

"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

FRIDAY, THE 14TH DAY OF JULY 2023 / 23RD ASHADHA, 1945

O.P. (RC) NO. 119 OF 2023

AGAINST THE ORDER DATED 13.04.2023 IN I.A.NO.1 OF 2022 IN
R.C.P.NO.35 OF 2022 OF THE RENT CONTROL COURT (ADDITIONAL
MUNSIFF) , THIRUVANANTHAPURAM

PETITIONER/RESPONDENT:

ASHOK HARRY POTHEN
AGED 60, S/O HARRY POTHEN, MANAGING DIRECTOR,
POTHEN MOTORS PRIVATE LIMITED, MARUTHOOR,
MANNANTHAL PO THIRUVANANTHAPURAM, PIN - 695015.

BY ADVS.

S.EASWARAN

K.V.RAJESWARI

P.MURALEEDHARAN (IRIMPANAM)

RESPONDENT/PETITIONER/PLAINTIFF:

PREMLAL,
AGED 70 YEARS, LATE K.A.KRISHNAN,
RESIDING AT FLAT NO 8A, ARTEC,
LAKEVIEW APARTMENTS, NH BYEPASS, ANAYARA PO
THIRUVANANTHAPURAM, PIN - 695029.

BY ADVS.

G.RAJEEV

AJITH KUMAR.S

O.P.(FC) No.119 of 2023

ASWANI P.S.
NAVEEN RADHAKRISHNAN
JYOTHSNA G.J.
ARDRA MINI SATISH

THIS OP (RENT CONTROL) HAVING COME UP FOR FINAL
HEARING ON 30.06.2023, THE COURT ON 14.07.2023 DELIVERED
THE FOLLOWING:

“C.R.”**JUDGMENT****P.G. Ajithkumar, J.**

The respondent-tenant in R.C.P.No.35 of 2022 on the file of the Rent Control Court (Additional Munsiff), Thiruvananthapuram, has filed this Original Petition under Article 227 of the Constitution of India. He is aggrieved of Ext.P7 order of the Rent Control Court in I.A.No.1 of 2022 in that rent control petition.

2. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent.

3. R.C.P.No.35 of 2022 was filed by the respondent seeking eviction of the petitioner under Section 11(2)(b) and 11(3) of the Kerala Buildings (Lease and Rent Control) Act, 1965. The respondent contended that the petition schedule premises was let out to the petitioner on a monthly rent of Rs.1,65,000/- as per a lease agreement dated 15.07.2015. There was stipulation for yearly enhancement of rent by 10%.

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The respondent filed I.A.No.1 of 2022 alleging that the petitioner defaulted payment of rent and as on February, 2022, an amount of Rs.1,32,69,902/- remained to be paid towards arrears of rent. It is further averred by the respondents that although an agreement for sale of the petition schedule building was entered into between the parties on 23.03.2017, the sale did not get through for the fault of the petitioner. Hence the advance sale consideration paid by the petitioner was adjusted against the rent. Adding the subsequent arrears till 15.10.2022 the rent amount due is Rs.1,04,74,693/-. On the said premises the respondent filed I.A.No.1 of 2022.

4. The petitioner took the stand that he was not a tenant, but a licensee. The document dated 15.07.2015 is a licence deed. The description of the petition schedule premises is different from what has been described in the said licence deed. The premises were handed over to the petitioner for a specific purpose of conducting a car showroom and parking facilities. The liability to pay rent as claimed by the

respondent was refuted by the petitioner. He contended that on executing agreement for sale dated 22.03.2017, the possession of the premises was handed over to the petitioner. Rs.25,00,000/- which was paid as advance sale consideration and the deposit amount paid at the time of executing the licence deed on 15.07.2015 are with the respondent. In such circumstances, he has no liability to pay the licence fees as agreed to in the said document.

5. Since the respondent did not come forward to execute the sale deed in terms of the agreement dated 22.03.2017, the petitioner issued notice to the respondent and his sister asking them to execute the sale deed after receiving the balance sale consideration. There occurred mediation talks in that regard, but the same was not fruitful. The period of licence is 10 years, which will be over only by September, 2025. For those reasons the petitioner denied his liability to pay the rent. He, however, did not claim that he paid the rent after August, 2017.

6. The Rent Control Court received in evidence Exts.A1 to A3 and Exts.B1 to B11 for the purpose of deciding I.A.No.1 of 2022. After considering the said documents and also the submissions by either side, the Rent Control Court took the view that Ext.A1, document dated 15.07.2015 is predominantly a rent agreement and the plea of the petitioner was not tenable. Accordingly, the petitioner was directed to deposit Rs.1,65,97,286/- being the arrears of rent admitted to be due for the period from 31.03.2017 to 15.03.2023 within a period of four weeks from the date of that order. The petitioner was further directed to deposit the rent for the future periods as well.

7. The learned counsel appearing for the petitioner would submit that Ext.P1 is a licence deed in every sense, and therefore, finding entered into by the Rent Control Court is incorrect. After referring to various clauses in Ext.P1, the learned counsel would submit that the petitioner was given permission to occupy the premises for the specific purpose of

conducting a car showroom and related operations with a further stipulation that the premises should not be used for any other purpose. Coupled with the other restrictions imposed to the occupation of the premises make the transaction a licence. The learned counsel placed reliance on **C.M.Beena v. P.N.Ramachandra Rao [(2004) 3 SCC 595]** and **Sunny Padamadan Rafael @ Sunny Padamadan v. Vijaya Shenony [2019 (2) KHC 90]** in order to contend that a wholesome interpretation of the provisions in Ext.P1 entails only one conclusion that, it is a licence.

8. The learned counsel appearing for the respondent, on the other hand, would submit that although the nomenclature of Ext.P1 is licence agreement, the terms in which possession of the premises was handed over constitute a rental arrangement. The learned counsel referred to clauses (6) and (11) in Ext.P1 specifically in order to fortify his contention that the arrangement is one of lease. In clause (6) it is stipulated that the monthly licence fee/rent shall be paid/

deposited into the account of the respondent. In clause (11) it is stipulated that the petitioner would have the right to uninterrupted peaceful and quiet enjoyment of the premises. In the view of the learned counsel for the respondent, the said stipulations are sufficient to indicate that unhindered possession was given to the petitioner and the domain over the premises was parted with by the respondents and as such the arrangement is one of lease. It is further contended that in consideration of the nature of the premises is being used by the petitioner and the subsequent conduct by the parties, the transaction is further established to be a lessee and not a licensee.

9. The Apex Court in **C.M.Beena [(2004) 3 SCC 595]** held thus,-

“8. The crucial issue for determination is as to whether there is a lease or licence existing between the parties. Though a deed of licence may have been executed it is open for the parties to the document to show that the relationship which was agreed upon by the parties and was really intended to be brought into existence was that of a

landlord and tenant though it was outwardly styled as a deed of licence to act as a camouflage on the Rent Control Legislation. 'Lease' is defined in Section 105 of the Transfer of Property Act 1882 while 'licence' is defined in Section 52 of the Indian Easements Act 1882. Generally speaking the difference between a 'lease' and 'licence' is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premise for a particular purpose or in a particular manner and but for the permission so given the occupation would have been unlawful [See: **Associated Hotels of India Ltd. v. R.N. Kapoor - AIR 1959 SC 1262**]. The decided cases on the point are legion. For our purpose it would suffice to refer to a recent decision of this court in **Corporation of Calicut v. K Sreenivasan [(2002) 5 SCC 361]**.

9. A few principles are well settled. User of the terms like 'lease or 'licence', 'lessor', 'rent' or 'licence fee' are not by themselves decisive of the nature of the right created by the document. An effort should be made to

find out whether the deed confers a right to possess exclusively coupled with transfer of a right to enjoy the property or what has been parted with is merely a right to use the property while the possession is retained by the owner. The conduct of the parties before and after the creation of relationship is of relevance for finding out their intention.

11. In Hill and Redman's Law of Landlord and Tenant (Seventeenth Edition, Vol.1) a more detailed discussion also laying down the determinative tests, is to be found stated as followed: "It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should be granted the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without being entitled to exclusive possession must operate as a licence and not as a lease. It was probably correct law at one time to say that the right of exclusive possession necessarily characterized the grant as that of a lease; but it is now possible for a licensee to have the right to exclusive possession. However, the fact that exclusive possession is granted, though by no means decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance. Further, a grant of exclusive possession may be only a licence and not a lease where the grantor has no power to

grant a lease. In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance rather than the form of the agreement, for the relationship between the parties is determined by the law and not by the title which they choose to put on it. It has been said that the law will not impute an intention to enter into the legal relation of landlord and tenant where circumstances and conduct negative that intention; but the fact that the agreement contains a clause that no tenancy is to be created will not, of itself, preclude the instrument from being a lease. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is prima facie a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and under the control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the tenant require that he should have exclusive possession. On the other hand, the employment of words appropriate to a lease such as 'rent' or 'rental' will not prevent the grant from being a mere licence if from the whole document it appears that the possession of the property is to be retained by the grantor." (at pages 14-15)."

10. In **Associated Hotels of India Ltd. v. R.N.Kapoor [AIR 1959 SC 1262]**, the Apex Court held thus,-

“27. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immoveable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is there-' fore a transfer of an interest in land. The interest, transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the Indian Easements Act defines a licence thus :

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

Under the aforesaid section, if a document gives only a right to use the property in a particular way or under

certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose'. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in **Errington v. Errington [(1952) 1 All E.R. 149]**, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p. 155:

"The result of all these cases is that, although a person who is let into exclusive possession is prima facie, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

The Court of Appeal again in **Cobb v. Lane [(1952) 1 All E.R. 1199]** considered the legal position and laid

down that the intention of the parties was the real test for ascertaining the character of a document. At p.1201, Somervell.. L. J., stated :

"..... the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties."

Denning, L. J., said much to the same effect at p. 1202:

"The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land ?"

The following propositions may, therefore, be taken as well-established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease." (Underlines supplied)

11. In the case of **B.M.Lall v. M/s Dunlop Rubber Co. (India) Ltd. & another [AIR 1968 SC 175]**, there was an agreement between the employer and the employee under which occupation of the employee in the premises was to cease not only on the termination of his employment but also on his transfer from one station to another and on his death. The employer was at liberty to allot any other flat to the employee on his transfer to another station and assign the premises fallen vacant by virtue of transfer to any other employee. In these circumstances, the Apex Court observed at page 178 thus:

"All the terms of the agreement are consistent with the expressed intention that the officer is permitted to occupy the flat as a licensee and nothing in the agreement shall be deemed to create the relationship of landlord and tenant. The agreement on its true construction read in the light of the surrounding circumstances operates as a license and not as a tenancy. It creates no interest in the land. It gives only a personal privilege or license to the servant to occupy the premises for the greater convenience of his work."

12. The law laid down in **Associated Hotels of India Ltd. [AIR 1959 SC 1262]** and **B.M.Lall [AIR 1968 SC 175]** referred to above was reiterated by the Apex Court in **Corporation of Calicut v. K.Sreenivasan [AIR 2002 SC 2051]** and held thus,-

“9. This Court while dealing with distinction between ‘licence’ and ‘lease’ has enumerated in various decisions as to what are the rights of a licensee. In the case of **Associated Hotels of India Ltd. v. R.N.Kapoor [AIR 1959 SC 1262]**, it was observed at page 1269 thus:-

"...if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful." (Emphasis added)

13. In **Sunny Padamadan Rafael @ Sunny Padamadan [2019 (2) KHC 90]** a Division Bench of this Court after considering the provisions of Section 105 of the

Transfer of Property Act and Section 52 of the Indian Easements Act held thus,-

“On an analysis of the aforesaid provision, we find that what is transferred by the licensor to the licensee is a right to do or continue to do a specific act in or upon the immovable property of the licensor. It follows that the possession of the building was not transferred under licence and the licensee is not allowed to do any act other than the act, for which he is permitted under the licence; whereas, in the case of lease, what is transferred under Section 105 of the Transfer of Property Act is the right to enjoy the immovable property. The lease envisages and transfers an interest in the demised property by creating a right in favour of the lessee in rem. Thus, the lessee of a building has the right to possess and enjoy the building; whereas a licensee of a building does not have such a right of possession and enjoyment of the building and he has a right to do or continue to do the specific business or trade only in the building for which permission has been granted by the licensor.”

14. It is thus the settled law that the nature of a document has to be understood not by its nomenclature or by interpreting one or two clauses in it in isolation, but by

interpreting the document as a whole. Going by the principles laid down by the Apex Court as well as this Court in the aforesaid decisions, there cannot be a single litmus test to decide whether the transaction in Ext.P1 is a lease or licence. In clause (3) of Ext.P1, there is a specific stipulation that the premises was given for the purpose of running a car showroom and related operations, and cannot be used for any other purpose. Of course, in clause (6) it was written "monthly licence fee/rent". The usage of such a word by itself would not distinguish the arrangement between lease and licence. In clause (11) it is stated that the petitioner was allowed to enjoy the licensed premises quietly, peacefully and uninterruptedly. But, in none of the clauses in Ext.P1, it has been stated that exclusive possession of the premises has been handed over to the petitioner. It may be true that the petitioner has been enjoying the premises without having any physical interference to such enjoyment by the respondent. However, by virtue of the provisions of Ext.P1, it is not able to

say that exclusive possession of the premises so as to constitute the transaction a valid lease has been given to the petitioner.

15. The parties to Ext. A1 are not illiterates. The petitioner is a seasoned businessman and the respondent is the owner of a premises having such a vast extent. They have sufficient ability to understand the difference between lease and licence as can be gathered from the clauses included in Ext.P1. When such persons with open eyes enter into a transaction by executing a document fixing the period as 10 years in a stamp paper worth Rs.100/-, it can only be said that their intention was to create a licence alone and not a lease. If they intended to create a lease for such a period, they would have executed a registered document, which is the insistence of law. Taking all such matters into account, we are of the view that the jural relationship created by virtue of Ext.P1 is that of a licence and not a lease. In that view of the matter, the finding of the Rent Control Court that the

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transaction is a lease cannot be sustained. That follows that the order of the Rent Control Court under Section 12(1) of the Act does not sustain in law and it is liable to be set aside.

The Original Petition is therefore allowed. The order of the Rent Control Court, Thiruvananthapuram dated 13.04.2023 in I.A.No.1 of 2022 in R.C.P.No.35 of 2022 is set aside.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr

APPENDIX OF OP (RC) 119/2023

PETITIONER EXHIBITS

- Exhibit P1 COPY OF THE LICENCE AGREEMENT DATED
15-7-2015
- Exhibit P2 COPY OF THE AGREEMENT OF SALE DATED
22-3-2017
- Exhibit P3 COPY OF THE RCP NO 35 OF 2022 ON THE
FILES OF RENT CONTROL COURT
THIRUVANANTHAPURAM
- Exhibit P4 COPY OF THE OBJECTION FILED BY THE
PETITIONER HEREIN TO RCP NO 35 OF 2022
ON THE FILES OF RENT CONTROL COURT
THIRUVANANTHAPURAM
- Exhibit P5 COPY OF IA NO 1 OF 2022 IN RCP NO 35
OF 2022 ON THE FILES OF RENT CONTROL
COURT THIRUVANANTHAPURAM
- Exhibit P6 COPY OF THE OBJECTIONS FILED BY THE
PETITIONER HEREIN TO IA NO 1 OF 2022
IN RCP NO 35 OF 2022 ON THE FILES OF
RENT CONTROL COURT THIRUVANANTHAPURAM
- Exhibit P7 COPY OF THE ORDER DATED 13-4-2023 IN
IA NO 1 OF 2022 IN RCP NO 35 OF 2022
ON THE FILES OF RENT CONTROL COURT
THIRUVANANTHAPURAM