**Lease and License**

**PRELUDE:**

Today *via* this Article we shall attempt to de-clutter the burning question, that is, the distinction between a lease and a license. This delicate question has been brought before the Supreme Court more than once. This factual position itself indicates that there exists a thin line between the two, which requires a careful dissection.

In ***Sohan Lal Naraindas v. Laxmidas Raghunath Gadit[[1]](#footnote-1)*** the Supreme Court held that the crucial test is the intention of the parties, i.e. whether they intended to create a lease or a license, and that the test of exclusive possession, though not decisive is of immense significance. Similar reasoning was also expressed earlier in ***Ramamurthy Subudhy v. Gopinath[[2]](#footnote-2), M.N. Clubwala (Mrs) v. Fida Hussain[[3]](#footnote-3)*** and ***Associated Hotels of India Limited v. R.N. Kapoor[[4]](#footnote-4)***, where the Court held that the document by itself could not be a deciding factor whether a particular transaction was a lease or a license.

**ANALYSIS AND FINDINGS:**

1. Section 105 of the Transfer of Property Act, reads:

“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 transferor is called the lessor, the transfree is called the lessee, the price is called the premium, and the money, share, service or any other thing to be so rendered is called the rent.”

1. Section 52 of the Easements Act reads:

“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 licence.”

1. If we focus our attention only upon the question of rights in the above two definitions, we find that in both cases there is a transfer of a right. It may be noted that in a lease the Right consists in enjoying such property transferred, and so also in a licence the Right consists in doing something in or upon the immovable property of the Licensor, though without the creation of an interest in the property.
2. Although it is not clearly stated that a lease creates an interest in the property, inasmuch as the opposite is stated in case of a license, yet by judicial dicta we have come to believe that a lease creates an interest in the property merely to highlight a contradistinction between a lease and a license. We have, therefore, imputed such creation of a right or interest in the property, not due to the existence of a positive statement to that effect in the definition of a lease, but merely because of the statement of its non-creation in case of a license.
3. This imputation of the creation of a right in the property in case of lease, is in reality a high overtone because all that follows from the definition is that the transfer is solely of ‘a right to enjoy’ which is equivalent to the ‘right to do so, in or upon the immovable property,’ as stated in the definition of a license.
4. Considering that the Transfer of Property Act and the Indian Easements Act, were both passed in the same year, 1882, obviously the concept of a Right would not have been different. We cannot conceive that a lease gives a right to enjoy the property in any manner the transferee feels best, as against a licensee who could have his rights directed in a particular manner as per the terms of the grant. In fact, it is quite clear that if a tenant does any alteration/modification/improvement, etc., he does so at his own risk, since he does not have any property rights over the subject-matter of the demise, and he would not be allowed to contend that he had rights in the property due to which he did the alteration/modification. As long as he keeps on paying the rent, the dichotomy of owner and tenant shall subsist and consequently his interest in the property is in no way better as that of the licensee.
5. The statement, therefore, that a lease alone creates interest in the land and that the license does not so create, is definitely a high overtone due to the laying of too great an emphasis on the words “does not amount to an easement or an interest in the property” as found in the definition of a license, as against its absence in the definition of a lease.
6. In ***Associated Hotels*** (supra) the Supreme Court referred to the difference between a lease and license and observed thus:

There is a marked distinction between a lease and a license. 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 term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor....

1. After referring to the definition of licence in Section 52 of the Easement Act, the Court held:

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

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

And again:

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

[Emphasis Added]

1. In the decision in ***Sohan Lal*** (supra), the Supreme Court observed thus:

“Intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. The description given by the parties may be evidence of their intentions but is not decisive. Mere use of the words appropriate to the creation of a lease will not preclude the agreement operating as a licence. A recital that the agreement does not create a tenancy is also not decisive. The crucial test in each case is whether the instrument is intended to create or not to create an interest in the property the subject-matter of the agreement. If it is in fact intended to create an interest in the property, it is a lease. If it does not it is a licence. In determining whether an agreement creates a lease or a licence the test of exclusive possession though not decisive is of significance.”

[Emphasis Added]

1. In this regard, it shall be profitable to refer to the observations in *Hill & Redman's Law of Landlord and Tenant[[5]](#footnote-5),* which contains a more detailed discussion on the determinative tests. The relevant observations read as:

"It is essential to the creation of a tenancy of a corporeal near diterment that the tenant should be granted the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without being entitled to exclusive possession must operate as a licence and not as a lease. It was probably correct law at one time to say that the right of exclusive possession necessarily characterized the grant as that of a lease; but it is now possible for a licensee to have the right to exclusive possession. However, the fact that exclusive possession is granted, though by no means decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance. Further, a grant of exclusive possession may be only a licence and not a lease where the grantor has no power to grant a lease. In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance rather than the form of the agreement, for the relationship between the parties is determined by the law and not by the label which they choose to put on it. It has been said that the law will not impute an intention to enter into the legal relation of landlord and tenant where circumstances and conduct negative that Intention; but the fact that the agreement contains a clause that no tenancy is to be created will not, of itself, preclude the instrument from being a lease. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is prima facie a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and under the control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession. On the other hand, the employment of words appropriate to a lease such as 'rent' or 'rental' will not prevent the grant from being a mere licence if from the whole document it appears that the possession of the property is to be retained by the grantor."

1. In ***C.M. Beena v. P.N. Ramachandra Rao***[[6]](#footnote-6), the Supreme Court quoted with approval the aforesaid observations from *Hill & Redman's Law of Landlord and Tenant.* The learned Judges also relied on the ratio in ***Associated Hotels*** (supra) in deciding the difference between lease and license.
2. In paragraph 8 of ***C.M. Beena*** (supra), the learned Judges held that difference between lease and the license is to be determined by finding the real intention of the parties from a total reading of the document, if any, between the parties and also considering the surrounding circumstances. The learned Judges made it clear that use of terms "lease" or "license", "lessor" or "licensor", "rent" or "license fee" by themselves are not decisive. The conduct and intention of the parties before and after the creation of relationship is relevant to find out the intention.
3. The Supreme Court has also in its subsequent pronouncements, namely, ***The New Bus Stand Shop Owners Assn. v. Corporation of Kozhikode and Ors.[[7]](#footnote-7)*** and ***Bharat Petroleum Corporation Ltd. v. Chembur Service Station[[8]](#footnote-8),*** has concurred with its earlier findings in ***C.M. Beena*** (supra). Thus, the Law is pretty clear with regard to the litmus test so as to discern whether a document is a lease or a license.
4. Now in this Article, we shall, one by one, analyze the individual ingredients of test(s) laid down the Supreme Court in its decisions throughout. Further, it may be safe to state that there is no one single litmus test laid down by the Supreme Court for determining whether a particular document is the lease or license. However, it is the cumulative result of the three major tests enunciated by the Court, which will determine the true nature of a instrument.
5. Firstly*,* each of the decisions lay immense emphasis on the ‘intention of the Parties’. It follows from the above that intention overrides the written document; that even though the document is styled as a lease, yet it may be a license; that even a recital that the document is not a lease, is inadequate.
6. Secondly, it needs to be discerned whether the instrument is intended to create or not to create an interest in the property the subject matter of the agreement. If it is in fact intended to create an interest in the property, it is a lease. If it does not, it is a license.
7. Thirdly, the test of exclusive possession though not decisive, but is of significance, in determining whether an agreement creates a lease or a license.
8. In view of the law as it exists today, it would not be half-bad for lawyers drafting license agreements to add another clause which stipulates that the Licensee was signing the agreement only after obtaining independent legal advice from his own advocate, who signed with him below in token of his perfect understanding of each and every clause of the license agreement and it is also better to advise clients to secure an Affidavit from his prospective licensee to annexe it to the license agreement and have it all registered, lest his licensee got some brain-waive at a future date.

1. (1971) 1 SCC 276  [↑](#footnote-ref-1)
2. AIR 1968 SC 919 [↑](#footnote-ref-2)
3. AIR 1965 SC 610 [↑](#footnote-ref-3)
4. AIR 1959 SC 1262 [↑](#footnote-ref-4)
5. (Seventeenth Edition, Vol.1, at pages 14-15) [↑](#footnote-ref-5)
6. 2004 (3) SCC 595 [↑](#footnote-ref-6)
7. (2009) 10 SCC 455 [↑](#footnote-ref-7)
8. (2011) 3 SCC 710 [↑](#footnote-ref-8)