

PATNA HIGH COURT

Deep Chand

Vs

Kasturi Devi

A.F.A.D. No. 603 of 1970

(Madan Mohan Prasad, J.)

16.05.1974

JUDGEMENT

Madan Mohan Prasad, J.

1. This second appeal arises out of a suit for a declaration of a right of easement over certain lands and for a permanent injunction restraining the defendants from interfering with the exercise of the said right.

2. The plaintiff's case, shortly stated, is as follows. The first plaintiff had purchased in the year 1944 the lands of plot No. 622 of mauza Daulatpur Abdul Chak which is situated south of a road going from Jehanabad to Arwal. In between the road and the aforesaid plot there are the Chant lands of the road and plot No. 622 which was purchased by the defendants in the year 1959 from one Hari Prasad Khetan, a relation of the first plaintiff's husband Murlidhar Khetan. The said plaintiff's husband Murlidhar had founded a high school which was situated at another place in the town of Jehanabad. The school could not get recognition owing to lack of accommodation. The first plaintiff, therefore, made her plot available for the construction of a building for the school. The construction was taken up and it had proceeded to chest height. In order to facilitate the construction of the school Hari Prasad Khetan had granted permission for taking of bricks and other materials by men and bullock-carts from the road to the site in plot No. 622 through his own plot 624. The width of such a passage was 18 feet east to west. The house of defendants 4 to 6 is situated on the eastern side of the said passage while defendants 1 to 3 are the purchasers of the land in the western side of the said Rasta. It is said that while the construction of the school building was in progress the defendants began to raise objection to the use of the aforesaid passage and they also wanted to construct a wall in order to close the passage. As a result there was a proceeding under Section 144 of the Criminal Procedure Code. It is further said that there is no passage from Arwal Road leading to the school and hence the plaintiffs have acquired the right of easement of necessity over the disputed lands of plot 624 and that the defendants have no right to interfere in the exercise of the aforesaid right. Hence the suit.

3. Defendant No. 2 who contested the suit alleged that he and the third defendant had purchased 9 decimals of land of plot No. 624. According to them, the construction in plot 622 had gone

upto the waist height only but was stopped by the plaintiffs themselves for reasons best known to them. They also said that the plot of the plaintiffs can be reached through ridges of other fields and through a Pind connecting the road to the plot. It has also been denied that Hari Prasad had allowed any right of passage or that the plaintiffs had ever exercised any right of passage.

4. The trial court found that the right of passage had been allowed through the disputed land for going to the school from Arwal Road and that the passages through ridges or the pind could not be called passages and in any case were not convenient passages. But it held that there was no easement of necessity as the two tenements belonged to two different persons. He, however, held that the right of the plaintiffs was that of a licensee and Hari Prasad having permitted the use of the land as a passage in view of Section 60 (6) of the Indian Easements Act, 1882 (hereinafter called 'the Act') the defendants could not revoke the license. In this view of the matter he decreed the plaintiff's suit. The lower appellate Court also concurred with the findings of the trial Court. Hence this appeal.

5. Mr. J. C. Sinha appearing for the appellant contended firstly that there could not be any easement of necessity in a case like the present one and that the aforesaid claim having failed the suit should have been dismissed. On behalf of the respondents, however, it was urged that the courts below did not decree the suit on the ground of there being a right of easement but on the ground that the license granted to the plaintiffs could not be revoked. Mr. J. C. Sinha in reply contended that the plaintiffs had only built walls which were chest high and not any permanent structure by way of a building, and the license had thus not become irrevocable. Further he urged that after the transfer of the land to the defendants the license had come to an end.

6. It appears that both the courts have found that the plaintiffs have failed to prove any right of easement whatsoever. It is not necessary therefore to deal with the arguments of Mr. Sinha in this connection nor to discuss the authorities relied upon by him. The only question thus which remains to be considered is whether the suit should have been dismissed or it was open to the defendants to show that they had claimed the said right as licensees and could successfully resist the suit on that ground.

7. On behalf of the respondents it has been pointed out that a petition under Order 6, Rule 17 of the Civil Procedure Code for amendment of the plaint had been filed before the trial Court after the hearing of arguments was over, on the 20th of July, 1966. By the aforesaid petition the plaintiffs had prayed for an amendment of the plaint by claiming that if no right of easement is found, the plaintiffs had acquired a license on the basis of which they had built a permanent structure on their own land and the suit should be decreed on that account. It appears from the order passed by the Munsif that he rejected the petition on the ground of its late filing but he said that it would be considered at the time of judgment as to whether the plaintiffs were entitled to this relief upon the basis of the evidence and it did not require an amendment of the plaint for that purpose. As a result thereof the trial court considered the question of declaration of the right of the defendants (plaintiffs ?) as licensees and so did the lower appellate court. It may be stated again at this juncture that both the courts have found as a fact that Hari Prasad Khetan, the vendor of the plaintiffs, had permitted the land in dispute as a Rasta for the purpose of carrying materials to the construction site. In the present case, therefore, the only question is as to whether this license could be revoked or stood revoked.

8. I find, however, that upon the plaintiff's case itself all that the vendor of the defendants had done was to allow his land to be used as a passage for the purpose of carrying bricks and other materials to the construction site. It is not the case of the plaintiffs that the defendants' vendor had permitted them to use the land as a passage even after the building of the school had been completed. In other words, it is not their case as made out in the plaint, that the permission was given to the effect that the school would be allowed to use the aforesaid passage for all times to come. This case was not made out even in the petition for amendment of the plaint by which the case of license was introduced. Thus the term of the license was limited to the use of the passage only for the specified purpose of carrying bricks and materials for the construction and did not grant a perpetual license. It will appear from Section 62 (f) of the Act that "where the license is granted for a special purpose and the purpose is attained, the license is deemed to be revoked. The plaintiffs thus cannot claim that the license could not be revoked. In fact, it must be deemed to have been revoked, with the termination of the work of construction.

9. It has been urged by Mr. J. C. Sinha that the license was revoked because of the transfer made to the present defendants. The relevant provision is contained in Section 59 of the Act which is as follows :-

"When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license."

It must, however, be mentioned that the license does not bind the transferee only if the license has not become irrevocable (See *Mathuri v. Bhola Nath*¹, and *Faqiray Mian v. Baijnath*²).

10. It, therefore, remains to be considered whether the license had become irrevocable. Upon the findings of the courts below these defendants had taken objection to the construction of the school building soon after their purchase and when the walls there of had gone upto chest height. It has, therefore, to be seen whether they could revoke the license in view of Section 60 of the Act which is as follows :

"A license 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 license, has executed a work of a permanent character and incurred expenses in the execution."

In view of the aforesaid provisions two questions arise, viz., whether the licensee had acted upon the license and whether the work executed was of a permanent character.

11. Regarding the question whether the building of walls is a work of a permanent character, there can be little doubt. The plaintiffs were putting up a building and obviously the walls of a building are parts of a permanent structure and work of permanent character. There can also be little doubt that the plaintiffs had incurred expenses in the execution of the aforesaid work. Mr. J. C. Sinha in this respect contended that there is no finding that the building had been completed before the sale in 1959 and thus there was no permanent structure on the land at the time of the sale of the disputed land to the defendants. If the erection of a building as a whole had been required by Section 60, there would have been force in this argument. Section 60 (b) of the Act,

however, requires merely the execution "of a work of permanent character". As stated earlier, there can be little doubt that walls are works of a permanent character. It is thus immaterial as to whether the building had been completed before the sale to the defendants. In several cases the aforesaid provision of law has come up for consideration and it has been held that a kacha thatched house is a work of permanent character (*Nasir ul Zaman Khan v. Azim Ullah*³), so is a wall erected by a licensee (*The Land Mortgage Bank of India v. Moti*⁴) and so also the erection of a compound wall (*Jagat Singh v. District Board, Amritsar*⁵). In the case of AIR 1931 Oudh 364 (supra) it was held that because a construction is incomplete, it could not be said not to be a work of permanent character.

12. The real question of law which, though not raised by the Counsel for the appellant, is whether the permanent structure had been built by the plaintiffs acting upon the license. It must be stated that in the present case no structure had been built on the land of the licensor, the licensee had built work of a permanent character on their own lands. The question thus arises whether a person can be said to be "acting upon the license" by executing a work of a permanent character on his own land or incurring expenses in its execution. The question came up for consideration by the Judicial Committee of the Privy Council in the case of the *Gujarat Ginning and Mfg. Co. Ltd. v. Motilal Hirabhai Spg. and Mfg. Co. Ltd*⁶. In that case a question similar to the one in the present case had arisen. Construction of railway lines had been made on the company's own lands and was said to be work of permanent character. Construing the words "acting upon the license" in Section 60 (b) of the Act their Lordships said :-

"..... Those words must mean (see Section 52) acting upon a right granted to do upon the land of the grantor something which would be unlawful in the absence of such right. A man does not 'act upon a license' if he does works and incurs expenses upon his own property. That he can do without any one's license. It was suggested that the subsection might be construed to include an acting on the promise or the statements by an alleged licensor from which the expectation of a license could reasonably be inferred. It may be observed that such words would require some explanation and qualification before they could properly find their way into a statute. Works done by the licensee on his own land may be done without the knowledge of the licensor, and it would be impossible to hold that the alleged licensor's land was bound in perpetuity (subject to Section 62) as the result of some works done by the alleged

licensee on his own property of which the former was unaware. Moreover the section is not dealing with the effect of an express contract between the parties, but with the consequences to follow from a certain conduct on the part of the licensee which if done on the land of the licensor might well give the licensee rights against him. Their Lordships see no reason in these circumstances for departing from what appears, to them to be the natural meaning of the words. The result is that Section 60 (b) does not avail the respondents because, there was no acting upon the license in the execution of works by them and if the respondents are forced to make their claim on the footing of a license within the meaning of Section 52 of the Indian Easements Act, license was revocable under the first words in Section 62 and it has been in fact revoked."

It is thus clear that a person would be acting upon the license only when he is executing a work of a permanent character upon the land of the licensor because the license related to the use of that land and not to any other. In the present case the plaintiffs had constructed work of a permanent character on their own lands and not on the lands of the defendants. They cannot thus have the advantage of Section 60 (b) of the Act and the license thus could be revoked.

13. Mr. Prem Lal appearing for the respondents had relied on some decisions, which I will notice presently, in support of his argument that in view of the construction of a work of a permanent nature the license had become irrevocable. The first decision which is cited is in the case of *Guman Singh v. Pyarelal*⁷, In that case the plaintiff's father, a Malguzar, had permitted the defendant to build temple on a plot in the plaintiff's village. The case has thus no relevance. The next decision is in the case of AIR 1931 Oudh 364 (supra). In that case also a house had been constructed on the land of the owners of the Mahal and the defendant claimed to have got a permission to construct the house. The other decision cited by him is in the case of *Rahimbax v. Samsu*⁸, In that case also the dispute was in respect of a land which had been given to the plaintiff's father for residence during his lifetime as a licensee. The plaintiff's father had constructed two rooms thereon for his residence. The defendants alleged that the license granted to the plaintiff's father had become irrevocable. It will thus appear that the question related to the same land and not to another land. These decisions are thus of no assistance in view of what I have said above.

14. In view of the discussions aforesaid, it must be held that the license acquired by the plaintiffs stood revoked, the license not having become irrevocable. In that view of the matter the courts below have erred in decreeing the suit of the plaintiffs. The Judgment and decree passed by the courts below are, therefore, set aside the appeal is allowed and the suit is dismissed with costs throughout including that of this appeal.

Appeal allowed.

Cases Referred.

¹1934 All LJ 698

²AIR 1931 Oudh 364

³(1906) : ILR 28 All 741

⁴(1886) ILR 8 All 69

⁵AIR 1940 Lah 18

⁶38 Bom LR 353

⁷AIR 1929 Nag 141

⁸AIR 1951 Nag 215