

(1985) 04 RAJ CK 0057
In the Rajasthan High Court
Case No : Civil First Appeal No. 31 of 1973

Shambhu Dutt Shastri

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 10-04-1985

Acts Referred:

Arms Act, 1959 — Section 22
Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 295, 363
Contract Act, 1872 — Section 10, 70
Sales of Goods Act, 1930 — Section 17, 2

Citation : (1986) 2 WLN 713

Hon'ble Judges : Dinkar Lal Mehta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dinkar Lal Mehta, J.—This appeal was also listed before this Court yesterday i.e. on 9th April, 1985, for final hearing. Mr. Ajit Bhandari, a panel lawyer, appeared before this court and submitted that he is not prepared to argue the case as the file of the case has been handed over to him only in the morning. Hearing was adjourned. Today, Mr. K.N. Garg, appearing on behalf of the State, looking to the nature of the case, rushed and approached Mr. M.I. Khan, Government Advocate, to give him assistance. Mr. M.I. Khan, who is an eminent lawyer, assisted the Court in the right earnestness. He rushed to the Court after the completion of the arguments of Mr. Lodha, counsel for the appellant. Generally, there is a dearth of good lawyers in the Government Advocate office and the Courts are not getting proper assistance, Mr. M.I. Khan, submitted that he was on the legs in other court. He further submitted that M/s S.B. Mathur, Additional Government Advocate, O.P. Sharma and Ajit Bhandari are not present in the court and for this reason the case has been handed over to Mr. Garg when a panel lawyer is in fact, within a short space of time Mr. Khan, prepared the case and assisted the court to the utmost satisfaction and raised number of technical pleas. I think it proper

to express my appreciation for Mr. Khan and would like that in future at least he should see that proper assistance is given by his colleagues to the court and the cases of the State Government do not go in default for not putting the case properly.

2. This appeal has been directed against the judgment and decree passed dated 13th November, 1972, passed by the learned District Judge, Alwar, dismissing the suit of the plaintiff-appellant. The plaintiff-appellant has filed a suit against the State of Rajasthan for compensation for the use and occupation of the disputed property. It is an admitted position that the final inventory of the property of His Highness of Alwar was prepared. Ex. A/5 relates to the disputed property. Under the covenant the disputed property was considered as private property with some conditions. The relevant portion runs as under:

Vinay Vilas Place with Garden, the Ancestral. The Vinay Vilas Place Garrage and the Adjoining Sangars. Building will however remain in the possession and use of the State so long as it is required by Government for educational purpose. During this period the Building will be maintained by the State and the garden by the Ruler. The Building in which the Workshop and the Offices are housed at present and four garages will continue to remain in possession and use of the State so long as they are required for the urpose. 3. The His Highness of Alwar gifted this property to Her Highness vide gift-deed dated 10th October, 1960 (Ex. 2). This fact is also not in dispute.

4. On behalf of the State, written statement was filed and thereafter the Court considering the pleadings framed the following issues on 13th September, 1971:

?1? vk;k tk;nkn eqrnkfo;k jkt _f"k dkyst ds dk;Z o bLrseky es vkrs jgus ds fy, Hkkjr ljdkj us eqn- ua- 1 dks nh blfy, eqnk;yk eqvкотk vnk djus dks ftEesokj ugh \

?2? vk;k tk;nkn eqrnkfo;k dk eqvкотk ckr ;wt ,.M vkD;wis"ku 2000@& ekfld gS\\

?3? vk;k nkok eq[rkj [kkl "kEHkwnRr "kkL=h ds }kjk nL[krh ,oa rLnhd gksus ds dkj.k esUVsu,fcy ugh gS\\

?4? eqnbZ fdl nknjlh dk eqLrgd gS\\

5. On behalf of the plaintiff, Shri Shambhu Dutt has deposed that he is Mukhtiar-khas of the plaintiff and also proved the power of attorney Ex. 1. He has further deposed that this property was transferred by defendant No. 2 as His Highness of Alwar to the plaintiff vide a gift-deed, Ex. 2. He has submitted that there was no agreement for non-realisation of the rent. Repeated demands were made for the payment of the rent repeated demands were made for the payment of the rent but it was not but it was not paid. He has submitted that notice Ex. 3 was served on the State of Rajasthan. The rental value of this property has been assessed at about Rs. 2,000/- per month looking to the valuation of the property. This witness has further stated that Raj Rish College is being run in the disputed premises since 1930 and is named as Raj Rish College on the name of late

Maharaja Jai Singh who had the title of Raj Rish. He has further admitted that the College was run by the Ex. Ruler of the Alwar State and since 1930 the disputed property is being occupied by the College, From the above evidence the admitted position is (1) that the disputed property is being occupied by Raj Rish College since 1930 and the College was being run by erstwhile Alwar State prior to its integration in the UOI. The Building is still occupied by the College; (2) There is no documentary evidence on record either in favour of the plaintiff or the defendant No. 1 to show that the property was given gratuitously or ungratuitously. The case of the plaintiff hinges on the interpretation of covenant Ex. 5. (3) At the time when the integration of the Alwar State was complete with the Union of India, a final list of inventory was prepared and the State Ministry informed about the same to His Highness, Alwar. A copy of such final list is A-5 on record. In such list, the disputed property has been given at S. No. 2 and the decision of the state Ministry about the same has been mentioned in the same list, which runs as under:

Ancestral. The Vinay Vilas Palace Building will however remain in the possessions and use of the State so long as it is required by Government for education purposes. During this period the Building will be maintained by the State and the Garden by the Ruler. The Building in which the Workshop and the Office are housed at present and four garages will continue to remain in possession and use of the State so long as they are required for the purpose.

6. On behalf of the plaintiff PW 2 Madan Singh and PW 3 K.N. Bhargava have been produced. Madan Singh (PW 2) has stated that the value of the property is very high. It can fetch a rent of Rs. 6,000/- to Rs. 7,000/- per month and casts to Rs. 26 & 30 lacs. PW3 K.N. Bhargava was formerly the Chief Engineer of the Rajasthan State in Public Works Department. He has given the valuation of the disputed property after preparing its plan. He issued the certificate Ex. 3 in his own hand and has signed it.

7. On behalf of the defendant, one witness DW/1 R.C. Jain has been produced.

8. It will not be out of place to mention here that His Highness of Alwar entered into a contract, who is still alive and is a party to the litigation, but has not appeared in the witness-box on behalf of the plaintiff, to prove the intention of the parties at the time of entering into the covenant Mr. Khan counsel for the State has raised a preliminary objection that the suit is not maintainable and it is hit by the provisions of Article 363 of the Constitution of India. He has also submitted that the property was managed and controlled by the erstwhile State of Alwar at the time of integration and, as such, it is covered under Article 295 of the Constitution of India and it cannot be the subject-matter of any dispute

9. Before I deal with the merits of the case, I would like to dispose of the preliminary objection raised by Mr. Khan. So far as covenant Ex. P-5 is concerned, it has been admitted by both the parties that it was entered into between the Union of India and the erstwhile Ruler of Alwar State. Mr. Khan

submits that where there is a term in any agreement or covenant with ex-ruler of Indian State, is relied upon either to have a right or to discharge a liability, there is a dispute arising out of such agreement or covenant. He has further submitted that Article 363 of the Constitution of India is not only in relation to primary agreement, but also an agreement entered into in pursuance of primary agreement. Mr. Khan, counsel for the State, has cited before me the case of The State of Rajasthan and Another Vs. Sawai Tejsinghji Maharaja of Alwar, He has invited my attention to para 2 of the above case and submitted that 12th October, 1963, Col. His Highness Maharaja Sawai Tejsinghji of Alwar filed civil suit No. 5 of 1963 in the Court of District Judge, Alwar for a declaration that the properties detailed in paragraph No. 4 of the plaint were the private properties of the plaintiff and the defendant No. 2, the State of Rajasthan, be ejected therefrom, or, in the alternative ordered to pay rent at Rs. 1000/- p.m. It will not be out of place to mention that in the aforesaid case the property was City Palace including adjoining building, the details of which are as under:

----- Description of property Decision of the States Ministry -----

City Palace including Ancestral. The portion of the build- adjoining building ing at present in use by the State for administrative purpose or for Museum and Imperial Bank will continue to be so used till such time as required. The requirements of the State in future will not be of the same order as today and every effort will be made to release the accommodation at present occupied in the Zanana and Mardana Mahals at the earliest practicable date. The State will bear the maintenance cost of the portion used by it. Any addition or alternation in the portion used by the State will require the prior consent of His Highness and should be carried out of the State Expense. 10. Mr. Khan, has submitted that this property has also been referred in Ex, A-5 Covenant which has been produced before this Court at item No. 1. Mr. Khan has also pointed that so far as item No I, namely, the State Palace including the adjoining building, was concerned, the decision of the State Ministry was that the portion of the building at present in use by the State for administrative purpose or for Museum and Imperial Bank will continue to be so used till such time as required. The requirement of the State in future will not be of the same order as today and every effort will be made to release the accommodation at present occupied in the Zanana and Mardana Mahals at the earliest practicable date. Mr. Khan laid much emphasise on portion that the State was bound to release the accommodation which was in the occupation in the Zanana and Mardana Mahals. He has also pointed out that in facts and circumstances of the case, there is no such condition and the State is not bound to hand over the property to the erstwhile ruler or his successor, but the State may constitute the property perfunctorily. He further submits that even in a case like the City Palace building where there is a condition that the property should be released in favour of the erstwhile ruler. The provisions of Article 363 of the Constitution of India have

been applied. Mr. Khan has submitted before me that an appeal was preferred by His Highness Maharaja Shri Tejsinghji of Alwar against the Union of India and another. His appeal has been dismissed by the Supreme Court in Colonel his Highness Sawai Tej Singhji of Alwar Vs. Union of India (UOI) and Another, Their Lordships of the Supreme Court held that Article 363 of the Constitution bars the jurisdiction of all courts in any dispute arising out of any agreement which was entered into or executed before ? he commencement of the Constitution by any Ruler of an Indian State to which the Government of India was party. Their Lordships further held that the operation of the article is not limited to any "Parent Covenant and every agreement whether it is primary or one entered into in pursuance of the provisions of a preceding agreement would fall within the ambit of the article.

11. Mr. R.M. Lodha, counsel for the appellant, has submitted before me that Article 363 does not apply in the facts and circumstances of the case. He submits that his suit is based on the Covenant Ex, A-5, which is the foundation of his rights. He further submits that there is no dispute so far as the Covenant is concerned. The dispute is about the interpretation of the Covenant and, for this reason Article 363 of the Constitution of India does not apply in the facts and circumstances of the case.

12. I have given my thoughtful consideration to the rival contentions of the parties. Article 363 of the Constitution should be given a reasonable interpretation and should not be given as a handle in the hands of the State, where injustice may be inflicted on the plaintiff solely for the reason that the defendants have malafide adopted a defence which has no basis and according to Jaw would be rejected but rightly. On the other hand, if the preliminary investigation is in the nature of the dispute and is permitted according to law, there is no limit however the investigation is to go in order to determine whether in truth the defendant has a defence. I would not like to take the extreme view in the matter to the interpretation of Article 363 of the Constitution. I would prefer to adopt the view that the Court must be satisfied that the conflicting rights have to be decided between the parties and it is only where there is such a case then the Court should decline to decide "he rights.

13. In the instant case, there is a dispute between the parties about the interpretaion of the covenant Ex. A5. The covenant was sine quo non. The Palace Building will ever remain in possession and use of the State so long as it is required by the Government for educational purposes. If further casts a duty on the State to maintain the Building. The Building in which the Workshops and Officers are situated will also continue to remain in possession of the State so long as it was required. It is an admitted position that the Building was being used for the College since 1930 which was run by the erstwhile State of Alwar and is still being used for the same purpose by the present State of Rajasthan. The intention of the parties was to be gathered from the surrounding facts. PW 1 Shambhu Dutt, power of attorney holder has stated that there was no condition

that the rent will not be charged. He has further stated that is having no personal information about the covenant. He has further stated that the notice u/s 80, CPC was served on the State of Rajasthan on 15th November, 1909. In para 3 of the notice it has been mentioned that the State of Rajasthan has been in use and occupation of the property for a number of years. It has failed to settle the rent and execute the rent deed of the premises despite several representations and reminders. No representation has been produced on record and there is nothing on record to show that when the representations, if any, were made. It is an admitted position that the Maharaja of Alwar executed the sale-deed on 10th October, 1960 in favour of Her Highness of the State of Alwar. The Covenant had been entered into in the year 1949 and, for 11 years the property remained with His Highness as owner of the property. There is no allegation that His Highness ever demanded the rent or compensation for use of occupation of the suit property. There is no reference also in the sale-deed Ex. 2 that Maharaniji will be entitled to get compensation from the State of Rajasthan. Thus, the past conduct shows that the matter has been agitated at a very late stage, may be after 2t years and, no compensation has been claimed by the plaintiff, or the predecessor-in-title earlier. In the facts and circumstances of the case, and looking to the past conduct of the plaintiff and his predecessor-in-title it cannot be said that there is no dispute at all in the matter of interpreting the Covenant Ex. 5. Thus, the defendants have succeeded in making out a prima facie case of their defence.

14. Apart from that, the question arises why a specific reference has not been made in the Covenant about the compensation or the rent, when it was intended that the property shall be used by the State of Rajasthan for education purposes for an unlimited period and the plaintiff will have no right to ask for the vacation of the property. In such circumstances, it was also said that the intention may be that the property may be used gratuitously for an indefinite period as the name of the father of the ruler was linked with the College. This is also a ground for taking the view that there was a reasonable defence and the defendants have a right to invoke the provisions of Article 363 of the Constitution of India in the matter.

15. It will not be out of place to mention that Shri Tej Singhji exruler of Alwar is still alive, but he has not entered into the witness-box to show that was the intention at the time of entering into the Covenant and, for this reason also an adverse inference can be drawn against the plaintiff.

16. General power of attorney holder has power to act, plead and appear on behalf of the party. But it cannot be said that the power of attorney holder is having power to appear in witness-box on behalf for the party. The plaintiff has not appeared in the witness-box and the statement given by the general power of attorney holder cannot substituted for the statement of the plaintiff and for this reason also adverse inference can also be drawn against the plaintiff for not appearing in the witness-box to prove her case. For the reasons stated above, 1

am of the view that in the instant case, prima facie defence which is reasonable exists and the provisions of Article 363 of the Constitution of India can be invoked by the defendant and the suit is not maintainable on this ground also.

17. Now, T shall deal with the provisions of Section 70 the Contract Act. It is an admitted position that the erstwhile State of Alwar was running college in this very building since 1930. It is also an admitted position that the Ruler was not running this college in his personal capacity, but was running the College as a Ruler of the erstwhile State and the expenses for the same were borne by the State. Section 70 of the Contract Act runs as under:

Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or restore, the thing so done or delivered.

18. The first ingredient of Section 70 of the Contract Act is that a person lawfully does anything for another person whether what has been done by a person has been done for another within Section 70 of the Contract Act is always a question of fact. The test is, whether the person who is acting holds such a position in relation to the other as to raise expressly or by a reasonable implication an inference that by the act done for the other person he could be entitled to look for consideration for it from the other person for whom it was done. It is an admitted position that the Covenant was entered into by the Union of India with the erstwhile ruler of Alwar State. The former State of Rajasthan was not a party in the matter of Covenant. The State of Rajasthan could have taken the view that the building was used since 1930 for the educational purpose, especially for running of College by the erstwhile State of Alwar & as such, it will fall within the purview of Article 295 of the Constitution of India But this question need not be decided as from a perusal of Section 10 itself it is clear that where a person lawfully does anything for another person. The word "Lawfully does anything" are having privity of contract between the parties The person who is delivering the property, or is doing something must do with the consent of the parties for whom it is done. But, in the instant case, such privity of contract or by implication or inference, consent of the former State of Rajasthan has not been established by the plaintiff in any way and the controversy whether any act has been done by the former Ruler of the erstwhile State of Alwar is again a disputed question of fact. Apart from that, the plaintiff has failed to prove what act has been done lawfully by the plaintiff for the State of Rajasthan. To do something and omit to do some thing and cannot be equated in interpreting the provisions of Section 70 of the Contract Act. In the instant case, at the most, it can be argued by the plaintiff, though it is not available on record, that the plaintiff or his predecessor-in-title has restrained himself by not taking any steps for the ejectment of the defendants from the disputed premises. But it is a negative act and positive act has to be done and the counsel for the plaintiff has not been able to show what positive act has been done by the plaintiff for the defendant. For this reason the

first ingredient "a person should lawfully do something for another or deliver something to him" has not come into operation at all. The second ingredient which is an alternative ingredient to the first ingredient is, "deliver anything to him". The question further arises whether any property was delivered by the plaintiff to the defendant and what should be the meaning of the words "deliver". Whether continuation of the possession amounts to delivery or whether it could be actual or physical delivery of the property. In the instant case, Shri Lodha, counsel for the plaintiff has invited my attention to the case of Bhagavadas Krishnadas and Another Vs. P.S. Soma Iyer and Others, . In the said case, their Lordships were considering the case of the purchaser in an auction sale. The property vests in the auction purchaser and the sale becomes absolute from the time it was sold. Vesting of property is made to relate back to the date of sale. The plaintiff in the instant case has put up the case that under the terms of the Covenant Ex. A/5, the defendants were allowed to continue in occupation so long as it is required by the defendant. In the instant case, the plaintiff has not come with the case that he has allowed the State of Rajasthan to continue in occupation for the use as educational institution. In the instant case, there is no privity of contract between the parties and whatever was a contract or a covenant it was with the Union of India and the ex-ruler of the erstwhile State of Alwar. Their Lordships were considering the provisions of Section 70 of the Contract Act and, have considered the written statement filed by the defendant in the said case reported in Bhagavada v. PS. Soma Iyer (supra). In para 4 of the written statement in the said case, the defence was that they had only asked for some thing and, that was granted by the plaintiff. Their Lordships interpreted the provisions of Section 70 of the Contract Act and came to the conclusion that from these facts it cannot be inferred that they were allowed to occupy building free of any obligation to pay rent. The word ""deliver" is wide enough and it may in some cases include symbolic delivery or physical delivery.

19. The word "delivery" in pursuance of sale u/s 16 Bombay Weights and Measures Act, has been interpreted as not to mean only the actual and physical delivery but it also means a delivery in pursuance of a sale. Delivery is not the delivery of the carrier. There goods were sent by a seller from A Station to a purchaser at B Station by Railway parcel and the purchaser took delivery at Bon production of a railway receipt, the railway could not beheld to have made the delivery as they were merely carriers, but the meller at A must be held to have made the delivery to the purchaser at B through the carriers. u/s 22 of the Arms Act "delivery" means a conscious delivery though it need not be a physical delivery in that there must be proof that the accused delivered the arms with his own hands. If the property is delivered under an order of a Court then the purchaser to whom the possession is given free from any incumberance, in such a case it is an actual delivery. Section 2(2) of the Sales of Goods Act defines "delivery to mean voluntary transfers of possession from one person to another. This is the same as given in Section 62 of the English Sale of Goods Act, 1893. The essence of the delivery is voluntary transfer of possession from one person

to another. When possession is voluntarily transferred from one person to another there is always a delivery which is either at once absolute or, if it be subject to a condition, absolute on the condition. The word "delivery" in the instant case has to be considered and interpreted which may be in accordance with the intention of the Legislature. Delivery creates a right which is left to a person who has lost his physical or legal possession of a chattel by agreement, as on a bailment, or through the wrongful act of another, as in the case of a theft or a conversion, or, it may be the right of one who is entitled to but has never obtained possession as in the case of the purchaser who has paid the price of goods brought but has not had delivery thereof. Possession itself, like ownership, is indivisible but the right to possession is not exclusive for by way of example, one in possession of a chattel at the will of the owner has a right to possession as against all the owner, whereas the latter has a right to possession against every one. u/s 17 the word "delivery" has been used with the clear intention that it must be an absolute delivery, not a contingent delivery. , That means, the delivery must be a delivery of a nature creating a right in favour of the person to make the property delivered and the person who delivers the property loses the right. In the instant case, it is an admitted position that the College was being run by the erstwhile State of Alwar since 1930 and the property was in possession of the erstwhile Alwar State since 1930 and the erstwhile State of Alwar was running, managing and controlling the educational institution.

20. In *Bhikhranj Jaipuria Vs. State of Bihar*, , their Lordship of the Patna High Court were considering the provisions of Section 70. Their Lordship held that a thing may be delivered in pursuance of a contract and if will have to be governed by the terms of that contract. Mere delivery of a thing irrespective of its context bring in the aid of Section 70 for the deliverer, fn *B.N. Elias and Co. Ltd. Vs. State of West Bengal*, their Lordships of the Calcutta High Court were considering the provisions of Section 70. They held that where goods are delivered pursuant to a request 70 does not apply. plaintiff's goods in the said cases were delivered in pursuant to a request. In order to attract the provisions of Section 70 of the Act three conditions are to be established, (i) a person should lawfully do something for another person or deliver something to him; (ii) in doing so, he must not act gratuitously; and (iii) the person for whom it is done must enjoy the benefit thereof. In *State of UP v. Mumtaz Hussain* (6) it was held that the claim made by the plaintiff is for compensation for wrongful detention of timber which the plaintiff claims had been purchased by him. It cannot be said that the plaintiff either did something for the State or that he delivered the timber to the State not intending to do so gratuitously. The timber was according to the plaintiff wrongfully seized and misappropriated by the officials of the State, it may be that if the plaintiff had succeeded in making out a case that the timber of the Shisham trees belonging to him had been seized by the defendants he may have been able to recover compensation for wrongful detention thereof by the employees of the State but then he cannot maintain a claim u/s 70 of the Contract Act.

21. Applying the principle in the instant case it can safely be said that even from a perusal of Ex. A-5 it is clear that the predecessor-in-title intended to do so gratuitously. There was a dispute between the parties and the present property of the ruler was to be determined. The State of Rajasthan was not a party. However, the Union of India entered into a covenant and that covenant is of a binding nature on the State. There is a specific provision in item No. 2 that the disputed property will remain in possession and use of the State as long it is required by the Government for educational purpose. Firstly, the words "will remain in possession of the State Government" go to show that there was no delivery of possession. The plaintiff's predecessor-in-title at the most agreed that they will recognise the possession as lawful possession and they will not put any obstacle in the matter and they will allow the State to use and accommodate the property so long as it is required for the purpose of educational institution. The educational institution has been running since 1930. So the word "delivery" as used in Section 70 cannot come into play in the instant case as no delivery was effected. In fact, the continuance of the possession is there and it was allowed to continue even under the covenant. Thus, this ingredient of delivery is missing and for this reason also Section 70 of the Contract Act will not apply.

22. The second ingredient, "in doing the said thing or delivering the said thing, he must not intend to act gratuitously" has not been established by the plaintiff to the satisfaction of the Court. The Court below has rightly held so. From a perusal of the covenant, which was entered into by way of settlement, there is no reference of compensation or rent to be paid to the plaintiff or his predecessor. When a settlement takes place, if the intention is otherwise, it is always mentioned in specific terms in the covenant or the agreement. From a perusal of the covenant it can safely be said that it was done gratuitously and the State Government was allowed to run the educational institution so long as it is required and it was not required to pay rent or compensation. Apart from interpreting the covenant, we can take the aid of the previous conduct of the parties. Before entering into the agreement or covenant, no rent or compensation was paid to the ruler of the erstwhile State of Alwar & the educational institution was running since 1930. The merger took place in the year 1948 and the erstwhile ruler of the former State of Alwar has not claimed from the erstwhile State of Alwar any compensation for the property. This also reflects that there was no intention to do so and the act was done with the intention that it is done gratuitously. The covenant was entered into in the year 1949 and the property was transferred by a registered sale-deed by the erstwhile ruler of Alwar in favour of Her Highness the Maharani of Alwar on 10th October, 1960. Upto 10th October 1960, the ruler has not claimed any compensation or rent and there is nothing on the record to show that any compensation was claimed by the ruler of the erstwhile State of Alwar. This conduct also shows that the intention of the parties was that the act was gratuitous in character and the State was not liable to pay any rent or compensation.

23. Apart from taking into consideration the fact and circumstances of the case,

one thing is evident from the record itself that the plaintiff has miserably failed to produce any type of evidence to show that the intention of the party was otherwise. A general power of attorney holder can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness-box on behalf of himself To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff. Non-appearance of the plaintiff as well as nonappearance of the former ruler of the erstwhile State further leads us to draw an adverse inference against the plaintiff. The ruler was a party to the covenant. He could have come to the court and could have said what was the intention of the party. The ruler was the husband of the plaintiff and, it is not a case where they are at daggers" drawn Apart from that, the respondent is one of the parties to the suit itself. In such circumstances, nonappearance of the owner himself, plaintiff's wife and the defendant-respondent leads me to conclude that there was no intention that compensation shall be paid, but the intention of the part was that it was gratuitous in nature.

24. Mr. Lodha, appearing on behalf of the plaintiff has submitted before the Court that one case has been decided by my learned brother Justice G.M. Lodha, in which he has taken a contrary view. The file was called and it is said that the case has been decided on 28th January, 1985, but no judgment is available and I am not in a position to express my opinion about the applicability of the said judgment in the facts & circumstances of this case, Mr. Lodha, could also not produce a copy of that judgment and is also not available with the Registry. I am not in a position to say that this is a case which needs a reference to a larger bench.

25. For the reasons stated above, the appeal is dismissed. The parties shall bear their own costs of this appeal.