

**(2008) 07 BOM CK 0135**  
**In the Bombay High Court**  
**Case No : S.A. No. 372 of 1993**

Francis

APPELLANT

Vs

Andrew alias Jairon (Dead) by LRs. Lucy D'Souza and Others

RESPONDENT

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**Date of Decision :** 01-07-2008

**Acts Referred:**

Easements Act, 1882 — Section 16, 56, 60

**Citation :** (2008) 6 ALLMR 874 : (2008) 6 MhLj 450

**Hon'ble Judges :** A.P. Bhangale, J

**Bench :** Single Bench

**Advocate :** R.S. Sundaram, for the Appellant; C.S. Samudra, for the Respondent

**Final Decision :** Allowed

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## Judgement

A.P. Bhangale, J.—By this appeal the appellants have challenged judgment and order dated 14th September, 1993 passed by 4th Additional District Judge, Nagpur in Regular Civil Appeal No. 340/1990, whereby the appeal by the original plaintiff was partly allowed and after setting aside judgment and decree dated 23-10-1990, passed by Second Joint Civil Judge Jr. Dn., Nagpur, the first Appellate Court declared that the appellant (plaintiff) is exclusive owner of the suit plot purchased by him pursuant to sale deed (Ex.23) in the suit. However, the first Appellate Court declined to grant relief of possession in favour of the plaintiff in respect of three rooms occupied by respondent Andrew @ Jairon s/o Bennadick D'Souza.

2. The conspectus of the facts can best be narrated as under:

The plaintiff had filed Regular Civil Suit No. 599 of 1987 in the Court of second Joint Civil Judge Senior Division, Nagpur claiming that the plaintiff is owner of the suit plot having purchased it under registered sale deed dated 10-3-1980. According to the plaintiff, defendant Andrew had retired from service and, therefore, the plaintiff had allowed him to occupy portion of house belonging to the plaintiff. The plaintiff had constructed four rooms in the year 1981 and

mother of the plaintiff requested him to accommodate the defendant since after his retirement he had no accommodation. To pay respect to the directions of the mother the plaintiff had allowed the defendant to reside in the additional three rooms constructed by the plaintiff adjacent to four rooms which he had constructed earlier. Further, according to the plaintiff, the defendant had no funds for purchasing plot or for construction of the house but being real brother the plaintiff did not charge him in any form. Latter when sons of the defendant and the defendant started causing nuisance to the plaintiff after picking up quarrels and because the defendant became addicted to liquor the plaintiff had issued notice dated 14-2-1987 through Advocate calling upon the defendant to vacate the suit premises, the defendant, in reply, claimed ownership. By written statement filed in the suit the defendant had claimed that three rooms, which are in his possession, were constructed by him and that he had contributed half amount for purchasing the plot. The plaintiff had assured him that he will divide the plot in three pieces and each brother will get one piece. Thus, the defendant claimed that he, with the help of one Gul Mohammad Contractor, had constructed three rooms. According to the defendant, the plaintiff had refused to execute deed of conveyance in his favour in support of piece of the plot on which he has constructed. It appears that in the trial Court it was held that the plaintiff had failed to prove that he is exclusive owner of the suit premises. While, the trial Court held that the defendant was entitled to 1/3rd plot and that he had constructed the house. In this result, the suit by the plaintiff was dismissed with costs.

3. Being aggrieved, the plaintiff had challenged the decree of dismissal by Regular Civil Appeal No. 340/1990 before 4th Additional District Judge, Nagpur who has pleased to allow the appeal partly.

4. It appears that in the trial Court the plaintiff led evidence of himself and other three witnesses. On the other hand the defendant led evidence of himself and two more witnesses. It appears in the evidence of the plaintiff that on 10-3-1980 he had purchased suit plot from one Sukhrabi by registered sale deed (Ex.23) and he had constructed four rooms in mud and bricks. At the instance of his mother since the defendant was unemployed three rooms were constructed in 1981 in mud and bricks for the residence of the defendant. He was not paying any rent or amount for residing in the rooms nor has been any funds for the construction. It also appears in evidence that because of the behaviour of the defendant of consuming liquor and having bad eye on the wife of the plaintiff he was asked to vacate the room by notice sent through Advocate (Exh.25) which was replied by the defendant (Exh.27). The plaintiff examined one Balkrush Sontakke to prove that he has lent a sum of Rs. 5,000/- to the plaintiff in April, 1981 which was repaid on 14-1-1987 in cash by the plaintiff. Another witness Shri Pandurang Kawthe was examined to establish that the plaintiff had purchased plot in the year 1980 and had borrowed a sum of Rs. 5,000/- from Shri Kawthe. One more witness Shri Shyamsunder Verma was examined to show that the plaintiff had received hand loan of Rs. 3,000/- for purchasing a plot. As

against this evidence of the plaintiff and his witnesses, the defendant had examined himself. It appears from his evidence that he is retired as mechanic from State Transport Corporation, Chandrapur. He claims that he had built a house on the plot purchased by the plaintiff in the year 1980 and according to him, his brother had assured him that if he contributed Rs. 1,000/- he will get share in it. It is also case of the defendant that plaintiff had allowed him to construct house and a sum of Rs. 1,000/- was paid to the plaintiff in February, 1981.

5. The defendant relied upon the evidence of one Gul Mohammad Abdul Mohammad to support his case that he had constructed house on the plot belonging to the plaintiff. One more witness Nana Marotrao Mohad was also examined by the defendant that there was some efforts to compound the matter between the plaintiff and the defendant and he had suggested that the plaintiff should accept Rs. 2,000/- from the defendant and execute the sale deed. His brother Pelegrim was not examined in the suit.

6. The learned Advocate for the appellant (original plaintiff) clarified that he is only challenging the finding recorded by the first Appellate Court that the respondent (original defendant) Andrew @ Jairon Bennadick D'Souza was licensee and acting upon the license had executed the work of construction of a permanent character and incurred expenses in the execution. There is no dispute that the plaintiff-Francis had purchased the suit plot under registered sale deed Exh.23 in the suit. The grievance is that the first Appellate Court while recording finding on issue No. 2 created a case which was never pleaded by written statement to hold that the defendant is licensee and acting upon license he executed work of permanent character and incurred expenses in its execution. The finding is assailed on the ground that the first Appellate Court had tried to fill up the lacuna in the case of the defendant introducing a new case in the absence of any plea in the written statement that the defendant is irrevocable licensee. In the written statement the defendant had contended that he contributed money. In other words he pleaded that he incurred expenses for construction but there was no specific plea that he was granted license and that it was irrevocable license. In substance, on the other hand, co-ownership was also claimed and there was offer to compound the matter as the defendant was interested to purchase a portion of the plot on which he had allegedly constructed three rooms.

7. To support the contentions the learned Advocate for the appellant cited following decisions:

(a) Elizabeth and Ors. v. Saramma reported in AIR 1985 NOC 159 in which the Court held that the irrevocable license has to be pleaded and proved. In absence of any pleadings or issue on this point, it cannot be said that the license was irrevocable. Irrevocability of license has to be pleaded and proved in absence of any pleadings or issue on this point it cannot be said that the license was irrevocable.

(b) In *State of Kerala and Another Vs. M.A. Mathai*, it is held that mere assumption is not enough, party must bring material and lead evidence in support of the stand.

(c) In *Shri Udhav Singh Vs. Madhav Rao Scindia*, the Court observed that all the primary facts which must be proved at the trial by party to establish the existence of or execution of grant are material facts which are bound to be substantiated in order to succeed.

(d) In *Bhagatsingh v. Jaswantsingh* reported in AIR 1966 SC 1861 the Court held that where a claim has never been made in the defence presented; no amount of evidence can be looked into upon a plea which was never put forward. The Apex Court referred to ruling reported in AIR 1930 57 (Privy Council) .

8. With reference to these rulings the learned Advocate for the appellant submitted that the first Appellate Court seriously erred in observing that three rooms were constructed by the defendant out of his own funds and as such there was license granted by the plaintiff. Thus, if the entire evidence is considered the observations and inferences drawn by the first Appellate Court were totally contrary to the evidence on record and were without any basis. The first Appellate Court filled up the lacuna and erred in holding that the oral license alleged to have been granted in favour of the defendant is irrevocable one without any pleadings or evidence to establish irrevocable license. Therefore, and also because the first Appellate Court erred to observe that decree of possession cannot be granted in favour of the appellant. Despite the fact that it held in favour of the plaintiff/appellant that he is owner of the suit plot; the basic principle that the possession has to follow the title is given a go bye.

9. Be that as it may, assuming that there was license it is purely personal in nature and legal representatives/legal heirs cannot be conferred upon any legal right or privilege for claim heritability to it.

10. According to the learned Advocate for the respondent the plaintiff himself had pleaded in paragraph 3 of the plaint that four rooms were constructed in the year 1981 made of "mud and bricks" and the mother of the plaintiff had requested him to accommodate the defendant as the defendant had no alternative for his living because at the relevant time the defendant had retired from his service with M.S.R.T.C. The defendant had pleaded that after his retirement he got funds and he contributed half amount for purchasing the plot at the instance of his mother. On the assurance of the plaintiff that plot will be divided in three equal parts amongst three brothers.

11. The learned Advocate for the respondent further contended that if defendant is allowed to construct permanently on the suit plot then within the meaning of Section 60(b) of the Easement Act he becomes irrevocable licensee as the plaintiff has not objected for such construction.

12. Witness No. 3 for defendant deposed that he had executed receipt Exh.49 as

he had constructed house for defendant for Rs. 900/- towards southern side. The same witness also deposed that he had constructed two houses one for plaintiff and other for defendant on the plot owned by the plaintiff.

13. The learned Advocate for the respondent contended that in view of Section 16 of the Easement Act, 1882 if the licensee acting upon the license executed a work a permanent character and incurred expenses in the execution then such license is irrevocable. The learned Advocate for the respondent made reference to Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, , it is held that grant of license in respect of certain premises and land attached thereto for running school. Subsequently, the school acting upon license, made constructions on land without any objection by licensor. Held, the license being irrevocable, the licensor or the transferee from him could not revoke it or evict school.

14. He also made reference to Suraj Prakash Vs. Union of India, , in which it is observed that: As per provisions of Section 60 of the Indian Easements Act a license is irrevocable only in those discerning few cases if the licensee acting upon the license has executed some work of permanent nature after incurring expenses thereon. It implies thereby that at the time when the license was given there must be a permission to execute a work a permanent nature and on the basis whereof the licensee has erected the works of a permanent character. This is not so in the instant case.

It must be noted that simply because a man is in occupation over a particular property he cannot be termed as a tenant or a licensee on the basis of his occupation. A tenancy like any other fact is a fact which is to be proved by evidence. A person cannot be held to be tenant merely on basis of inspection report showing him to be in possession of the disputed property when neither any lease deed nor any rent note or any other piece of paper was placed on record in support of the contention.

15. In Sulebhai v. Municipal Corporation, Greater Bombay reported in 1995 AIHC 1188, it is held that Municipal Corporation giving license to Dawoodi Bohra Community exclusively for using plot of land as cemetery pending execution of trust deed. Decision to that effect taken long before granting license. Management of cemetery vested in hands of trustees belonging to said sect. It is held that "bare license" amounted to irrevocable license. Graves erected on plot would be of permanent character.

16. Thus, it is contended that in the present case, the construction made by the defendant on the plot belonging to the plaintiff was out of money spent by the defendant for which the plaintiff had no objection. Therefore, it was irrevocable license u/s 60(b) of the Easement Act. Therefore, possession of the defendant was required to be protected, even if the plaintiff is allowed to enjoy his ownership in respect of the suit plot.

The learned Advocate for the respondent has supported the judgment of the first

Appellate Court. Hence, he prayed for dismissal of the appeal.

17. In reply, the learned Advocate for the appellant submitted that there was no pleading in respect of the oral license or the grant from the plaintiff to the defendant to permit him to construct upon the suit plot. The license is not transferable in view of Section 56 of the Easement Act, 1882. Even on the basis of the evidence it cannot be said that there was permanent construction, it was construction in "mud and bricks". The plaintiff pleaded that he had gratuitously permitted his brother to occupy some portion of the suit plot because of mother's insistence.

18. In view of the above, to clarify the legal position in the matter, it will be very useful to reproduce paras 12 and 13 from the decision of the Orissa High Court in Biswanath Panda Vs. Gadadhar Panda and Another, . In which the Court has observed as under:

12. A license may be created by deed or by parol and in either case a mere license is revocable, but where it is coupled with a grant, it becomes irrevocable. In case of a license by parol coupled with a grant of interest which is incapable of being granted otherwise than by deed, such a license operates as a mere license because of the invalidity of the grant and is revocable.

13. A mere license does not create any estate or interest in the property to which it relates. It only confers legality for an act which would otherwise become unlawful. A license may be purely personal, gratuitous or contractual. The first two classes of mere licenses are revocable, the third class is revocable or not revocable according to the express or implied terms of the contract between the parties. A license coupled with grant of an interest in nature of property is not revocable. Such a license is a right to enter on land and enjoy a profit a prendre or other fv incorporeal hereditament.

19. The learned Advocate for the appellant invited my attention to Section 56 of the Indian Easements Act, 1882 to contend that the license cannot be transferred by the licensee in view of Section 56 of the Easement Act. Original defendant Andrew died during the pendency of these proceedings on 4-5-1996 and is represented by LRs respondents No. 1 to 7 on record.

Admittedly, the first Appellate Court also recorded that the construction was carried out with muds and bricks. If that is so, it cannot be said that those three rooms were constructed of permanent character, as such the construction is purely temporary.

20. Therefore, the finding as to irrevocable license in para 14 of the impugned judgment appears perverse and is not at all sustainable. Considering the legal position that mere license does not create any estate or interest in the property; but only confers legality on acts which would otherwise be unlawful. A license may be purely personal, gratuitous or contractual. In the instant case, it appears that it was gratuitous at the instance of mother as one brother, who is owner of

the suit plot, allowed his another brother to occupy a portion of the suit plot such license or permission being of gratuitous nature such license is revocable and not transferable in favour of the legal representatives, as it is purely personal right to enter on the land and enjoy the occupation, till the license is revoked.

That being so, the legal representatives of the original defendant i.e. present respondents are not entitled to continue in possession or occupation of the suit portion of the land. The finding on issue No. 2, in the circumstances of the case, are perverse and unsustainable and is liable to be set aside, in the result, lawful possession must follow title.

21. Therefore, the appeal is allowed. The plaintiff/appellant is entitled for possession of the suit plot and respondent (defendant) shall hand over possession of the portion of their occupation in the suit plot to the plaintiffs.

The parties shall bear their own costs.