

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.1201 of 1998

Mst. Aasmati Halba (now dead), through LRs

(Plaintiff)

1. Kumari Basanti Naag, aged about 40 years, daughter of late Luduram, R/o Masjidpara, Geedam, Tahsil and District Dantewada (M.P.) (now C.G.)
2. Subhash Chandra Naag, aged about 38 years, S/o late Luduram, R/o Masjidpara, Geedam, Tahsil and District Dantewada (M.P.) (now C.G.)

---- Appellants

Versus

1. Mst. Butki Bai (dead),
2. Suraj Bhan Singh, aged about 25 years, S/o Indra Bhan Singh, R/o Majidpara in Village Geedam, Tahsil Dantewada, District Bastar (M.P.) (now C.G.)
3. Kumari Soo-loo, aged about 19 years, daughter of Indra Bhan Singh, Care of Mst. Butki Bai, R/o Majidpara in Village Geedam, Tahsil Dantewada, District Bastar (M.P.) (now C.G.)
4. Kumari Shaa-ma, aged about 22 years, daughter of Indra Bhan Singh, Care of Mst Butki Bai, R/o Masjid-para in Village Geedam, Tahsil Dantewada, District Bastar (M.P.) (now C.G.)
5. The State of Madhya Pradesh (now the State of Chhattisgarh), Bhopal City (now Raipur City), Tahsil and District Bhopal (now Raipur) (M.P.) (now C.G.), Care of the Collector, Bastar District, Jagdalpur, Town, Tahsil and District Bastar (M.P.) (now C.G.)

(Defendants)

---- Respondents

For Appellants: Mr. R.N. Jha, Advocate.

For Respondents No.2, 3 and 4: -

Mr. Kshitij Sharma, Advocate.

For Respondent No.5 / State : -

Mr. Avinash Singh, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

05/09/2018

1. The substantial questions of law involved, formulated and to be answered in this plaintiff's second appeal are as under: -

1. Whether the finding of the 1st appellate court while reversing the well reasoned order passed by the trial court to the extent of granting a right in favour of the defendants for 6 decimals of land is proper, legal and justified?

2. Whether the finding of the 1st appellate court in creating a right in favour of the appellants by granting benefit under Easement Act to the defendants is proper, legal and justified?

2. With the consent of parties and in light of the submissions made, the substantial questions are re-framed as under: -

Whether the first appellate Court is justified in holding that the license of the defendants has become irrevocable under Section 60(b) of the Indian Easements Act, 1882?

(Parties hereinafter will be referred as per their status shown in the plaint before the trial Court.)

3. Original plaintiff Parvati, widow of Udkudi Panara, who died during the pendency of suit, had filed a suit for declaration of her title and permanent injunction stating inter alia that she was the duly recorded bhoo-dhari of 0.17 acre of land bearing Khasra No.664 situate in Village Geedam, Tahsil Dantewada, District Bastar. It was further pleaded that on a small portion of the land, she had constructed a residential house and rest of the land was lying vacant and in the year 1968, husband of defendant No.1 – Indrabhan Singh came to Village Geedam on being transferred as Teacher along with his wife defendant No.1 and his son defendant No.2 and hired a house adjacent to the plaintiff's house, and on the request of Indrabhan Singh, he was allowed to raise a temporary

mud-made structure for his residence over a small portion of the plaintiff's open land on the specific condition that as and when he will be transferred from Geedam, he would pull down the so raised mud-made temporary superstructure and remove the same at his own costs and leave the land vacant in its original condition which was agreed and consequently, the temporary structure was allowed to be constructed on 0.06 decimal of her land. It is the case of the plaintiff that it was a revocable license in favour of Indrabhan Singh, but before he could be transferred, he died in the year 1978 and according to the plaintiff, temporary and irrevocable license granted to him by the original plaintiff stood revoked by operation of law as provided in clause (f) of Section 62 of the Indian Easements Act, 1882 (for short, 'the Act of 1882'). It is the further case of the plaintiff that she asked defendants No.1 & 2 to vacate her land and give possession to her which was refused leading to filing of the instant suit for injunction and recovery of possession.

4. The defendants filed their written statement as well as counter claim before the trial Court stating inter alia that they are in possession of the suit land by constructing a house and as such they are factually in possession of the entire suit land 0.17 acre and there is hostile intention to possess the suit land and as such, they have perfected their title by way of adverse possession. Counterclaim was also filed that the defendants have perfected their title on the entire 0.17 acre of land. Written statement and counterclaim was filed on 12-11-1990. By amending written statement on 14-12-1990, the defendants have specifically denied

that they are in possession of suit land in the capacity of licensees, rather they insisted that they have perfected their title by adverse possession. However, the trial Court granted them to amend the written statement on 26-7-1995 permitting them to take the plea of irrevocable license based on Section 60(b) of the Act of 1882.

5. The trial Court framed as many as twenty issues including the plea of adverse possession and irrevocable license and ultimately, by its judgment & decree dismissed the suit finding that the plaintiff is title holder of suit land and the defendants have not perfected their title by adverse possession and there is no irrevocable license granted in favour of the defendants, rather it is revocable license till Indrabhan Singh, husband of defendant No.1, is transferred from Geedam. Being dissatisfied with the judgment & decree of the trial Court, the defendants have preferred first appeal before the first appellate Court and the said Court only dealt with the issue of adverse possession and the issue of irrevocable license and held that the issue of adverse possession has rightly been held not established by the defendants, but, further, dismissed the suit holding that the license granted to the defendants was irrevocable in light of Section 60(b) of the Act of 1882. Questioning legality and validity of the judgment & decree of the first appellate Court, the plaintiffs herein have preferred this second appeal in which substantial question of law formulated has been set-out in the opening paragraph of this judgment.
6. Mr. R.N. Jha, learned counsel appearing for the appellants/plaintiffs, would submit that the first appellate Court is absolutely unjustified in

reversing the decree granted by the trial Court based on Section 60(b) of the Act of 1882. He would further submit that there is no plea that there was license in favour of the defendants and the licensee executed the work of permanent character and he did so acting upon the license and incurred expenses on doing so, and the onus of proving this fact is always on the defendants who have pleaded irrevocable license. He would finally submit that despite opportunity of hearing have been granted after framing an additional issue to lead evidence in support the pleading raised belatedly, the defendants did not adduce any evidence on the said amended pleadings and therefore, the judgment & decree passed by the first appellate Court dismissing the suit of the plaintiff deserves to be set aside and the suit be decreed restoring the judgment & decree of the trial Court.

7. Mr. Kshitij Sharma, learned counsel appearing for respondents No.2, 3 and 4/defendants, while opposing the submissions, would vehemently submit that it is admitted position on record that the defendants are licensees and they have executed a work of permanent character over the suit land by incurring expenses in construction to the extent of ₹ 30,000/- and therefore the first appellate Court is absolutely justified in setting aside the decree of the trial Court by dismissing the suit.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
9. It is not in dispute and even the trial Court as well as the first

appellate Court have clearly held that the plaintiff is title holder of the entire land i.e. 0.17 acre of land. The trial Court has also held that the original plaintiff had given the suit land 0.06 decimal to defendant No.1's husband for construction of house with a condition that he will pull down the construction and vacate the suit premises on his transfer. Finding on the said issue No.1 has not been even disturbed by the first appellate Court.

10. The question for consideration would be, whether the respondents / defendants have pleaded and proved that there is license in their favour which has become irrevocable in view of the provisions contained in Section 60(b) of the Act of 1882?

11. Section 60 of the Act of 1882 provides as under: -

“60. License when revocable.—A license may be revoked by the grantor, unless—

(a) xxx xxx xxx

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.”

12. Admittedly, clause (a) of Section 60 of the Act of 1882 is not applicable to the present case. Under clause (b) of Section 60, license is revocable only if three conditions are fulfilled, namely, (i) the licensee executed work of a permanent character, (ii) he did so acting upon the license, and (iii) he incurred expenses in doing so. The onus of proving these facts is always on the defendant who pleads irrevocable license.

13. Section 60(b) of the Act of 1882 is based on the principle of estoppel by acquiescence. The rule of irrevocability is in fact,

based on the principle of an implied grant arising from the conduct of licensor which estopped him from claiming his right of revocation.

14. In the matter of Ram Sarup Gupta (Dead) by LRs v. Bishun Narain Inter College and others¹, the Supreme Court has emphasized the need to raise necessary pleading that license was irrevocable as contemplated by Section 60(b) of the Act of 1882 holding that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It was also held that no party should be permitted to travel beyond its pleading and all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further noted that the pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Their Lordships further referring to the judgments of the High Courts held that a license is irrevocable under Section 60(b) of the Act of 1882 only if three conditions are fulfilled, namely, (i) the licensee executed work of a permanent character, (ii) he did so acting upon the license, and (iii) he incurred expenses in doing so. The onus of proving these facts lie upon the licensee and in the absence of any evidence on these questions the license could not be irrevocable under Section 60(b) of the Act of 1882.

15. Similarly, in the matter of Panchugopal Barua and others v. Umesh Chandra Goswami and others², Their Lordships of the Supreme Court have laid down the principles contained in Section 60(b) of the Act of 1882 by observing that before a license could be

1 (1987) 2 SCC 555

2 (1997) 4 SCC 713

held irrevocable, the following three conditions must be satisfied:-

- (1) that the occupier must be a licensee;
- (2) that he should have acted upon the license;
- (3) and executed a work of a permanent character and incurred expenses for the execution of the work.

16. Likewise, the Kerala High Court in the matter of Annathu Sarojini and others v. Muhammed Sainulabdeen and others³ relying upon the decision rendered by the Supreme Court in Ram Sarup Gupta (supra) held that in order to attract Section 60(b) of the Act of 1882, one of the essential conditions is that the licensee should execute a work of a permanent character and that he has to do it 'acting upon the license'. If the license specifically disallowed the licensee to execute a work of a permanent character and in contravention of such a stipulation, if the licensee has executed a work of a permanent character, a licensee cannot claim protection under Section 60(b) of the Act of 1882.

17. Thus, from the principles of law flowing from the above-stated judgment, it is quite vivid and well settled that a license is irrevocable only if three conditions are satisfied namely, firstly, the licensee executed work of a permanent character; secondly, he did so acting upon the license; and thirdly, he incurred expenses in doing so. The onus of pleading and proving these facts is always upon the defendant who pleads irrevocable license.

18. Reverting to the facts of the present case, it is the case of the plaintiff that she allowed the husband of defendant No.1 to raise a

³ AIR 1990 Kerala 248

construction of temporary nature for his residence on 0.06 decimal of her land till he is transferred to other place as Teacher, but since before he could be transferred, he died at Geedam itself, therefore, the license came to an end and despite request, defendants No.1 to 4 did not vacate the suit premises. The trial Court has recorded a finding to this effect as issue No.1 answering in favour of the plaintiff and against the defendants, but after grant of decree first appeal was preferred by the defendants, however, the said finding was not challenged successfully and the said finding has become final. Now, coming to the question as to whether the defendants have pleaded and established the three pre-conditions for license to be irrevocable as pleaded and established, the defendants filed written statement along with their counterclaim on 12-11-1990 in which apart from making their defence, they have claimed in the counterclaim that they have perfected their title over the entire land i.e. 0.17 acre of the plaintiff and have perfected their title by adverse possession. Thereafter, by amendment dated 14-12-1990, the defendants took a specific defence that they are not the licensees over the suit land. The amendment was incorporated in para 2 of the written statement. Thereafter, both the parties adduced their evidence and closed their evidence, thereafter, only on 26-7-1995, the defendants further amended the written statement / counterclaim in shape of para 13 of their written statement / counter claim to the effect that if the court reaches to the conclusion that the defendants are staying in the suit premises 6 decimals and constructed a house which was constructed 30

years back and they have incurred ₹ 30,000/-, therefore, that is a construction of permanent character which is protected under Section 60(b) of the Act of 1882.

19. A careful perusal of the aforesaid pleading would show that the pre-conditions mentioned in Section 60(b) of the Act of 1882 are even not pleaded by the defendants. Firstly, the defendants did not claim to be licensees of the plaintiff in para 13 of the written statement and simply said that the construction has been made and if the Court reaches to the conclusion that they are residing with the leave of the plaintiff, then it is constructed 30 years back and they have incurred ₹ 30,000/-. Again, the plea that the defendants did so acting upon the license is absolutely lacking. The words 'acting upon the license' by executing a work of a permanent character are necessary and it has to be pleaded that a person would be acting upon the license only when he is executing a work of a permanent character upon the land of licensor. As such, the first two questions are absolutely and blissfully missing in the plea based on Section 60(b) of the Act of 1882. Even otherwise, the question of stating that the defendants did so acting upon the license and executed a work of a permanent character does not arise because, the defendants did not even admit themselves to be licensees of the plaintiff, therefore, the defendants did not say so while averring the pleading in paragraph 13 of the written statement. The last ingredient is that they incurred expenses on doing so. But again what they have said is, while making construction they have incurred ₹ 30,000/-. Incurring of expenses cannot be said to be

'acting upon the license' and it cannot be held that the defendants had while executing the work of permanent character, incurred expenses on doing so. Therefore, in the pleadings, all the three conditions which are necessary for establishing the benefit of Section 60(b) of the Act of 1882, are fully missing.

20. Assuming the pleading as it has to be under Section 60(b) of the Act of 1882, coming back to the evidence adduced by the defendants, it would appear that the plea with regard to irrevocable license based on Section 60 of the Act of 1882 came to be introduced in the written statement on 26-7-1995 pursuant to which an additional issue was framed as issue No.20 and the trial Court on 5-8-1995 again fixed the case for evidence of the defendants holding that additional issue has been framed and fixed the case for evidence on 13-9-1995 on the said additional issue. The defendants did not adduce any evidence and conveniently declared their evidence closed on 13-9-1995, as such, on the amended pleading, based on Section 60(b) of the Act of 1882, the defendants did not adduce any evidence for the reasons best known to them. Thus, on the amended pleading based on Section 60 of the Act of 1882, no evidence was led by the defendants. But the first appellate Court granted decree in favour of the defendants holding that house was constructed by the defendants which was permanent in character and therefore the benefit of Section 60(b) of the Act of 1882 is available to the defendants. In my considered opinion, unless the three pre-conditions are satisfied as mentioned herein-above, the benefit of Section 60(b) of the Act of 1882 cannot

be granted to the defendants. According to the defendants themselves, they have constructed the house in question long ago and they are living therein. Even if it is presumed that the defendants by making construction of the house in question have executed the work of permanent character, still it will be necessary for them to prove that they did so acting upon the license. As has been held herein-above, the defendants in their written statement never accepted, rather expressly denied that they are licensees of the plaintiff, according to them they have become owners by adverse possession as such, they have constructed house. It means, they have constructed house or executed the work of permanent character, if any, under the belief or presumption that they are owners of the suit land 6 decimals. They did not execute the work acting upon the license which necessarily requires not only license but presumption and consent of the licensor to execute such work of permanent character. In absence of such plea and evidence, it cannot be held that the license granted to the defendants has become irrevocable enumerated under Section 60(b) of the Act of 1882.

21. In view of the legal position discussed herein-above, I am unable to sustain the judgment & decree of the first appellate Court holding that the license was irrevocable in view of the provisions contained in Section 60(b) of the Act of 1882 and answer the substantial question of law in favour of the plaintiff and against the defendants.
22. As a fallout and consequence of the aforesaid discussion, judgment & decree passed by the first appellate Court is hereby set aside

and that of the trial Court is restored thereby affirming the decree passed by the trial Court.

23. The second appeal is allowed leaving the parties to bear their own cost(s).

24. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma