

(2015) 10 SHI CK 0033

In the High Court Of Himachal Pradesh

Case No : Regular First Appeal No. 135 of 2005 and Cross Objections No. 198 of 2005

Kali Charan

APPELLANT

Vs

ICICI Bank

RESPONDENT

Date of Decision : 07-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 11, 146
Easements Act, 1882 — Section 52, 60, 7
Himachal Pradesh Urban Rent Control Act, 1987 — Section 3(j)

Citation : (2015) 10 SHI CK 0033

Hon'ble Judges : Dharam Chand Chaudhary, J

Bench : Single Bench

Advocate : Bhupender Gupta, Senior Advocate and Janesh Gupta, for the Appellant; R.L. Sood, Senior Advocate and Arjun Lall, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dharam Chand Chaudhary, J—This judgment shall dispose of the present appeal and also Cross Objections aforesaid arising out of the judgment and decree dated 4th March, 2005, passed by learned District Judge, Shimla, in Civil Suit No. 15-S/1 of 2002.

2. While the appellant, hereinafter to be referred as "the defendant" is aggrieved by the decree of possession of the suit premises shown in site plan Ext. P-12 against him, whereby he has been directed to deliver the vacant possession thereof to the respondent, hereinafter to be referred as "the plaintiff-bank" within a period not exceeding more than one month from the date of decree and also return the articles of crockery supplied to him by the plaintiff-bank, at the same time the plaintiff-bank is aggrieved by that part of the decree whereby its suit for recovery of Rs. 5,40,000/- on account of damages has been dismissed.

3. The suit premises shown in the site plan Ext. P-12, is situated in the sub-

basement of the building owned by the erstwhile ANZ Grindlays Bank Limited, The Mall, Shimla. The Bank later on came to be named as Standard Chartered Grindlays Bank Limited, The Mall, Shimla on and with effect from 1st day of August, 2000. In the year 1981, the suit premises was made available to the defendant by the Bank on license basis for providing canteen facilities to its employees and Award staff. Under the arrangement so made the affairs of the canteen were to be managed by the Secretary of the employees-union and its office bearers. It was for them to supervise the day-to-day pursuits of the canteen and also to fix the rates of the items to be cooked and prepared in the canteen by the defendant. Even the quality of the food was also to be checked by the Secretary of the Union. The purpose to run the canteen was to supply good food stuff to the employees of the bank at cheaper rates and for that the bank was subsidizing for the electricity charges at the rate of Rs. 80/- per month, besides the supply of furniture, crockery and cutlery etc. The defendant was not authorized to sell eatable and other food articles prepared in the canteen to outsiders. The facility of canteen being not of commercial venture, was absolutely for the benefit and use of the members of the bank-staff. The defendant was not required to pay any rent or ever demanded by the plaintiff-bank.

4. The services of the Award staff of the bank were dispensed with totally on and with effect from 30th September, 2001. Therefore, there being no need of the canteen facilities any further the defendant was asked to remove himself and his belongings from the canteen premises, as his license had already been revoked. However, the defendant did not remove either himself or his personal belongings from the premises in question and to the contrary in a clandestine manner he started permitting outsiders to enter into the canteen premises, exclusively the property of the plaintiff-bank. The outsiders were being served with eatables and beverages by him irrespective of the fact that the canteen was given only for the staff members of the plaintiff-bank. The entry of outsiders has become a source of danger to the safety and security of the plaintiff-bank.

5. The defendant instead of removing his personal belongings and handing over vacant possession of the suit premises to the plaintiff-bank filed Civil Suit No. 209-I of 1991, Ext. P-5, for seeking the relief of permanent prohibitory injunction against it. The relief was sought on the sole ground that the plaintiff herein can only evict him from the canteen premises under due process of law and not by use of force. The suit accordingly was decreed having been compromised vide order Ext. P-11.

6. The plaintiff in order to avoid legal complications, has served the defendant with legal notice dated 4th July, 1992 and thereby he was called upon to remove himself and also his personal belongings from the suit premises, failing which he will render himself liable to pay use and occupation charges, but of no available. The same was followed by another notice dated 3rd May, 2002, Ext. P-2, but despite the receipt of the same also he failed to remove himself and his

belongings from the suit premises, hence the present suit for the grant of following relief:

"a) To issue a mandatory injunction in favour of the plaintiff bank and against the defendant directing him to remove himself, his personal belongings, his servants and their personal belongings and/or any persons claiming through or under him from the suit premises comprising one room in the sub basement portion of the premises known as Standard Chartered Grindlays Bank Ltd. popularly known as "Grindlays Bank Building". The demised premises being properly described in para 8 of the plaint and having been coloured in red in the building plan filed with the plaint. In the alternative, this Hon''ble Court may kindly be pleased to pass a decree of possession in favour of the plaintiff and against the defendant directing the defendant to hand over vacant and peaceful possession of the canteen premises described hereinabove to the plaintiff bank alongwith the crockery, cutlery and other articles that have been supplied to him by the plaintiff bank.

b) This Hon''ble Court may further be pleased to pass a decree at the rate of Rs. 500/- per day in the sum of Rs. 5,40,000/- in favour of the plaintiff bank and against the defendant on account of unauthorized use and occupation charges in respect of the suit premises alongwith interest at the rate of 18% p.a. from the date of filing of the suit till the recovery of the aforementioned amount. This Hon''ble Court may further be pleased to pass a decree against the defendant and in favour of the plaintiff for unauthorized use and occupation charges at the aforementioned rate of Rs. 500/- per day from the date of filing of the suit till the date that the defendant complies with the terms and decree that may be passed against him for removing himself and or his servants and belongings from the premises in question or till the date that the vacant and peaceful possession of the premises is handed over by the defendant to the plaintiff bank. The decree for unauthorized use and occupation charges as claimed, be passed alongwith pendente lite and future interest at the rate of 18% p.a.

c) Allow any other relief deemed fit by this Hon''ble Court in favour of the plaintiff bank and against the defendant in the peculiar facts and circumstances attending to the case;

d) Allow costs of the suit in favour of the plaintiff bank and against the defendant."

7. The defendant on entering appearance has contested the suit. In preliminary, the objections that the same on behalf of Standard Chartered Grindlays Bank Limited in view of the sale of the building by it to ICICI bank is not maintainable and that he being in adverse possession of the suit premises decree for mandatory injunction cannot be granted, were raised. On merits, he has not disputed the suit premises made available to him in the year 1981 by the bank for providing canteen facilities at subsidized rates to its employees. However, according to him, he was not a licensee of the plaintiff-bank so far as the suit

premises is concerned. The license, according to him, was granted in his favour for a period of one year by the employees-union, which was never renewed or extended. Therefore, he is in adverse possession of the suit premises. In the year 1989, the Municipal Corporation, Shimla has issued a license under the Shop and Commercial Establishment Act in his favour. He has installed electricity and water connection in his own name in the suit premises in the year 1982. He, therefore, allegedly become owner of the same and as such question of revocation of the license not at all arises. It is denied that he was not authorized to sell eatables and other food articles to outsiders and that he has unauthorisedly started commercial venture in the suit premises. He has also disputed his liability to pay damages to the plaintiff.

8. In replication, the plaintiff has denied the contents of the preliminary objections being wrong and on merits reiterated the entire case as set out in the plaint.

9. On the pleadings of the parties, the following issues were framed:

"1. Whether the defendant was inducted as licensee in the disputed premises by the predecessor of the plaintiff bank? OPP.

2. Whether the license in favour of the defendant has been lawfully revoked and the plaintiff is entitled to recovery of possession of the disputed premises from the defendant? OPD.

3. Whether the suit in the present form is not maintainable, as alleged? OPD.

4. Whether the suit is barred by limitation, as alleged? OPD.

5. Whether the defendant has become the owner of the disputed premises by way of adverse possession? OPD.

6. Whether the plaintiff is entitled to claim damages against the defendant as use and occupation charges, if so, how much? OPP.

7. Relief."

10. The parties were put to trial on all these issues. The plaintiff in turn has examined three witnesses in all. PW-1 Shri Joginder Kumar, is Junior Assistant General Record Room, Shimla, who has produced the record of Civil Suit No. 209-I of 1991, titled Kali Charan versus Grindlays Bank and proved the copies of order sheets Exts. P-6 to 11. PW-2 Shri L.D. Pal, Manager of the plaintiff bank has instituted the suit and has proved the plan of the suit premises Ext. P-12, list of articles supplied to the defendant by the plaintiff bank, Ext. P-14, copy of notice Ext. P-2, postal receipt Ext. P-14, acknowledgement Ext. P-1, copy of bank account of the defendant Ext. P-3, copy of plaint in the previous suit filed by the defendant, Ext. P-5 and copy of written statement Ext. P-4 filed by the plaintiff bank. PW-3 Shri Devinder Kumar Sharma, Senior Manager of Indian Bank, The Mall Shimla has been examined to prove the lease deed Ext. P-15 qua the premises under the use and occupation of the Indian Bank as well as the

area leased out and the amount being paid towards monthly rental thereof.

11. The defendant, on the other hand, has examined D.W.-1 Shri Naresh Sood, Estate Officer, Municipal Corporation Shimla, who has proved the certificate Ext. D-5 and the receipt Ext. D-6. D.W.-2 Shri Murali Gupta is Junior Assistant Electricity Board, Idgah Sub Division, Shimla, who has proved the installation of electricity connection in the suit premises in the name of the defendant. The defendant has himself stepped into the witness box as D.W.-3.

12. Learned trial Court on hearing the parties on both sides and appreciation of the evidence available on record has decreed the suit partly to the extent as pointed out at the outset, however, dismissed the same for the relief of recovery of damages to the tune of Rs. 5,40,000/- vide impugned judgment and decree, hence the present appeal and Cross Objections aforesaid in this Court.

13. The defendant has assailed the decree for possession of the suit premises passed against him on the grounds, inter alia, that there was no privity of contract between him and the plaintiff-bank and as the suit initially was filed by Standard Chartered Grindlays Bank Limited, the plaintiff was not entitled to take any benefit out of the agreement, if any, between the Standard Chartered Grindlays Bank and the defendant. The suit for the relief of mandatory injunction was incompetent and had the Court below construed the pleadings in its right perspective the irresistible conclusion would have been that the status of the defendant was not that of a licensee. The ingredients of license in terms of Indian Easements Act were also not established on record. The suit premises was governed by the provisions of HP Urban Rent Control Act, therefore, the trial Court had no jurisdiction to pass a decree for mandatory injunction. The status of the defendant ought to have been held to be that of a tenant and not a licensee. Merely that he was catering to the employees of the plaintiff-bank would not change his status to that of a licensee that too when no iota of evidence was available on record to show that license was ever created by the plaintiff-bank in favour of the defendant. The frame of issues No. 1 and 2 itself shows the non-application of mind on the part of learned trial Court. The plaintiff was not competent to issue a notice revoking thereby the alleged license. The plaintiff rather had no locus-standi to institute the suit for the relief of mandatory injunction and to continue therewith even after the sale of the suit premises. The provisions of Specific Relief Act have been ignored and the provisions of Easements Act misconstrued. The notice Ext. P-2 itself was bad in the eyes of law and there is no question of revocation of the alleged license.

14. The findings on issue No. 3 are stated to be erroneous being not based upon the proper appreciation of the pleadings and evidence available on record. Also that issues No. 4 and 5 could have not been clubbed for determination. After the expiry of one year the then owner of the suit premises has not made any effort to recover the possession thereof from him. Also that the defendant right from the very beginning was running a canteen in the suit premises not only catering to the needs exclusively of the employees of the bank but that of the public at

large also. Merely that the rates of eatables in respect of the employees of the bank were being fixed in consultation with the employees-union would not have any adverse affect on the rights of the defendant to use the premises in his own right. Learned trial Court misdirected itself in not properly construing the evidence oral and documentary which has led into miscarriage of justice to the defendant.

15. The plaintiff-bank in Cross-Objections has assailed that part of the impugned judgment and decree whereby the relief of recovery of Rs. 5,40,000/- towards use and occupation charges has been declined on the grounds inter alia that the findings recorded on issue No. 6 are based upon conjectures and surmises and not on proper appreciation of evidence available on record. As a matter of fact, in view of the findings on issues No. 1 to 5 recorded in favour of the plaintiff, issue No. 6 could have also not been decided against it. The defendant having not denied the facts in paras-3, 4 and 5 of the plaint qua conversion of the award staff canteen into a proper commercial venture to cater to the needs of the outsiders and the general public also, the plaintiff was entitled to the recovery of use and occupation charges also. It is duly proved on record that the defendant had been supplying eatables from the canteen at the rates fixed by him independently according to the market rates to the outsiders. The findings to the contrary recorded on issue No. 6 are stated to be far-fetched and not based upon the evidence available on record. The factum of the plaintiff-bank had dispensed with the award staff for whose benefit the license was given for opening the canteen in 1981-82, has also been erroneously ignored. The services of the award staff were dispensed with on 30th September, 2001 as held by the trial Court itself in the impugned judgment, therefore, contrary stand could have not been taken while answering issue No. 6 against the plaintiff. There being cogent and reliable evidence as has come on record by way of the testimony of PW-2 Shri L.D. Pal and PW-3 Shri Devinder Kumar Sharma qua use and occupation charges of the premises like the suit premises in the area, the suit should have been decreed for the recovery of use and occupation charges as claimed. It is also pointed out that even the defendant has also not disputed the payment of use and occupation charges, however, according to him, he is not liable to pay the same at the rate of Rs. 500/- per day. The findings on issue No. 7 have also been sought to be modified and it is urged that costs be also awarded in favour of the plaintiff-bank against the defendant.

16. Mr. Bhupender Gupta, learned Senior Advocate representing the defendant, has pointed out that the suit premises was given to the defendant by the employees-union and as such the plaintiff could have not filed the present suit. In the written statement Ext. P-4 filed by the plaintiff in the previous suit Ext. P-5, the plaintiff has admitted the suit premises having been given to the defendant by the employees-union. It is, therefore, the union who had inducted the defendant in the suit premises and as the union is not the party, therefore, according to Mr. Gupta, the suit is not maintainable. The plaintiff could have not maintained the suit, as according to learned Counsel, there is nothing in the sale

deed to show that after the transfer of the suit premises to the plaintiff, it could have continued with the suit initially filed by its previous owner, i.e., Standard Chartered Grindlays Bank Limited. The suit has not been filed after the alleged revocation of the license for about ten years. The plaintiff, therefore, cannot claim the damages.

17. On the other hand, Mr. R.L. Sood, learned Senior Advocate representing the plaintiff-bank, has strenuously pointed out that the plea of adverse possession is not legally permissible. It was also not the case of the defendant that he was inducted as tenant by the employees-union. Since it is the plaintiff, the owner of the suit premises, could have only inducted the defendant as licensee. The license was revoked in the year 1991. The plaintiff is now not supplying the gas-cylinder nor paying the electricity charges in respect of the suit premises after the year 1992. When as per the case of the defendant himself the license was not got renewed after 1991 he started supplying the eatables in the canteen on market rates, therefore, the suit should have been decreed for the recovery of the use and occupation charges also. The plaintiff is erroneously non-suited on the ground that it is not owner of the building, as according to learned Counsel, the ownership was changed in the name of the plaintiff in the month of July, 2002 and the application under Order 22 Rule 10 of the Code of Civil Procedure filed for seeking permission to allow the present plaintiff to continue with the suit by learned trial Court was allowed vide order dated 28th October, 2002 in view of the plaintiff having acquired title in the suit premises during the pendency the suit and allowed to continue with the suit in place of Standard Chartered Grindlays Bank Limited. Therefore, on this score also the suit for the recovery of use and occupation charges could have been decreed.

18. It is also pointed out that in the interim, the execution of the judgment and decree has been stayed during the pendency of this appeal subject to payment of Rs. 5,000/- per month towards use and occupation charges by the defendant vide order passed on 22nd December, 2005, in CMPs No. 301 and 584 of 2005 and as the said order has not been challenged by the defendant, therefore, according to learned Counsel, the plaintiff is entitled to recover the use and occupation charges as claimed in the plaint. Since the defendant is in unauthorized possession of the suit premises right from 1992, therefore, the plaintiff is also said to be entitled to the award of costs also against him.

19. In order to decide the fate of the appeal and the Cross-Objections, following points arise for determination:

"Point No. 1 Whether the findings recorded by learned trial Court on issues No. 1 to 5 holding thereby the plaintiff entitled to vacant position of the suit premises are not legally and factually sustainable?

Point No. 2 Whether that part of the judgment and decree whereby the decree for recovery of a sum of Rs. 5,40,000/- towards use and occupation charges has been declined is not based on proper appreciation of the material available on

record, hence not legally sustainable; if yes, to what effect?

Point No. 3 Relief."

20. For the reasons to be recorded hereinafter my findings on the aforesaid points are as under:

Point No. 1.

21. The sum and substance of the arguments addressed on behalf of the defendant is that there was no privity of contract between the plaintiff and the defendant, the status of the defendant as that of a licensee is not proved, the ingredients of a valid license in terms of the Indian Easements Act are not at all established, the status of the defendant was that of a tenant and not licensee, it is HP Urban Rent Control Act, which is applicable in this case and that the procedure prescribed under the Act for eviction of a tenant is required to set in motion for the eviction of the defendant from the suit premises.

22. As a matter of fact, all such contentions raised have been dealt with by learned trial Court while answering issues No. 1 to 3. As per admitted case of the parties, the suit premises was given to defendant by the then ANZ Grindlays Bank Limited for setting up canteen and providing canteen facilities to its Award staff. The defendant has also not denied this aspect of the matter. It is satisfactorily proved on record that the affairs of the canteen were to be managed by the Secretary of the employees-union. The rates of the items to be cooked and prepared in the canteen were also being fixed by the union. It is also satisfactorily proved that the canteen facilities were to be provided exclusively to the employees of the bank and not to the outsiders.

23. As a matter of fact, the canteen was not given to the defendant to run the same as a commercial venture, however, only for the benefit of the Award staff of the bank. The defendant was not required to make the payment of rent nor is it his case that he paid any amount by way of rent to the plaintiff. It can only reasonably be believed that the license of suit premises in favour of the defendant was not the result of any written agreement and rather oral. Irrespective of the suit premises was given to the defendant for providing facilities of canteen only to the employees of the bank, allegedly started selling of eatables to the outsiders and apprehending endanger to the safety of the bank at one point of time the predecessor of the plaintiff, i.e., ANZ Grindlays Bank Limited initiated action to get the suit premises vacated from him. He, however, filed Civil suit No. 209-I of 1991 for permanent prohibitory injunction against ANZ Grindlays Bank Limited, as is apparent from the copy of plaint, Ext. P-5. It was his specific case that he is running the canteen as per the terms and conditions imposed upon him by the bank and also that the affairs of the bank were being managed by the Secretary of the employees union. It was his further case that he cannot be evicted from the suit premises except for due process of law. The ANZ Grindlays Bank had contested the suit, however, during the course of trial agreed to seek eviction of the defendant from the suit premises in

accordance with law and the said suit was decreed vide judgment dated 9th April, 1992, Ext. P-11, having been compromised.

24. There is again no quarrel so as to the name of ANZ Grindlays Bank which has granted license in respect of the suit premises to the defendant was subsequently changed on 1st August, 2000 as Standard Chartered Grindlays Bank Limited. The defendant continued to provide the facilities of canteen to Award staff of the bank after its name changed as Standard Chartered Grindlays Bank Limited. In the absence of any evidence to the contrary produced by the defendant it can reasonably be believed that the license granted in his favour came to be renewed orally from time to time up to September, 2001 because the then Standard Chartered Grindlays Bank Limited dispensed with the services of its Award staff on 30th September, 2001 and asked the defendant to vacate the suit premises.

25. The defendant has not disputed the plaintiff's case qua dispensation with the services of its Award staff. When as per own case of the defendant the suit premises was given to him for running the canteen to provide canteen facilities to the employees of the bank, the license on dispensation with the services of such staff stood automatically revoked. Otherwise also, in terms of Section 60 of the Easements Act, 1882, the license can be revoked by the grantors at any time unless the property to which it pertains stood transferred to the licensee or the licensee during the currency of the license has executed the work of a permanent character and incurred expenses on the execution of such work to the notice and knowledge of the grantors of the license.

26. Here neither the suit premises is transferred to the defendant nor he has raised any structure of permanent character by making investment, therefore, it lies ill to claim that the defendant is not a licensee for the reasons that in terms of Section 52 of the Act *ibid* when some immovable property is granted by its owner to some other person(s) to do something therein without creating any easementary right or any other interest in such property, the right so given is called the license. As per own case of the defendant, the suit premises was given to him for running a canteen that too for providing facilities of canteen only to the employees of the bank. Though the defendant has denied providing of any such facility to the outsiders, however, the evidence as has come on record by way of his own testimony leads to the only conclusion that he started entertaining the outsiders also and sold food items to them on market rate.

27. Anyhow, on dispensation with the services of its Award staff by the plaintiff-bank and having called upon the defendant to vacate the suit premises he failed to do so, this has led in issuance of legal notice Ext. P-2 dated 3rd May, 2002. The notice vide acknowledgment Ext. P-1 was received by the defendant, but he again failed to vacate the premises in question. This has led in institution of the present suit in the trial Court on 11th June, 2002 by the Standard Chartered Grindlays Bank Limited. It is after few days of the institution of the suit the building in which the suit premises situated came to be conveyed to the present

plaintiff vide conveyance deed dated 1st July, 2002. The conveyance deed though is not on record, however, necessary information qua the same which was reproduced in the application under Order 22 Rule 10 of the Code of Civil Procedure registered as CMA No. 618-S/6 of 2002, reads as under:

"1. That the present case is pending adjudication before this Hon"ble Court. However, during the pendency of the present case, a subsequent development has taken place inasmuch as, the premises known as "Grindlays Bank Building" in which building the premises in dispute are situate have been sold to ICICI, Applicant Bank, by means of Registered Sale Deed dated 28th June, 2002, Registered in the Office of the Sub-Registrar at Sl. No. 264, Book No. 1. Volume 116 and Page 40 and additional copy of which is pasted in Book No. 1, Volume 361 at pages 27 to 36. The ICICI has its Registered Office at Land Mark, Race Course Circle, Vadodara-390 007 and Corporate Office at ICICI Towers, 2nd Floor, Bandra, Kurl Complex, Bandra (East), Mumbai-4000051.

2. That in accordance with the terms of the Sale Deed, the Applicant, ICICI Bank has become owner of the aforesaid building. The premises in dispute in the present case form part and parcel of the building in question.

3. That according to the terms of the Sale Deed, the Applicant, ICICI Bank has been assigned the right title and interest in the said building and has been specifically given the right to continue with the present litigation and proceedings through its various stages. The Applicant Bank is also placing on record of this case a copy of the sale deed."

28. In reply to the application, the defendant has not disputed the conveyance of the building in which the suit premises situate to the present plaintiff, however, disputed its right to continue with the suit. Anyhow, learned trial Court has considered the application and decided the same vide order dated 28th October, 2002, though relevant portion of the order so passed reads as follows:

"Having regard to the provisions laid down in the Registration Act, Transfer of Property Act and in view of the fact that the suit was instituted on 11.6.2002 and the premises were alienated on 28.6.2002, the plea of the applicant is granted and the application is allowed. It will remain tagged with the main matter file, after registration. The ratio laid down in the precedent referred to above is distinguishable on facts. Let necessary correction in the cause title be made with red ink as also in the relevant register. Amended memo of parties be also taken on record. Replication filed by the plaintiff is also taken on record."

29. Therefore, it lies ill to claim that the plaintiff-bank has no right to seek the eviction of the defendant from the suit premises. The arguments that there is no privity of contract between the present plaintiff and the defendant have also no legs to stand.

30. The defendant cannot claim the status of a tenant for the reason that the defendant within the meaning of Section 3(j) of the HP Urban Rent Control Act is

not a person by whom or on whose behalf rent, is payable for a residential or non-residential, building. Neither it is the case of the defendant nor is there any iota of evidence to show that he had been paying any amount by way of rent to the plaintiff or its predecessor. He was not only given the suit premises free of rent, but was being also provided cooking gas, utensils, crockery etc. etc. because there is no denial to this part of the plaintiff's case. Therefore, the defendant was granted a license so far as the suit premises is concerned for running a canteen exclusively for the Award staff of the bank as the ingredients of a license in accordance with the provisions contained under the Easements Act stand established. Learned trial Court has rightly decided issues No. 1 to 3 in favour of the plaintiff-bank on appreciation of evidence available on record as well as the legal provisions applicable in its right perspective.

31. If coming to the findings on issues No. 4 and 5, in the given facts and circumstances and also the evidence available on record the defendant cannot be said to have become owner of the suit premises by way of adverse possession. He was simply a licensee so far as the suit premises is concerned. The suit premises was given to him to run a canteen exclusively for the employees of the bank. As per his own case, the affairs of the canteen were being managed by the employees-union. He himself filed Civil Suit No. 209-I of 1991 for seeking relief of permanent prohibitory injunction against the plaintiff in the year 1991. It was his case that he cannot be evicted from the suit premises except for due process of law. That suit was decreed having been compromised vide judgment dated 9th April, 1992, Ext. P-11. True it is that immediately after 9th April, 1992 the plaintiff has not filed the suit for possession of the suit premises and rather allowed the defendant to run the canteen therein till 30th September, 2001, the day when the bank totally dispensed with the services of its Award staff. The defendant was also called upon to vacate the suit premises as the facility of canteen on dispensation with the services of the Award staff was not required. He, however, failed to vacate the same. This has led in serving him with legal notice dated 3rd May, 2002 Ext. P-2. The plaintiff allowed the defendant to run canteen in the suit premises upto 30th September, 2001 and thereafter called upon him orally and also by way of notice to vacate the premises in question. Therefore, there is no element of hostility nor his possession over suit premises can be said to be continuous, peaceful, uninterrupted and to the knowledge and notice of the plaintiff. His possession rather was permissive in nature. Otherwise also, from 9th April, 1992, the day when the suit filed by him was decreed as compromised till he was called upon in September, 2001 to vacate the premises in question the period of twelve years was not complete. True it is that the suit was instituted against him on 11th June, 2002, however, in the facts and circumstances discussed hereinabove, the period of twelve years to raise the plea of adverse possession is not complete as well before that he was called upon to vacate the suit premises.

32. Under Article 65 of the Limitation Act owner of immovable property can file a suit for possession thereof within twelve years from the date when the

possession of the defendant becomes adverse to the plaintiff. The onus was upon the defendant to prove that his possession over the suit premises was adverse for a period over twelve years before the institution of the suit by the plaintiff. There is no iota of evidence to show that the defendant was in continuous and peaceful possession of the suit premises. Therefore, there is no question of his acquiring title in the suit premises by way of adverse possession. The suit in the given facts and circumstances cannot also be said to be beyond limitation. Learned trial Court, therefore, has not committed any illegality or irregularity while deciding issues No. 4 and 5 against the defendant. Though, it is canvassed that clubbing of issues No. 4 and 5 was not legally sustainable, however, such plea seems to be raised merely for rejection as nothing has been brought to the notice of this Court during the course of arguments as to what prejudice by clubbing and deciding these issues is caused to the defendant. Point No. 1 is accordingly answered in favour of the plaintiff-bank.

Point No. 2.

33. Now if coming to the findings recorded on issue No. 6 under challenge in the Cross Objections, from the arguments addressed on both sides the points such as in view of findings on issues No. 1 to 5 in favour of the plaintiff and against the defendant, issue No. 6 could have been decided against the defendant, the impact of the admission qua conversion of the facility of canteen in commercial venture, qua supply of eatables at market rates, the dispensation with the services of Award staff on 30th September, 2001 and the impact and assignment of the building in which the suit premises situate in favour of the present plaintiff during the pendency of the suit etc. etc. arise for determination.

34. The question of ownership of the plaintiff-bank has been hotly contested and learned lower Court has also not held entitled to the plaintiff-bank for the use and occupation charges on the ground that the plaintiff-bank became owner of the building in which suit premises situate on 1st July, 2001. Also that in the absence of sale deed it cannot be said that the plaintiff have the right to claim use and occupation charges. The findings so recorded are not legally sustainable for the reasons that allowing the application under Order 22 Rule 10 of the Code of Civil Procedure by the trial Court itself lead to the conclusion that the suit premises was assigned to the plaintiff and all interests qua it devolved upon the plaintiff during the pendency of the suit. The plaintiff, therefore, was allowed by the Court itself to continue with the suit against the defendant. The scope of Order 22 Rule 10 of the Code of Civil Procedure came to be considered by the Apex Court in *Dhurandhar Prasad Singh Vs. Jai Prakash University and Others*, AIR 2001 SC 2552 : (2001) 5 JT 578 : (2001) 4 SCALE 495 : (2001) 6 SCC 534 : (2001) 3 SCR 1129 : (2001) 3 SLJ 432 : (2001) AIRSCW 2674 : (2001) 5 Supreme 278 . The relevant portion of this judgment reads as follows:

"7. Under Rule 10, Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against persons upon whom such interest has devolved and this

entitles, the person who has acquired an interest in the subject matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in *Moti Lal v. Karab-ud-Din*, he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath Roy Chowdry v. Rookea Begum*, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings."

35. Similar is the ratio of Division Bench judgment of Allahabad High Court in *Brahm Dutt Sharma Vs. Life Insurance Corporation of India*, AIR 1966 All 474 . The relevant portion of this judgment reads as follows:

"8. Section 146 C.P.C. provides that "save as otherwise provided by the Code any proceeding that can be taken by a person may also be taken by any person claiming under him". The Supreme Court in *Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another*, AIR 1958 SC 394 : (1958) 1 SCR 1287 , held that the expression "claiming under" is wide enough to include cases of devolution and assignment of interest mentioned in Order XXII, Rule 10, C.P.C. The assets and liabilities of the control business of insurers devolved on the Life Insurance Corporation of India under Section 7 and, therefore, by operation of law they became the successors-in-interest of the Company in respect to matters relating to insurance business of the Company. We, therefore, overrule the objection."

36. Similar is the ratio of the judgment rendered by this Court in *Shakti Chand Vs. Chamaru Ram etc.*, (1974) 3 ILR HP 1154 , which reads as follows:

"6. The first contention on behalf of the appellant is that he should have had an opportunity of being heard in the appeal before it was disposed of by the lower appellate court and that for want of such hearing he has been gravely prejudiced. It is open to the appellant or respondent in appeal to apply under Order 22 Rule 10 read with Order 22 Rule 11 of the Code of Civil Procedure for bringing on the record the transferee of a party to the appeal if during the pendency of that appeal the property in dispute has been sold to such transferee. No such application was made during the pendency of the appeal. Learned Counsel for the appellant relies on *Smt. Saila Bala Dassi v. Smt. Nirmala Sundri Dassi*. In that case, which was an appeal from the Calcutta High Court, the Supreme Court held that the transferee should have been impleaded in the appeal before the Calcutta High Court having regard to the circumstances which clearly showed

that the transferor although purporting to pursue the proceedings before the trial Court, was acting against the interests of the transferee. The facts disclosed that the application by the transferee to be brought on the record in the appeal before the High Court had been opposed by the transferor. The allegation of the transferee was that the transferor had entered into collusive arrangements with the contesting parties with a view to defeat her rights, and she prayed that she should be brought on the record in order that she could protect t her interest. It was in those circumstances that the Supreme Court took the view that the Calcutta High Court should have exercised its discretion in favour of the transferee in that case and should have brought her on the record as an appellant. In the present case, there is nothing to show that the vendors have been acting against the interests of the transferee in the appeal before the lower appellate Court. The law does not require that if property is transferred during the pendency of an appeal and that the transferors are already on the record it is still necessary that the transferee should be brought on the record. A discretion has been vested in the court, and all that is necessary to see is that the discretion is properly exercised. The mere circumstance that the property has been transferred during the pendency of the appeal does not give a right to the transferee to be brought on the record. In my opinion, there is nothing to suggest that ex debito justitiae the present appellant and the respondents No. 7 and 8 should have been brought on the record before the lower appellate Court."

37. In the given facts and circumstances and the evidence discussed supra, it would not be improper to conclude that there is no question of payment of use and occupation charges by the defendant before 30th September, 2001 because the defendant was allowed to run the canteen in the suit premises till that day as it is on that day when the services of the Award staff were totally dispensed with and the defendant was called upon to hand over the vacant possession of the suit premises. The plaintiff, therefore, can claim the use and occupation charges thereafter because as per own admission of the defendant he was supplying eatables to the outsiders at the market rates. He rather has set up the case by producing on record the receipt, issued by the Municipal Corporation, Shimla to run the canteen in the suit premises. Not only this, but as per Ext. D-2 he even got installed the electricity connection in the suit premises in his own name without the consent of the plaintiff-bank. Meaning thereby that he converted the suit premises from staff canteen to commercial venture and did not hand over the vacant possession thereof even after revocation of the license orally on and after 30th September, 2001 and even by serving him with legal notice dated 3rd May, 2002, Ext. P-2. His plea qua oral revocation of the license with effect from 30th September, 2001 is not believed to be true. From 3rd May, 2002 when legal notice Ext. P-2 was served upon him, he is liable to pay use and occupation charges to the plaintiff.

38. Now on what basis the plaintiff has claimed the same at the rate of Rs. 500/- per day, the evidence as has come on record by way of testimony of PW-3 Shri Devinder Sharma, Manger of the Indian Bank, The Mall Shimla Branch has been

pressed in service. The said bank has hired 2638 square feet area on the Mall at the monthly rent of Rs. 43,750/- to house its branch. The use and occupation charges payable by the defendant, however, cannot be assessed at the rate of Rs. 500/- per day or in view of the evidence as has come on record by way of the testimony of PW-3 for want of any other and further link evidence contemporaneous in nature to show that the rent per day of the premises like the suit premises is Rs. 500/- in the area or the space hired by the Indian Bank is similar to the suit premises. However, the use and occupation charges payable by the defendant can be assessed at the rate of Rs. 5,000/- per month because this Court vide order dated 22nd December, 2005, passed in CMP No. 301 of 2005 filed in the appeal and CMP No. 584 of 2005 in the Cross-Objections has stayed the execution of the impugned judgment and decree on payment of Rs. 5,000/- per month as use and occupation charges by the defendant to the plaintiff from the date of judgment and decree passed by the trial Court. Neither the defendant nor the plaintiff has assailed this order any further meaning thereby that both parties are in agreement so far as use and occupation charges qua the suit premises at the rate of Rs. 5,000/- per month is concerned.

39. In view of the legal and factual position discussed hereinabove, learned trial Court was not justified in holding that the plaintiff cannot claim use and occupation charges. I, therefore, decree the suit for the recovery of use and occupation charges from the date of institution of the suit at the rate of Rs. 5,000/- per month. The defendant to deposit the entire amount in the Registry of this Court within two months, failing which together with interest at the rate of 9% per annum from the date of institution of the suit till realization of the entire amount. Point No. 2 is answered accordingly.

Relief.

40. In view of the discussion hereinabove, the appeal fails and the same is accordingly dismissed, whereas the Cross-Objections succeed and the suit is decreed for the recovery of use and occupation charges at the rate of Rs. 5,000/- per month from the date of institution of the same till the vacant possession is handed over to the plaintiff with a further direction to pay the decretal amount within two months from the date of this judgment, failing which interest at the rate of 9% per annum from the date of institution of the suit till realization of the entire amount. There is, however, no order so as to costs. The appeal and the Cross-Objections stand disposed of accordingly.