

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

WRIT PETITION NO. 2219 OF 2006

Shrikant Dattatraya Deshpande ...Petitioner
R/a. Plot No.29, Parijat Co-operative Housing
Society, Tushar Bungalow, Bibwewadi, Pune-
411037

Versus

Shalini Waman Bhat (dead)
through Lrs.
Jayant Waman Bhat
R/at. 29, Parijit society, Opp. Vasant Baug
Society, Bibwewadi Road, Pune 411 037.

...Respondents

2. The Competent Authority Pune
(under Rent Act)
Griha Nirman Bhavan,
Agarkar Nagar, Pune 411 001.

3. The Additional Commissioner Pune,
Revisional Authority, (under Rent Act)
Council Hall, Pune 411 001.

D. J. Bhanage - Advocate for the petitioner.
A. V. Anturkar – Sr. Advocate i/b Sandeep Phatak - for respondent .

CORAM : DAMA SESHADRI NAIDU, J.

DATE OF PRONOUNCEMENT : 13th September 2019.

JUDGMENT :

Petitioner Shrikant Dattatraya Deshpande claims to be a “tenant”. Indeed, much turns upon that expression, for respondent Jayant Waman Bhat asserts that Shrikant is only a licensee. Originally, Shalini Waman Bhat, Jayant’s mother, as the owner, filed Application No.17 of 2004 under Section 24 of the Maharashtra Rent Control Act, for evicting Shrikant. She filed that application before the Competent Authority, Pune Division. Through its order, dated 29th January 2005,

the Competent Authority allowed that application.

2. Aggrieved, Shrikant filed Revision No.166 of 2005 before the Additional Commissioner, Pune. But the Additional Commissioner, too, dismissed the revision, through order dated 3rd March 2005. Then, Shrikant has filed this writ petition. Pending these proceedings, Shalini Waman Bhat died; so her son, Jayant, as the legal representative, has been prosecuting the case.

3. Though the facts seem to lie in a narrow compass, this case has a chequered history. It all began in 1986. So I need to set out the facts, as well as the course of litigation, briefly though.

4. On 1st June 1986, Shrikant and Mrs. Bhat signed an agreement. That agreement was for three years, that is until 31st May 1989. Through that agreement, Mrs. Bhat permitted Shrikant to live in a portion of her house. The bone of contention throughout has been whether the agreement created a lease or a licence. Plainly put, is Shrikant a tenant or a licensee?

5. Though the agreement ended in 1989, Shrikant continued to enjoy the property. On 3rd March 1994, Mrs. Bhat allegedly disrupted the power supply to the leased portion of the house. Therefore, Shrikant filed Application No.193 of 1994, before the Small Cause Court, Pune. He invoked Section 24 of the now-repealed Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In that case, the issue was about the restoration of power supply. Incidentally, there arose a question about whether Shrikant is a tenant or a licensee.

6. Through its order dated 25th August 1994, the Small Cause Court ordered the restoration of power supply. Besides that, it also held that Shrikant is a tenant. Aggrieved, Mrs. Bhat filed a revision. The District Court allowed that revision. It seems that it has felt that the Small Cause Court ought not to have determined the status of the parties. At any rate, Shrikant impugned the revisional order in WP No.1272 of 1998. In June of the same year, this Court allowed that writ

petition. Then, Mrs. Bhat filed a Civil Application in that disposed-of Writ Petition.

7. In the Civil Application No.5856 of 1998, Mrs. Bhat contended that the Court's observation that Shrikant was a tenant would prejudice her cause before the Civil Court, where she had sued for recovery of possession. I will refer to it soon. Then, this Court, through its Order, dated 17th June 1998 in the Civil Application, held that the expressions employed in the order about the parties' status should not prejudice their rights before the Civil Court.

8. Now, I will refer to the Civil Suit. Mrs. Bhat filed Special Civil Suit No.8 of 1995 before the Civil Judge, Senior Division, for recovery of possession from Shrikant. In that suit, first, Mrs. Bhat maintained that Shrikant is a licensee and that the agreement is a leave and license agreement. She has pleaded that her remedy before the Authorities under the Act stands barred by efflux of time. So she sought from the Civil Court the remedy of recovering possession from Shrikant.

9. Then, Shrikant, as the defendant, applied under Order 7, Rule 11 of CPC. He wanted the Civil Court to dismiss the suit for want of jurisdiction. As a result, on 24th June 2003, the Civil Court dismissed the suit. Aggrieved, Mrs. Bhat filed Writ Petition No.346 of 2004. This Court, through its Judgment, dated 13th April 2004, disposed of the writ petition holding that Mrs. Bhat had an efficacious alternative remedy, for an order under Order 7 Rule 11 is a deemed decree.

10. But Mrs. Bhat pursued no alternative remedy against the Civil Court's rejecting the plaint. Instead, she invoked Section 24 of the Maharashtra Rent Control Act and applied before the Competent Authority for Shrikant's eviction. Indeed, she pleaded that Shrikant is a licensee and that the licence expired long back. The competent Authority allowed that application, as I have noted earlier.

11. On revision, the Revision Authority, too, refused to interfere. So Shrikant has filed this writ petition, invoking Article 227 of the

Constitution of India.

Submissions:

Petitioner:

12. In the above factual background, Shri D. J. Bhanage, the learned counsel for the petitioner, has submitted that the civil courts and this Court, throughout, have held that Shrikant is a tenant. For that assertion, Shri Bhanage has emphasised the Small Cause Court's observations in Shrikant's Application No.193 of 1994.

13. While faced with subsequent developments and, especially, the reversal in the reversion, Shri Bhanage has insisted that a finding of fact does not get diluted even in the face of the doctrine of merger. According to him, this Court may have observed in the later round of litigation that the parties could agitate the issue before the Civil Court. But that observation will not help the owner's cause.

14. At any rate, Shri Bhanage has taken me to the agreement, dated 1st June 1986. Reading out from, as he puts it, a literal-English translation of the agreement, Shri Bhanage has asserted that the document unmistakably establishes the parties' intention: the agreement is a lease, and Shrikant a tenant.

15. Shri Bhanage has submitted that calling Shrikant a licensee is a misnomer. First, he could not have been living in the house without having its effective possession. Second, as it is a bungalow, Shrikant's not having access to the other parts of it will not defeat his right to be a tenant to the extent leased to him. About the restrictions on the use of the property, Shri Bhanage insists that any restrictions on the use of the property for its safety or upkeep cannot amount to a restriction on its enjoyment. At any rate, those conditions would not affect Shrikant's leasehold right.

16. According to Shri Bhanage, the competent Authority and the Revision Authority have not addressed the issue in its proper legal perspective. Referring to the judgment the Authorities have relied on,

Shri Bhanage stresses that the ratio of those judgments favours Shrikant.

17. To elaborate, Shri Bhanage has submitted that this Court's observation about the relationship between the parties stands undisturbed. And though the Court is said to have left the issue open about the tenancy, that liberty was confined to Civil Suit No. 8 of 1995. When the suit was dismissed for want of jurisdiction, the owner did not take the matter to its logical end. So, Shri Bhanage has urged this Court to allow the writ petition.

18. Shri Bhanage has relied on *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit*^[1], *Manika Dei v. Dhadi Madgul*^[2], *Capt. B.V. D'Souza v. Antonio Fausto Fernandes*^[3], *Ramachandra Sahu v. Pramila Sahu*^[4], *Vafati Lalmohamed v. Sarfunisa Abdulmajid*^[5], *Globe Publications v. Madan Gopal*^[6], *Tulsi v. Paro*^[7], *Bharamappa Nemanna Kawale v. Dhondi Bhima Patil*^[8], *C.M. Beena v. P.N Ramachandra Rao*^[9], *Smt. Krishnabai v. Baburao*^[10], *Laxman Vitthal Rewankar v. Rajaram Narayan Pohurkar*^[11], *Gulabchand Chhotalal Parikh v. State of Gujarat*^[12], *Choudhary Sahu v. Surajballi Sah*^[13], *Centre of Indian Trade Unions v. Union of India*^[14], *Amratlal Valji v. Dr. G.S. Shah*^[15], and *Achintya Kumar Saha v. Nanni Printers*^[16].

Respondent:

-
- 1[] (1971) 1 SCC 276
 - 2[] AIR 1987 ORI 74
 - 3[] AIR 1989 SC 1816
 - 4[] AIR 1992 Orissa 183
 - 5[] AIR 1993 Gujarat 163
 - 6[] AIR 1996 P & H 115
 - 7[] (1997) 2 SCC 706
 - 8[] AIR 1997 SC 122
 - 9[] (2004) 3 SCC 595
 - 10[] AIR 1978 Bombay 290
 - 11[] AIR 1979 Bombay 305
 - 12[] AIR 1965 SC 1153
 - 13[] AIR 1982 SC 98
 - 14[] AIR 1997 Bombay 79
 - 15[] 2007 (1) Bom. CR., 390
 - 16[] AIR 2004 SC 1591

19. Shri A. V. Anturkar, the learned Senior Counsel for the first respondent, has formulated, in his words, seven points to counter Shrikant's assertions. To begin with, the alleged lease deed falls within the mischief of Section 107 of the Transfer of Property Act. As the period mentioned in it was three years, it required compulsory registration. In its absence, the document could not be considered for any other purpose than collateral. To elaborate, Shri Anturkar has submitted that only possession, nothing else, could be gathered from Exh. A2 agreement.

20. Then Shri Anturkar has, as his second proposition, drawn my attention to Sections 91 and 92 of the Evidence Act. He has contended that the agreement was reduced to writing. That done, in terms of Section 92 of the Evidence Act, no further evidence could be led to dilute the contractual terms reduced to writing. As his third proposition, the learned Senior Counsel has submitted that the burden was heavy on Shrikant to establish before the Court or the authorities that there was tenancy and the relationship between them was that of landlady and tenant. According to him, Shrikant has not even got into the witness box to discharge his burden. Instead, Shrikant has marked the documents, such as copies of depositions in some other suit. In that context, Shri Anturkar has contended that the depositions in other cases become only the previous statements without any independent evidentiary value.

21. As to his fourth proposition, Shri Anturkar has elaborated on Shrikant's alleged exclusive possession. He has taken me through the agreement to highlight, as he puts it, the restrictions the landlady imposed on Shrikant's enjoying the property. He has also emphasized that the parties executed the agreement without any legal advice or assistance. Therefore, it reflected the parties' true intention. In praise of the parties, he has submitted that the agreement contained absolutely neutral expressions, with no reference to either lease, rent, or receipt,

much less to any exclusive possession.

22. Eventually, as part of his remaining propositions, the learned Senior Counsel has taken me through Section 11 of CPC. Then, he contended that the eviction proceedings remain unaffected by the principle of *res judicata*. He has contended that the Civil Court that refused to entertain Suit No. 8 of 1995 is incompetent to decide the dispute. It is the Competent Authority that has the jurisdiction under Section 24 of the Act. So, the basic ingredient of Section 11 of CPC finds missing—a decision on merits by a competent court in an earlier round litigation.

23. In the alternative, Shri Anturkar has submitted that if the judgment in Suit No. 8 of 1995 were to bind the parties, there was a clear finding that the suit property admittedly was given on license to Shrikant. If it was an erroneous observation, Shrikant ought to have tried to have it modified or corrected.

24. Thus, eventually, the learned Senior Counsel has relied on *Anthony v. K. C. Ittoop & Sons*^[17], *Delta International Ltd., v. hyam Sundar Ganeriwalla*^[18], and *Sevoke Properties Pvt. Ltd. v. West Bengal State Electricity Distribution Company*^[19].

Reply:

25. Shri Bhanage, in reply, has submitted that the expression “admittedly” in the Civil Court’s judgment was in the context of the pleadings but not an observation by the Court. He has also submitted that the first respondent has never raised the issue of registration or the burden of proof before any Authority.

26. Heard Shri D. J. Bhanage, the learned counsel for the petitioner, and Shri A. V. Anturkar, the learned Senior Counsel for the respondent.

¹⁷[] (2000) 6 SCC 394

¹⁸[] (1999) 4 SCC 545

¹⁹[] AIR 2019 SC 2664

Discussion:

27. This matter needs decluttering. Many rounds of litigation have only led to confusion; so let us identify the issues.

Issues:

Issue No.1: Are the Owner's proceedings barred by Res Judicata? Or, is there any judicial finding or declaration that the occupier is a tenant in the earlier round of litigation?

Issue No.2: If treated as a lease deed, does the Agreement, dated 1st June 1986, require registration?

Issue No.3: What is the Agreement, dated 1st June 1986: is it a lease deed or a leave and licence agreement?

Issue No.4: Does the marking of the Previous Depositions in Other Cases Between the Same Parties amount to Substantive Evidence?

Issue No.5: Have the Competent Authority and Revisional Authority Committed any Jurisdictional Error requiring this Court's Judicial Intervention?

Discussion:

28. This case has seen a few rounds of avoidable litigation already. So it pays to trace its litigious roots.

The Roots of Litigation:

Case Details	Result	Remarks
Application No.193/1994 U/s. 24 of the Bombay Rent Act (Old Act)	25.8.94: Allowed (Shrikant)	(1) The landlady was asked to restore power supply; (2) "The intention of the parties was to create lease, and so the applicant is the tenant of the suit premises."
CRA Nos.135/94 & 136/94	29.11.97 Allowed (Mrs. Bhat)	(1) "It nowhere mentions that a person whose status is not accepted by the other side as a tenant can apply for restoration of the electricity supply as per the section (Section 24)." (2) "The status of a person cannot be inquired into."

WP No. 1272 of 1998	23.06.1998 Allowed (Shrikant)	Reversed the order in revision and restored the trial Court's order.
C A. No.22498/1998 in WP No.1272 of 1998	17.07.1998 Clarified	"No expressed any opinion on the issue as to whether the petitioner-applicant is the tenant of the suit premises."
Civil Suit No. 8 of 1995 (6th Joint Civil judge Senior Division, Pune.)	24.06.2003 Mrs. Bhat's suit was dismissed for want of jurisdiction	(1) "On perusal of the pleadings itself, the defendant as licensee of the suit property was given to him on leave and license basis. (2) "Admittedly the suit property was given on license to the defendants. Admittedly the defendants approaching the Small Cause Court for . . . restoration of electricity supply. In the same judgment, it was observed that the defendant was tenant of the suit premises, the same thing was confirmed by the Hon'ble High Court. It is endless to mention that the order passed by the above Court has not been challenged . . ." (3) The pleadings are sufficient to infer that the Civil Court does not have any justification to entertain to suit for possession and arrears of license fees as claimed by the plaintiff.
WP No.346 of 2004	13.04.2004 Dismissed (Mrs. Bhat lost)	Mrs. Bhat has an efficacious alternative remedy against the trial Court's judgment, dt.24.06.2003 in Suit No.8 of 1995.
Application No.17 of 2004 U/s. 24 of MRC Act, before the Competent	29.01.2005 Allowed (Mrs. Bhat won)	The Competent Authority allowed it: ordered Shrikant's eviction. Findings: (1) Shrikant filed on record documents with List-Exh.38 but he did not adduce any oral evidence.

Authority		(2) Interpreted the agreement to be a leave and licence agreement (para 34) (3) Earlier nowhere has there been a declaration that Shrikant is a tenant (para 36).
Revision Application No.166 of 2005 Before the Addl. Commissioner	03.03.2006 Dismissed (Shrikant suffered concurrent findings)	The Revisional Authority concurred with the Competent Authority and affirmed the Order, dt.29.01.2005

Issue No.1: Are the Owner's proceedings barred by Res Judicata? Or, is there any judicial finding or declaration that the occupier is a tenant in the earlier round of litigation?

29. Shrikant has strenuously and persistently contended that the courts below have already declared that he is a tenant. Indeed, there was a finding in the Small Cause Court's Order, dated 25th August 1994, in Shrikant's Application under Section 24 of the Bombay Rent Act. It was for the restoration of power supply. In revision, that observation was upset. But this Court in Writ Petition No.1272 of 1998, restored it. Eventually, through its order, dated 17th July 1998, in CA. No.22498 of 1998, once again this Court has nullified the observations. So that observation has perished.

30. In *Manika Dei and Ramachandra Sahu* of Orissa High Court, *Vafati Lalmohamed* of Gujarat High Court, *Globe Publications* of Punjab and Haryana High Court, and *Laxman Vitthal Rewankar* of this Court hold that the finding as to the relationship of landlord and tenant given by the Authority under the Rent Control Act is the finding given by a "court of limited jurisdiction" and operates as "res-judicata" in the subsequent suit.

31. In *Bharamappa Nemanna Kawale*, the Supreme Court has held that if the 'Decree' held by a party who is not the tenant has

become final, it is not open to another party to contend in the executing Court that the first party is still a tenant. But this decision presupposes that the 'decree' was by a competent court. Otherwise, as it is well-known, the observations, or even findings, by a court without jurisdiction are of no consequence.

32. This Court in *Krishnabai* has noticed that the landholders elected to choose one of the two inconsistent remedies and obtained relief under one statutory provision. It was on the footing that the occupier was their tenant. In that context, the Court has held that the landholders, then, could not approbate and reprobate and contend in other proceedings that the occupier was never their tenant but only a partner in cultivation. Such a plea would be barred by principles of *res judicata* because of the previous order.

33. Here, the landlady all along contended that Shrikant was a licensee. She contended before the Civil Court that her remedy before the Authorities was barred by limitation. Then the Civil Court has held that the case was not barred under any law. She could have her remedies against the "licensee."

34. In *Gulabchand Chhotalal Parikh v. State of Gujarat*²⁰, the Supreme Court has held that the general principles of *res judicata* will apply to a decision on merits in a Writ Petition. Subsequent Suit is barred. In *Centre of Indian Trade Unions*, this Court has held that the doctrine of *res judicata* is not confined to civil suits; it applies to writ petitions, too. Then, after explaining the doctrine, this Court has further held that constructive *res judicata* applies to PILs. In *Choudhary Sahu*, the Supreme Court has held that if no appeal is filed, a decree or order becomes final.

35. Here, the Civil Court rejected the plaint; it was on the ground that the landlady, as per her pleadings, must have another statutory remedy, and for that the forum was different. Then, after an initial

aborted attempt to challenge that order or decree, the landlady chose to have the remedy the Civil Court held available.

36. Now we will turn to the suits. In Civil Suit No. 8 of 1995, the trial Court, through its judgment dated 24.06.2003, rejected the suit. It seems that was in response to Shrikant's application under Order 7, Rule 11 of CPC. It has mostly recorded the rival contentions about Shrikant's status or the nature of the agreement. Its employing "admittedly" more than once for both the rival contentions may have to be understood in that context. But it dismissed the suit, as I gather, based on Mrs. Bhat's pleadings: "the pleadings are sufficient to infer that the Civil Court does not have any justification to entertain to suit for possession and arrears of license fees as claimed by the plaintiff."

37. This Court in WP No. 346 of 2004 has only held that Mrs. Bhat has an alternative remedy. Once the Civil Court has rejected a plaint or even the very suit on the grounds that it has no jurisdiction, it becomes *coram non judice*. In other words, a court declaring itself *coram non judice*, yet declaring some right, if it were, is nothing but a contradiction in terms. A judicial oxymoron. So, I reckon there is no declaration about Shrikant's status.

38. The past litigation put behind, now I will focus on the impugned order and its legality.

The Present Litigation:

What is Challenged?

39. Shrikant assails the Order, dated 3rd March 2006, passed in Appeal No.166 of 2005 by the learned Additional Commissioner, who is the Revisional Authority under Section 44 of the Maharashtra Rent Control Act 1999. That order confirms the Competent Authority's Order, dated 29th January 2005, passed under Section 24 of the Act. So the challenge is against the concurrent findings.

What is the Subject?

40. Shrikant has been occupying the first floor of a residential property belonging to Jayant, the present owner. His mother let him in. Shrikant claims that he has been in exclusive possession of the property since 1986. So he asserts he is a lessee. The possession is undisputed, but his status is. Contrary to Shrikant's claim, the landlady and, later, her son Jayant maintain that he is a licensee who must vacate.

On What Basis?

41. Mrs. Bhat and Shrikant signed an agreement on 1st June 1986. The primary dispute is about the nature of the agreement: is it a lease deed or a leave and licence agreement? Even the duration is a bone of contention. The Agreement was initially supposed to be for three years—from 01.06.1986 to 31.05.1989. But Shrikant contends that it was intended to be for an indefinite period since the landlady was occupying the rest of the whole bungalow along with her husband, who was then alive.

Issue No.2: Does the Agreement, dated 1st June 1986, if treated as a lease deed, require registration?

42. Section 17(1)(d) of the Registration Act and Section 107 of the Transfer of Property Act provide that leases 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. Particularly Section 107 of TP Act mandates:

“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.

43. Section 49 of the Registration Act, 1908, sets out the effect of non-registration of documents required to be registered. That Section reads:

“49. Effect of non-registration of documents required to be registered:

No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall

-
- (a) affect any immovable property comprised therein, or
 - (b) confer any power to adopt, or
 - (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument.”

44. Let us examine Section 49 of the Registration Act. This provision describes the “effect of non-registration of documents required to be registered.” If we assume that a document requires registration under Section 17 or under the Transfer of Property Act, but it has not been registered. Then, that document cannot (a) affect any immovable property shown in the document; or (b) confer any power to be adopted, or (b1) be received as evidence of any transaction affecting the property shown in the document. Here, an agreement of lease, if it were, needs to be registered.

45. But Section 49 provides for exceptions. The unregistered document “may be received as evidence of a contract in a suit for specific performance,” or as evidence of any collateral transaction not required to be effected by a registered instrument. Interpreting Section 49 of the Registration Act, the Supreme Court in *SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited*^[21] has held that “a collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction.”

46. We may as well examine the semantic significance of “affect”

in Section 49 of the TP Act. In *Atluru Saraswatamma v. Atluru Paddayya*^[22], in 1923, a Division Bench of the Madras High Court has held that all sorts of transactions may remotely affect the immovable property. So Section 49 of the Registration Act must be read in the light of Section 17 of the same Act and Section 91 of the Evidence Act. If this is done, the word "affecting" will be seen to be only a compendious term for expressing the phrase "purporting or operating to create declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent." And leasehold right is a right under Section 49 of the TP Act.

47. In *Anthony*, the Supreme Court has held non-registration of the document produces only two consequences. One is that no lease exceeding one year is created. The other is that the instrument becomes useless for creating any lease. But the presumption that a lease not exceeding one year stands created by the conduct of the parties remains unrebutted. In that context, Anthony has also observed that to the parties to an unregistered lease deed, the Rent Control Act does apply.

48. So the conclusion is that the agreement, dated 1st June 2008, ought to have been registered if it were treated as a lease deed.

(a) Is Non-Registration a Curable Defect?

49. A learned Full Bench of this Court in *Hemendra Rasilal Ghia v. Subodh Mody*^[23] has categorized, in paragraph 71 of the judgment, the objections about document marking into three categories: (i) the objection to the documents insufficiently stamped; (ii) the objection about the mode of proof; and (iii) the objection about the document *ab initio* inadmissible in evidence. In view of Section 17 (1) (d) of the Registration Act and Section 107 of the TP Act, read with Section 49 of the same Act, a document which requires registration but has not been

22[] AIR 1923 Mad 297

23[] 2008(6) Mh.L.J. 886

registered renders itself *ab initio* inadmissible. It is unlike insufficient stamp duty, which is curable.

(b) Can this Objection be raised at any Stage?

50. Non-registration vitiates a document; it robs the document of both its solemnity and value. It can affect no immovable property shown in the document, nor can it be received as evidence of any transaction affecting the property shown in the document. As the document is *ab initio* inadmissible, the objection can be raised at any stage.

(c) What is Collateral Purpose under Section 49 of the TP Act?

51. Suffice it to refer to *Rana Vidya Bhushan Singh v. Ratiram*^[24]. A three-Judge Bench of the Supreme Court has held that a document required by law to be registered is inadmissible as evidence of a transaction affecting the immovable property if it is unregistered. But it may be admitted as evidence of collateral facts, or for any collateral purpose. Then, in the context of that case, as is here, their Lordships have held that if an agreement was unregistered, it could not create in a party's favour, say, the right of tenancy for a 'specified period.' The agreement, to that extent, is inadmissible in evidence. "But in support of the plea that his possession was that of a tenant", the party could rely upon the recitals in that agreement of lease.

52. That said, neither Mrs. Bhat, the original landlady, nor her son and successor, Jayant, the present landlord, is prepared to agree that it is a lease deed. They maintain that it is a leave and licence agreement. Does the agreement, dated 1st June 1986, pass muster as a deed of licence?

Issue No.3: What is Agreement, dated 1st June 1986: is it a lease deed or a leave and licence agreement?

53. For this purpose, we should construe that document. Ext. C is the agreement. The title of the document reads: "Agreement in respect

24[] 1969 (1) UJ 86

of Residential Premises.” Then, it describes the purpose of the agreement. In May 1986, the landlady’s son, that is the respondent in this writ petition, was transferred to another place. At the same time, Shrikant needed some accommodation. So the landlady gave the residential portion (described) “for use.” The period of the agreement is three years—to end on 31st May 1989. Then, Shrikant must hand over the premises “in the condition in which the same was taken in possession along with material.”

54. The conditions of the agreement were enlisted: (a) Shrikant should deposit with the landlady Rs.20,000/-. It would be returned on 31st May 1989, after her taking the possession back. (b) For using the premises, Shrikant must pay Rs.1,000/- per month in advance. (c) Shrikant should pay the electricity charges; until a meter was received from MSEB, he should pay the electricity charges as per the submeter. (d) No changes could be made to the premises without the landlady’s leave. (e) No obstacle should be created on the staircase. (f) The bathroom on the first floor (where Shrikant lives) should not be used for washing clothes and utensils. Now comes the most important condition, and it reads:

(8) (a) However, before completion of the period of this agreement, if my son gets transfer, I will require the place. In these circumstances you will have to leave the place before completion of the period of agreement.

(n) If I require possession of the place before completion of the agreement/or if you want to leave the place before the completion of the limitation, a notice of minimum one month will have to be given by both.”

55. As respondent Jayant contends the agreement is content-neutral. It has no tell-tale expressions such as lease, rent, possession, enjoyment, and so on. Nor does it have expressions like licence, permission, and so on either, for us to conclude that it is a licence. First, it is in the vernacular; second, it is the translation provided by the petitioner-occupier, who is facing eviction. The owner does not object to

any expressions in the translation. Fairness belongs to the counsel that translated the document at whatever level of the litigation.

56. The agreement speaks of a stop-gap arrangement until her then-transferred son came back. Though the agreement period was three years, it was tentative. It was actually coterminous with her son's return. Plainly put, three years or her son's return, whichever is earlier. True, the landlady's son did not return in three years, nor did she seek the possession at the end of the agreement period. With hindsight, we may note that if she had asked then for the return of possession, this litigation would have started a little earlier than it actually started. Noting more.

57. The agreement employs the expression "use" rather than "enjoy". Standing alone, the expression "use" is devoid of any specific connotation and value-neutral. Contrasted, But "enjoying" is "using as one likes". So "use" is permissive and "enjoy" is pervasive. Shrikant could use the premises. Shrikant had to pay the electricity charges. The landlady assured him a separate meter. So Shrikant insists that the arrangement showed the parties' intention. I am afraid nothing turns on it. The meter, if arranged, was to ensure the charges were calibrated separately.

58. There are restrictions on the use of the property: no obstacles on the staircase; the bathroom on the first floor (where Shrikant lives) should not be used for washing clothes and utensils.

59. There are two conditions that dealt with how the agreement should terminate. The former stipulated that if the landlady's son returned before three years, Shrikant had to leave the place. The latter condition provided for one month's notice. If either party to the agreement wanted to terminate the agreement before the three-year period, she or he should give one month's notice. Do these two conditions contradict? They do not.

60. The former condition is categorical; it admits of no ambiguity. The return of the landlady's son would spell the doom for the agreement. That was non-negotiable. Besides that, for any other reason, if either party to the agreement wanted the contract to end, then the notice-period was stipulated.

(a) What distinguishes a lease from a licence?

61. Section 105 of the TP Act defines "lease." It is a transfer of a right to enjoy any immovable property. Under Section 108 of that Act, the lessee is entitled to be put in possession of the property. On the other hand, Section 52 of the Easements Act, defines "licence" as a grant from person to another, 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 crux of the lease is the creation of interest in the property; the crux of the licence is its absence—the absence of any interest in the property. In the lease, enjoyment is the prerogative, and in the licence it is permissive.

62. There is a marked distinction, declares the Supreme Court in *Associated Hotels of India Ltd. v. R.N. Kapoor*, between a lease and a license. A lease is, the decision holds, transferring 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 the lessee gets that right to the exclusion of the lessor. Taking the above discussion forward, K. Subba Rao J (as his Lordship then was) in his concurring opinion, has also noted the statutory contours of Section 52 of the Indian Easement Act.

63. After analysing the above provision, *Associated Hotels* observes that if a document gives only a right to a person to use the property in a particular way or under certain terms while the property remains in the owner's possession and control, it will be a license. The legal possession, therefore, continues to be with the owner, but the

licensee is permitted to use the premises for a particular purpose. “But for the permission, his occupation would be unlawful.” *Associated Hotels* observes that the license does not create in the licensee’s favour any estate or interest in the property.

64. Acknowledging the conceptual confusion about the nature of the licensee’s possession, *Associated Hotels* observes that “the dividing line [between a lease and license] is clear though sometimes it becomes very thin or even blurred.” Then, it refers to the once-favoured test of exclusive possession as an infallible measure to determine the nature of possession. After referring to a handful of English caselaw, *Associated Hotels* enlists the tests that can determine whether a transaction is lease or license: (a) To ascertain whether a document creates a license or lease, by preferring substance of the document over the form; and (2) to ascertain the intention of the parties—that is, whether they intended to create a lease or a license. Then, it rules that if the document creates an interest in the property, it is a lease; but if it only permits another to use the property, of which the legal possession continues with the owner, it is a license. On the other hand, if under the document a party gets exclusive possession of the property, *prima facie*, he is considered a tenant; but circumstances may be established which negative the intention to create a lease.

65. In *C.M. Beena v. P.N. Ramachandra Rao*^[25], the Supreme Court has held that a few principles are well settled. User of the terms like 'lease' or 'licence', 'lessor' or 'licensor', 'rent' or 'licence fee' are not by themselves decisive of the nature of the right created by the document. An effort should be made to find out whether the deed confers a right to possess exclusively coupled with the transfer of a right to enjoy the property, or it is merely a right to use the property while the owner retains the possession. The parties’ conduct before and after the

25[] AIR 2004 SC 2103

creation of the relationship is relevant for our discovering their intention._

66. In *Delta International*, the Supreme Court has exhaustively examined the concept of “intention” of the parties to a deed. It has held that the intention must be gathered from the words they have used, and there could be no intention independent of that meaning. Recently, the Supreme Court in *Sevoke Properties* has held that the only purpose for which an unregistered lease can be looked at is for assessing the nature and character of the occupier’s possession.

67. Here, Mrs. Bhat allowed Shrikant to “use” the property. She dictated what Shrikant should do and should not do: he was enjoined to use even the bathroom only in a particular way. He was asked to leave the property the movement Mrs. Bhat’s son came back on a transfer, the agreement period notwithstanding.

68. Now, I will also refer to the decisions Shrikant has cited. *Sohan Lal Naraindas*. In that case, the document is titled ‘leave and licence agreement.’ But on facts, the Supreme Court notes that the defendant was put in exclusive possession of the loft. There is no evidence that the loft was given to the defendant out of sympathy or because of friendship, or relationship, or any similar motive. It was stipulated that the plaintiff may terminate the agreement by giving one month’s clear notice, the agreement could not be terminated by notice of a shorter duration.

69. Here, the residential portion was let out only as a stop-gap arrangement, and the licence was terminable on the happening of a contingency. That contingency—the return of the landlady’s son—will terminate the agreement, the agreement period notwithstanding. Besides that, there have been restrictions on the use: for example, how and only for what purpose the bathroom could be used.

70. In *Tulsi*, the Supreme Court has held that a licensee gets the possession only with the consent of the licensor and is liable to vacate

when so asked. Then, Shrikant contends that he has had uninterrupted possession. According to him, though the alleged licence expired in 1989, until 1994 his possession had not been disturbed. That said, once it is a licence, merely because the licensor has not asked the licensee to vacate soon after the licence period does not transform the licence into lease. The length of the period is not, I must say, a determinative factor.

71. In *Achintya Kumar Saha*, the Supreme Court has reiterated that the nature of lease and licence to be gathered from surrounding circumstances. In *Amratlal Valji*, this Court has relied on the Supreme Court's proposition in *C.M. Beena's* case. It has held that the difference between lease and licence is to be determined based on the document and surrounding circumstances.

(b) What sort of possession does the occupier have?

72. Shrikant contends that it would have been impossible for him to enjoy the property, had he not been in possession. A person's occupying a residential property speaks volumes about that occupier's possessing the property, and enjoyment without possession, according to him, is unthinkable and impracticable.

73. In this context, I may note that there are many shades of possession: say, corporeal possession, incorporeal possession, constructive possession, adverse possession, *de facto* possession, *de jure* possession, mediate possession, and immediate possession. Indeed, immediate possession is a direct or primary possession. The person in direct possession has a higher control over the thing possessed. It means there is no intermediary or medium. On the contrary, if someone possesses something through another, the thing remains in possession of another. That is, the possessor has a lesser control over the thing he has physically possessed, though.

74. Lexically speaking, 'possession' is a chameleon-hued word. G. W. Paton in his *A Textbook of Jurisprudence* has 'pessimistically states'

that the search for its proper meaning is likely to be a fruitless one.^[26] The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja*^[27], to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

75. As noted in *Gunwantlal v. The State of M.P.*^[28], possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the persons to whom physical possession is given holds it subject to that power or control. That is, the word 'possession' means the legal right to possession. In an interesting case, it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness*.^[29])

76. Here, I must hold that what Shrikant has is mediate possession, like the mother's possessing the son's firearm in *Sullivan*. To conclude, his possession is mediate and permissive.

Issue No.4: Marking of the Previous Depositions in Other Cases Between the Same Parties: Does it amount to Substantive Evidence?

77. At any rate, to countervail Mrs. Bhat's assertion that it is a licence, what evidence has Shrikant led? Once the plaintiff discharges the primary evidential burden, then it is a matter of shifting onus. It does not remain constant; it swings like a pendulum between the parties. Shrikant did not get into the witness box. Instead, he merely

26[] As quoted in Garner's Dictionary of Legal Usage, OUP, 3rd Ed., p.688

27[] 1979 Cri LJ 1390, as quoted in *State of Punjab vs. Hari Singh*: (2009) 4 SCC 200

28[] 1972 Cri LJ 1187, as quoted in *Hari Singh* (supra)

29[] 1976 (1) All ER 844 (QBD), as quoted in *Hari Singh* (Supra)

produced a bunch of documents, mainly the depositions of the parties including his own, from the earlier rounds of litigation. Did that amount to his discharging the burden? I reckon Section 33 of the Evidence Act answers this question.

78. According to Section 33 of Evidence Act, evidence given by a witness in a judicial proceeding is relevant for proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states. That said, for a person to place that piece of evidence in the subsequent judicial proceedings, (a) the witness must have been dead, or (b) cannot be found, or (c) is incapable of giving evidence, or (d) is kept out of the way by the adverse party, or (e) the witness's presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. Further, the proceeding must be between the same parties or their representatives in interest; the adverse party in the first proceeding must have had the right and opportunity to cross-examine; and the questions in issue were substantially ought to be the same in the first as in the second proceeding.

79. I see no such contingency as provided in Section 33 of the Evidence Act met here. Shrikant's mere marking the depositions before the Competent Authority, I am afraid, is of no consequence. The record does not reveal that the marking was with the adversary's consent.

Issue No.5: Have the Competent Authority and Revisional Authority Committed any Jurisdictional Error requiring this Court's Judicial Intervention?

80. First, Mrs. Bhat invoked Section 24 of the MRC Act and approached the Competent Authority, who passed an order of eviction on 29th May 2005. He passed the order under Section 43 of the MRC Act. Then, Shrikant invoked Section 44 of the same Act. First, the Competent Authority's order is non-appealable. Second, what the

Divisional Authority exercises under Section 44 of the MRC Act is revisional power. Once the licence expires, the landlord or the landlady, under Section 24, can recover possession of premises given on licence.

81. Section 44 of MRC Act is under Chapter VIII. That chapter concerns “Summary Disposal of Certain Applications.” To begin with, Section 39 declares that the provisions of Chapter VIII, which include both Sections 43 and 44, have an overriding effect. They shall have an effect “notwithstanding anything inconsistent therewith contained elsewhere in the Act or in any other law for the time being in force.”

82. Under Section 44, the Additional Commissioner of a Revenue Division, may, at any time, *suo motto* or on the application of any person aggrieved, can exercise its revisional power. It is only for “satisfying itself that an order made in any case by the Competent Authority under section 43 is according to law.” To ascertain that the Competent Authority’s authority has acted under the law, the Revisional Authority can “call for the record of that case and pass such order in respect thereto as it or he thinks fit.”

83. Thus, in the first place, the primary adjudication under Section 24 of MRC Act itself is summary. And over that summary adjudication, Section 44 of the Act provides for revisional powers to the Additional Commissioner.

84. In *Malini Ayyappa Naicker v. Seth Menghraj Udhavadas*^[30], a three-Judge Bench of the Supreme Court has examined a similarly worded provision—Section 75 of the Provincial Insolvency Act (“the Insolvency Act”). *Malini Ayyappa Naicker* has held that the Legislature did not confer on the High Court under Section 75(1) of the Insolvency Act an appellate power, nor did it confer on it jurisdiction to reappreciate the evidence on record. While exercising that power, the High Court is by and large bound by the findings of fact reached by the District Court. If the legislature intended to confer power on the High

30[] (1969) 1 SCC 688

Court to re-examine both the questions of law and fact, it would have conveyed its intention by appropriate words, as has been done under various other statutes.

85. In this context, *Malini Ayyappa Naicker* has held that “a wrong decision on facts by a competent court is also a decision according to law.” A decision being “contrary to law” as provided in Section 100(1)(a) of the Code of Civil Procedure, it has further held, is not the same thing as a decision being not “according to law” as prescribed in Section 75(1) of the Insolvency Act. Though *Malini Ayyappa Naicker* has not defined the expression “according to law”, it has quoted with approval *Bell & Co. Ltd. v. Wamen Hemrai*^[31]. This Court in *Wamen Hemrai* has given a few instances when the High Court may check whether a decision is according to law: If the court or tribunal had no jurisdiction, or it has based its decision on evidence which should not have been admitted, or it has not given the unsuccessful party a proper opportunity of being heard, or it has cast the burden of proof on the wrong shoulders.

86. Here I see none of the instances pointed out in *Malini Ayyappa Naicker*. The concurrent findings of both the Competent Authority under Section 24 of the MRC Act and of the Revision Authority under Section 44 of the same Act suffer from no legal infirmities to be interfered with by this Court under Article 227 of the Constitution of India.

As a result, the writ petition is dismissed with costs.

[DAMA SESHADRI NAIDU, J.]