

(2012) 05 BOM CK 0046

In the Bombay High Court

Case No : Second Appeal No. 19 of 2003

M/s Agarwal Minerals (Goa) Pvt. Ltd.

APPELLANT

Vs

Smt. Arcangela Cabral

RESPONDENT

Date of Decision : 04-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 103
Easements Act, 1882 — Section 60
Evidence Act, 1872 — Section 68
Transfer of Property Act, 1882 — Section 105

Citation : (2012) 114 BOMLR 1848

Hon'ble Judges : U.V. Bakre, J

Bench : Single Bench

Advocate : S.R. Rivonkar, for the Appellant; S. Dessai and Ms. Ketki Pednekar, for the Respondent

Final Decision : Dismissed

Judgement

U.V. Bakre, J.—This Second Appeal has been filed by the plaintiff of Regular Civil Suit No. 288/79/B, against the judgment and decree dated 20/11/2002 passed by the Additional District Judge-I, Panaji (First Appellate Court) in Regular Civil Appeal No. 32 of 1994. The said appeal was preferred by the plaintiff against the judgment and decree dated 08/03/1994 of the Civil Judge, Junior Division, Panaji (Trial Court) in said Regular Civil Suit No. 288/79/B. Respondent herein was the defendant in the said Suit. The plaintiff had filed the said suit for a direction to the defendant, her agents and heirs to remove the "suit gaddo" and restore the land to its original condition. The plaintiff is the owner in possession of the property known as "Aivao" situated at Caranzalem and bearing Land Registration No. 1686. It was alleged by the plaintiff that the defendant was permitted to place a small mobile "gaddo" (suit gaddo) in the said property at the corner formed by the cross-roads: one leading from Panaji to Dona Paula and the other leading from Cabo Palace to the Citadel. The said gaddo bears no. 387 of the Municipality in Ward no. 15. The plaintiff stated that the license was granted to

the defendant purely on humanitarian ground and not only on account of her personal pleas but due to the intervention of Dr. Jack de Sequeira, a leading political figure and a good friend of the Managing Director of the Plaintiff-Company. According to the plaintiff, the said license was granted on the terms which were subsequently incorporated in a Deed of License dated 6th December, 1969, which terms were:

- (a) That the license was temporary and the Defendant agreed to remove the suit gaddo as and when required by the Plaintiff;
- (b) That the suit gaddo was to be mobile and no stationary structure or elevation could be erected except with written consent of the plaintiff;
- (c) That the area occupied by the suit gaddo was not to exceed 5 x 3 meters ;
- (d) That the defendant was liable to pay license fee of Rs. 7/- per month.

2. The plaintiff stated that the defendant turned out to be a totally ungrateful woman and hence from time to time she was requested to shift the suit gaddo but again and again postponed on the ground of her pitiful entreaties stating that she is a widow with a large family to look after and also because she rectified errors committed by her. The plaintiff further stated that in due course, the defendant flouted several clauses of the license and converted the suit gaddo into a permanent and fixed structure of concrete and cement and also exceeded the area allotted for her occupation and failed to pay the license fee. It was alleged that a final opportunity was given to pay the arrears of license fee and also to hand over vacant possession of the land to the plaintiff. Thereafter, defendant approached the advocate of the plaintiff and paid the arrears of license fee and also agreed to hand over vacant possession of the land within 7 days. However the defendant has not done so. Therefore, the present occupation of the defendant is of a mere trespasser. Hence the suit.

3. By way of Written Statement, the defendant claimed to be the tenant of the premises and alleged that the Civil Court has no jurisdiction. The defendant further alleged that the suit gaddo is not a gaddo as alleged. According to her, she was granted lease in respect of the portion of the land from the said property by the plaintiff sometime in the year 1962, for commercial purpose and was allowed to construct a permanent structure within an area of 25 square metres of the said land to have a liquor shop-cum-cold drink house. Defendant further submitted that pursuant to the said permission, she constructed the permanent structure, occupying an area of 25 square metres and having concrete base and started her business therein, which structure bears No.387 of the Municipal ward No. 15. The defendant further alleged that a few years back, the Government widened Dona Paula -Panaji road due to which the defendant had to demolish her structure. According to the defendant, she was allowed by the plaintiff to shift her business premises in the same property and further she was allowed to construct a permanent structure. She has alleged that presently the area occupied by her premises will be about 25 square metres. She claimed that a

permanent lease has been granted to her.

4. The plaintiff examined four witnesses whereas the defendant examined five witnesses.

5. The Trial Court came to the conclusion that the plaintiff could not prove that the defendant was permitted to place a small mobile gaddo in the suit premises by license dated 6th December, 1969. The plaintiff could not prove the execution of the said Deed of License, which is at Exhibit P.W.1/B. The Trial Court further held that the defendant is a Lessee of the portion of the land wherein a permanent structure has been put up by her and she is not liable to be evicted. The Trial Court also held that the defendant has neither reconstructed nor exceeded the carpet area of the same. The Trial Court, therefore, dismissed the suit.

6. The First Appellate Court, in its turn, held that the Trial Court was perfectly justified in holding that the plaintiff have failed to prove that the defendant was only a licensee. The First Appellate Court does not appear to have agreed with the Trial Court in respect of the finding that the defendant is a lessee. However, the First Appellate Court has held that the plaintiff could not prove that the defendant was permitted to install a mobile gada in terms of the Deed of License dated 6/12/69. The First Appellate Court has observed that the evidence on record indicates that the plaintiff had permitted the defendant to construct a permanent structure for the purpose of running a bar and accordingly the defendant had constructed a permanent structure and was running a bar in the same. The First Appellate Court has further observed that it is in the evidence that the defendant had to shift the said bar in view of the widening of the existing road and that the defendant had constructed a new structure in the same property with the permission of the plaintiff. On the above grounds, inter alia, the Regular Civil Appeal No. 32/94, came to be dismissed.

7. It is this judgment and decree of the First Appellate Court which is subject matter of the challenge in the present Second Appeal which has been admitted on the following substantial questions:

(a) Whether the learned Additional District Judge has committed error in law by discarding the Deed of license (Exhibit - P.W.1/B) on the ground that the said deed was not executed before any Notary Public or any other authority, though the execution of the said deed was proved by the Appellant through PW 2 who had signed the said Deed in presence of PW4, who is the attesting witness and is according to Section 68 of the Evidence Act, 1872?

(b) Whether the Courts below were right in rejecting the relief sought for by the appellant, herein, in the absence of the respondent proving title in the suit property?

8. Shri S. R. Rivonkar, learned counsel for plaintiff, argued that P.W.1, Purshottam, who is Director of the Plaintiff-Company has produced the Deed of

License as Exhibit P.W.1/B; P.W. 2, Kanayalal has identified his own signature on the said Deed and P.W.4, Narayan Naik has also identified his signature on the same and has stated that all the parties have signed the said document in his presence. With regard to the thumb impression allegedly put by the defendant, he contended that the meaning of the expression "sign", in relation to a person who is unable to write his name, means even putting of his mark or authenticating in such manner as may be prescribed. Therefore, according to Mr Rivonkar, even putting of thumb impression can mean "signed". He, thus, argued that the Deed of License at Exhibit P.W.1/B has been duly proved. He further argued that there is no law requiring such a Deed to be executed before any Notary Public or any other Authority. He then pointed out that there is no dispute that the plaintiff is the owner of the property. He further argued that the Deed of License at Exhibit P.W.1/B proves that its a mere license. He drew my attention to the legal notice dated 22/03/1978 which is a part of Exhibit P.W.1/C-colly., by which the defendant has been directed to remove the suit gaddo. He pointed out that the plaintiff had allowed the defendant to run a mobile gaddo in his property but the written statement of the defendant reveals that she set up a new gaddo since part of the property was acquired by the government for widening of Dona Paula to Panaji road and this shifting of gaddo was done without permission of the plaintiff. He contended that no lease in terms of section 105 of the Transfer of Property Act, either express or implied, is proved by the defendant and the bare license granted to her has been terminated by notice dated 22/3/1978. Therefore, according to Shri Rivonkar, learned counsel for the plaintiff, the defendant is a trespasser and has not right or title to continue to have the said structure in the plaintiff's property. According to the learned Counsel, the First Appellate Court has simply concurred with the findings of the Trial Court, without any evidence on record. He, urged that both the substantial questions of law are liable be answered in favour of the plaintiff and the impugned orders to be quashed and set aside. Shri Rivonkar, therefore, prayed that the Appeal be allowed and the suit gaddo be ordered to be removed forthwith. Learned Counsel has relied upon (1):- Sheo Nand and Others Vs. The Deputy Director of Consolidation Allahabad and Others, ; (2):- J.J. Lal Pvt. Ltd. and Others Vs. M.R. Murali and Another, .

9. Per contra, Shri S. Dessai, learned senior advocate, on behalf of the defendant, at the outset, read out the averments made in the plaint and contended that the suit is regarding the "suit gaddo" which was existing prior to the acquisition of the portion of the property for the purpose of widening of Dona Paula to Panaji road. He further pointed out that the "suit gaddo" was admittedly demolished after acquisition of the said portion of the land, in the year 1972. According to Shri Dessai, there is no relief sought for in respect of the presently existing structure at some other place, in the same property, which is not merely a gaddo but a permanent structure and therefore decreeing the suit is out of question. He invited my attention to the correspondence between the plaintiff and Dr. Jack de Sequeira. According to him, the said correspondence is all after

the date of acquisition of the property and hence pertains to the second structure and the said correspondence on record reveals that the said permanent structure has been erected with due permission of the plaintiff. Learned Sr. Counsel took me to paragraph 29 of the Judgment of the Trial Court and paragraph 17 of the impugned Judgment of the First Appellate Court, wherein it has been observed that it is in the evidence that the defendant had to shift the said bar in view of widening of the existing road and that defendant had constructed a new structure in the same property with the permission of the plaintiff. Relying upon clause (b) of Section 60 of the Indian Easements Act, learned senior counsel argued that the license granted to construct the second structure is irrevocable, since the said structure is a permanent one. He argued that therefore the defendant has a title as irrevocable licensee. Learned Counsel relied upon clause (b) of section 103 of the CPC and argued that in a second appeal, the High Court may, if the evidence on record is sufficient, determine any issue necessary for the disposal of the appeal, which has been wrongly determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, by reason of a decision on such question of law as is referred to in section 100. He further argued that even if the expression "Sign" includes putting of thumb impression, however the same is to be proved by means of identification of the thumb impression which has not been done in the present case. He further argued that though the said Deed of License is dated 6th December, 1969, however, clause 4(e) of the same states that the said license is for 11 months beginning from 01/01/1969. According to Shri Dessai, the above shows that the said Deed of License is a sham document since it is for the period which has already expired. He submitted that the execution of the Deed of License has not been proved. Learned Senior Counsel, therefore, urged that both the substantial questions are bound to be answered against the plaintiff and in favour of the defendant. He further submitted that both the said questions do not at all arise since the subject-matter of the suit is the first structure, which has already been demolished. He submitted that substantial question of law is a question of law which goes to the root of the case. He has relied upon *State Bank of India and Others Vs. S.N. Goyal*, wherein the meaning and scope of the expression "Substantial question of law" has been explained. He argued that it has to be a fundamental question which turns the decision. For supporting his contentions on the scope of the expression "substantial question of law", he has also relied upon Second Appeal No. 10/1992 between *Temple of Maruti V/s. Balkrishna Suryaji S. Kakodkar (deceased)*, by L.R."s", decided by the learned Single Judge of this Court, on 7th/8th April, 2011. Learned senior counsel pointed out that neither in the plaint nor in the oral evidence, the plaintiff has specified as to when exactly the alleged license was granted for keeping the suit gaddo. He argued that the defendant has produced the excise license at Exhibit D.W.1/B which is of 1966. He pointed out that there is a suggestion put to D.W.1 that this license pertains to the earlier premises. Therefore, according to learned senior advocate, the case of the plaintiff that the license was granted in 1969 is false. He relied upon:- (1) *Vinod Kumar Arora Vs. Surjit Kaur*, ; (2) *Associated Hotels of India Ltd. Vs.*

R.N. Kapoor, ; and (3) Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, , in support of his various contentions.

10. I have perused the impugned Judgment and order of the First Appellate Court and that of the Trial Court and the material referred to by the learned counsel for the parties.

11. Learned Counsel for both the parties agree that there is no legal compulsion that the Deed of License dated 6/12/1969 which is at Exhibit P.W.1/B, be executed before the Notary Public or other Authority. However, as has been rightly contended by Mr. Dessai, learned Senior Counsel, if the same was executed before the Notary Public or other Authority, then it would have had more strength. There are concurrent findings of the lower Courts that P.W.2, who has signed the said Deed, on behalf of the Plaintiff, is an interested witness, being attached to the plaintiff's Company and P.W.4 who has signed the said Deed and who further says that the document was signed by the parties in his presence, is also an interested witness, being a tenant of the plaintiff. The said Deed of License was executed on 6/12/69 and as per clause 4(e) of the said Deed, the license is for 11 months beginning from 1/1/69 and this indicates that if the plaintiff is to be believed, the deed was executed after expiry of the period of 11 months and thus there was no need to sign the deed on 6/12/69. There is on record the excise licence obtained by the original defendant for running a Tavern which establishes that the first structure existed in 1966 and not in 1969, as alleged. There are concurrent findings of the Lower Courts, not believing the execution of the said Deed, on account of the above facts. Then, there is a finding by the lower Courts that a perusal of the letter dated 8/7/72 (Exhibit P.W.1/E) and the legal notice dated 22/3/78, which is the part of Exhibit P.W.1/C-colly., makes it clear that the defendant has not signed the said Deed of License. The above is a finding of fact based on more than one probable reason. This Court, in Second Appeal, cannot disregard the same. In the case of "She Nand"(supra), relied upon by learned counsel for the plaintiff, it has been held that where Consolidation Authorities reach perverse findings not supported by evidence on record or actually against the weight of evidence, the Revisional Authority is duty-bound to scrutinise the whole case again in order to determine the correctness, legality or propriety of the Orders passed by the subordinate authorities. In the case of "Vinod Kumar Arora"(supra), relied upon by learned Senior Counsel, on behalf of the defendant, it has been held that the High Court is fully justified in rejecting the finding of the Rent Controller and the Appellate Authority, even though it is a finding of fact, when both the Authorities have based their findings on conjectures and surmises and they have lost sight of relevant pieces of evidence which have not been controverted. In the case of "Temple of Maruti"(supra), learned Single Judge of this Court has in detail considered the meaning and scope of the expression "substantial question of law" by referring to the Apex Court Judgment in the case of "S. N. Goyal"(supra). This Court has taken note of the same. In the present case, neither the findings are on the basis of non-existent material nor on conjectures and surmises. They

are based on the evidence adduced by the Plaintiff-Company itself. This Court cannot come to a different conclusion on the basis of the evidence on record.

12. P.W. 4, Narayan Naik, has identified his own signature at point "A" on the said Deed of License dated 6/12/69 at Exhibit P.W.1/B. But insofar as the others are concerned, he has only stated that all the parties had signed in his presence. He has not identified the thumb impression on that document to be of the defendant. Hence, as rightly contended by Shri Dessai, learned Counsel for the defendant, the evidence of P.W.4 cannot prove that the said Deed of License has been executed by the defendant.

13. Section 68 of the Evidence Act applies to cases where the document required by law to be attested bears the necessary attestation and when there is question of proof of execution of such document. In the present case, the Deed of License dated 6/12/69 (Exhibit P.W.1/B) is not a document required by law to be attested. Hence, section 68 of the Evidence Act is not applicable to this document.

14. In view of the discussion supra, the first substantial question (a) does not arise and even if it arises, the same gets answered in the negative i.e. against the Plaintiff. The alleged Deed of License is not proved and cannot be considered and is therefore rightly discarded by the Courts below.

15. A bare perusal of the pleadings in the plaint reveals that they pertain to the "suit gaddo" a mobile gaddo allegedly placed by the defendant, with the permission of the plaintiff, at the corner formed by the cross-roads: one leading from Dona Paula to Panaji and the other leading from Cabo Palace to Citadel. The pleading in the plaint, for sure, reveal that the alleged "suit gaddo" was placed there much prior to the acquisition of the said land and was converted into a permanent structure of bigger size without shifting the same. The legal notice dated 22/3/1978, which is part of Exhibit P.W.1/C-colly., calling upon the defendant to remove the "Gaddo", is also in respect of the "suit gaddo" allegedly existing since prior to the acquisition of the land. As rightly observed by the Trial Court, in paragraph 29 of the Judgment, there is no pleading in the plaint that the defendant, after acquisition of the land for road widening, demolished the old structure and constructed a new structure in the same property, without the permission of the plaintiff. The First Appellate Court, in paragraph 17 of the impugned Judgment, has observed that it is in the evidence that the defendant had to shift the said bar in view of widening of the existing road and that the defendant had constructed a new structure in the same property with permission of the plaintiff. There is no whisper of this new structure in the plaint. The old structure which is named by the plaintiff as "suit Gaddo" has been already demolished at the time of widening of the existing road and this was in the year 1972. Hence, as pointed out by learned Senior Counsel, the prayer in the suit filed in the year 1979, to remove the suit gaddo was without any cause of action, since the Suit Gaddo was already demolished.

16. The structure constructed by the defendant, with the permission of the plaintiff, after widening of the road, in another part of the same property, is admittedly a permanent structure. According to the plaintiff, the defendant has failed to prove any title in the suit property and hence the Courts below could not have rejected the relief sought for by the plaintiff. Both the Courts below have concurrently held that the plaintiff has failed to prove that the defendant is a mere licensee. Even if it is presumed that the defendant is a licensee in respect of the portion of the suit property, then also, as has been argued by learned Senior Counsel, on behalf of the defendant, the said license would be an irrevocable license, in terms of section 60 of the Indian Easements Act. Section 60 provides as under:

60. License when revocable._ A license be revoked by the grantor, unless

(a) it is coupled with a transfer of property and such transfer is in force;

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

17. The Trial Court has held that the plaintiff's case is that the structure was only a moveable gadda, but the evidence on record indicates that the defendant always had a structure of laterite stones in the suit property in which she was running a bar. The Trial Court has further held that the suit bar was shifted around 1972, after the road widening and demolition of the old structure. The First Appellate Court has observed that the evidence adduced by the defendant indicates that the plaintiff had permitted the defendant to construct a permanent structure for the purpose of running a bar and accordingly the defendant had constructed permanent structure and was running the bar in the same. The First Appellate Court has further observed that it is in the evidence that the defendant had to shift the said bar in view of widening of the existing road and that the defendant had constructed a new structure in the same property with the permission of the plaintiff. By letter dated 8/7/1972(Exhibit P.W.1/E), the Chairman of the plaintiff namely Mr. G. N. Agrawal wrote to Dr. Sequeira that as per the recommendation and letter dated 13th May last, of Dr, Sequeira, he (Mr. Agrawal) agreed to accommodate Mrs. Archangela Cabral from Caranzalem by allowing her to keep her "gada" near her residential house for which she had to sign a contract. Mr. Agrawal has further written in the said letter that Mrs. Archangela, instead of keeping her gada, on wheels, near her house, has constructed a cemented stone plinth and kept her gada without wheels and has not signed any contract. In reply, Dr. Sequeira, by letter dated 21/7/1972, which is a part of Exhibit P.W.1/D-colly, informed Mr. Agrawal that he has explained to Mrs. Cabral, the contents of the letter dated 8th July and has told her to see Mr. Agrawal personally. Dr. Sequeira has further mentioned that Mrs. Cabral has lost her brother recently, of cancer, leaving 8 small children who have to be looked after by her and further one of the said children is down with typhoid and that she would come and explain the position to him soon. Again, by letter dated 16th July, 1973, which is also a part of Exhibit P.W.1/D-colly, Dr. Sequeira has written

to Mr. Gangadhar Agrawal that he is sending Arcanja Cabral to him to explain the matters to him in person. Dr. Sequeira requested Mr Agrawal to be lenient, good and generous to Mrs. Arcanja as she has some bad reverses in her family. The above correspondence pertains to the new structure. The evidence on record reveals that after demolishing the old structure on account of the widening of the road, the defendant constructed a new permanent structure in the same property and this was in the year 1972. In this structure, a liquor bar is being run and there is excise licence of the year 1966 produced by D.W.1 at Exhibit D.W.1/B. This structure has electricity connection and water connection also. The suit has been filed by the plaintiff in the year 1979. It cannot be believed that what was all done by the defendant was without permission of the plaintiff. In the case of "Ram Sarup Gupta"(supra), the Apex Court has held that where license is oral, purpose of its grant and circumstances leading to the grant as also conduct of the parties have to be considered to determine whether it is irrevocable. The defendant, having done work of a permanent character, qualifies for protection under clause (b) of section 60 of the Easements Act.

18. In view of the above, the defendant has proved the titled as irrevocable licensee, u/s 60 of the Easements Act. In terms of clause (b) of section 103 of the Code of Civil Procedure, this Court can determine any issue necessary for final disposal of the Appeal, if it is found that the same has been wrongly determined or not determined at all, in the case, by reason of the decision on the substantial question of law involved in the appeal, provided there is sufficient evidence on record for the determination of such issue.

19. The Courts below were right in rejecting the relief sought for by the plaintiff. The second substantial question therefore gets answered accordingly. In the result, the Second Appeal fails and is dismissed, but with no order as to costs.