

**(1991) 11 KL CK 0017**  
**In the High Court Of Kerala**  
**Case No : C.M.A. No. 107 of 1991**

Thayyil Kanissante Valappil Saraswathi APPELLANT  
Vs  
Bharatha Textiles, Cannur RESPONDENT

**Date of Decision :** 22-11-1991

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 7 Rule 1  
Easements Act, 1882 — Section 60

**Citation :** AIR 1992 Ker 219 : (1992) 2 ILR (Ker) 284

**Hon'ble Judges :** G.H. Guttal, J

**Bench :** Single Bench

**Advocate :** T.A. Ramadasan and A.K. Alex, for the Appellant; M. Ramesh Chander, M. Vijaykumar and M.S. Manikantan, for the Respondent

## **Judgement**

G.H. Guttal, J.—The Appellant, who is the plaintiff in O.S. No. 294/87 in the court of Munsiff, Kannur impugns the validity of the Appellate order dated 5th November, 1990 in A.S. No. 27/89 made by the I Addl. Sub Judge, Thalassery by which he reversed the decree for mandatory injunction made by the trial court and remanded the case for trial of the issue whether the respondent holds an irrevocable license u/s 60(b) of the Easements Act. The facts necessary for disposal of this petition appear in paragraphs 2, 3 and 4 below: The appellant and the respondent are in this judgment referred to as the plaintiff and the defendant respectively.

2. The plaintiff instituted O. S. No. 294/87 in the court of the Munsiff, Kannur. She claimed a decree for a mandatory injunction that the defendant-respondent herein, shall remove the shed used as pump house and the water pipes connecting the well to the defendant's factory. The plaintiff based her title on the assignment dated 1-6-1986 made by Devaki, Nalini, Prasanna and Ashokan who were the admitted owners of the land.

There is a well in the land purchased by the plaintiff. The defendant runs a handloom factory in the name of Bharat Textiles. The plaintiffs predecessors-in-

title permitted the defendant to take water from the well. The defendant constructed a shed (pump house) and also fixed water pipe lines from the well to the factory. According to the plaintiff the defendant executed this work without the consent or sanction of the plaintiff or the plaintiffs predecessors-in-title. It is this shed and the pipe line that the plaintiff wants to be removed from her property.

3. An English translation of the written statement is filed by counsel for the defendant. Its correctness is not disputed by the plaintiffs counsel. The substance of the written statement relevant to this case is this :

i) The defendant has been using water from the well jointly with the plaintiffs predecessors-in-title since 1977. "For this purpose a pumpset has been installed a pump-house constructed and the pipeline was taken along the plaint scheduled property to Bharat Textiles ....." (paragraph 2 of the written statement).

ii) Even when the property was transferred in favour of the plaintiff .....this defendant was using the water drawn by the pumpset and taken along the pipeline to the defendant's Textile establishment (paragraph 2 of the written statement)

iii) "Devaki and other entitlees jointly permitted the defendant to draw water by using pumpset and accordingly it is that the defendant is enjoying the said right". (Paragraph 3 of the written statement).

4. The learned trial judge, considered all \* the evidence and came to the conclusion that the plaintiff has exclusive right to the property including the land on which the pump-house is situated and over which the pipe lines are drawn. He, therefore, granted a mandatory injunction commanding the defendant to remove the pump house and the pipe lines. No issue was framed by the trial court as to whether

(a) the defendant held a license from the owners of the property and

(b) "acting upon the license" the defendant executed the work of erection of the pump house, a permanent structure and fixed water pipelines

and

(c) incurred expenses in such execution.

Consequently, therefore, the question as to whether the defendant was such a licensee within the meaning of Clause (b) of Section 60 of the Easements Act did not arise for consideration. In appeal suit No. 27 of 1989 filed by the defendant the learned Sub-Judge came to the conclusion that all the material required for making out a claim of irrevocable license within the meaning of Section 60(b) of the Easements Act, was in the pleadings. According to the learned Sub-Judge, the trial judge erroneously assumed that the defendant had not raised the plea of irrevocable license. He, therefore, set aside the decree and remanded the suit for disposal after giving to the parties an opportunity to amend the pleadings and

adduce fresh evidence.

5. The question which falls for consideration is whether the written statement discloses the facts necessary to constitute even a broad frame work within which a case of irrevocable license under Clause (b) of Section 60 of the Easements Act can be read. A true understanding of the case pleaded in the written statement, cannot be attempted without bearing in mind the principles of law relevant to a pleading of the case u/s 60(b) of the Act. I have set out these principles in paragraphs 6 to 11 below:

6. Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, a case in which the importance of pleading of the right under Clause (b) of Section 60 of the Easements Act, was considered, laid down certain principles. In a nutshell and in the context of this case, the principles are:

(a) The object of pleading being to inform the opponent of the case he has to meet, the written statement, should inform the plaintiff that the defendant claims to have built the pump house in pursuance of a license.

(b) While, in construing the written statement, hair-splitting technicalities should be avoided, and the substance understood, the written statement must state material facts, such as, grant of license and erection of permanent structure, acting upon such license.

(c) Even if such a case is not specifically set out, if there is an issue about such right, the plaintiff must be taken to have known the case, he has to meet.

(d) If evidence has been let in without an issue or pleading, about irrevocability of license, such evidence should be ignored.

(e) Even if the written statement is deficient, it is enough if the plaintiff knew that he has to meet a case u/s 60(b) of the Easements Act.

7. In Chavalier I.I. Iyyappan and Another Vs. The Dharmodayam Company, as in this case, the plea of license or its irrevocability was neither raised nor adjudicated upon by the trial court. The Supreme Court held that the plea cannot be raised for the first time in appeal.

8. The judgment of the Bombay High Court in Mahadeo Tatu Naik Vs. Ramakant Atmaram and Another, is instructive, for construing pleadings. In that case the question was, whether the plaintiff, who did not raise the case of irrevocability of license u/s 60(b) of the Easements Act in the trial court, should be permitted to raise the point for first time in the appeal.

The plaintiff had admitted that the defendant was his licensee. Yet, having regard to the fact that the case u/s 60(b) of the Act was not raised in the trial court, it was held that the admission that the defendant was a licensee did not imply that the question of irrevocability of license was "before the court". When applied to a case where only the status of licensee is pleaded or admitted this judgment means that, even where the status of the defendant as licensee is admitted, such

admission cannot be stretched to imply that work of permanent character was executed or that it was exercised "acting upon the license". These facts have to be pleaded.

9. In *Raghubir Saran and Others Vs. Param Kirti Saran*, the Allahabad High Court like the Bombay High Court in *Mahadeo Tatu Naik Vs. Ramakant Atmaram and Another*, and the Supreme Court in *Chavalier I.I. Iyyappan and Another Vs. The Dharmodayam Company*, did not allow the case u/s 60(b) of the Easements Act to be urged for the first time in appeal.

10. In *Radhakrishna Hazra Vs. Joykrishna Hazra*, the Calcutta High Court emphasized that it was not enough for a licensee to erect permanent structures, he must prove that such structures were built "acting upon the license". It follows that if there is no pleading in regard to "acting upon the license" Clause (b) of Section 60 of the Act does not come into play.

11. In *Kidar Lall Seal and Another Vs. Hari Lall Seal*, relied upon by the defendant, the Supreme Court held that the claim in the plaint though worded inartistically, in substance, was for a decree under S. 92 of the Transfer of Property Act. Upon construction of the plaint, relief was granted as it did not prejudice the defendant. The judgment does not assist the defendant because, the Supreme Court merely moulded the relief, the pleading and evidence in support of which, existed. It does not follow that a fact not pleaded was urged and held proved.

12. The plaintiff urged that the written statement does not disclose that the defendant intended to claim that he was a licensee and that "acting upon such license" had built a permanent structure of pump house. He was therefore not called upon to meet such a case. The learned Subordinate Judge, Thalassery by his impugned order, has permitted the defendant to make out a new case at the stage of appeal which is not permissible in law. I will consider this submission in the light of the principles of law summarised in paragraphs 6 to 11 above.

13. The question that is required to be considered is whether the written statement brings out the case which the learned Sub-Judge has read into it. The object of pleading is to inform the opponent of the right claimed. Did the defendant, in his written statement inform the plaintiff that he claimed an irrevocable license ? The written statement does not use the words "irrevocable license". Nor does it quote Section 60(b) of the Easements Act. But three facts have been clearly asserted:

(i) Use of water from the well with the permission of the plaintiffs vendors.

(ii) "For this purpose" pumpset was installed and pumphouse constructed.

(iii) continued use of such water even after the plaintiff purchased the property.

The permission to use water from the well which means grant of license to use water from the well has been specifically pleaded. But grant of license by itself

does not mean, that "acting upon such license" some further act was done. Therefore, I will endeavour to analyse and understand the substance of the defendant's pleading without making -- a hairsplitting operation. No doubt the words of Clause (b) of Section 60 of the Easements Act do not find a place in the written statement. Did the written statement inform the plaintiff that (i) the defendant claimed a license to use water from the well and that (ii) "acting upon such license" he erected the permanent structures of the waterpipe and the shed? The actual words used by the draftsman of the written statement may be different from the words used in Clause (b) of Section 60 of the Easements Act. It is enough if the defendant through the written statement conveyed that the installation of the waterpipes and construction of the pumphouse were made in pursuance of the permission granted by the owners. Such a pleading means that the defendant acted and the license erected the permanent structures. If the defendant merely asserted the installation of the pumpset or the construction of the pumphouse, the matter would be different. From the mere fact that pumpset and pumphouse were erected it does not follow that there was any nexus between such installation or erection, and the license to use the water from the well. Without such nexus it cannot be said that the defendant intended to claim the right under Clause (b) of Section 60 of the Easements Act. The element of "acting upon the license" is of the essence of the right under Clause (b) of Section 60 of the Easements Act. Once the defendant pleads such a nexus between the permissive use of water from the well and the installation of the pumpset and execution of the work of building the pumphouse, there is a pleading of the right under Clause (b) of Section 60 of the Easements Act.

14. The three facts pleaded in the written statement have been set out in paragraph 13 above. The defendant did not stop after pleading that Devaky, Nalini and Prasanna permitted her to use water from the well for his Textile factory. He went ahead and stated what he did after the permission to draw water was granted to him. He asserts that "for this purpose" pumpset was installed and pumphouse constructed. The words "for this purpose" mean, "for the purpose of drawing water in accordance with the license granted by the owners." To "act" means to carry out, to perform or to play one's part. "Acting upon such license" means carrying out such license or doing something in pursuance of the license. In the context of this case the words "for this purpose" convey the same meaning as the words "acting upon the license" used in Clause (b) of Section 60 of the Easements Act. The words "for this purpose" indicate that the defendant installed the pumpset and erected the pumphouse, in pursuance of and for the purpose of using the license to use water from the well. These words furnish the connection, the reason, and the object of installing the pumpset and building the pumphouse. Therefore the written statement has adequately set out the material facts necessary to make out a case of irrevocable license under Clause (b) of Section 60 of the Easements Act.

15. Mahadeo Tatu Naik Vs. Ramakant Atmaram and Another, and Radhakrishna Hazra Vs. Joykrishna Hazra, were correctly decided on the facts of those cases.

In the former, the finding was that the case of irrevocability of license was not "before the court". In the latter there was no pleading of "acting upon the license". In both the cases the nexus between the license and the execution of the permanent structure were not pleaded. In this case the written statement brings out all the essentials of the right under Clause (b) of Section 60 of the Easements Act.

16. The question of irrevocability of the license was not urged in the trial court. No issue based on the pleading set out in paragraph 13 above was raised. It was open to the defendant to urge that such an issue be raised. It is not the case of the defendant, that the application, oral or written for raising such an issue was rejected. The question is whether on the authority of Chavalier I.I. Iyyappan and Another Vs. The Dharmodayam Company, it can be held that the subordinate judge was in error in allowing the defendant to urge the irrevocability of the license for the first time in appeal.

17. In Chavalier I.I. Iyyappan and Another Vs. The Dharmodayam Company, no plea of license -- much less its irrevocability -- was raised in the pleading. The pleading related to the validity of a trust created by Iyyappan in respect of the property which did not belong to him. In the grounds of appeal in the High Court, Iyyappan did not plead the existence or irrevocability of license. These facts distinguish the case before me from Chavalier I.I. Iyyappan and Another Vs. The Dharmodayam Company, ). Besides, the Supreme Court, on analysing the case, found that on merits there was no case of irrevocable license. In the present case, there is a clear pleading of irrevocable license. The judgment of the Supreme Court has no application to the facts of this case.

18. For all these reasons, the learned subordinate judge was right in remanding the case. The petition is dismissed with costs.