

(1960) 01 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : Second Appeal No. 26 of 1959

Beant Singh

APPELLANT

Vs

Cantonment Executive Officer

RESPONDENT

Date of Decision : 18-01-1960

Acts Referred:

Cantonments Land Administration Rules, 1937 — Rule 43, 48
Easements Act, 1882 — Section 52, 60, 62, 63
Transfer of Property Act, 1882 — Section 105

Citation : (1960) 01 J&K CK 0005

Hon'ble Judges : K.V. Gopalakrishnan Nair, J

Bench : Single Bench

Advocate : I.D. Grover and J.L. Sehgal, for the Appellant; K.K. Mahajan, for the Respondent

Judgement

K.V. Gopalakrishnan Nair, J.—This is a second appeal against the judgment of the Addl. District Judge Jammu who reversed the decision

of the Munsiff, Jammu granting an injunction in favour of the Appellant.

2. The Appellant instituted a Suit in the Munsiff's court asking for a permanent injunction to restrain the Jammu Cantonment Board from evicting

him from a land in which he claimed a lease hold interest. The Respondent-Defendant contended that the transaction was only a license and not a

lease and that the license, having terminated the licensee is not entitled to any injunction against the licensor. The trial court found that the Plaintiff

was only a licensee; it, however, granted a temporary injunction in his favour to inure till the Defendant-licensor obtained a decree in ejectment

from a competent court. On appeal by the Cantonment Board, the Addl. District Judge dismissed the suit not on the ground that the true nature of

the transaction between the parties did not admit of the relief asked for but on

the main ground that the suit ought to have been instituted against the Government of India in view of Rule 43(iii) of the Cantonment Land Administration Rules. The Plaintiff has now come up in second appeal.

3. The first contention urged on behalf of the Plaintiff-Appellant is that Rule 43(iii) of the Cantonment Land Administration Rules has no application

to the case. That rule is as under:

Suits affecting proprietary rights in land shall be brought by or against the Central Government and not by or against the Board....

It is rightly pointed out by the learned Counsel for the Appellant that the suit out of which the Present appeal has arisen did not in any way call in

question or seek to affect, the proprietary rights in the land concerned. The Plaintiff did not question, the right, title or interest of the Government of

India or even of the Cantonment Board to the land. His claim was that under, an agreement validly entered into by him with the Cantonment Board

he was entitled to certain rights which were sought to be interfered with by the Respondent. He claimed an injunction to restrain the Defendant-

Respondent from such wrongful interference. He did not challenge or plead in derogation of the rights of the proprietor of the land. His claim was

based exclusively on his rights under the agreement which was admittedly valid and binding on the parties.

4. The learned Counsel for the Respondent has not been able to meet this contention. He felt himself constrained to agree that the scope of the

litigation was confined to a determination of the rights and obligations of the parties under a valid agreement entered into between them. It does not

therefore, appear that the learned Addl. District Judge was right in holding that the suit was hit by Rule 48(iii).

5. But this is not sufficient for a decision of the appeal. Other, important grounds had been taken by the Cantonment Board in the Memorandum of

Appeal presented to the lower court. These grounds relate to the true nature and character of the transaction between the parties and their mutual

rights and obligations thereunder.

6. The Appellant has urged before me that the transaction is one of lease and not of license. This makes it necessary to examine briefly the chief

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. Section 52 of the Easements Act defines a license

thus:

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.

It is clear that a mere license does not create any estate or interest in the property to which it relates; it only makes an act lawful which without it

would be unlawful. A lease, on the other hand, creates an interest in immovable property. A lessee has the right to exclusive possession of the

property leased, but a licensee has only a right to use the property; such right does not amount to an easement or an interest in the property.

If a contract is merely for the use of property in a certain way or on certain terms, while it remains in the possession and control of the owner, it is a

license. On the other hand, if an interest in immovable property is transferred and right to exclusive possession of the property is granted, the

transaction would be one of lease. Whereas a bare license grants only a personal privilege to the licensee, a lease creates an estate in the property

in favour of the lessee. In *Wood v. Leadbitter* (1845) 13 M.&W 838: 153 ER 351, Baron Alderson explained the nature of a license in the

following words:

A dispensation or license property passeth no interest nor alters or transfers property in anything, but only makes an action lawful which without it

had been unlawful.

7. In *Glenwood Lumber Co. Ltd. v. Phillips* (1904) AC 405 at p. 408, Lord Davey pointed out:

The Appellants contended that this instrument conferred only a license to cut timber and carry it away and did not give the Respondent any right of

occupation or interest in the land itself.: Having regard to the provisions of the Act, under the powers of which it was executed and to the language

of the document itself, their Lordships cannot adopt this view of the construction or effect of it. In the so-called license itself it is called indifferently

a license and a demise, but in the Act it is spoken of as a lease, and the holder of

it is described as the lessee. It is not however, a question of words but of substance. If the effect on the instrument is to give to holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

In *The Acting Secretary, Board of Revenue (Separate Revenue) Vs. The Agent, South Indian Railway Company Ltd.*, the distinction between a lease and license was explained in the following words:

The difference between a lease and a license is that, in the case of a license there is no interest in immovable property transferred to the licensee;

while in the case of a lease there is a transfer or carving out of such interest in favour of the person in whose favour the lease is granted. One chief

consideration is whether there is any right of exclusive possession given. If the effect of the document is to give the holder an exclusive right of

occupation of the land, it will be a demise of the land but it is not a mere question of words but of substance. The mere calling a document a license

would not affect the question; but in arriving at a conclusion where the terms are not clear, one has to see what the circumstances are to judge the

intention of the parties. It is relevant to consider what the rights of the parties were and what the object of the agreement was. The mere facts that

there are restrictive covenants would not by itself make a lease a license if the other terms are clear, but in considering what the intention of the

parties was, it is relevant to see what control one party has over the property on which another party is called to do certain things.

8. The view expressed in some of the earlier decisions that the test whether exclusive possession has been granted or not will be decisive in

determining whether the grant, is a lease or a license does not appear to have been adhered to in, more recent decisions which have pointed out

that the real test for ascertaining the true nature and character of the transaction is the intention of the parties. This position has been clearly pointed

out by Subba Rao, J. in *Associated Hotels of India Ltd. Vs. R.N. Kapoor*. His Lordship observes:

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 rejected in *Errington v. Errington*

1952 1 All ER 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 in 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.

The Court of Appeal again in *Cobb v. Lane* 1952 1 All ER 1199, considered the legal position and laid down that the intention of the parties was

the real test for ascertaining the character of a document. At p. 1201, Somervell L.J. stated:

...the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.

Denning L.J. said much to the same effect at p. 1202:

The question in all these cases is one of intention: Did the circumstance and the conduct of the parties show that all that was intended was that the

occupier should have a personal privilege with no interest in the land?

He then sets down the following four tests for ascertaining whether a transaction is a lease or a license:

(1) to ascertain whether a document creates a license 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 license,

(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 license, 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.

9. Applying these tests to the document on which both sides rely in the instant case, I am clearly of opinion that it creates only a license and not a

lease. The language of the document is apt only to create a license; its phraseology from beginning to end will be inappropriate, if the creation of a

lease were intended. The document merely grants a permission to erect temporarily a wooden shed of a specified dimension for the purpose of

carrying on temporarily the trade of dry-cleaning clothes. This permission is liable to be cancelled at any time at the will of the grantor.

The grantee cannot transfer the permission or let out the shed erected by him. Seven days notice by the grantor is provided to enable the grantee to

remove his structure and other materials from the land. On his failure to do so, the structure and the materials of the grantee will become forfeited

to the grantor. In more than one clause of the document it is stated that permission to construct the wooden shed and carry on the trade therein

shall be purely temporary and liable to be cancelled at the discretion of the grantor. It is expressly provided that the land is not to be used by the

grantee for any other purpose.

The grantee is also bound under the document to keep the shed and the surrounding clean and tidy and to carry out the instructions given by the

grantor regarding cleanliness and sanitation. The permission is liable, to be cancelled, if the executive officer of the Cantonment is of the opinion

that the licensee is an undesirable person. The document itself designates the transaction as a mere license.

10. These provisions are entirely consistent with the grant of a license and do not accord with the creation of a lease. What is perhaps of even

greater significance is that the Cantonment Land Administration Rules under which the grant in question was made prescribe different procedure

and use of different forms for the creation of a lease and a license. These rules also enjoin different considerations in the matter of granting a lease

and giving a license. It appears that in the present case the procedure prescribed for the grant of license and not that prescribed for a lease was

followed by the Cantonment Authority who is the grantor. The considerations that were taken into account in making the grant appear to be those

which relate to a license and not to a lease.

The form prescribed by the rules for granting a license was adopted in the present case and not the one prescribed for a lease. These

circumstances go to show that the intention was only to grant a license and not a lease; and the document which embodies the transaction between

the parties is perfectly, consistent with this intention. I have, therefore, scarcely any hesitation in coming to the conclusion that the Plaintiff-Appellant

is only a licensee and not a lessee.

11. As the transaction between the parties is only a license, the next point to be considered is whether the license is revocable. Section 60 of the

Easements Act enacts that a license may be revoked by the grantor unless it is coupled with a transfer of, property and such transfer is in force, or

unless the licensee acting upon the licence has executed a work of a permanent character and incurred expenses in the execution. In the instant

case, the licence is not coupled with a transfer of property nor has the licensee, acting upon the licence, executed a work of a permanent character.

The license is, therefore, revocable.

12. We have now to consider whether any restriction exist in law on the power of a licensor to determine a revocable licence. In AIR 1932 108

(Privy Council) Lord Russell of Killowen observed:

Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must their Lordships, think, depend upon the

circumstances of each case. The general proposition would appear to be that a licensee whose licence is revocable is entitled to reasonable notice

of revocation. For this proposition reference may be made to *Cornish v. Stubbs* (1870) 5 CP 334 and *Mellor v. Watkins* (1874) 23 WR 55 in the

latter of which cases Blackburn, J. states that a person giving a revocable licence ""is bound to give the licensee reasonable notice.

When the exercise of the right conferred by the licence involves nothing beyond, there can be no reason to urge against the existence of a power to

determine the licence ""brevi manu"" at the will of the licensor.

13. Section 63 of the Easements Act says that when a license is revoked, the licensee is entitled to a reasonable time to leave the property affected

thereby and remove any goods which he has been allowed to place on such property. The agreement in the present case has provided for seven

days' notice to enable the licensee to remove his structures and goods if any, which he might have brought on the land in pursuance of the licence.

The licence expired by effluxion of time on 31st. March 1956. This is an admitted fact.

The suit was brought by the licensee more than three months after the termination of the license. He had, therefore, ample time, before he came to

the court, to remove his, structures and goods from the land in relation to which he had obtained the licence. What is more, the licensor, had given

him express notice calling upon him to remove his temporary structures and goods from the land. From the agreement between the parties, one

may properly infer that seven days was considered by them to be a reasonable time for removal of the goods of the licensee from the land. But a

very much longer period enured to the licensee in the instant case.

The agreement expressly provided that on the licensee failing to remove the materials within the prescribed period of seven days, they would be

forfeited to the licensor. The claim of the licensee that he did not remove the wooden structure from the land in spite of the termination of the

license and in spite of the express provision in the document of license, cannot clothe him with any right to continue to enjoy his license. The

licensee was offered reasonable time and opportunity to remove his materials from the land, and he has no right, in the circumstances of this case,

to ask for a longer time or further opportunity for doing so.

Furthermore, under Clause (c) of Section 62 of the Easements Act a license which was granted for a limited period shall be deemed to be revoked

on the expiration of that period. When the Plaintiff brought the action, the license had come to an end by operation of law as also on the terms of

the agreement. A notice revoking the license also appears to have been duly served on the licensee by the licensor. In spite of all this, the licensee

thought fit to bring an action against the licensor to restrain him from interfering with his enjoyment of the license.

Grant of the injunction asked for will undoubtedly have the effect of making a revocable license irrevocable or rather granting a fresh irrevocable

license against the will of the owner of the land. Neither of these things a court is entitled to do. Yet, the learned Munsiff granted the Plaintiff-

licensee a temporary injunction till the licensor obtained a decree from the court in ejectment of the licensee. This decree appears to me to be

utterly unsupportable. It is somewhat strange to grant a decree for a temporary injunction in a suit for a permanent injunction.

Where a permanent injunction cannot at all be granted on the facts of a case, it would not be proper to grant even an ad interim, injunction.

Neither, the decree asked for nor the decree that was passed can be supported under any of the provisions of the Specific Relief Act. The decree

in effect prevented the licensor who is the owner of the land and who is in legal

possession of it, from lawfully exercising his rights of ownership and

possession in respect of it. An injunction cannot be granted to prevent doing of an act which a party is lawfully entitled to do.

14. The learned Counsel for the Appellant strenuously urged that the licensor is bound to bring a suit either for injunction or for ejectment against

the licensee before he can get rid of the right of the licensee to enjoy the licence. According to him, this would be the position even if the licence

had been validly revoked and the licensee's right under the agreement had ceased. I have not been referred to any authority in support of this

somewhat extraordinary contention.

It militates against the very concept of a license. A license is a right "to do or continue to do in or upon the immovable property of the grantor

something, which would, in the absence, or such a right be unlawful." If a license validly determines the right of a licensee to do or continue to do in

or upon the immovable property of the licensor anything in enjoyment of that license would come to an end, the result of which will be to make

further exercise of that right unlawful.

If an injunction in favour of such a licensee is given, it would only be permitting him to do what is unlawful for him to do. The court would thus be

throwing its protection round a wrong-doer and forcing the rightful owner of property to submit to the unlawful action of the wrong-doer. I do not

think any court should by any order or decree passed by it bring about such a strange and intolerable situation. The law does not permit a licensee

whose license has been validly revoked to exercise his license any longer.

If he does so, he does something wrong. He will be only a trespasser after he has lost his right under the license, and the owner of the land is

entitled to deal with him as a trespasser. There is neither principle nor authority to support the rather strange proposition that in spite of the valid

termination of the right of the licensee, he can continue to exercise his right until the licensor obtains a decree from the court prohibiting him from

doing so.

After the termination of the license, the licensor is entitled to deal with the property as he likes and to treat an intruder as sheer trespasser. This

right he gets as an owner in possession of his property. He need not secure a decree of court to obtain this right. He is entitled to resist in defence

of his property the attempts of a trespasser to come upon his property.

He may exert the necessary and reasonable force to expel a trespasser. Whatever be the liability that the true owner may incur under the Criminal

Law or even under the, Civil Law for use of excessive force, the trespasser will not be entitled to maintain a civil action against him so as to

continue the trespass. In respect of a landlord's right to re-enter and take possession, the law in England is stated in Vol. XX pp. 280 and 281 of

Halsbury's Laws of England (Hailsham ed.) as follows:

Where the tenant fails to deliver up possession, the landlord is entitled to re-enter and take possession, subject only to certain statutory

restrictions: Thus he can re-enter where the tenant has abandoned possession, or where he can effect the entry peaceably; and even if he enters

forcibly, and is thus liable to criminal proceedings under the statutes, yet the tenant has no civil remedy against him in respect of the entry or in

respect of the eviction, if no more force than is necessary is used.

Please see also *State of West Bengal Vs. Birendra Nath Basunia and Others*, .

15. In *Hemmings v. Stokes Poges Golf Club Ltd.* (1920) 1 KB 720, the facts were that the Plaintiffs, a man and his wife, lived in a cottage

belonging to the Defendants, the man being in their service and being required by them to live in the cottage as part of his service and for the

performance of his duties. He left their service, but refused to give up the cottage after notice to quit duly given. Thereupon the Defendants entered

the cottage and removed the Plaintiffs and their furniture using no more force than was necessary for that purpose. In a civil action by the Plaintiffs

for assault, battery and trespass, it was held that the Defendants were not liable, their right of entry being a defence to civil proceedings for the acts

complained of. At p. 737. Bankes L.J. stated as follows:

In the present case the Defendants were undoubtedly entitled to possession of the cottage. The Plaintiffs had no right and did not pretend they had

any right to remain there. Assuming, but without deciding, that the entry by the Defendants was a forcible entry, the right to possession was in the

Defendants, and the acts which are alleged as giving the Plaintiffs a right of action were done in defence of their right to possession: *Blades v. Higgs*

(1861) 10 CB 713; and of the possession which they had acquired by the alleged decision will encourage lawlessness as was suggested for the

Respondent. A person who makes a forcible entry upon lands and tenements renders himself liable to punishment, and he exposes himself also to the civil liability to pay damages in the event of more force being used than was necessary to remove the occupant of the premises, or in the event of any want of proper care in the removal of his goods. If the view of the law expressed in *Newton v. Harland* (1840) 1 SNR 474 Cal Man and G 644 is correct it must follow that the law confers upon the lawless trespasser a right of occupancy the length of which is determined only by the law's delay.

16. It has been held in India as well as in England that where a right of re-entry has accrued to a landlord on breach of a condition of the lease, the property reverts to the landlord and that he can peaceably re-enter and take possession of the demised property without having to institute a suit for that purpose. The decision in (1920) 1 KB 720 just cited appears to go further and say that the tenant has no remedy against the landlord, even if the latter effects a forcible re-entry.

17. It is unnecessary in the present case to discuss to what extent and in what circumstances a lessor in India has a right of forcible re-entry or whether he has such a right at all. It cannot, however be doubted that licensee whose license has validly come to an end is in an inferior position to that of a tenant who continues in possession even after the termination of his tenancy. A tenant at sufferance under the English Law has at least possession in his favour which is not unlawful, although it is readily determinable by virtue of the clearly over-riding rights of the landlord. A tenant in India who continues to hold the property even after the determination of his tenancy may be able to claim that his possession is juridical and that he can be ejected only to due course of law.

But a licensee whose license has validly come to an end seems to have no vestige of any right however slender. The personal privilege which he obtained under the licence has ceased to be; and I am unable to see anything in law which entitles him to claim to exercise any right in respect of the land to which his erstwhile license related. Before a person can claim that he can be put out of the land only under a decree of the court, he must be able to show that he has some right recognized by law to remain on the land or to do some act on that land.

18. The position of the Plaintiff in the present; case can be put thus:

I have no manner of right to the Defendants' land or to do anything on it, but I propose to remain on the land and do something on it unlawfully.

The true owner of the land is likely to resist me; I, therefore, want the court to prevent the true owner from doing so. I must be allowed to do the

unlawful act which I intend to do until the true owner goes to a court and obtains a decree to prohibit me from doing so or to throw me out of the

land.

This, indeed, is a very strange stand to take. It seeks to destroy the right of a true owner to defend his property and maintain his possession against

a wanton trespasser. It amounts to claiming a privilege for unlawful acts of trespass and a premium on lawlessness. As I already indicated, a court

of law will not afford any assistance to a person who comes with such a claim. The true owner on whose land the trespass is attempted is entitled

to expel the trespasser by using such force as the law permits him. I am unable to see why the principle of the decision in (1920) 1 KB 720

(Supra) should not apply to the case of a licensee who in spite, of the valid determination of his license chooses to remain upon the land of the

licensor against the latter's will and desire.

The Plaintiff in that case was not a lessee; he was in occupation of the cottage of the Defendant only as a servant of the Defendant. He did not

vacate the cottage even after he left the service of the Defendant and did not heed the Defendant's demand to quit. The Defendant thereupon

entered the premises and turned out the Plaintiff by applying the necessary force. The Court of Appeal held that the action, of the Defendant was

justified in law. The Plaintiff before me does not have any higher right than the Plaintiff before the English court had. Broadly speaking, they occupy

similar status in law so far as the right of the owner to turn them out of the property is concerned. It is, therefore, not tenable, to argue that the

Plaintiff before me is entitled to remain on the Defendant's land till the Defendant is able to obtain a decree of civil court against him and that the

Defendant cannot turn him out without recourse to a court of law.

19. In view of the foregoing. I am unable to see any merit in the claim of the Plaintiff-Appellant. He is not from any point of view entitled to an

injunction against the Defendant-Respondent. The appeal, therefore, fails and is

dismissed with costs throughout.