Smt. Rajbir Kaur & Anr vs S. Chokesiri & Co on 9 August, 1988

Equivalent citations: 1988 AIR 1845, 1988 SCR SUPL. (2) 310, AIR 1988 SUPREME COURT 1845, (1988) 2 APLJ 57, (1988) 3 JT 593 (SC), 1989 (1) SCC 19

Author: R.S. Pathak

Bench: R.S. Pathak

PETITIONER:
SMT. RAJBIR KAUR & ANR.

Vs.

RESPONDENT:
S. CHOKESIRI & CO.

DATE OF JUDGMENT09/08/1988

BENCH:
VENKATACHALLIAH, M.N. (J)
BENCH:
VENKATACHALLIAH, M.N. (J)
PATHAK, R.S. (CJ)

CITATION:
1988 AIR 1845 1988 SCR Supl. (2) 310
1989 SCC (1) 19 JT 1988 (3) 593
1988 SCALE (2)461
CITATOR INFO :
R 1989 SC1141 (18)
E&D 1989 SC1416 (9)
RF 1992 SC1696 (5)

ACT:
Civil Procedure Code, 1908: Order 26 rule 9, Order 39 rule 7 and section 115-Commissioner appointment of-By Court-Notice to parties not necessary if purpose of appointment would be defeated or frustrated-Revisional Court to be reluctant to embark on independent reassessment of evidence and supplant its own conclusion.

East Punjab Urban Rent Restriction Act, 1949 : Sections 13 an 15 (5)- Tenant-Eviction on ground of sub-letting-Right to enjoyment of property to be for consideration-Concurrent finding with regard to exclusive possession- Whether amenable to reversal in revision.

Transfer of' Property Act, 1882 : Section 105-Lease and licence-Distinction between-Determined by the law and not by

the label parties choose to put upon it-Right to exclusive possession Determination of' from acts done by grantee.

HEADNOTE:

The appellants had granted a lease of commercial premises in favour of the respondent-company, who carried on the business in clothing and textiles in the demised premises. Later, the appellants moved an application under section 13 of the East Punjab Urban Rent Restriction Act, I94Y seeking eviction of the respondent inter alia on the ground that it had unauthoirsdly and without the consent of the appel- lant inducted two sub-tenants-a tailor and an ice-cream vendor-in two portions of the premises. The defence of the respondent in the written statement was that the maintenance of such booths had become a necessary adjunct of all big shops in modern shopping centres, and that the respondent remained in the exclusive possession of the demised premises.

The appellants relied particularly on the Report and evidence of the Court-Commissioner who in his report substantially corroborated appellants' charge of sub-letting. On the other hand, the respondent relied upon the agreements entered into by it with the alleged sub-tenants which, according to it, clearly excluded any possibility of sub-letting. The respondent also examined M.L. Sharma, (R.W. 3) a senior architect in Chandigarh Administration who

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produced the Plans (Ext. R. 4) relating to certain alterations in the demised premises.

The Rent Controller, on an appreciation of the evidence, was persuaded to the view that while the allegations of sub-letting in favour of the tailor had not been established, the case of sub-letting so far as the Ice-cream parlour was concerned had clearly been established.The Rent Controller held that the evidence on record indicated the exclusive possession of M S Kwality Ice Cream. The Rent Controller further held that in the circumstances of the case it was also legitimate to draw an inference, and raise a presumption that monetary consideration alone had prompted the respondent into the transactions.

The respondent filed an appeal before the District Judge, and the Appellate Authority affirmed the finding of the Rent Controller on the question of sub-letting in so far as the Ice Cream Parlour was con- cerned. The Appellate Authority also found that even in the case of the tailor there was sub-letting.

In Civil Revision, the High Court upon a re-appreciation of the evidence set aside the concurrent finding of the Courts below in regard to the element of exclusive possession and set-aside the order of eviction passed by the

Courts below. The High Court relied on the agreements between the respondent and the sub-tenants and held that the conditions prescribed in these documents did prima facie indicate that it was a case of licensees and not of sub-letting. The High Court took note of the procedural objection in regard to the appointment of the local Commis-- sioner without notice to the respondent, and was of the view that there were circumstances to show that his report was not factually correct.

On behalf of the appellants it was contended that (i) the High Court was in error in interfering, in exercise of its revisional jurisdic- tion, with the concurrent finding of fact recorded by the courts below; ; (ii) the reliance on the High Court on the evidence of R.W. 3 and Plans (Exhibit R.4) on the point of exclusive possession was wholly misplaced (iii) a finding of fact which was the result purely of appreciation of oral evidence by the trial court could not be interfered with by an Appellate-Court and a-fortiorari in Revision; and (iv) the view of the High Court as to the alleged infirmity of the Court-Commissioner's report was erroneous.

On behalf of the respondent it was contended that (i] where a finding of fact was shown to have been rendered infirm and vitiated by a misreading of evidence, the

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Revisional jurisdiction under the Act, which was wider than that under section 115 C.P.C. could be invoked to correct errors even in findings of facts; [ii] the finding of a question of sub-tenancy being a mixed question of fact and law, this Court even on an independent consideration of the whole matter, should not interfere as one of the essential ingredients in the concept of a sub-lease, viz., the existence of monetary consideration, in the form of Rent', as dis- tinct from consideration by way of services, was wholly lacking; and (iii) the appear should fail on the correctness of the finding of the High Court on the lack of exclusive possession alone; and (iv) the two transactions lacked the normal and the usual indicia of tenancy and were no more than mere personal privileges or personal-licence to occupy, and that no interest in the property was transferred.

Allowing the appeal, this Court,

HELD: 1. One of the twin principal tests by which a lease was distinguishable from the relationship created under a licence is the element of the right to exclusive possession involving the transfer of an interest in the property; the other being the 'Rent' stipulated for the grant. The grant only of the right to use the premises without being entitled to the exclusive possession thereof operates merely as a licence. [323B-C]

Wood v. Leadbitter, 153E.R. 351-354; Glenwood Lumber Co. v. Phillips. [l9O4] A.C. 405-408; Associated Hotel of India v. R.N. kapoor, [1960] 1 SCR 368-353; B.M. Lall v. Dunlop

Rubber Co., [1968] SCR 23, 27; Qudrat ullah v. Municipal Board Bareilly, [l974] SCC 202, 204; Board of Revenue v. A.N. Ansari, [l976] 3 SCR 661, 665 and Khulil ahmad Bashir Ahmed v. Tufelhussain Samasbhai Sarangpurwala., JT 1987 4 S.C. 342,346, referred to.

2. It is essential to the creation of a tenancy that the tenant be granted the right to the enjoyment of the property and that, further, the grant be for consideration. [323F]

Dipak Banerjee v. Smt. Lilabati Chakkroborty, 4 JT 1987 3 454, 456, referred to.

3. Exclusive possession itself is not decisive in favour of a lease and against a mere licence, for, even the grant of exclusive possession might turn out to be only a licence and not a lease where the grantor himself has no power to grant the lease. In the last analysis, the question whether

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a transaction is a lease or a licence "turns on the operative intention of the parties" and there is no single litmus-test to distinguish one from the other. [324C-D]

Cobb v. Lane, [l952] 1 All E.R. 1198; Merchant v. Charter, [19773 3 All E.R. 918, 922 and M.N. Clubwala v. Fida Hussain Sahel, [l9d4l 6 SCR 642, referred to.

4. In deciding whether a grant amounts to a lease or only a licence, regard must be had more to the substance than the form of the transaction. It is determined by the law and not by the label the parties choose to put on it. To give exclusive possession, there need not be express words to that effect; it is Sufficient if the nature of the acts done by tie grantee show that he had and was intended to have the right of exclusive possession. The fact that the agreement contained a clause that no tenancy was to be created will not, of itself, preclude the instru- ment from creating a lease. [l327G-H; 328A]

B.M. Lall v. Dun(op Rubber Co., [l968j 1 SCR 23, Z7, referred to

5. The scope of revisional jurisdiction depends on the language of the statute conferring the revisional jurisdiction. Revisional jurisdiction is only a part of the appellate jurisdiction and cannot be equated with that of a full-fledged appear. Though the revisional power-depending upon the language of the provision--might be wider than revisional power under section ~51 of the Code of Civil Procedure, yet a revisional court is not second or first appeal. [330H; 331A]

6. When the findings of fact recorded by the Courts below are supportable on the evidence on record, the revisional Court must, indeed, be reluctant to embark upon an independent re-assessment of the evidence and to supplant a conclusion of its own, so long as the evidence on record admitted of and supported the one reached by the Courts below. In the circumstances, the concurrent finding as to exclusive possession of M/s Kwality Ice-Cream,was not amenable to reversal In revision. [331B-D]

7. The question whether the statement of the witnesses in regard to what was amenable to perception by sensual experience as to what they saw and heard is acceptable or not is the area in which well-known limitation on the powers of the appellate Court to reappreciate the evidence falls. The appellate Court, if it seeks to reverse those findings

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of fact, must give cogent reasons to demonstrate how the trial Court fell into an obvious error. [33H; 335A]

Watt v. Thomas, [1947] A.C. 484, 487, 488; Benmax v. Austin Motor Co. Ltd., 119551 2 W.L.R. 418, 422 and Sarju Pershad v. Jwaleshwari 4Pratap Narain Singh, [1950] SCR 781, 783; referred to.

8. It is no doubt true that in the present case the order of the trial court appointing a Commissioner did not in terms direct the parties to appear before the Commissioner. There is this infirmity in the proceedlngs of the Commissioner. But It is possible to construe the power to appoint a Commissioner to inspect the extant state and natur of structures as not confined to Rule 9 of Order 26 but referable to Rule 7 of Order 39 CPC where the court can dispense with prior notice, should it appear to the court that the very object of making of appointment of a Commissioner would be defeated and frustrated by the issue of prior. [335E-G]

Latchan Naidu and Anr. v. Rama Krishan Ranga Rao Bahadur Bobbili Samasthanam, AIR 1934 Madras 548.

9. A more careful examination of the context in which M.L. Sharma, the senior architect, who produced Ext. R. 4 was examined shows that Ext. R. 4 was relied upon in rebuttal of and in answer to an Altogether different ground, i.e,, the ground of unauthorised structural'alterations and the alleged damage caused to the building thereby and to show that the structural alterations had been authorised by the first appellant. It is quite plain that Respondent itself did not seek to rely on this evidence on the point of exclusive possession or lack of it. Reliance on the plans to take away the effect of the positive evidence on record was not, therefore, justified. [330D-E, G]

10. In the present case, the appellants specifically pleaded "sub- letting". Respondent understood that pleading as to imply all the incidents of sub-letting including the element of `Rent' and specifically traversed that plea by denying the existence of consideration. Parties went to the trial with full knowledge of the ambit of the case of each Other. In the circumstances the pleadings would require to be construed liberally. [336F]

Ram Sarup Gupta v. Bishun Narain Inter College, AIR 1987 SC 1242; referred to.

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11. The burden of establishing facts and contentions which support the party's case Is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a

party has failed to establish these to the appropriate standard, he will lose. although the burden of proof as a matter of law remains constant through out a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according to the weight of the evidence adduced by the party during the trial. In the circumstances of the case, the appellants having been forced by the Courts below to have established exclusive possession of the Ice-Cream Vendor of a part of the demised premises and the explanation of the transaction offered by the respondent having been found by the Courts below to be unsatisfactory and unacceptable, it was not impermissible for the Courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. [337F.H; 338A-B]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4077 of 1982.

From the Judgment and Order dated 23.8. 1982 of the Punjab and Haryana High Court in Civil Revn. No. 2588 of 1980.

G.L. Sanghi, S.K. Mehta, M.K. Dua, S.M. Tandon, P.N. Puri,R. Jagannath Goulay and Aman Vochher for the Appellants.

Dr. Y.S. Chitale, H.K. Puri and Ashok Jain for the Respondents.

The Judgment of the Court was delivered by VENAKATACHALIAH, J. This Appeal, by Special Leave, by the Landlord arises out of and is directed against the Judgment and Order dated 23.9. 1982 of the High Court of Punjab and Haryana in Civil Revision Application No. 2588 of 1980, allowing the Respondent tenant's appeal and-in reversal of the concurrent findings of the court below that there was an unauthorised sub-letting dismissing Appellant's application under Section 13 of the East Punjab Urban Rent Restriction Act, 1949 (Act) for an order for grant of possession.

There were other grounds for eviction-one of them that there were unauthorised structural alterations; but having regard to the limited scope of the proceedings before the High Court. those other points do not survive.

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2. The two appellants-mother and son-as owners of the commercial-premises S.C.O, No. 15, Sector 17 E, Chandigarh, granted a lease, under deed dated 25.11.1970, in favour M/s. S.Chokesiri & Co., respondent fierein. The lease was for a term-certain of 10 years from 1. 1.1971 under the terms and on conditions particularised in the Deed. Rent was initially Rs.3,000 per month subject to certain

increases stipulated in the lease-deed. Respondent carries on a business in clothing and textiles under the name and style ,Saree Sansar" in the demised premises.

The principal ground-and the only ground that survives- on which eviction was sought was that the respondent had, in about the year 1973, unauthorisedly and without the consent of the appellants, inducted two sub-tenants in two portions of the premises who,there after, carried-on their respective businesses of their own in the respec- tive portions so sub- let. One was a tailor, a certain Banwari Lal, who carried on his business under the name and style "Royal Star Tailors"

> and the other. Agia Ram Lamba, Proprietor of M/S. Kwality Restaur- ant who established a business under the name and style ,,M/s. Kwality Ice Cream" in the portion sub-let.

3. The specific defence to this charge of sub-letting and the explanation for the admitted presence of those two other busines establishments in the premises had better be excerpted from the respondent's additional written statement:

> "The respondents have not sub-let any part of the demised premises to any one. The whole of the demised premises are in the exclusive possession of the respondents and are being used for the purpose of carrying on the business of the respondents, namely, selling cloth and readymode garments and for purpose subsidiary and ancilliary to the said business . . . . ."
>
> "No part of the demised premises has been sub-let by the respondent to M/S. Kwality Ice Cream or any tailors. Sector 17 is the most fashionable shopping centre of the city. Most of the customers who frequent this shopping centre, are ultra modern persons. It is a matter of common knowledge that in modern shopping centres, the owners of show-rooms, whatever the nature of their business, keep small booths to provide cold drinks, ice-cream and paup- corns etc., to the customers, who come there with their children and spend PG NO 317 considerable time making purchases in the show-rooms. The maintenance of such booths has become a necessary adjunct of all big shops in modern shopping centres."
>
> "Similarly, is well-known that in order to run the business of selling cloth efficiently, it is necessary to have a tailoring shop on the premises. Every customer, who makes purchase of cloth in any cloth shop of any consequence wants consult a tailor in order to know exactly the length of the material that will be required by him for preparation of garments of his choice and most of the customers also like to have the garments stitched by the tailoring outfit on the premises of the cloth shop, more especially when the customers belong to sophisticated upper class."

The respondent also produced and relied upon the agreements dated 13.9. 1973 entered into between Respondent and the said Banwari Lal of ,Royal Star Tailors" (Ex. Mark `B') and dated 17.9.1973 between the Respondent and the said Agia Ram Lamba of "M/s. Kwality Restaurant" (Ex.

Mark A') the terms of which, according to the respondent, clearly excluded any possibility of sub-letting.

4. Appellants, in support of their allegation of sub- letting relied, particularly, on the Report 'and evidence of Sri S.K. Chhabra, Advocate-Court-Commissioner (A.W.I) who in his report substantially corroborated appellants' charge of sub-letting; of Ram Lal Malhotra (A.W. 2.) and Inspector in the Enforcement Office who spoke to the notice stated to have been issued by the authorities in regard to the partitions effected in the premises to accommodate the Tailor and the Ice Cream Vendor; or Ravinder Pal Singh (A.W.

4) A customer of the Ice Cream Parlour who spoke about the exclusiveness of its possession, of Nirmal Singh (A.W. 5) who gave a similar account respecting the tailoring establishment; of Davinder Singh (A.W. 7), the husband of the first appellant and father of the second. who spoke about the nature and extent of the alleged sub-letting and of the exclu- siveness of the possession of the sub-tenants of the portions in their respective occupation and certain other matters; and of Kul Rajinderlal (A.W. 8) who took photographs (Exhibits AW 8/1 to 4) which are stated to disclose that the Ice Cream Parlour was open late in the night even after the respondent's textile business had been closed.

Mehtab Singh Gill, the second appellant, tendered- evidence as A. W. 9. Some documents were marked and relied upon in evidence on appellant's side.

Respondent examined, amongst others, Rajinder Kumar (R.W. 2) stated to be an attestor of Exhibits Mark 'A' and Mark 'B'; M.L. Sharma (R.W. 3) a Senior Architect, in Chandigarh administration who produced the Plans at (Ext. R.

4); Surinder Mohan (R.W. 5) the tailor's son; Swatantar Kumar (R.W. 6) a partner of "M/s. Kwality Restaurant"; Parveen Jain (R.W. 7) who was examined to contradict A.W. 8 in regard to the time at which the photographs Ext. AW 8/1 to 4 were taken; Baldev Raj (R.W. 8) the Manager of "M/s. Kwality Restaurant"; Krishan Lal (R.W. 9) an employee of "M/s. Kwality Ice Cream" and Des Raj Jain (R.W. 10) a partner of the respondent firm.

The relevant portions of document (Mark A) dated 17.9, 1973 say:

> "(l) That 1st party will provide Softy Ice Cream Machine along with one employee at their premises and the whole Softy Ice Cream will be supplied by the 1st part at his own risk and costs.
>
> (8) That both the parties can terminate the system at any time without any notice. In that case the 1st part will take away the machine from the premises."

The relevant recitals in the document (Mark B) dated l3.9.1973 provide :

> "(1) That the first party will do tailoring work only in the portion, i.e., back court yard and he will keep the employees with the prior consent of the second part and the premises will be locked in the evening by the second part. The possession will remain with the second part. (2) That the arrangement has been done as it is beneficial to both the parties and it will boost the business of second part and the first part be licencee in the premises and licence can be revoked will only (sic) at any time without any notice and in that case the 1st part will remove his machine and other articles. The 2nd PG NO 319 part will not liable to pay any damages."

5. The learned Rent Controller, on an appreciation of the evidence on the point, was persuaded to the view that, while the allegations of sub-letting in favour of the tailor had not been established, the case of sub-letting so far as the "M/s. Kwality Ice Cream" was concerned, had clearly been established. It is relevant to mention here that sometime in the year 1976 after the institution of the proceedings the Tailor gave up his business and vacated the portion in his occupation. In about the year 1980 the Ice Cream Vendor is also stated to have gone away. Learned Rent Controller held that the evidence on record indicated the exclusive possession of the Kwality Ice Cream and that in the circumstances of the cases it was also legitimate to draw an inference, and raise a presumption, that monetary consideration alone had prompted the respondent into the transactions. Accordingly the learned Rent Controller by his order dated 2.3. 1979 allowed the appellants' application and made an order granting possession.

6. The appeal preferred by the respondent before the District Judge was unsuccessful and the order of eviction came to be upheld.The Appellate Authority also found that even in the case of M/s.Royal Star Tailors, there was a sub- letting. The Appellate Authority held:

> "So in the cases in hand, two exclusive portions have been parted with for M/s. Royal Star Tailors and for M/s. Kwality Ice Cream and the only conclusion in view of the evidence on record could be that the premises has been sublet and the documents Mark A and Mark B, could not be termed as licence deeds by any stretch of imagination Hence, so far as the finding on the ground of sub-letting is concerned, I do not find any reason to differ with learned Rent Controller and on this point I affirm the finding of the Rent Controller on this part of the issue. "

7. The High Court, by its order dated 23.8. 1982, in Civil Revision Application No. 2588 of 1980 however, in exercise of its Revision jurisdiction and upon a re- appreciation of the evidence set-aside the concurrent- findings of the Courts-below in regard to the element of exclusive possession and set-aside the orders of eviction passed by the Courts-below. Consequently appellants' application for possession was dismissed.

PG NO 320 In reaching this conclusion, the High Court placed reliance on the two documents Mark A and Mark B entered into between the respondent on the one hand and M/s. Kwality Restaurant and Banwarilal, the Tailor, respectively, on the other. The High Court observed:

> "A look at these documents goes to show that it was specifically mentioned therein that the possession of the demised premises will remain with the petitioner-tenant and only the work connected with the supply of Softy Ice Cream and tailoring was allowed to be carried on. Except for the charges for the electricity consumed no rent is payable by the third parties to the petitioner. The agreements further envisage that the licences could be revoked at any time without any notice. The conditions prescribed in these documents do prima facie indicate that it was a cast: of licences, and not of sub-letting."

Referring to what it thought were certain procedural objections in accepting the Report and the evidence of the Court-Commissioner (A.W. 1) which had been accepted by the Courts-below, the High Court was persuaded to this view:

> "It appears that the Authorities below have given great importance to a report of the Local Commissioner who was appointed during the trial for inspection of the demised shop. It is not disputed that the order appointing the Local Commissioner was passed by the Rent Controller ex-parte without notice to the petitioner.
>
> "In the first place, there is nothing on the record to indicate that the petitioner was at any stage afforded an opportunity to file objections to this report as is usually done in such matters."

In regard to the correctness of the Report itself, the High Court had this observation to make:

> "The Local Commissioner made a report Exhibit A-1 to the effect that there are three separate portions on the ground floor where the demised premises were situated and each of these portions had a separate access. A material part of this report is that none of the above portion is PG NO 321 approachable from inside the demised shop. If this report of the Local Commissioner would have been correct, there may be something to say in favour of the land-lords on the points of the conferment of exclusive possession of the portions to the third parties. There are, however, circumstances to show that this report is not factually correct."

The High Court placed reliance on certain plans said to have been submitted for effecting certain alterations to the building which are stated to have contained the signature of the first appellant to come to the conclusion that, consistent with the structural dispensations indicated in the plans, the alleged sub-tenants could not have had exclusive possession. On this aspect, the High Court observed:

> "These plans were proved by M.L. Sharma, Senior Architect (RW. 3) who testified that they bear the signatures of Rajbir Kaur respondent-landlady. In fact, their correctness was also admitted by Devinder Singh, Mukhtiar and husband of Rajbir Kaur, andlady. These plans, according to learned counsel for the petitioner, indicate that after entering into the main gate of the shop one could go into the portion which

was permitted be used by the Kwality Restaurant for supply of Softy Ice Cream. Similar is the case with the portion occupied by the tailor. The learned counsel for the respondents has not been able to rebut fact. This being so, the question of parting with exclusive possession of any portion of the the shop in favour the of the two alleged sub-.tenants, does not arise.

(Emphasis Supplied1i)

13. The contentions of Sri G.L.. Sanghi, learned Senior Advocate in support of the appeal admit of being formulated thus:

(a) The High Court was in error in interfering, in exercise of its revisional-jurisdiction, with the concurrent finding fact recorded by both the Courts-below as to the exclusivity of the possession of M/s. Kwality Ice Cream of the portions in which it was carrying on of its business . This was a pure question of fact the concurrent finding on which was not amendable to interference in execise of revisional powers under the 'Act';

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(b) That reliance by the High Court on the evidence of R.W. 3 and Plans Exhibit R. 4 to show that the structural modifications indicated an accessibility between the main premises and the portions in the occupation of sub-tenants was wholly misplaced as, indeed, Exhibit R. 4 was itself produced in a totally different context and for altogether different purpose, viz., to meet the ground of eviction based on unauthorised construction and not for purposes of rebutting exclusive-possession of the sub-tenants;

(c) That even if the Revisional jurisdiction of the High Court admitted a re-appreciation of evidence, a finding of a fact which was the result purely of appreciation of oral evidence by the trial court could not be interfered with even by an Appellate-Court and a-fortiorari in Revision;

(d) That the view of the High Court as to the alleged infirmity of the Court-Commissioner's (A.W. 1) report on the ground that his appointment was not preceded by a notice to the Respondent was erroneous.

9. Dr. Chitaley, learned Senior Advocate for the respondent, sought to support the order of the High Court contending, in the main, that, where a finding of fact is shown to have been rendered infirm and vitiated by a misreading of evidence and a non-consideration of material evidence, and where the inference and conclusion drawn from the evidence is non-sequetor the Revisional jurisdiction under the 'Act' which is wider than that under Section 115 C.P.C. could be invoked to correct errors even in findings of facts and that, at all events, the finding of a question of sub-tenancy being a mixed questions of fact and law, this Court, even on an independent consideration of the whole

matter, should not interfere as one of the essential ingredients in the concept of a sub-lease, viz., the existence of monetary-consideration, in the form 'Rent', as distinct from consideration by way of services was wholly lacking. Learned counsel, however, emphasized the correctness of the finding of the High Court on the lack of exclusive-possession, on which alone, according to the learned counsel the appeal should fail.

10 . Such controversy as exists in the case turns solely on whether the relationship between the Respondent on the one hand and " M/s.'Kwality Restaurant" and the "Royal Star Tailors" on the other, is one of sub-letting. Dr. Chitaley contends that the two transactions lack the PG NO 323 normal and the usual indicia of tenancy and were no more than mere Personal privileges or personal-licence to occupy; and that no interest in the property was transferred.

This case, indeed, presents once again the recurring facets of a familiar controversy, whether the transaction between a tenant and the person-alleged by the landlord-to be his sub-tenant is in law really one of sub-tenancy which often resembles, and is Most liable to be confounded with, a licence. One of the twin principal tests by which a lease is distinguishable from the relationship created under a licence is the element of the right to exclusive possession involving the transfer of an interest in the property; the other being the 'rent' stipulated for the grant. In Wood v. Leadbitter, 153 E.R. 351 at 354 Baron Alderson emphasized the element of the transfer of interest:

> "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful. "

In Glenwood Lumber Co. v. Phillips, [1904l] A.C. 405 at 408 the distinction was pointed out thus:

> "If the effect of the instrument is to give the holder an 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 in law a demise of the land itself."

It is essential to the creation of a tenancy that the tenant be granted the right to the enjoyment of the property and that, further.the grant be for consideration. While the definition of 'Lease' Section 105 of the Transfer Property Act, 1882, envisages the transfer of a right to enjoy the property, on the other hand the definition of a 'Licence' under Section 52 of the Indian Easements Act, 1982 consistently with the above, excludes from its pale any transaction which otherwise, amounts to an "easement" or involves a transfer of an interest in the property, which is usually involved in the case of a transfer of right to enjoy it. These two rights, viz. easements and lease in their very nature, are appurtenant to the property. On the other hand, the grant only of the right to use the premises without being entitled to the exclusive possession thereof operates merely as a licence. But the converse implications PG NO 324 of this proposition need not necessarily and always be true. Wherever there is exclusive-possession, the idea of a licence is not necessarily ruled out. English Law contemplates what are called 'Possessory-Licences' which confer a right of exclusive-possession, marking them off from the more usual type of licences which serve to authorise acts which would otherwise be trespasses. (See: John Dewar; "Licences and Land Law".

Modern Law Review Vol. 49 No. 6 Nov. 1986 and S. Moriorty "Licences and Land Law:

> Legal principles and public policies"1984 100 L.Q.R. 37) Thus exclusive possession itself is not decisive in favour of a lease and against a mere licence, for, even the grant of exclusive -possession might turn out to be only a licence and not a lease where the grantor himself has no power to grant the lease. In the last analysis the question whether a transaction is a lease or a licence "turns on the operative intention of the parties" and that there is no single, simple litmustest to distinguish one from the other. The "solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties" (See Cobb v. Lane, [9521] 1 All E.R. 1198). In Merchant v. Charters, [1977] 3 All E.R.918 at (C.A.) Lord Denning MR referred to the tests for determining whether an occupier is a licensee or tenant thus:
>
> "Gathering the cases together What does it come to? What is the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession or not. It 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 lable which 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 occupy the room, whether under a contact or not,in which case he is a licensee?"

11. In Associated Hotels of India v. R.N.[1960] 1 SCR 368 at 383 this Court referring to the classic distinction between a lease and a licence said:

> PG NO 325 "There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the terms of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor."
>
> In B.M. Lall v. Dunlop Rubber Co.[1968] 1 SCR 23 at 17 the distinction between the two concepts was brought out:
>
> "A lease .... is the transfer of a right to enjoy premises whereas a licence is privilege to do something on the premises which otherwise would be unlawful....The transaction is a Iease, if it grants an interest in the land;it is a licence if it gives a personal privilege with no interest the land...."

In Qudrat Ulah v. Municipal Board, Bareilly, [1974] 1 SCC 202 at 204 it was stated:

> "..... If an interest in immovable property, entitling the transferers to enjoyment, is created, it is a lease; if permission to use without right to exclusive possession is alone granted, a licence...."

In Board Revenuer v. A. M. Ansari,[1976] 3 SCR 661 at 665 it was again observed:

> "... it is the creation of an interest in emmovable property or right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in lease ....."

In Dipak Banerjer v. Smr. Lilabati Chakrobory, 4 JT 1987 3 454 at 456 Sabyasachi Mukharji, J. observed:

> PG NO 326 "But in order to prove tenancy or sub-tenancy two ingredients had to be established, firstly the tenant must have exclusive right of possession or interest in the premises or part of the premises in question and secondly that right must in lieu of payment of some compensation or rent.
>
> However in regard to the second requirement of 'consideration'for the transfer of the right to enjoy the property, it was in that case held that though Section 105 of the Transfer of Property Act envisaged even 'services' rendered by the lessee as a consideration for the grant, however, under the Rent Acts, the position would be different. The proposition was noticed thus :
>
> "The question is, whether in the context of the provisions of Rent Act, services can be consideration for sub-tenancy. In other words whether in view of the provisions of the Rent Act services can be a good or any consideration for sub-lease is the question. Answering, it was held:
>
> "We are of the opinion that it cannot be"
>
> "It is however not possible to accept that services in lieu or the right of occupation would amount to receipt of rent under the Rent 'Act to create sub-tenancy. This frustrates and defeats the purpose of the Rent Act."

12. Again, in KhuliI Ahmed Bashir Ahmed v. Tufelhussin Samasbhai Saranpurwala,JT 1987 4 S.C. 342 at 348 Sabyasachi Mukharji J. observed:

> "To put precisely if an interest in immovable property entitling the transferee to enjoyment was created, it was a lease;if permission to use land without exclusive possession was alone granted a licence was the legal result. We are of that opinion

> that this was a licence and not a Iease as we discover the intent."

13. The question is, whether in the present case, the evidence on record justifies the inference that the tailor and the Ice-Cream-Vend or were put in exclusive possession. Dr. Chitaley contended that the question would require to be determined upon a proper construction of the deeds entered PG NO 327 into between the parties, and that alone is decisive of the matter. Indeed, learned counsel placed strong reliance on the following observations by this Court in M. N. Clubwala v. Fida Hussain Saheb, [1964] 6 SCR 642.

> "Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the inten-tion of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement. "

(Emphasis Supplied) The proposition of Dr. Chitaley as to the conclusiveness of what emanates from the construction of the documents, has, in this case, its own limitations. The import significance and conclusiveness of such documents making, or evidencing, the grants, fall to be examined in two distinct contexts. The dispute may arise between the very parties to the written instrument, where on the construction of the deed one party contends that the transaction is a licence' and the other that it is a lease'. The intention to be gathered from the document read as a whole has, quite obviously, a direct bearing. But in cases where, as here, the landlord alleges that the tenant has sub-let the premises and where the tenant, in support of his own defence sets-up the plea of a mere licencee and relies upon a deed entered into, inter-se, between himself and the alleged licencee, the landlord who is not a party to the deed is not bound by what emanates from the construction of the deed. At best, it is a piece of evidence, the weight to be accorded to which will necessarily depend upon all the other circumstances of the case. The tenant and the sub-tenant, who jointly set up a plea of licence against the landlord may choose to camouflage the truth and substance of the transaction behind a facade of a self-serving and canveniently drafted instrument. The transaction, might be collusive and a mere mask the parties choose to wear to confuse and confound third parties. In such a case the realities and substance of the transaction and not merely the deed, become the basis for the determination of the legal nature of the relationship. The deed is a mere piece of evidence. In deciding whether a grant amounts to a lease or only a licence, regard must be had more to the substance than the form of the transaction. It is determined by the law and not by the label the parties choose to put on it. To give exclusive possession, there need not be express words to that effect; it is sufficient if the nature of the acts done by the grantee show that he has and was intended to have the right of exclusive possession. The fact that the PG NO 328 agreement contains a clause that on tenancy is to be created will not, of itself, preclude the instrument from creating a lease.

In B. M. Lall's case (1968) 1 SCR 23 at 27 this Court observed :

> "The question is not of words but of substance and the label which the parties choose to put upon the transaction, though relevant, is not decisive. The test of exclusive possession is not decisive, though it is a very important indication in favour of

tenancy.

14. Contentions (a) and (b) could conveniently be dealt with together. Sri Sanghi's first contention is the non- availability, to the Revisional Court, of the power to reappreciate evidence and substitute a finding of fact of its own in place of the concurrent finding of the Court- below.

The cognate question is whether the concurrent finding of exclusive possession of M/s. Kwality Ice Cream is supportable on the evidence and if so, whether the High Court could, in revision, have substituted a finding of its own on the point. It is true, having regard to the language of Section l5(5) of the Act conferring revisional powers which include an examination of the legality or propriety of the order under revision, the High Court can, in an appropriate case. reappreciate evidence and interfere with findings of fact. But the question is whether that was called foe of justified in the present case. 'Sri Sanghi pointed out that finding of the trial-Judge on the question of exclusive possession of M/s. Kwality Ice Cream could not be found fault with on the alleged ground of any non-consideration of material evidence. He submitted that the finding was supportable on the evidence. Sri Sanghi particularly referred to some admissions of the respondent's own witnesses in the course of their evidence. Learned counsel drew attention to the deposition of Krishan Lal (R.W. 9) who, while admitting his identity in the photograph Ex. AW 8/4 said:

> "In Exh. AW 8/4, I am sitting. I was cleaning the Machine. My one hand was near the mouth. Portion of Softy is separate. It is correct to suggest that the Proprietor of 'Saree Sansar, opens the shop separately.
>
> (Emphasis Supplied) PG NO 329 Sri Sanghi also referred to the following statement of Das Raj jain (R.W. 10) a partner of the respondent's firm, which, according to the Iearned counsel, amounts to an admission of the exclusiveness of his possession :
>
> "The Ice-Cream premises can be locked from outside independently."

Sri Sanghi, quite understandly, placed strong reliance on the report of the Commissioner (A.W. 1) whose report substantiated the appellants' case. So far as the admissions attributed to Das Raj Jain (R.W. 10) is concerned, Dr. Chitaley would say that the statement of the witness that the premises could be looked from outside indepen- dently does not militate against or detract from the internal inter-connection between the main premises of "Saree Sansar'? and "Kwality Ice-Cream". But the report and evidence of the local Commissioner excluded any possibility of any such internal inter-connection.

On an appreciation of the evidence the Iearned Rent- Controller came to hold:

> "Evidence of the petitioners clearly establishes that there is a separate cabin for selling ice cream which is under the control ice cream sellers. The licence deed is only a cloak to cover the real relationship of the respondent with M/s Kwality Restaurant, Sector 17E, Chandigarh. It is not be lievable at all the respondent the parted with a portion of the premises to M/s Kwality Restaurant, Sector 17E, Chandigarh, without

> any consideration and just for sake of supplying ice-cream to the customers that too after Charging the price. It is all against the natural conduct that the respondent may part with a portion of the premises just for this merely facility."
>
> "The Photographer Kul Rajinder Lal (A.W. K) is an independent and truthful witness who took the Photographs at about 9 P.M. when the business of ice cream was being conducted. The statements of that Witnesses Swatantar Kumar (R. W 6), Parveen Jain (R.W.7) Saldev Raj (R.W.8) and Krishan Lal (R.W.9) are the statement of the interested persons who had clearly told a lie with a view to depose in favour of the respondent that the photographs were taken PG NO 330 early in the morning. If the photographs were taken earlier in the morning, it would have been possible that the shop of the respondent would be open ...."

(Emphasis Supplied) "No other presumption excepting that of subletting can be raised in the circumstances of the case. The respondent Das Raj (R.W. 10) has admitted that there are bigger cloth merchants in Sector 17 than his shop but none of them has opened such a booth of ice cream in their shops."

15. The view of the High Court, in substance, was that there was conflict between the version of the Commissioner and the state of affairs indicated in the Plans (Ext. R. 4) which did not support the exclusive and separate nature of the Ice-Cream Vendor's possession and that the latter should prevail. But a more careful examination of the context in which M.L. Sharma (R.W. 7) the Senior Architect who produced Ext. R.4. was examined shows that Ext. R. 4 was relied upon in rebuttal of and in answer to an altogether different ground i.e., the ground of unauthorised structural alterations and the alleged damaged caused to the building thereby and to show that the structural alterations had been authorised by the first-appellant. It is quite plain that Respondent itself did not seek to rely on this evidence on the point of exclusive-possession or lack of it. Not even a suggestion was put to A.W. 7 or A.W. 9 to the effect that the structural alterations as evidenced by Ext. R. 4 rendered the exclusive-possession of M/s. Kwality Ice Cream impossible. Nor,indeed even one out of the 26 grounds in Memorandum of appeal before the appellate Court or the 24 grounds raised in the revision application before the High Court, refer to this inference to be drawn from Ext. R.4. More importantly., even Das Raj Jain (R.W. 10) partner of the Respondent firm does not himself claim this import and significance for Ext. R. 4. No witness stated that the structural alterations were strictly in accordance with the plan, Ext. R. 4. Apparently, this was not also the aspect on which Respondent placed reliance before the Courts-below. Reliance on the plans to take away the effect of the positive evidence on record was not, therefore,justified.

16. The scope of the revisional jurisdiction depends on the language of the statute conferring the revisional jurisdiction. Revisional jurisdiction is only a part of the appellate jurisdiction and cannot be equated with that of a full-fledged appeal. Though the revisional power-depending PG NO 331 kupon the language of the provision-might be wider than revisional power under Section 151 of the Code of Civil Procedure, yet, a revisional Court is not a second or first appeal.

When the findings of fact recorded by the Courts-below are supportable on the evidence on record, the revisional Court must,indeed, be reluctant to embark upon an independent re-assessment of the evidence and to supplant a conclusion of its own, so long as the evidence on record admitted of and supported the one reached by the Courts- below. With respect to the High Court, we are afraid, the exercise made by it in its revisional jurisdiction incurs the criticism that the concurrent-finding of fact of the Courts-below could not be dealt and supplanted by a different finding arrived at on an independent re-assessment of evidence as was done in this case. We think in the circumstances, we should agree with Sri Sanghi that the concurrent finding as to exclusive possession of M/s. Kwality Ice-Cream was not amenable to reversal in revision. Contentions (a) and (b), in our opinion, are well taken and would require to be held in appellants'favour.

17. On contention (c) as to the limitation on the powers, even of the appellate Court, to dislodge finding of facts recorded by the trial-court on a re-appreciation of oral evidence, we think, the submissions of Sri Sanghi are not also without substance. The proposition, that the appellate Court should not too lightly interfere with the appreciation of oral evidence made by the trial Court, particularly based on the credibility of the witnesses whose demeanour the trial Court has had the advantage of observing, is too well settled to require reiteration. A clear exposition of the Rule as to what extent the appellate Court should regard itself as bound by the conclusions reached by the trial Court on questions of fact is to be found in the speech of Lord Thankerton in Watt v. Thomas, [1947] A.C. 484 at 487-488:

> "I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:
>
> (1). Where a question of fact has been tried by a judge without a jury, and there is no question of mis-direction of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trail judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion, (II). The appellate PG NO 332 court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (III). The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

But in cases where there is no question of credibility or reliability of any witness or the question is one of a proper inference to be drawn from proved facts, the appellate Court is-and should be generally in as good a position to evaluate the evidence as the trial Judge is. Lord Reid in Benmax v. Austin Motor Co. Ltd., [1955] 2 W.L.R. 418 at 422 observed:

> "But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from

> proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought,of course. to give weight to his opinion."

In the same case, Viscount Simonds indicated the need to keep the distinction between a finding on a specific-fact on the one hand and a finding which is an inference from proved fats on the other,clearly distinguished. The limitations on the power of the appellate Court to reappreciate the evidence is clearly confined to the former. That is the distinction between what is 'perception' and what is 'evaluation'.

Viscount Simonds observed:

> "A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or to repeat what I have said, what is perception, what evaluation."

PG NO 333

18. Reference on the point could also usefully be made to A.L.Goodhart's article 7-l LQR 402 at405 in which, the Iearned author points out:

> "A Judge sitting without a jury must perform dual function. The first function consists in the establishment of the particular facts. This may be described as the perceptive function. It is what you actually perceive by the five senses. It is a datum of experience as distinct from a conclusion."
>
> "It is obvious that, in almost all cases tried by a judge with-out a jury, an appellate court, which has not had an opportunity of seeing the witnesses, must accept his conclusions of fact because it cannot tell on what grounds he reached them and what impression the various witnesses made on him. "

(Emphasis Supplied) The following is the statement of the same principle in "The Supreme Court Practice" (White Book 1988 Edn. Vol. 1).

> "Great weight is due to the decision of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of witnesses who, have been seen and heard by him are material elements in the consideration of the truthfulness of these statements. But the parties to the cause are nevertheless entitled as well on question of fact as on questions of law to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence, and drawing its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

(p.854-55) ".... Not to have seen witnesses puts appellate Judges in a permanent position of disadvantage against the trial Judge, and unless it can be shown that he has failed to use or has palpably misused his advantage-for example has failed to observe inconsistencies or indisputable fact or material probabilities (ibid. and Yuill 1945 P. 15: Watt v. Thomas, [19473 A.C 484)-the higher Court ought not take the responsibility of reversing conclusions so arrived at PG NO 334 merely as the result of their own comparisons and criticisms of the witnesses, and of their view of the probabilities of the case..."

(P. 855) ".... But while the Court of Appeal is always reluctant to reject a finding by a Judge of the specific or primary facts deposed to by the witnesses, especially when the finding is based on the credibility or bearing of a witness, it is willing to form an independent opinion upon the proper inference to be drawn from it...." (P. 855) A consideration of this aspect would incomplete without a reference to the observations of B.K. Mukherjea J., in Sarju Pershad v. Jwaleshwari Pratap Narain Singh and Others, [1950] SCR 781 at 783 which as a succinct statement of the rule, can not indeed be bettered :

> "The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which the deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is-and it is nothing more than a rule of practice-that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact. "

19. The area in which the question lies in the present case is the area of the perceptive functions of the trial Judge where the possibility of errors of inference does not play a significant role. The question whether the statement of the witnesses in regard to what was amenable to perception by sensual experience as to what they saw and heard is acceptable or not is the area in which the well-known limitation on the powers of the appellate Court to PG NO 335 reappreciate the evidence falls. The appellate Court, if it seeks to reverse those findings of fact, must give cogent reasons to demonstrate how the trial Court fell into an obvious error.

With respect to the High Court, we think, that, what the High Court did was perhaps even an appellate Court, with full fledged appellate jurisdiction would, in the circumstances of the present case, have felt compelled to abstain from and reluctant to do. Contention (c) would also require to be upheld.

20. Re, Contention (d) The High Court was of the view that the proceeding of the Commissioner was vitiated by the absence of a notice to the respondent preceding the order appointing the Commissioner. It is true that some High courts had taken the view that no order appointing a local Commissioner under Order 26 CPC could be passed ex-parte. (See Latchan Naidu and Anr. v. Rama Krishan Ranga Rao Bahadur Bobbili Samasthanam, AIR t934 Madras 548. But subsequent pronounce- ments of several High Courts, including the Madras High Court, have inclined to the better view that there might be circumstances which may necessitate and justify even an ex- parte order appointing a Commissioner. But the requirements of Rule 9 of Order 26 are construed to apply to a stage after the making of an order appointing the Commissioner. In the present case, it is no doubt true, that the order dated 3.2. 1975 of the trial court appointing a Commissioner did not in terms direct the parties to appear before the Commissioner. There is this infirmity in the proceedings of the Commissioner.

But it is possible to construe the power to appoint a Commissioner to inspect the extant state and nature of structures as not confined to Rule 9 of Order 26 but referable to Rule 7 of Order 39 CPC where the court can dispense with prior notice, should it appear to the court that the very object of making of appointment of a Commissioner would be defeated and frustrated by the issue of prior notice. On the scope of Rule 8 of Order 39 as it stood even prior to its amendment, High Courts have held that an ex-parte order appointing a Commissioner. is permissible. However it is not necessary to pronounce on this question as even the other evidence on record relied upon by the trial Court and the appellate Court support their finding as to the exclusive possession of the Ice- cream seller.

PG NO 336

21. Dipak Banerjee's case on which strong reliance was placed by Dr. Chitaley does not, in our opinion, advance the case of the Respondent any further. There, the question was whether the tenant had sub-let two rooms in the premises to a tailor who is stated to have established therein a tailoring business. The tenant denying the sub-letting contended that the tailor was allowed to occupy a part of the premises "due to pity and charity" and that he was "sewing in the house without any rent". It would appear that the tenant also did some service for the landlord and the members of his family. The alleged sub-tenant not having entered the box, the plea of sub-letting had come to be accepted. In the appeal before this Court it was held that there was neither pleading nor evidence nor a specific- finding on the question of exclusive possession of the alleged sub-tenant and that, therefore, one of the essential ingredients of a sub-lease was a lacking. It was further held that providing of services could not also be construed as consideration for purposes of the, Rent Acts and that therefore, the second ingredient was also absent. The decision turned on the particular facts of the case. That case could be of no assistance to the respondents. Likewise, the decisions in Khalil Ahmed 'case , where also, on the facts of the case, it was held that the case of a sub-lease had not been made good.

22. Dr. Chitaley than urged that there was not even a pleading by the appellant on the point of money- consideration for the parting of possession and that no amount of evidence adduced on a point not pleaded could at all be looked into. As a general proposition the submission is unexceptionable; but in the present-case, the point, in our opinion, is not well taken Appellants

specifically pleaded "sub-letting" . Respondent understood that pleading as to imply all the incidents of' sub-letting including the element of 'Rent' and specifically traversed that plea by denying the existence of considerations. Parties went to trial with full knowledge of the ambit of the case of each other. In the circumstances the pleadings would required to be construed liberally.

In Rum Sarup Gupta v. Bishun Narain Inter College. AIR 1987 SC 1242 this Court said this of the need to construe pleadings liberally.

Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue PG NO 337 emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and find the proceeded or trial on those issues by producing evidence, in that event it would not be open to a parry to raise the question of absence of pleadings in appeal."

(Emphasis Supplied) After all, the ,,parties do not have the foresight of prophets and their lawyers the draftmanship of a Chalmers." There is no substance in this contention of Dr. Chitaley either.

22. The High Court did not deal specifically with the question whether, in the circumstances of the case, an inference that the parting of the exclusive possession was prompted by monetary consideration could be drawn or not. The High Court, did not examine this aspect of the matter, as according to it, one of the essential ingredients, viz., of exclusive possession had not been established. lf exclusive possession established, and the version of the respondent as to the particular and the incidents of the transaction is found unacceptable in the particular facts and circumstances of the case, it may not be impermissible for the Court to draw an inference that the transaction was entered into with monetary consideration in in mind. It is open to the Respondent to rebut this. Such transactions Of sub-letting in th guise of licences are in their very nature , clandestine arrangements between the tenant and the sub-tenant and there and there can not direct evidence got. It is not. unoften, a matter for legitimate inference. The making good a cast of sub-letting is, of course, on the appellants. The burden of burden establishing facts and contentions which support the party who takes the risk of non-persuasion.If at the conclusion of the trial, a party has failed to establish these to the appropriate standard. he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden shifts according as the weight of the evidence adduced by the party during the trial. In the circumstances of the case, we think, that appellants having been forced by the Court's-below to have established possession of the Ice- Cream Vendor of a part of the demised-premises and the explanation of the transaction offered by the respondent PG NO 338 having been found by the Courts-below to be unsatisfactory and unacceptable, it was not impermissible for the Courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations. There is no explanation forth-coming from the respondent appropriate to the situation as found.

23. In the result, for the foregoing reasons, this Appeal is allowed, the order of the High Court under Appeal is set aside and the order of eviction passed by the Courts-below restored. Having regard to all the circumstances of the case, we grant time to the respondent to vacate and yield up the vacant possession till 3 lst December,1988. In the circumstances of the case, the parties are left to bear their own costs both. here and below.

H.S.K. Appeal allowed.