

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.574 OF 1996**

Ratnagiri Zilla Khadi Sangh. .. Applicant

Versus

Govindrao Korgaonkar Dharmadaya .. Respondent
Sansta through Anil Prabhakarpant
Koregaonkar & Ors.

...

Mr. Sachin Shetye for the applicant.
Mr. N.V. Bandiwadekar for the respondent.

**CORAM: BHARATI DANGRE, J.
DATED : 26th APRIL, 2022**

JUDGMENT:-

1. The second appeal came to be admitted on 30/04/1997, on the following substantial question of law:-

“(i) If the transaction is a licence, then what is the nature of right conferred upon the licensee under section 60(b) of the Easements Act, 1952?

(ii) Whether the protection of Section 60(b) of the Easement Act is available in the case of oral licence and the necessary facts can be gathered from the purpose for which the licence is granted coupled with the conduct of the parties and the circumstances surrounding it?

(iii) Whether it is permissible for the court to look into

the documents furnished and returns filed by the licensee-public trust with the charity Commissioner for the purposes of ascertaining the nature of work executed by it?”

2. Learned Counsel Mr. Shetye has also furnished two additional questions of law which arises in the appeal and the same are accepted as a substantial question of law to the following effect:

a) Whether the Courts below were right in law in holding that the defendant was a licensee in the suit land when there was no instrument or document produced by the Plaintiff disclosing the relations between the parties?

b) Whether the Courts below were right in holding that the Defendant was a licensee, ignoring the admitted fact that there was no document executed between the parties, no terms in clear words about the possession of the suit land which was in exclusive possession of the Defendant from the year 1947 and also in view of the admitted fact that the Defendant was allowed by the Plaintiff to construct the structure in the suit premises?

3. On the paper book being filed, the appeal is taken up for hearing.

Heard Adv. Sachin Shetye for the appellant and Adv. N.V. Bandiwadekar for the respondent no.1, since he was the only contesting respondent before the trial Court.

Special Civil Suit No. 3 of 1982, came to be instituted by the plaintiff Shri. Govindrao Koragaonkar Dharmadaya Sanstha through its managing trustees Shri. Anilrao Korgaonkar, resident of Kolhapur, against Ratnagiri Zilla Khadi Sangh Goupuri Ashram Kankavali District, Ratnagiri, another Public Trust being impleaded as defendant no.1. The suit was filed for a possession of two pieces of land bearing survey No.18/1 and 31/1 situated within village Waghade, Tahsil Kankavali, District Sindhudurg, specifically described in para 5 of the plaint. The plaintiff claim to be the owner of the suit property and there was also a reference to survey no. 18/2, which is not the suit property but it is alleged that all three parcels of land were owned by the plaintiff trust.

4. The plaintiff pleaded that one Appasaheb Patwardhan, who had devoted himself in public welfare and undertook development of agricultural activity in Konkan area and had deep interest in research in the agricultural field, intended that the research will help the agriculturist in Ratnagiri district to improve the potential value of their land. The plaintiff was associated with Appasaheb Patwardhan and, therefore, decided to hand over the said land to him to carry out his research. The plaintiff, however, sold land bearing survey No. 18/2 to the defendant no.1 at a nominal price. The suit properties were given to the defendant no.1 as a licensee and for that purpose a

resolution was passed by plaintiff's trust and defendant no.1 was put in possession of the land. The plaintiff pleaded that the entire work of defendant was undertaken under the instructions of the plaintiff trust and they were put in possession of the land as licensee, so as to facilitate Shri. Appasaheb Patwardhan to serve the people and improve the status of the agriculturists and also have a better breed of cows and bullocks.

After demise of Appasaheb Patwardhan, the trustees of the plaintiff were not satisfied with the work of the defendant trust, as they could see that the object for which the land was allotted was being frustrated and the trustees and the office bearers of defendant had no intention to carry forward the aim and object projected by Appasaheb Patwardhan. On the other hand, they indulged themselves into embezzlement of public fund. The plaintiff issued a letter to the defendant expressing the intention to visit the suit property and when Anil Koragaonkar the trustee of the plaintiff visited the trust on 29/04/1977, none of the office bearers were present. On the contrary, he was informed that some resolution has been passed by the defendant trust against the interest of the plaintiff. This constrained the plaintiff to issue a notice to the defendant no.1 on 4/05/1977, by which the plaintiff determined the licence of the defendant with effect from 31/01/1978 and called upon the defendant trust to put the plaintiff in possession of the suit property including the buildings standing thereon. However, the defendants responded to the said notice claiming to be the protected tenant and the owners and refused to hand over the vacant possession of the suit property.

Hence the suit came to be instituted by the plaintiff for recovery of possession of the suit property and mesne profit @ Rs. 9,000/- per year and also for previous three years.

The plaintiff specifically pleaded that, when the suit properties were given in possession of the defendant trust, a sum of Rs. 40,000/- was handed over in order to fulfill the purpose, which late Appasaheb Patwardhan intended to implement on the suit property.

5. Suit Summons were issued to the defendant and the defendant no.1 contested the suit by filing written statement (Exh. 20). Defendant nos.2, 3, 5, and 8 though served remain absent and the suit proceeded exparte against them. The defendant no.4 filed the written statement by stating that he is no more concerned with the land and not liable to hand over the possession.

Resultantly, only defendant no.1 contested the suit.

6. In defence, the defendant no.1 raised a preliminary objection of non-impleadment of Charity Commissioner to the suit and also other trustees. As a result of the said objection, the Charity Commissioner as well as the trustees were impleaded as parties to the suit. The defendant also contended that no cause of action has been alleged by the plaintiff in the plaint and since the plaintiff is also a registered trust, all its trustees are necessary parties and that suit by the managing trustee is not maintainable.

Apart from the preliminary objection the defendant no.1 contested the title of the plaintiff and claimed that the defendant

trust is the owner of the suit property, as the properties were purchased as benamidar in the name of the plaintiff, but the real owner is the defendant trust and its trustees. It was pleaded that Annasaheb Sahastrbuddhe, the then President of the plaintiff including late Appasaheb Patwardhan and Prabhakar Koragaonkar were the founder of the the public trust and shared a cordial relationship. Parbhakar Koragonkar has requested Appasaheb Patwardhan to purchase some land for implementation of his objective and, therefore, the suit property/land was purchased by plaintiff in the name of Prabhakar Koragonkar, but it was actually purchased by the defendant and Appasaheb Patwardhan had paid the consideration. It was pleaded that taking benefit of benami transaction, the plaintiff is praying for its possession.

About the case of the plaintiff that Rs. 4,000/- was paid by the plaintiff trust, in defence, it was pleaded that the amount was out of the fund, which was raised for the memorial of Appasaheb Patwardhan, which was to incur expenditure of Rs 95,000/- and 40,000/- was contributed by the plaintiff. Out of the said fund, which was already raised by the defendant, various rooms were constructed in the suit land and were used for the purpose of achieving the objective of late Appasaheb Patwardhan.

The defendant No.1 also took a plea of being tenant in the suit property at nominal rent of Rs. 11 /- and claimed that since they were in actual possession of the suit land on the tiller's day i.e. 1/04/1957, the defendant became the owner/purchaser of the land.

7. The case of the plaintiff, that the defendants are licensee in the land is specifically denied. In alternative, it was pleaded even if they are the licensee they have constructed premises worth Rs. 70,000/- to 80,000/- and have become lessee and hence the right of the plaintiff to evict a licensee has been extinguished. It was also pleaded that the defendant trust is following the ideology propagated by Appasaheb Patwardhan on the suit property and therefore the plaintiff cannot be given its possession.

In the wake of the rival contentions, the Joint Civil Judge Senior Division, Ratnagiri settled various issues and cast the burden upon the plaintiff to prove that the defendant is a licensee in the suit property. The burden to prove that the defendant had incurred Rs. 70,000/- to 80,000/- for construction of building and Rs. 10,000/- for improvement in the suit land was cast on the defendant.

The vital issue that arose before the Court was to determine the exact nature of relationship between the plaintiff and the defendant and, particularly, whether it was of a licensee and licensor or a lessee and lessor, because the defendant specifically responded to the suit by pleading that they are the lessee and not licensee. The Court was therefore confronted with discern the relationship and since there was no agreement between the parties recording the exact nature of relationship, the trial court discerned the intention of the parties in ascertaining the claim of the plaintiff that the defendant was a licensee.

By drawing a distinction between a 'Lease' as defined under section 105 of the Transfer of Property Act and a 'Licence' which is defined under section 52 of the Indian Easement Act, the Trial Court applied the test as propounded by Hon'ble Apex Court in case of *Associated Hotels of India Vrs. R. N Kapoor AIR 1959 SC 1262* and by applying the test, to the facts of the case and the evidence placed, it arrived at a conclusion that the defendants were not in exclusive possession and, therefore, they cannot be treated as lessee and, they were in possession of the suit property as licensee.

8. In arriving at the said conclusion, the trial court appreciated the pleadings as contained in the plaint and the written statement and the evidence of the plaintiff Shri. Anil Kargonkar as well as the Shantaram Mahadeshwar and Shripad V Panvalkar who deposed in support of the case of the defendant.

By appreciating the evidence on record, the Trial Court did not accept the case of the defendant that they are tenants in the suit land and as such, they are purchaser of the same, in terms of Bombay Tenancy and Agricultural Lands Act. It was held that the said plea is vitiated in view of section 80 (b) of the Bombay Tenancy and Agricultural Lands Act since the provisions of section 32(g) cannot be made applicable to the trust properties in terms of section 80(b).

As regard the burden cast on the defendants to prove that they had spent amounts for improvement of the suit property, the Trial Court relied upon the admission given in the examination

that not only the lands, but also 4 houses and Rs.40,000/- was paid to them by the plaintiff.

Since the plaintiff had proved that the defendant is the licensee, the plaintiff was entitled for possession. The arguments advanced on the basis of section 60 of the Easements Act on the part of the defendant, was also considered and a finding has been arrived that since there is no proof of execution of work of permanent nature by the licensee and that the trust has incurred any expenses in the execution of the work, the plaintiff was held entitled to revoke the licence and was also held entitled for possession.

Resultantly the suit of the plaintiff was decreed with cost. The plaintiff was permitted to recover possession of the suit property including building standing on it after two months from the date of the decree. The plaintiff was also held entitled for future mesne profits under separate inquiry under Order 20 Rule 12 of the Code of Civil Procedure.

9. The above judgment, was subjected to an appeal being preferred before the Additional District Judge vide civil appeal no. 95 of 1990. The Appellate Court on appreciating the reasoning, recorded by the trial court in allowing the suit concurred with the finding of the Civil Judge Junior Division. The Appellate Court recorded that, from the record as well as the admitted fact, it is clear that the defendant was permitted to occupy the land with the building standing thereon. Recording that the defendants themselves have submitted an application to the Charity Commissioner admitting that there was buildings on

the suit land and the buildings were let out to the defendant and therefore since prior to induction of defendant, there was permanent construction on the property, the defendants cannot be permitted to take benefit of the construction and as the licence was irrevocable, recording that the defendant has not adduced any evidence of the construction and that too with the knowledge of the plaintiff, the defendant was held to have not discharged the burden cast upon them.

In contrast, the Appellate court referred to Exhibit -104, which is the extract of Resolution no. 103, revealing that the plaintiff trust had constructed the building for the benefit of the defendant and this was taken as proof of the fact that there were buildings standing on the suit property right from inception.

Concurring with the finding of the Learned Civil Judge, the Appeal came to be dismissed.

10. I have heard learned counsel Mr. Shetye for the appellant. He would submit that from the evidence of PW1, it is clear that the defendants were handed over barren land and the structures were erected by the defendant Trust. The learned counsel would submit that the plaintiff in the plaint had referred to vacant land being handed over and though it is pleaded that some donation was given to construct the building, he would submit that the structures were constructed by the defendant. Referring to the evidence, he would submit that the land was not a cultivable one and the defendant has incurred expenditure to make it so and this has come on record through the evidence of the defendant's witnesses, but according to Mr. Shetye, the trial court has

completely recorded a perverse finding. The learned counsel further submit that both the courts below have erred in noticing the succinct distinction between 'Lease' and 'Licence' and when there is no written document on record, his submission is the courts below ought to have been very careful in appreciating the evidence brought on record. He would also submit that the Court has looked into the documents and writings filed by the licencees with the Charity Commissioner for the purpose of ascertaining the nature of the work, but that has been completely ignored.

In short, the arguments of the appellant is that both Courts below had erred in recording a finding that the defendant was a licensee, in absence of the instrument or document disclosing the said relationship, merely on the basis of the pleadings and evidence. He would submit that the courts below were not justified in arriving at such a conclusion. It is also submitted that the courts below have not appreciated the exclusive possession of the defendant from the plaintiff which would ordinarily indicate the transaction of a lease and not of a licence.

In contrast, Advocate for the respondent Shri Bandiwadekar, support the impugned judgment would submit that the courts below have rightly appreciated the evidence brought on record and he would submit that the concurrent findings call for no interference, since the defendant has failed to discharge the burden and produce any proof of expenditure incurred in carrying out the construction on the suit property.

11. The question of law that arises in the present appeal is, if the transaction between the plaintiff and the defendant is of a

licencee, what is the nature of the rights conferred upon the licensee under section 60 (b) of the Easements Act 1952. The further question of law that arises is whether protection of section 60 (b) of the Easements Act is available in case of oral licence and whether necessary facts can be gathered from the conduct of the parties and the surrounding circumstances.

The plaintiff had filed a suit for possession of the suit property and claimed that the trust is the owner and purchaser of the property and along with the suit property, one more parcel of land was given to late Appasaheb Patwardhan for his agricultural research, who intended to explore the same for general welfare of public. The lands were given without remuneration/rent/fees. The third parcel of land in survey No. 18/2 was sold to the defendant for a nominal consideration. The plaintiff claimed that the land was allotted to the defendant for its use without any interest, being transferred and it was nothing short of a Grant, to carryout the objective of Appasaheb Patwardhan, who was a founder of the respondent Trust and was involved in various activities. The plaintiff extended a helping hand by offering donation to the trust on the basis of the cordial relationship, which the parties shared and an amount of Rs.45,000/- was contributed by the plaintiff trust for purchase of land as well as construction of building. The case of the plaintiff is the grant was in form of a licence and not a lease, and the question that came to be determined by the trial court was whether the suit property is made over to the defendants as a lessee or a licensee.

12. Section 105 of the transfer of property Act prescribes what

would amount to a lease and the section reads thus:-

“ A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other things of value, to be rendered periodically or on specified occasion to the transferor or by the transferee who accept the transfer on such term.”

Section 52 of the Indian Easement Act prescribes what is ‘Licence’ and it reads thus:

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

13. In *Associated Hotels of India Vs. R.N. Kapoor* (Supra) the Hon’ble Apex Court has evolved a test to distinguish between the two concepts and, the parameters on which, the distinction is to be drawn are set out in the following words, and it is also observed by the Apex Court that the essence of distinction is as under :

“A dispensation or a licence property passeth no interest, no alters, or transfer property in anything, but only make a action lawful which without it had been

unlawful. The difference between the tenancy and licence is therefore, that in a tenancy an interest passes in the land, whereas in a licence it does not. In the present litigation, it was not case of the either party that any interest in the property was transferred their case was merely that the defendants were given a right to do certain acts on the disputed land which would have been unlawful in the absence of such licence. In other words it was only a personal privilege granted to the defendants that no interest in the land itself”.

It is admitted position that there was no document, executed between the plaintiff and the defendant, as regards the suit property, from which it can be determined whether there was a lease or a licence in favour of the respondent. Had the document existed, the intention of the parties could have been gathered from it. However, in absence of such a document, the trial court has rightly determined the intention of the parties from their conduct.

If an interest in immovable property is created, then it would be a lease, but if the permission to use the right to exclusive possession alone is granted, then it is a licence.

In this background, when the real test is the intention of the parties, whether they intended to create a lease or a licence, the trial court has appreciated the evidence by examining the nature of relationship between the two.

14. The appellant/ the defendant had pleaded a case that the land in dispute was transferred to the defendants for all intention

and purposes and they were to be in exclusive possession and this was conclusive of the fact that the defendants were the lessee. In absence of any agreement between the parties the intention has to be ascertained from the surrounding circumstances i.e. whether the defendant were put in exclusive possession of the suit property.

For ascertaining the same, the evidence brought on record is to be scanned.

The plaintiff witness, Anil Korgaonkar deposed before the court that Appasaheb Patwardhan was a Managing Trustee and he was also engaged in the working of Gramodhhar and, therefore, the plaintiff trust handed over the suit land to Appasaheb Patwardhan, by passing a resolution which were produced on record. He specifically deposed that the trust passed a resolution to allow the defendants to look after the suit land and permit them to enter into without any remuneration or rent. He specifically deposed to the following effect. "It was not agreed that the defendant shall pay part of yield of land to the plaintiff. It was also not decided to pay any kind of rent to the plaintiff by the defendant. There was no agreement written in between the plaintiff and the defendant. We had a report from defendant, from year to year."

15. The defendant entered into the witness box through one Shantaram Mhadeshwar. He deposed that he has filed his evidence affidavit claiming that he was working as manager of the defendant trust and was engaged since 1959.

Obviously, the said defendant has no knowledge of the

actual transaction since the lands were given to Appasaheb Patwardhan in the year 1948 and this witness is not a competent witness to throw light upon the nature of the transaction between the two and about the structure standing thereupon. The witness admits that the land was purchased from the donation given by Shri. Korgaonkar and the buildings were constructed thereupon by Appasaheb Patwardhan. He admits that there is an office building, in which the members of the society reside and there are two other old buildings, one godown, two building and one toilet block, etc. He admits that the buildings are built in stone and are permanent in nature, with Manglori Tiles. The witness has deposed about certain trees standing on the suit property and that they have been planted in the year 1950. The defence witness has specifically admitted that Prabhakar pant Korgaonkar had donated the huge sum and, he shared a cordial relationship with Appasaheb Patwardhan. In the cross-examination he admit that the suit lands were purchased by the plaintiff trust in 1948.

16. From the evidence of the said witness, who alleged that the lands were purchased from the money belonging to Appasaheb Patwardhan but they were purchased in the name of the plaintiff, but he has not been able to produce any document to that effect. He specifically admitted that no intimation was given to the Charity Commissioner that the lands belong to the defendant.

Pertinent to note that if the suit property was belonging to the defendant, no steps were taken to mutata their name on the land record and this fact is admitted by the said witness.

17. The second witness examined by the defendant, is a close associate and a disciple of Appasaheb Patwardhan. He deposed that the suit property was levelled and made suitable for cultivation, houses were constructed and goshala was started in terms of the objective of the defendant society. However, in cross-examination this witness specifically admit that he is not aware of day-today affairs of the defendant society and he also admits that the defendant trust never took any steps to mutate their names in the land record nor, any notice to that effect, was ever given to the plaintiff.

18. The above evidence brought on record, has been appreciated by the first fora i.e Civil Judge Junior Division and recording that the relationship between the plaintiff and the defendant as surfaced on record, is as a permissive user and no interest was passed over to the defendant, and hence the relationship was held to be of a 'Licencee'.

Upon such a finding, the trial court also dealt with the argument about section 60 of Easement Act.

The case of the plaintiff is that the trust revoked the grant in favour of defendant No.1 and claimed its possession.

The trial court also dealt with section 60 of the Easement act which permit the licence to be revoked unless

(a) It is coupled with transfer of property and such transfer is in force.

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

19. Appreciating that the scope of section 60, is to see that whether a licence generally can be revoked with a reasonable notice and if it is revoked without a notice, an action for damages can be maintained, the trial court rendered the finding as under:

“If we peruse the sub section 2 of the section 60, which restricts the rights of licensor of revocation licence when he allowed the licensee to construct the premises by agreement itself. There is no background to show that the defendants were allowed and agreed by the plaintiff to construct the premises. Nor even the circumstances establish, that the defendants incurred expenses for construction of alleged premises”.

20. The plaintiff relied upon the decision of Calcutta High Court in case of *Radhakrishna Hazra vs. Joykrishna Hazre, AIR 1967 page 204* to support the submission that where a defendant spend money for erecting pakka structure, section 60 would not be applicable to them as the defendant is held to be a licensee and erected some pakka structure and spent some money, it cannot be inferred that the same was done by him acting on the licence or within the terms of the licence and therefore the protection available under section 60 was denied.

In absence of the defendant discharging the burden to prove that the defendant had executed the work of permanent character and incurred expenses in its execution, in absence of any proof being adduced to that effect showing, that the construction was carried out after handing over of the suit

property and, that too, in consonance with licence granted, the trial court has rightly answered issue no.8 in favour of the plaintiff and held that the plaintiff is entitled for possession of the suit land.

21. While answering the issue as to whether the defendant has proved that he has incurred expenditure of Rs.70,000/- to Rs.80,000/- for construction of building and improvements in the suit property, as claimed in para 12 of written statement, the court on first instance had clearly recorded that on admission of the defendant, given in the reply to the notice as well as the application forwarded by them by to the Charity Commissioner, when they sought registration of their trust under the Bombay Public Trusts Act, they have clearly admitted that not only the land but also 4 houses/building and Rs 40,000/- was paid to them by the plaintiff and, though by oral evidence, it is now sought to be projected that the expenses were incurred by them, it is contrary to the documents placed on record. The testimony of the defendant witnesses was therefore not accepted, since, when the trust applied for registration, they gave the above declaration and, the manager of the trust in the reply to the notice, also accepted the said fact that the land had 4 houses standing on it and even a sum of Rs. 40,000/- was paid by the plaintiff trust.

22. The learned counsel, Mr. Shetye has vehemently submitted that the land was not fertile but it was made fertile and cultivable, by leveling and this amounted to improvement.

I do not consider this factor to be covered with clause (b) of section 60, where it contemplate that a licensee acting upon

the licence has executed a work of permanent character and incurred expenses in the execution, and issue no.4 being answered in the negative, the appellant is not entitled to take benefit of clause (b) of section 60 of Easement Act nor I am inclined to accept the said argument, to conclude that the defendant had executed work of the permanent character since the execution of the work must be, by incurring expenses, which the defendant have failed to prove.

The courts below have rightly appreciated the evidence on record and rendered a concurrent finding against the appellant.

23. Answering the issue no.3 to the above effect, and since in the facts of the case, the ingredients of section 60 (b) of the Easement Act 1952 are not proved by the defendant, the two courts have rightly held that the plaintiff was entitled to revoke the licence. As far as issue no. 4 is concerned, though it is a case of oral licence, it is always permissible to assimilate the necessary facts from the surrounding circumstances, coupled with the conduct of the parties, and this has been rightly done by both the courts below.

As far as issue no. 7 is concerned, the defendant has not produced on record any document to establish that the work executed on the suit land was by incurring expenditure, which was shown and reflected in their books of account. No evidence to that effect is brought on record to accept the deposition of the witnesses that there are certain trees planted on the suit land and this has incurred expenditure of Rs.70,000/- to 80,000/-. No statement of account to reflect that the expenditure has been so

incurred is proved, except the balance-sheet which has been produced on record, without any particular entry of the spending of Rs.70,000/- to Rs.80,000/- on behalf of the trust for creating structure of permanent nature.

24. By answering the question of law as above, the appeal deserve a dismissal. By affirming the findings rendered by the courts below, the appeal is dismissed. Decree is directed to be drawn accordingly.

In the light of the aforesaid discussion, the courts below have rightly appreciated evidence as well as the pleadings and held that the defendant was a 'Licencee' in the suit land though there was no document reflecting the relationship between the parties, but on the basis of the deposition and nature of enjoyment of the property by the defendants with a limited interest, the court has rightly held that the relationship was of a licensee despite the fact that the possession of the defendant continued from the year 1947. There is no evidence brought on record by the defendant that as a condition of a licence, they were permitted to construct the structure in the suit premises and accordingly additional question of law A and B also stand answered against the appellant.

(SMT. BHARATI DANGRE, J.)