

(1974) 10 BOM CK 0011

Bombay High Court**Case No:** O.C.J. Appeal No. 30 of 1974 and Suit No. 375 of 1962

Narendra Bachubhai Dave

APPELLANT

Vs

Jethalal S. Dave

RESPONDENT

Date of Decision: Oct. 30, 1974**Acts Referred:**

- Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 - Section 12, 13, 15, 15A, 4
- Transfer of Property Act, 1882 - Section 10

Citation: (1978) 80 BOMLR 196**Hon'ble Judges:** R.M. Kantawala, C.J; Kania, J**Bench:** Division Bench**Final Decision:** Dismissed

Judgement

Kania, J.

This is an appeal from the judgment and order of Gandhi J. dismissing the Chamber Summons taken out by the appellants, in suit No. 375 of 1962 in this Court, praying that appellant No. 1 should be relieved of certain undertakings given by him under the consent decree passed in the said suit and for stay of all proceedings in execution of the said consent decree. The appeal raises some interesting questions under the newly added Section 15A and Sub-section (4A) of Section 5 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Bombay Rent Act").

2. Appellant No. 1 before us was defendant No. 2 in Suit No. 375 of 1962 and all the appellants including appellant No. 1 are the heirs and legal representatives of defendant No. 1, who has died after the disposal of the suit. It may be mentioned that the parties are related and belong to the same family. The family is certainly no stranger to litigation. Respondent No. 1 before us was original plaintiff No. 1 and respondent No. 2 was plaintiff No. 2, which is a firm consisting of some of the family

members. There was an open plot of land at Santa Cruz belonging to one Moisuddin. On August 17, 1944, by an indenture of lease, Moisuddin granted a lease of the said plot for a period of five years to one Ishwarlal Desai. Ishwarlal Desai constructed certain structures on the plot, one of them being a theatre called Roop Talkies, and carried on the business of exhibiting cinematograph films there. On October 23, 1951 there was an indenture of assignment by which the entire property was assigned to one Hariprasad Dave, a brother of respondent No. 1 and the deceased defendant No. 1. It appears that the said Hariprasad purchased these properties for the benefit of himself, defendant No. 1 and the three sons of respondent No. 1 viz. Krishnashanker, Ashwinkumar and Kishorekumar. It further appears that the lease was renewed for a period of twenty years from August 15, 1951 in favour of the said Hariprasad Dave. On February 27, 1953 a partnership firm was constituted of the five persons mentioned above viz. Hariprasad Dave, defendant No. 1 and the aforesaid three sons of respondent No. 1 and this firm was known as M/s. Roop Talkies. This firm carried on its business till March 31, 1958, when defendant No. 1 retired from the partnership. Jethalal Dave, respondent No. 1 (plaintiff No. 1), was taken as a partner in the place of defendant No. 1, On May 8, 1958 an agreement of leave and licence was entered into by which the partners of M/s. Roop Talkies viz. respondent No. 1 and his aforesaid three sons granted to defendant No. 1 leave and licence to enter the said theatre known as Roop Talkies and carry on the business of exhibiting cinematograph films there. We shall come to this agreement in some detail a little later. After this agreement was entered into, it appears that there were certain disputes between the parties and defendant No. 1 claimed tenancy rights and, according to respondent No. 1, committed breaches of this agreement. It is not necessary to consider in detail these disputes. However, it appears that by the agreements dated November 4, 1960 and June 16, 1961 defendant No. 1 accepted the position that he was a licensee under the agreement dated May 8, 1958. On November 10, 1962 the aforesaid suit No, 375 of 1962 was filed by respondent No. 1 against defendant No. 1 for possession of the Roop Talkies and of the articles described in Schedule "A" to the plaint. On October 1, 1964 respondent No. 2 viz. the firm of M/s. Roop Talkies, was joined as plaintiff No. 2. In 1966 there was an amendment to the plaint whereby certain allegations were made against defendant No. 1 and defendant No. 2, although at that stage defendant No. 2 (appellant No. 1) was not joined as defendant to the suit. These allegations were that defendant No. 1, who was then carrying on the business in the name and style of M/s. Narendra and Co. had admitted his son, appellant No. 1 as a partner in the said firm of M/s. Narendra and Co. without the consent of the respondents and that thereafter defendant No. 1 and appellant No. 1 were conducting the business of Roop Talkies together, it was alleged that by permitting appellant No. 1 to join in the conduct of the said business, defendant No. 1 had committed a breach of the aforesaid leave and licence agreement. It appears that on September 16, 1969 this suit reached hearing. At that stage, appellant No. 1 was added as a party defendant to the suit, and a consent decree was passed by the Court pursuant to certain

consent terms which were handed in by the parties. It appears that certain undertakings, to which we shall come presently, were given and a consent decree was passed by the Court.

3. Since the disputes turn to a considerable extent on the construction and legal effect of this consent decree, we may set out briefly the relevant provisions contained therein. The important provisions in the said consent decree dated September 16, 1969 run as follows:

...THIS COURT BY AND WITH SUCH CONSENT DOTH ORDER that the defendants do hand over to the 1st plaintiff or to his son Kishorekumar Jethalal Dave possession of the suit premises together with the articles mentioned in the Schedule Exh. "A" to the plaint.... AND THIS COURT BY AND WITH SUCH CONSENT DOTH DECLARE that the defendants shall however be at liberty to carry on the business of exhibiting pictures in the suit premises and for that purpose will be entitled to give any person playing time rights or right to exhibit pictures of other persons at the suit premises, provided that the period of such agreements will not extend beyond 30th day of September 1973, AND THIS COURT BY AND WITH SUCH CONSENT DOTH ORDER that the defendants shall pay to the 1st plaintiff or to the said Kishorekumar Jethalal Dave for the period upto 30th day of September 1970 a sum of Rs. 2,500 (Rupees two thousand five hundred) per month AND THIS COURT BY AND WITH SUCH CONSENT DOTH FURTHER ORDER that the defendants shall pay to the 1st plaintiff or to the said Kishorekumar Jethalal Dave for the period subsequent to 1st October 1970 a sum of Rs. 3,100 (Rupees three thousand one hundred) per month on or before the 10th of every month in respect of their use of the suit premises and the articles mentioned in the Schedule Ex. "A" annexed hereto until the defendants hand over to the 1st plaintiff or to the said Kishorekumar Jethalal Dave possession of the suit premises together with the said articles. THIS COURT BY AND WITH SUCH CONSENT DOTH FURTHER RECORD that the plaintiffs agree and undertake to this Hon"ble Court not to execute the decree passed in terms of clause hereinabove mentioned till 30th September 1973 or to disturb the possession of the defendants in respect of the suit premises and the said articles and the defendants will be entitled to remain in possession of the suit premises as licensees.... AND THIS COURT BY AND WITH SUCH CONSENT DOTH FURTHER RECORD that the defendants do agree with the plaintiffs and undertake to this Hon"ble Court to hand over to the 1st plaintiff or the said Kishorekumar Jethalal Dave possession of the suit premises together with the articles mentioned in Schedule Exh. A" annexed hereto on or before the 30th day of September 1973 or such earlier date that the plaintiffs may become entitled to execute the decree....

As far as the rest of the consent decree is concerned, it may be mentioned that the consent decree recites the prayers in the plaint and permits the respondents to carry out the amendment joining appellant No. 1 as a party defendant to the suit. The consent decree records an undertaking on behalf of the defendants that they

will not part with the possession of the suit premises or with any of the articles mentioned in Schedule "A" annexed to the consent decree. The consent decree also provides for certain payments in respect of municipal and other rates, taxes and charges to be made by the defendants and for the return of the deposit of Rs. 20,000 to the defendants, which amount was deposited under the terms of the agreement dated May 8, 1958, on the handing over of possession by the defendants and provides for an indemnity by the plaintiffs (respondents) to keep the defendants harmless against any claim that may be made against them by Hariprasad Someshwar Dave or Krishnakumar Jethalal Dave and Ashvinikumar Jethalal Dave in respect of their handing over possession of the suit premises to respondent No. 1 or his son Kishorekumar Jethalal Dave. The Schedule "A" which is annexed to the consent decree, contains the description of the property of Roop Talkies situated at Military Road (now known as Pandit Jawaharlal Road), Santa Cruz East, Bombay, and the latter portion of the said schedule contains a description of the movable properties referred to in the consent decree, to which description we shall come a little later in some detail.

4. On March 31, 1973 Maharashtra Act No. XVII of 1973 came into force, under which certain amendments were introduced into the Bombay Rent Act. The "Statement of Objects and Reasons" to this Act shows that the mischief, which was intended to be remedied was that the provisions of the Bombay Rent Act were being avoided by the expedient of giving premises on leave and licence for some months at a time, often renewing the same from time to time at a higher licence fees. It was felt that the licensees were thus charged excessive licence fees and had no security of tenure, and hence it was provided by Clause 14 of the Bill that certain licensees should be granted protection as statutory tenants. We may make it clear that we have referred to the Statement of Objects and Reasons not as a guide to the interpretation of the provisions introduced by the new Act but merely to show the circumstances under which the said provisions were introduced. On July 21, 1973 defendant No. 1 died intestate leaving behind him the present appellants as his heirs and legal representatives. On July 25, 1973 appellant No. 1 received a letter addressed to defendant No. 1 by the advocate of the respondents pointing out that both the defendants had given an undertaking to the Court not to part with the possession of the aforesaid premises and articles and alleging that the defendants had repeatedly committed breaches of certain terms of the consent decree regarding the payment of the amount of municipal and other rates, taxes and charges. By the said letter the attention of the defendants was drawn to the undertaking given by them to hand over possession of the said cinema theatre premises with all articles therein on or before September 30, 1973 and a hope was expressed that the defendants would observe the undertakings given by them. By the said advocate's letter the respondents expressed their desire to take over possession of the suit premises and the articles therein on September 30, 1973. On September 12, 1973 the appellants took out a Chamber Summons praying that

appellant No. 1 (defendant No. 2) should be relieved of the aforesaid undertaking given by him under the consent decree dated September 16, 1969 and that pending the hearing and final disposal of the suit filed by the appellants against the respondents in the Court of Small Causes at Bombay being R.A.N. Declaratory Suit bearing Stamp No. 7239 of 1973 all proceedings in execution of the consent decree should be stayed. It may be mentioned that prior to taking out this Chamber Summons the appellants had filed the aforesaid suit in the Court of Small Causes for a declaration of their alleged rights as tenants in the suit premises. Admittedly, the undertaking was not complied with and possession of the suit premises and the said articles was not handed over to the respondents on September 30, 1973, nor has this been done till today.

5. This Chamber Summons reached hearing before Gandhi J. Briefly stated the case of the appellants in support of the Chamber Summons was that the consent terms and the consent decree passed in the aforesaid suit No. 375 of 1962 amounted to a contract between the parties under which a licence was granted by the respondents in favour of the defendants in respect of the suit premises, namely, the Roop Talkies with effect from the date of the decree till September 30, 1973. It was contended that u/s 15A, which has been added to the Bombay Rent Act by the aforesaid Maharashtra Act XVII of 1973, the appellants had become the tenants of the respondents in respect of the Roop Talkies from February 1, 1973, as they were in occupation of the Roop Talkies on February 1, 1973 as licensees. It was further contended that on the death of defendant No. 1, the appellants became tenants protected under the provisions of the Bombay Rent Act as amended and that the appellants were entitled to remain and continue in possession of the Roop Talkies notwithstanding the aforesaid decree. Averments were made regarding the filing of the aforesaid suit in the Court of Small Causes. It was submitted that the respondents were not entitled to execute the decree against appellant No. 1 or the other appellants or to enforce the undertaking given by appellant No. 1 or the deceased defendant No. 1 at the time of the passing of the said consent decree. It was further prayed that in the said circumstances it was convenient, necessary and in the interests of justice that appellant No. 1 should be relieved of the undertaking given by him. The contentions of the respondents were that the consent decree concluded the position once and for all that the deceased defendant No. 1 was not a lessee, but was conducting the business of the Roop Talkies. It was denied that the defendants were to remain in possession of the said suit premises till September 30, 1973 as licensees as alleged by them. It was alleged that the defendants were merely given time to vacate and were permitted by the decree to continue to conduct the business till September 30, 1973. It was submitted that the appellants were not entitled to raise any plea of protection in breach of the undertaking given to the Court and it was denied that the appellants or the defendants were licensees under any of the aforesaid agreements. It was submitted that the provisions of Section 15A of the Bombay Rent Act had no application to the appellants.

6. By his judgment and order disposing of the Chamber Summons Gandhi J. held that he was not prepared to accept the submission made on behalf of the appellants that a licence was created in respect of the Roop Talkies by the consent decree as alleged by them. It was observed that the undertaking given by the defendants left no room for doubt that there was no intention to create any legal relationship between the respondents and the defendants. It was further held by Gandhi J. that even assuming that a licence had been created, it was not a licence in respect of the premises but it was a licence for conducting the business of M/s. Roop Talkies and to facilitate this business to use the premises, the building Roop Talkies. It was held that as there was no licence much less a subsisting licence in favour of the appellants, they were not entitled to any benefit under the provisions introduced by the amendments into the Bombay Rent Act as aforesaid. It was further held by Gandhi J. that the appellants had failed to make out any case for being relieved of the undertakings given by them. In view of these findings, the Chamber Summons was dismissed by Gandhi J. This appeal has been preferred against that decision.

7. It may be mentioned that along with the Chamber Summons, there were also certain other proceedings, which were placed for hearing before Gandhi J., but as these were not disposed of, we are not concerned with the same in this appeal.

8. As the contentions raised in this appeal turn largely upon the provisions of Sections 15A and 5(4A) introduced in the Bombay Rent Act by the aforesaid Maharashtra Act XVII of 1973, it would not be out of place to set out these provisions here. Sub-section (4A) of Section 5 of the Bombay Rent Act runs as follows:

"licensee", in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge; and includes any person in such occupation 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 Co-operative Societies Act, 1960; but does not include a paying guest, a member of a family residing together, a person in the service or employment of the licensor, or a person conducting a running business belonging to the licensor or a person having any accommodation in a hotel, lodging house, hostel, guest house, club, nursing home, hospital, sanatorium, dharmashala, home for widows, orphans or like premises, marriage or public hall or like premises, or in a place of amusement or entertainment or like institution, or in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provision of a residence attached to his or her post or office is temporarily not occupying the premises, provided that he or she charges licence fee or charge for such premises of the employee or spouse not exceeding the standard rent and permitted increases for such premises, and any additional sum for services supplied with such premises, or a person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any undertaking or

institution; and the expression "licence", "licensor" and "premises given on licence" shall be construed accordingly;

Section 15A runs as under:

15A. (1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract, where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purposes of this Act. the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of Sub-section (1) shall not affect in any manner the operation of Sub-section (1) of Section 15 after the date aforesaid.

Certain other provisions of the Bombay Rent Act may also be noted at this stage. Section 12(1) of that Act provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of that Act. Section 13 of the Act sets out the circumstances when the landlord would be entitled to recover possession of the premises.

9. The submission of Mr. Mehta, the learned Counsel for the appellants, was that on February 1, 1973 the appellants were in occupation of the premises of Roop Talkies, which was admittedly not less than a room, as the licensees under the said consent decree, that on that day the said licence was subsisting and it was given for a fee or charge and they have, therefore, become, for the purposes of the Bombay Rent Act, the tenants of the respondents in respect of these premises. It was further submitted that in view of their becoming tenants of the suit premises, the respondents were not entitled to recover possession of the premises notwithstanding anything contained in the consent decree, as the grounds set out in Section 13 had not been established to the satisfaction of any Court. In our view, and this is not disputed by the learned Counsel for the appellants, it is clear that in order to claim protection as tenants u/s 15A of the Bombay Rent Act the appellants must be licensees in respect of "premises" as denned in the Bombay Rent Act. This is clear from the very words of Sub-section (4A) of Section 5, which starts by defining the term "licensees" as being in respect of any premises or any part thereof. Moreover, the provisions of Section 6 of the Bombay Rent Act clearly show that the provisions of part II which includes Section 15A, apply only to premises let or given on licence for residence, education, business, trade or storage. It is thus beyond dispute that before the appellants or appellant No. 1 can claim the protection afforded by Section 15A, they must establish that they were the licensees under a subsisting licence on February 1, 1973 in respect of "premises" as defined under the Bombay Rent Act. Section 5(8) of the Act defines "premises" thus:

"premises" means-

(a) any land not being used for agricultural purposes,

(b) any building or part of a building let or given on licence separately (other than a farm building) including-

(i) the garden, grounds, garages and out-houses, if any, appurtenant to such building or part of a building,

(ii) any furniture supplied by the landlord for use in such building or part of a building,

(iii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof,

but does not include a room or other accommodation in a hotel or lodging house;

In this connection, the submission of Mr. Sorabjee, the learned Counsel for the respondents, was that even assuming that there was a licence created in favour of the defendants or the appellants under the said consent decree, the said licence was not in respect of "premises" as denned in Section 5(8) referred to above, as the subject-matter of the alleged licence was the running business of Roop Talkies and not the building or the theatre known as Roop Talkies. It was urged by him that even assuming that the said consent decree created a licence in favour of the appellants, it was clear that the dominant intention of the parties respectively was to grant and take a licence in respect of the cinema business conducted in the said building of Roop Talkies and not the building by itself. In this connection, strong reliance was placed by him on the decision of the Supreme Court in [Uttamchand Vs. S.M. Lalwani](#), In that case, a lease had been executed by the respondent Lalwani in favour of the appellant in respect of what was described as a Dal mill building with fixed machinery in sound working order and accessories on a certain annual rent. The question, which arose was, whether this lease could be said to be a lease of an accommodation within the meaning of Section 3 of the M.P. Accommodation Control Act, 1955. Section 3(a) of that Act defined the term "accommodation" as meaning:

(x) any land which is not being used for cultivation;

any building or part of a building, and it includes-

(1) garden, open land and outhouses, if any, appurtenant to such building or part of a building;

(2) any furniture supplied by the landlord for use in such building or part of a building;

(3) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof.

The question which arose before the Supreme Court was whether the lease was in respect of the accommodation as denned above. It was observed by their Lordships of the Supreme Court that the character of the lease must be determined by ascertaining as to what was the dominant intention of the parties in executing the document. The Supreme Court went on to observe as follows (p. 719):

...There can be no doubt that the fittings of the machinery in the present case cannot be said to be fittings which had been fixed for the more beneficial enjoyment of the building. The fittings to which Section 3(a)(y)(3) refers are obviously fittings made in the building to afford incidental amenities for the person occupying the building. That being so, it is clear that the fittings in question do not fall u/s 3(a)(y)(3).

It was held that the dominant intention of the appellant in accepting the lease from the respondent was to use the building as a Dal mill and that it was not a lease whereby the appellant entered into possession for the purpose of residing in the building at all. It was a case where the appellant entered into the lease for the purpose of running the Dal mill which was located in the building. On the basis of these findings, it was held that the provisions of that Act were not attracted to the lease in question. In the case before us, we find that under the consent decree, assuming that it does grant a licence in favour of the appellants, this licence is in respect of not only the immovable property described in the schedule to the consent decree, but also in respect of certain furniture and fittings. We need not concern ourselves with the items of furniture referred to in the schedule to the consent decree. However, the description of the items, which certainly cannot be regarded as items of furniture, but which, it is common ground, might be regarded as fittings, shows that a considerable amount of cinema equipment was covered by this alleged licence. This equipment, inter alia, consists of two projectors, several spools, two Big Intensity arc-lamps with 14" mirrors, a sound system, several amplifiers, a supply unit and several other articles, which can conveniently be described as the usual cinema accessories. A detailed description of these items is contained under the head "Machinery" in the said schedule. It appears to us that these fittings, which can by no stretch of imagination be regarded as merely incidental, were not intended for the more beneficial occupation of the building of Roop Talkies but were clearly intended for the running of the business of exhibiting cinema films therein. We may point out that under the provisions of Section 5(8) of the Bombay Rent Act, the fittings which are included in the term "premises", are fittings affixed to such building or part of a building for the more beneficial enjoyment thereof. The definition of the term "premises" contained in the Bombay Rent Act is in part materia with the definition of the term "accommodation" in the M.P. Accommodation Control Act, 1955, which was under consideration before the Supreme Court in the case referred to by us above. It appears to us that if the principle laid down by the Supreme Court in that decision is to be applied, then only such fittings can be included in the term "premises" as are intended for the

beneficial enjoyment of the building as such and not such fittings as are intended for use in the running of any particular business like the business of exhibition of cinematograph films in the building. As we have already pointed out, the fittings which are covered by the schedule to the consent decree can, in no case, be said to be merely incidental or of no value. The provisions of the consent decree show that substantially the same importance has been given to these fittings as to the building of Roop Talkies. As in the case before the Supreme Court, it appears to us that under the consent decree, even assuming that it did create a licence, the same was not for residing in the building of the Roop Talkies, but for the purpose of running the business of exhibiting of cinematograph films in the said building. We may make it clear that although it is a little doubtful as to whether this cinema equipment can be covered by the term "fittings", both the parties have proceeded on that footing and even if these are not held to be fittings, this in no way helps the appellants, because this equipment can never be said to be furniture. In view of this, it appears to us that there is substance in the submission of Mr. Sorabjee that the appellants cannot be said to be the licensees as defined in Section 5(4A) of the Bombay Rent Act at all. We may mention that Mr. Sorabjee also drew our attention to the decision of the Madras High Court in [Pals Theaters and Others Vs. B. Abdul Gafoor Sahib and Others](#), where it was held that the word "building" in Section 3(5) of the Madras Buildings (Lease and Rent Control) Act, 1960, only includes fittings and fixtures in the nature of essential amenities for buildings let for residential/non-residential purposes. In our view, this decision is not very helpful in the case before us, as the definition of the term "building" in the said Madras Act is not in pari materia with that of the term "premises" in Section 5(8) of the Bombay Rent Act.

10. It was urged by Mr. Mehta, on the other hand, that the term "premises" as defined in Section 5(8) of the Bombay Rent Act would include the fittings in question before us. It was submitted by him that a cinema theatre equipped with the usual cinema accessories should be included in the term "premises" in Section 5(8) of the Bombay Rent Act. Our attention was drawn by Mr. Mehta to the decision in [Mohammad Jaffer Ali Vs. S. Rajeswara Rao and Others](#), where it has been held that the expression "any fittings affixed by the landlord for use in such house" includes apparatus and machinery and that a cinema theatre is nothing but a large house with furniture supplied and cinema apparatus and other accessories affixed therein. There the question arose under the provisions of the A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960. In that case, the lease in question was in respect of a cinema theatre with the usual cinema accessories and a question arose as to whether this could be said as lease of a building under that Act. We find, however, that the decision in that case does not support the contention of the appellants before us. In the first place, it must be noticed that the definition of the term "building" contained in the A.P. Act is substantially different from that of the term "premises" in the Bombay Rent Act, as far as fittings are concerned. The relevant portion of Section 2(iii) of the A.P. Act, which defined the term "building", clearly

shows that furniture and fittings affixed by the landlord for use in the house in question were included in the definition of the term "building". The question before the Andhra Pradesh High Court, therefore, was whether the fittings in question were for use in the house or the building. In that case, it could not be gainsaid that the cinema equipment was for use in the cinema building. It appears that it is in view of this definition that the Full Bench of the Andhra Pradesh High Court took the view that if cinema apparatus is fixed in the building for use therein, it becomes a fitting affixed in a building and is included within the term "building" in that Act. In the case before us, however, the word "premises" includes only fittings affixed to such building or part of a building for the more beneficial enjoyment thereof. As we have already pointed out, the Supreme Court has held in *Uttamchand v. S.M. Lalwani* that this beneficial enjoyment is the beneficial enjoyment of the building as such viz. for residential use or occupation as such and not for conducting any particular business therein. The word "use" employed in the Andhra Pradesh Act, on the other hand, would include use even for the purpose of a particular business. In view of this material distinction in the definition of the term "building" in the Andhra Pradesh Act and that of the term "premises" in the Bombay Rent Act, we are of the view that this decision will not be of any help to Mr. Mehta in this case. It is significant that the Full Bench of the Andhra Pradesh High Court has in this decision taken note of the decision of the Supreme Court in *Uttamchand v. S.M. Lalwani*, to which we have already referred, and has pointed out that that decision turns on the definition of the term "accommodation" in Section 3(a) of the Madhya Pradesh Accommodation Control Act, 1955. The Full Bench has further pointed out that the decision of the Supreme Court was in the light of the peculiar definition of the term "accommodation" and it was on that ground that the Full Bench has distinguished that decision. In the case before us, as we have already pointed out, the definition of the term "premises" in Section 5(8) of the Bombay Rent Act is in pari materia with the definition of the term "accommodation" in the M.P. Act, and hence, in our view, the ratio of the Supreme Court decision is applicable to this case. Moreover, in the case relied on by Mr. Mehta, as it appears from para. 5 of the judgment, the Full Bench has also taken into account the material provisions contained in the document of lease as showing that the lease was really in respect of the theatre and not of any business.

11. Our attention was next drawn by Mr. Mehta to the decision in [K. Kungu Govindan and Others Vs. Parakkat Kunhilekshmi Amma and Others](#), where it was held that the letting of a cinema theatre together with the furniture and other accessories supplied by the landlord for use in such a building would amount to letting of a "building" within the meaning of Section 2(1) of the Kerala Buildings (Lease and Rent Control) Act, 1959 as amended by Kerala Act 29 of 1961. In this case again, it must be pointed out that the word "building" is so defined in Kerala Buildings Act, 1959 as to include any furniture supplied by the landlord for use in the building or any part thereof. That Act was amended by Kerala Act 29 of 1961 and by

that Act it was provided that any furniture supplied or any fittings affixed by the landlord for use in such building or part of a building would be included in the term "building". This is clear from the contents of paras. 7 and 8 of the above report. This decision again turns on the definition of the term "building" contained in the Kerala Buildings Act, which included the fittings affixed by the landlord for use in such building. In fact, it is significant that in this decision the learned Judges of the Kerala High Court have considered the decision of the Supreme Court in *Uttamchand v. S. Lalwani* and have pointed out that, the Supreme Court in that case had to consider the proper interpretation to be placed on the expression "accommodation" in Section 3(a) of the M.P. Accommodation Control Act, 1955. The Full Bench of the Kerala High Court has pointed out the difference in the definition of the word "accommodation" in the M.P. Act and that of the word "building" in the Kerala Act. The Full Bench has indicated that it was by reason of the definition of the term "accommodation" contained in the M.P. Act that the Supreme Court came to the conclusion that the items of machinery in question before it could not be considered to be fittings affixed for more beneficial enjoyment of the building in question. As we have already pointed out, the definition of the term "premises" in Section 5(8) of the Bombay Rent Act, particularly in connection with fittings, is in *pan materia* with the definition of the term "accommodation" in the M.P. Act and is materially different from the definition of the term "building" in the Kerala Act, 1959 as amended by Act 29 of 1961. In view of this, this decision also is of no assistance to Mr. Mehta.

12. Mr. Mehta next referred to the decision of the Calcutta High Court in *D.S. Jain v. Meghamala Roy* (1964) 68 C.W.N. where it was held that the lease of a furnished and well-equipped cinema house comprising a building with furniture and machineries etc. necessary for a cinema show house would come within the purview of the West Bengal Premises Tenancy Act, 1956. This decision, however, is not of much assistance in the case before us, because the definition of the term "premises" in the aforesaid Act has not been considered at all. Moreover, the relevant terms of the lease, which have been referred to in the judgment show that a large part of the rent was for the use of things other than machinery. Moreover, it appears from the decision of the Calcutta High Court in [Residence Ltd. Vs. Surendra Mohan Banerjee and Others](#), that the word "premises" in the West Bengal Premises Rent Control Act, 1950 was defined as including any furniture supplied or any fittings affixed by the landlord for use of the tenant in such building or part of a building. It is common ground before us that there was no material difference in the definition of the term "premises" under the West Bengal Premises Tenancy Act 1956 at the relevant time. But this definition, as we have already pointed out, is materially different from the definition of the term "premises" in the Bombay Rent Act. Hence, this decision of the Calcutta High Court in *D.S. Jain v. Meghamala Roy* is of no assistance to Mr. Mehta in his aforesaid submission. Reference was also made by Mr. Mehta to the decision of a division Bench of the Gujarat High Court in *M.R. Desai v. Alibhai* (1960) 2 Guj. L.R. 102. In that case, it was held that a factory is not premises within the operation of

the Bombay Rent Act, 1947. There is, however, a passing observation in this decision to the effect that in a cinema theatre what is let out is obviously the theatre and the mere fact that a projecting machine is part of the agreement would not convert a letting out of a theatre into a letting out of something which is not premises. This, however, admittedly is not the ratio of the case. At best, it can be considered to be an obiter but it really appears to us to be no more than a merely passing observation. Moreover, there is no discussion regarding the definition of the term "premises" and hence, this observation is of little assistance in the present case.

13. In the light of the above discussion, we are of the view that even assuming that a licence was created by the consent decree in favour of the defendants or the appellants, that licence was not in respect of "premises" as defined in the Bombay Rent Act. Hence the appellants cannot claim to be the licensees of premises as defined in Section 5(8) of the Bombay Rent Act, and they cannot claim to be protected as tenants under the provisions of Section 15A of that Act. We may point out that, in the view which we are taking, there is nothing in the provisions of Sections 15A and 5(4A) of the Bombay Rent Act which would affect the executability of the consent decree. The only case made out by appellant No. 1 for being relieved from the undertakings given under the aforesaid consent decree is on the basis of the said consent decree having ceased to be executable, and hence that case must also fail. In our view, therefore, the appeal of the appellants is liable to be dismissed on this ground alone. As however, several other arguments have been advanced before us, we propose to refer briefly to some of them.

14. It was submitted by Mr. Mehta that on February 1, 1973 the appellants were in occupation of the Roop Talkies under the aforesaid agreement of licence created by the said consent decree. This licence was not gratuitous, the occupation was admittedly of not less than a room, and the agreement of licence was subsisting till September 30, 1973 and hence, the appellants became entitled to be considered as tenants under the provisions of Section 15A of the Bombay Rent Act. The provisions of Sub-section (4A) of Section 5 of the Bombay Rent Act, to which we have already referred, show that to be considered as a "licensee", it must be established that the person in occupation was in such occupation under a subsisting agreement of licence. The first question, therefore, to be considered is whether the consent decree can be considered to be an agreement. Mr. Mehta submitted that a consent decree was merely a contract between the parties to which was superadded a command of the Judge. It was further submitted that a consent decree could bring about the relationship of landlord and tenant or lessor or lessee between the parties thereto and that all consequences which flow from a contract will also flow from a consent decree or order embodying a contract between the parties. On the other hand, it was submitted by Mr. Sorabjee that when a consent decree, although it has its origin in the consensus of the parties, is passed, it bears the imprimatur of the Court and becomes the rule of the Court, and hence it cannot be equated with a mere contract between the parties but it is something more than a contract. It was

further submitted by Mr. Sorabjee that the expression "subsisting agreement" in Sub-section (4A) of Section 5 of the Bombay Rent Act does not cover an undertaking to the Court or an order or decree of the Court. In this connection, several authorities have been cited by the respective counsel. However, as we have already taken the view that the appellants are not entitled to be considered as licensees u/s 5(4A) of the Bombay Rent Act for the reasons which we have set out earlier, we do not feel called upon to refer to these authorities or to decide the question as to whether the said consent decree can be said to be a subsisting agreement for the purpose of Section 5(4A) of the Bombay Rent Act.

15. The next question which was debated before us was as to whether it could be said that any licence was created by the said consent decree, even assuming that it amounted to an agreement between the parties. In this connection also, we may make it clear that, in the view which we have taken, we do not feel called upon to determine this question, because even assuming that such a licence was created by the consent decree, in our view, the appellants are still not entitled to the protection of Section 15A of the Bombay Rent Act as the licence was not in respect of "premises". We, however, propose to refer to some of the arguments advanced by the respective counsel in this connection. It was urged by Mr. Sorabjee that the provisions of the consent decree considered in the light of the surrounding circumstances show that there could have been no intention on the part of the respondents to create any relationship between them and the defendants. There was already a suit for possession filed by the respondents against the defendants. The decree provided for possession of the suit property and the articles latest by September 30, 1973. In these circumstances, it was submitted by Mr. Sorabjee that there could never be any intention on the part of the respondents to create any relationship or right in favour of the appellants. In this connection, reliance was placed by both the parties on the decision in [Ramjibhai Virpal Shah Vs. Gordhandas Maganlal Bhagat](#), where it has been held by a division Bench of this Court that in a suit between the landlord and his tenant where the tenant claims the protection of the Rent Restriction Act, it would be open to the landlord to enter into an agreement with the tenant by which the relationship of landlord and tenant can be created afresh between the parties. Where the agreement is reduced to writing, the relationship brought into existence by the writing must always be determined in the light of the words used by the parties in executing the document. The substance of the transaction has to be determined, and if in substance the transaction appears to be one of lease, the fact that an effort is made to clothe the transaction with an appearance of licence by the use of ingenious and clever words would not alter the essential character of the transaction. In that sense the use of words such as "mesne profits" or "compensation" can have no material effect. But, this is a statement of one aspect of the matter. It has been observed in that case that if the intention of the parties clearly appears to be not to create the relationship of landlord and tenant between them, then in construing the words used in the

document the Courts would have to bear that fact in mind. In this connection, the contention of Mr. Mehta was that the words used in the consent decree must be interpreted in their plain and grammatical sense. It was submitted by him that consent decree clearly provided that the respondents agreed and undertook not to execute the decree till September 30, 1973 or to disturb the possession of the defendants in respect of the suit premises and the said articles and recognized the right of the defendants to remain in possession of the suit premises till September 30, 1973 as licensees subject to certain eventualities. It was pointed out by him that the consent decree in terms declared that the appellants would be at liberty to carry on the business of exhibiting cinematograph films in the suit premises till September 30, 1973 except for certain eventualities. It was submitted by him that in the case of interpretation of a written document the intention of the parties must be gathered from the written document. The function of the Court is to ascertain as to what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; and to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention. See Halsbury's Laws of England, third edn., vol. 11, p. 382. Reliance was placed by Mr. Mehta on the decision in [Smt. Kamala Devi Vs. Seth Takhatmal and Another](#), where it has been observed in connection with construing the terms of a security bond that if the language is clear and unambiguous and applies accurately to the existing facts, the Court shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intention. As against this, it is the submission of Mr. Sorabjee that the golden rule regarding construction of decrees or other written instruments which the Court has to observe is to find out the substance of the transaction and to construe the words in the light of the intention of the parties. It was submitted by him that in the present case the substance of the matter was that there was a final decree for possession, the execution of which was conditionally postponed for some time and that the possession of a person under a conditional decree for eviction cannot be regarded as that of a statutory tenant or a licensee. It was urged by Mr. Sorabjee that on the construction of the consent decree, no licence was created but only a concession was granted to the defendants, as the judgment-debtors, to remain in occupation for some time under a decree for eviction and that the use of the word "licensee" in the decree is not decisive. This word was used merely to obviate a possible contention of tenancy by the defendants. Strong reliance was placed by Mr. Sorabjee on the decision of the Supreme Court in [Bai Chanchal and Others Vs. Syed Jalaluddin and Others](#), . In that case the lessors filed a suit against the lessees for recovery of possession. On July 8, 1946 on the basis of a consent decree the suit was decreed against some of the occupants including the four appellants. The agreement on the basis of which the decree was passed provided that the defendant-appellants would continue in possession of the property for a

period of five years and would hand over possession after the expiry of this period of five years. During this period they undertook to pay mesne profits at the various rates. It was held that the terms of the agreement could not be interpreted as creating a new tenancy constituting the decree-holders as landlords and the judgment-debtors as their tenants. It was observed that the terms of the consent decree neither constituted a new tenancy nor a licence. All that the decree-holders did was to allow the judgment-debtors to continue in possession for five years on payment of mesne profits as a concession for entering into a compromise. In our view, this decision would have been directly applicable had there been a mere decree for possession and the execution thereof had been postponed for some time. But, in the decree before us there are certain other provisions to which we have referred earlier, and to which our attention was drawn by Mr. Mehta, which might possibly make a difference. As we have already observed, we do not propose to decide this question and we have merely referred to some of the arguments advanced and authorities relied on by the parties in this regard.

16. The next point on which some controversy was raised before us was as to whether, even assuming that the consent decree created a licence in respect of premises under a subsisting agreement, the defendants or the appellants were not included within the meaning of the term "licensee" u/s 5(4A) of the Bombay Rent Act as they were persons conducting a running business belonging to the lessors viz. the respondents. It was submitted by Mr. Sorabjee that the defendants, and now the appellants, were conducting the business belonging to the respondents and hence were not included in the definition of the term "licensee" in Section 5(4A) of the Bombay Rent Act. On the other hand, it was submitted by Mr. Mehta that there was nothing on the record to establish that the defendants or the appellants were conducting a running business belonging to the respondents and that the record, on the contrary, showed that the running business belonged to the appellants. This is again a contention which we do not feel called upon to decide in the view which we have already taken.

17. The next question, which we propose to consider is as to what would be the situation, if the defendants or the appellants must be deemed to have become tenants in respect of the suit premises u/s 15A of the Bombay Rent Act. It was the submission of Mr. Mehta that once the appellants are held to be tenants within the meaning of the Bombay Rent Act in respect of the premises of Roop Talkies u/s 15A, then it must follow that the consent decree against them for possession has become inexecutable. The submission of Mr. Mehta is that u/s 12(1) of the Bombay Rent Act a landlord is not entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy. In the present case, the defendant No. 1 and, after his death, appellant No. 1 and the other appellants were ready and willing to pay the standard rent of the premises. Nor has it been shown that they had committed any breach of the terms

or conditions of the tenancy. Hence, notwithstanding the decree the respondents as the landlords are not entitled to recover possession of the premises from the appellants. Mr. Mehta frankly conceded that it was not his contention that the decree was a nullity or void at the time when it was passed. It was urged by him that a decree, though valid when passed may become inexecutable by subsequent legislation and it is the duty of the executing Court to give effect to such subsequent legislation. It was submitted that a decree can become inexecutable either if the right of the decree-holder under the decree is taken away or if statutory protection is given to the judgment-debtor, which is inconsistent with the execution of the decree. Strong reliance was placed by Mr. Mehta in this connection on the decision of J.C. Shah J. (as he then was) in *Gurupadappa Shivlingappa v. Akbar* (1949) 52 Bom. L.R. 143. In that case the plaintiff was the owner of certain premises in Belgaum of which the defendant was in possession as a tenant. The suit filed by the plaintiff against the defendant ended, on July 11, 1947, in a consent decree under which the defendant admitted that he was a monthly tenant. The decree provided inter alia that the defendant do deliver up possession of the suit property to the plaintiff before January 31, 1948. At the date of the decree, the Bombay Rent Act, 1944, was in force. That Act was repealed by the Bombay Rent Act, 1947, which came into force on February 13, 1948. On February 16, 1948 the plaintiff applied to execute the consent decree by recovering possession of the demised premises. The defendant contended that he was not liable to be evicted but was entitled to the protection afforded by Section 12(1) of the Bombay Rent Act, 1947. It was held by Shah J. that by virtue of the consent decree the defendant became a contractual tenant of the plaintiff and was entitled to claim the benefit of Section 12(1) of the Bombay Rent Act of 1947. There was no material on the record of the case to indicate that the plaintiff's case fell within the terms of Section 13 of the Bombay Rent Act and if the defendant was entitled to the benefit of Section 12(1) of that Act, then the execution *darkhast* was liable to be dismissed. It was observed by Shah J. that a statutory provision may, either expressly or by implication, prevent execution of a decree according to its terms. It is true that according to this decision, the protection of Section 12(1) of the Bombay Rent Act can be claimed even in respect of a decree passed at a time when the provisions of the Bombay Rent Act were not applicable. It must be remembered, however, that this is a decision of a single Judge of this Court and the persuasive authority of this decision is somewhat shaken by the decision in *Ramjibhai Virpal v. Gordhandas*. In that case it has been held (at p. 380), in connection with Section 9(7) of the Bombay Rent Act, 1944, which was in *pari materia* with Section 12(1) of the Bombay Rent Act, 1947, that once a decree is passed, Section 9(1) of that Act cannot be invoked for the simple reason that the executing Court will have no jurisdiction to go behind the decree and allow questions to be raised which affect the propriety of the decree itself. It was held that Section 9(1) had no application to execution proceedings. The division Bench has also taken the view (see p. 382) that the provisions of Section 12(1) of the Bombay Rent Act are inapplicable to the execution proceedings. It was on that footing that

the contention of Mr. Desai, in that case, that his client was entitled to claim the status of a tenant under the Bombay Rent Act of 1947 in execution proceedings and rely for support on the provisions of Section 12(1) of the Bombay Rent Act was negated. Moreover, the observations in Gurupadappa Shivlingappa's case (at p. 145), to the effect that an executing Court is not always bound to execute a consent decree according to its terms if these are contrary to the terms of a statute, are negated by another division Bench of this Court in Govind Waman v. Murlidhar Shrinivas where it has been held that a compromise decree passed by a Court of competent jurisdiction which contains a term contrary to the provisions of Section 10 of the Transfer of Property Act, 1882, is not a nullity and is binding as between the parties unless it is set aside by proper proceedings. The division Bench has further held that it is necessary to distinguish between decrees which are illegal and void and those that are contrary to law. The decrees falling in the latter category are binding between the parties unless they are set aside in proper proceedings. In that case the question which arose in the appeal also related to execution proceedings-the application for execution having been allowed to be converted into a suit. This decision, therefore, shows that the division Bench has taken the view that even if a term of a consent decree is contrary to the provisions of Section 10 of the Transfer of Property Act, 1882, the decree is not rendered a nullity and is liable to be executed by the executing Court. Moreover, in Gurupadappa Shivlingappa's case the question as to whether, even at the time when the consent decree was passed, on July 11, 1947, the Court could have regarded the compromise as a lawful compromise under Order XXIII, Rule 3 of the CPC and passed a decree for possession thereon seems to have been overlooked. It clearly appears from the judgment that even at the time when the decree was passed, the relations between the parties were governed by the Bombay Rent Act of 1944. Section 9(1) of that Act provided, inter alia, that the landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, rent to the full extent allowable and performs the other conditions of the tenancy. There is nothing in the judgment to show that any of the grounds which would have entitled the landlord, under the Bombay Rent Act, 1944, to the recovery of possession had been established, and hence it is doubtful whether the decree passed for possession was itself valid or whether it was a nullity. As far as we are concerned, we are bound by the decision in Ramjibhai Virpal's case to the effect that Section 12(1) of the Bombay Rent Act has no application to the execution proceedings.

18. It was next urged by Mr. Mehta that even apart from the provisions of Section 12(1) of the Bombay Rent Act, once the appellants are deemed to have become tenants under the Bombay Rent Act by subsequent legislation, the Court seeking to execute the aforesaid consent decree dated September 16, 1969 is bound to take into account such legislation and decline to execute the decree. In this connection strong reliance was placed by Mr. Mehta on the decision in [Haji Sk. Subhan Vs.](#)

[Madhorao](#), . In that case the respondent filed a suit for possession of certain fields including the fields in suit and based his claim on his proprietary right to recover possession. The suit was decreed and the decree was upheld by the High Court of Madhya Pradesh by its order dated April 20, 1951. It appears that sometime before March 31, 1951, and the delivery of judgment on April 20, 1951, the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 came into force. This fact was not brought to the notice of the High Court. The respondent decree-holder filed an execution application praying, inter alia, for delivery of possession. It was held by the Supreme Court that the provisions of Section 3(1) and (2) of the aforesaid Madhya Pradesh Act viz. Act No. 1 of 1951, were sufficient to divest the respondent of his proprietary right over the lands. It was held that under the said Act the rights of the respondent decree-holder ceased to exist on March 31, 1951 by virtue of Sections 3 and 4 of that Act and vested in the State thereafter. On the other hand it was held that the appellant continued in possession and had, on the basis of the entries in the village papers which had to be presumed correct for the purpose of assessment of compensation, secured a declaration of his being malik makbuza of such land from an officer of the State in whom the land in suit vested. His right to occupy the land under this right was not adjudicated by the High Court in the judgment leading to the decree sought to be executed. He could therefore object to the execution of the decree for the delivery of possession as the respondent had no subsisting right and as he had secured from the State a good right to possess it as a malik makbuza, even though it be on the basis of a wrong entry in the village papers. It was observed that the principle that the executing Court could not question the decree and had to execute it as it stood, had no operation in the facts of that case. The objection of the appellant was not with respect to the invalidity of the decree or with respect to the decree being wrong. His objection was based on the effect of the provisions of the aforesaid Act which had deprived the respondent of his proprietary rights, including the right to recover possession over the land in suit and under whose provisions the respondent had obtained the right to remain in possession of it. In these circumstances, the executing Court could refuse to execute the decree holding that it had become inexecutable on account of the change in law and its effect. We find that although at the first glance this decision lends some support to Mr. Mehta's contention, on a closer scrutiny of the decision it appears to be clearly distinguishable from the case before us. In that case, Section 3 in terms provided for divesting of all proprietary rights of the proprietor in an estate, mahal, alienated village or alienated land in the area specified in the notification and for vesting the same in the State free of all encumbrances. Section 4 of that Act provided that the consequences mentioned therein would follow the notification u/s 3 notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force. It was held by their Lordships of the Supreme Court that a decree passed by a Court would be included in the term "document" used in Section 4 of that Act. An analysis of this decision shows that in that case there was a clear provision taking away the

right of a proprietor in respect of an estate, mahal etc. even under a decree for possession, once a notification had been issued and there was a further provision for vesting of the said rights in the State. In the present case, as we shall presently show, there are no words used in Section 15A of the Bombay Rent Act which in express terms override the effect of any decree for possession passed in favour of a party. Moreover, in that case the rights under the decree were proprietary rights which vested in the State with retrospective effect. The decree, therefore, was executable, in any event, only at the instance of the State and the right of the appellant to be continued in possession of the land as malik makbuza had been recognised by the State itself. The observation in the judgment that the decree had become in-executable, on which strong reliance has been placed by Mr. Mehta, must be considered in the light of these facts. In the case before us, apart from there being no words in Section 15A of the Bombay Rent Act which express an intention to override any decree, there is no provision which takes away the right of the decree-holder or vests it in the State or any other authority as in the case before the Supreme Court. In these circumstances, it appears to us that the ratio in that decision has no application to the case before us. On the other hand, we find that in [Ramdas P. Chitrigi Vs. Monica Pascol Miranda and Another](#), it has been held by a Full Bench of this Court that the provisions of the Bombay Rent Act do not apply to appeals pending on the date on which the provisions of Parts II and III of the Act were applied to the premises which were the subject-matter of the proceedings. In that case, the view previously taken, that Section 12 of the Bombay Rent Act is prospective and not retrospective, has been clearly approved. It appears to us that in the light of this decision, there is substance in the submission of Mr. Sorabjee that the appellants are not entitled to claim protection of the provisions of Section 12(1) of the Bombay Rent Act. The provisions of Section 15A are prospective as from February 1, 1973. On the plain terms of Section 15A of the Bombay Rent Act, there is nothing to show that it was intended to override any decree for possession which might have been passed prior to its coming into force. It was, in this regard, submitted by Mr. Mehta that the opening words of Section 15A containing the non-obstinate clause and running as follows:
Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract,...

were sufficient to override a consent decree as a consent decree is included in the term "contract" used therein. Reliance has been placed by Mr. Mehta on the decision in *Wentworth v. Bullen* (1829) 109 E.R. 313, where it was observed by Parke J. that the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge. This decision has been approved in *Conolan v. Leyland* (1884) L.R. 27 Ch. D. 632. In that decision reference has been made to the statement of Chief Justice Erie see *Batson v. Newman* (1876) L.R. 1 C.P. 573 to the effect that the above opinion expressed by Parke J. was really a considered judgment rather than a dictum and was perfectly

correct. Our attention has also been drawn by Mr. Mehta to the decision in Subba Rao v. Jagannadha Rao A.I.R [1867] S.C. 591 where the Supreme Court has observed (para. 10) that compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the Court on the agreement of the parties. The Court did not decide anything. Nor can it be said that a decision of the Court was implicit in it.

19. As against this, it was the submission of Mr. Sorabjee that once a consent decree has been passed, there is an imprimatur of the Court on the agreement between the parties and it becomes a rule of the Court and it is something much more than a contract. It was submitted by him that the word "contract" in Section 15A of the Bombay Rent Act does not cover an undertaking given to the Court or an order or decree of the Court. In this connection, our attention was drawn by Mr. Sorabjee to the provisions of Section 4(4)(a) of the Bombay Rent Act, which was incorporated into the Act by the Bombay Act 4 of 1953. Section 4(4)(a) provides that the expression "premises belonging to the Government or a local authority" in Sub-section (1) of Section 4 shall notwithstanding anything contained in the said sub-section or in any judgment, decree or order of a Court, not include a building erected on any land held by any person from the Government. Similarly, reference may also be made to the provisions of Section 15(2) of the Bombay Rent Act, which was added by Bombay Act 49 of 1959, where there is a specific reference in the non-obstinate clause to the judgment, decree or order of the Court along with a contract. The provisions of Sections 4(4)(a) and 15(2) of the Bombay Rent Act clearly show that at the time when Section 15A was enacted, the Legislature was aware that when it was intended to override the terms of any judgment, decree or order, these were ordinarily specifically referred to in the non-obstinate clause and such appropriate language had, in fact, been used in these provisions to achieve that object. Reference was also made by Mr. Sorabjee to the decision in Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy Chetty I.L.R (1911) 35 Mad. 75 where it has been held that the basis of a compromise decree is a contract between the parties to the litigation and the principles applicable to contracts would often have to be considered in determining the rules of estoppel applicable to such decrees; at the same time, such a decree cannot be regarded as a mere contract, and has got a sanction far higher than an agreement between parties. The parties to the decree cannot therefore put an end to it at their pleasure in the manner that they could rescind a mere contract. Nor can it be impeached on some grounds on which a mere contract could be impeached such as absence of consideration or mistake. At page 81 of the report we find that the division Bench of the Madras High Court has quoted with approval the observations contained in the commentary by Black on "Judgments", second edn., (vol. I, p. 16), which run as follows: The judgment is not the agreement; it is the act of the law invoked by the parties in executing the agreement.

In [C.F. Angadi Vs. Y.S. Hirannayya](#), their Lordships of the Supreme Court, after considering the aforesaid observations of Parke J. in *Wentworth v. Bullen*, have observed that a compromise decree between the parties was something more than a contract (see para. 12 of the report). In *Govind Waman v. Murlidhar Shrinivas* the compromise decree contained a clause contrary to the provisions of Section 10 of the Transfer of Property Act, 1882, as we have already pointed out, and it was sought to be contended that by reason of this it was not liable to be executed at all. This contention was advanced by Mr. Murdeshwar, who was appearing for the appellant in that matter. In connection with this contention, Gajendragadkar J. (as he then was), who delivered the judgment of the Bench observed as follows (p. 468):

...If a decree had not been drawn in terms of compromise in the present case and the matter had remained merely at the stage of a compromise between the parties, Mr. Murdeshwar undoubtedly would have succeeded. But the difficulty in his way arises by reason of the fact that to the compromise of the parties a command of the Court has been super-imposed; and that makes all the difference.

These observations have been referred to by the Supreme Court in *C.F. Angadi v. Y.S. Hirannayya* (at p. 198). In view of these decisions, it appears to us that although certain consequences which may result from a contract might also result from a consent decree, nevertheless a consent decree passed by a Court on the basis of compromise between the parties cannot be equated with a contract, but must be regarded as something more than a contract. In our opinion, the mere use of the word "contract" in the non-obstante clause in Section 15A of the Bombay Rent Act is not enough to override a consent decree which provides for possession being handed over.

20. It was next submitted by Mr. Mehta that, even if the non-obstante clause in Section 15A of the Bombay Rent Act were to be altogether disregarded, the main operative portion of that section shows that once a person was in possession of premises not less than a room as a licensee on February 1, 1973 and the licence was subsisting on that date, he must be deemed to be a tenant thereof under that Act. It was submitted by him that such a deemed tenancy would come into existence even where the licence was created by a consent decree which might provide for possession being handed over. This may or may not be so. However, even if this is correct, it would not by itself render the decree inexecutable, in so far as it provides for delivery of possession. As we have already pointed out, if the intention was to achieve that object, appropriate words ought to have been used in the non-obstante clause in Section 15A of the Bombay Rent Act. It is true that the enacting part of a statute must, where it is clear, be taken to control the non-obstante clause where both cannot be read harmoniously as submitted by Mr. Mehta. However, as we have already pointed out, in our view, the operative part of Section 15A of the Bombay Rent Act read apart from the non-obstante clause does not affect the execution of the decree for possession passed before the provisions of Section 15A came into

force. In this regard, reference may be made to the decision of the Supreme Court in [Katikara Chintamani Dora and Others Vs. Guntreddi Annamanaidu and Others](#), to which our attention has been drawn by Mr. Chagla, who appeared for one of the interveners. We are not concerned directly with controversy which arose in that case. What is material, however, is, in the majority judgment the words of Bowen LJ. in *Reid v. Reid* (1886) L.R. 31 I.A 402, that in construing a statute or a section in a statute which is to a certain extent retrospective, the Court ought nevertheless to bear in mind the maxim that, except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights, have been cited with approval. Once a decree for possession was passed in favour of the respondents, they undoubtedly acquired a vested right to recover possession under it and an intention to interfere with such a vested right cannot be inferred except if the words of Section 15A clearly showed an intention to override the provisions of a decree or order of a Court. In our view, therefore, even assuming that the appellants must be deemed to have become tenants of the premises of Roop Talkies on February 1, 1973 under the provisions of Section 15A of the Bombay Rent Act, that by itself would not render the consent decree inexecutable against them.

21. This brings us to the question as to whether any case has been made out that appellant No. 1 (defendant No. 2) should be relieved of the undertaking given by him to the Court to hand over to respondent No. 1 or his son Kishorekumar the possession of the suit premises together with the articles mentioned in Schedule "A" to the plaint. In this connection, the case of the appellants is that by virtue of the provisions of Section 15A of the Bombay Rent Act, to which we have already made reference, the deceased defendant No. 1 and appellant No. 1 had become tenants of the respondents in respect of the Roop Talkies on and from February 1, 1973 and after the death of defendant No. 1 the appellants and in any event appellant No. 1 were tenants thereof under the provisions of the Bombay Rent Act as amended by the Act of 1973 and were entitled to the protection of that Act notwithstanding the consent decree dated September 16, 1969. In view of the provisions of the Bombay Rent Act the respondents were not entitled to execute the decree against any of the appellants. The possession of appellant No. 1 would be lost if the respondents are permitted to enforce the undertaking given by appellant No. 1 at the time of passing of the consent decree and that it was, therefore, just, convenient and necessary and in the interests of justice that appellant No. 1 should be relieved of the said undertaking given by him to the Court. We have already taken the view that neither of the defendants became tenants under the Bombay Rent Act and further that, in any event, the said consent decree remained executable. In view of this, it is clear that the entire case of the appellants for relieving appellant No. 1 from the undertaking fails. That case is based entirely on the basis of the consent decree being rendered inexecutable. In the view, which we have taken that basis itself stands demolished and hence there is no case to relieve appellant No. 1 from the undertaking given by him to the Court.

22. We, however, propose to consider as to whether there is any case for relieving appellant No. 1 of the undertaking given by him to the Court even assuming that the consent decree dated September 16, 1969 is no longer executable.

23. In this connection, the submission of Mr. Mehta was that the Court has a right to relieve a party from the undertaking in suitable cases. Our attention was drawn by him to the statements in the Supreme Court Practice, 1973 1 456 to the effect that the Court will not vary an undertaking given by a party but may relieve him if sufficient reason is shown. It was urged by him that the Court has the jurisdiction and the power to relieve a party from the undertaking given by him in suitable cases. This position is not disputed by Mr. Sorabjee. The question, however, is whether any case has been made out for relieving appellant No. 1 from the undertaking given by him. It is beyond dispute that relief from the undertaking is not sought on the ground of any inability to comply with the decree or any hardship which would be involved in complying with the same. The case sought to be made out is that, as the appellants or, in any event, appellant No. 1 have acquired the right to be protected tenants under the Bombay Rent Act, the appellant No. 1 should be relieved of the undertaking so as to enable him to enjoy and exercise that right efficaciously. Our attention was drawn to the observations of Story in his book on Equity Jurisprudence, vol. I, in para. 64 at p. 53 to the effect that if the law commands or prohibits a thing to be done, equity cannot enjoin the contrary or dispense with the obligation. It was submitted by Mr. Mehta that the power to relieve a party from an undertaking should be exercised by the Court in accordance with the public policy. According to Mr. Mehta, in view of Section 15A of the Bombay Rent Act, the public policy is that the licensees who were deemed to have become tenants should be protected in their possession. We may point out that at one stage, it was also submitted by Mr. Mehta that Section 15A of the Bombay Rent Act overrides the law of contempt by reason of the non-obstante clause covering anything contrary contained in any other law for the time being in force, and that, as a result of this, the undertaking must be deemed to be discharged. We are not inclined to accept this submission, as, in our view, the non-obstante clause does not in any manner relate to relieving persons from any undertaking given by them. In this connection, we may point out that it was submitted by Mr. Mridul, who appeared for one of the intervenes, that any interpretation of Section 15A of the Bombay Rent Act, which would have the effect of nullifying undertakings given to the Court, would render the section unconstitutional as being repugnant to the constitutional scheme of separation of powers, as the power to relieve a party from the undertaking given by him to the Court was in the nature of a purely judicial power. At this stage, Mr. Mehta made it clear that it was not his case that u/s 15A of the Bombay Rent Act, the undertaking given by appellant No. 1 had automatically come to an end by the effect of the statute or that under this section it was obligatory on the Court to relieve appellant No. 1, who, according to him, was deemed to have become a tenant of the premises, of the undertaking given by him.

He stated that his only submission was that in view of the provisions of this section, the Court should exercise its discretion in favour of appellant No. 1 and relieve him of the undertaking given by him. It is in view of this that the question of the constitutionality of this section has not been gone into by us at all.

24. As against this submission, it was submitted by Mr. Sorabjee that an undertaking given by a party to the Court has the effect of an order of the Court. It is a solemn arrangement or understanding between the litigant, who gives an undertaking and the Court, which accepts it. In the present case, the undertaking given by appellant No. 1 and defendant No. 1 was independent of and in addition to the consent decree. It was submitted by him that relief from an undertaking can be granted only on equitable grounds i.e. grounds on which the Court of equity would grant the relief. It was submitted by him that by applying for being relieved from the undertaking, appellant No. 1 was really seeking to approbate and reprobate, which he is not entitled to do. It was pointed out by Mr. Sorabjee that there was no plea on behalf of appellant No. 1 or any of the appellants of any personal disability or uncontrolled circumstances or mistake, and relief was sought only on the ground that certain new legal rights have been conferred by subsequent legislation on appellant No. 1 and on that ground appellant No. 1 should be permitted to resile from the undertaking given by him. It was submitted by him that discretion of the Court should not be exercised in favour of a party who wants to resile from a solemn promise after fully availing himself of the benefit under the decree. Relieving appellant No. 1 from the undertaking in a case like the one before us would tantamount to putting a premium on dishonesty and breach of solemn obligations.

25. As far as we are concerned, we find from decided cases and the commentaries on this subject that there is an infinite variety of cases in which the Courts have relieved parties from the undertakings given by them. It would be presumptuous on our part to attempt to exhaustively enumerate the classes of cases where the Courts have relieved parties from the undertakings given by them. We may, however, point out that there is one common feature in all these cases where parties have been relieved by Courts from the undertakings given by them and this feature is that in all those cases the Courts were persuaded to take the view that it was fair and equitable that the parties should be so relieved. In our view, when a party applies for being relieved from an undertaking given by him and it is in the discretion of the Court to do so or not, the question to which the Court must address itself is, Is it fair and equitable that the party applying for being relieved from the undertaking should be so relieved? In this conclusion we are supported by the observations of Jessel M.R. in *Mullins v. Howell* (1879) L.R. Ch.D. 763. In that case relief from the undertaking was sought by the defendant on the ground that the undertaking was given by him under a certain mistake or misapprehension, and the observations of Jessel Master of Rolls, show that what he took into consideration was as to whether he should not, following the rule in equity, enforce the agreement as against the defendant, and a fortiori should not enforce the undertaking against him. We may

also refer to the observations from Maitland's Lectures on Equity, Lecture 18, which run as follows:

That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.

These observations have been cited with approval by the Supreme Court in [C. Beepathumma and Others Vs. V.S. Kadambolithaya and Others](#). The question, therefore, to which we propose to address ourselves is : Have the appellants been able to show that such circumstances exist in the case before us that it is fair and equitable that appellant No. 1 should be relieved from the undertaking given by him? In this connection, we must note that the consent decree dated September 16, 1969 was obtained, in all probability, by reason of the aforesaid undertaking or on the footing of the said undertaking given by appellant No. 1 and defendant No. 1, to hand over possession of the suit premises latest by September 30, 1973. Whether this be so or not, one thing is clear and that is, it is not possible to say that but for this. Undertaking the respondents would have entered into this consent decree. It is quite clear and beyond dispute that this undertaking constituted an integral and substantial part of the bargain between the parties which resulted in the consent decree. By reason of this consent decree, the appellants got time to remain in possession of the suit premises and the aforementioned articles upto September 30, 1973 which right they have enjoyed and of which they had the benefit. Is it now fair or equitable on the part of appellant No. 1 to apply to be relieved from this undertaking on the ground that he would thereby be able to enjoy the right alleged to have been conferred upon him by Section 15A of the Bombay Rent Act? In our view, the answer to this question must be categorically in the negative. More[^] over, it must be appreciated that the case of the appellants is that the relationship of licensors and licensees was brought about between the defendants and the respondents by reason of the consent decree, which incorporates the undertaking. It is on the basis of that alleged relationship that the appellants found their claim to have become tenants of the suit premises under the provisions of Section 15A of the Bombay Rent Act. In such a case, it would be thoroughly inequitable to allow them to claim the benefit of that alleged relationship and at the same time to relieve them from the undertaking given by them. As far as question of public policy is concerned, we fail to see any rule of public policy which would induce us to relieve appellant No. 1 of the undertaking given by him merely to enable him to enjoy certain rights, which, according to him, are conferred on him u/s 15A of the Bombay Rent Act. In the first place, even assuming that appellant No. 1 is deemed to have become a tenant of the suit premises, there is nothing in law which prevents him from surrendering that tenancy or his possession. In this connection, it must be remembered that unlike the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, the Bombay Rent Act does not provide for any safeguard to be complied with or put any restriction on the right of a tenant to surrender his

tenancy, and hence there is nothing against public policy or the policy of law in a tenant giving an undertaking to surrender his possession. In our view, therefore, the appellants have failed to make out any case for appellant No. 1 being relieved of the undertaking given by him.

26. Before parting with the question of the undertaking, we may refer to two incidental matters. At one stage, it was suggested by Mr. Sorabjee that as far as the order of the learned trial Judge refusing to relieve appellant No. 1 of the undertaking given by him was concerned, the same did not amount to a judgment within the meaning of that term in Clause 15 of the Letters Patent of this Court and no appeal lay against the same. This contention was, however, given up by Mr. Sorabjee, and hence we are not called upon to decide on the same. We may also mention that at one stage it was faintly suggested by Mr. Mehta that appellant No. 1 should be relieved of the undertaking given by him, as the undertaking given by defendant No. 1, who is dead, could not be enforced against any of the other appellants and the decree was not liable to be executed against any of the appellants. This argument, of course, does not survive as we have taken the view that this decree is executable against all the appellants. But, even on the footing that the decree was not executable against the appellants, it may be pointed out that no averments, have been made to show that the appellants Nos. 2 to 6 are entitled to "be considered to be tenants of the premises of Roop Talkies on the death of defendant No. 1, as there is no averment that they were living with defendant No. 1 at the time of his death as members of his family. It was also pointed out by Mr. Sorabjee that the view so far taken is that rights as statutory tenants are not considered to be heritable. As the appellants have not made any statement that the appellants other than appellant No. 1 are persons who were members of the family of defendant No. 1 residing with him at the time of his death, they cannot claim here to be tenants in respect of the premises of Roop Talkies under the Bombay Rent Act. Even assuming that they can be so considered, that by itself, in our opinion, would be no ground for relieving appellant No. 1 from the undertaking given by him.

27 In the result, the appeal fails and is dismissed. As far as the question of costs is concerned, it appears to us that looking to the points involved and the length of time taken in the arguments, it is proper that the appellants should pay to the respondents, in one set, costs of this appeal as taxed on the long cause scale with two counsel certified. Liberty is given to the Taxing Master under Rule 601 of the Rules of the High Court of Bombay (Original Side), 1957, to allow a sum in excess of Rs. 2,000 towards instructions, if he so thinks fit. We direct that the Notice of Motion taken out by the respondents in Suit No. 375 of 1962 and the notice under Order XXI, Rule 22 of the CPC be placed on the Board for hearing on November 29, 1974.