



2024:DHC:7890



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Order: 26.09.2024+ **W.P.(C) 5742/2012****SHIV ENTERPRISES**

.....Petitioner

Through: Mr. Asutosh Lohia, Ms. Shraddha Bharggav, Mr. Sharan Mehta and Mr. Rohit Sarajwat, Adv.

versus

GOVT. OF NCT OF DELHI & ANR

.....Respondents

Through: Ms. Astha Gupta, Adv.

CORAM:**HON'BLE MS. JUSTICE TARA VITASTA GANJU****TARA VITASTA GANJU, J.: (ORAL)**

1. The grievance of the Petitioner as set out in the present Petition is that the Petitioner has been charged with payment of deficient stamp duty including penalty in respect of its property at Shop No. GF-003 Ground floor measuring approximately licensable area i.e. Super area of 990 sq. ft. having covered area of 594 sq. ft., Pacific-Delhi, Najafgarh Road, Khayala, Delhi [hereinafter referred to as the "subject property"]. In addition, the Petitioner also impugns the notices as well as the assessment order issued in furtherance of the impugned notice(s) and consequential proceedings emanating therefrom.

2. Notice in the present Petition was issued by a Coordinate Bench of this Court on 12.09.2012 directing that the Impugned Notices and penalty shall remain stayed. This position has continued as is since



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then.

3. It was the case of the Petitioner that the Petitioner on 24.02.2011 entered into an agreement/license deed with M/s Pacific Development Corporation Limited [hereinafter referred to as “PDCL”] for taking on license fee basis an area of 990 sq. ft. for a period of nine years in the superstructure commonly known as Pacific Mall situated at Najafgarh Road, Khyala, Delhi for running a silverware and high-end giftware. [hereinafter referred to as “the Agreement”].

4. Learned Counsel for the Petitioner submits that initially on 13.03.2012, a notice bearing No. F.COS/RG/2011-12/2612-2646 was issued alleging that the Pacific Mall had sold the constructed/given on lease shops and had not paid any stamp duty thereon nor registered the agreement with the Sub-Registrar of that area.

4.1 In response to the notice, the Petitioner appeared and filed a reply dated 20.03.2012 which is annexed along with the Petition. The Petitioner, in the said reply, set out that it is a license agreement and that there is no agreement to sell and/or to lease between the Petitioner and the Pacific Mall.

4.2 Despite the said reply, on 24.03.2012, a second notice was received by the Petitioner. It was further set out in the notice dated 24.03.2012 that in the event that the Petitioner does not appear, the stamp duty assessed *ex-parte* at market value at present prevalent circle rates shall be imposed on the Petitioner.



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4.3 The Petitioner in March 2012 replied to the said notice again reiterating that there was only a license deed entered into and that the Petitioner was a licensee and there was no agreement to sell or lease entered into.

4.4 The Respondent No. 2 subsequently issued a demand letter dated 02.08.2012, bearing no. F.SDM(RG)/COS/2012-13/9559 calling upon the Petitioner to make payment in the sum of Rs. 1,26,800 as penalty towards deficient stamp duty. The notice dated 02.08.2012 was followed up by another notice dated 24.08.2012 reiterating the earlier notice. No reasons for this conclusion, that there exists an agreement to lease/sell have however been set out by the Respondents in either of its notices. This led to the filing of the present Petition.

5. The Counter-Affidavit was filed by the Respondents wherein it was contended that after going through the contents of the license agreement that Respondent No.2 opined that the premises were not licensed, but given out on lease. Since, the agreement dated 24.02.2011 is a lease agreement, the demand for stamp duty has been assessed accordingly. It is further stated that a challan was issued to the representative of the Petitioner stating the total amount of stamp duty has not been paid by the Petitioner.

6. Learned Counsel for the Petitioner submits that on the face of it, the document which has been filed is a license agreement. He seeks to rely thereupon, more specifically, Sections 4, 5 and 7 of the Schedule of the Agreement, as well as clauses of the document which is termed



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as General Conditions of License (Retail) [hereinafter referred to as "General Conditions"]. In addition, he submits that license was for a period of nine years and that the agreement has come to an end by efflux of time.

6.1 He further submits that from a reading of the notices, more specifically notice dated 24.03.2012, quite clearly the Respondents have proceeded on the basis that this was an agreement to sell and not an agreement to lease.

7. Learned Counsel for the Respondents, on the other hand, submits that the Respondents have proceeded on the basis of the agreement to lease and that they have adjudicated the stamp duty in accordance with Article 35(a)(iii) of the Schedule to Indian Stamp Act, 1899 as applicable to Delhi [hereinafter referred to as "the Stamp Duty"]].

7.1 Learned Counsel for the Respondents further submits that this is not a license deed but is a lease deed. It is contended that in terms of the judgment of *Bharat Petroleum Corporation Ltd. v. Chembur Service Station*¹, it has been held that the shops in malls despite being labelled as licenses, are effectively leases. The licensee retains key rights, such as stocking and locking the shop, while the licensor controls business hours and maintenance. Thus, the arrangement functions as a lease, protecting the licensee from dispossession or eviction without legal recourse, and as such in this case, the instrument

¹ 2011 SCC OnLine SC 424



will be construed as a lease rather than a license².

7.2 Learned Counsel for the Respondents also raises an objection that the remedy of Appeal is available under Section 47-A of the Indian Stamp (Delhi Second Amendment) Act, 2001 and that such remedy has not been exercised by the Petitioner prior to approaching this Court.

8. In Rejoinder, learned Counsel for the Petitioner submits that the provision as cited by the learned Counsel for the Respondents for filing of an Appeal has no application as the same pertains to a document transferring a property sent for registration.

9. License is defined in Section 52 of the Indian Easements Act, 1882 as under:

“52. ‘Licence’

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

9.1 The plain reading of this shows that a licence granted by the owner enables a licensee a right to do or continue to do certain specified things in or upon an immovable property.

² Illustration B

23. The owner of a land constructs a shopping mall with hundred shops. The owner of the mall earmarks different shops for different purposes, that is sale of different types of goods/merchandise, that is, shops for exclusive clothing for men, shops for exclusive clothing for women, shops for hosiery, shops for watches, shops for cameras, shops for shoes, shops for cosmetics and perfumes, shops for sports goods, shops for electronic goods, shops for books, shops for snacks and drinks, etc. The mall owner grants licences in regard to individual shops to licensees to carry on the identified or earmarked business.



10. It is no longer *res integra* that the difference between lease and a license has to be culled out from an examination of the documents and the intent of parties. The Supreme Court in *Associated Hotels of India Ltd v. R. N. Kapoor*³ [speaking through K. Subba Rao, J. for the majority] held that the true construction of a document turns upon the terms of the said document but it is the substance of the agreement and not the form which sets out the real intention between the parties. It further held that where a particular document gives the right to use the property in a particular way or under certain terms while it remains in the possession and control of the owner, it will be a license. The relevant extract is below:

“28. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable 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 Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore 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 Section 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 immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence.”

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,

³ AIR 1959 SC 1262



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 ER 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.”

The court of appeal again in *Cobb v. Lane* [(1952) 1 All ER 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. At p. 1201, Somervell, L.J. stated:

“... 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. said much to the same effect at p. 1202:

“The question in all these cases is one of intention : Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?”

[Emphasis supplied]

10.1 Although the document in the particular case was held to be a lease, the distinction between a lease and a license were discussed and certain propositions were set out to distinguish the two. The relevant extract of the *Associated Hotels* case is below:

“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. ...”

[Emphasis supplied]

10.2 The Supreme Court in *Associated Hotels* case has further held that a lease of an immovable property is a transfer of an interest in the land, however, where 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, will be a license.

11. The Supreme Court in *CM Beena v. P.N. Ramachandra Rao*⁴ has further explained the license to use the premises for a particular purpose while the owner retains the control and possession of such premises. The relevant extract is set out below:

“8.....

Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in a particular manner and but for the

⁴ 2004 (3) SCC 595



permission so given the occupation would have been unlawful.....”

[Emphasis supplied]

11.1 A Division Bench of this Court in *Jagjit Cotton Textiles Ltd. Vs. Col. A.K. Malhotra*⁵ has held that a clause allowing unrestricted entry into the premises to a licensor indicate that the instrument is a license and not a lease. It further states that when an agreement grants unrestricted right of entry into a premises, such an instrument can only be construed as a license and not a lease. The relevant extract reads as follows:

“.....

7. The most important clause which is the key to the determination of the question is clause 7. As seen above, this clause clearly specifies that the licensor i.e. the respondent shall continue to have full possession and control of the premises, fittings and telephone. The clause also confers on him an unrestricted right of entry into and use of the premises. Thus the agreement recognises that the first appellant and its officer did not have exclusive possession of the premises. It is well settled that mere permission to use the premises without being entitled to exclusive possession thereof creates only a licence. Therefore the first appellant has only a status of a licensee under the agreement.

.....

9. In *Sohanlal Naraindas Vs. Lawnidas Raghunath Gadit* 1971 (1) SCC 276 the Supreme Court faced with the question whether the agreement created a lease or licence held as follows:

"9. 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 is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operates as a licence. A recital that the agreement does not create a tenancy

⁵ 1995 SCC OnLine Del 624



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 a licence the test of exclusive possession, though not decisive, is of significance.....”

.....

10. In *Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala* (1988) 1 SCC 155 the Supreme Court while **construing the instrument as a licence deed, inter alia, relied upon clause 12 thereof which gave the licensor the right to enter upon the premises and inspect the same at any time and in this regard observed as follows:**

"To put it 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."

11. Again in *Smt. Rajbir Kaur and another Vs. M/s. S. Chokesiri & Co. JT 1988(3) SC 593 at 601* the Supreme Court stated the principle in determining whether the agreement created a lease or licence thus:

“.....One of the twin principal tests by which a lease is distinguishable from the relationship created under a licence is the element of the right to exclusive possession involving the transfer of an interest in the property; the other, being the 'rent' stipulated for the grant”

.....

14. Having regard to the aforesaid decisions it is apparent that where the agreement grants to **a person only the right to use the premises without being entitled to the exclusive possession thereof.** it merely creates a licence in his favour. But even where exclusive possession is transferred, the grant may or may not operate as a lease since the test of exclusive possession, though significant is not decisive and the idea of a



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licence is not necessarily ruled out.

15. In the instant case clause 7 of the agreement grants full possession of the premises to the owner. It entitles him to an unrestricted right of entry into the premises. This right of entry clause clinches the point in favour of the plaintiff. It puts the matter beyond all doubt that the instrument creates only a licence and not a lease...

[Emphasis supplied]

12. The Agreement entered into between the Petitioner and PDCL is in three parts: a short Agreement, a Schedule and General Conditions. The Agreement sets out the party names, and that the PDCL permits the Petitioner to use the premises on the terms and conditions as set out in the Schedule and the General Conditions. The Schedule and General Conditions of the document contain detailed terms of the contract between the parties. Section 4 of the Schedule sets out the term as 9 years from the commencement date, and Section 5 sets out that the license fee is chargeable on the super area. Section 7 of the Schedule specifies the purpose of the business which is stated to be for a retail under the name and style of “*Momentz*”, for silverware and high-end giftware. It further states that the licensee shall not be permitted to change the nature of the business or the brand/merchandise category. It additionally sets out other clauses which include refundable security deposit.

12.1 The General Conditions to the Agreement as titled “General Conditions of License (Retail)” in Clause 3.1 sets out that basic license fee shall be the monthly basic license fee payable by the licensee to the licensor during the license period as set out in Section 5.1 of the



Schedule. Clause 5 of the General Conditions sets out that the licensee (Petitioner herein) shall use the premises solely as is set out in Section 7 of the Schedule, and that the licensee is not permitted to change the nature of the business during its tenure. Clause 5.1 of the General Conditions and Section 7 of the Schedule are set out below:

*“5.1 The Licensee shall use the premises solely for the purposes set out in Section 7 of the Schedule and under Its trade name set out in **Section 7 of the Schedule unless permitted by Licensor in writing and acknowledges that it shall not have an exclusive right to any particular type of business being conducted in the building.**”*

7.	Purposes for which premises are let/permitted business	<i>For the retail operation, under the name and <u>style of "Momentz" under silverware and highend giftware.</u></i> <i>The License shall not change the nature of business carried from the demised premises and shall not change the permitted brand/merchandise category, till the tenure of the agreement.</i>
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[Emphasis supplied]

12.2 Clause 8.1 of the General Conditions of the Agreement sets out that licensor (PDCL) shall have the right to enter the premises on any day for inspecting the premises. Clause 8.2 further sets out that the licensee shall permit the licensor to enter the premises to check for compliances. Clauses 8.1 and 8.2 are set out below:

“8.1 The Licensor or its designated representative shall have the right from time to time during the normal business hours on any working day with prior notice to the Licensee to enter upon the Premises for the purpose of inspecting the service and maintenance in the Premises.

8.2 The Licensee shall permit the Licensor or its authorized representative to enter into the Premises at all reasonable times to check for the compliance with the Agreement.”



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13. As stated in Section 7 of the Schedule, the purposes for which the premises was let out was very specific i.e., to carry out the business of silverware and high-end giftware.. In addition, the licensee was not permitted to change the brand or the merchandise category during the tenure of the Agreement. Use of the premises beyond the specified hours would lead to additional charges. These types of restrictive covenants would not be present in a lease agreement.

13.1 In addition, the licensor had access to the premises at any time and the entry of the licensor was not subject to the permission of the licensee (Petitioner herein) which would normally be required for in a lease deed. Thus, there were several restrictions on the Petitioner under the Agreement.

14. The Petitioner in its reply dated 20.03.2012 to the notice issued by the Respondents set out that what was entered into with PDCL was a license agreement and not an agreement to sell or lease. It further set out that the Petitioner did not have 24-hour unrestricted rights of ingress and egress to the premises. The licensee of the premises was not entitled to use the premises for a purpose other than as specified. In addition, it was contended by the Petitioner that it is not able to change the nature of its business or category of its business without the permission of the licensor/PDCL. The relevant extract of the Reply is below:

“...In this regard I wish to submit that our status with M/s Pacific Mall with regard to Shop No. GF/019 at Pacific Mall, Subhash Nagar/Delhi, is strictly as that of a licensee alone. This fact is evidently clear from a bare reading of the licence



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agreement and the scheduled annexed thereto (which are forming a part of the present reply). Apparently, your good offices have been mis-informed since we have not entered into any agreement to sell and/or lease with the Pacific Mall.

That the arrangement between us and Pacific Mall is that of a license - is clear from the following facts:

- (i) We do not have 24 hour unrestricted rights of free ingress and egress to the licensed premises.*
- (ii) We cannot use the licensed premises for any purpose other than the one specified in the license Agreement.*
- (iii) We are liable and have already paid the stamp duty on license fee, (wherever applicable).*
- (iv) We are paying operating costs on the licensed premises as per the rates specified in clause 5.2 of the schedule annexed to the License Agreement.*
- (v) In case, we use/occupy the licensed premises for timings beyond the normal business hours (as specified in the license agreement) we are liable to pay extra operating costs/damages for the same.*
- (vi) We cannot unilaterally change the nature of business and/or category of business carried out from the licensed premises.*
- (vii) We are liable to make compulsory contributions to the marketing fund set-up by the Mall Authorities....”*

14.1 The reply(ies) of the Petitioner were not examined by the Respondents prior to issuing of the second notice or the penalty order on 02.08.2012.

15. The notice dated 13.03.2012 sets out that the notice is relying upon order no. F.1(7)/Regn./DC/2001/372 dated 22.10.2001 issued by the Divisional Commissioner, Delhi wherein it is stated that the agreement to sell is compulsorily registerable with the Sub-Registrar. This order/circular has not been placed on record, however, quite clearly, it is referring to registration/stamp duty payable on an



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agreement of sale. The notices, thus, refer to an agreement to sell, not a lease or license. The relevant extract is set out below:

“Whereas as per the Order No. F.I(7)/Regn./DC/2001/372 dated 22.10.2001 issued by the I.G.R./C.C.R.A./Divisional Commissioner; Delhi, the Agreement to sell is compulsory registrable with the Sub-Registrar but the evidence on record shows that neither stamp duty has been paid nor documents have been registered.”

[Emphasis supplied]

15.1 The issue is clinched by the second notice dated 24.03.2012 where in addition, to relying on the said order dated 20.10.2001, it further states that the failure of the Petitioner to appear before the under signed would lead to the property “*being assessed ex-parte at market value at present prevalent circle rates*”. Circle rate is the guidance value or minimum price at which immovable property can be sold. It is subject to change from time to time depending on various factors such as location and market rent. The relevance of circle rate comes into play where the value of the sale consideration in a sale-purchase transaction (sale deed / agreement to sell) is less than the circle rate. The stamp duty for such transaction will be valued as per the circle rate and computed accordingly. Thus, any reference to circle rate would only be applicable in an agreement of sale and not of lease.

16. A reference to the provisions for a stamp duty on a lease will show that there is no “circle rate” or “market value” mentioned therein. The stamp duty payable is the same duty as a conveyance is levied under the Act for a consideration of an amount of the average annual rent. Article 35 (a) (iii) and Article 23 of the Schedule IA of the



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Indian Stamp Act⁶ as applicable to Lease Agreements in Delhi are extracted below:

	Description of Instrument	Proper Stamp-Duty
35.	<i>LEASE, including an under-lease or sub lease and any agreement to let or sub-let- (a) where by such lease the rent is fixed and no premium is paid or delivered - ... (iii) where the lease purports to be for a term exceeding five years and not exceeding ten years...</i>	<i>... The same duty as a Conveyance (No. 23) as levied by this Act, for a consideration equal to the amount or value of the average annual rent received....</i>
23.	<i>CONVEYANCE as defined by section 2(10) not being a Transfer charged or exempted under No. 62. Exemption – Assignment of copyright under the Copyright Act, 1957, section 18. CO-PARTNERSHIP DEED – See Partnership (No. 46)</i>	<i>Three per cent of the consideration amount set forth in the instrument. Further reduced to two per cent in respect of individually/jointly held immovable property by woman/women: Provided that in cases of jointly held immovable property, the reduced rate of stamp duty shall apply only to the share(s) held by woman/women.]</i>

17. Without doubt, thus, the examination that was taking place by the office of the Respondents was with respect to an agreement to sell and not an agreement to lease as there is no assessment of “prevalent circle rates” in ascertaining stamp duty in an agreement to lease. As stated above, for lease, a stamp duty would be with respect to the value of the average annual rent received.

18. There is one other reason why the Court has reached its conclusion. The record shows, that the Respondents did not undertake

⁶ Schedule 1-A as applicable to Delhi



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any kind of exercise in examining whether the document is a lease or a license and have merely set out that it is an agreement to sell/agreement to lease.

18.1 In fact, the impugned notices do not set out which of the two category– "*lease*" or "*sale*" – has the Respondent opined that the Agreement falls under. The Respondent in its Counter-Affidavit stated that the SDM "opined" that the premises were not licenced but given on lease. No reason for such opinion nor analysis has been set forth. No examination of the terms of the Agreement or the intention of the parties has been undertaken by the Respondent No.2 prior to passing the Impugned Order or the Impugned Penalty Notice.

19. Learned Counsel for the Respondents has attempted to justify the notices by relying on the judgment in the ***Bharat Petroleum*** case, to submit that a license deed executed for a Mall has been held to be a lease.

19.1 The Supreme Court in the ***Bharat Petroleum*** case examined the issue of termination of a license to use a petrol pump premises for the purpose of sale of petroleum products and whether the license to use a petrol pump premises for the sale of petroleum products granted could be construed as a license as defined in Section 5(4A) of the Old Bombay Rent Act and so as to attract Section 15A of the said Act on the occupation of the premises. The two Judge Bench of the Supreme Court gave their separate judgments on the nature of the license granted to the Respondents. The extract relied by the Respondents



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forms part of the Judgment given by R.V. Raveendran, J, which is deferred with by H.L. Gokhale, J.

19.2 In view of the dissenting opinions of the two judges, the judgment in the ***Bharat Petroleum*** case was referred to a larger bench of the Supreme Court on 02.03.2011. However, the issue remained inconclusive in view of the fact that the case was withdrawn by the Appellant on 21.08.2024⁷.

20. The Supreme Court in ***Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala***⁸ has held that where an interest is granted in property giving permission to lease land without exclusive possession, it constitutes a license and where a clause grants a licensor the right to enter upon a premises and inspect the same at any time, the document would be a license and not a lease. From an examination of the language used in the Agreement and the restrictions put upon in the use of the premises in question by the Appellant (licensee) including that the user was for 20 hours and that the licensor has the right to enter upon the subject premises and inspect the same at any time, the Supreme Court held that the Agreement was a licence and not a lease. While citing ***Halsbury's Laws of England***⁹, it further held that whether an agreement creates tenancy or a license, the decisive consideration would be the intention of the parties.

⁷ Order dated 21.08.2024 in Civil Appeal No.2276/2011

⁸ (1988) 1 SCC 155

⁹ 4th Edition Volume 27 Page 13



“10...To put it 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.

...

12. The distinction between leave and licence has been well summarised in Halsbury's Laws of England, Fourth Edition, Volume 27 page 13. In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. Lord Greene, M. R. had observed this in Booker v. Palmer. This is a salutary test.”

[Emphasis supplied]

21. As discussed above, there are several restrictions in the Agreement/its Schedule and the General Conditions. These include the fact that the licensee is not permitted to change the nature of its business carried out from the premises. It is not permitted to change the brand or the merchandise category. Additionally, the licensor (PDCL) has the right to enter upon the premises on any day. The hours of use by the licensee are also restricted to the timings set out by the PDCL and in the event that the hours are extended, the Petitioner is liable to pay additional fees to the PDCL. Thus, from an examination of the Agreement and its restrictive nature, the intention of the parties



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is to enter into a license and not a lease. Relying on the judgments of the Supreme Court in the **CM Beena** case and the **Khalil Ahmed** case, this Court finds that the intention of the parties was to assign rights without any transfer of title.

22. Lastly, the objection of alternate remedy as set out by the Respondent is also not available. Under Section 47-A of the Indian Stamp (Delhi Second Amendment) Act, 2001 which is relied upon, as it gives the power to the registering authority, while registering a document of transfer, to refer the same to Collector, to determine its value if such document of transfer appears to him as being undervalued. It reads as:

“47A. (1) If the Registering Officer, while registering any instrument transferring any property, has reason to believe that the value of the property or the consideration, as the case may be, has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the value or consideration, as the case may be, and the proper duty payable thereon.

xxx

(4) Any person aggrieved by an order of the Collector under sub-section (2) or sub-section (3) may appeal to the District Court within whose jurisdiction the property transferred is situated.

(5) An appeal under sub-section (4) shall be filed within thirty days of the date of the order sought to be appealed against.”

22.1 Concededly, this provision is inapplicable to the present case as the alternate remedy is available only in circumstances where while registering in instrument of transfer, the Registrar is of the opinion that the stamp duty has not been correctly set forth. It refers such instruments to the Collector for determination of the value to be ascribed on the instrument. It is in those circumstances if a person is



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aggrieved by the order of the Collector that an Appeal may be filed. No such adjudication or determination has been undertaken in the present case.

23. In view of the foregoing discussions, the Petition is allowed. The impugned notices, penalty orders and all proceedings emanating therefrom are set aside.

24. Parties will act based on the digitally signed copy of the order.

TARA VITASTA GANJU, J

SEPTEMBER 26, 2024/r

Corrected and uploaded on 11.10.2024