ALLAHABAD HIGH COURT

Raghubir Saran

Vs.

Param Kirti Saran

Second Appeal No. 1397 of 1951. , against judgment of Addl. Civil J. Moradabad,

(M.C. Desai, C.J. and T. Ramabhadran, J.)

10.03.1951. 12.09.1961

JUDGMENT

M.C. Desai, C.J.

1. This is an appeal by the plaintiffs whose suit for permanent injunction and possession over a plot of land has been dismissed by the appellate court. The second appeal has been referred to a larger Bench by Upadhya, J. because an important question of law is involved in it. The respondent is admittedly the owner of the land and it is admitted that one Bankey Lal, or his predecessor, built on it a tiled thatch. Who exactly constructed it, on what conditions and terms, and when is not known. In execution of a decree obtained against Bankey Lal's widow Smt. Shanti, the thatch together with the right of residence was put to auction in 1929 and purchased by the appellants. The sale certificate granted to them on 23-3-1929 expressly mentions that the site, i.e., the land on which the thatch stood, was not sold, and that right of residence was sold, to them. Though the appellants claimed that the thatch existed till one or two years before the institution of the suit giving rise to this appeal in 1946, the findings of the courts below are that it fell down in 1930, that the land remained vacant ever since then and that the respondent is in possession of it. The appellants started to construct a house on the land in 1946 when they were obstructed by the respondent hence the suit by them. The trial court decreed the suit, but the lower appellate court dismissed it.

2. It is not disputed that whoever constructed the thatch was a licensee; we may assume that Smt. Shanti continued to be a licensee. Unless a license is irrevocable (revocable?) within the meaning of Section 60 of the Easements Act it be revoked expressly or impliedly. What is meant by "revocation of a license may be implied' is that the Court may, in its discretion, infer revocation from certain circumstances though it is not bound to do so. Section 62 lays down the circumstances in which a license "is deemed to be revoked." Evidently when any of the circumstances mentioned in Section 62 exists the court is bound to infer revocation; in other

circumstances it is at its discretion. Sri Ambika Prasad relied upon the circumstance mentioned in Section 62(d) as a circumstance in which the courts below were bound to infer revocation of the license. We do not agree. The property affected by the license in the present case is the land; it was the land in respect of which the license was granted by the respondent or his predecessor in interest. The thatch which was constructed was certainly not a property affected by the license for the simple reason that it did not exist when the license was granted. Because the license was granted for the construction of a thatch it cannot be said that the thatch constructed is the property affected by the license. Here the thatch was destroyed and not the land and, therefore, the circumstance mentioned in Section 62(d) is not proved to exist, and the court was not required to hold that the licenc, stood revoked when the thatch fell down.

3. Another circumstance relied upon by Sri Ambika Prasad is that mentioned in Clause (f). The license was granted, presumably for the purpose of constructing a thatch and the purpose can be said to have been abandoned when the thatch fell down and no attempt was made to rebuild it or to construct another on the site within a reasonable period. The license, therefore can be said to have been revoked when the thatch fell down and it was not reconstructed or another was not built on the land for a period exceeding twelve years. We do not mean to lay down that twelve years period is a reasonable period; what we lay down is that when no attempt was made to rebuild the thatch or to build another during fourteen years, the appellants must be deemed to have abandoned the purpose of the license. After the license was (deemed to be) revoked in this manner, they had no right to construct a house, and if still they attempted to construct a house they were acting as trespassers and the respondent was fully justified in resisting them. A trespasser is not entitled to a decree for possession or injunction as he has no title. The respondent's act of preventing the appellants from constructing a house on the land itself can be treated as an implied revocation of the license. When the thatch constructed under the license fell down and the respondent stopped the appellants from reconstructing it, it means nothing but that he revoked the license. No formality is required for the revocation of a license; it can take place in any form. We were referred to *Sheo Sahai v. Tilok Singh*[1], in which Niamat Ullah, J. observed as follows:

> "The mere fact that a riaya's house completely falls down does no justify the proprietor to take possession of the site, unless the circumstances afford a reasonable ground for believing that the riaya had abandoned all intention to rebuild it."

Whether any intention to rebuild the house exists or not, is a question of fact and one court cannot lay down how another court should decide it. In this case there is no question whether the appellants abandoned the intention to rebuild the thatch or not. Whether they abandoned the purpose of the license or not was undoubtedly a question that arose, but it is distinct from the question whether they abandoned the intention to rebuild the thatch. An intention to rebuild it at some time in distant future may not be carrying out the purpose of the license. With great respect to the learned Judge we do not think that the question is relevant at all. The learned Judge has not

discussed the law regarding revocation of licenses and has not referred to the relevant provisions of the Easements Act. The case seems to have been decided on consideration of justice, equity and good conscience and not of any statutory law.

[1]1936 All LJ 569: AIR 1936 All 553

4. Sri Hari Swarup contended vehemently that the license was irrevocable. A license is irrevocable under Section 60 when each of the following three conditions is fulfilled:

> (1) the licensee executed a work of a permanent character; (2) he did so acting upon the license; and (3) he incurred expenses in the execution. The construction here was only a thatch with a tiled roof. It was auctioned for Rs. 55/- together with wooden frames and shutters. Obviously it must have been constructed of mud. Still it could be a work of a permanent character. In *Nasir-ul-zaman Khan v. Azim Ullah*[2], followed by Neava J. in *Gauri Shanker v. Mithai*[3], and by Kanhaiya Lal. J. in *Amyad Khan v. Shafiuddin Khan*[4], it was held that a kachcha thatched house may be "a work of a permanent character." We may therefore, agree with Sri Hari Swarup that the thatch was of a permanent character even though the evidence is that it was used only for tethering cattle and storing fodder. The other two conditions, however, are not proved to be fulfilled. There is apparently no evidence to prove that the thatch was constructed by the licensee acting upon the license and that he incurred expenses in the execution. Some expenses might have been incurred in purchasing the tiles at least, but it cannot be assumed that they were incurred by the licensee and that the tiles were not presented to him by the predecessor of the respondent. Whether the licensee acted upon the license by constructing the thatch or not and whether he incurred expenses in the execution or not, are essentially questions of fact, the onus lay upon the appellants to prove them, because he relied upon the provisions of Section 60 for contending that the license was irrevocable. When he adduced no evidence whatever it must be held that the licensee was not proved to have acted upon the license and to have incurred expenses in the execution. It seems that the question about the irrevocability of the license was not raised before the trial court and no issue was struck about it; that explains why no evidence was produced by either party about if. No question of fact can be allowed to be raised in second appeal. When two of the conditions required for the irrevocability are not fulfilled the license granted by the predecessor-in-interest of the plaintiff cannot be said to be irrevocable.

5. Sri Hari Swarup further contended that the license which was irrevocable in the initial stage did not become revocable when the thatch fell down. It is not necessary for us to go into that question because we have found the license not to be irrevocable.

6. The appellans were not the original licensees they only purchased the thatch together with the right of residence in it in auction. Sri Ambika Prasad contended that the license is not transferable. It is not an interest in the property and the permission granted by the licensor to the license is personal. If a license is not an interest in the property then there is no question of its

being transferable. Only one kind of license is transferable and that is mentioned in Section 56; every other license is untransferable. Smt. Shanti could not transfer her licensee rights, they could not be sold in the

[2] ILR 28 All 741 [4] AIR 1925 All 203
[3] AIR 1924 All 750

execution of the decree passed against her. Even if the auction purchasers professed to purchase them and obtained a sale certificate in respect of them they cannot be said to become licensees when the law does not permit such a transfer. Sri Hari Swarup relied upon the case of Amjad Khan AIR 1925 Allahabad 203 (supra) but the question was not discussed three at all and was not decided. It is true that the license that was held to be irrevocable in that case was in the hands of the heirs of the original licensee, but when the question whether the license was heritable or not was not even discussed, the decision that the license was irrevocable cannot possibly amount to a decision that the license was heritable. Moreover, heritability is not the same thing as transferability and a right may be heritable but not transferable. Therefore, AIR 1925 Allahabad 203 is not an authority for the proposition that a licensee's right is transferable.

7. The only right that the appellants acquired through the auction purchase was the proprietary right over the thatch and the right of residence therein. The thatch fell down and, therefore, there arises no question of the appellants exercising their right of residence now. They had a right of residence in the thatch purcased by them and not a general right of residence or a right of residence in another thatch or house or the right to construct another house on the site. The license was not transferred to them or purchased by them. No interest in the site was acquired by them at all. They, therefore, had no right to construct another house on the site. Whatever right they acquired in the auction purchase vanished when the thatch fell down and they removed the malba. They certainly cannot have a better right than was possessed by the original licensee. If the original license was for construction of a tiled thatch supported by mud walls, they cannot construct a pucca house instead. The construction of a pucca house would be an unlicensed act and could be resisted by the respondent.

8. The provisions of the Municipalities Act were extended to a part of the abadi of the village in which the land in dispute is situated. It was argued by Sri Hari Swarup that owing to the extension of the provisions of the Municipalities Act the respondent lost all his rights in the land and that the customary law contained in the wajibularz became inapplicable. There is no substance in this claim. The Municipalities Act does not contain any provision affecting the rights of the proprietors of the land to which its provisions are extended. Whatever were the rights and the liabilities of the proprietors of the land and their tenants and licensees they remain unaffected by the extension of the provisions of the Act to it. The object of the Municipalities Act is other than that of affecting proprietary rights in the land. Unless it contains a provision affecting their proprietary rights, we do not see how its extension to the land can have any effect on them. There is certainly no warrant for saying that the respondent lost his property in the land

when the provisions of the Municipalities Act were extended to it. Certainly the appellants did not become the proprietors of the land in the absence of any provision in the Municipalities Act transferring the title from the respondent to them. The respondent does not rely upon any customary law in support of his right to prevent the appellants from making any construction on the land now. We have found that he was fully justified under the statutory law in resisting the appellants. It is unnecessary to consider whether the customary law contained in the wajibularz still remains applicable after the extension of the provisions of the Municipalities Act to the land, but we may say that if the wajibularz by its own terms remains applicable to it we do not see any reason why the extension of the provisions of the Municipalities Act should make any difference. If the wajibularz as it stands, is still applicable to the land it must be applied when the Municipalities Act contains no provision making it inapplicable. If it becomes inapplicable, it would be only if according to its own terms it is not applicable in the changed circumstances. In *Hafiz Mohd. Ahmad Saeed Khan v. Shiam Lal*[5], a Full Bench of this Court held that the extension of the provisions of the Town Area Act affects the rights of the proprietors of the land only to the extent it was necessary under the provisions of the Act and otherwise their proprietary rights remain untouched, and that the wajibularz does not necessarily lose its force and cease to govern the rights of the parties in the area coming within the limits of the Town Area. The extension of the provisions of the Municipalities Act to an area stands on the same footing as the extension of the provisions of the Town Area Act. In *Amba Sahai v. Gopeshwar Babu Mehra*[6], it was observed by Agarwala, J. (Malik C.J. concurring) that if on a certain date certain land becomes part of a non-agricultural village or a town, the general presumption of customs that applies to an agricultural village and is recorded in the wajibularz will not be deemed to apply to it. The learned Judge has not referred to the Full Bench case mentioned above. Further it may be that the wajibularz in this case was on its own terms applicable to the village so long as it remained agricultural and was not included within the limits of a municipality or a town area.

9. Lastly, whatever may be the position in respect of the wajibularz there is no doubt that the statutory law contained in the Easements Act is not affected by the extension of the provisions of the Municipalities Act to the land in dispute.

10. We hold that the appellants have no right left in the land in dispute. They were not in possession for more than twelve years and they had no title also to the land. Their suit, was therefore rightly dismissed. We confirm the decree of the lower appellate court and dismiss the second appeal with costs.
Appeal dismissed.

[5]1944 All LJR 397: AIR 1944 All 2736
[6] AIR 1953 All 607