

(1959) 12 CAL CK 0018

In the Calcutta High Court

Case No : Appeal from Original Decree No. 126 of 1954

Dalchand Kothari

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 07-12-1959

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : (1961) 1 ILR (Cal) 10

Hon'ble Judges : Guha, J; Banerjee, J

Bench : Division Bench

Advocate : S.C. Mitter, Diptikana Bose and Bhabesh Chandra Ghose Roy, for the Appellant; N.C. Chakraborty, for the Respondent

Judgement

Banerjee, J.—The disputed land, measuring 11,732 sq. ft., is situate at Kalijhora Bazar, Sevoke Range, within a Reserved Forest area of Kurseong Forest Division.

2. The Defendant is in occupation of the disputed land.

3. It is in evidence that the Defendant had at first been granted a permit (Ext. B) to maintain a tea shop, measuring 725 sq. ft., -within the Reserved Forest area. That permit was for one year from April 1, 1941, to March 31, 1942. Excepting oral assertion, made on behalf of the Defendant, there is little else to show that this permit was renewed in subsequent years, but we are prepared to believe that the permit was renewed from year to year, may be on varying terms and conditions.

4. In the year 1948, the Defendant was granted a fresh permit (Ext. 13), for the period April 1948 to March 31, 1949, to the following effect:

Permit to maintain Grocery shop and compound, Godown and Compound in Setikhola Block, Compartment Kalijhora Bazar of Sevoke Range.

Whereas the sum of Rs. 71-8-6 (Rupees seventy-one annas eight and six pies) only has been paid as rent to the Forest Officer-in-charge of Sevoke Range and

credited in his accounts under Item No. 64 of March 1948.

Permission is hereby granted to Dalchand Kothari, son of Thakurdas Kothari, by trade or occupation business, of village Kalijhora, Thana Siliguri, district Darjeeling, to maintain a grocery shop and compound measuring $33 \times 25 = 825$ sq. ft. shop in the Godown and Compound 2,000 sq. ft. compound, 600 sq. ft. godown, 600 sq. ft. compound abovementioned locality of the Reserved Forests, subject to the conditions of occupancy set forth below.

ILLEGIBLE, Divisional Forest Officer, Kurseong Division.

5. We shall refer to the material conditions hereafter in this judgment.

6. By his letter, dated August 24, 1948, the Divisional Forest Officer raised the charges from Rs. 71-8-G to Rs. 182-2 and called upon the Defendant to pay the difference, amounting to Rs. 110-9-6 within a month. The said letter is Ext. A.

7. The Defendant objected to the increase by his letter, dated October 6, 1948 (Ext. 4). The Divisional Forest Officer, however, overruled the objections by his letter, dated October 21, 1948 (Ext. 4(a)). Thereupon, without prejudice to his right to question the legality of the increased demand, the Defendant asked for extension of time to pay the sum of money demanded from him, by his letter, dated October 29, 1948 (Ext. 4(b)).

8. At or about this stage, it came to the knowledge of the authorities of the Forest Department that the Defendant had encroached upon considerable areas of forest land. Officers of the department carried out measurement and found that in place of 4,025 sq. ft., namely, the area in respect whereof the permit had been granted, the Defendant was in actual possession of 11,732 sq. ft., that is to say an excess area of 7,707 sq. ft.

9. Thereupon, on December 6, 1948, the Divisional Forest Officer served a notice on the Defendant, calling upon him to vacate the land within one month from the date of receipt of the notice, on the ground that he had encroached upon other lands and also made certain unauthorised constructions. The notice is marked Ext. 4(d).

10. The notice Ext. 4(d) considerably chastened the Defendant Respondent and on January 4, 1949, he addressed the following letter (Ext. 4(e)) to the Range Officer, Sevoke Range.

Sir,

I do hereby apologise to you in presence of the following gentlemen for all the malactivities done by me against you.

In future I shall be obedient and faithful and abide by all rules and regulation of your Directorate and extend all sorts of co-operation whenever so ordered by you.

As regards unauthorised extension of fixed demand holding No. SV 3 for constructing a new two-storied building I am ready to pay the compensation and

rent as will be assessed by you within a fortnight on receipt of your order.

Further the holding may be cancelled from my name and new holding No. for the entire holding with all construction over it (old and new) may kindly be entered in favour of my eldest son Srichand Kothari.

11. The prayer made by the Defendant was not granted by the Divisional Forest Officer and he was called upon to move away within 15 days (vide letter Ext, 4(f), dated April 18, 1949).

12. Repeated reminders given to the Defendant failed to achieve the desired result and the Defendant continued in occupation of the disputed land.

13. It was in these circumstances that the State Government was compelled to institute the suit, out of which this appeal arises, claiming eviction of the Defendant from the disputed land and also claiming damages from him. The Defendant was described as a licensee, whose licence was said to have been revoked on December 6, 1948. Apart from encroachments made, various acts of negligence and devastation were alleged against the Defendant, with the details of which we are not concerned.

14. The written statement contained averments in denial of the allegations of encroachment, breach of the conditions of the license, negligence and other wrongful acts made against the Defendant. But the substantial defence taken by the Defendant was that he was a tenant and not a licensee under the plaintiff and his tenancy could not be terminated at the will of the Plaintiff or in the manner done. The Defendant also disputed the quantum of damages claimed against him.

15. The learned Subordinate Judge considered the evidence both, oral and documentary and came to the conclusion that the Defendant was not a tenant but a licensee under the Plaintiff and that his licence had been rightly terminated. The learned Subordinate Judge also held that the Plaintiff was entitled to damages and applying the rate of the licence fee as the basis for calculation of damages, in respect of the entire area in occupation of the Defendant, the learned Subordinate Judge found that the Plaintiff was entitled to damages amounting to Rs. 2,124-12. The learned Subordinate Judge therefore decreed the Plaintiff's claim for eviction and damages to the extent hereinbefore indicated.

16. The propriety of the aforesaid decree is being disputed, before us at the instance of the Defendant.

17. Mr. Shyama Charan Mitter, learned Advocate for the Defendant Appellant, made a two-fold submission for our consideration.

18. He contended, in the first place, that the permit (Ext. 13) was in substance a document which created the relationship of landlord and tenant between the Plaintiff State and Defendant Respondent. Such a relationship could be

terminated only by a notice for termination of monthly tenancy, as contemplated in Section 106 of the Transfer of Property Act and not in the arbitrary and off-hand manner as was done by the Plaintiff Respondent. In these circumstances Mr. Mitter contended that the lease in favour of the Defendant remained subsisting and the Defendant was not liable to be evicted. Mr. Mitter further contended that there could not be any claim for damages made against the Defendant, during the continuance of the lease. Mr. Mitter contended in the next place that the principle adopted for assessment of damages was erroneous.

19. So far as the first argument of Mr. Mitter is concerned there is a lacuna patent on the face of it. It was not his contention that the Defendant was a tenant in respect of the entire, 11,732 sq. ft. area, which was in his occupation. Therefore, even though we accept the argument, which of course we do not, that the Defendant was a tenant in respect of the land covered by the permit (Ext. 13), his position was that of a trespasser in respect of the other areas of land found in his occupation. Therefore, the first branch of the argument of Mr. Mitter is no answer to the Plaintiff's claim for eviction in so far as it relates to areas of land, other than those covered by Ext. 13.

20. There are, however, very good reasons why we must not treat the Defendant as a tenant but as a bare licensee in respect of the land covered by Ext. 13, and as a mere trespasser in respect of other lands in his occupation.

21. In elaboration of the first branch of his argument Mr. Mitter contended that Ext. 13 evidenced an exclusive grant and if for such a grant a fixed rental was payable, the exclusive grant should not be called a licence but must be characterised as a lease.

22. In order to understand the force of this argument we have to examine the extent of the power of a licensor to revoke a licence coupled with grant and the distinction between a lease and a licence.

In the case of *Arpan All v. Jnanendra Kumar Pal Chaudhuri* I.L.R.(1945) Cal. 361, Mitter and Latifur Rahman, JJ., laid down the following proposition:

- (i) A mere licence is revocable at will.
- (ii) But if there is an express or implied contract between the licensor and the licensee not to revoke the licence for a time or indefinitely, then such licence is not revocable till the expiration of the period for which such contract subsists.
- (iii) Except for a sufficient cause a licence coupled with a grant is not revocable so long as such grant or interest is not exhausted.

23. In a later judgment in *Muhammad Ziaul Haque Vs. Standard Vacuum Oil Company*, , Sinha, J. enunciated the law on the point in the following language:

A licence may be of two kinds, namely, a bare licence which is purely a matter of personal privilege, and a licence coupled with a grant or interest. What amounts to a licence coupled with a grant or interest is a matter of some complication, but

it is now quite clear that it need not necessarily be in an interest in land. (Wood v. Leadbitter (1845) 13 M. & W. 838. Hurst v. Picture Theatres (1915) 1 K.B. 1, and Arpan Ali v. Jnanendra Kumar Pal 49 C.W.N. 345.)

A licence is revocable unless (1) it is coupled with a grant or interest; or (2) the licensee acting upon the licence has spent money in executing works of a permanent nature.

24. This is how the law regarding the power of a licensor to revoke a licence has been enunciated and set at rest by this Court.

25. Regarding the fundamental distinction between a lease and a licence, there is an elaborate judgment by S.R. Das, Chief Justice of the East Punjab (as the once Chief Justice of India then was) and Harnam Singh, J., in (Governor-General v. Indarmani) AIR (1950) East Punjab 296, in which the following passage appears:

In deciding whether the agreement * * * amounts to a lease, regard must be had to the substance of the agreement, and if the effect of the agreement is to give the holder the exclusive right of occupation of the property, though subject to certain reservations, or to a restriction of the purposes for which it may be used it is a lease; but 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 control of the owner it is a licence. In other words, the employment of words appropriate to a lease will not prevent the grant from being a licence merely, if from the whole document it appears that the possession of the property was to remain with the grantor.

26. Almost contemporaneously was decided by the House of Lords, the case of H.E. Wijesuriya v. Attorney General for Ceylon (1950) A.C. 493. Lord Simonds in delivering the judgment of their Lordships laid down the following test for determination whether a particular document was a lease or a licence:

the decisive test is whether on its true construction the effect of the document is to give exclusive possession to the holder of the so-called permit; and, adopting this test, they are of opinion that all that is granted by the document is the right to tap and take the produce of the rubber trees within a defined area together with such rights of occupation or possession and other ancillary rights as are necessary to make the primary right effective. They find nothing in the document which would exclude the Crown or its officers from entering on, and making such use of, the land as might be thought fit, subject only to the limitation that in doing so they must not derogate from the rights granted to the grantee. In their Lordships' opinion, therefore, the so-called permit was not a lease but a licence.

27. We respectfully agree with the test laid down in the aforesaid two judgments for ascertaining the distinction between a lease and a licence.

28. Bearing in mind the distinction referred to above, we now turn to examine the terms and conditions incorporated in the permit, granted to the Defendant and marked Ext. 13. The document is headed "Permit to maintain grocery shop

and compound, godown and compound." By that document permission was granted to the Defendant to maintain a grocery shop and compound, and a godown and compound of given measurement in the locality known as Setikhola Block, compartment Kalijhora Bazar of Sevoke Range, within a Reserved Forest area, subject to certain conditions. The conditions attached to the document imposed strict restrictions on the manner of maintenance of the grocery shop, godown and compound and required the Defendant to vacate the site and remove the structure within one month, on his being required so to do. One of the terms of the licence was so strict that it required the Defendant to dismiss his servants and agents employed in the shop or in the godown, if the Divisional Forest Officer did not like their presence. Reading the entire document (Ext. 13), it appears to us that the Defendant was only granted permission to maintain a shop and a godown, with attached compounds, within the Reserved Forest area. The permission amounted to user of the land in a certain manner and on certain conditions but the possession thereof remained with and under the control of the Plaintiff Government. For such enjoyment, as given under the permit, the Defendant was to pay a sum of money to the Plaintiff, which was inappropriately described as rent in the document. But regard being had to the entire tenor of the document, the use of this inappropriate word "rent" in the permit (Ext. 13) need not be overemphasised. In our opinion what was granted to the Defendant under Ext. 13 was a licence to use the land covered thereby in a particular manner and subject to certain conditions.

29. At the time when the notice to quit was served the licence had expired. As admitted by the Defendant himself in his letter of apology, Ext. 4(e), he had been guilty of certain "malactivities", apparently meaning encroachment on other lands, unauthorised constructions and violation of the terms and conditions in the permit. Under the terms of the licence itself it could be revoked in the manner as was done in this case. In our opinion, nothing prevented the Plaintiff from revoking the licence, under the circumstances as aforesaid, and all the more so because the period of licence had expired. We therefore overrule the first branch of argument advanced by Mr. Mitter.

30. The second branch of the argument of Mr. Mitter can be very shortly disposed of. The grievance made by Mr. Mitter was that between the statement in para. 4 of the plaint and the statement in the Report (Ext. 12) there was a difference as to the area said to have been encroached upon by the Plaintiff. This argument of Mr. Mitter is based on a misreading of the document Ext. 12. According to Mr. Mitter, the area encroached upon was stated to be 8,944 sq. ft. in Ext. 12 as against 7,707 sq. ft. in para. 4 of the plaint. On this basis Mr. Mitter argued that the case made in the plaint was not borne out in evidence and therefore that part of the Plaintiff's claim deserved to be dismissed.

31. In our reading of Ext. 12, the figure 8,944 sq. ft. represents the area of compound only. The total area in occupation of the Defendant was found to be 11,732 sq. ft. If out of that the area covered by the permit (Ext. 13), namely,

4,025 sq. ft. be deducted, the quotient becomes 7,707 sq. ft. That is the figure that was mentioned in para. 4 of the plaint. The grievance made by Mr. Mitter is unsubstantial and must be overruled.

32. The learned Subordinate Judge calculated damages on rental basis on the entire area in Defendant's occupation, namely, 11,732 sq. ft. This was not an erroneous basis of calculation. So far as the rate of rent (more appropriately licence fee) is concerned, instead of proceeding on the basis of the agreed fee (Rs. 71-8-6), the learned Subordinate Judge took as his basis the figure to which the fee had been increased by the State Government under letter Ext. A. On the basis he calculated that the Licence fee payable by the Defendant would be Rs. 531-3 per annum for the entire 11,732 sq. ft, of land in Defendant's occupation. At that rate for the period from April 1, 1949 to March 31, 1953, a sum of Rs. 2,124-12 was found payable by the Defendant to the Plaintiff as damages. There is nothing inherently wrong in this calculation. We, therefore, affirm the decree for damages passed by the learned Subordinate Judge.

33. Both the contentions made by Mr. Mitter therefore fail and we dismiss this appeal with costs.

34. Mr. Mitter prayed for a little time to vacate the disputed land, if the appeal failed. The Defendant has constructed structures on the land and naturally would require time to quit. In these circumstances, we make this order that if the Defendant deposits in the Court below the amount of damages decreed against him within one month from today, the decree in so far as it is one for eviction shall not be executed until the expiry of the month of March, 1960. For the present the decree for eviction shall not be executed for one month from today. In default of deposit of the sum of money, as hereby directed, the Plaintiff will be at liberty to execute the decree at its pleasure.

Guha, J.

35. I agree.