

## Arun Kumar Kayal Vs Sabita Das Gupta

**Court:** Calcutta High Court

**Date of Decision:** April 25, 2002

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Section 100

Easements Act, 1882 – Section 52

Transfer of Property Act, 1882 – Section 105, 107, 108, 108(o)

**Citation:** 106 CWN 955

**Hon'ble Judges:** Narayan Chandra Sil, J

**Bench:** Single Bench

**Advocate:** Sudhis Dasgupta, Jiban Ratan Chatterjee and Badal Saha, for the Appellant; Asimes Goswami, Rajyasri Das and Debasish Roy, for the Respondent

### Judgement

N.C. Sil, J.

This appeal is directed against the judgment and decree dated 18.7.1993 and 19.7.1993 respectively passed by Sri A.K.

Sadhu, learned Additional District Judge, 8th Court, Alipore. 24 Parganas (South) in Title Appeal No. 119 of 1992 affirming the Judgment and

decree dated 29.9.1991 and 18.11.1991 passed by Sri S. Mukherjee. learned Assistant District Judge, 2nd Court, Alipore, 24 Parganas (South)

in connection with Title Suit No. 65 of 1985. It appears from the record of the lower courts that the suit was for ejectment on revocation of licence

and for mesne profit on the ground of default in payment of licence fees and reasonable requirements. The learned trial Judge decreed the suit

which was affirmed by the learned lower appellate court.

2. The substantial questions of law formulated for the determination in the present appeal is as below:

Whether the findings of the courts below that the defendant-appellant is a licensee and not the tenant under the West Bengal Premises Tenancy Act

is rather perverse.

3. Mr. Sudhis Dasgupta, learned Advocate appearing with Mr. J.R. Chatterjee, learned Advocate for the defendant/appellant has pointed out to

me that the tenancy of the defendant was created by a deed. Mr. Dasgupta has drawn my attention to exhibit (1) and the language used therein and

tries to impress upon me that from language used in Ext. 1 it appears that as if it is a case of tenancy. It is pointed out by him that the exclusive

physical possession of the suit premises was parted in favour of the defendant and that is one of the tests to determine the question whether it is a

case of licence or tenancy. From the conditions imposed in the instrument (Ext. 1) Mr. Dasgupta submits, the provisions of Section 108(o) of the

Transfer of Property Act are apparent and from part 14 of the said document (Ext. 1) the provisions of clause (m) of Section 108 of the Transfer

of Property Act are coming to the surface. It is further argued by Mr. Dasgupta that paragraph 16 of the said document contains the provisions of

ouster of tenancy right and there is also a renewal clause of the tenancy contained in paragraph 22. Mr. Dasgupta has drawn my attention to the

provisions of Section 105 of the Transfer of Property Act which contains the definition of the term "lease". Mr. Dasgupta has cited a number of

case laws which I shall discuss at the appropriate point of time.

4. Mr. Ashimesh Goswami, learned Advocate appearing along with Mr. D. Roy, learned Advocate and Miss Rajyasri Das, learned Advocate for

the respondent argues before me that there is absolutely no substantial question of law for the determination in the present appeal and the

concurrent findings of the courts below are, in fact, on facts which cannot be interfered with in the present Second appeal. Mr. Goswami argues

before me that the instant document (Ext. 1) is not a registered one and for that purpose he has taken me through the provisions of Section 107 of

the Transfer of Property Act and tries to impress upon me that in order to create a lease by an instrument, it is required u/s 107 of the Transfer of

Property Act that such deed must be a registered instrument. And that not being so. Mr. Goswami goes on arguing, the deed in question, (Ext. 1)

is of a licence and not of lease. Mr. Goswami has then pointed out that here the defendant was introduced by the sister's husband of the plaintiff.

Mr. Goswami has drawn my attention to the paragraph 3 of Ext. 1 and submits that the intention of the parties has been disclosed there. It is also

argued by him that in the instant case the control of the suit premises was retained by the guarantor/ plaintiff and as such it cannot be the case of

lease. Mr. Goswami has also cited a number of case laws which will come in my discussion later on.

5. In reply Mr. Dasgupta has taken me through (Ext. 3) which is the power of attorney and paragraph 14 of that document speaks about letting out

of the suit premises in order to create tenancy by way of realisation of rent. Mr. Dasgupta has also referred to exhibit (f), a letter of one Mr. Sen

addressed to Mr. Kayal, the defendant where the term "rent", was used at the point of initiation of the tenancy. Mr. Dasgupta has also drawn my

attention to Exhibit (C) and (C/1) dated 5.6.1980 and 28.6.1980 respectively and tries to impress upon me and those two documents came into

existence before the agreement of tenancy was executed. Mr. Dasgupta has also referred to Exhibit (G) and the terms used there as of "one

month's rent as security" and tries to impress upon me that it is a case of tenancy simpliciter. Mr. Dasgupta has then argued before me that the

Exhibit (1) was admittedly not registered and in such case at the worst the said document may not be admissible but even then the oral agreement

for creation of the tenancy is quite permissible under the law.

6. The agreement in question is Exhibit 1. It is an admitted document. In order to appraise the present case I feel it necessary to quote the terms

and conditions embodied in the said agreement which are as below:

1. The Licensor doth hereby grant and the licensee doth hereby accept the licence to use and occupy the above-mentioned flat together with all

fixtures and fittings, as set out in Schedule "A" hereunder for his residential purpose only for a period of three years with effect from the first day of

June, 1980.

2. As consideration of the licence hereby granted to use and occupy the said flat, the licensee, having regard to the facilities at and amenities

available in the said accommodation and also having regard to the suitability of the said locality and the accommodation so far as he is concerned,

doth hereby agree and covenant that he shall, during the continuance of the Agreement or while the licensee shall remain in use and occupation of

the said flat, pay the licensor a sum of Rs. 2,000/- (Rupees two thousand only) per month and a pro-rata amount for any broken period or less

than a month without deduction whatsoever as licence fee or compensation on or before the 5th day of the succeeding month and if the said day is

a holiday, on the next succeeding working day, the first of such payment to be made on the 5th day of June, 1980.

3. The licensee shall keep an amount of Rs. 600/- (Rupees six hundred) in deposit with the Licensor in respect of the electric meters and electric

bills that may remain unpaid due to the Calcutta Electric Supply Corpn., Ltd., not submitting the bills in time and for any bill or bills being lost in

post and the Licensor shall reimburse the said amount of Rs. 600/- after effecting the necessary adjustment with unpaid electric bills (if any), after

the expiry of three calendar months from the date of termination of the licence and on production of receipts of the electric bills paid.

4. The Licensee shall keep a further amount of Rs. 2,000/- (Rupees two thousand only) in deposits with the Licensor as Security Deposit in

respect of any damage to the structure of the said flat and/or any breakage or damage to the fittings and fixtures therein save except normal wear

tear and the Licensee shall refund the said amount of Rs. 2,000/- (Rupees two thousand) only after effecting necessary repairs to the damages

and/or replacement of the breakages, within a period of three calendar months from the date of termination of the licence.

5. The Licensee shall not remove any fixtures or fittings which are now existing and attached to the said accommodation.

6. The Licensee shall not make any structural alterations or additions in or to the said accommodation or shall not make any new construction in

any portion of the said accommodation without the previous consent, in writing, of the Licensor.

7. The licensee shall use the said accommodation for his own residential purpose and for that of the members of his family only and that as a

person of ordinary prudence would use it if it were his own and for no other purpose.

8. The licensee shall not transfer, assign or part with possession of the said accommodation or any part thereof, without the consent in writing of

the Licensor.

9. The Licensee shall not do or permit to be done any act which will or may become nuisance or cause annoyance to other residents and

neighbours including the licensor, nor shall do or permit to be done any antisocial, illegal or immoral act in the said accommodation.

10. The licensee shall make all necessary maintenance and internal repairs in respect of the said accommodation (including the supplies therein,

such as electricity, water, sanitation etc.) during the continuance of the licence at his cost and shall keep the said accommodation in good condition.

But the Licensor will pay the maintenance charges payable to the housing board in respect of the said flat and will ensure that no inconvenience is

caused to the licensee due to non-payment of such maintenance charges.

11. The Licensee shall use the kitchen only for the purpose of cooking and shall not use any other room or space for the same and shall not use for

cooking any fuel other than domestic cooking gas, electricity or Kerosene oil, preferably gas and electricity only.

12. The licensee shall not store in the said accommodation any goods of dangerous inflammable or combustible nature (other than domestic

cooking gas or Kerosene oil for cooking purpose only) or do or permit to be done therein or thereto anything that may in any way cause the said

accommodation to deteriorate in value.

13. The Licensee shall allow inspection of the said accommodation by the licensor or her men, agents or servants as and when inspection may be

sought for, on prior notice being given by the licensor for the same.

14. The Licensor undertakes to pay the Municipal Tax both owner's and occupier's share - now payable or which may hereafter be assessed; but

in case the Municipal Tax be increased or any other tax or levy be imposed by the Govt. or the Municipal Corpn. or any other public body, the

licensee shall pay the proportionate increase.

15. For due performance of the terms and conditions of this agreement, the Licensee has on or before the execution of these presents deposited

with the licensor one month's license fee being Rs. 2.000/- and the same shall be adjusted towards the licensee fee for the last month or refund as

the case may be.

16. It is hereby understood and agreed between the parties that the licence hereby granted is personal to the licensee and that nothing in these

presents shall be construed to confer any legal right to tenancy upon the licensee or any interest of whatsoever nature in the said flat and that the

licensee can enjoy the use of the flat subject to the terms and conditions of the Agreement.

17. In the event of any breach of the terms and conditions of this agreement by the licensee, the Licensor shall be entitled to revoke, and/or cancel

the licence hereby granted and thereupon the licensee and members of his family shall remove themselves from the said flat with all their goods and

belongings.

18. The agreement may be terminated by the licensee by giving one month's prior notice in writing, by registered post. However the licensor will

give to the licensee six month's notice to terminate the agreement and vacate the premises within six months of the expiry of the license period.

19. The licensor and the licensee shall bear their respective costs of preparation of this agreement.

20. This agreement shall be executed in duplicate. The licensor shall retain the original and the licensee the duplicate and each party shall bear the

stamp duty payable in respect of its copy of the agreement.

21. Any communication addressed to the licensee at his said accommodation shall be sufficient service thereof. Any communication addressed to

the licensor at his last known place of above shall be sufficient service thereof.

22. This agreement may be renewed by mutual discussion between the licensor and the licensee for a period not exceeding three years, on terms

and conditions to be mutually settled between two parties at the time.

23. The licensee shall be responsible for and pay the electric bills and other associated charges (if any) raised by the Calcutta Electric Supply

Corporation Ltd. (which expression shall unless excluded by or repugnant to the context, include its administrators, representatives and assigns) in

respect of Electric Meters.

24. The Licensor shall ensure that all charges for electricity consumed in respect of the said flat prior to the commencement of the licence hereby

granted are paid. If these charges are not paid and the Licensee is constrained to pay them with a view to either prevent disconnection of supply of

electricity or otherwise, the Licensor shall reimburse the licensee the said charges together with cost, if any, and in the event of failure on the part of

the licensor to do so the licensee shall, without prejudice to its other rights, be entitled to deduct the same from the licence fee payable in respect of

the said flat or from any other sums payable by the licensee to the licensor.

25. The Licensor shall pay to the licensee the cost of light shade and one grill in outer verandah.

7. Now, in the background of the above quoted agreement I shall place the case laws referred to by the learned advocates for both the parties.

Thus, Mr. Sudhis Dasgupta has referred to a number Of decisions which have dealt with the principles for determination of a question as to

whether a given transaction is a lease or licence. Those are the decisions made in the case of Associated Hotels of India Ltd. Vs. R.N. Kapoor, ,

Capt. B.V. D'Souza Vs. Antonio Fausto Fernandes, , Delta International Limited vs. Shyam Sundar Ganeriwalla and Anr. ( 1999, 2 CHN 16)

and Street vs. Mountford (1985, 2 AER 289). The guidelines and the principles to determine whether a transaction or agreement between the

parties is a lease or licence in nature have been discussed in those cases.

8. I shall first take up the principles decided in the case of Associated Hotels of India Limited (supra). In the said case the agreement in question

between the parties was as follows:

The following are its terms and conditions:

1. In pursuance of the said agreement, the licensor hereby grants to the Licensee, leave and license to use and occupy the said premises to carry

on their business of hair dressers from 1.5.1949 to 30.4.1950.

2. That the charges of such use and occupation shall be Rs. 9,600 a year payable in four quarterly installments i.e. 1st immediately on signing the

contract, 2nd on 1.8.1949, 3rd on 1.11.1949 and 4th on 1.2.1950, whether the licensee occupy the premises and carry on the business or not.

3. That in the first instance the licensor shall allow to the licensee leave and license to use and occupy the said premises for a period of one year

only.

4. That the licensee shall have the opportunity of further extension of the period of license after the expiry of one year at the option of the licensor

on the same terms and conditions but in any case the licensee shall intimate their desire for an extension at least three months prior for an extension

at least three months prior to the expiry of one year from the date of the execution of this Deed.

5. The licensee shall use the premises as at present fitted and keep the same in good condition. The licensor shall not supply any fitting or fixture

more than what exists in the premises for the present. The licensee will have their power and light meters and will pay for electric charges.

6. That the licensee shall not make any alterations in the premises without the prior consent in writing from the licensor.

7. That should the licensee fail to pay the agreed fee to the licensor from the date and in the manner as agreed, the licensor shall be at liberty to

terminate this Deed without any notice and without payment of any compensation and shall be entitled to charge interest at 12 per cent per annum

on the amount remaining unpaid.

8. That in case the licensee for reasons beyond their control are forced to close their business in Delhi, the licensor agrees that during the remaining

period the license shall be transferred to any person with the consent and approval of the licensor subject to charges so obtained not exceeding the

monthly charge of Rs. 800.

9. In the background of such drafting of the agreement the Hon"ble Apex Court is pleased to observe that the document no doubt uses the

phraseology appropriate to a licence. But, it is the substance of the agreement that matters and not the form, otherwise clever drafting can

camouflage the real intention of the parties. Thus, the apex court after having taken the said agreement between the parties into consideration

observed that under the document the respondent was given possession of the two rooms for carrying on his private business on condition that he

should pay the fixed amount to the appellants irrespective of the fact whether he carried on his business in the premises or not. The dissenting

Judge (Subba Rao, J.) of the Hon"ble Apex Court then after having taken the provisions of Section 52 of the Indian Easements Act into

consideration observed that under the said 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. It was observed by the dissenting Judge that 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. The dissenting Judge of the

Hon"ble Apex Court also observed that 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 if reflected in Errington vs. Errington, 1952-1 AER 149 wherein Lord Denning reviewing the case law on the subject summarizes the result

of the discussion as follows :

The result of all those 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.

10. With the above observation the dissenting Judge of the Hon<sup>ble</sup> Apex Court after having relied on some other English cases enunciated some

propositions and I am tempted to quote the same 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.

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 wherein 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.

11. Thus in the dissenting judgement it was held that the agreement in question as quoted by me ante is one of lease and not of licence. I have

purposely discussed the dissenting judgment first only in order to appreciate the majority judgment in a perspecuous manner. It may be mentioned

here that as regards the principle of interpretation of an instrument to determine whether it is one of a lease or licence one of the majority Hon<sup>ble</sup>



Judge (S.K. Das, J.) out of three agreed with the dissenting judgment and this is actually what prompted me to discuss the dissenting judgment first.

12. It was a three Hon"ble Judges" Bench in the case of Associated Hotels of India Limited (supra) and majority judgement was passed by

Hon"ble Mr. Justice S. K. Das and Hon"ble Mr. Justice A. K. Sarkar while the dissenting judgment was passed by Hon"ble Justice K. Subba

Rao. I like to state the facts of that case in a very short campus as mentioned in His dissenting judgment passed by Hon"ble Justice K. Subba Rao.

The appellants. Associated Hotels of India Limited are the proprietors of Hotel Imperial, New Delhi. The respondent R. N. Kapoor was in

occupation of two rooms described as ladies" and gentlemen"s cloak rooms and carried on his business as a hair dresser. He secured possession

of the said rooms under a deed dated 1.5.1949, executed by him and the appellants. He got into possession of the said rooms, agreeing to pay a

sum of Rs. 9,600/- a year i.e. Rs. 800 per month, but later on, by mutual consent, the annual payment was reduced to Rs. 8,400/- i.e. Rs. 700/-

per month. On 26.9.1950, the respondent made an application to the Rent Controller, Delhi, alleging that the rent demanded was excessive and

therefore a fair rent might be fixed under Delhi and Ajmer-Merwara Rent Control Act, 1947. The appellants appeared before the Rent Controller

and contended that the act had no application to the premises in question as they were premises in a hotel exempted u/s 2 of the Act from its

operation and also on the ground that under the aforesaid document the respondent was not a tenant but only a licensee. The Rent Controller held

that the exemption u/s 2 of the Act related only to residential rooms in a hotel and therefore the act applied to the premises in question. On appeal

the learned District Judge, Delhi came to a contrary conclusion that the transaction between the parties was not a lease but a licence. The

respondent preferred a revision against the said order of the learned District Judge to the High Court of Punjab at Simla and the learned single

Judge of the said High Court held that the said premises were not rooms in a hotel within the meaning of Section 2 of the Act and the document

executed between the parties created a lease and not a licence. The said order of the High Court was challenged before the Hon"ble Apex Court.

13. Keeping that fact of the case in the background the majority judgment was passed and it was held that considering the intention of the parties

reflected in the agreement in question, the transaction was that of a licence and not of tenancy. I like to quote the Head Notes of the majority

judgment which are as follows:

Per S.K. Das, J. : It would be doing violence to the contest if the expression "room in a hotel" in Section 2(b) is interpreted in a strictly literal

sense. A room in a hotel must fulfil two conditions : (1) it must be part of a hotel in the physical sense and (2) its user must be connected with the

general purpose of the hotel of which it is a part. A modern hotel provides many facility is to its residents like billiard rooms, post office and

banking facilities by letting out rooms in the hotel for that purpose. A barber's shop within the hotel premises is no exception. The circumstance

that people not resident in the hotel might also be served by the hair dresser does not alter the position; it is still an amenity for the residents in the

hotel to have a hair dressing saloon within the hotel itself. Where the spaces in a cloak room in the hotel premises are let out for carrying on the

business of a hair dresser and such a business was one of the amenities which a modern hotel provides, the rooms in question are rooms in a hotel

within the meaning of Section 2(b) and the tenant is not entitled to ask for fixation of fair or standard rent for the same.

Per Sarkar, J. : There is no reason why a room in a hotel within the Act must be a room normally used for lodging.

A room in a hotel within the Act need not be a room let out to a guest in a hotel. Room in a hotel need not be intimately connected with it, by

which apparently is meant, the business of the hotel. The business of the hotel is carried on in the whole building and therefore in every part of it.

There is no reason why the Act should exempt from its protection a part which is intimately connected as it is said, and a part not so intimately

connected.

In order that a room in a hotel may be within the definition it need not be let out for the purposes of the hotel. There is nothing in the definition

about the purposes of the letting out.

A room in a hotel within the definition is any room in a building in the whole of which the business of a hotel is run. So understood, the definition

would include the spaces in the cloak rooms of the hotel. These spaces are, rooms in a hotel and excluded from the operation of the Act. The Rent

Controller has no power to fix any standard rent in respect of them.

14. On a close scrutiny of the majority judgment and the dissenting judgment passed in the case of Associated Hotels of India Limited (supra) it is

candid that the intention of the parties was gathered not only from the deed itself but also from the facts of the case and accordingly the question

whether those two rooms used as the cloak rooms for hair dresser were part of the said hotels or has got its independent standing was the

paramount consideration and according to the majority judgment those two rooms formed the part of the hotels and so the agreement in question

was one of a licence and not of a lease.

15. In the case of Capt. B.V. D'souza (supra) the ratio decided in the case of Associated Hotels of India Limited (supra) was relied on. In the said

case of Capt. B.V. D'Souza the ratio decided in the case of Shell-Mex and B. P. Limited vs. Manchester Garages Ltd. (1971, 1 AER 841) was

explained and it was held as below:

The main purpose of enacting the Rent statutes is to protect the tenant from the exploitation of the landlord, who being in the dominating position is

capable of dictating his terms at the inception of the tenancy; and the Rent Acts must receive that interpretation which may advance the object and

suppress the mischief. By adopting a different approach the Rent laws are likely to be defeated altogether. It is therefore, not possible to accept the

argument that if the parties themselves have chosen to describe the transaction as a licence, court cannot make out a different case for them.

16. It was also held in the said case of Capt B.V. D'Souza (supra) that the findings of the courts below were not those facts so as to be binding on

the High Court u/s 100 of the CPC and the case had to be decided on the nature of possession of the appellant which is dependent on a correct

interpretation of the document.

17. In the case of Delta International Limited (supra) the decision of the Division Bench of this court in the case of Shyam Sunder Ganeriwalla and

etc. Vs. Delta International Ltd. and Another, was set aside and the appeals filed before the Hon'ble Apex Court were allowed. In the case of

Delta International Limited the ratio decided in the case of Associated Hotels (P) Ltd. (supra), Errington vs. Errington (supra) and Cap. B.V.

D'souza (supra) were referred to. The facts of the case of Delta International Limited (supra) as stated in the Head notes are as below:

By an agreement dated 18.7.70, Dewar executed leave and licence agreement in favour of ESSO Standard Eastern Inc. (in short ESSO). ESSO

in its turn permitted Shyam Sunder Ganeriwalla, respondent No. 1, to run a petrol service station. In 1985, the Delta International Limited filed

Civil Suit No. 491/85 in the High Court of Calcutta for permanent injunction restraining the defendants or their agents from using any of the

fixtures, fittings and accessories lying at the suit-premises; for damages, for wrongful use and occupation of the premises at the rate of Rs. 20,000/-

p.m. from 1.5.85. i.e. the date of termination, of leave and licence and for recovery of possession of the suit-premises. The learned Single Judge

passed the decree in favour of the plaintiff by holding that the agreement in question was only a licence agreement and it was not a sub-lease. In

appeal, the said Judgement was reversed by holding that the agreement in question constitutes a lease mainly on the basis of exclusive possession.

18. From the facts and circumstances of the case the following decision was made by the Hon'ble Apex Court : (i) to find out "the intention of

parties"; keeping in mind that in cases where exclusive possession is given, the line between lease and licence is very thin. (ii) The intention of the

parties is to be gathered from the document itself. Mainly, intention is to be gathered from the meaning and the words used in the document except

where it is alleged and proved that document is a camouflage. If the terms of the document evidencing the agreement between the parties are not

clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the

parties, (iii) In the absence of a written document and when somebody is in exclusive possession with no special evidence how he got in, the

intention is to be gathered from the other evidence which may be available on record, and in such cases exclusive possession of the property would

be most relevant circumstance to arrive at the conclusion that the intention of the parties was to create a lease, (iv) If the dispute arises between the

very parties to the written instrument, the intention is to be gathered from the document read as a whole. But in cases where the landlord alleges

that the tenant has sublet the premises and where the tenant in support of his own defence sets up the plea of a mere licensee and relies upon a

deed entered into, inter se, between himself and the alleged licensee, the landlord who is not a party to the deed is not bound by what emanates

from the construction of the deed; the tenant and the sub-tenant may jointly set up the plea of a license against the landlord which is a camouflage; in

such cases, the mask is to be removed or veil is to be lifted and the true intention behind a facade of a self-serving conveniently drafted instrument

is to be gathered from all the relevant circumstances. Same would be the position where the owner of the premises and the person in need of the

premises executes a deed labelling it as a licence deed to avoid the operation of rent legislation, (v) prima facie, in absence of a sufficient title or

interest to carve out or to create a similar tenancy by the sitting tenant, in favour of a third person, the person in possession to whom the possession

is handed over cannot claim that the sub-tenancy was created in his favour; because a person having no right cannot confer any title of tenancy or

sub-tenancy. A tenant protected under statutory provisions with regard to occupation of the premises having no right to sublet or transfer the

premises, cannot confer any better title. But, this question is not required to be finally determined in this matter. (vi) Further lease or licence is a

matter of contract between the parties. Section 107 of the Transfer of Property Act inter alia provides that lease of immovable property may be

made either by registered instrument or by oral agreement accompanied by delivery of possession; if it is a registered instrument, it shall be

executed by both the lessee and the lessor. This contract between the parties is to be interpreted or construed on the well aid principles for

construction of contractual terms, viz. for the purpose of construction of contracts, the intention of the parties is the meaning of the words they have

used and there can be no intention independent of that meaning; when the terms of the contract are vague having double intendment one which is

lawful should be preferred; and the construction may be put on the instrument perfectly consistent with him doing what he had a right to do. It is

also observed in the judgment of the Apex Court that nowhere it is pleaded that the deed executed between the parties is a camouflage to evade

the rigours of the provisions of the Rent Act nor it is stated that a sham document is executed for achieving some other purpose. In the result the

Hon"ble Apex Court allowed the appeals setting aside the judgment of the Division Bench of this court.

19. In the instant case also on perusal, of the written statement I do not find anything that was challenged by the defence that the deed executed

between the parties is a camouflage to evade the rigours of the West Bengal Premises Tenancy Act nor do I find anything from the total transaction

between the parties that the plaintiff had any predominant role over the defendant at the time of execution of the deed. What it appeared from the

written statement filed by the defendant before the trial court is that the defendant was given the exclusive possession of the suit premises and that

the plaintiff was a tenant simpliciter under the West Bengal Premises Tenancy Act, 1956.

20. Mr. Goswami has also relied upon the ratio decided in the case of Delta International Limited (supra) and tries to impress upon me that the

intention of the parties is to be gathered from the deed itself. He has taken me through Head Note (C) of that judgment appearing in Delta

International Limited Vs. Shyam Sundar Ganeriwalla and Another, wherein it is stated that where contract is expressly for licence which is

executed by handing over exclusive possession of the property, there remains a very narrow distinction between licence and lease and in such case

terms of the document should be read literally without drawing any inference that the parties intended to create a landlord-tenant relationship.

21. Mr. Goswami has referred to the ratio decided in the case of H.S. Rikhy vs. New Delhi Municipal Committee in which it was, inter alia, held

that the use of the word ""rent"" in receipts passed by a Municipality to the occupiers of the shops in the market constructed by it is not conclusive of

the matter that relation of landlord and tenant is created between the Municipality and the said occupiers. The word ""rent"" may be used in the legal

sense of recompense paid by the tenant to the landlord for the exclusive possession of premises occupied by him. It may also be used in the

generic sense, without importing the legal significance of compensation for the use and occupation. "Rent" in the legal sense can only be reserved

on a demise of immovable property. Hence, the Hon'ble Apex Court held, the use of the term "rent" cannot preclude the landlord from pleading

that there was no relationship of landlord and tenant. The question must, therefore, depend upon whether or not there was a relationship of

landlord and tenant in the sense that there was a transfer of interest by the landlord in favour of the tenant.

22. Mr. Goswami has also referred to the ratio decided in the case of Suhas Yeshwant Chopde Vs. Sachhidanand D. Purekar, . In the said case it

was held that mere use of the word "rent" is not conclusive and does not convert a licence agreement into a lease. The Hon'ble Apex Court further

observed in that case that the High Court in appeal erred in dismissing the landlord's suit for possession and mesne profits after giving undue

importance to the word "rent" in the agreement and in some receipts.

23. It is true that the word "rent" appeared in some documents like Ext. "F", Ext. "G" and others but in view of the decisions as discussed above

the use of such word "rent" is not the conclusive test to determine the nature and character of an instrument.

24. Mr. Dasgupta has drawn my attention to Ext. 3 which is the power of attorney executed by the plaintiff from London in favour of Mr.

Priyabrata Sen appointing him her Attorney and in paragraph 14 of the said power of Attorney it is stated by her that Mr. Sen was authorised on

her behalf. To let out the flat allotted to me and to receive and realise such rent as my Attorney may in his absolute discretion think fit and to take

such other steps as may be necessary for the purpose of creating a tenancy of the said flat. "Mr. Dasgupta has given much stress on the words

creating of tenancy of the said flat" and tries to impress upon me that these words have a definite impact upon the agreement in question (Ext. 1).

But, unfortunately I cannot agree with the submissions made by Mr. Dasgupta in this regard, for, the question of consideration in the instant case

must be confined to the agreement executed between the power of attorney-holder and the defendant and it cannot be extended to the power of

attorney executed in favour of Mr. Sen by the plaintiff particularly in view of the fact that the plaintiff in the instant case is not coming forward to

challenge or to assert that there was any deviation of departure from the power she had given to her power of attorney-holder, Mr. Sen.

25. Now, I like to hark back on the agreement in question executed between the parties (Ext. 1) as quoted in the foregoing lines in my judgement

wherefrom it would appear that in every paragraph the words "LICENSOR" and "LICENSEE" were used and I like to make a special mention of

Clause 16 of the said agreement in order to understand the real intention of the parties and even at the cost of repetition I quote the said paragraph

as below:

It is hereby understood and agreed between the parties that the licence hereby granted is personal to the Licensee and that nothing in these

presents shall be construed to confer any legal right to tenancy upon the Licensee or any interest; of whatsoever nature in the said flat and the

licensee can enjoy the use of the flat subject to the terms and conditions of the Agreement.

26. In the instant case both the parties to the agreement are literate enough to understand the clear and perspicuous literal meaning of the

agreement. Clause 16 as quoted above is candid and perspicuous enough for the understanding of the parties that the licence granted to the

licensee was personal in nature conferring no legal right to tenancy. The Rent Acts and particularly the West Bengal Premises Tenancy Act are the

welfare statute in nature keeping the interest of the tenants in view. It is the common place experience that the landlords are put in tremendous

hardship to evict the tenants even in the case of his personal requirement for the various nitty-gritty of the tenancy laws and this prompts the tenant

to catch even a straw at the time of drafting agreement and to keep the same from any nebulous speculation to determine its nature. In the instant

case the language used in the deed is so candid that it does not require to adopt any other interpretation that its literal position. And accordingly

the ratio decided in the case of Delta International Limited (supra) which is, in fact, relied on by both the parties appears, in my considered view, to

be applicable in the instant case. Furthermore, I may recapitulate from the various judgments of the Supreme Court discussed above in the instant

case wherein it was observed that where exclusive possession is given in terms of a document, the line between the lease and licence is really water

thin. In the instant case the agreement (Ext. 1) bears all the characteristics of a document for creating a tenancy ostensibly, but the language of the

deed is so clear that it does not require, in my view, to enter into the other circumstances or post agreement conducts of the parties.