

(1990) 02 KL CK 0031
In the High Court Of Kerala
Case No : A.S. No. 244 of 1981

Annathu Sarojini and Others

APPELLANT

Vs

Muhammed Sainulabdeen and Others

RESPONDENT

Date of Decision : 16-02-1990

Acts Referred:

Easements Act, 1882 — Section 60

Citation : AIR 1990 Ker 248

Hon'ble Judges : Varghese Kalliath, J

Bench : Single Bench

Advocate : C.K. Sivasankara Panicker, K.S. Radhakrishnan and P.B. Mohankumar, for the Appellant; P.N.K. Achan and N.N. Suganapalan, for the Respondent

Judgement

Varghese Kalliath, J.—This is an appeal by the plaintiffs. They filed the suit for recovery of possession of the plaint schedule property on the strength of their title to the property. The plaintiffs are four ladies. Admittedly they have got title to the property. The defendants do not dispute the title of the plaintiffs.

2. The first defendant executed an agreement dated 30-5-1970. This agreement is a registered agreement. By virtue of this agreement now the defendants says that the first defendant was put in possession of the suit property as a licensee. It was stipulated in the agreement that the agreement will operate from 1-6-1970 and that for the grant of the licence, the first defendant has to pay Rs. 166.66. The property was given for a definite purpose, viz., to make certain structures for the purpose of running a cinema theatre. The permission was granted for a fixed period, viz., 5 years. The first defendant was thus continuing possession of the property in question. While so, defendants 2 and 3 purchased the right to conduct the cinema theatre from the first defendant. This has happened, according to defendants 2 and 3 on 6-3-1973 and they continued to run the cinema theatre in the suit property.

3. The plaintiffs wanted to revoke the licence and to get back the property free of

the obligations under the grant of licence. They filed a suit on 18-11-1976 as O.S.No. 210/76 before the Munsiff's Court, Manjeri. That suit was dismissed on 13-7-1979. An appeal was filed as A.S. No. 119/79, The appeal was allowed and the suit was remanded for fresh disposal by judgment dated 23-1-1980. The remand judgment allowed the plaintiffs to amend the plaint. Thereafter the plaintiffs converted the suit for recovery of the property on the strength of title. Initially the suit was instituted for terminating the licence and for a decree directing the defendants to remove the structures in the property. When once the suit was converted into a suit on title, the Munsiff Court returned the plaint for presenting it before appropriate court. The suit was presented before the Sub Court and there it is numbered as O.S.No. 32/80. It has to be noted that before the institution of the suit, the plaintiffs caused a lawyer notice to be sent to the first defendant on 15-9-1976. This notice is Ext.A2. In reply to that notice, the first defendant said that he has transferred the cinema theatre to defendants 2 and 3, Another notice was issued to defendants 2 and 3 on 4-12-1976. This notice is Ext.A3. Ext. A3 is replied by defendants 2 and 3 by Ext.A4. In the suit, defendants 2 and 3 were impleaded on 9-3-1977.

4. Defendants 2 and 3 filed a written statement wherein they contended that they are holding the property under a licence. Their definite case is that after obtaining the ownership of the theatre from the first defendant, they approached the plaintiffs and the plaintiffs agreed for their continuance and also agreed for making permanent structures in the property. In short, the case of defendants 2 and 3 is that the plaintiffs cannot recover possession of the property, since they are holding the property under an irrevocable licence (Section 60(b) of the Easements Act). In order to strengthen this defence, defendants 2 and 3 contended that they executed works of permanent character and incurred expenses in the execution of such works. The definite case of defendants 2 and 3 is that they were permitted by the plaintiffs to make such permanent constructions. Further it is stated that all these things happened by the intervention of mediators and one of the mediators is DW2. The Court below considered the evidence of the case and held that the defendants have proved a case of irrevocable licence in their favour and on that ground, the suit was dismissed. Now the plaintiffs appeal.

5. Counsel for the appellants submitted that the finding that defendants 2 and 3 were able to establish a case of irrevocable licence u/s 60(b) of the Easements Act is incorrect and unsustainable on the facts proved in this case. Counsel also submitted that the undisputed case now accepted by the court below is that the defendants are holding the property under a licence and even if that licence is an irrevocable licence, since the suit is filed on the strength of title, the plaintiffs can recover the property from the defendants after paying compensation for the structures made or improvements made by the defendants. I have to examine these aspects of the matter.

6. Section 60(b) of the Indian Easements Act 1882 reads thus:--

"60. Eicence when revocable.-- A licence may be revoked by grantor, unless-

(a).....

(b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution."

It is clean and clear from the averments in the written statement filed by defendants 2 and 3 that they are relying on a licence which is not in writing. Further they say that as per that licence, the plaintiffs have given permission to the defendants to execute works of per-manent character and pursuant to that licence, they have made constructions in the property which are of permanent character. The questions that have to be considered in applying the provisions contained in Section 60(b) of the Easements Act were considered by the Supreme Court in the decision reported in Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, . In paragraph 12 of this decision, it is said that "a licence is irrevocable u/s 60(b) of the Act only if three conditions are fulfilled, namely (i) the licensee executed work of a permanent character, (ii) he did so acting upon the licence, and (iii) he incurred expenses in doing so". Further in this decision itself it is observed that "the onus of proving these facts lies upon the licensee and in the absence of any evidence on these questions the licence could not be irrevocable u/s 60(b) of the Act." It is in evidence that defendants 2 and 3 got the transfer of the rights in the theatre when Ext. Al licence was in force. The terms of Ext. Al licence clearly enjoin certain duties and obligations on the parties and one of the important obligations on the part of the licensee is to surrender the property after the period of 5 years. It is stipulated in Ext. Al that the licensee has no right to make any permanent structures and that on the expiry of the term fixed in Ext.A1, the licensee should give vacant possession after removing any structures made by the licensee.

7. It is difficult for the defendants to say that they continue as licensees on the basis of the terms in Ext.A1. The defendants contended that when they got right over the theatre, they approached the plaintiffs and got a fresh licence from the plaintiffs. Counsel submitted that even though the fresh licence is an oral licence, that licence permitted defendants 2 and 3 to make permanent structures and so the defendants are entitled to protection u/s 60(b) of the Indian Easements Act. The question whether this submission has to be accepted or not depends upon a correct appreciation of evidence adduced in the case. In this regard, counsel for the appellants drew my attention to the reply notice issued by defendants 2 and 3. It is Ext.A4. Counsel submitted that the defendants got the first opportunity to say that there was an oral licence granted by the plaintiffs when they replied the notice, Ext.A3. In Ext.A3, the plaintiffs have stated the terms of the agreement, Ext.A1 and that the first defendant has committed breach of the terms of the agreement and so they wanted to terminate the agreement. Further it is stated that even if defendants 2 and 3 had obtained any right by virtue of any transfer of the rights under Ext. A1 by the first defendant; they wanted to terminate that right also, if any, with defendants 2 and 3. This is what has been stated in the

notice :

(Vernacular matter omitted ...Ed.)

Of course, the notice proceeded in a way that Ext.A1 has created some sort of kudiyalma right in the property. That question need not be considered since the defendants have no case that Ext.A1 has created a tenancy right and also they are not claiming any such right under Ext.A1. Their clear case is that they have got an oral licence. Ext. A4 is the reply. It was sent on 20-12-1976. The defendants did not even remotely mention about the oral licence. They did not say that they have got an independent licence and that licence allowed them to make permanent construction in the property. No satisfactory explanation is forthcoming for not stating this significant fact. Of course, counsel for the respondents has reminded me that Ext.A4 should not be treated as a pleading. I never intended to do so.

8. Any how, counsel referred me to Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, and wanted me to rely on the following observations of the Supreme Court (para 6):--

"It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction....."

I am of the view that the significant omission to say that they are holding the property under an oral licence, which is irrevocable in Ext.A4 is a matter of great importance in appreciating the evidence of the defendants. It has to be remembered that the defendants have to establish their case of oral licence and the burden is entirely upon them to satisfy the court about the terms and conditions of that oral licence. The fact that in Ext.A4 there is no mention about the oral licence assumes great significance in this context.

9. DW 1 is the second defendant. His evidence is of not much value, since he is an interested witness, DW 2, according to the defendants, is the mediator defendants very much relied on his evidence. Both sides read the entire evidence of this witness. On a perusal of the deposition of this witness, I feel that the case of defendants 2 and 3 has not been spoken to by this witness. This witness has said:

(Vernacular matter omittedEd.)

From what I have quoted above, it is clear that there was no concluded oral licence between the parties. Of course, counsel for the respondents wanted me to advert to certain other passages from his deposition. In fairness, I shall quote

those passages also. These are the passages relied on by counsel for the respondents:

(Vernacular matter omittedEd.)

Counsel submitted that from the above statement, it is possible to infer that the plaintiffs have granted a licence to defendants 2 and 3 and that licence allowed defendants 2 and 3 to make permanent structures. On reading the entire evidence of DW 2 particularly the passages quoted above, I am of the view that the only inference that is possible is that there was no new concluded contract between the plaintiffs and the defendants. The only possible inference is that defendants 2 and 3 continued to run the theatre and in regard to their right over the property that was governed by Ext.A1 itself.

10. Now I have come to the conclusion that the defendants have failed to establish their case of oral licence. The only question that has to be considered is whether the defendants can rely on Ext.A1 and that they have got an irrevocable licence. In this connection, it has to be noted that in order to attract Section 60(b) of the Easements Act, one of the essential conditions is that the licensee should execute a work of a permanent character and that he has to do it "acting upon the licence". If the licence specifically disallows the licensee to execute a work of a permanent character and in contravention of such a stipulation if the licensee has executed a work of a permanent character, I do not, think that such a licensee can claim protection u/s 60(b) of the Indian Easements Act.

11. In (1988) 1 KLT 335 (Ulahannan v. George) I had occasion to consider this aspect of the matter. I said that "A contract to the contrary disentitles the licensee from deriving advantage conferred by Section 60. There is nothing to preclude a party from binding himself to surrender land, although there may be a construction of a permanent character standing thereon. In the document in this case, there is a clear provision that at the time of surrender of possession, the defendant should dismantle the structure put up by him in the land in question and even in the written statement, the defendant's case appears to be that in case of termination of tenancy at the instance of either party, he would only be entitled to value of improvements in respect of the permanent structures put up by him. There is a clear contract which would disentitle the appellant from claiming the benefit u/s 60 of the Easements Act". In AIR 1942 All 330 (Ganga Sahai v. Badrul Islam), the court observed that "A condition in the licence that the landlord would have the right to get the site vacated whenever he so chose by the licensee deprives the licensee of the benefit of Section 60." In the same decision it is stated that "A contract to the contrary disentitles the licensee from deriving advantage conferred by Section 60. There is nothing to preclude a party from binding himself to surrender land, although there may be a construction of a permanent character standing thereon". In Chotey Lal Vs. Mt. Durga Bai, , the court observed that "Where a licensee executes a work of a permanent character under a clear understanding that he or his heirs may be called upon after certain time to leave the land, it is not open to him to plead such work as a bar against

his eviction on a suit brought by the plaintiff in pursuance of the solemn undertaking given by him."

12. As I said earlier, Ext.A1 clearly debars the licensee under Ext.A1 from executing any work of a permanent character. In these circumstances, I do not think that the defendants can sustain the plea that there was an oral licence and they have made constructions of permanent nature acting on that oral licence and so they are entitled to get protection u/s 60(b) of the Indian Easements Act.

13. The court below has not considered the case in the right perspective and has not considered correctly the right of the defendants to claim protection u/s 60(b) of the Indian Easements Act. It has to be noted that in considering issue No. 1, whether the defendants 2 and 3 are holding under plaintiffs as a result of direct engagement, the court below found thus :--

"The defendants later obtained permission. It is also for the purpose of running cinema and in the light of the ruling in Narsingh Das and Others Vs. Mian Safiullah Sha, the court has to draw a presumption that the second oral entrustment is also for doing the very same thing. Thus I find that there is truth in the defence and that the defendants had been permitted to put up structures. That will dispose of the Issue under consideration".

I would say that the finding is quite unsatisfactory. I have discussed the evidence and came to the conclusion that there was no acceptable evidence for "the second oral entrustment". I hold that defendants 2 and 3 cannot resist the suit invoking the provisions of Section 60(b) of the Indian Easements Act.

14. Counsel for the appellants submitted that even if there was an oral licence in favour of defendants 2 and 3 and that licence allowed the defendants to make permanent structures and in that case Section 60(b) of the Easements Act is applicable, even then since the suit is laid on the strength of paramount title and that title is admitted by the defendants, the plaintiffs can recover the property on payment of compensation for the structures made by the defendants. Counsel referred to me to the decision reported in 1974 K LT 466 (Vasu v. Sreedharan). A Single Bench of this Court while disagreeing with the decisions reported in Hafiz Manzoor Ahmad and Others Vs. Mohammad Abdul Jamil, ; AIR 1942 180 (Oudh) and AIR 1957 Tri 44 (Mahesh Chandra v. Alindra Chandra Deb) held that a kudikidappukaran is always liable for eviction at will, though he is a licensee whose licence cannot be revoked by virtue of Section 60 of the Easements Act. In short, the learned Judge held that in a case of an irrevocable licence, the grantor of that licence has got an entitlement to recover the property even when the licensee has executed a work of permanent character. I have got my own doubts about this proposition of law. In a Division Bench of Allahabad High Court, the court speaking through Sulaiman, J. said :

"It seems to us that it would be a contradiction in terms to hold that a licence is irrevocable u/s 60 of the Easements Act if a work of a permanent character has been executed and, at the same time to lay down that the grantor can revoke

the licence provided he is willing to pay compensation."

(vide Hafis Manzoor Ahmad and Others Vs. Mohammad Abdul Jamil,)

15. I do not want to discuss this aspect of the matter any further. I am of the view that the licence in this case is not irrevocable and so the plaintiffs are entitled to terminate that licence and on termination, the defendants are liable to surrender the property after removing the structures they have made in the property. In this case, counsel for the respondents submitted before me that very valuable improvements by putting up permanent structures have been made by the respondents and it will be inequitable to direct them to surrender the property or to recover the property from the defendants without payment of cost of the improvements made by the defendants. I also feel that it will be inequitable in the circumstances of the case, if I direct that the defendants have to surrender the property after removing the structures in the property or if I grant a decree to recover the property to the plaintiffs with a direction to remove the structures by the defendants. Counsel for the appellants submitted before me that the plaintiffs are prepared to pay compensation for the value of improvements made by defendants 2 and 3 in the property.

In the result, I set aside the judgment and decree of the court below and decree the suit allowing the plaintiffs to recover the property on payment of compensation for value of improvements made by the defendants in the property. The trial Court is directed to determine the value of improvements. Appeal is disposed of. No order as to costs.