L.J. had observed at page 384 of the report (1) that to ascertain whether a document created a licence or lease, the substance of the document must be preferred to the form; (2) the real test was the intention of the parties-whether they intended to create a lease or a licence; (3) if the document created an interest in the property, it is a lease; but if it only permitted another to make use of the property, of which the legal possession continued with the owner, it was a licence; and (4) if under the document a party got exclusive possession of the property, *prima facie*, he was considered to be a tenant; but circumstances might be established which negative the intention to create a lease.

10. Mr. R.F. Nariman very strenuously relied on the decision of this Court in *Mrs. M.N. Clubwala and another v. Fida Hussain Saheb and others*, [1964] 6 S.C.R. 642 at page 653. This Court emphasised the if the exclusive possession to which a person was entitled under an agreement with a landlord was coupled with an interest in the property, the agreement would be construed not as a mere licence but as a lease. Mr. Nariman's point was that the facts of the case were identical to the facts of the present case. Our attention was drawn to a decision of the Bombay High Court in the case of *Sohanlal*

Naraindas v. Laxmidas Raghunath Gadit, (68 Bombay Law Reporter 400) where Tarkunde, J. Observed that the intention of the parties and exclusive possession were important elements. This decision was approved in appeal by this Court in *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit*, [1971] 3 S.C.R. 319 where this Court reiterated that the test of exclusive possession was important point. He drew our attention to the observations of Shah, C.J. at page 321 of the Report. Reliance was also placed on the observations of Krishna Iyer, J. in the decision of *Qudrat Ullah v. Municipal Board, Bareilly*, [1974] 2 S.C.R. 530 where at page 533 of the report Krishna Iyer, J. Observed that there is no simple litmus test to distinguish a lease as defined in section 105, Transfer of Property Act from licence as defined in section 52 of the Easements Act, but the character of the transaction turns on the operative intent of the parties. To put precisely if an interest in immovable property entitling the transferee to enjoyment was created, it was a lease; if permission to use land without exclusive possession was alone granted, a licence was the legal result. we are of the opinion that this was a licence and not a lease as we discover the intent. For this purpose reference may be made to the language used and the restrictions put upon the use of the premises in question by the appellant. In the document in question the expression "licence" was introduced and clause (2) said that it was only for the business purposes. The licence fee was fixed. It permitted user only for 20 hours. Restriction in the hours of work negates the case for a lease. Clause (12) is significant which gave to the licensor the right to enter upon the premises and inspect the same at any time. In our opinion the background of the facts of this case and the background of the entire document negate the contention of the appellant that it was a lease and not a licence.

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14. In the aforesaid view of the matter, we are clearly of the opinion that in view of the intention of the parties in the document and the facts and circumstances of this case, it was a licence and not a lease. We need not detain ourselves with the question of estoppel upon which very interesting arguments were advanced before us by Mr. Nariman is noted above."

In case of **T.K. Jacob v. Gracykutty and others**^[3], the Kerala High Court held in paragraph Nos.4, 5 and 8 as under:

"4. The recent decision of the Supreme Court on the subject is reported in AIR 1988 SC 1845(RajbirKaurv. M/s. Chokosiriand Co.). Venkatachaliah, J. speaking for the Bench consisting of Chief Justice and himself has articulately and lucidly considered the question referring to the fundamental principles, in the decisions of the Supreme Court. The Supreme Court said (at page 1850 of AIR 1988 SC):--

"Exclusive possession itself is not decisive in favour of a lease and against a mere licence, for, even the grant of exclusive possession might turn out to be only a licence and not a lease where the grantor himself has no power to grant the lease. In the last analysis the question whether a transaction is a lease or a licence "turns on the operative intention of the parties" and that there is no single., simple litmus test to distinguish one from the other."

5. The property in question is an extent of 90 cents. It is within the Municipal Corporation limits. The document shows that in the property, there were trees and the executant reserved his rights to take the yield of the trees. The document is Ext. B1. It is dt. 31-3-1967. As per the document, defendant obtained certain rights stated in the document and for that, he has agreed to pay a remuneration (rent) of Rs. 350/- per mensem for the first five years and thereafter, for the next five years Rs. 375/-. Thus the period fixed in Ext. B1 is ten years. Of course, there is a clause that after ten years, if the first defendant wants, the period can be extended on a rent to be fixed on mutual agreement of the parties. In the document, it is stated that the property is taken for a commercial purpose, to wit, stacking timber. It is also provided in the document that necessary sheds can be constructed by the defendant for facilitating the commercial purpose of the defendant. , There it is stated that he is allowed to do it as a licensee and further it is provided that after the expiry of the period, the structures Court by the defendant have to be removed by him and vacant possession of the property has to be given to the owner of the property -- Vakkachan.

... ..

8. In *Quadrat Ullah v. Bareilly Municipality* (AIR 1974 SC 396), Krishna Iyer, J. had occasion to consider the question in detail. This decision has been referred to in - AIR 1988 SC 1845. Krishna Iyer, J. said that . "there is no simple litmus test to distinguish a lease as defined in Section 105 of the Transfer of Property Act from a licence as defined in Section 52 of the Easements Act, but the character of the transactions turns on the operative intent of the parties. To put it pithily, if an interest in immovable property, entitling the transferors to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a licence is the legal right."

In case of ***the Acting Secretary, Board of Revenue (Separate Revenue) v. the Agent, South Indian Railway Company Limited***^[4], the Madras High Court held in paragraph Nos.2 to 5 as under:

"2. Ordinarily a lease is a grant of property for a time by one who has a greater interest in the property, the consideration being usually the payment of rent. A license, on the other hand, is a permission to do some act which, without such permission, it would be unlawful to do. All the cases to which we have been referred make the distinction between a lease and a license to depend upon whether sole and exclusive occupation is given.

3. Now, the document in its terms contains a number of restrictions which might be consistent with the grant of a lease but which collectively indicate in my opinion that what was granted was a license. The drawer of the document was evidently anxious to avoid giving a lease so as not to contravene the instructions of the Government of India that Railway Companies have no permission to lease lands in their possession without the concurrence of the Secretary of State. Throughout the document the person who is given possession is called a "licensee," and in Clause 12 there is an express provision that "nothing herein contained shall be construed to create a tenancy in favour of the licensee." The fact that certain clauses of the agreement impose conditions which would be ordinarily implied by the grant of a license but would be exceptions to the grant of a

lease, does not necessarily indicate that it is a lease. These clauses were probably inserted *ex abundante cautela*; for instance, under Clause 4 "The licensee shall allow the General Traffic Manager . . . or any one authorised by him in this behalf free access at all times to the said land." Clause 1 makes the use of the land subject to any regulations or by-laws as may from time to time be passed. Under Clause 2 the licensee is prohibited from erecting any building on the land. Under Clause 3 he cannot allow the land to be used for any other goods but his own. Under Clause 6 there is an agreement to pay rent, but that of itself will not make the document a lease. It is simply a misuse of the term to call it "rent" instead of "fees" if it is not a lease. Clause 10 further provides for the "privileges," as they are termed, not being transferred or sub-let without the consent of the General Traffic Manager. Clause 11 provides for the license being revocable on 15 days' notice on either side. Finally, the document is one signed by both parties to the agreement and is not a unilateral deed. All these terms which I have quoted indicate that the merchants were not given the sole and exclusive occupation of the plots of ground upon which they were to deposit the coal.

4. That being so, the intention of the parties as gathered from the document is against its being construed as a demise of an interest in property. The ground put forward by the Agent of the Railway for holding that the document is a license rather than a lease, namely, that in every lease the lessor should have a legal right to lease out the land, does not affect my judgment. Even a person without a title to land may execute what purports to be a lease of that land. The test is not the right of the lessor to give the lease, but the interest intended by him to be created by the document. The fact however that the Railway Company is prohibited by orders of the Government of India from executing leases of lands in their possession is important for understanding the intention of the framer of the document as showing that the Company would be naturally averse to giving away any rights that ought to be reserved. A number of cases have been quoted before us, but the two which to my mind appear to have most bearing on the question are *Frank Warr and Co., Ltd. v. London County Council* (1904) 1 KB 713, where the use of refreshment rooms was given by the lessees of a Theatre, and *Sweetmeat Automatic Delivery Co. v. Commissioners of Inland Revenue* (1895) 1 QB 484, where automatic machines were placed on the platform

of Railway Stations. In both these cases the permission given was held to fall short of a lease for the reason that no interest in land was given by the agreements.

5. Coming now to decisions of this Court, both in Seeni Chettiar v. Santhanathan Chettiar (1896) ILR 20 M 58 : 6 MLJ 281 (FB) and in Mammi-kulti v. Puzhakkal Edom (1906) ILR 29 M 353 the test of whether a document was a lease or not was held to be whether it vested any exclusive interest in immoveable property in the transferee or whether it gave him merely a right to enter on the property and to do something thereon."

A perusal of the appellate order passed by the Agent to the Government discloses that the appellate authority, except referring to the judgments of the Hon'ble Apex Court, did not examine the issues in the light of the principles laid down in the said judgments. Though the petitioner filed written submissions and also cited the judgments of the Hon'ble Apex Court, the revisional authority simply endorsed the orders of the lower authorities. Except endorsing the orders of the lower authorities, there was absolutely no objective consideration by the revisional authority.

Another significant and peculiar aspect which requires to be noted in this context is that on one hand the authorities conclude that the subject document is inadmissible in evidence and on the other hand, they attempted to interpret the recitals contained therein against the petitioners. The principles laid down in the above-referred judgments in the considered and definite opinion of this Court are squarely and aptly applicable to the case on hand.

In the instant case also the recitals clearly show that the petitioner did neither lose the possession of the property nor parted with the same in order to indulge in any transaction which attracts the prohibition as contained under the Regulations. In

absence of the necessary and mandatory ingredients as contained in Section 2 (g) of the Regulations, by any stretch of imagination, it cannot be concluded that the transaction is hit by the Regulations.

Another vital aspect, which cannot be lost sight of is that the petitioner is undertaking welfare activities in the agency area for the tribal people, which fact is not disputed by the respondents. In these circumstances, this Court is of the considered opinion that the orders impugned in the present writ petition are unsustainable and untenable as the transaction in the instant case does not fall under the definition of 'transfer' as defined under Section 2 (g) of the Regulations.

For the aforesaid reasons, the writ petition is allowed, setting aside the orders of the 1st respondent – State Government issued vide G.O.Ms.No.43 Social Welfare (LTR-2) Department, dated 16-05-2006, confirming the orders of the Agent to Government, dated 27-02-1990 and the orders of the Special Deputy Collector, dated 30-09-1993. There shall be no order as to costs.

The Miscellaneous Petitions, if any, pending in this Writ Petition shall stand closed.

A.V. SESA SAI, J

February 09, 2016

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THE HON'BLE SRI JUSTICE A.V. SESA SAI

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WRIT PETITION No.15824 of 2006

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[\[1\]](#) AIR 1959 SC 1262
[\[2\]](#) AIR 1988 SC 184
[\[3\]](#) AIR 1991 Kerala 281
[\[4\]](#) AIR 1925 Mad. 434