(1996) 10 MAD CK 0040

Madras High Court

Case No: Second Appeal No. 381 or 1991 and C.R.P.No. 1563 of 1995

R.M. Sundaram @ Meenakshi Sundaram and another		APPELLANT
	Vs	
The Correspondent, National Elementary School, Pundarigakulam, Vadakarai, Nagapattinam		RESPONDENT

Date of Decision: Oct. 31, 1996

Acts Referred:

- Easements Act, 1882 - Section 52
- Evidence Act, 1872 - Section 91, 92
- Specific Relief Act, 1963 - Section 38
- Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 - Section 10, 14, 16
- Transfer of Property Act, 1882 - Section 105, 111

Citation: (1998) 1 CTC 195

Hon'ble Judges: S.S. Subramani, J

Bench: Single Bench

Advocate: Mr. K. Sengottian, for the Appellant; Mr. M.S. Subramanian, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. Second appeal arises from a suit filed by the appellant and his adoptive mother as O.S.No. 312 of 1980, on the file of District Munsif''s Court

Nagapattinam. That suit was filed by them for the following reliefs:

(a) for mandatory injunction directing the defendant from removing all the furnitures and other articles kept by the defendant for conducting classes

and to forbid from interference with the possession and enjoyment of the property thereafter.

(b) to grant such order and further reliefs which are deemed necessary and expedient in the proved circumstances of the case: and

(c) to Award costs of the suit.

2. Material averments in the plaint are. the property originally belonged to late Muthu Thandapani Chettiar. First plaintiff is his widow and second

plaintiff is his adopted son. It is said that Muthu Thandapani chettiar died on 21.8.1969 and the plaintiffs have succeeded to his estate, having

absolute right and title over the property. It is said that the suit property is a residential building and a thatched shed. It is further said that the

municipal and revenue records amply show the title and possession and enjoyment of the property by the plaintiffs predecessor in title, and they

were enjoying the same, after his lifetime. It is also said that plaintiffs as owners of the building, are making periodical payment of tax due to the

Municipality and the building is in occupation for the plaintiffs for domestic residential purpose. The Tamil Nadu Electricity Department is collecting

consumption charges from the plaintiffs for making use of the property for domestic purpose. During the time of election, the Election Tahsildar,

Nagapattinam sought permission of the plaintiffs to have election booth in the suit property and plaintiffs also permitted the same. It is said that the

plaintiffs have effective possession and enjoyment of the suit property as its owners. It is further averred that the defendant is in occupation of the

building as a licensee, and he is conducting classes of elementary section from 9-00 a.m. to 5- 00 a.m. on all working days. The main building is

fetching a monthly rent of Rs. 55 and the thatched portion is rented out for Rs. 50. It is said that as per the the terms and conditions of the licence,

defendant is not authorised to use the building either before 9-00 a.m. or after 5-00 p.m., and during the closure of the section of classes, the

plaintiffs were at liberty to remove the benches, stools and furnitures from the class room and keep them aside by way of gaining sufficient space

for domestic purposes of the plaintiffs, their relations and friends. It is said that the plaintiffs are actually and virtually residing in the very same

property and are fully utilising the premises during the rest of the hours of the day. The main doors are being closed only by the plaintiffs, and in

fact, they are keeping guard over the furnitures, chairs and benches left by defendant after the closure of the classes, and the lock and key for the

main door are with the plaintiffs. It is said that the occupation of the defendant is only on the basis of permission, and he has no interest in the

property. He has only a licence irrecovable at the pleasure of the plaintiffs. It is further said that the building is very old and dilapidated and has

fallen into ruins. Plaintiffs intend to demolish the building for the purpose of reconstruction. It is further said that the defendant is indulging in acts of

violence and is also attempting to trespass into the vacant portion of the property and therefore, a notice was issued terminating the licence on

21.7.1978, for which a reply was sent. It is said that the reply is bereft of truth. Non compliance of the demand has compelled the plaintiffs to

institute the suit for reliefs aforementioned.

3. In the written statement filed by the defendant, it was contended that the property did not belong to the deceased Muthu Thandapani Chettiar. It

was purchased by his ancestors for the purpose of charity, from a Temple. The Scheduled Building was constructed for the purpose of Trust with

an object of leasing out of the same and to conduct the charities effectively. Deceased was only in management of the Trust and his capacity was

only that of a Trustee. In fact he leased the property as a Trustee and the defendant has been conducting the school from 1913 onwards. The

further statement of the plaintiffs that the relationship between the parties is that of a licensee and licenser is denied. It is said that the defendant is a

lessee of the property and a civil suit for mandatory injunction is not maintainable. He also denied having arrangement pleaded in the plaint.

According to the defendant School, they are in occupation of the property ever since the registered lease deed of 1913 and they are in exclusive

possession of the property. It is said that they are making payment as rent and not as premium as alleged in the plaint. The further allegation that the

defendant is entitled to use the building only from 9-00 a.m. to 5-00 p.m. is also not correct. There is no restriction in the lease of 1913. They are

in exclusive occupation of the entire building with some portion of the vacant site for the last more than 75 years. It is admitted that one key of the

school is with the plaintiffs. That is only for the purpose of convenience of the school staff and to have a watch over the school article from being

stolen away. It is only a concession given by the defendant to the plaintiffs. It is also said that the various receipts given by the defendant to the

plaintiffs and their predecessor will show that they are making use of the building only as a tenant and not as a licensee. It is further said that the

lease has not been terminated in accordance with law, and for that reason also, the suit is liable to be dismissed. On these contentions, they prayed

for dismissal of the suit.

4. Originally the trial court dismissed the suit, against which there was an appeal. The appeal was allowed and the matter was remanded for fresh

consideration. The order of remand was challenged by the defendant in C.M.A. No. 238 of 1982 before this Court. V. Ratnam, J. as he then was,

upheld the order of remand and delivered the following judgment: -

No exception can be taken to the remittal order passed by the lower Appellate Court. It is seen from the judgment of the lower Appellate Court

that the trial court had not bestowed any attention upon the question whether the appellant came into possession of the property as a lessee or

licencee. A decision on that question would have a material bearing upon the further relief to be granted in the suit. If it is found that the appellant

came into possession as a lessee then the further question that may arise is. Whether the appellant would still be entitled to claim benefits as a

leassee in view of the setting up of title to the property in favour of the trustees. If the appellant came into possession as a lessee, then the question

whether the respondents would be entitled to recover possession of the property on the termination of the licensee has to be decided. Those

question have not been considered at alt by the trial court with reference to the evidence that has been let in and a decision on these questions will

be relevant and will have a material bearing upon the ultimate result of the suit. The lower appellate court is right in remitting the suit for fresh

disposal. The civil miscellaneous appeal is. therefore dismissed. There will be no order as to costs.

5. Pursuant to the order of remand, trial court again considered the entire case, and dismissed the suit. The trial court held that the defendant is in

possession on the basis of Ex.B-10, lease deed dated 30.8.1913. It is not a license as alleged. It has further found that the plaintiffs have title to the

property and they are the owners of the same. The remedy of the plaintiffs is only to move the Rent Control Court, and the suit for mandatory

injunction as if the relationship is that of a licensor and licensee is not correct. The suit was dismissed.

6. Aggrieved by the judgment, plaintiffs preferred A.S.No.165 1989. The lower appellate court also confirmed the findings of the trial court. It

further held that the denial of the title by the defendant as bona fide.

7. It is against the concurrent judgment of both the courts, this second appeal is filed. During the pendency of the first appeal, the first plaintiff died.

This second appeal is filed only by the second plaintiff.

8. At the time of admission of the second appeal, the following substantial question of law were raised for consideration:-

1. Whether on the facts and circumstances of the case and in the light of Exx.A-15, A-23, A-24 and B-5 to B-7 and the admission of D.W.1, the

lower appellate court is correct in law holding that the respondent is only lessee and not a licensee in the suit property?

and

2. When the defendant had denied the title of the plaintiff to the suit property, is it open to the lower appellate court to go into the question whether

such denial is bona fide or not instead of applying the legal consequence involving such denial of title in the light of the observations of this Court in

C.M.A. No.238 of 1982?

9. In the meanwhile, alleging that the defendant is a tenant coming under the Rent Control Act, a petition was filed u/s 8(5) of that Act. The reason

was that the plaintiffs refused to receive the rent, and they were denying the relationship as that of landlords and tenant. When the defendant paid

the rent, plaintiffs refused to accept the same.

10. In the rent control proceedings also, the status of the defendant as tenant disputed. But the Rent Control Court found that he is a tenant of the

building, and since the refusal to accept the rent was not proper, the Rent Controller permitted the tenant to deposit the rent in the court. The

application was allowed. Even though the landlord filed an appeal before the Appellate Authority the same was also without success. It is against

the concurrent judgments of both the authorities, below, the Revision is filed by the plaintiffs, who are respondents in the rent control proceedings.

11. Since, the main defence in the rent control proceeding is the pendency of the civil suit from which the second appeal arises, it was though fit to

dispose of the same by a common judgment. Learned counsel on both sides also agreed for the said proposal. If it is ultimately found that the

defendant is a lessee, nothing survives in the rent control proceedings.

12. The main argument of learned counsel for the appellant/plaintiff was that the relationship between the parties is that of licensor and licensee. An

alternate argument was also put forward on the basis of order of remand. It was contended that consequent to the order of remand, parties joined

in issue regarding title to the property. Both the Courts below have now held that the plaintiffs have title and lower appellate court has further found

that the denial of title was bona fide and, therefore, even if the defendant is a lessee, since he had denied the title, relief could be granted in this

proceeding without asking the plaintiffs to seek appropriate remedies through Rent Control Court. Learned Counsel, therefore, gave much

importance to the Judgment in C.M.A.NO. 238 of 1992.

13. I will first consider the question whether the relationship of the parties is that of licensor and licensee or lessor and lessee.

14. Even though the plaintiff states about some agreement by which the user of the property is restricted from 9-00 a.m. to 5-00 p.m. on working

days, no documentary evidence is filed by the plaintiffs to substantiate that arrangement. On the contrary, defendant has taken a contention that

they are in possession on the basis of Ex.B-10, a registered document dated 30.8.1913. Both the Courts below, on appreciation of proved facts,

have come to the conclusion that the defendant is in occupation on the basis of that document dated 30.8.1913. It makes reference to two

buildings which are scheduled to the plaint in this case. The executants of the document are none other than the son of late acquirer Muthu

Thandapani Chettiar and the Secretary of the School Committee, Pakkirisami Pillai. Both the courts below have construed this document as a

lease.

15. Regarding the factum of possession from 1913, the finding of fact was not seriously challenged by learned counsel for the appellant. On merits

also, I do not find there is scope for interference regarding that finding, i.e., the occupation is on the basis of Ex.B-10. The effect of the document

will have material bearing in the result of the suit. The nomenclature of the document is rend deed. The property is also fully described by

boundaries and the arrangement is for a period of ten years. The monthly payment is also described as and in case, any default is made the

consequences are also provided therein. There is also a provision for payment of the municipal tax. the document is also registered in the

concerned Sub Registrar''s Office.

16. One important feature of the document is the statement that the said property was purchased for doing charities to the Temple and the

Charities could be done from out of the rent collected from the property. Absolutely there is no mention about the restricted enjoyment between 9-

00 a.m. to 5-00 p.m. as averred in the plaint.

17. One of the essential ingredients of a lease is that the property must be given for enjoyment and it is transfer as defined under the Transfer of

Property Act. An interest is created in the property. As per the definition of ''lease'', the property must be in the possession, and without

possession there cannot be any enjoyment of the same. When we consider the question of enjoyment of possession, naturally, the purpose for

which the document was written also will have to be taken into consideration. If the document is executed for the purpose of conducting a school,

naturally without possession, the school cannot be conducted. Evidence has also been let in this case to show that the defendant is having the key

and various belongings of the school are kept therein in safe custody. Furniture that are necessary for running a school are also kept therein.

18. In the case of a licence, under normal circumstances, possession is not handed over. It is only a permissive occupation. But for the permission,

the occupation becomes unlawful. It is not a transfer, nor does it require registration. On the above important ingredients of lease and licence, we

have to consider the scope of Ex.B-1 and the right of the defendant under the same.

19. In Facchini v, Bryson, 1952 (1) TLR 1286 it was held at page 1389 by Lord Justice Denning thus:

In all the cases where an occupier has been held to be a licensee thee has been something in the circumstances, such as a family arrangement, an

act of friendship or generosity, or such like to negiative any intention to create a tenancy. In such circumstances, it would be obviously unjust to

saddle the owner with a tenancy, with all the momentous consequences that entails nowadays, when there was no intention to create a tenancy at

all.

This special circumstances as held by their Lordships was approved in Finbow v. Air Ministry1963 (1) W.L.R 697 On the facts of the case, their

Lordships distinguished the same and various ditinguishing features were taken into consideration to hold that it is a licence even if the parties were

not coming under ''Special Circumstances'' i.e., in the basis of the family arrangement or an act of friendship or necessity etc.

20. In Street v. Mounford1985 (2) All. E.R. 289 the entire law was once again considered. In that case, it was held that if exclusive possession is

given, and a fixed or periodical term is paid as rent, unless there are special circumstances, the contract has to be interpreted only as a lease and

not as a licence. At page 297 of the Reports, it was held thus:

Exclusive possession is of first importance in considering whether an occupier is a tenant; exclusive possession is not decisive because an occupier

who enjoys exclusive possession is not necessarily a tenant. The occupier may be a lodger or service occupier or fall within the other exception

categories mentioned by Denning LJ in Errington v. Errington. Finally, at page 300, their Lordships held thus: ..... the only intention which is

relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent Sometime, it may be difficult to discover

whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances

that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive

possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable

and which would or might negative the grant of an estate or interest in the land include occupancy under a contract of employment or occupancy

referable to the holding of an office. But where as in the present case the only circumstances are that residential accommodation is offered and

accepted with exclusive possession for a term at a rent the result is a tenancy.

The position was well summarised by Windeyer, J. sitting in the High Court of Australia in Radaich v. Smith1959 (101) CIR 209where he said:

What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a

personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest

in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of that land for a term or from year to year or

for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the

creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is

not tenant is simply to contradict the first property by the second. A right of exclusive possession is secured by the right of a lease to maintain

ejectment and after his entry trespass. A reservation to the landlord, either by contract or stature of a limited right of entry, as for example to view

or repair, is of course, not inconsistent wilh the grant of exclusive possession. Subject to such reservations, a tenant for a term or from year to year

or for a life or lives can exclude his landlord as well as strangers from the demised premises. All this is long established law See Cold on Ejectment

(1857) pp. 72-73, 287 - 458. (Emphasis as in Original"" Reports) ''

21. In their Book entitled Landlord and Tenant Law, David Yates and A.J. Howkins (Published in 1981) the learned Authors have (at pages 13

and 14) extracted a passage from the decision in 1978 (2) All.E.R. 1011 and also various decisions of the English Courts. The relevant portion

reads thus. The same judicial approach has been displayed with regard to arrangements held to fall outside the protection given to business tenants

by the Landlord and Tenant Act. 1954.Pt. II and in 1978 in a case involving flat-sharing agreement, called ''licence'', in which the licensor reserved

the right to select the person to share the accommodation with licensee. Cumming - Bruce. L.J. said:

We are confronted with one more attempt by an owner of housing accommodation to provide it at a profit for those in great need of it without the

restrictions imposed by Parliament on his or her contractual right so charge for it and regain possession of it ... Counsel for the respondents ....

submits that in a Rent Act situation any permission to occupy residential premises exclusively must be a tenancy and not a licence, unless it comes

into the category of hotels, hostels, family arrangements of service occupancy or a similar undefined special category. We can see no reason why

an ordinary landlord not in any of these special categories should not be able to grant licence to occupy an ordinary house. If that is what both he

and the licensee intend and if they can frame any written agreement in such a way as to demonstrate that it is not really an agreement for a lease

masquerading as a licence, we can see no reason in law or justice why they should be prevented from achieving that object. Nor can we seen why.

their common intentions should be categorized as bogus or unreal or as sham merely on the grounds that the court disapprove of the bargain.

This consistent judicial approach still leaves it open to the court to find that the real intention of the grantor is not the declared intention that was

acquiesced in by the grantee. In other words, that the transaction was a sham. The conclusion seems to be, the grantor who makes it obvious that

his intention is to avoid the operation of protective legislation is likely, where that intention is acquiesced in by the grantee, to succeed. The grantor

who attempts to hide his true intention in a formal document that does not truly represent what the parties actually agreed, is likely to fail.

It may be that, as a result of other factors, the inference that a tenancy was intended in countered in the particular case. As Denning, L.J. observed

in Facchini v. Bryson. In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a

family arrangement, an act of friendship or generosity, or such tike, to negative any intention to create a tenancy. As the passage quoted from the

judgment of Cumming - Bruce, L.J. shows, this is perhaps putting the case too strangely, in that a licence can be intended, even in the absence of

those special categories. II is nevertheless true that the special circumstances surrounding the grant of a right of occupation may, in themselves,

operate against the normal inference of an intention to create a tenancy.

At page 15 of the same Book, learned Authors further say that one of the essential characteristics of a lease is that the tenant should be given the

right to exclude all other persons, including his landlord, from the premises. A right of occupation granted for a fixed period cannot be a tenancy if

the person granting the right remains in general control.

22. R.E. Megarry in his book, The Rent Acts - 10th Edn. (1967) from page 55 onwards makes a distinction between the lease and licence'', and

at page 58 and 59 the special and other circumstances from which an inference of licensee could be gathered are considered. The relevant portion

of the passage read thus:

Even if a servant is not a service occupier, he may still be an ordinary licensee and not a tenant. Moreover, some indicate of a licence is given by an

arrangement under which the occupier is liable to leave without notice and the grantor has the right of access to his furniture of the premises with

the right to remove what he wants and to sleep on the premises. Again, it has been said that it is difficult to infer a tenancy where the rights were

granted not by a formal document but by a quite casual conversation on the telephone.

The surrounding circumstances:

In all the cases where an occupier has been held to be a licensee thee has been something in the circumstances, such as a family arrangement, an

act of friendship or generosity, or such like, to negative any intention to create a tenancy.

Tenancy Negatived. Licences have accordingly been held to exist where a house-owner permits members of the family to occupy parts of the

house in return for regular payments; where a father permitted his son to occupy a house in return for paying the building society installments;

where a sister purchased a house for her brother to occupy free of payment; where a mother allowed her son to occupy and ''sub-let'' part of a self

contained flat in the house she owned and occupied; where tenants who were temporarily absent from the house, e.g., during the war, or by reason

of professional engagements, left friends in occupation, even though the friends made periodical payments; where an employer purchased a house

for occupation by a servant unable to buy it himself and the servant merely paid the rates of the interest on the purchase-money, or suffered a

reduction of salary, or where the employer''s settled practice was to grant its servants mere licences; where the flat in question had direct access to

premises upon which the former employers of the occupier carried on confidential work, and where a landlord refused to grant a new tenancy to a

deceased tenant''s daughter who has an arguable but unsound claim to tenancy, but, possibly moved by compassion, refrained from attempting to

evict her for some six months during which he accepted rent from her.

23. In Halbury''s Laws of England - Fourth Edn. (Vol. 27) dealing with ''Leased distinguished from licences to occupy land'', in paragraph 6 of that

Volume, it is said that it is a case of intention of parties, and the parties cannot convert a lease into a licence by merely stating that document as a

license, nor can the parties treat licence as lease. In the said paragraph, it is stated thus:

General principles for determining whether agreement creates lease of license. 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. The parties to an

agreement cannot, however, turn a lease into a licence merely by stating that the document is to be deemed a licensee or describing it as such. The

parties''s relationship is determined by law or a consideration of all relevant provisions of the agreement; and an agreement labelled by the parties

to it as a ''licensee'' will still be held to create a tenancy if the substance of the agreement conflicts with that label. Similarly, the use of operative

words, (let, lessor etc.) which are appropriate to a lease will not prevent the agreement from conferring only a licence if from the whole document it

appears that is was intended merely to confer a licence. Primarily the court is concerned to see whether the parties to the agreement intend to

create an arrangement personal in its nature or not, so that the assignabilily of the grantee''s interest, the nature of the land the grantor''s capacity to

grant a lease will all be relevant considerations in assessing what is the nature of the interest created by the transaction. In the absence of any formal

document the parties'' intention must be inferred from the circumstances and the parties'' conduct.

In paragraph 7 it is further stated that the mere exclusive possession is not itself conclusive evidence as to the existence of tenancy, but it is the

consideration of the first importance, although of lesser significance than the intention of the parties, and, while deciding whether agree is entitled to

exclusive possession regard must be had to the substance of the agreement, It is further said that in order to give exclusive possession there need

not be express words to that effect, it is sufficient if the nature of the acts to be done by the grantee required that he should have exclusive

possession. In paragraph 8, how a licence is created is also stated. It is said that if the grantee is having only a personal privilege with no interest in

the land, it is only a licence, and, if the agreement is merely for the use of the property in a certain way and on certain terms while the property

remains in the owner''s possession and control, the agreement will operate as a licence, even though the agreement may employ words appropriate

to lease.

24. The principle of ''special circumstance'' as decided by Lord Justice Denning is also referred to by the Supreme Court in Sohan Lal Naraindas

v. Laxmidas Raghunath Gadit. That was a case of a non-residential building, and except that the parties were adjoining shop owners, there was no

other relationship between them. The document was written as if it was a licence. In paragraph 5 of the judgment, their Lordships gave importance

to the absence of special relationship to interpret the document as a lease. It was held thus:

The defendant was put in exclusive possession of the loft. The plaintiff did not reserve possession of any part of the loft or a right of entry therein.

The loft had a separate entrance. The customers of the defendant used the separate entrance to the loft during business hours and his stock of cloth

remained in the loft after business hours. The plaintiff and defendant were both cloth merchants and the only consideration for granting the licence

was the payment of Rs. 250 per month. There is no evidence that the loft was given to the defendant out of sympathy or because of friendship or

relationship, or any simitar 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.

25. I have already said that the Parties have no case that the School Committee is in any way related to the granter under Ex.B-10. The term of the

document is also ten years, and I have already said that it is a registered document. From a reading of the document, it is made further clear that it

is not a temporary arrangement between the parties. For, that is also one of the considerations to be taken note of regarding the intention of the

parties. Normally, a licence is given when there is any case of urgency and until alternate arrangement are made. That is why the relationship is

given importance in such transactions.

26. When both parties are free to enter into a contract either in the nature of a lease or a licence, and with open mine, they enter into a transaction

giving the document the name as a lease, that also shows that the parties intended to create only that relationship. Even though there is no wording

of handing over the property to the grantee, if the grantee can make use of the same if it is in his effective control, it can be inferred that he obtained

exclusive possession. I have said that for a period of ten years, the grantee was given the liberty to run a school under its management. Without

physical and exclusive possession, a school cannot be run, and that too under the control of the grantor. From Ex.B-10, it is seen that for the

purpose of charity, there must be a permanent income. The document also says that they will get income only by leasing the property. If it is a

temporary arrangement is in the case of a licence, the purpose of the charity also cannot be fulfiled. The description of property with all its

boundaries is also necessary only in the case of a lease. u/s 105 of the Transfer of Property Act, a lease is transfer of a specific immovable

property. That is why the description is given importance in such transactions. The subject matter of the lease was an immovable property. In the

case of a licence, there is no subject matter. It is only permission that is required. According to me, in view of the circumstances which I have

extracted above and also in view of the principles of law which I have discussed, it can be safely concluded that the transaction is a lease.

27. Apart from Sohan Lal Naraindas Vs. Laxmidas Raghunath Gadit, , for the sake of completion of the discussion, it is better to make note of the

following decisions as well. In Qudrat Ullah Vs. Municipal Board, Bareilly, , their Lordships followed an earlier decision reported in Associated

Hotels of India Ltd. Vs. R.N. Kapoor, , and held thus:

There is no simple litmus test to distinguish a lease as defined in Section 105. Transfer of Property Act. from a licence as defined in Section 52,

Easements Act, but the character of the transaction turns on the operative intent of the parties. To put it pithily, if an interest in immovable property,

entitling the transferrors to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is also granted, a

licence is the legal result. Marginal variations to this broad statement are possible and Exs. ''1'' and ''4'' fall in the grey of unclear recitals.

28. In Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala, , their Lordships discussed the entire law and held thus:-

In order to determine whether the document created a licence or a lease the real test is to ascertain the intention of the parties i.e., whether they

intended to create a licence or a lease. If the document creates an interest in the property entitling the transferee to enjoyment, then it is a lease; but

if it only permits another to make use of the property without exclusive possession, that it is a licence. Substance of the document must be

preferred to form.

29. In Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and Others, , also, it was held thus:-

Lease has been defined in Section 105 of the Transfer of Property Act. The essential elements of a lease are: 1. The parties; 2. the subject matter

of immovable property; 3. the demise, or partial transfer; 4. the terms, or period; 5. the consideration or rent. The relationship of lessor and lessee

is one of contract. When the arrangement vests in the lessee a right of possession for a certain time it operates as a conveyance or transfer and it is

a lease. The section defined a lease as a partial transfer, i.e., a transfer of a right of enjoyment for a certain time.

A license is a power of authority to do some act which, without such authority, could not lawfully be done. In the context of an immovable

property a licence is an authority to do an act which could otherwise be a trespass. It passes no interest, and does not amount to a demise, nor

does it give the licensee an exclusive right to use of the property. The definition in the Rent Act includes any person in occupation under a subsisting

agreement for licence given for a licence fee or charge of any premises or part thereof in a building vesting in or leased to a Co-operative housing

society registered or deemed to be registered under the Maharashtra Societies Act, 1961.

The intention of the parties in making the agreement is determinative of the question whether it was a lease or licence. The test of exclusive

possession, though of significance, is not decisive. By mere use of the word lease or licence the correct categorisation of an instrument under law

cannot be affected. While interpreting the agreement court has also to see what transpired before and after the agreement. Ex praecedentibus et

consequentibus optima bit interpretatio. The best interpretation is made from the context. The best intention of the parties to an agreement has to

be gathered from the terms of the agreement construed in the context of the surrounding antecedent and consequent circumstances. The crucial test

would be what the Parties intended. If in fact it was intended to create an interest in the property, it would be a lease, if it did not, it would be a

licence. Interest for this purpose means a right to have the advantage accruing from the premises or a right in the nature of property in the premises

but less than title. In this case the intention to create is only a licence and not a lease is clear from the tenor of the arrangement. Positively it speaks

of a licence for the use of the flat and negatively that the licensee would not claim any tenancy or sub-tenancy. What was given to the licensee was

the use of the flat with furnitures, fittings, etc., which would not be said to have created any interest in the flat though in effect the use continued for

stipulated period of time. (Italics supplied)

30. In T. R. Srinivasa Chetty Vs. G. Nagarajan and Another, a learned Judge of this Court has occasion to consider the distinction between a

lease and licence, and while considering the document in that case, certain distinguishing features were taken into consideration. The following were

given importance to consider a document as lease:-

The question whether a transaction is a lease or licence will have to be ascertained from the intention of the parties and the nature of possession

granted. The following circumstances present in the instant case establish the transaction is a lease:

1. The second respondents in the civil revision petition was entitled to exclusive possession of the premises facing Godown Street in which he was

carrying on business in partnership with other partners:

2. The Civil revision petitioner herein has no manner of right in the business carried on in the portion of the premises facing Godown Street;

3. The civil revision petitioner has got an exclusive entrance for the portion of the premises occupied by him and he had no access to the portion of

the premises occupied by the second respondent.

4. The portion occupied by the second respondent was provided with a sub -meter for electricity;

5. The monthly payment though termed as compensation and commission payable by the second respondent to the civil revision petitioner was in

reality rent for the premises occupied by the second respondent;

6. The demise was for a fixed term of five years;

7. No power was reserved for the civil revision petitioner to cancel the contract before the expiry of the fixed term;

8. No provision was also made for extending the term of the contract by mutual agreement;

9. Penal provisions were incorporated providing for enhanced payment of rent in case the second respondent continued after the term of five

years"".

31. Mulla in ""The Transfer of Property Act"" - 8th Edition (1995), commenting on Section 105. at Page 798, has said that The description given by

the parties may be evidence of the intention, but is not decisive''. So, the nomenclature of the document is also of some importance while

considering the deed.

32. The subsequent conduct is also relevant in construing the circumstances, as held in Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani

(Smt) and Others, . In this case, after Ex. B-10, till the dispute between the parties began, no evidence has been let in by the grantor that they

exercised any control in the enjoyment of the property by the grantee. At the same time, it is evident that both the plaintiffs and their predecessors

were issuing receipts to the defendant as if they have received rent for the building.

33. Learned counsel for the appellant relied on certain circumstances to infer that the arrangement between the parties is a licence. That are Ex.A-

10 dated 28.8.1958, Ex. A-15 dated 10.5.1977, Ex.A-20 dated 10.12.1975, Ex. A21 dated 15.8.1975 and Ex. A-28 dated 2.7.1979 and Ex.

A-24 dated 3.12.1979.

34. In Ex. A-10, permission is given to the plaintiff to repair the building. It is given by the Nagapattinam Municipality. I do not think any

importance could be given to Ex. A-10. There is a legal obligation on the part of the landlord to repair the demised premises, and if he seeks

permission, it is only in discharge of that obligation. If the landlord is not complying with the legal obligation, the tenant himself can compel the

landlord to do the same or he can himself do it, and the expenses incurred therefore can be adjusted in rent. So, nothing turns on Ex.A-10, nor

does it show that he is in possession. Ex. A-15 is a letter. It show that he is in possession. Ex.A-15 is a letter by the Election Department,

addressed to the second plaintiff that during General Elections of 1977, asking them to hand over the building in advance for making use of the

same for election purposes. That document is also not going to advance the case of the plaintiff in any way. In that letter itself, it is said that the

polling booth is located at National Elementary School premises, and they seek the permission of the owner to have the election purpose is not in

evidence. Again, when the rights of parties are governed by written document, a third party''s correspondence will be of no relevance, Ex.A-20 is

a letter written by the Headmaster of the School to the Electricity Board. It is said therein that the school is being run only during day time and the

building is in the possession of the owner and, therefore, electricity bills are to be charged for domestic purpose only. Even the plaintiff has no case

that after Ex.B-10, there was any subsequent arrangement following the terms of the document. If possession continued on the basis of Ex.B-10,

the mere statement by the Headmaster that the building is in the possession of the owner will not help him. Again the purpose of the letter is only

that the consumption could be charged only as if it is for domestic purpose, i.e., they are not making use of the electricity. School is run only during

day- time. If we read the document in that sense, the argument that the building is in the possession of the owner as stated therein will not advance

the case of the plaintiff in anyway. Ex.A-23 is also a letter written by the Secretary of the School, asking the plaintiff to effect the repair and it is not

possible for them to spare Rs. 5,000 for the said purpose. The explanation given to Ex.A-10 will equally apply to Ex.A-23 also. In the receipt

dated 2.7.1979, there is a word ''licence fee'' and it is a receipt issued by the plaintiff. In that letter, plaintiff described himself as the landlord.

Ex.A-24 is also a letter dated 3.12.1979 wherein also the word licence fee is used. I may say that Exs.A- 23 and A-24 are after the dispute

began. During the relevant time, there were criminal cases between the parties on the ground that the defendant has trespassed into the vacant land.

Long before those document plaintiff also issued a suit notice on 1978 terminating the licence,

35. Learned counsel for the appellant also relied on certain statements made by D.W.1 while he was in the box. When a document is clear without

any ambiguity, the so called admission will not advance the case of either party. It is well-settled that the terms of the document cannot be

contradicted by a so called admission. Learned counsel for the appellant also relied on Exx.B-5 to B-7 wherein also the word ''licence fee'' is

used. Those documents are also long after the dispute began. Again what the defendant wanted was only the evidence of payment. The nature of

payment is a matter of construction of the document. For the above reasons, I hold that the transaction between the parties on the basis of Ex.B-

10 and ever since thereafter they are only that of a lessee and not a licensee.

36. I have already extracted the relief sought for in the plaint. It is in the nature of a mandatory injunction and the plaintiff assumes that he is in

possession. Once it is held that the relationship is not that of a licensor and licensee, plaintiff will have to terminate the lease and recover

possession. There is no termination of lease. Again, the relief of mandatory injunction is governed by Section 38 of the Specific Relief Act. In the

case of a lease, there is no obligation on the part of the lessee to vacate the premises. The rights and duties of a lease are governed by the

provisions of Transfer of Property Act and where Rent Control Act is applicable the provision therein will have to be applied. The relief prayed for

being a decree for mandatory injunction also, therefore, cannot be granted.

37. Learned counsel for the appellant submitted that even though the relief sought for is in the nature of a mandatory injunction, the purpose of the

suit is to recover the property and the Court is competent to grant relief in appropriate cases. I agree with the submission that the Court could grant

the relief if the plaintiff is found to be eligible to get that relief. If it is a case of lease without termination, such a relief cannot be granted. In the case,

the area where the building is situated is governed by the provisions of Rent Control Act also. No relief of mandatory injunction can be granted in

view of the provisions of Rent Control Act also. Question No. 1 is therefore found against the appellant.

38. Question No.2: Learned counsel for the appellant gave too much importance to the judgment in C.M.A. No. 238 of 1982. On the basis of that

judgment, it is contended that the parties have joined in issue regarding the bona fide title to the property. When once the Court enters a finding

that the denial of title is bona fide, the remedy is only through Civil Court, and therefore, instead of relegating the matter to Rent Control Court,

relief could be granted in this suit itself. The argument seems to be attractive. But at the same time, I have to reject the same for reason stated

herein. As I have said earlier, the relationship between the parties is that of lessor and lessee. The subject matter of the lease under Ex.B-10 is also

a building. The building is situated within an area attracted by the provisions of Rent Control Act. In cases where parties are governed by Rent

Control Act, eviction can be had only through the procedure prescribed by that Act and only for the grounds mentioned therein, eviction can be

had. When the parties are governed by a special enactment like Rent Control Act, a separate termination notice may not be necessary for, even if

the relationship is terminated eviction cannot be allowed, but for the provisions of that Act vide V. Dhanapal Chettiar Vs. Yesodai Ammal, , and

K.K. Krishnan Vs. M.K. Vijaya Ragavan, .

39. u/s 10 of the Tamil Nadu Buildings (Lease and Rent Control) Act. 1969, a tenant shall not be evicted whether in execution of a decree or

otherwise, except in accordance with the provision of that Section or under sections 14 to 16. There are two Provisos to Section 10(1), and the

Second Proviso says that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether

the denial or claims is bona fide and if he records a Finding that effect, the landlord shall be entitled to sue for eviction of the tenant in a Civil Court

and the Court may pass a decree for eviction on any of the grounds mentioned in the said sections, notwithstanding that the Courts finds that such

denial does not involve forfeiture of the lease or that the claim is unfounded. Section 10(2)(vii) of the said Act further says that ''where the tenant

has denied the title of the landlord or claimed a right of permanent tenancy and that such denial of claim was not bona fide the Controller shall

make an order directing the tenant to put the landlord in possession of the building and if the controller is not so satisfied he shall make an order

rejecting the application. If we read the Second Proviso to Section 10(1) of the said Act, the cause of action for filing a suit is a decision or a

finding by the Rent Controller that the denial of title is bona fide. That is a condition precedent for a Civil Court to decide the title to the property

and also to grant eviction on the grounds mentioned in the Act. So, till such finding is entered by the Rent Controller, the Civil Court cannot usurp

that power or enter a finding that the denial of title is bona fide. This point is settled by the decision of the Supreme Court reported in M/s. East

India Corporation Ltd. Vs. Shree Meenakshi Mills Ltd., , a matter arising under the Tamil Nadu Act itself. It was held there in thus:

Section 10 Prohibits eviction of a tenant whether in execution of a decree or otherwise except in accordance with the provisions of that Section or

Sections 14 to 16. These provisions as well as the other provisions of the Act are a self-Contained Code, regulating the relationship of parties,

creating special rights and liabilities, and providing for determination of such rights and liabilities by tribunals constituted under the status and whose

orders are endowed with finality. The remedies provided by the statute in such matters are adequate and complete. Although the statute contains

no express bar of jurisdiction of the Civil Court, except for eviction of tenants in execution or otherwise, the provisions of the statute are clear and

complete in regard to the finality of the orders passed by the special tribunals set up under it. and their competence to administer the same remedy

as the Civil Courts render in Civil Suits. Such tribunals having been so constituted as to act to conformity with the fundamental principles of judicial

procedure, the clear the explicit intendment of the legislature is that all the question relating to the special rights and liabilities created by the statute

should be decided by the tribunals constituted under it. Although the jurisdiction of the Civil Court is not expressly barred, the provisions of the

Statute explicitly show that, subject to the extraordinary power of the High Court and the Supreme Court such jurisdiction is impliedly barred,

except to the limited extent specially provided by the statute. (Para 6)

xx xx xx

What is stated in the second proviso to Section 10(1) is the sole circumstances in which the Civil Court is invested in with jurisdiction in the matters

of eviction. But the jurisdiction cannot be invoked otherwise than as stipulated in the second proviso. This means that the condition precedent to

the exercise of jurisdiction by a Civil Court is that the tenant should have denied the title of the landlord or claimed a right of permanent tenancy

and the Controller should, or such denial or claim by the tenant, reach a decision whether such denial or claim is bona fide. Upon such decision, the

Controller must record finding to that effect. In that event, the landlord is entitled to sue for evicting of the tenant in a Civil Court, where these

conditions are satisfied, the Civil Court will have jurisdiction to pass the decree for eviction on any of the ground mentioned in section 10 or

Sections 14 to 16, notwithstanding that the Court has found that the tenant''s denial of the landlord''s title does not involve forfeiture of the lease, or

his claim of right of permanent tenancy is unfounded. Except to this limited extent, the jurisdiction of the Civil Court in matters of eviction of a

tenant is completely barred and the jurisdiction in such matters is vested in the tribunals set up under the statute. (Para 8)

40. In this case, there was no necessity for the Civil Court to decide whether denial of title is bona fide. The civil Court is only adjudicating the title

of the property, and not bona fide of the defence. If the argument of learned counsel for the appellant is accepted that since the Civil Court has

entered a finding regarding bona fide of denial of title, it follows that a special procedure is to be adopted in this case against the provisions of the

Rent Control Act.

41. Now let us consider the scope of the judgment in C.M.A. No. 238 of 1982. This Court only directed to consider the question whether the

appellant will be entitled to claim the benefits of a lessee in view of the setting up of title of the property in favour of the Trustees. I do not think that

the direction in C.M.A. is in any way advantageous to the appellant as contended before me. The Court only directed whether the defendant is

entitled to claim the benefits of a lease. Section III(g) of the Transfer of Property Act provided for forfeiture of a lease in case the lessee set up title

in himself or sets up title in favour of a third person or acts against the terms of the contract. An option is also given to the lessor, whether he

exercises the right of forfeiture. But if the building is within the area of the Rent Control Act, in spite of the forfeiture clause, the building cannot be

recovered except under the provisions of that Act. Even if the lessor exercised the option of forfeiture, the building could be recovered only under

the provisions of the Rent Control Act. The said legal position is settled in view of the decisions reported in V. Dhanapal Chettiar Vs. Yesodai

Ammal, and K.K. Krishnan Vs. M.K. Vijaya Ragavan, . It is also worthwhile to take the assistance of Mulla of ''The Transfer of Property Act''-

8th Edn. At page 929, the learned Author has said thus:

Even if the lease is determined by the forfeiture under the Transfer of Property Act, the tenant under the Rent Law continued to be a tenant that is

to say, there is no forfeiture, in the eyes of law. The tenanl becomes liable to be evicted under the State Rent Act and not otherwise.

So, merely because the tenant denies title or sets up title in a third person, his status, as a tenant under the Rent Control Act gives him the statutory

protection from being evicted. Therefore, when we consider the question of entitlement of the defendant as a lessee, it has only to be held that in

spite of denial of title, defendant can continue to be in possession unless he is evicted under the provisions of the Rent Control Act. In view of the

reason given above, I do not find any merits in the contentions of learned counsel for the appellant that merely because the defendant denied title of

the landlord, he is entitled to get possession of the property in this proceeding. Question No. 2 is also, therefore, found against the appellant.

42. In the result, I hold that the second appeal is without merit and the same is, therefore, dismissed with costs.

43. C.R.P. No. 1563 of 1995. I have already said that the decision in Second Appeal will be sufficient to dispose of the Revision under the Rent

Control Act. By filing an application u/s 8(5) of the Rent Control Act, tenant is admitting the title of the landlord arid he has been directed to

deposit rent in Court.

44. Both the Courts below have found that there are justifying reasons for the tenant to invoke Sections 8(5) of the Rent Control Act, seeking

permission of the Court to deposit the rent. No interference is called for in the Revision and the same is, therefore, dismissed. There will be no

order as to costs in the Revision.