

## **Puran Singh Sahni vs Smt. Sundari Bhagwandas Kripalani And ... on 20 February, 1991**

**Equivalent citations: 1991 SCR (1) 592, 1991 SCC (2) 180, 1991 AIR SCW 779, 1991 (2) SCC 180, 1991 UJ(SC) 1 566, (1991) 1 SCR 592 (SC), (1991) 1 RENCJ 476, (1991) 1 RENCN 575, 1991 BOMRC 397, (1991) 1 ALL RENTCAS 361, 1993 BOMCJ 815, 1991 BOM LR 93 109, (1991) 2 CURCC 26, (1991) 2 JT 24 (SC)**

**Author: K.N. Saikia**

**Bench: K.N. Saikia, M.M. Punchhi**

PETITIONER:

PURAN SINGH SAHNI

Vs.

RESPONDENT:

SMT. SUNDARI BHAGWANDAS KRIPALANI AND OTHERS

DATE OF JUDGMENT 20/02/1991

BENCH:

SAIKIA, K.N. (J)

BENCH:

SAIKIA, K.N. (J)

PUNCHHI, M.M.

CITATION:

1991 SCR (1) 592

1991 SCC (2) 180

JT 1991 (2) 24

1991 SCALE (1) 303

ACT:

Bombay Rents, Hotel and Lodging House Rates (Control ) Act, 1947] Transfer of Property Act, 1882: Ss.5(4A), 5(11)(bb), 15A/s. 105- Agreement giving temporarily for a fixed period, use of Premises with furniture and fittings on compensation for use and occupation without creating any interest in the grantee-Whether a leave and licence or a lease-Licence terminated w.e.f. 10.3.1972-Status of the occupant thereafter-Whether entitled to Protection as a deemed tenant under s. 15-A `Leave and licence' and `Lease'-Distinction between.

Constitution of India: Art. 14: S. 91, Maharashtra Co-operative "Societies Act, 1960-Whether ultra vires.

Maharashtra Co-operative Societies Act, 1960: S. 91- Eviction of a nominal member by a tenant copartner member of a tenant copartnership Co-operative Housing Society-Whether

a dispute touching `business of a society'-Whether the society and tenant co-partner member can raise a dispute under-Jurisdiction of Co-operative Courts-Whether bared by s. 28(1) of Bombay Rents, Hotel and Lodging House rates (Control) Act, 1947.

HEADNOTE:

The second respondent was a tenant copartnership co-operative Housing Society and father of the first respondent was its tenant co-partner member. By an application dated 10.6.1969 he sought permission of the society to temporarily induct the appellant into his flat. On the same date the appellant applied to the said Society for its nominal membership stating that he intended to take the flat for temporary use and occupation, that he would not claim any right of permanent nature and that on receipt of notice he would vacate the flat. By an agreement of leave and licence dated 11.6.1969, the father of respondent no. 1 (licensor) gave use of the flat with its furniture and fittings to the appellant (licensee) on Rs. 1,000 per month as compensation for use and occupation for a period of 11 months with a facility of renewal of the agreement for two such further periods. The Managing Committee of the Society, by its Resolution dated 13.6.1969, granted the permission.

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The licensor by letter dated 22.1.1972 purported to terminate the licence w.e.f. 10.3.1972, and asked the appellant to vacate the flat, but the latter declined to do so. On receiving intimation from the licensor, the Society, by its letter dated 22.2.1972, required the appellant to vacate the flat and deliver its possession to the licensor before the stipulated date, but in vain. Instead, the appellant on 13.3.1972 applied to the Court of Small Causes, Bombay for fixation of standard rent of flat.

In April 1972 the licensor and the Society raised a dispute under s. 91 of the Maharashtra Co-operative Societies Act, 1960 to recover possession from the appellant, who in turn filed a suit in the Court of Small Causes, Bombay for declaration that he was tenant of the flat. He also filed an interim application for stay of the dispute proceeding till disposal of his application for fixation of standard rent, which was rejected and his writ petition against the said order was also dismissed by the High Court on 7.9.1977.

The Co-operative Court, Bombay dismissed the dispute proceeding holding that the appellant was a licensee and not a tenant but the society was an idle party which acted in collusion with the licensor to evict the appellant.

On appeal by the licensor and the Society, the Maharashtra State Co-operative Appellate Court set aside the

order of the Co-operative Court, against which the appellant filed a writ petition before the High Court contending that the agreement, though styled as a leave and licence, was a lease; that s. 91 of the Maharashtra Co-operative Societies Act was not attracted and could not have been invoked by the respondents; and that s. 91 itself was ultra vires Art. 14 of the Constitution to the extent it tried to reach non-members of co-operative societies. The High Court dismissed the writ petition. Hence the present appeal by special leave.

By Maharashtra Act 17 of 1973, ss. 5(4A), and 15-A were introduced in the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, to confer the status and protection of a tenant on a licensee, who, on the first day of Feb. 1973, had a subsisting agreement and was on that date in occupation of any premises or part thereof, which was not less than a room, as a licensee.

On the question whether: (1) the agreement dated 11.6.1969 was one of leave and licence or if lease, and if it was so, whether the

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occupant was entitled to benefit of s. 15-A of the Rent Act; and (2) the matter was one touching the business of the society so as to attract s. 19 of the Maharashtra Co-operative Societies Act within the jurisdiction of Co-operative Courts.

Dismissing the appeal, this Court

HELD: 1.1 By mere use of the word lease or licence the correct categorisation of an instrument under law cannot be affected. Whether a particular grant amounts to lease or a licence, depends on its substance. 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. If there is a transfer of interest in law and exclusive possession is given to the grantee or where the ingredients of a lease are present and the licensee is, according to law, a tenant, then it is a lease and he ought to be given benefit of the Rent Act. [602B-E]

1.2 In determining whether the agreement was a lease or licence, the test of exclusive possession, though of significance, is not decisive and exclusive possession itself will not amount to creation of interest nor would it militate against the concept of a licence, if the circumstances negative any intention to create a tenancy. [602G, E-F]

1.3 The intention of the parties in making the agreement is determinative of the question whether it was a lease or licence. The intention has to be gathered from the terms of the agreement construed in the context of the surrounding, antecedent and consequent circumstances. The crucial test would be what the parties intended. If in fact it was intended to create an interest in the property it

would be a lease, if it did not, it would be a licence Interest for this purpose means a right to have the advantage accruing from the premises or a right in the nature of property in the premises but less than title. [603H, 602F-H]

2. In the instant case, it is clear from the tenor of the agreement that the intention of the parties was to create only a licence and not a lease. Positively it speaks of a licence for the use of the flat and negatively that the licensee would not-claim any tenancy or subtenancy. What was given to the licensee was the use of the flat with furniture, fittings etc., which could not be said to have created any interest in the flat though in effect the use continued for a stipulated period of time. [602A-C]

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Board of Revenue etc. v. A.M. Ansari etc., [1976] (3) SCR 661; Tarkeshwar Sio Thakur Jiu v. Dar Dass Dey & Co. & Ors., [1979] 3 SCC 106, relied on; Sohan Lal Naraindas v. Laxmidas, Raghunath Gadit (1971) 1 SCC 276, followed.

Antoniades v. Villiers and Anr., [1988] (3) All. E.R. 1058; N.E. Railway v. Hastings, [1900] A.C. 260, Isaac v. Hotel De Paris, Ltd. [1960] (1) All E.R. 348, Booker v. Palmer [1942] 2 All E.R. 674 referred to.

3.1 Section 15A read with s. 5(11)(bb) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, makes the tenant one of status rather than of contract. Intention to create a licence as defined in the Act if the other requirements fulfilled, would, therefore, be enough to confer that status from the specified date. Section 15A required that the occupant must be in occupation of the premises as a licensee as defined in s.5(4A) on the first day of Feb. 1973. If he be such a licensee, the non-obstante clause of s.15A(1) gives him the status and protection of a tenant in spite of there being anything to the contrary in any other law or in any contract. Even as against the express terms of the subsisting contract licence, a person in occupation of any premises or part thereof, which is not less than a room, as a licensee, shall, in view of these provision, be deemed to have become a tenant on the first day of Feb. 1973, and would enjoy the benefits of s. 15A. But if he was not a licensee under a subsisting agreement on the 1st of Feb. 1973, then he did not get the advantage of the amending provision of the Rent Act. [608E-F, 610AB]

3.2 The sine qua non for the applicability of s. 15A of the Rent Act was that a licensee must be in occupation as on Feb.1, 1973, under a subsisting licence. A person continuing in possession after termination, withdrawal or revocation of the licence is a trespasser or a person who has no semblance of any right to continue in occupation of the premises. Such a person by no stretch of imagination could be called a licensee. [612B-C, 610C]

4. The appellant would, otherwise, be included in the

definition of licensee under s. 5(4A) of the Rent Act, but as he had no subsisting licence, the same having stood terminated by notice on 10.3.1972, the licence as defined by the Rent Act itself would not apply to appellant's case, and he was nothing but a rank trespasser not entitled to the protection of s. 15A of the Rent Act and could not, therefore, plead the bar of s. 28(1) thereof. [608A, 609A, 612C-D]

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D.H. Maniar and Ors. v. Waman Laxman Kudav, [1976] 4 SCC 118, O.N. Bhatnagar v. Smt. Rukibai Narsindas & Others, [1982] 3 SCR 681, relied on. Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, [1986] 4 SCC 447, referred to.

Hindustan Petroleum Corporation Ltd. & Anr. v. Shyam Cooperative Housing Society & Ors, [1988] 4 SCC 747, distinguished.

5. The matter of eviction of the appellant was a dispute touching the business of the society as envisaged by s.91 of the Maharashtra Co-operative Societies Act and the Co-operative Courts rightly exercised jurisdiction. [611B; 613B]

Smt. Krishna Rajpal Bhatia and Ors. v. Miss Leela H. Advani & Ors., [1989] 1 SCC 52, relied on. Deccan Merchants Cooperative Bank Ltd. v. M/S Dalichand Jugraj Jain & Ors., [1969] 1 SCR 887 referred to.

6. Since the appellant was involved in a dispute touching the business of the society of which he was a nominal member, his contention that s. 91 of the Maharashtra Co-operative Societies Act to the extent it tries to reach persons who are not members is ultra vires Art. 14 of the Constitution, was not tenable. [613C-D]

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2846 of 1989.

From the Judgment and Order dated 24.4.1989 of the Bombay High Court in W.P.No. 4118 of 1986.

H.S. Guru Raja Rao, S. Markandeya and Ms. C. Markandeya, for the Appellant.

L.A. Kriplani and S.K. Jain for the Respondents. The Judgment of the Court was delivered by K.N. SAIKIA, J. This appeal by special leave is from the Judgment and Order of the High Court of Bombay dated 24.4.1989 in Writ Petition No. 4118 of 1986 dismissing the petition.

The second respondent Shyam Cooperative Housing Society Ltd. was a tenant co-partnership cooperative society (for short, 'the Society') and Panjumlal H. Advani late father of the first respondent (for short, 'Advani') was its tenant co-partner member. By an application dated 10.6.1969, Advani obtained permission of the Society to induct the appellant temporarily into his

flat and accordingly, the appellant took on rent from Advani flat No. 24, Block No. 1, second floor, Nanik Niwas, situate at Bhulabhai Desai Road, Bombay (for short, 'the flat') on a monthly rent of Rs. 1,000 (Rupees one thousand) on 10.6.1969. On the same date the appellant, under the Society's rules, applied for its nominal membership stating, inter alia, that he intended to take the flat for temporary use and occupation; that he would not claim any right of permanent nature; and that he would vacate the flat on receipt of notice thereof. By an agreement of leave and licence dated 11.6.1969 entered into between the appellant and Advani, the appellant took exclusive possession of the flat. The agreement was for a period of 11 months and was renewable for 2 further periods of 11 months each. Vide Resolution No. 208 dated 13.6.1969, the Managing Committee of the Society granted the permission.

By letter dated 22.1.1972 Advani purported to terminate the licence with effect from 10.3.1972 and asked the appellant to vacate the flat and the appellant having not acceded to the request, Advani informed the Society, which, vide letter dated 22.2.1972 required the appellant to vacate the flat and to deliver possession thereof to Advani on or before the 10th March, 1972. The appellant instead of vacating the flat filed an application in the Court of Small Causes, Bombay on 13.3.1972 for fixation of its standard rent. In April 1972, Advani and the Society raised a dispute under section 91 of the Maharashtra Cooperative Societies Act to recover possession from the appellant who in turn filed declaratory suit No. 989/5305 of 1972 in the Court of Small Causes, Bombay on 10.11.1972 seeking a declaration that he was the tenant of the flat, with an interim application for stay of the proceeding till the disposal of his application for fixation of standard rent; but that application was rejected and the appellant was thereafter unsuccessful in the High Court which was dismissed on 7.9.1977. The learned Judge of the IIInd Cooperative Court, Greater Bombay by his Judgment dated 6.3.1985 dismissed the suit holding that the appellant was a licensee and not a tenant, but the Society was an idle party and had acted in collusion with Advani to vacate the appellant.

Advani and Society appealed therefrom to the Maharashtra State Cooperative Appellate Court, Bombay in Appeal No. 397 of 1985 which was allowed and the impugned Judgment of the IIInd Cooperative Court was set aside on 31.7.1986.

The appellant impugned the appellate order in Writ petition No. 4118 of 1986 in the High Court of Judicature at Bombay, contending, inter alia, that the agreement between the appellant and Advani, though styled as a leave and licence, was a lease; that section 91 of the Maharashtra Cooperative Societies Act, 1960 was not attracted and could not have been invoked by Advani and the Society; and that section 91 itself was ultra vires the Article 14 of the Constitution of India to the extent it tried to reach persons who were not members of cooperative societies.

The High Court, while dismissing the writ petition, inter alia, held that the agreement was of temporary nature and no interest in the flat having been created in favour of the appellant, even though he had exclusive possession, it could not have been a lease; that the alleged collusion between Advani and the Society to evict the appellant was based on conjectures and could not take the matter out of the purview of section 91 of the Cooperative Societies Act which was not ultra vires.

Mr. S.S. Gururaja Rao, the learned counsel for the appellant submits, inter alia, that the agreement dated 11.6.1969 between Advani and the appellant was one of lease with all its ingredients and not one of leave and licence; that the agreement having been a lease the cooperative Court had no jurisdiction in respect thereof and it was the Civil Court envisaged under the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 that would have jurisdiction in the matter; and that even assuming that the Cooperative Court had jurisdiction in respect of a leave and licence created under the provisions of the Act, that Court would not have jurisdiction in this matter, the appellant being only a nominal member and not a tenant member of the Society.

Mr. L.A. Kripalani, the learned counsel for the respondents, submits that the agreement was one of leave and licence and not of lease; that in the matter of the agreement the Cooperative Court alone has jurisdiction and no other court; and that being a nominal member of the Society in view of his application for such a membership the appellant would come within the jurisdiction of the Cooperative Court.

The first question to be decided in this appeal, therefore, is whether the agreement dated 11.6.1969 was one of lease or of leave and licence.

In the agreement dated 11.6.1969 the Party of the First part has been called the 'licensor' and the Party of the Second part has been called the 'licensees'. The licensor is stated to be a shareholder and member of the Society. Its recitals said:

"AND WHEREAS the Licensor is the absolute owner of the said flat and whereas the party of the Second part has approached the Party of the First part to allow them the use of the said flat with, fittings, fixtures and furniture lying therein. AND WHEREAS the Party of the First part has agreed to allow the party of the Second part to use the said flat along with fittings, furniture, fixtures etc. The following were the relevant terms of the agreement:

"1. The 'licensor' has given the use of his flat No.24, 2nd floor, Nanik Niwas, Block No. 1, Bhulabhai Desai Road on Leave and Licence basis.

2. The licence in the initial stage is for the period of 11 months to be renewed by another period of 11 months and a second option of 11 months also, to make up the period of 33 months.

3. The Licensees shall pay compensation of Rs. 1,000 (Rupees one thousand only) per month to the 'licensor' the use of the said flat along with fittings, fixtures and furniture lying therein more fully described in the schedule herewith attached; This compensation payable by the said 'Licensees' to the said 'Licensor' shall include all the charges and taxes leviable either by the Shyam Cooperative Housing Society Ltd., Bombay -26 or by the Bombay Municipal Corporation or by any local or State authorities except the changes which are specially mentioned hereunder.

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9. It is agreed by this agreement that only 'Licensee' is intended to be given to the 'Licensees' to use the flat and fixtures, fittings, furniture etc. more fully described in the schedule attached herewith and the 'Licensees' will at no time claim tenancy or sub-tenancy of the premises. The premises are in Nanik Niwas, Block No.1, Second Floor, Flat No.24, of the Shyam Cooperative Housing Society Ltd., and the rules regulations and bye-laws of the said Society do not permit any tenancy or sub-tenancy being created in respect of the premises.

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22. That the 'Licensee' will not surrender their rights under this agreement in favour of anyone else except the 'Licensors'. That the 'Licensees' shall observe all rules, regulations, and by-laws of the Shyam Cooperative Society as nominal members during the period of this licence.

From the above recitals and the terms and conditions there is no doubt that ex facie it is one of leave and licence for use of the flat and fixtures, fittings, furniture etc. and that the licensee would at no time claim tenancy or sub-tenancy in respect of the flat. There is also no doubt that in his application for nominal membership, the appellant stated that he intended to take the flat for temporary use and occupation and that he would not claim any right of permanent nature. In the Managing Committee Resolution No.208 dated 13.6.1969, the appellant was admitted as a nominal member of the Society and was permitted to temporarily occupy the flat. Thus, there appears to be no room for contending, contrary to the terms of the agreement, that the agreement was a lease and the appellant was a tenant of Advani, as such the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter referred to as 'the Rent Act', was applicable to him.

However, relying on *Antoniades v. Villiers and Anr.*, reported in 1988 (3) All E.R. 1058, it is submitted for the appellant that he having been given exclusive possession of the flat for a time, the agreement must be construed as a lease and him as a tenant. In that case the respondent let a flat to the appellants, a young unmarried couple, under separate but identical agreements termed 'licenses', which were executed contemporaneously and stipulated with reiterated emphasis that the appellants were not to have exclusive possession. In particular, by clause 16, that agreement stated that the licensor shall be entitled at any time to use the rooms together with the licensee and permit other persons to use all of the rooms together with the licensee and further stated that the real intention of the parties in all the circumstances was to create a licence which did not come under the Rent Acts. The rental payable was 87 pounds per month by each occupant and the agreements were determinable by one month's notice by either party. The respondent never attempted to use any of the rooms or authorised any other persons to use the rooms. In July 1986 the respondent



gave the appellants a notice to quit and applied to the court for an order for possession, but his claim was dismissed on the ground that the appellants were tenants who were entitled to the protection of the Rent Acts. The respondent appealed to the Court of Appeal, which allowed his appeal. The appellants having appealed to the House of Lords it was held that the agreements were interdependent on one another and were therefore to be read together as constituting one single transaction. Since it was the intention of the two appellants to occupy the flat as man and wife and since that intention was known to the respondent, the true nature of the arrangement was to create a joint tenancy and the purported retention by the respondent of the right to share the occupation of the small flat with the appellants or to introduce an indefinite number of third parties to do so was clearly a pretence to deprive them of the protection of the Rent Acts. It followed that the agreements created a joint tenancy and not a licence, and the appeal would therefore be allowed. It may be noted that in the above case there was no obligation of or relation to any cooperative society and laws governing members thereof, whereas in the instant case admittedly Advanai was a tenant co-partner member of the Society and the appellant by virtue of the agreement of licence was also admitted to nominal membership accepting his statement in his application. While interpreting the agreement we have also to see what transpired before and after the agreement. *Ex praecedentibus et consequentibus optima bit interpretation.* The best interpretation is made from the context. "It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done." As was said in *N.E. Railway v. Hastings*, [1900] A.C. 260(267): "The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible. In the agreement the intention to create a licence is clear. Positively it speaks of a licence for the use of the flat and negatively that the licensee would not claim any tenancy or sub-tenancy. That the intention of the parties was to create only a licence and not a lease is clear from the tenor of the agreement. True, by mere use of the word lease or licence the correct categorisation of an instrument under law cannot be affected. What was given to the licensee was to use of the flat with furniture, fittings etc., which could not be said to have created any interest in the flat though in effect the use continued for a stipulated period of time. It is true, where the ingredients of a lease are present and the licensee is according to law, a tenant, he ought to be given the benefit of the Rent Act.

As was held in *Board of Revenue etc. v. A.M. Ansari etc.*, AIR 1976 SC 1813: 1976 (3) SCR 661, it is the substance of the agreement between the parties which is a decisive consideration on the question whether a particular grant amounts to a lease or a licence. In *Tarkeshwar Sio Thakur Jiu v. Dar Dass Dey & Co. & Ors.*, AIR 1979 SC 1669: (1979) 3 SCC 106, the document though named as licence was construed as a

lease. 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. If there is a transfer of interest in law and exclusive possession is given to the grantee then it is a lease. Thus, exclusive possession by itself will not amount to creation of interest. Exclusive possession by itself would not militate against the concept of a licence, if the circumstances negative any intention to create a tenancy.

Following *Sohan Lal Naraindas v. Laxmidas Raghunath Gadit*, [1971] 1 SCC 276, we reiterate that the intention of the parties to an agreement has to be gathered from the terms of the agreement construed in the context of the surrounding, antecedent and consequent circumstances. The crucial test would be what the parties intended. If infact it was intended to create an interest in the property, it would be a lease, if it did not, it would be a licence. In determining whether the agreement was a lease or licence, the test of exclusive possession, though of significance, is not decisive. Interest for this purpose means a right to have the advantage accruing from the premises or a right in the nature of property in the premises but less than title.

Lease has been defined in section 105 of the Transfer of Property Act as under:

"A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

The essential elements of a lease are:

1. the parties
2. the subject matter, or immovable property
3. the demise, or partial transfer
4. the term, or period
5. the consideration, or rent.

The relationship of lessor and lessee is one of contract. In *Bacon's Abridgement*, a lease is defined as "a contract between the lessor and the lessee for the possession and profits of land, etc., on the one side and recompense by rent or other consideration on the other." Hence it has been held that "a mere demand for rent is not sufficient to create the relationship of landlord and tenant which is a matter of contract assented to by both parties." When the agreement vests in the lessee a right of possession for a certain time it operates as a conveyance or transfer and is a lease. The section defines a lease as a partial transfer, i.e., a transfer of a right of enjoyment for a certain time.

This Court has held that a renewal of a lease is really grant of a fresh lease though it is called a renewal because it postulates the existence of a prior lease. Where the initial term was, say one year, it could not co-exist with a renewal of that very lease within one year. Renewal could take place only on the expiry of the initial lease, and not before.

The intention of the parties in making the agreement is determinative of the question whether it was a lease or licence. In Halsbury's Laws of England, 4th Edn. Vol. 27, at paragraph 6, on General Principles for determining whether agreement creates lease or a licence we read:

"In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive considerations is the intention of the parties. The parties to an agreement cannot, however, turn a lease into a licence merely by stating that the document is to be deemed a licence or describing it as such. The parties' relationship is determined by law on a consideration of all relevant provisions of the agreement; and an agreement labelled by the parties to it as a 'licence' will still be held to create a tenancy if the substance of the agreement conflicts with that label. Similarly, the use of operative words ('let', 'lessor' etc.) which are appropriate to a lease will not prevent the agreement from conferring only a licence if from the whole document it appears that it was intended merely to confer a licence. Primarily the court is concerned to see whether the parties to the agreement intend to create an arrangement personal in its nature or not, so that the assignability of the grantee's interest, the nature of the land and the grantor's capacity to grant a lease will all be relevant considerations in assessing what is the nature of the interest created by the transaction. In the absence of any formal document the parties' intention must be inferred from the circumstances and the parties' conduct."

It has been submitted for the appellant that the very fact of exclusive possession of the flat being given to the appellant was sufficient to make him lessee and Advani his landlord. We do not agree with the submission in an unqualified form. There have been cases where exclusive possession has been given outside the Rent Act. In *Isaac v. Hotel De Paris, Ltd.*, [1960] (1) All E.R.348, the respondent company owning the hotel de Paris where the lessees of another building called the P.Hotel, it was held that the respondent company were entitled to an order for possession because the relationships between the parties was not that of landlord and tenant but of licensor and licensee, even though there was exclusive possession by the appellant and the acceptance of the amount of the rent by the respondent company, the circumstances and the conduct of the parties showing that all that was intended was that the appellant should have a personal privilege of running a night bar at the P.Hotel with no interest in the land at all, and this privilege came to an end with the notice of May, 1956 and that after the notice the appellant remained in occupation at sufferance, and, in the circumstances, the acceptance of rent by the respondent company did not waive their right to immediate possession. It was observed that there were many cases in the books where exclusive possession had been given of premises outside the Rent Restriction Acts and yet there had been held to be no tenancy. Lord Denning quoted from *Booker v. Palmer*, [1942] 2 All E.R. 674 (677):

"There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind.' The following passaged was also cited with approval:

"It is clear from the authorities that the intention of the parties is the paramount consideration and while the fact of exclusive possession together with the payment of rent is of the first importance, the circumstances in which exclusive possession has been given and the character in which money paid as rent has been received are also matters to be considered."

On the question of nature and effect of the grant of exclusive possession in paragraph 7 of Halsbury's Laws of England, 4th Edn., Vol.27, we read:

"The fact that the agreement grants a right of exclusive possession is not in itself conclusive evidence of the existence of a tenancy, but it is a consideration of the first importance, although of lesser significance than the intention of the parties.

In deciding whether a grantee is entitled to exclusive possession regard must be had to the substance of the agreement. In order 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 grantee requires that he should have exclusive possession. However, the grant of an exclusive right to a benefit can be inferred only from language which is clear and explicit. If an exclusive right of possession is subject to certain reservations or to a restriction of the purposes for which the premises may be used, the reservations or restriction will not necessarily prevent the grant operating as a lease."

We may now examine the position of the appellant under the Rent Act. The Rent Act has not defined a 'lease'. As defined in section 5(11) 'tenant' means any person by whom or on whose account rent is payable for any premises and includes-

(a) such sub-tenants and other persons as have derived title under a tenant before the 1st day of February, 1973;

(aa) any person to whom interest in premises has been assigned or transferred as permitted or deemed to be permitted, under section 15;

(b) any person remaining, after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title before the 1st day of February, 1973;

(bb) such licensees as are deemed to be tenants for the purpose of this Act by section 15A;

(c) xxx xxx xxx xxx xxx xxx"

Thus the above sub-section (bb) read with section 15A of the Rent Act makes the 'tenant' one of status and not of contract. the licensee has been conferred the status of a tenant. This reminds us of what Sir Henry Maine observed in Ancient Law. "The movement of progressive societies had been from status to contract". But Lord Simmonds pointed out in *Johnson v. Merston*, [1978] 8 All E.R. 37, that since the days of Maine, the movement of the progressive societies in various fields, has been almost the reverse, that is, from contract to status. With acute dearth of accommodation and dire need for it people may agree to a pretence or unreasonable term from which law alone can protect them and render justice to the parties.

As defined in the section 5(4A) of the Rent Act 'licensee', in respect of any premises or any part thereof means:

"The person who is in occupation of the premises or such part as the case may be under a subsisting agreement for licence given for a licence fee or charge; and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Cooperative Societies Act, 1960; but does not include a paying guest, a member of a family residing together, a person in the service or employment of the licensor, or a person conducting a running business belonging to the licensor or a person having any accommodation for rendering or carrying on medical or para-medical services or activities in or near a nursing home, hospital or sanatorium, or a person having any accommodation in a hotel, lodging house, hostel, guest house, club, nursing home, sanatorium, dharamshala, home for widows, orphans or like premises, marriage or public hall or like premises, or in a place of amusement or entertainment or like institution, or in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provision of a residence attached to his or her post or office is temporarily not occupying the premises, provided that he or she charges licence fee or charge for such premises of the employee or spouse not exceeding the standard rent and permitted increases for such premises, and any additional sum for services supplied with such premises, or person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any undertaking or institution; and the expressions 'licence', 'licensor' and 'premises given on licence' shall be construed accordingly."

The above definition is comprehensive one. A licence is a power or authority to do some act which, without such authority, could not lawfully be done. In the context of an immovable property a licence is an authority to do an act which would otherwise be a trespass. It passes no interest, and does not amount to a demise, nor does it give the licensee an exclusive right to the use of the property. The definition in the Rent Act includes any person in occupation under a subsisting agreement for licence given for a licence fee or charge of any premises or part thereof in a building

vesting in or lease to a cooperative housing society registered or deemed to be registered under the Maharashtra Cooperative Societies Act, 1960. The appellant would, otherwise, be included within this definition. But he has no subsisting licence, the same having been cancelled on 10.3.72.

Section 15A of the Rent Act which was inserted by Maharashtra Act 17 of 1973 provides:

"Certain licensee in occupation on 1st February 1973 to become tenants.

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

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

Thus, section 15A read with section 5(11) (bb) of the Rent Act makes the tenant one of status rather than of contract. Intention to create a licence as defined in that Act if the other requirements fulfilled would, therefore, be enough to confer that status from the specified date. The above provisions applies to person in occupation of any premises or part thereof which is not less than a room, as a licensee he shall on the date be deemed to have become a tenant on the first day of February 1973. The licence of the appellant was cancelled on 10.3.72. Again, in the instant agreement what has been given is only the use of the flat and the furnitures and fittings.

`Licence' had earlier been defined in section 52 of the Indian Easements Act, 1882:

"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 immovable 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 license."

In view of licence of the appellant having been cancelled on 10.3.72, licence as defined by the Rent Act itself, would not apply, to the appellant's case. He would, therefore, not be protected under s. 15A of the Rent Act.

The learned counsel for the appellant submits that due to scarcity of accommodation, the appellant had to accept the terms that he would not, by virtue of the agreement of leave and licence, claim any right of tenancy or sub tenancy and that should not be a bar to his being given the benefit under the Rent Act. However, considering the facts and circumstances of this case we are not inclined to hold that the appellant should not be bound by the expressed intention in the agreement.

In *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram*, [1986] 4 SCC 447, this Court held that licence was a privilege and not an interest in property. A tenant, whose interest in the tenancy is determined for any reason but who is protected by the statute, was entitled to create a licence in favour of another person until a decree of eviction has been passed against him. A statutory tenant was in the same position as a contractual tenant until a decree for eviction is passed against him and the rights of contractual tenant including the right to create licence even if he was transferor of an interest which was not in fact the transfer of interest. If the licence have been created before February 1, 1973, the licensee must, by the express terms of section 15A of the Rent Act be deemed to be a tenant and he should, subject to provisions of the said Act be deemed tenant of the landlord on the terms and conditions of the agreement consistent with the provisions of the Act. At paragraph 58 of the report it was observed that there was no reason and there was nothing in the Rent Act or the Statement of Objects and Reasons to indicate that restricted meaning to the expression "licence" should be given. As the amended section said that whoever was in possession as a licensee should be deemed to have become for the purpose of the Act the tenant of the landlord and there was no warrant to restrict the ordinary meaning of that expression. If the restricted meaning was given then the apparent scheme or the purpose for introduction of the amendment would be defeated at least to a large section of licensees who were contemplated to be protected, as the objects of the Act sought to do.

The Rent Act was amended by Maharashtra Act 17 of 1973. By the Amending Act section 5(4A) and section 15A were introduced in the parent Act to confer on the licensee, who had a subsisting agreement of February 1, 1973 the status and protection of a tenant under the Rent Act. Section 15A required that the occupant must be in occupation of the premises as a licensee as defined in section 5(4A) on the 1st of February, 1973. If he be such a licensee, the non-obstinate clause of section 15A (1) gives him the status and protection of a tenant in spite of there being anything to the contrary in any other law or in any contract. In other words, even as against the express terms of the subsisting contract of licence, the licensee would enjoy the benefits of section 15A. But if he was not a licensee under a subsisting agreement on the 1st of February, 1973, then he did not get the advantage of the amending provision of the Rent Act. A person continuing in possession of the premises after termination, withdrawal or revocation of the licence continued to occupy it as a trespasser or as a person who has no semblance of any right to continue in occupation of the premises. Such a person by no stretch of imagination could be called a licensee. In *D.H. Maniar and Ors. v. Waman Laxman Kudav*, [1976] 4 SCC 118, this position was made clear. The appellant in the instant case was not in possession as a licensee on 1st of February, 1973, the licence having been terminated prior to that date. This takes us to the next question, namely, whether the Cooperative Court had jurisdiction over the matter.

Section 91(1) of the Maharashtra Cooperative Societies Act which deals with disputes, provides:

"(1) Notwithstanding anything contained in any other law for the time being in force any dispute touching the constitution, elections of the committee or its officers other than the elections of committees of the specified societies including its officers, conduct of general meetings, management of business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is

affiliated or by a creditor of the society, to a cooperative Court if both the parties thereto are one or other of the following:-

(a) a society its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society;

(b) a member, past member or a person claiming through a member, past member or a deceased member of a society, or a society which is a member of the society or a person who claims to be a member of the society.

xxx xxx xxx xxx xxx xxx Under the above provision the matter of eviction of the appellant by the tenant co-partner member of the society can be said to be touching the business of the society.

In *Deccan Merchants Cooperative Bank Ltd. v. M/s Dalichand Jugraj Jain & Ors.*, [1969] (1) SCR 887, it has been held that the word "business" in the expression 'touching the business of a society' in section 91 (1) does not mean affairs of the society. It has been used here in a narrower sense and means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws. It was, however, held that section 91 of the Maharashtra Cooperative Societies Act did not affect the provisions of section 26 of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947. Although both these provisions start by excluding "anything contained in any other law", two Acts could be harmonized best by holding that in matters covered by the Rent Act, its provisions rather than the provisions of the Maharashtra Cooperative Societies Act, should apply. The latter Act was passed in the main, to shorten litigation, lessen its cost and to provide a summary procedure for the determination of the disputes relating to internal management of the society. But under the Rent Act a different social objective was intended to be achieved and for achieving that social objective it was necessary that the dispute between the landlord and the tenant should be dealt with by the courts set up under the Rent Act and in accordance with the special provisions of that Act and this social objective did not impinge on the objective underlying the Maharashtra Cooperative Societies Act.

In *O.N.Bhatnagar v. Smt. Rukibai Narsindas & Ors.*, [1982] 3 SCR 681, which was also case of *Shyam Cooperative Housing Society Limited*, it was held that the claim of the society together with such member for ejection of a person who was permitted to occupy having become a nominal member thereof, upon revocation of licence was a dispute falling within the purview of section 1 of the Maharashtra Cooperative Societies Act, 1960 and that the proceeding under section 91(1) of the Maharashtra Cooperative Societies Act, 1960 were not barred by the provisions of section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The two Acts, could be best harmonized by holding that the matters covered by the Rent Acts, its provisions, rather than the provisions of the Cooperative Societies Act should apply. But where the parties admittedly did not stand in the jural relationship of landlord and tenant, as their dispute would be governed by section



91(1) of the Societies Act and that the appellant by virtue of his being a nominal member, acquired a right to occupy the flat as a licensee, but his rights were inchoate,. In the facts of the instant case upon the terms of sections 5(4A) and 15A of the Rent Act, it is clear that the appellant was not entitled to the protection of section 15A. The sine qua non for the applicability of s. 15A of the Rent Act was that a licensee must be in occupation as on February 1, 1973 under a subsisting licence. It is not disputed that the appellant did not answer that description since the agreement of leave and licence in his favour admittedly stood terminated by the notice of the respondent No. 1 on 10.3.1972. That being so, the appellant was nothing but a rank trespasser and was not entitled to the protection of section 15A of the Rent Act and could not, therefore, plead the bar of section 28(1) thereof.

In *Hindustan Petroleum Corporation Ltd. & Anr. v. Shyam Cooperative Housing Society & Ors.*, [1988] 4 SCC 747, at paragraph 14 it was held under the facts of that case that the petitioner Hindustan Petroleum Corporation Ltd. was clearly protected under section 15A of the Rent Act and in that view of the matter the jurisdiction of the Registrar under Section 91(1) of the Cooperative Societies Act would be as laid down in *O.N. Bhatnagar's* case (*supra*). The proceedings initiated under section 91 were accordingly quashed. This case is, therefore, distinguishable on facts.

Following *Bhatnagar's* case in *Smt. Krishna Rajpal Bhatia and Ors. v. Miss Leela H. Advani & Ors.*, [1989] 1 SCC 52, where a tenant co-partner member of a registered co- partnership type cooperative housing society inducting another person into her flat for a term of eleven months subject to renewal of the term from time to time after obtaining society's permission and after the person so inducted becoming a nominal member of the society and the agreement between the parties embodied in usual standard form of leave and licence, it was held that the tenant co- partner member only created a licence and not a lease and that the Maharashtra Cooperative Societies Act, 1960 was applicable. There also the nominal membership of the society was obtained in terms of the society's bye-laws and the licence was terminated by notice after expiry of the term, but the occupant was not vacating. Claim made by the co-partner under section 91 of the Maharashtra Cooperative Societies Act, 1960 for ejectment of the occupant was held to constitute a 'dispute touching the business of a society' within the meaning of section 91 and hence the Registrar's jurisdiction to entertain the claim was held not to have been barred under section 28 of the Rent Act.

Applying the law laid down in the above decisions we are of the view that the instant dispute is one envisaged in section 91 of the Maharashtra Cooperative Societies Act and the Cooperative Courts rightly exercised jurisdiction.

The next question, namely, section 91 is ultra vires the Article 14 of the Constitution of India to the extent it tries to reach persons who are not members is not tenable, inasmuch as the appellant is involved in a dispute touching the business of the Society and he was a nominal member of the Society by dint of his agreement of leave and licence and he was made so on his application.

Result is that this appeal fails and it is dismissed, but under the facts and circumstances of the case without any order as to costs. Interim orders stand vacated.

R.P.

Appeal dismissed.

