

(1983) 04 AHC CK 0003
In the Allahabad High Court
Case No : Second Appeal No. 2004 of 1976

Swaran Singh and Others

APPELLANT

Vs

Lakhi Prasad Musaddi and Others

RESPONDENT

Date of Decision : 29-04-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 10 Rule 2
Easements Act, 1882 — Section 52, 60
Limitation Act, 1963 — Section 14
Transfer of Property Act, 1882 — Section 106, 107, 108

Citation : AIR 1983 All 322

Hon'ble Judges : Deoki Nandan, J

Bench : Single Bench

Advocate : K.N. Tripathi, for the Appellant; Narendra Mohan, Rudreswari Pd. and O.P. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

Deoki Nandan, J.—This is a Defendants' Second Appeal from a decree for possession over a plot of land and recovery of Rs. 117/- as rent and mesne profits up to the date of suit. The Defendant was allowed the liberty to remove his constructions and materials including the petrol pump on the land before vacating it. According to the Plaintiff's case, the Defendant, Sher Singh, since deceased, and now represented by his heirs and legal representatives, took the land measuring approximately 45" X 25" on a monthly rent of Rs. 15/-. The Plaintiff was entitled to terminate the tenancy by giving one month's notice to the Defendant and since the Plaintiff did not want to keep the Defendant as a tenant he terminated the Defendant's tenancy by notice dated the 5th July, 1961 u/s 106 of the T.P. Act. The Defendant sent a wrong reply claiming permanent tenancy rights and did not vacate the land, hence the suit claiming possession by the Defendant's ejectment and arrears of rent and mesne profits amounting to Rs. 117/- up to the date of suit. A prayer for the removal of the Defendant's structures on the land in suit was also added by amendment.

2. Defendant admitted the taking of the land on payment of the monthly rent of Rs. 15/- subject to additional pleas, whereunder he claimed that the land was taken some 27-28 years ago, the date of the written statement being the 5th Feb., 1965, for the purposes of construction of petrol pump and shop buildings on payment of Rs. 15/- per month and constructed a pucca and permanent petrol pump and shop buildings thereon spending a substantial amount of money amounting to Rs. 20,000/- thereon in the knowledge of the Plaintiff and has continued in possession as such ever since. The Defendant claimed that he was not liable to ejectment and his position was that of a permanent Parjawatdar or licensee of the land in suit which could not be terminated by a simple notice. Estoppel was also pleaded as a bar to the suit and before the amendment of the plaint an objection was also raised that the Plaintiff was not entitled to relief as he has not claimed removal of the constructions which existed on the land. By an amendment of the written statement, it was further pleaded that the petrol tank and buildings existed on the land in suit since before 1947 and it was an accommodation to which U.P. Act No. III of 1947 was applicable and that consequently the suit was barred by want of the District Magistrate's permission u/s 3 of that Act.

3. As many as 13 issues were framed by the trial Court. The first issue, whether the Defendant is a permanent licensee of the land in suit as alleged, was the most material issue in the case and on that the trial Court held that the allegation made in para 1 of the plaint that the Defendant was a tenant of the Plaintiff, was admitted in para 1 of the written statement and in the additional written statement (Paper No. 60-A) the only allegation about Paper No. 20 dated the 4th April, 1938 was that the original did not contain the th clause, although Ext. 1 dated the 6th April, 1938 written by the Defendant was admitted by his learned Counsel. The trial Court held it "firmly established" from these papers that the land in suit "was taken on a monthly rent of Rs. 15/- by the Defendant and now it is too late in the day for the Defendant to allege that he was a licensee and not tenant of the land in dispute." The trial Court further observed that "at any rate there is no evidence on the record that the Defendant was a mere licensee and not a tenant of the land in dispute" and answered the issue in the negative.

4. The next issue taken up by the trial Court for adjudication was issue No. 12: "Whether there was an agreement between the parties that the Plaintiff would eject the Defendant on giving the latter one month's notice. If so, its effect?" The trial Court found that in view of the Defendant's letter dated the 6th April, 1938 it could not be said that the proposal made by the Plaintiff's father on the 4th April, 1938 was accepted in full by the Defendant and answered the issue in the negative.

5. Issue in the absence of a registered instrument of lease. The trial Court further held that there was no agreement not to eject the Defendant and the lease was not a permanent one. It was accordingly liable to be determined by

notice u/s 106 of the T.P. Act. Issue No. 2 was accordingly answered in the affirmative and issue No. 10 in the negative. The trial Court next took up issues Nos. 6 and 13 together for consideration and held that the Defendant was a tenant, his tenancy could be determined by a 30 days notice and although he had not committed any default in payment of rent, the last sentence of Ext. 1 dated the 6th April, 1938 did not have the effect of nullifying Section 106 of the T.P. Act and the tenancy could accordingly be terminated by a 30 days" notice under that provision. On issues Nos. 8 and 9, the trial Court held that what was let out was land and the suit was not barred by Section 3 of U.P. Act No. III of 1947. On issue No. 3, the trial Court found that the petrol pump, show room and shop had been in existence on the land in suit admittedly for the last 20 years; but, as the land in suit was let out to the Defendant he was entitled to raise constructions with the consent of the lesser, therefore, the suit cannot be held to be barred by estoppel or acquiescence. Issue No. 4 raised the question whether the Plaintiff was entitled to the benefit of Section 14 of the Limitation Act. That question arose because the suit had earlier been instituted in the Munsif's Court, but the valuation of the suit was later on amended and the plaint having been returned for presentation to the proper Court as the amended valuation exceeded the pecuniary limits of the Munsif's jurisdiction, it was presented in the Court of the (Civil Judge. On a consideration of the evidence, the trial Court answered the issue in the Plaintiff's favour. Issue No. 7 raised the question whether the Defendant is liable to remove the constructions existing on the land in dispute, on his eviction and that was also answered by the trial Court in the Plaintiffs favour in view of Section 108 "(h) of the T.P. Act. On issue No. 11, the trial Court held the Plaintiff entitled to the amount of rent and mesne profits claimed by him. Issue No. 5 raised the question of relief to which the Plaintiff was entitled, and on that the trial Court held that the Plaintiff was entitled to recover possession over the land after the Defendant's ejectment, but it would be Open to the Defendant to remove the constructions and his materials including, the land in suit.

6. With these findings, the trial Court decreed the suit as aforesaid.

7. On appeal by the Defendant, the following four points were raised before the lower appellate Court:

(1) Whether the deceased Defendant Sher Singh was a permanent lessee of the land as claimed, if so, to what effect?

(2) Whether the Plaintiff-Respondent made any representation to the deceased Defendant to install petrol pump and make other constructions over it, and if so, whether the suit is barred by estoppel and acquiescence?

(3) Whether the notice relied upon by the Plaintiff for termination of tenancy was illegal?

(4) Whether the notice of ejectment and termination of tenancy was waived by the Plaintiff-Respondent?

8. On point No. 1, the lower appellate Court held that no permanent lease was granted by the Plaintiff's father. Only a monthly tenancy was created. On point No. 2, it held that the Plaintiff was not estopped from claiming possession over the land in the original condition in which it was let out to the Defendant Sher Singh. On point No. 3, the lower appellate Court held the notice to be legal and valid. I may here mention that the question whether the Defendant was entitled to the protection U.P. Act No. III of 1947 was considered by the lower appellate Court under point No. 3 and it held that the provisions of that Act were not applicable to the case. On point No. 4, the lower appellate Court held that the notice was not waived by the Plaintiff.

9. In the result, the lower appellate Court confirmed the trial Court's decree. It, however, granted the Defendant three months' time to remove his structures from the land in suit and restore the land in its original condition to the Plaintiff-Respondent, failing which the Respondent will be entitled to execute the decree and obtain possession over the land.

10. After the case had been heard by me in part, the hearing was adjourned for a few days to enable the parties, if possible, to arrive at a settlement for continuing the Defendant's tenancy of the land, on payment of increased rent, the figure mentioned being ten times, the present rent on account of the fact that the Defendant, and after him his legal representatives, have been carrying on the business of petrol pump on the land and" would suffer irreparable loss by the closure of their business on ejection from the land. But the effort did not succeed as it Appears that although the Appellants' Counsel stated that they were willing to pay ten times the rent, the learned Counsel for the Plaintiff-Respondent stated that his client did not respond to his communication on the point.

11. At the resumed hearing of the appeal, learned Counsel for the Defendant-Appellants moved an application for amendment of the memorandum of appeal by addition of a ground No. 6 to the effect that "the lease deed (Paper 20-C) being inadmissible in evidence for want of registration the position of the Appellants is that of a licensee who have raised permanent structures on the land in dispute with the knowledge and permission of the Respondent No. 1 and his father and as such the licence coupled with grant is irrevocable u/s 60 of the Easements Act and the Appellants cannot be evicted from the land in dispute and the Respondent No. 1 is also hit by the doctrine of estoppel and acquiescence."

12. The said application was opposed by the learned Counsel for the Plaintiff-Respondent. He urged that while in para 1 of the written statement the Defendant had admitted the fact alleged in para 1 of the plaint that he was a tenant on payment of monthly rent, or, in other words, the fact that the Defendant was a tenant from month to month on payment of Rs. 15/- as monthly rent was admitted by the pleadings of the parties, the case taken up before the lower appellate Court was that the Defendant was a permanent lessee. That implied the giving up of the plea that the Defendant's position was

that of a Parjawatdar or permanent licensee. The lower appellate Court rightly rejected the Defendant's contention that he was a permanent lessee on the short ground that a permanent lease could not have come into being without a registered instrument of lease. Even so, the Defendant's case as pleaded in the statement made under Order 10, Rule 2 of the CPC before the trial Court was that "the agreement alleged in para 2 of the W.S. between the Defendant and the Plaintiffs father Ram Prasad Musaddi, the original lessor, for the construction on the land in suit of a petrol pump and building connected with it was oral"; and that being so the Appellants could not now be allowed to build up a case of permanent licence on the letter dated the 4th April, 1938 (Paper No. 20-C).

13. Having heard the learned Counsel for the parties on the said application, I find that even if the Defendant-Appellants were permitted to base a case of permanent licence on the letter, dated the "4th, April 1938 written by the Plaintiff's father, the letter does not grant any such licence to the original Defendant now represented by the Appellants, acting upon which the Defendant might have executed a work of permanent character and incurred expenses in its execution, as could be said to be irrevocable u/s 60(b) of the Indian Easements Act, 1882. The works of permanent character said to have been executed on the land were the fixing of the petrol pump and erection of the shop building. The letter dated the 4th April, 1938 runs as follows:

The plot of land measuring 45" X 25" on the east side of the main gate of my garden (situated on the Station Road, Mirzapur) measured from the Dharamshala side to the west will be given to you on rent Rs. 15/- (Rupees fifteen) only per month.

Increased...but you have the right to vacate the plot whenever you like on three months notice and we will have right to ask you to vacate the plot on one month notice.

14. The letter does not purport to grant any permission to the Defendant to raise a work of a permanent character on the land. The two Courts below have held, on an appraisal of the other evidence on the record, that the installation of the petrol pump was subsequent to the taking of the land by the Defendant for purposes of carrying on the business of repairing automobiles.

15. Under the circumstances, apart from the fact that the plea of permanent licence was never based on the letter dated the 4th April, 1938 (Paper No. 20-C), but was based on oral agreement, the said paper does not establish any such plea. It goes no further than establishing that the Defendant was permitted to enter into possession of the land in suit on payment of a rent of Rs. 15/- per month. Even if the Defendant-Appellants could not be permitted to found their plea of permanent licence on the Plaintiff's letter dated the 4th Apr., 1938 (Paper No. 20-C) I do not think that they could be shut out from raising the plea that their position was that of a permanent licensee, which was pleaded by them in the written statement as originally filed. The admission of the fact of entering

into possession of the land in suit on payment of a monthly rent of Rs. 15/- was subject to additional pleas. Para 1 of the plaint did not, in so many words, plead that the status of the Defendant was that of a tenant from month to month. It only said that the land taken by the Defendant on payment of rent at the rate of Rs. 15/- per month, and that the month of the tenancy commenced on the first of the English Calendar month and ended on the last day of the month. That did imply a plea of tenancy from the month to month, but the admission by the Defendant in his written statement, was made expressly subject to additional pleas and in the additional pleas he did specifically allege that his position was that of a Parjawatdar or permanent licensee. I, do not, therefore, think that the Defendant-Appellants could be shut out from establishing, if they could, that their position was that of a permanent licensee notwithstanding the fact that the argument raised before the lower appellate Court was that their position was that of a permanent lessee. Mr. Bhatnagar contended that the raising of the plea that they were permanent tenants implied the giving up of the plea that they were permanent licensees, but I do not, however, think that a party could be pinned down to the argument raised by the Counsel in this manner on a matter like this. The substance of the Defendant's plea was that they had a permanent right of occupancy. It matters little for them whether their position was that of a permanent lessee or a licensee. Moreover, the cause of justice is better served by deciding a point raised on the merits rather than shutting it out on technicalities. The said application is disposed of accordingly. . I now proceed to consider the question whether the position of the Defendant-Appellants was that of a permanent licensee which is the basic point that calls for decision in this case.

16. It was not claimed before me that the position of the Defendant-Appellants was that of a permanent lessee, and I think rightly so, for a lease for any term exceeding one year could be made only by a registered instrument vide Section 107 of the T.P. Act. A licence, on the other hand, does not require any writing or registered instrument. Section 52 of the Indian Easements Act, 1882. defines a licence thus:

52. Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence.

Section 60 of the Easements Act, 1882, runs thus:

60. A licence may 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 licence, has executed a work of a permanent character and incurred expenses in the execution.

17. The first question, which, therefore, arises in the case, is, whether the

transaction, under which the Defendants came into possession of, and held the property, was a lease or a licence. In case it is found that it was not a lease, but was a licence, the second question would be whether, (a) it was coupled with a transfer of property and such transfer was in force; or (b) the Defendants, acting upon the licence, had executed a work of a permanent character and incurred expenses in the execution.

18. The pleadings in the case have been referred to above. Apart from the reference to the Defendant as a keraedar, or a tenant, and the relationship between them as Keraedari or tenancy, through the plaint, the Plaintiff expressly pleaded in para 1 that he was the owner of the land as per boundaries and measurements given below and situate on Station Road in the city of Mirzapur on which the Defendant, who was the Plaintiff's tenant, had promised to pay rent at the rate pf Rs. 15/- per month, and that the month pf the tenancy commenced on the first day of every English calendar month and ended on the last day thereof. The said allegation was, in para 1 of the written statement, admitted subject to additional pleas. The additional pleas raised were, in para 2 of the written "statement, that the land was taken some 27 or 28 years ago for construction of a petrol-pump and shop building at Rs. 15/- per month from the original owner, Ram Prasad Musaddi, and on that a pucca and permanent petrol pump and construction of shop etc. at considerable expense, were raised as per agreement aforesaid, and in the knowledge of the owner of the land, on which the Defendant spent about Rs. 20,000/- and had continued to remain in possession ever since. In para 3, it was pleaded that, as per agreement and in law, the settlement of the land with the Defendant was permanent and continued to be so and it was in that belief that the Defendant had raised constructions by spending a considerable amount of money and Ram Prasad Musaddi and the Plaintiff himself had, through his agent and from his conduct also, showed that the Defendant was not liable to ejectment so long as he paid Rs. 15/- per month,. When the Defendant had spent such a large sum of money in the said belief and under the said agreement for permanent settlement, and his business prospered, the Plaintiff, in league with the Defendants' enemies, filed the suit on wrong allegations. The only right, which the Plaintiff had, was to realize the amount of Parjawat. He had no right to eject the Defendant so long as the constructions continued to east thereon. In para 4 of the written statement, it was pleaded that the position of the Defendant was that of a permanent Parjawatdar, licensee of the land, which could not be terminated by a mere notice. These pleadings do in a way rule out a ease of a licence. The Plaintiff's case was that the Defendant was a tenant. The Defendant admitted that position, but pleaded that he could not be evicted so long as the constructions raised by him continued to exist on the land, and that his position was that of a permanent Parjawatdar or a licensee. It has been seen above that, according to the statement made under Orde 10, Rule 2 of the Code of Civil Procedure, the agreement alleged in paragraph 2 of the written statement between the Defendants and the Plaintiff's father, Ram Prasad Musaddi, for the construction

on the land in suit of a petrol-pump and building was oral. It has further been seen above that the letter dated the 4th April, 1938, from the Plaintiff's father does not grant any such licence, acting upon which the Defendants might have executed a work of permanent character as could be said to be irrevocable u/s 60(b) of the Easements Act, 1882. It has been found by the two Courts below that the fixing of the petrol pump and erection of the shop building were events subsequent to the grant of the tenancy. That finding is based on the oral evidence led by the Plaintiff. According to the Defendant's statement, he had taken the land for the purposes of establishing a petrol-pump and constructing a shop thereon on the understanding that he would not be evicted so long as he continued to pay the rent of Rs. 15/- per month; that he started work on the land some ten days thereafter, and, when he constructed the petrol-tank, the Plaintiff's father used to come to the land and make enquiries from him. He never objected nor prohibited the constructions, and that the petrol tank was erected in the year 1938 and the show room was also constructed at that time. His statement further showed that he got the licence for keeping the petrol pump from the Explosives Department in the year 1939. He had taken the electric connection for the petrol pump and the show room on the 6th May, 1938 and had been running the petrol pump since 11th May, 1938.

19. While it cannot be disputed that the petrol pump and the shop, which are both works of a permanent character have been in existence on the land in suit and could have been erected there except with the permission of the Plaintiff or his father, the first question, which calls for consideration, as observed above, whether the transaction, which the land was taken, was a lease or a licence. A lease is a transfer of property and does give the lessee an interest in the property. Apart from a lease from year to year or for any term exceeding one year, or reserving a yearly rent, "all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession," There was no registered instrument and the letter dated the 4th April, 1938 (Exhibit 4) or its reply dated the 6th April, 1938 (Ext. 1) could not have by themselves brought into existence a lease from month to month. All that the letters show is that there was an agreement for payment of a monthly rent of Rs. 15/- and that the rent would be payable from 1st May, 1938. Although the letter dated the 4th April, 1938 says that the Defendant could vacate whenever he liked on three months' notice, the Plaintiff will have the right to ask the Defendant to vacate on one month's notice, it does say that the rent will not be enhanced and the letter dated the 6th April, 1938 does say that the rent will be paid regularly, and, in default, the Plaintiff will be entitled to ask the Defendant to vacate the land. The terms of the tenancy orally settled between the parties could be culled out from these two letters. The tenancy came into being by the delivery of possession pursuant to the oral agreement between the parties. The letters do not constitute an instrument of lease. They are merely evidence of the terms orally settled between the parties. According to the Defendants' own case, the land was taken for fixing a petrol pump and

erecting a shop. Neither of them were agricultural or manufacturing purposes. Under the circumstances, if a lease came into existence by delivery of possession on the terms agreed to between the parties, the lease must be deemed to have been from month to month, as provided for by Section 106 of the T.P. Act. The period of notice could be varied by contract between the parties, but the Defendant did not accept the correctness of requirement of three months' notice if the Defendant wanted to vacate the land and one month's notice if the Plaintiff wanted him to vacate the land, as contained in the letter dated the 4th April, 1938. The Defendants' own letter dated the 6th April, 1938 does not specify any period of notice. Thus, the period statutorily fixed by Section 106 of the T.P. Act, which is now 30 days in the case of tenancy from month to month, would prevail.

20. Looking to the pleadings of the parties and the aforesaid material on the record, I am of the view that the transaction between the parties, under which the Defendants entered upon the land and continued to hold it was a lease from month to month. That rules out the case of licence, as defined by Section 52 of the Easements Act. The second question, whether the licence was irrevocable, does not arise. Even so, the lease of the land, though from month to month only, was surely a transfer of immovable property within the meaning of Clause (a) of Section 60 of the Easements Act, 1882. The permission to fix the petrol pump and to erect a permanent building for the showroom may be treated to be a licence and even if that was treated to be a licence coupled with the transfer of property, by way of the lease from month to month, that licence could not be revoked only so long as such transfer continued to be in force. The lease being a lease from month to month only it could be determined by notice u/s 106 of the T.P. Act, and, on determination of the lease, the transfer created thereby ceased to be in force and licence became revocable. It is not a case where the Defendant might have independently of the transfer, or the lease of the property in his favour, erected any works of permanent character and incurred expenses on their execution, acting upon permission or licence granted to him by the owner of the land. The constructions were surely erected within the knowledge of the owner and no objection was raised by him, but it has not been made out that any express permission to do so was obtained independently of the monthly tenancy and that the constructions were raised on the basis of that permission and without relying on the tenancy.

21. The result may seem somewhat incongruous, inasmuch as, while a lease amounts to transfer of property and creates an interest in the land and is in that sense a right in property, a licence has in the situation contemplated by Section 60, the effect of conferring almost a permanent right of occupancy. But the intention of the parties seems to have been clear. If a grant of land had been intended by way of a permanent lease, a registered-instrument would surely have been executed. All that was intended "was a lease from month to month though indefinite in point of time.

22. As a last resort, the learned Counsel for the Appellants prayed for some time to vacate the land^ It is not possible to accede to that request so as to modify the decree under appeal in any way, but in view of the fact that the Defendants-Appellants have a petrol pump on the land in suit and are entitled in law to remove the same along with the material of the buildings standing on the land, I am sure the executing Court would, in the circumstances of the case, grant them reasonable time for removing the same.

23. The appeal fails and is dismissed with costs.