

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.123 OF 2021

In the matter of an Appeal under Section-100 of the Code of Civil Procedure assailed the judgment dated 05.10.2021 passed by the learned District Judge, Baripada in RFA No.21 of 2018 confirming the judgment and decree 27.02.2018 and 08.03.2018 respectively passed by the learned Civil Suit No.100/524 of 2011-2005 of the Court of learned Civil Judge, Baripada.

Pradeep Kumar Agarwalla & Another :: ***Appellants.***

-versus-

The General Secretary, Vivekananda Kendra & Another :: *Respondents.*

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

For Appellants :::: M/s. P.K. Rath, A. Behera,
P. Nayak, S. Das, S. Rath,
S. Panda, Advocates.

For Respondents :::: M/s. T. Panigrahi, R.R. Dash,
D. Nayak, S.P. Rath,
B.D. Dash, R.C. Mishra,
Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING:: 06.12.2022, DATE OF JUDGMENT:: 23.12.2022

D.Dash, J. The Appellants by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, ‘the Code’) have assailed the judgment and decree passed by the learned District Judge, Baripada in RFA No.21 of 2018.

By the same, the Appeal filed these present Appellants being the aggrieved Defendant Nos.3 and 4 in the Civil Suit No.100/524 of 2011-2005 of the Court of learned Senior Civil Judge, Baripada under Section-96 of the has been dismissed.

The Respondent No. 1-Society as the Plaintiff have filed the suit for declaration of its right of ownership and possession of the property in question with further prayer to declare the cancellation deed executed on 03.12.2003 by the deceased-Defendant No.1 in the Trial Court as fraudulent, illegal, inoperative and void with further prayer for mandatory and permanent injunction in directing the Appellants (Defendant Nos.3 and 4) to give vacant possession of the land in Schedule-A as also the building standing thereon and restrain to so disturb in future.

The suit having been decreed, these Appellants (Defendant Nos.3 and 4) being aggrieved by the same had carried the First Appeal which too had been dismissed. Hence, the present Appeal is at the instance of those Defendant Nos.3 and 4 as the Appellants herein.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. The Plaintiff's case is that the Defendant No.1 who died during the suit is the owner of the land as described with the building in

Schedule-A of the plaint standing thereon. The Defendant No.1 was a patron of the Plaintiff-Society. She proposed the Plaintiff-Society to take the suit property on lease for functioning of its Baripada branch. So, the matter being approved by the Committee of the Plaintiff-Society. The Defendant No.1 executed a deed of lease for 99 years, which stood registered on 23.03.1998. The Plaintiff-Society thereafter occupied the building along with vacant space as the lessee. The Plaintiff-Society also spent money for repair and alteration of the building. They made it heritable and suitable for carrying out the activity of the Plaintiff-Society. It is stated that after five years of lease, the Plaintiff all of a sudden issued a notice dated 14.12.2003 under Section-106 of the Transfer of Property Act, 1982 (for short, 'the T.P. Act') after executing the deed of cancellation on 03.12.2003 indicating the violations of the conditions of the lease by the Plaintiff-Society. It is the further case of the Plaintiff that on 09.05.2005, the Defendant No.2 broke open the lock and got it replaced by another and placed some miscreants inside the said house. Due to prolong illness of the Defendant No.1, her nephew Dipan Kumar Ray and Ratna Bose are stated to have managed to get that deed of cancellation on 03.12.2003. As per the terms and conditions of the said registered lease-deed executed on 23.03.1998, the Defendant No.1 was taking Rs.1000/- per year towards annual rent for the suit premises. It is stated that the Plaintiff-Society had never carried out any

nefarious activities in the suit premises as alleged in the said deed of cancellation, which has been registered on 03.12.2003. The allegations made in the said cancellation deed are stated to have been false. The Plaintiff-Society further states that after 11 days of cancellation, a notice was sent by an Advocate to the General Secretary of the Plaintiff-Society indicating the cancellation of the lease-deed and directing them to vacate the suit premises in favour of the Defendant No.1. The notice sent is stated to be based on falsehood and planned for the purpose. The cancellation deed is alleged to be fraudulent and one obtained at the instance of the nephew of the Defendant No.1 and others by taking advantage of the old age of Defendant No.1. It is also stated that such cancellation deed is not in accordance with the provisions of law and the same is having no value in the eye of law. The Plaintiff-Society further stated that the Defendants had no manner of right, title and interest over the Schedule-A land and as such, they have no right to possess the same land described in Schedule-A of the plaint with the house standing thereon.

However, on 08.05.2005, the Defendant No.1 through Defendant No.2 forcibly dispossessed the devotees of the Plaintiff-Society and since then the occupation of the land and house had been taken over by them by force. Defendant No.1 who was unmarried died on 07.03.2007 leaving behind no heir. It is said that after death, nobody is there to

claim the suit land and building. Then after some time the Plaintiff-Society could know that during pendency of the suit, the Defendant No.1 through the Defendant No.2 as her power of attorney holder has sold the suit land and building to Defendant Nos. 3 and 4 vide registered sale-deed dated 17.01.2006 for a consideration of Rs.17,80,100/-. The Defendant Nos. 3 and 4 in the facts and circumstances are thus said to have derived no right, title and interest over the suit land and building standing thereon. The sale-deed is said to be not a genuine one and void. The Defendant No.2 as the power of attorney holder of the Defendant No.1 is stated to be having no saleable right over the suit land and the building standing over it and the sale made in favour of Defendant Nos. 3 and 4 therefore is said to be of no value in the eye of law.

The Plaintiff-Society has made the following prays:-

- (1) It be declared that the Plaintiff is the rightful owner in possession of leasehold property mentioned in Schedule-‘A’;
- (2) the deed of cancellation executed on dated 03.12.2003 be declared as fraudulent, illegal, inoperative and void;
- (3) mandatory permanent injunction be passed over Schedule-‘A’ land and building directing the Defendants to give vacant possession of the leasehold property described in Schedule-‘A’;
- (4) that the Defendants may be permanently restrained to enter into the said land and building situated therein as subject to

occupation of the 1st floor of the building by the Defendant No.1 alone as per Agreement.

4. The Defendant Nos. 1 & 2 did not file any written statement. The Defendant Nos. 3 and 4 jointly filed their written statement. While it traversing the plaint averments, they have stated to have no knowledge about the lease deed, if any, executed by the Defendant No.1 in favour of the Plaintiff-Society. They state to have learnt about the cancellation of the same by the Defendant No.2 on the ground of violations of the terms and conditions mentioned in the lease deed. It is further stated that the suit land with the building belong to Defendant No.1 and she had executed a power of attorney in favour of the Defendant No.2, who has sold the suit land and building to them by registered sale-deed dated 17.01.2006 on receipt of valuable consideration. They thus assert to be the bonafide purchasers for value.

5. With the above rival pleadings, the Trial Court has framed the following issues:-

- (i) Whether the suit is maintainable in its present form?
- (ii) Whether the suit is barred by the law of limitation?
- (iii) Whether the suit is bad for non-joinder of necessary parties?
- (iv) Whether the cancellation of the lease deed by defendant no.1 late Anima Bose was legal?
- (v) Whether the defendant no.3 and 4 have any right over the suit building by virtue of their sale deed?
- (vi) Whether the plaintiff is entitled to the relief as claimed?

(vii) Whether the plaintiff is entitled to any other reliefs?

6. Deciding the issue No.4 with regard to the cancellation of lease-deed by Defendant No.1, upon examination of evidence and their evaluation, the answer has been given in favour of the Plaintiff-Society that such deed of cancellation is illegal and void. Practically, answer to the above issue has led the Trial Court to decree the suit granting the reliefs as under:-

“Defendant Nos. 3 and 4 having suffered from the said judgment and decree passed by the Trial Court having carried the First Appeal have been unsuccessful, the present Appeal therefore is at the instance of the Defendant Nos. 3 and 4.”

7. The present Appeal has been admitted to answer the following substantial question of law:-

Whether during subsistence of the leasehold right in favour of the Plaintiff under Ext.1, the sale under Ext.A in favour of Defendant Nos. 3 and 4 including possessory right be effected?

8. Learned Counsel for the Appellants submitted that the Courts below in the present case have proceeded in taking an erroneous view that the document which is projected from the side of the Plaintiff-Society i.e. Ext.1, being simply a registered one and nomenclatured as lease for a period of 99 years is actually as such when upon proper construction it is not that what so titled. According to him, the deed,

Ext.1 which is projected by the Plaintiff-Society to be the basis of their claim in seeking the relief is not a deed of lease for a period of 99 years in the eye of law. He submitted that merely because, it has been registered, the Courts below should not have accepted it as so titled. He submitted that upon proper construction of the details of the terms and conditions as also the evidence on record especially as to the user of the property, the finding ought to be that it was not at all a lease for 99 years but merely a permission to occupy a part for the specific purpose and thus in reality a licence. He therefore, submitted that the very foundation of the case of the Plaintiff-Society that they have the leasehold right over the property in question on the basis of that Ext.1 is not tenable. He, therefore, submitted that the suit ought to have been simply dismissed. In order to buttress the said contention, learned Counsel for the Appellants has invited the attention of the Court to the contents of the deed, Ext.1 in pointing out as to how those being read together, run in total conflict with the nomenclature of the said document.

He further submitted that the Courts below are not correct in decreeing the Plaintiffs suit for the declaration accepting that they are the lessees. He submitted that the prayer made by the Plaintiff-Society that they are the rightful owner in possession of the leasehold property is the ground to negate their claim and that thereby determines the lease in terms of the provisions contained under Section-111(g) of the T.P.

Act. He further submitted that on proper construction of the document, Ext.1 on which the claim of the Plaintiff-Society in the suit is based, the same can at best said to be a mere permission granted by the Defendant No.1 to the Plaintiff-Society to use the part of the house and premises for carrying out the activities of this Kendra and thereby, the Plaintiff-Society cannot be said to have been clothed with any right over the property as the lessee much less as having the ownership right as claimed. He, therefore, submitted that when the very basis of the claim of the Plaintiffs, Ext.1 as projected falls, the purchase made by the Defendant Nos.3 and 4 from the admitted owner of the property by registered sale-deed can never be declared to be void and it cannot be so held in this suit at the instance of the Plaintiff-Society. He submitted that in the exercise to search out the answer to the substantial question of law, it has to be ascertained as to it the deed was actually a lease as claimed by the Plaintiff or not so as to say that the Plaintiff-Society has the right over the property as the lessee for which the Defendant No.1 was not having the right to transfer the property. He submitted that this being a pure question of law and relating to construction of the document concerned whose execution is not in dispute and thus can be raised in this Second Appeal for the first time for being so ruled upon.

9. Learned Counsel for the Respondent-Society on the other hand submitted that it being admitted by the parties that the property had been

leased out to the Plaintiff-Society by the Defendant No.1 for a period of 99 years, it is not permissible to construe the same as to if it is not so. He for the purpose of providing support to the submission that Ext.1 is a lease has relied upon the decision of the Apex Court in case of **Chandy Varghese and others Vrs. K. Abdul Khader and Others**; 96 (2003) CLT 700 (SC). He submitted that the execution of a deed of cancellation of that original lease by the Defendant No.1 is of no value in the eye of law and the original lease could have only been cancelled by Defendant No.1 by moving the Court and obtaining a decree to that effect. He, therefore, submitted that when recourse has not been taken by the Defendant No.1 to get the said lease standing in favour of the Plaintiff-Society set aside through Court but has been done by way of execution of cancellation deed; the legal effect and force of the original lease is not taken away in the eye of law. Therefore, the Courts below according to him are right in decreeing the suit.

10. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statement and have perused the evidence on record both oral and documentary.

11. Before proceeding to directly take up the exercise of answering the substantial question of law by addressing the rival submissions, the important legal feature of the case as to construction of the document,

Ext.1 on which the entire claim of the Plaintiff-Society as advanced is based needs examination. In the facts and circumstances of the case, it is seen that the Plaintiff-Society has based its whole claim upon the registered deed, Ext.1, which it claims to be a deed of lease of the property in question for a period of 99 years. Therefore, it would be necessary to find out as to whether said foundation for the Plaintiff-Society's claim stands in the eye of law or not. This being a pure question of law depending upon the construction of that document Ext.1 whose subsistence is required to be found out so as to hold its impact upon the registered sale deed, Ext.A executed by the original owner who is also the lessor for the Plaintiff; this Court finds it just and appropriate at first to ascertain the nature of the transaction under Ext.1 and its legal import.

It is the settled position of law that the Plaintiffs in order to be entitled to the reliefs claimed is to stand on his own by establishing the foundational facts upon which his case is based and for the purpose it cannot take advantage of the weakness of the case of the Defendants or even on the failure to prove their case. The point thus arises as to if the Ext.1 is a deed of lease for a period of 99 years and the Plaintiff-Society has been conferred with the right thereunder as the lessee in respect of the suit land and building standing thereon.

12. The Plaintiff-Society has nomenclatured the suit as “Suit for Declaration of Leasehold Right, Recovery of Possession and Mandatory Permanent Injunction”. The subject matter of the suit has been described in Schedule-‘A’ of the plaint, which runs as under:-

SCHEDULE-‘A’

The land situated in Mouza-Baripada town Ward No.4 (Golapbag) under Baripada town Police situation recorded in the name of Anima Bose under Khata No.6.

<u>Plot No.</u>	<u>Kisam</u>	<u>Area</u>
203	Gharabari-I	Ac.0.070 decimals.

It has been stated in the plaint that Defendant No.1 (since dead) had executed one 99 years lease deed in favour of the Plaintiff which has been admitted in evidence and marked Ext.1. As would be seen from the terms and conditions enumerated in the aforesaid deed, the Defendant No.1 had allowed the Plaintiff-Society to occupy the building along with the vacant space. In Schedule-A of the plaint as it appears nothing has been indicated about existence of the building which is however not denied by the parties. As against the title of the suit as aforementioned, the prayer in the plaint is however to declare that the Plaintiff-Society is the rightful owner in possession of the leasehold property as mentioned in Schedule-A. At the cost of repetition, it be stated that Schedule-A is the land and over that, the building stands and then the subsequent prayer is to the effect to restrain the Defendants permanently to enter into the suit land and the standing building, subject

to the occupation of the first floor of the building by the Defendant No.1 alone as per the agreement.

13. The essential ingredients of lease are :-

- (1) that by the document immovable property should be transferred with a right to enjoy the property in lieu of rent;
- (2) there must be a lessor and lessee;
- (3) the term of period of lease;
- (4) the consideration or rent or in cash or kind.

The lease is not a mere contract, but is a transfer of an interest of immovable property in lieu of consideration may be cash or kind and the ownership remains with the lessor, though right to enjoy of the property is transferred to the lessee. Until and unless the aforesaid ingredients are found place in the documents and evidence, on record, only then the document can be termed as lease.

14. In case of *Chandy Varghese* (supra) cited by the learned Counsel for the Plaintiff's-Society (Respondent No.1); the question before the Court was to whether the original owner Kuahumni had intended to transfer any interest in favour of one Shankara Narayan Iyyer so as to say that subsequent holders have said right based on transfer or not.

In that case, reference has been made to the decision, it has been held therein:-

“22. Section 105 of the Transfer of Property Act defines a lease of immovable property as ‘transfer of a right to enjoy such property made for a certain time in consideration for price paid or promised. Under Section 108 of this Act, the lessee is entitled to

be put in possession of the property. A 'lease' is, therefore, 'a transfer of interest in land'. Whereas Section 52 of the Easement Act defines a 'licence' to mean a right granted to another person over immovable property to do or continue to do some act which would in the absence of such right be unlawful'. When such right does not amount to an easement or creates any interest in the property, the right is called a 'licence'. In all cases where the dispute is about the nature of the document to be a lease or licence, the question that has to be addressed by the Court to itself is what is the intention disclosed by the parties from the terms of the document or the transaction. Where the conclusion is that circumstance or conduct of the parties shows that all that was intended was that the occupier should have a personal privilege with no interest in the land, the transaction would be licence and not a lease."

In case of **Board of Revenue Vrs. A.M. Ansari**; 1976 (3) SCC 512 it has been held therein:-

"It is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is, in other words, transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential therefore, to look to the substance and essence of the agreement and not to its form.

In order that an agreement can be said to partake of the character of lease, it is necessary that the grantee should

have obtained an interest in and possession of land. If the contract does not create an interest in land then the land would be considered as a mere warehouse of the thing sold and the contract would be a contract for goods.”

15. Whether it is a lease or not the crucial issue for determination is to find out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use a property in a particular way or under certain the terms given to the occupant while the owner retains control or possession over the premises results in licence being created; for the owner retains legal position while all that the licensee gets is a permission to use the premises in a particular purpose or in a particular manner and but for the permission so given, the occupation would have to be unlawful. (*C.M. Beena And Anr Vrs. P.N. Ramachandra Rao*; (2004) 3 SCC 595).

16. An effort should be made to find out whether the deed confers a right to possess exclusively coupled with the transfer of right to enjoy the property or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.

If the effect of the instrument is to give the holder an exclusive right of occupation of the subject matter, it is in law a demise of the same.

If an interest in immovable property entitling the transferee to enjoyment is created, it is a lease; if permission to use the land without exclusive possession is alone gathered, a licence is the legal result ***Khalil Vrs. Tufel Hussein***; AIR 1988 SC 184 (190). Where the tenor of the agreement showed a clear intention to deprive the Defendant of an interest, it was leave and licence. The instrument where shows the parties intent that the one is to divest himself of the possession and other is to come into possession for a determinate time, either immediately or in future, it operates as a lease.

17. The test of exclusive possession is though not decisive, is of quite significance to decide whether a particular transaction is lease or licence. It is a most significant indicator to hold that the document creates a lease but that does not preclude the Court from holding that the document is in fact a licence (***Sohan Lal Naraindas Vrs. Laxmidas Raghunath Gadit***; (1971) 1 SCC 276 and ***Rajbir Kaur Vrs. S. Chokesiri***; (1989) 1 SCC 19. In that case of ***Sohan Lal Narindas*** (supra) an attempt was deliberately made to camouflage the true nature of the agreement. Under the circumstance the apex court observed: “*Intention of the parties to an instrument must be gathered from the*

terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of the intention but it is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject matter of the agreement. If it is in fact intended to create an interest in the property it is a lease. If it does not, it is a licence. In determining whether the agreement creates a lease or licence the test of exclusive possession, though not decisive, is of significance.”

18. It is again the well settled position of law that the substance of the document and not the nomenclature will determine the true legal character of the grant. The construction of a document would depend upon its pith and substance and not upon the labels that the parties may put upon it. The crucial test is whether the instrument is intended to create or not to create an interest in the property, which is the subject matter of the agreement. If it is in fact intended to create an interest in the property; it is a lease.

19. Now, therefore, bearing the above settled principles of law in mind, the document, Ext.1 which is the base upon which of the claim of the Plaintiff-Society in filing the suit and seeking the relief as already

stated stands, needs examination. The document in the given case is Ext.1, dated 23.03.1998 is a registered one. The document has been labeled as “Lease of Land and Building For a Term of 99 years”. The condition no.1 is as under:-

- (a) the lessor is hereby demise to the lessee for the purpose of having the office of Vivekananda Kendra and carrying out the above from aims and objectives of the said Kendra as per the Memorandum of Rules and Guidelines and for no other purpose.

20. It is further stated therein that during the said term yearly rent of Rs.1000/- would be paid by the Plaintiff-Society to the Defendant No.1, when the Defendant No.1 shall pay the ground rent. It has also been stated that the lessee will keep the said premises in a good condition and complete repair and fit in all respect to be used for. The other condition that lessee (Plaintiff-Society) was to pay the water tax, electric charges as would be consumed for the said premises which also has the reference to the user. There absolute ban as per the condition for the Plaintiff-Society to transfer mortgage or sublet the said premises has been put and while stating that the Plaintiff-Society can make necessary alteration, construction on the existing building or on the open space; it has been further indicated that such would be only for carrying out its activities properly. Most importantly, the next condition stands that the Defendant No.1 is to occupy the first floor of the building as usual.

21. The first witness examined by the Plaintiff-Society who is an official of Kendra is P.W.1. He in his examination-in-chief has stated that Defendant No.1 had executed one 99 years lease-deed to carry out the activities of the Kendra. This P.W.1 during his cross-examination has stated that prior to the year 2006; the suit property was under occupation of Defendant No.1, although he states that such occupation was illegal. He states to have no knowledge about possession of Defendant No.1 after cancellation of the lease-deed.

The other witness P.W.2 has stated that the Defendant No.1 was then residing in the building; the same is also the evidence of P.W.3 who was then working in that Kendra at the particular place that Defendant No.1 was residing in the suit land where the centre was also functioning.

Thus, when from the deed, Ext.1, it is seen that the intention of the parties were to see that the aims and objectives of the said Kendra are carried out by user of the property in question belonging to the Defendant No.1 in her occupation, that is only in respect of which they were given to occupy the portion of the building, the portion i.e. the first floor of the building where she was residing has not been allowed to be used at all nor even to have the entry to the said floor which then too closes the entry to the terrace. The evidence of the Plaintiff's witnesses also stand to the effect that such arrangement was made for carrying out

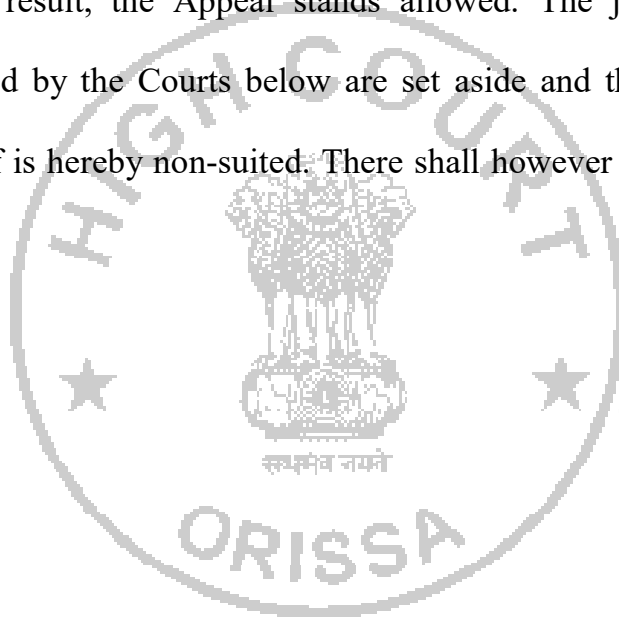
the activities of the Kendra and the Defendant No.1 did not part with the possession of the entire property in favour of the Plaintiff-Society except allowing them to use the same for the purpose. She was very much residing in the first floor of the building and even it is said by one of the witness of the Plaintiffs that she was in possession of the entire one after some time being taken over. It has however been pleaded in the plaint that the Defendant No.1 has forcibly and illegally occupied the leasehold property which is not the fact as is evident from the evidence of the Plaintiffs witnesses. From all these aforesaid, this Court is of the view that by Ext.1, the property in question had not been leased out in favour of the Plaintiff-Society for a period of 99 years, but it was an arrangement between the Plaintiff-Society and Defendant No.1 for the user of the part of the building and the land lying nearby with the sole purpose of running of that Kendra when (the entire suit property even as per the deed had not been given on the hands of the Plaintiff-Society).

For all these aforesaid, when this Court finds that Ext.1 was not a deed of lease of the property in question for a period of 99 years as claimed by the Plaintiff-Society; the substantial question of law is thus answered against the Plaintiffs. Accordingly, it is held that the suit filed by the Plaintiffs seeking the reliefs is liable to be dismissed and the

Courts below have erred in decreeing the same even though the foundation as laid for the suit in claiming the reliefs is not made out.

In that view of the matter when the sale transaction in favour of the Defendant Nos. 3 and 4 are not under challenge in this suit on any other ground either by that Defendant No.1 or by any one claiming through her, the Plaintiff-Society cannot impeach the same when their claim over the property as the lessee falls flat.

22. In the result, the Appeal stands allowed. The judgments and decrees passed by the Courts below are set aside and the Respondent No.1-Plaintiff is hereby non-suited. There shall however be no order as to cost.



**(D. Dash),
Judge.**

Narayan