

2009 PLRonline 016

[#127100]

SUPREME COURT OF INDIA

*Before :Justice Markandey Katju and Justice Asok Kumar Ganguly.*

The NEW BUS STAND SHOP OWNERS ASSOCIATION – Appellant

*Versus*

CORPORATION OF KOZHIKODE & another – Respondents

Civil Appeal No. 6391 of 2009 (@ Special Leave Petition (Civil) No. 11051 of 2006).

18.9.2009.

**Transfer of Property Act, 1882, Section 105 – Lease or license – Difference between a *tenancy* and a licence is that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not. [Para 18]**

**Transfer of Property Act, 1882, Section 105 – Easements Act, 1882, Section 52 – Lease or licence – Difference between lease and the licence is to be determined by finding the real intention of the parties from a total reading of the document, if any, between the parties and also considering the surrounding circumstances – Use of terms “lease” or “licence”, “lessor” or “licensor”, “rent” or “licence fee” by themselves are not decisive – The conduct and intention of the parties before and after the creation of relationship is relevant to find out the intention – It is clear that the intention of the parties in the case is to create a licence and not a lease and the right of exclusive possession was retained by the Corporation – Relationship which is created between the Corporation and the shop holders is that of a licensor and licensee and not that of a lessor or a lessee – The stamp duty on licence agreement should be governed by Entry 5(c) of the Kerala Stamp Act, which is a residuary Clause in the Schedule and not by Entry 33. *C.M. Beena and another v. P.N. Ramachandra Rao, 2004(3) SCC 595, followed. [Para 27]***

*Held*, agreement between the parties merely falls under the category of licence as the licensee is never given the exclusive possession. The Corporation retained the exclusive possession of the shops and this is clear from the conditions of the licence discussed above.[Para 27,28]

From the conditions of licence that exclusive possession is not given to the members of the appellant-Association and possession is always retained with the Corporation. Even though, exclusive possession is not a decisive test but the absence of exclusive possession is certainly one of the indications to show that the agreement is one of the licence and not of lease.[Para 19]

The amount which the shop holders are paying has not been described as rent either in Section 215 of Kerala Municipal Act or in the conditions of licence. The said amount has been described as fees which is one of the vital features in this case which persuade us to construe the agreement between the parties as one for licence and not of lease. [Para 17]

#### **Cases Referred :-**

1. *Abdulrahiman v. Tirur Municipality, 2001(2) KLT 716.*
2. *Errington v. Errington and Woods, 1952(1) KB 290.*
3. *Peakin v. Peakin [1895 – 2 I.R. 359].*
4. *Cobb v. Lane [1952] All England Reporter 1199.*
5. *Associated Hotels of India Ltd. v. R.N. Kapoor, 1960(1) SCR 368.*
6. *Mrs. M.N. Clubwala v. Fida Hussain Saheb, AIR 1965 Supreme Court 610.*
7. *Board of Revenue v. A.M. Ansari, AIR 1976 Supreme Court 1813.*
8. *C.M. Beena v. P.N. Ramachandra Rao, 2004(2) RCR (Civil) 494 : 2004(1) RCR (Rent) 520 : 2004(3) SCC 595.*
9. *Marchant v. Charters, (1977)3 All England Reporter 918.*
10. *Thomas v. Sorrell, (1673) Vaughan 351.*

*For the Appellant :- Anoop G. Chaudhari and June Chaudhari, Sr. Advocates with Ajit Pudusseri, K. Vijayan and Prabhat Kr. Rai, Advocates.*

*For the Respondent :- K. Radhakrishnan, Sr. Advocate for B.B. Singh with P.V. Dinesh, H. Mohan and P. Rajesh, Advocates.*

## JUDGMENT

**Asok Kumar Ganquly, J.** – Leave granted. The subject matter of challenge in this proceeding is the judgment and order dated 21.02.2006 whereby the learned Judges of the Division Bench held that the controversy in this case is covered by the Division Bench judgment of Kerala High Court in O.P. No. 18225 of 1997, **P.A. Kuruvila and others v. State of Kerala** decided on 15.12.1999 and also by another decision of the High Court in **Abdulrahiman v. Tirur Municipality, 2001(2) KLT 716**. In the judgment of the learned Single Judge of the High Court dated 8.7.2004, from which appeal was taken to Division Bench, the learned Single Judge also dismissed the writ petition by referring to certain judgments. In paragraph 5 of the judgment of the learned Single Judge it was held that looking at the nature of the arrangement between the parties it has to be held that it is a lease despite a different nomenclature being given to it.

2. However, before this Court the matter has been argued at length. After hearing learned counsel for the parties the controversy between the parties appears to be that the appellant is an Association of New Bus Stand Shop Owners and they are occupying various shops and offices in the Municipality Bus Stand Building which is owned by the Corporation of Kozhikode in the State of Kerala (hereinafter referred to as “the Corporation”). The case of the appellant-Association is that for the use of the shops which were constructed by the first respondent, licences were issued to the appellant-Association in terms of Section 215 of the Kerala Municipalities Act, 1994 (hereinafter called “the said Act”). Pursuant to such licences issued by the said Corporation, licence agreements have been entered into with individual shop owners.

3. By referring to the provision of Section 215 of the said Act and also the terms of the licence agreements, the learned counsel for the appellant submitted that they were all the time paying licence fee in accordance with the relevant statutory provisions at the time of renewal of the licences. Suddenly, the State of Kerala insisted that the said licences should be treated as lease and at the time of renewal of the same, stamp duty which is payable on lease has to be given.

4. In the counter affidavit which has been filed in this proceeding on behalf of the Municipal Authority, the following stand has been taken in paragraphs 4 and 5 of the said counter affidavit. The same are set out below :-

“4. I beg to submit that the Government of Kerala vide letter No. 12980/E2/91/T.C. dated 04.07.1991 stipulates that while issuing shop rooms in shopping complexes owned by Local Self Government Institutions, an agreement is to be executed in stamp paper worth 2.5% of the total value of annual license fee which was subsequently enhanced to 5% through an amendment to the Kerala Stamp Act through the Kerala Finance Bill, 1996 which came into force w.e.f. 20.07.1996. I further beg to submit that almost all licensees, including those in the I.G. Road Bus Stand Shopping Complex complied with the direction and submitted revised rent accordingly.

5. It is submitted that this respondent which comes under the Local Self Government Department of the State Government is bound to comply with the direction of the State Government. I further beg to submit that an enhancement to the tune of 20% on licence fee is being effected while renewing agreement, which is accepted by the licensees as well.”

5. The State of Kerala also filed an affidavit wherein the stand is that in the New Bus Stand Building at Indira Gandhi Road, Kozhikode the said Corporation for commercial purposes let out rooms which were offered and allotted to the bidders in a public auction. An amendment was introduced in the Kerala Stamp Act which came into effect from 29.07.1996. In the light of the said amendment, the Secretary of the said Corporation directed the occupants of the rooms to execute agreements on stamp papers worth 5% of the annual licence fee for continuous occupation of the rooms.

6. In paragraph 4 of that affidavit it has been stated that State Government vide letter No. 12980/E2/91/TD dated 4.7.1991 stipulated that while letting out shop rooms in

shopping complex owned by local self Governments, an agreement is to be executed on stamp paper worth 2.5% of the total value of annual licence fee. The said rate was subsequently enhanced to 5% as per amendment in the Kerala Stamp Act which came into force with effect from 29.07.1996. Accordingly, pursuant to the direction by the State Government, the Corporation informed all the licensees to execute agreement at the revised rate of 5%. In paragraph 5, it has been stated even though it is actually a licence, the nomenclature is not decisive. It is also stated that agreement creates a "lease" within the meaning of Transfer of Property Act.

7. Alternatively, it was also urged even if the said agreement does not create a lease under Section 105 of the Transfer of Property Act, it will be covered within the definition of "Lease" under the Kerala Stamp Act, 1959 and reliance was placed on Section 2(1) (iii) of the said Act. It was also stated that Entry 5(c) of the Kerala Stamp Act is not applicable in the facts of this case and the case of the appellant should be governed under Entry 33 of the Kerala Stamp Act.

8. Therefore, the main question which falls for determination before this Court is, whether the agreement under which the appellant-Association has been granted shops and is carrying on business is an agreement for lease or it is a licence. If it is lease then rate of stamp duty will be different and if it is licence, such duty will be different. Even though the State is insisting that the same is lease but the stand of the Corporation in its affidavit is that it is a licence.

9. In order to ascertain whether the licence granted to the appellant is actually a lease we must look into the statutory provisions under which it is granted and some terms and conditions of the licence.

10. Admittedly, the licence has been granted to the appellant-Association under Section 215 of the Kerala Municipality Act, 1994. The said Section is set out below :-

*"215. Power of Municipality to acquire and dispose of property. - (1) A Municipality may, with the previous sanction of the Government, acquire any property whether land or building within or without its Municipal area for any public purpose for providing any convenience, service or facility or may dispose of by sale or otherwise any property belonging to it or vested in it in the manner as may be prescribed.*

*(2)(a) A Municipality may construct commercial or other buildings and let them out to the public who need them on licence and may charge such fees as it may fix for the use and occupation of the same, subject to such restriction as or limitations if any, as may be imposed by the Government in that behalf;*

*(b) \*[xxx]*

*Provided that after the said period, a licence may be renewed subject of such terms and conditions as may be fixed at that time;*

*(c) In all cases except renewal of licence or rehabilitation of a licensee, licence shall be granted only by public auction or tender.*

*(3) Every licence under sub-section (2) shall contain terms and conditions governing the use and occupation of the building or room or space therein and the rate and time of payment of fees and such terms and conditions shall be reduced in writing in the form of an agreement in stamp paper of the appropriate value.*

*(4) No building or room or space let out under sub-section (2) shall be sub-let by the licensee to any person nor the nature of use changed without the prior approval of the Municipality :*

*Provided that the Municipality may at the instance of a licensee transfer the licence to any other person subject to such terms and conditions as it may deem fit to impose and upon such transfer, it shall be deemed to be a fresh licence for all purposes".*

From a perusal of the said Section, it appears that the charges which a licensee has to pay has been described as fees in Sections 215(2)(a), 215(3), 215(7) and 215(8). The right of construction is solely that of the Municipality as it appears from Section 215(2)(a). It is also made clear that licence shall be granted by public auction or tender. The licensee has been specifically prohibited under Section 215(5) from letting out to any other person the space given to him. In the event of such letting out, the Secretary by an order may cancel the licence and in that event licensee will have to vacate the premises.

11. Apart from the aforesaid statutory provision under Section 215, the conditions of licence are also very important. It is made clear that the same is granted for a period of three years and it has been specifically stipulated that the amount the licensee has to pay is licence fee. Clause 6 of the licence condition is very important and reads as under :

*"The Commissioner shall be in legal possession of the licensed premises and hence licensee shall not enjoy the exclusive possession of the same. The licensee shall have the right only to use the premises as per the terms and conditions enunciated in this agreement."*

The Commissioner or other Corporation Officers with or without workmen shall have right at all time to enter upon the said premises to view the conditions thereof and if any loss or damages are found it shall be lawful to the Commissioner to make good the loss in the manner prescribed in clause 4 (ii) & (iii)". (Emphasis supplied)

12. Clause 10 of the licence condition is also relevant and is set out below :

"10. (i) The licence granted to the licensee under this agreement shall expire on the date specified in the agreement and he shall have no authority to use the premises thereafter and shall vacate the premises on the expiry of the licence. Provided that the authority competent may at its discretion renew the licence subject to such terms and conditions as it may fix, but such renewal of licence shall not be claimed as a matter of right.

(ii) In case the licence of the premises is not renewed before the expiry of the licence under this agreement, the licensee shall vacate the premises on the expiry of the period of licence and further use of the premises by him shall be deemed to be unauthorized use and occupation".

13. Clause 12 of the said licence condition which is also relevant is set out below :

"The licensee without written consent of the licensor, shall not transfer his right or give possession of the premises to any other person under any circumstances".

14. Clause 25 of the said licence condition which is also relevant is set out below :

"The licence hereby granted shall not create any interest or title over the property in favour of the licensee except for the beneficial enjoyment of the same during the period of licence".

15. On a perusal of the provision of Section 215 and the aforesaid conditions of licence the intention of the parties is clear. It has always been held that in order to determine whether a document is a lease or licence what is most important to be considered is the intention of the parties. Keeping in mind the aforesaid terms and conditions of licence, if we try to ascertain whether the agreement between the appellant-Association and the Corporation is a lease or licence within the meaning of lease as defined under Section 2(l) of the Kerala Stamp Act, we have to consider the definition of lease under Section 2(l).

16. Section 2(l) of the Kerala Stamp Act is thus set out below :-

"S.2 (1) "lease" means a lease of immovable property, and includes also -

- (i) Marayapattom;
- (ii) Kanapattom;
- (iii) an agreement or other undertaking in writing not being a counterpart of a lease, to cultivate, occupy, or pay or deliver *rent for immovable property*;
- (iv) an agreement or other undertaking in writing, executed by the renters of abkari and opium farms.
- (v) any instrument by which tolls of any description are let;
- (vi) any writing on an application for a lease intended to signify that the application is granted; and
- (vii) a patta; (Emphasis supplied)

From the aforesaid definition of lease under the Kerala Stamp Act, one thing is clear that it must be an agreement in writing to cultivate, occupy, or pay or deliver rent for immovable property.

17. In the instant case, the amount which the shop holders are paying has not been described as rent either in Section 215 of Kerala Municipal Act or in the conditions of licence. The said amount has been described as fees which is one of the vital features in this case which persuade us to construe the agreement between the parties as one for

licence and not of lease.

18. Reference in this connection may be made to the decision of the Court of Appeal in **Errington v. Errington and Woods, reported in 1952(1) KB 290**. Lord Denning in deciding the issue whether an agreement is a lease or licence referred to the decision given by Chief Justice Vaughan in the seventeenth century in **Thomas v. Sorrell, (1673) Vaughan 351**. In the said judgment, Chief Justice Vaughan outlined certain features of lease which are as follows :

“A dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful.” The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will (see **Doe v. Chamberlaine** and **Lynes v. Snaith**), whereas if he had not exclusive possession he was only a licensee.” [(**Peakin v. Peakin**) 1895 - 2 I.R. 359]

Relying on the said principle, Lord Denning explained that the difference between a tenancy and a licence is that, in a tenancy, an interest passes in the land, whereas, in a licence, it does not.

19. The position has been further elucidated by saying that it has to be ascertained whether the occupier has exclusive possession or not. The learned Judge also explained that the test of exclusiveness sometimes gives rise to misgivings and that the test of exclusive possession is by no means decisive. In the instant case we have found from the conditions of licence that exclusive possession is not given to the members of the appellant-Association and possession is always retained with the Corporation. Even though, exclusive possession is not a decisive test but the absence of exclusive possession is certainly one of the indications to show that the agreement is one of the licence and not of lease.

20. Relying on Errington (supra), the Court of Appeal again dealt with this question in **Cobb and Another v. Lane [1952] All England Reporter 1199**. Here also Lord Denning held that the distinction between lease and licence has become very important as several Rent Restrictions Acts have come into operation. The learned Judge held whether the agreement is a lease or a licence must depend on the intention of the parties. Therefore, in all such cases the following questions should be posed by the Court :

“...Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land ?...” (Page 1202 of the report)

If we follow the said principle in the instant case, we find that what was given to the shop holders was merely a licence and not a lease.

21. Relying on those two decisions of the Court of Appeal, this Court in **Associated Hotels of India Ltd. v. R.N. Kapoor, 1960(1) S.C.R. 368**, discussed this issue in very lucid terms. Justice K. Subba Rao, who was in minority, discussed this question with a clarity which is often associated with His Lordship's opinion. The learned Judge referred to Section 105 of the Transfer of Property Act and then compared it with Section 52 of the Indian Easements Act. After referring to those two Sections and also after referring to the decision in Errington (supra) the learned Judge pointed out the distinction between the lease and the licence by expressly approving the tests laid down by Lord Denning and which may better be quoted :

“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....” (Page 384-385 of the report)

22. If we apply the aforesaid principles in the facts of case in hand, we are bound to hold that the agreement between the parties merely falls under the category of licence as the licensee is never given the exclusive possession. The Corporation retained the exclusive possession of the shops and this is clear from the conditions of the licence discussed above.

23. Subsequently, in the case of **Mrs. M.N. Clubwala and Anr. v. Fida Hussain Saheb and Ors., AIR 1965 Supreme Court 610**, the same propositions have been reiterated by Justice Mudholkar in para 12 of the report after relying on the decisions in Errington (supra) and also Cobb (supra) and also the decision of this Court in Associated Hotels of India Ltd. (supra). The principle laid down by the learned Judge is as follows :

“.....We must, therefore, look at the surrounding circumstances. One of those circumstances is whether actual possession of the stalls can be said to have continued with the landlords or whether it had passed on to the stall-holders. Even if it had passed to a person, his right to exclusive possession would not be conclusive evidence of the existence of a tenancy though that would be a consideration of first importance. That is what was held in **Errington v. Errington and Woods, 1952-1 K.B. 290** and **Cobb v. Lane, 1952-1 All England Reporter 1199**” ..... (Page 614 of the report)

24. Also a three-Judge Bench of this Court in **Board of Revenue etc. etc. v. A.M. Ansari etc., AIR 1976 Supreme Court 1813**, relied on the decision in Errington (supra) and Cobb (supra) and expressively approved the opinion of Lord Denning in Cobb (supra) in paragraph 10. The same passage was approved by Justice Subba Rao (as His Lordship then was) in Associated Hotels of India Ltd. (supra).

25. Reference in this connection can be made also to a later judgment of the Court of Appeal in **Marchant v. Charters, (1977)3 All England Reporter 918**, where again Lord Denning reiterated these principles in a slightly different form by holding that the true test is the nature and quality of the occupation and not always whether the person has exclusive possession or not. The true test in the language of the learned Judge is as follows :

“.....It does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these are factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a [contract](#) or not, in which case he is a licensee ?”

26. If we apply these tests in the facts of this case, it will be clear that the agreement between the parties is one for licence and not of a lease.

27. In a rather recent judgment of this Court in the case of **C.M. Beena and another v. P.N. Ramachandra Rao, 2004(3) SCC 595**, the learned Judges relied on the ratio in **Associated Hotels of India Ltd.** (supra) in deciding the difference between lease and licence. In paragraph 8 of the said judgment, learned Judges held that difference between lease and the licence is to be determined by finding the real intention of the parties from a total reading of the document, if any, between the parties and also considering the surrounding circumstances. The learned Judges made it clear that use of terms “lease” or “licence”, “lessor” or “licensor”, “rent” or “licence fee” by themselves are not decisive. The conduct and intention of the parties before and after the creation of relationship is relevant to find out the intention. The learned Judges quoted from the treatises of Evans and Smith on “The Laws of Landlord and Tenant” and of Hill & Redman on “Law of Landlord and Tenant” in support of their proposition.

28. Following the aforesaid tests and in view of the discussions made hereinabove, it is clear that the intention of the parties in the case is to create a licence and not a lease and the right of exclusive possession was retained by the Corporation. In that view of the matter, relationship which is created between the Corporation and the shop holders is that of a licensor and licensee and not that of a lessor or a lessee. The stamp duty on licence agreement should be governed by Entry 5(c) of the Kerala Stamp Act, which is a residuary Clause in the Schedule and not by Entry 33.

29. This appeal is, therefore, allowed. Both the judgments of the High Court, of the Single

Judge and of the Division Bench are quashed. There shall be no order as to costs.