04 Dec., 2020

Ques.) Define a "Lease". Explain in detail the distinction between a "Lease" and a "Licence".

Ans.) Sec. 105, TP Act : "Lease" : 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.

Sec. 105, TP Act, defines "lease". Lease is a transfer of right of enjoyment of an immovable property made for a certain period, in consideration of a price paid or promised to be paid or, money, share of crops, service or any other thing of value to be given periodically or on specified occasions to the transferor by the transferee.

Lease is not a transfer of ownership in property, it is transfer of an interest in an immovable property. The interest is the right to use or enjoy the immovable property. Since "interest" in an immovable property is considered as property, lease is a transfer of property. However, lease is a transfer of only a partial interest. It is not a transfer of absolute interest. Lease contemplates seperation of right of possession from the ownership. The interest which is transferred is a right of enjoyment of property for fixed period on payment of some consideration in cash or kind. In common language the lessor is usually called landlord and lessee is known as tenant and the price is called the premium or rent.

⇒ <u>Essential elements of lease</u> : The essential elements of lease are as under :—

(i.) the parties, i.e., transferor and transferee
(ii.) the demise, i.e., a right to enjoy immovable property
(iii.) term or duration of lease
(iv.) consideration, i.e., premium or rent

The Hon'ble S.C. in Narain Prasad Aggarwal V. State Of M.P., AIR 2007 SC, held that existence of lease-deed must also be proved.

Sec. 29(b), Guardians and Wards Act, 1890, provides that the guardian cannot lease out any property of a minor for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will be cease to be a minor, because minor cannot grant lease and lease executed by a minor is void. The lessor who transfer the right of enjoyment of his property must be a person competent to contract and must also have a right to transfer the possession of property, i.e., he must possess a sound mind at the time of granting lease, he must have authority to effect lease. He has authority if he is the owner of the property or atleast possession of the property, because in a lease there is a transfer only of possession. Therefore, not only the owner, but also the lessee is entitled to grant lease. Lease by a lessee is called sub-lease. However, lessee too must be competent to contract at the date of execution of lease deed. Lease in favour of a minor is void because the transfer by way of lease contemplates agreement by minor to pay rent and other obligations. Lessee may be a juristic person, a company or a registered firm.

The limited estate which is right of enjoyment of property is called demise and in a lease this right of enjoyment or demise is the subject-matter of transfer.

The right of enjoyment must be given to the lessee for a certain period of time. The term may be any period of time, longer or shorter, even for perpetuity, but it must be specified in the lease-deed. Time must be ascertainable. It should not be uncertain or ambiguous. Lease may be in perpetuity or permanent lease.

In India, the leases in perpetuity is permissible and have been in practice since long. Where a land is held in lease for the purposes of building house or residence, the lease may be presumed to be a permanent lease. The Hon'ble S.C. in Chapsibhâi v. Purshottam, AIR 1971 SC, observed that such leases are permanent lease because the rights of tenant or lessee are heritable. The Hon'ble S.C. emphasised that a lease-deed has to be read as a whole.

⇒ **Consideration : Premium or Rent** : The contract of lease must be supported with some consideration. Consideration in a lease is premium or rent.

⇒ **Distinction between "Lease" and "Licence"** :

Lease is the transfer of the right of enjoyment in an immovable property.

Licence on the other hand, is the right of person to use the land of another while it remains in the possession of the other.

Sec. 105, TP Act defines "lease" as a transfer of a right to enjoy an immovable property for a certain time in consideration of price paid or promised to paid in cash or kind.

Licence is a right to do or continue to do upon the land of another, which in the absence of this right would be unlawful as is provided in Sec. 52, Indian Easement Act, 1882.

The fundamental difference between a lease and a licence is that in the former, there is a transfer of interest in an immovable property, whereas in licence there is no transfer of any interest in the property.

Lease and licence both are the rights of a person to use and enjoy the immovable property of another person.

There are following points of distinction between the two:

(i.) Lease is a transfer of interest, therefore it is a transfer of property.

In licence, there is no transfer of any interest so it is not a transfer of property.

(ii.) In lease, the transferee gets a proprietory right in respect of the land which is called a demise or a lease-hold estate.

Licence, on the other hand, is a personal right of a person (licensee) using the land of another person. The right of the licensee is in the nature of a permission to do or continue to do certain thing on another's land. It is, therefore, a personal right.

(iii) Being a proprietory right, lease is a transferable interest.

Licence being a personal right is not transferable and cannot be assigned to a third party.

(iv.) Lessee is entitled to maintain action against any trespasser.

A licensee cannot take any action against the trespasser.

(v.) Lease cannot be revoked before expiry of the term and without breach of express condition by the lessee.

On the other hand, subject to certain exceptions, a licence is generally revocable.

These Points of difference have been stated in Mangal Amusement Park Pvt. Ltd. V. State Of M.P., AIR 2012 S.C.

Pradeep Oil Cooperation V. Municipal Cooperation Of Delhi, AIR 2011 S.C. : By licence no estate or interest is created.

Lease, on the other hand, amounts to transfer of an interest in property.

Sec. 52, Indian Easements Act, 1882: "Licence" defined:
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".

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* Distinction between "Mortgage" and "Lease":

In Gita Cotton Trading Company v. Chief Controlling Revenue Authority, AIR 2013 Andhra Pradesh — the Hon'ble Andhra Pradesh H.C. has stated that both are species of the same genus, viz, transfer of property, but the nature of disposition is different. Mortgage is created to provide security for repayment of a debt but without transfer of possession except when then there is usufructuary mortgage or one with conditional sale.

In lease, the lessee gets possession of the property for its use and enjoyment in return for lease money or rent. The rights of the parties in these two transactions are different, they being linked with the basic nature of the transaction. There can be a perpetual lease but not a perpetual mortgage.

Sec. 58, Transfer Of Property Act, 1882:

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.