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**AIR 1991 Bom 85**

**Bombay High Court**

**Case No:** First Appeal No. 553 of 1985

Smt. Ramuben Bhimji  
and Others

APPELLANT

Vs

Padmabai and Others

RESPONDENT

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**Date of Decision:** Feb. 20, 1990

**Acts Referred:**

Easements Act, 1882 â€” Section 52, 56, 60#Transfer of Property Act, 1882 â€” Section 105, 108

**Citation:** AIR 1991 Bom 85

**Hon'ble Judges:** Ashok Agarwal, J

**Bench:** Single Bench

**Advocate:** G.K. Vora, for the Appellant; C.R. Menon, for the Respondent

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### **Judgement**

1. Whether the Agreement of 1st December 1962 created a licence or a lease is a short question that arises for determination in the present

Appeal.

2. The learned Judge of the trial Court by his impugned judgment and decree was pleased to hold that the transaction between the parties was one

of a lease and the defendants were protected by the provisions of the Bombay Rent Act. Consequently, the suit of the appellants/plaintiffs for

possession was dismissed. Being aggrieved by the said decree, the plaintiffs have preferred the present Appeal.

3. An Agreement dated 1st December 1962 was entered into between one Bhimji Karson, the husband of the first plaintiff and the father of the

plaintiffs Nos. 2 to 5 on the one hand and one Damodar Govind, the husband of the defendant No. 1(a), where-under the latter was granted leave

and licence to occupy a portion of a larger plot viz. 18 ft. x 50 ft. in the premises situate on S. V. Road, Goregaon (West), Bombay-400 062. A

Copy of the Agreement is Exhibit C to the Plaint. The licence is for a period of eleven months. An amount of Rs. 30/- per fortnight was made

payable by way of licence fee.

4. The said Bhimji Karson died in the year 1968 and his heirs filed Ejectment Application No. 495/E of 1970 for possession u/s 41 of the

Presidency Small Cause Courts Act. The same, was withdrawn on 20th December 1972 with liberty to file a substantive Suit on the same cause of

action. After the withdrawal of that suit, the present suit was filed. The said Bhimji Karson had also filed Regular Suit No. 3635/7580 of 1970 for

recovering arrears of compensation. On the 14th of March 1978 a consent decree on admission was passed against Damodar Govind. The

present Suit was initially filed against Damodar Govind who died during pendency of the suit. The plaintiffs thereafter brought the present

respondents as his heirs and legal representatives.

5. The Written Statement in the present Suit was filed initially by Damodar Govind. In short, it was his case that though the Agreement of Leave &

Licence dated 1st December 1962 was executed, it was for all practical purposes a lease. According to him he was put in exclusive possession on

payment of rent of Rs. 30/- per month. He claimed protection under the Bombay Rent Act and prayed for dismissal of the suit.

6. The present defendants adopted the contentions raised by Damodar Govind in his Written Statement by filing their own independent Written

Statement. They reiterated the stand of Damodar Govind that the Agreement dated 1st December 1962 though apparently was one of leave and

licence was for all purposes and intent a Deed of Lease. They also claimed protection of the Bombay Rent Act and prayed for dismissal of the suit.

7. At the trial, the plaintiff No. 2 examined herself as P.W.1. In rebuttal the defendant No. 1 examined herself as D.W.1 and one Sadanand Nair

as D.W.2, On the appraisal of the aforesaid evidence, the learned Judge of the Trial Court was pleased to hold that Damodar Govind had been

inducted in the Suit premises as a tenant. Consequently, the defendants were entitled to the protection under the Rent Act. Consistent with these

findings the suit of the plaintiffs was dismissed with costs. The plaintiffs were allowed to withdraw the amounts deposited by the defendants in

Court at the rate of Rs. 30/- per month. Taking exception to this decree, the plaintiffs have preferred the present Appeal.

8. Shri Vora, the learned Advocate appearing on behalf of the plaintiff, strenuously submitted that the learned Judge of the Trial Court erred in

holding that the Agreement dated 1st December 1962 was a document of lease. He erred in holding that Damodar Govind had been put in

exclusive possession on payment of monthly rent of Rs. 30/-. He criticised the evidence led on behalf of the defendants and submitted that no

reliance could be placed on that evidence for holding that a lease was created in favour of Damodar Govind. According to him, the document of

1st December 1962 was clear and unambiguous and the parties had executed the same after knowing full well the contents thereof. What was

created in favour of Damodar Govind was a mere leave and licence. On termination of that licence the plaintiffs were entitled to a decree for

possession.

9. Shri Menon, the learned Advocate appearing on behalf of the defendant on the other hand adopted the reasons that had commended

themselves to the learned Judge of the trial Court and prayed for dismissal of the Appeal.

10. The plaintiff No. 2 is the son of Bhimaji Karson who had inducted Damodar Govind in the suit premises. He deposed that his father Bhimaji

had given the suit land to the defendant No. 1 under an agreement of leave and licence dated 1st December 1962. The suit land was given to him

for the purpose of carrying on the business of motor repairing. He further deposed that he had permitted the deceased Damodar to keep his tools

in the temporary shed bearing Municipal No. 265/A, which stood on a part of the suit land. He was charging him Rs. 30/- per fortnight as

compensation. Damodar, in breach of the Agreement had converted the kaccha structure into a pucca one. He also stated that Damodar was in

arrears of compensation since 1st September 1970.

11. In cross-examination he stated that he was the eldest son of his father. In 1962 he was 20 years of age and he was then studying in college. In

1962 he and his father used to look after their property. His father and Damodar and he himself had gone to an advocate by name Mr. Kutmutia at

Goregaon for drafting the agreement of leave and licence. He denied that Damodar was not knowing English language and he denied that the suit

land was given to Damodar as the tenant. He denied that the copy of the agreement which was produced in Court at Exhibit A was not the correct

copy of the agreement which Damodar had signed. He admitted that his father had not taken any action against Damodar from 1962 to 1969.

After the death of his father the witness took legal steps against Damodar. He denied that the widow of Damodar was carrying on business in the

suit premises. According to him, somebody else was carrying on business in the suit premises, he denied that Damodar was the tenant of his father

in respect of the suit premises and he used to pay rent to his father.

12. In my view, the aforesaid evidence is consistent and trustworthy. It is common ground that both Bhimaji Karson as also Damodar Govind who

were parties to the agreement dated 1st December 1962 are no more. A perusal of the agreement dated 1st December 1962 would show that the

stamp paper was purchased by one R. J. Kutmutia. The same lends support to the version of the plaintiff No. 2 that Bhimaji Karson, Damodar

Govind and the plaintiff No. 2 had gone to the said Advocate Kutmutia for the purpose of drafting and executing the agreement. It is true that what

was filed at Exhibit A was not the original document but a copy thereof and this was exhibited along with various other documents during the

course of recording of the evidence of this plaintiff No. 2. Since it was exhibited, without raising any objection the same can safely be relied upon

as a true copy of the original. The said document clearly recites that what was granted was a leave and licence to use the suit plot of land

admeasuring 18 ft. X 50 ft. along with the shed bearing No. 265. It recites that the suit plot would be used only for the purpose of repairs to motor

vehicles and the licensee was to keep the plot completely open. The said temporary kutcha structure was permitted to be used by the licensee out

of grace by the licensor till the same was demolished by the licensor. It was to be used for keeping the licensee"s articles therein. The licensee was

prohibited from construction or erecting and sort of structure on the open portion of the land permitted to him to be used. The licensee agreed to

shift to any other portion of the plot whenever the licensor desired and called upon him to do so by giving him another portion of the plot of the

same measurement. An amount of Rs. 30/- per fortnight was made payable by the licensee to the licensor. The licensee agreed that the grant of the

licence did not in any way create any tenancy right or intended to create any tenancy right and that the said grant is personal and the possession of

the plot of the temporary structure was of and with the licensor. The licensee was prohibited from permitting anybody else to use and occupy the

said portion of the land in any capacity and the suit plot was to be used for carrying on the work of repairing motor vehicles. The licence was for a

period of eleven months from the 1st of December 1962 and on expiration of the licence either by efflux of time or by earlier determination the

licensor would be entitled to enter without going to Court. A notice of 24 hours was provided for earlier determination or revoke ion of the licence.

The licensor was entitled to ask the licensee to call upon any persons coming to the licensee on the plot to go out and leave the same, if the licensor

thought them as undesirable persons and the licensor was not bound to give any reasons for the same and the licensee agreed that he will

immediately ask, when so called upon, the said person to go out of the suit plot and not to come again. It was agreed that if the servants or agents

of the licensee are found by the licensor undesirable or their activities are dangerous and not desirable, the licensor was entitled to call upon the

licensee to dispense with their services immediately, It was also agreed that the licensor, his agents or servants are entitled at any time to enter the

premises for inspection and/or for any other purpose for the management of the property without permission of the licensee.

13. In my judgment, the aforesaid Clauses found in the agreement are clear and are not capable of being construed as a lease. The evidence of the

plaintiff No. 2 is consistent. No material has been elucidated in the cross-examination so as to lead to an inference that what was intended to be

granted was a lease and not a leave and licence. The mere fact that the deceased Bhimji Karson had not taken any action against Damodar Govind

during his life time for the purpose of securing possession would not, without anything more, convert the licence into that of a lease.

14. As against the above evidence, we have the evidence of defendant No. 1(a), widow of the deceased Damodar Govind. In my judgment, her

evidence is of no consequence as she was nowhere in the picture when the suit agreement dated 1st December 1962 was executed. She was

married to Damodar Govind much later in the year 1970, She does not claim any personal knowledge as she came to Bombay from Kerala after

her marriage. The only source of her information was the one furnished by her husband. The information which she has deposed to would, therefore,

be hear-say and inadmissible. What is surprising is that she asserted that there was no agreement between her husband and Bhimji. In other words

she sought to assert that the agreement dated 1st December 1962 had not been executed by her late husband. This assertion cannot be accepted

even for a moment in view of her admission that she had read the written statement filed by her husband and she also knew the contents of the

additional written statement filed on behalf of the other defendants on 19th July 1978. She could not explain the statement made by her husband in

paragraphs of the written statement dated 21st August 1973, ""and say and repeat that the agreement of leave and licence of 1962 was only an

eye-wash and fake one, but in effect defendants were and are the tenants of the suit premises."" She admitted that she had filed her written

statement after it was interpreted to her by her advocate and that she had understood the contents of her husband"s written statement before she

adopted the same. Despite the aforesaid admission she continued to feign ignorance regarding the agreement of leave and licence between her

husband and the deceased Bhimji. Having considered her evidence, I find that the same does not inspire confidence and is liable to be rejected.

15. The defendants have examined D. W. 2 Sadanand Nair. He claims to have been present when the negotiations had taken place between

Bhimji Karson and Damodar Govind. According to him, Bhimji told Damodar that the vacant piece of land ad- measuring 30 ft. x 18 ft. would be

given for his business and it was decided that Damodar should pay Rs. 30/- by way of rent to Bhimji. Bhimji had told him at that time that there

was no necessity of making any agreement. Like defendant No. 1(a) Padmabai, this witness has also sought to assert that there was no written

agreement executed between Bhimji Karson and Damodar Govind. In my judgment, this is a belated attempt on the part of the defendants to get

over the recitals contained in the agreement of the 1st of December 1962. In cross-examination he admitted that he could not give the area of the

open piece of land out of which Damodar was given a part. He could not say where the shed was. According to him, Damodar had constructed a

shed in 1962 on the piece of land given to him. He was unable to show in the plan (Exhibit B) as to where Damodar constructed the shed because

he did not understand the map. The assertion by witness that Damodar had constructed the shed on the suit plot in 1962 cannot be believed as the

same runs counter to the averments found in the agreement. The agreement provides that there was a temporary kutchha structure and the same

was permitted to be used by Damodar for the purpose of keeping his tools. The endeavour on the part of the witness when he deposed that it was

Damodar who had constructed the shed in 1962 was an attempt to prove that what was given to Damodar was a lease and not a mere leave and

licence. In my view, this witness has been set up only to bolster the case of the defendants. He tried to assert that he did not have any talks with

defendant No. 1 (a) Padmavati Damodar about this case any time. This is contrary to the admission of defendant No. 1 (a) Padmavati. She

admitted that she had talks with Sadanand about the suit. Sadanand stated that on the Wednesday prior to the recording of his evidence, defendant

No. 1(a) had come to his house and requested him to give evidence in the Suit. She told him that her husband had told her that he was present at

the time when the suit plot was given to her husband. He asserted that it was on the 30th November 1962 when he along with Damodar had met

Bhimji. He did not maintain any diary but had given the date from his memory. He did not remember what day of the week it was. He did not

remember when he joined service. He did not remember the date on which Damodar died. He did not know the date when he got married and he

did not remember the date on which Bhimji Karson died and he also did not know his birth date.

16. In my view, no reliance can be placed on the evidence either of defendant No. 1 (a) Padmavati or D. W. 2 Sadanand Nair. I find the evidence

led on behalf of the plaintiffs as reliable and trustworthy. I, therefore, hold that what was given to Damodar Govind was not a lease but a mere

leave and licence as evidenced by the agreement of leave and licence (Exhibit A) dated 1st December 1962.

17. Shri Mcnon appearing on behalf of the defendants placed reliance on the case of Associated Hotels of India Ltd. Vs. R.N. Kapoor, , wherein

it was observed as under (at pp. 1269-70) :--

There is a marked distinction between a lease and a licence. S. 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 S.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 S. 52 of the Indian Easements Act defines a licence thus:

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the 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, 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 LJ 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 ?"

The following propositions may, therefore, be taken as well-established : (1) To ascertain whether a document creates a licence or lease, the

substance of the document must be preferred to the form; (2) the real test is the intention of the parties -- whether they intended to create a lease

or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which

the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property,

"prima facie", he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. Judged by the

said tests, it is not possible to hold that the document is one of licence. Certainly it does not confer only a bare personal privilege on the respondent

to make use of the rooms. It puts him in exclusive possession of them, untrammelled by the control and free from, the directions of the appellants.

The covenants are those that are usually found or expected to be included in a lease deed. The right of the respondent to transfer his interest under

the document, although with the consent of the appellants, is destructive of any theory of licence. The solitary circumstance that the rooms let out in

the present case or situated in a building where in a hotel is run cannot make any difference in the character of the holding. The intention of the

parties is clearly manifest, and the clever phraseology used or the ingenuity of the document-writer hardly conceals the real intent. I, therefore, hold

that under the document there was transfer of a right to enjoy the two rooms, and, therefore it created a tenancy in favour of the respondent.

18. Shri Menon also placed reliance on the case of *Aninha D'Costa Vs. Parvatibai M. Thakur*, wherein it is held :

The underlying assumption in the case of a licence is that the owner continues to be in possession and control of the property. But this is not all.

The attributes of a licence can be seen from some of the provisions in the Easements Act, such as, Sections 56 and 60. In the case of a licence,

there is something less than a right in the licensee to enjoy the property; it cannot be exercised by servants and agents, it is terminable and a

transferee of the property is not as such bound by the licence. In the case of a lease, on the other hand, there is a transfer of a right to enjoy the

property, that is, the lessee is entitled to enjoy the property. The test of exclusive possession must be regarded as a very important test of tenancy.

Difficulties were felt in the application of this test by reason of the stringent provisions of the Rent Act and in order to meet these, the test has since

been modified. Although a person who is let into exclusive possession is *prima facie* to be considered a tenant, nevertheless he will not be held to

be so if the circumstances negative any intention to create a tenancy. Words alone are not sufficient. A tenancy cannot be turned into a licence

merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be

granted a personal privilege with no interest in the land, he will be held only to be a licensee.

19. In my judgment, the aforesaid precedents cannot come to the aid of the defendants for the simple reason that as I have already pointed out

hereinabove that the evidence led on behalf of the defendant consist of evidence which is either hearsay or wholly unreliable. That evidence cannot

lead to an inference that what was intended between the parties was not a leave and licence but a lease. I have found that the evidence led on

behalf of the plaintiffs is cogent, trustworthy and consistent with the Agreement dated 1st December 1962. Hence, I have no hesitation in holding

that what was intended and was created was a licence and not a lease. On revocation of the licence the occupation of the defendants would be

unlawful. The plaintiffs would, therefore be entitled to a decree for possession.

20. Under the said licence, an amount of Rs. 30/- per fortnight was payable. The defendants, during the pendency of the suit, had deposited

amounts only at the rate of Rs. 30 per month. Since I have held that the agreement of leave and licence was executed and agreement between the

parties was in terms of the recitals contained in the agreement, the defendants would be liable to pay at the rate contemplated in the agreement i.e.

at the rate of Rs. 30/- per fortnight and not at the rate of Rs. 30/- per month. Since the agreement of leave and licence has been revoked it follows

that the plaintiffs will be entitled to a decree for possession.

21. In the result, the impugned judgment and decree of the trial Court is set aside and the Suit of the plaintiffs is decreed in terms of prayer Clauses

(a), (b), (g) and (h) with the modification that the future mesne profits will be at the rate of Rs. 60/- per month in place of Rs. 75/- per month. The

defendants will be entitled to the credit of the amount deposited in the trial Court towards the decree. The plaintiffs will be emitted to the costs both

of the suit as also the Appeal.

Shri Menon, the learned Advocate appearing on behalf of the defendants prays for stay of my decree, for a period of eight weeks to enable the

defendants to consider preferring of an Appeal. Shri Vora appearing on behalf of the plaintiffs has no objection but submits that the same should be

on condition that the defendants pay the full arrears up to date within a period of six weeks. On deposit of the aforesaid amount, my decree not to

be executed for a period of eight weeks from today.

22. Order accordingly.