

**(1935) 04 AHC CK 0044**  
**In the Allahabad High Court**

Rafiq Ahmad and Another

APPELLANT

Vs

H. Mohammad Siraj Hussain Khan and Others

RESPONDENT

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**Date of Decision :** 03-04-1935

**Acts Referred:**

Easements Act, 1882 — Section 60

**Citation :** 156 Ind. Cas. 48

**Hon'ble Judges :** Ganga Nath, J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## Judgement

Ganga Nath, J.—This is a defendants' appeal and arises out of a suit brought against them by plaintiff Mohammad Siraj Husain Khan for partition of the materials of the house standing on the land described in the plaint. The site belonged to the plaintiff. In 1905, Amir Bakhsh, father of Nanua, defendant-appellant, took the land from the plaintiff's father under a registered kabuliyat on January 30, 1905. It was provided in this kabuliyat that no other person would be allowed to reside in the house without the permission of the zemindar. On the death of Amir Bakhsh, the house was succeeded to by Amir Bakhsh's daughter and his son Nanua. Amir Bakhsh's daughter sold her 1-3rd share in the materials of the house to the plaintiff. Nanua sold his 2-3rd share in the materials to the defendant-appellant No. 1. The plaintiff brought a suit for the partition of his 1-3rd share in the materials and for the removal of the 2-3rd materials by defendant No. 1 and for possession over the site. The plaintiff also claimed mesne profits. The defendants contended that the plaintiff was not the sole owner and therefore had no right to maintain the suit, that defendant No. 2 or his father was not the tenant or lessee and the plaintiff's claim was barred by Section 60 of the Easements Act and that the mesne profits claimed were excessive. The trial Court found against the defendants and decreed the plaintiff's claim for ejectment of defendants Nos. 1 and 3 to 5 and removal of 2-3rd materials and Rs. 24 mesne profits. On appeal, the learned Additional Subordinate Judge confirmed the decree of the trial Court and dismissed the

appeal. Against this decision this appeal has been filed by defendants Nos. 1 and 2. As appears from the sale deed executed by defendant No. 2 in favour of appellant-defendant No. 1, defendant No. 2 has sold away his rights in the material to defendant No. 1. The site admittedly belongs to the zemindar. The appellants have no right or interest in the land. No right of residence has been transferred to appellant No. 1. Appellant No. 1 has purchased only 2-3rd of the materials which belonged to appellant No. 2. Appellant No. 2, as already stated, has sold away the materials of his share and has no rights left in them.

2. As regards the suit being barred by Section 60 of the Basements Act, no question of any license arises in this case. Appellant No. 2, as already stated, has not transferred any right of residence and consequently appellant No. 1 has none to occupy the site. As will appear from the terms contained in the registered kabuliyat executed by the father of defendant No. 2, it was agreed that no other person would be allowed to reside in the house without the permission of the zemindar. Consequently, defendant No. 2 could not, and, as a matter of fact, has not transferred any right of residence in the house to defendant No. 1. The judgment of the lower Court is correct. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs and the decree of the lower Court be confirmed.

3. Permission to file a Letters Patent Appeal is rejected.